Remarks of Paul Bisulca
Briefing of the Maine Legislature on the
Maine Indian Claims Settlement Act, Maine Implementing Act,
Maine Indian-Tribal State Commission, and Current Tribal-State Relations
January 25, 2007

Honorable members of the 123rd Legislature, good morning. My name is Paul Bisulca and I chair the Maine Indian Tribal-State Commission, which was created as part of the Maine Indian Land Claims Settlement almost three decades ago. We refer to this commission as MITSC.

Many years ago I sat in seat number 6 in this chamber as a representative for the Penobscot Indian Nation, and for about 5 years I regularly attended MITSC meetings, which were then chaired by Bennett Katz, former Senate majority leader at the time of the Land Claims, and later Dick Cohen, former attorney general who oversaw for the state the negotiations and settlement of the Land Claims. I knew both of these men.

With me today are John Dieffenbacher-Krall, executive director of MITSC, and Paul Thibeault, an attorney with Pine Tree Legal Assistance. For the next hour the three of us will explain to you what MITSC is, why we are here today talking about it, and what is the 1980 Settlement between Maine and the Penobscot, Passamaquoddy and Maliseet tribes. Also with us is Linda Sikkema, Director, Institute for State Tribal Relations, National Conference of State Legislatures. Linda comes to us from Colorado and will provide you with a national perspective on State-Tribal relations.

First, let me introduce to you the MITSC Commissioners: for the State of Maine, Greg Cunningham, attorney for Bernstein, Shur, Sawyer & Nelson in Portland; Mike Hastings, Director of Research and Sponsored Programs for the University of Maine; Paul Jacques, Deputy Commissioner, Inland Fisheries and Wildlife; and Karin Tilberg, Senior Policy Advisor for Natural Resources, Office of the Governor. Tribal representatives include Rick Doyle, Chief of the Passamaquoddy Tribe at Pleasant Point; Donald Soctomah, Passamaquoddy Tribal Representative; John Banks, Director of Natural Resources for the Penobscot Nation; and Mark Chavaree, Legal Counsel for the Penobscot Nation.

Nineteen-eighty marked the culmination, through settlement, of an Indian land claim in Maine brought by the Passamaquoddy Tribe, the Penobscot Indian Nation, and the Maliseet Band of Indians. This land claim was characterized by the U.S. Justice Department as "*potentially the most complex litigation ever brought in the Federal courts with social and economic impacts without precedence and incredible litigation costs to all parties.*" (US Senate Select Committee Report, p.157) It was not expected that the settlement of this land claim would exist without problems. In the words of Governor Joe Brennan, *"I do not think anybody can boldly assert that this was the perfect resolution. I think it is a reasonable one, but where there are consequences that may not have been contemplated, I think they have to go back and be resolved."* (US Senate Select Committee Report pp. 142-143)

The Maine Indian Tribal-State Commission was created by the 1980 Settlement not as a state agency but as an intergovernmental entity to monitor the creation of a new relationship between

the State and the Tribes who reside in Maine and to address the unintended consequences about which Governor Brennan spoke. Accordingly, it was charged with continually reviewing, as it determines appropriate, the effectiveness of this Settlement Act and the social, economic and legal relationship between the State and the Passamaquoddy Tribe and the Penobscot Nation. MITSC, in my view, cannot in its continuing review of the settlement be constrained by exact interpretations of the language in the Settlement, although those certainly guide us, but needs to look at how an issue at question fits into the broader understanding of the Settlement – the intent of the Settlement. Paul Thibeault will provide you with an overview of the actual Settlement Act.

MITSC has other responsibilities to:

- promulgate fishing rules and regulations for waters over which it has jurisdiction
- make recommendations about fish and wildlife management policies on non-Indian lands to protect fish and wildlife stocks on lands and waters subject to regulation by the Tribes or MITSC
- make recommendations about the acquisition of certain lands to be included in Indian Territory
- review petitions by the Tribes for designation as an extended reservation
- But, the most important responsibility is to continually review the effectiveness of the settlement and the social, economic and legal relationship between the Tribes and the State.

In addition to these responsibilities, MITSC has assumed some of the duties that once fell to the Maine Department of Indian Affairs, which was eliminated with the Settlement. We now respond to numerous public inquiries and staff various state initiatives, and we do that with a part-time executive director and a volunteer chair and commissioners. MITSC is also expected to provide a certain liaison function between the State and the non-MITSC tribes, the Maliseets and the Micmacs. As such, we are sometimes asked to provide information pertaining to those tribes. I should add that there is a bill now in the Legislature to bring the Maliseets into MITSC.

