The Maine Implementing Act in 2011:

A legislative analysis of bills conferring aboriginal rights to the Wesget Sipu and their impact on the Maine Implementing Act.

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WITH MUCH THANKS TO: MITSC COMMISSIONER: PAUL THIBEAULT; AND MARK KNIERIM, JENNIFER LOCKE AND ELAINE APOSTOLA OF THE MAINE STATE LAW AND LEGISLATIVE REFERENCE LIBRARY.

Three important bills were introduced in the 125th Session of the Maine Legislature. Two bills concern the conveying of certain aboriginal rights to a non-profit organization comprised of individuals with ties to Native people who lived in the St. John River Valley. These individuals have formed a non-profit known as Wesget Sipu.

LD 270 provides free moose hunting to the Tribes and lists the Wesget Sipu as a Tribe and LD 427 allows tuition waivers for the Wesget Sipu to attend the University of Maine system. Both of these bills have recently been voted, "Ought not to pass."

These bills rely on an earlier bill passed in 2000 that allowed Wesget Sipu to issue free hunting, trapping and fishing licenses. This bill is in conflict with the Maine Implementing Act (MIA) in that it constitutes a challenge to the internal tribal matters provision of that Act.

The third bill, LD 1456, introduced by Passamaquoddy Representative Madonna Soctomah, would remedy the conflict with the MIA caused by the 2000 law. This paper offers an analysis of the development of aboriginal rights within the hunting and fishing law, why the 2000 law is in conflict with the MIA, and the necessity for LD 1456.

Introduction

We would like to begin by acknowledging that the history of the Wabanaki Tribes goes back thousands of years. The 300 years after contact with Europeans were brutal to Tribal Peoples. Numbers dropped so drastically that by the late 1700's the recorded census of some Tribal communities in Maine reflected a male population in the single digits. During this time of genocide, upheaval and displacement we know that many Tribes and Bands disappeared. Over the past 100 years, the Wabanaki have sought to document the genealogy of home communities and assist those who come seeking their ancestors. Each federally recognized Tribe in Maine has staff that focuses entirely on census and genealogy. Native identity is cherished.

MITSC will not discuss whether or not the Wesget Sipu are Wabanaki, but has checked with all of the Chiefs and it appears that some of these individuals did approach the Aroostic Band of Mic Mac requesting to be put on their rolls. When these individuals could not verify their genealogy in accordance with the established tribal membership process, their applications for membership were denied. Shortly

after this refusal, the non-profit organization, Wesget Suppo (later Wesget Sipu) emerged. One or two Tribal people were employed to provide cultural teaching, a board of directors was formed and a federal grant was obtained to research Native American presence in the St. John Valley, to gather oral history and documentary evidence. This evidence was to be shared with the Acadian Archives.

MITSC is aware of the suffering of the Acadian people. Their history is a profoundly tragic one that does cross paths and ancestry with the Wabanaki Tribes throughout the Northeast. Whether the state of Maine should recognize this and offer Acadians certain entitlements is beyond the scope of MITSC. Any such entitlements should be distinct from Aboriginal rights, which are inalienable and inherent.

The Wesget Sipu web site explains, "Wesget Sipu is a Native American Tribe of Mi'qmak and Maliseet from the St. Johns Valley in Northern Maine." Membership requires "verifiable genealogy" that reflects "Native American Ancestry with *ties* to the St. John River Valley." This is extraordinarily confusing language. The commonly accepted descendancy language is replaced by the word "ties" and the term "Indian[1]," which has been used in federal Indian law for two hundred years, is replaced by the generic descriptor "Native American." Over the last 11 years, this language has been crafted into Maine statutes.

In February, MITSC met with all of the Wabanaki Chiefs to discuss pending legislation that references Wesget Sipu. All expressed genuine concern for all people who have Native ancestry and explained that they wanted no part in refusing rights to Native people, but they are not familiar with the Wesget Sipu organization, and Wesget Sipu has never approached the Tribes to open a dialog or establish a relationship. If these families are Wabanaki, they are relations of the Tribes. We strongly urge them to follow traditional Tribal protocol and contact the Tribes, ask to be placed on a Tribal Council agenda and obtain the advice of the Tribal Leaders in the five Wabanaki communities. Such consultation with Tribal leaders, which has not happened, should be the first step—not State legislation.