To understand how MITSC was expected to fulfill its responsibilities, I give you two quotes from the 1980 hearing before the U.S. Senate Select Committee on Indian Affairs. Attorney General Dick Cohen, *"I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship, in my view there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine."* (US Senate Select Committee Report, p. 164) Tom Tureen, attorney for the Passamaquoddies and Penobscots*, "It was the State's view that the destiny of the Maine tribes as much as possible in the future should be worked out between the State and the tribes."* (US Senate Select Committee Report, p 181-182)

Accordingly, MITSC was structured to have equal numbers of State and Tribal representatives sitting around a conference table as equals continually reviewing the effectiveness of the settlement and working out future destinies. Furthermore, it was envisioned that a retired state or federal judge would serve as the MITSC chair to provide the expertise necessary to formulate sound recommendations to the State and Tribal governments concerning the unintended

consequences that Governor Brennan referred to in 1980. Having a judge as the chair never happened, but we, nevertheless, formulate very good recommendations. At least we think so. Despite the best efforts of some very capable people, MITSC never effectively played a role in guiding Indian policy in Maine in the last twenty plus years. The result has been what I and those previous MITSC chairs, who I mentioned, believe was avoidable litigation and tension between the Tribes and the State of Maine. In 2003, the tribes left MITSC for a 14 month period with the chair and executive director subsequently leaving. John and I came to MITSC near the end of 2005 with the resolve to make MITSC politically relevant and to win back our erstwhile lost constituents.

Presently, a Tribal-State Work Group, formed by an executive order from the Governor, is at work charged with addressing problems that are now affecting tribal-state relations. Since one of the problems is a weak MITSC, the work group will consider ways, to include legislative remedies, to empower this organization. John will discuss the work group in his portion of the orientation and a more detailed explanation of the work group will be provided to the Judiciary Committee later today.

At this point, I should also mention that almost exactly ten years ago a Task Force on Tribal-State Relations formed by the 117th Legislature completed a final report titled, *At Loggerheads – The State of Maine and the Wabanaki*. What you will hear in John's portion of the orientation will essentially mirror the findings in that report – the problems identified ten years ago remain with us. One of the good things that materialized from the 1996 Legislative study was the Annual Assembly of Governors and Chiefs, which recommends that the Governor of Maine and the Tribal leaders discuss, on an annual basis, matters of common interest. The last Assembly was held on May 8, 2006 in Veazie. Again, John will discuss this further.

This orientation will be informative and it will offer to you in a very frank way our consensus-based understandings and views, based on many years of experience dealing with tribal-state relations, relations that originally were in some areas vaguely defined and relations that are now maturing with a need for new definitions. The objective for us is to strive for a relationship that is guided not by the courts but by deliberate public policy with the interest of all citizens in mind. This, we believe is more productive and less wasteful of all parties' resources.

Paul Thibeault will now provide an overview of the Settlement Act. He will be followed by John Dieffenbacher-Krall who will address why we believe MITSC has not been effective, what we are now doing to change the way MITSC functions, and what MITSC is doing that should be of interest to you: why we are here talking about MITSC. Lastly, Linda Sikkema will put all of this in a national perspective.

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Thank you, Paul. In this portion of the presentation I will give you an overview of the background and terms of the Maine Indian Claims Settlement. I will briefly describe the legal/political relationship that existed between the tribes, the state and the federal government before the Settlement, what that relationship might have become if there had been no settlement, (including the federal Indian law concepts that would have defined that legal relationship); and then a description of the major provisions of the Settlement, including the unusual jurisdictional structure that it created.

But first I want to make some prefatory comments. As an attorney, I have never represented tribal or state governments. As a Legal Services attorney and Public Defender working in Indian Country, I have represented individual Indian people living in poverty. It has been my experience that when tribal and state governments become embroiled in endless jurisdictional disputes, the people who suffer the most are not the governmental leaders or bureaucrats, and certainly not the lawyers. It is my clients living in poverty, neglected citizens of both their tribes and the State, who suffer most from the inadequacy of government services and lack of economic development. That is why I am here today.

Second, it is often said that the relationship between the State of Maine and the Indian Tribes within its borders is unique. However, it is important to remember that within the context of federal Indian law many tribes have unique relationships with the federal government and the states. These differences are the historical result of treaties, executive orders, special statutes, local court decisions, and various other local factors. Indeed, with more than 560 federally recognized tribes in this country, it might fairly be said that local variations in inter-governmental relationships are the norm rather than the exception.

The historical relationship between the federal government and the Indian tribes situated within the boundaries of Maine and the other original colonies of New England has been very different from the relationship between the federal government and "western" tribes. From the formation of the federal government in 1789, the latter relationship was federalized in nature as the central government of the United States established relationships with "frontier" tribes through treaties and executive agreements. By contrast, the federal government had few if any direct dealings with the tribes in Maine and generally did not extend recognition to those tribes. Instead, the Maine tribes were generally regarded first as colonial and later as state Indians. As a result, when the Maine tribes asserted land claims in the 1970s alleging that their tribal lands had been acquired by the state in violation of the Nonintercourse Act, they first had to overcome the claim by the state that they were not really bona fide Indian tribes at all. This pre-settlement situation in Maine was described in the judicial opinion in Great Northern Paper v. Penobscot Nation in 2001 as follows (legal citations have been deleted):

From the time that Maine was ushered into the United States as a state separate and independent from Massachusetts in 1820, the United States government consistently declined to recognize or to assume responsibility for the Indians residing in Maine…The State of Maine, in turn, undertook the almost exclusive role of assisting and regulating the Indians residing within its borders…

The absence of established tribal sovereignty was evidenced by the state's extensive role in governing the Tribes throughout the history of the State of Maine. Consistent with this role, Maine actively regulated the affairs of Indians within its borders for almost 160 years, creating hundreds of laws that specifically related to the protection and regulation of the Tribes... Indians residing within Maine's borders were subjected to the general laws of the state like "any other inhabitants" of Maine…

Although the Tribes were recognized in a cultural sense, they were simply not recognized by the state or the federal government in an official or "political sense"... Prior to the settlement, the federal government never entered into a treaty with the Tribes nor did Congress enact any legislation mentioning the Tribes… The regulation by state government, coupled with the total absence of congressional regulation, contrasted sharply with many tribes in other states…

For more than a century, this situation went substantially unquestioned. In 1975, however, the Tribes' relationship with the state and the federal government changed substantially as a result of a significant court decision… Early in the 1970s, the Tribes had asserted claims for vast portions of lands in Maine on the basis that the lands in question had been transferred from them in violation of the federal Indian Nonintercourse Act of 1790, which protected "any . . . tribe of Indians".... The Tribes asked the Department of Interior, Bureau of Indian Affairs, to file a protective action on the Tribes' behalf against the State of Maine, to reclaim the lands that had allegedly been transferred in violation of the Act…Consistent with its historic approach to Maine's Tribes, the Department denied the Tribes' request, asserting, among other things, that the federal government had never formally recognized the Tribes and that it had no trust relationship with the Tribes…

The Tribes then sued to force the Department to act on their behalf. Ultimately, the United States Court of Appeals for the First Circuit rejected the Department's views and held that the Indian Nonintercourse Act applied to the Tribes, despite the absence of "specific federal recognition," and that the resulting trust relationship obligated the federal government, at a minimum, to investigate the Tribes' claims and take such action as may be warranted…

The Morton decision had several significant effects on the relationship between the Tribes and the state. First, pursuant to the newly recognized federal trust relationship, a fiduciary duty was imposed upon the federal government, requiring it to act on behalf of the Tribes to investigate the validity of their claims against the State of Maine. Second, the continuation of Maine's jurisdiction over the Tribes began to be questioned because the Tribes could potentially invoke the application of other federal statutes on their behalf...

The Passamaquoddy legal victory in the Morton case led to the enactment of several eastern land claims settlement acts including the Maine Indian Claims Settlement Act (MICSA). All of these settlements were based on fundamental principles of federal Indian law: that only the federal government has the authority to convey or extinguish tribal rights to aboriginal land or to restrict the historical sovereign powers of Indian tribes.

It is important to realize that prior to the settlement in 1980 the Maine tribes had already won several critical court decisions that established that notwithstanding the long period of time during which the State of Maine had treated them as "State Indians", their historical sovereignty had not been diminished. The decision in the Morton case led the U.S. Department of the Interior to extend federal recognition to the Passamaquoddy Tribe before the Settlement. Likewise, the Maine Supreme Judicial Court decision in 1979 in State v. Dana, recognizing that the State of Maine lacked criminal jurisdiction over crimes committed by tribal members on tribal lands, also pre-dated the Settlement. The federal court opinion in Bottomley v. Passamaquoddy Tribe, also decided in 1979, showed that the Maine tribes did not possess a reduced version of tribal sovereignty watered down by local history, but rather that they retained the full attributes of sovereignty as defined by federal Indian Law, including tribal sovereign immunity. In short, if there had been no settlement and instead the land claims had been litigated, even if the tribes had not prevailed on their land claims, it is likely that today the tribes in Maine would possess and exercise the full degree of sovereignty that we usually associate with the "western" tribes.

In the context of the series of court decisions in the 1970s, it is clear that the participation by the tribes in the settlement process was in itself an exercise of inherent sovereignty that had been judicially re-affirmed. With the Settlement, the state was able to regain some part of the control which it had exercised for many years. But it is important to remember that, under federal Indian law, this transfer of authority could happen only because Congress ratified the Maine Implementing Act.