LD's 427 and 270

The legislation introduce in the 125th Session is about far more than moose hunting permits and tuition waivers. In essence this legislation would convey capital "T" Tribal status to a non-profit organization through a small change of descriptors in an already existing law. Were these laws to pass as written, Maine would create a new but inadequately defined status: that of state recognized "Native American" Tribes distinct in legal status from the four federally recognized Indian Tribes. MITSC urges great caution. The era of so-called "state tribes" was formally ended in Maine with the Settlements. Since that time, the only Tribes in Maine with any legal status have been the four federally recognized Tribes. Creation of a new category of

[1] The formal, legal context of the term "Indians" in Title 25 of the US Code and in most legal contexts requires being regarded as an Indian by and established Tribal community; usually this is a federally recognized Tribe.

"state tribes" is a serious step for the state that will undoubtedly have major legal, monetary and political implications.

History of Wabanaki Aboriginal Hunting, Trapping and Fishing Rights in Maine:

To understand the implications of the proposed legislation, it is necessary to trace the evolution of the language in these two bills; then address the issue of "de-facto state recognition" alluded to by Wesget Sipu legal advisor, Duane Belanger in his email dated, January 4, 2011.

In order to do this, it is necessary to present a brief history lesson tracing the language used to describe Aboriginal rights in Maine. We will begin with the Hunting and Fishing statutes, where the language is first introduced, then track the evolution of the language, and finish with the proposed Wesget Sipu legislation now before the Judiciary Committee.

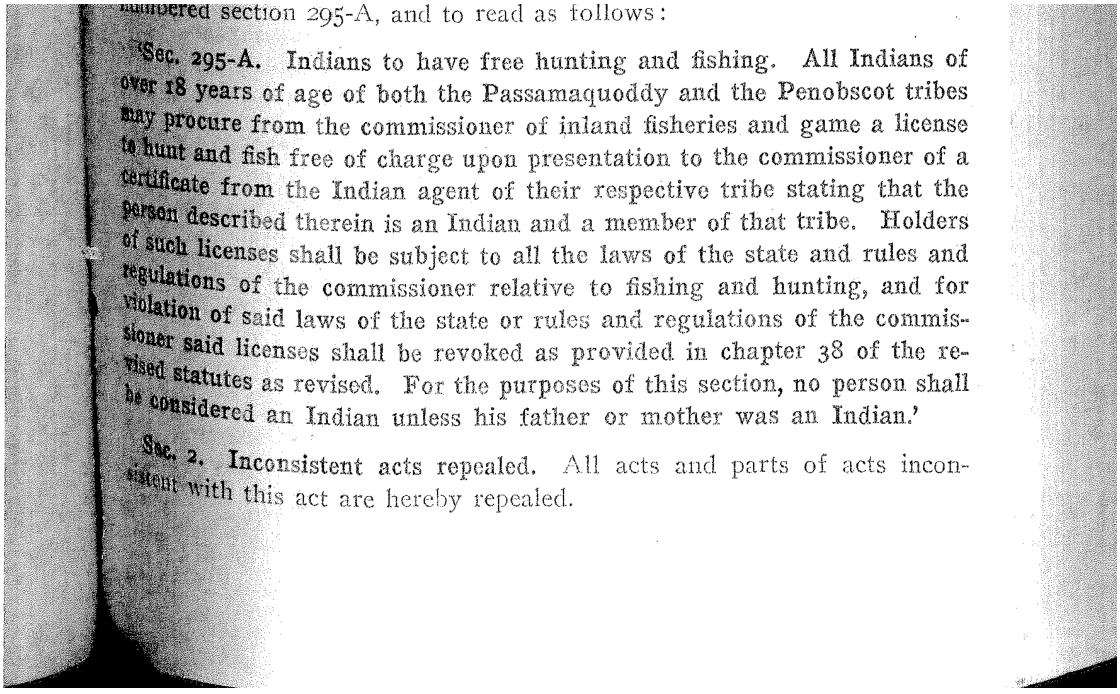
This history begins with the recognition of the inherent Aboriginal rights of the Wabanaki. The earliest reference to these rights occurs in the "Treaty of Falmouth of 1726-1727 between the Government of the Massachusetts Province and various 'Eastern Indians.'" In this Treaty, the Indians granted certain rights to the Province and reserved rights for themselves as they formerly held them. Among these rights were the rights to hunt and fish:

> *Saving unto the Penobscot, Norridgowock, and other Tribes, within his Majesties Province aforesaid and their Natural Descendants, respectively, . . . the Privilege of Fishing, Hunting, as formerly.*

Hunting and fishing licenses were first issued in Maine in 1897. In 1934, a survey by the Bureau of Indian Affairs of Maine Indians noted that most Maine Indians could not afford the state licenses. In 1935, the cost of the licenses jumped by 15 cents. It was at this time that the first piece of legislation issuing free hunting and fishing licenses for the Penobscot and Passamaquoddy was enacted. This bill, *An Act Relating to Indians (S.P. 710, L.D. 808)* was introduced in 1935. The language was simple:

> ***All Indians of both the Passamaquoddy and Penobscot tribes*** *in the state upon presentation of their certificate of registration shall be issued a hunting and fishing license without charge.*

This bill was tabled in the 87th Legislature, but brought to the floor and passed in the 88th Legislature with a more precise definition of eligibility.



numbered section 295-A, and to read as follows:

'Sec. 295-A. Indians to have free hunting and fishing. All Indians of over 18 years of age of both the Passamaquoddy and the Penobscot tribes may procure from the commissioner of inland fisheries and game a license to hunt and fish free of charge upon presentation to the commissioner of a certificate from the Indian agent of their respective tribe stating that the person described therein is an Indian and a member of that tribe. Holders of such licenses shall be subject to all the laws of the state and rules and regulations of the commissioner relative to fishing and hunting, and for violation of said laws of the state or rules and regulations of the commissioner said licenses shall be revoked as provided in chapter 38 of the revised statutes as revised. For the purposes of this section, no person shall be considered an Indian unless his father or mother was an Indian.'

Sec. 2. Inconsistent acts repealed. All acts and parts of acts inconsistent with this act are hereby repealed.

In this statute **an Indian** had to be of 18 years of age, be a member **of the Passamaquoddy and Penobscot tribes**, be able to present a certificate from the Indian agent of their Tribe, and agree to be subject to the laws of the State and regulations of the commissioner. In order to meet the definition of Indian, the individual had **to have one parent who was an Indian.**[2] ***Here we need to underscore that every version starting in 1935 has required Tribal membership.***

In 1947, when trapping was added to the list of Aboriginal rights, the language we are concerned with today, that defining who was an Indian, was tightened, requiring **both parents to be Indian**. In 1953, the age was dropped to 16: the language we are concerned with remained consistent. In 1959, the definition of Indian was changed to specifically coincide with the **Tribal membership lists of the Penobscot and Passamaquoddy Tribes.** This reflected a tightening of the definition ruling out the provision of free licenses to descendants.

PUBLIC LAWS, 1959 CHAP. 270

'X. The commissioner shall issue a hunting, trapping and fishing license to any Indian over the age of 16 years of the Passamaquoddy and Penobscot tribes without any charge or fee, providing the Indian presents a certificate from the Commissioner of Health and Welfare stating that the person described is an Indian and a member of that tribe. For the purpose of this section, an Indian shall be ~~a person whose mother and father were Indians~~ **any member on the tribal lists of the Penobscot and Passamaquoddy tribes of Indians**. Holders of such licenses shall be subject to all of the laws, rules and regulations of this chapter.'

Effective September 12, 1959

[2]If one reads the debate of this legislation, it becomes clear that the additional modifying language requiring one parent to be Indian was in response to arguments that a jealousy might emerge from the granting of free licenses to Indians. In addition to identification by the Indian Agent, the Agent had to also certify that one of their parents were Indian.

In 1971, the statute was amended to drop the age to 10; the defining language remained unchanged.

In 1979, in the definition section of the law, the definition of "Indian" for the purpose of awarding free hunting and fishing licenses was again clarified as follows:

17. Indian. "Indian" means any person who is on the membership list of the Penobscot Tribe, the Passamaquoddy Tribe or the Association of Aroostook Indians and who has resided in the State of Maine for at least **5** years.[3]

The Commissioner was also given the authority to award free licenses to members of a number of non-Indian groups.[4]

The portion of the statute specifically referring to Indian hunting and fishing licenses reads as follows:

The commissioner shall issue a hunting, trapping and fishing license to any Indian, **10** years of age or older, of the Passamaquoddy, Penobscot, Maliseet or Micmac Tribes without any charge or fee, providing the Indian presents a certificate from the respective reservation governor or the President of the Association of Aroostook Indians stating that the person described is an Indian and a member of that tribe. Holders of these licenses shall be subject to chapters **701** to **721.**

The language we are discussing remained consistent.

This statute was further amended in 1985 to read.

A. The commissioner shall issue a hunting, trapping and fishing license to any Indian, 10 years of age or older, of the Passamaquoddy, Penobscot, Maliseet or Micmac Tribes without any charge or fee, providing the Indian presents a certificate from the respective reservation governor, the Aroostook Micmac Council or the Central Maine Indian Association stating that the person described is an Indian and a member of that tribe. Holders of these licenses shall be subject to chapters 701 to 721.

To highlight the changes:

- The governors, or governmental body in the case of the Mic Macs, are authorized to certify Tribal members.

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[3]The **5**-year requirements reflected the migratory nature of the lives of Mic Mac who held seasonal jobs in Aroostook County and extended free licenses to those who had made their homes in Aroostook County. The Aroostook Association of Indians maintained rolls and served these people.

[4]Medal of Honor recipients, those in the armed forces, patients in the veterans hospital, and patients and inmates at certain state institutions.

- Recognizing that a number of Wabanaki people had migrated from the Tribal Areas, the Central Maine Indian Association, staffed entirely by Tribal members from the four Tribes with the exception of their grant writer, and tasked to respond to the needs of Tribal members living off the reservations was authorized to act on behalf of the 4 listed Tribes.

The key language to highlight here is as follows: ***is an Indian and a member of that tribe.***

In 2000, a very confusing statute was passed that added the Wesget Suppo while deleting the Central Maine Indian Association, which had closed its doors. There is no discernable organizational connection or similarity of purpose between the CMIA and the Wesget Suppo. The CMIA was staffed by and worked with the 4 federally recognized Tribes to provide services to Tribal members who were outside of the Indian Service Area, the Wesget Suppo is not connected to the 4 Tribes nor does it provide services to their members. The preamble to the legislation had to argue the necessity of an immediate fix to a constitutional crisis, given that the legislation was not properly introduced prior to cloture. The following is from the most troubling section, which upon our read, is at least misleading if not entirely false:

Whereas, the Central Maine Indian Association no longer exists; and

Whereas, until "Wesget-Suppo" is recognized in the statutes as the organization authorized to issue fishing, trapping and hunting licenses, Native Americans will be unfairly denied benefits under the inland and fisheries laws; and

Recognizing now that MITSC should have raised questions immediately: What follows is the text of the 2000 law.

> 8. Native American. The commissioner shall issue a hunting, trapping and fishing license, including permits, stamps and other permission needed to hunt, trap and fish, to a Native American, 10 years of age or older, of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians or the Aroostook Band of Micmacs that is valid for the life of that Native American without any charge or fee if the Native American presents a certificate from the respective reservation governor, the Aroostook Micmac Council or "Wesget-Suppo" stating that the person described is a Native American and a member of that nation, band or tribe. Holders of these licenses are subject to this Part, including, but not limited to, a lottery or drawing system for issuing a particular license or permit.

The list of Tribes that are referred to is not changed, but we see the first change of descriptors. “Indian,” a term that has both a legal and a statutory definition gets changed to “Native American.” This is of concern because “Indian” commonly connotes a member of a formally recognized Tribe while Native American is a generic term that refers to a person of North American Indigenous ancestry—indeed a potentially much larger group of people. While there are slightly more than 8,000 people on current Tribal rolls, there are an additional 13,000 people in Maine

who claim dual ancestry on the 2010 census. Additionally, with no formal consultation, the Central Maine Indian Association, which had a close working relationship with the 4 federally recognized Indian Tribes, was ***replaced by the "Wesget-Suppo," which at that time had no formal connection to the 4 federally recognized Indian Tribes, and still has no formal connection to those Tribes.***

For the first time a non-profit with no relationship with an existing Tribe was given the authority to certify that an individual was **"a member of that nation, band or tribe."** Here tribe, nation, or band clearly refers to the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet and the Aroostook Band of Mic Mac. I urge you to read this carefully, "Wesget Suppo" was not listed as a Tribe in this legislation; it was simply awarded an authority to certify "Native Americans" with no definition added for that descriptor. We are unaware of the criteria that "Wesget Suppo" was or Wesget Sipo is using since they have not checked with the Tribes to confirm status of individuals seeking these licenses nor have they given notice when a license has been conferred.

It is here we may have a conflict with the MIA: under both fundamental principles of Federal Indian law and the specific terms of the Maine Implementing Act, the determination of Tribal membership status is exclusively controlled by the Tribes as an internal Tribal matter.

This brings us to the two pieces of legislation introduced in this session:

LD 270: Issuance of moose hunting permits. In accordance with section 11552, the commissioner may issue moose hunting permits and may establish the number of moose hunting permits to be issued for each wildlife management district established by the commissioner by rule open to moose hunting. The commissioner shall reserve 200 moose hunting permits to be distributed equally among the federally recognized Indian tribes of the State and 25 moose hunting permits for the Wesget Sipu Tribe. No more than 10% of the moose hunting permits may be issued to nonresident and alien hunters.

LD 427: Tuition waiver

A postsecondary educational institution that establishes a practice or policy of waiving tuition charges for Native Americans must include within that practice or policy equivalent treatment of any person who is certified to be a member of the Wesget Sipu - Fish River Tribe by the board of directors of a nonprofit corporation formed to represent and promote the traditions of the Wesget Sipu - Fish River Tribe. For purposes of this section, "postsecondary educational institution" means the University of Maine System, the Maine Maritime Academy and the Maine Community College System.

LD 427 is unnecessary. Currently, tuition waivers are awarded by the University of Maine system through a very generous policy that applies to the members of the 4 federally recognized Tribes in Maine, their descendants (if their parents or grandparents were on the census), and all members of North American Tribes and their descendants (if their parents or grandparents were on the census) and if they have resided in Maine for a period of a year previous to application. Modifying a generous and efficient policy that is

working well through legislation is an extreme action. It did not make any sense to enact a statute whose only purpose is to obtain waivers for the Wesget Sipu under a program that is not otherwise governed by Maine statutes.

In both pieces of legislation the Wesget Sipu are, for the first time in any Maine legislation, referred to as a Tribe. In LD 427, "a board of directors of a nonprofit corporation, with no connection to the 4 federally recognized Tribes is given the authority to certify tribal membership status. If these two pieces of legislation were to pass, the Wesget Sipu—a nonprofit corporation—may have been conferred a specific albeit inadequately defined status: that of state recognized Tribe**.** When considering these kinds of policy changes, it is important to be cautious and take into consideration the numbers from the 2010 census quoted earlier. Along with the status of state recognition, will come additional state fiduciary responsibilities. This is evident in LD 270, which provides 225 moose hunting permits; a statute that was not been crafted by the four federally recognized Indian Tribes, and LD 427, which would allow for tuition waivers.

Fortunately, both LD 427 and LD 270 were voted "Ought Not to Pass."

LD 1456

This brings us to LD 1456, "An Act Regarding the Right of Native Americans to be Issued Hunting, Fishing and Trapping Licenses, which provides the necessary fix created in 2000 with the addition of the Wesget Suppo (Sipu) to the fish and wildlife statute. This act replaces the word Native American with "person of the Passamaquoddy Tribe, Penobscot Indian Nation, Houlton Band of Maliseet Indians or Aroostook Band of Mic Mac" and deletes the Wesget Sipu from the statute.

The only change MITSC would recommend for consideration in the work session is a change of the word "person" to the term "Indian." We encourage this because the Indian was defined in the Fish and Wildlife Statute in 1979 and this language would bring consistency in Maine statutes.

Additionally, from our review of the few states that do have state recognized Indian Tribes (14), all refer to historic Tribes within their borders. The only state that has an active, formal process for recognizing new Tribes is Vermont, a state trying to rectify the legacy of a eugenics program that targeted at its Abenaki population. **If there were intent to recognize state Tribes in Maine, we would also recommend that this issue be referred to MITSC for consideration and then to a Tribal State Work Group for examination rather than create such a status in a haphazard manner.**