BASIC PRINCIPLES OF FEDERAL INDIAN LAW

What are the basic concepts of federal Indian law that provided the legal context in which the court cases were decided in the 1970s and MICSA was enacted? It starts with the recognition of tribes as separate governments that have a unique place within our federal constitutional framework. Federal recognition of tribes is binding on states. ***What is recognized is that the tribe as a political and legal entity (not merely an ethnic or cultural minority group) has a direct and special relationship with the United States government***. A central component of that relationship as it has evolved through history is the federal trust responsibility that obligates the federal government to protect tribal resources and act in the best interests of tribes and their members.

Indian tribes and their territories are separate from the states of the union. They do not have the same relationship to the federal government as States. They are not subject to the limitations on government found in the federal Constitution. It is important to recognize that tribes are wholly independent of one another politically. There is no overarching law that binds or obligates one

to another. While tribes in Maine share some culture and history, their differences are also profound.

After the American Revolution, Indian tribes became subject to the legislative power of the U.S. and their external powers of sovereignty were terminated (e.g. the power to enter into treaties with foreign nations). Internal sovereignty (powers of local self-government over tribal territory) survived unless expressly limited by treaty or federal legislation; or implicitly limited by nature of the tribes' domestic dependent status.

In general, States do not have jurisdiction over Indians within Indian country unless expressly delegated by Congress. For example, Public Law 280 (1953) delegated to some states broad criminal jurisdiction in Indian Country and limited civil adjudicatory jurisdiction, but not civil regulatory jurisdiction.

Tribes, and not the states, have jurisdiction over crimes committed by Indians against Indians in Indian Country. Tribes also retain their historical jurisdiction over crimes by non-member Indians. This authority was placed in doubt in 1990 by a U.S. Supreme Court decision, but Congress acted immediately to reaffirm historical tribal authority, and the Supreme Court subsequently acknowledged the exclusive power of Congress to delineate the scope of inherent tribal sovereignty.

Tribes and states sometimes have concurrent jurisdiction. Which sovereign will exercise jurisdiction in a particular context may be determined by judicial principles of comity that are based on mutual respect between co-sovereigns, or by tribal-state compacts negotiated on a government to government basis in an atmosphere of good faith and common interests.

In summary, Indian tribes have all those elements of sovereignty that have not been found by the U.S. Supreme Court to be inconsistent with their status as domestic nations or expressly given up or withdrawn in agreements with the federal government. The Maine Settlement could not and did not create the sovereign powers currently exercised by the tribes. As an exercise of plenary Congressional authority in Indian affairs, MICSA modifies those powers, but is not their historical source.

Judicial Canons of Construction in Federal Indian Law

To compensate for the historical disadvantages at which the negotiation process placed the tribes and to help carry out the federal trust responsibility, the Supreme Court has fashioned rules of construction that are sympathetic to Indian interests:

-Treaties and other agreements are interpreted as Indians would have understood them

-Treaties and federal statutes are interpreted in favor of retained tribal self-government and property rights

- Doubts or ambiguities in treaties or statutes enacted for Indians' benefit are resolved in Indians' favor

-Federal Indian laws are interpreted liberally to carry out their protective purposes

Maine Indian Claims Settlement - Basic Elements

The Maine Indian Land Claims Settlement consisted of two basic elements:

Federal Component- Maine Indian Claims Settlement Act-25 U.S.C. §§ 1721 et seq. (MICSA)- Enacted by Congress, extinguishing the land claims, compensating the Indians for their claim, and ratifying the Maine Implementing Act.

State Component- Maine Implementing Act- 30 M.R.S.A. §§ 6201 et seq. (MIA)- An agreement between the State and the Indian Tribes that was enacted by the Maine Legislature. This specifies the laws that are applicable to Indians and Indian lands in Maine.

Four years of difficult negotiations led to a settlement out of court. The Passamaquoddy Tribe, Penobscot Indian Nation, and the Houlton Band of Maliseets received $81.5 million, the largest settlement of its kind and the first to include provisions for the reacquisition of land. Those funds came from the federal government, not the state. To get the money, the tribes had to give up their claim to 12.5 million acres assessed at $25 billion and relinquish some of the powers of self-government that recently had been reaffirmed in the courts.

The settlement included neither Maliseet People outside of the Houlton Band nor any Micmac People. They also claimed title to parts of what is now Maine, but by the terms of the settlement, under which they received no land or money, their claims were extinguished.

Federal and State Recognition

With the settlement, the Houlton Band of Maliseets obtained federal recognition and the Penobscot Indian Nation and Passamaquoddy Tribe continued to be federally recognized, while forging a new relationship with the State. Federal recognition made the tribes and their members eligible for a variety of federal benefits and programs, including housing, health care, education and resource protection.

As a result of the settlement, the Maine Department of Indian Affairs, which acted as an advocate and liaison with other state agencies, was abolished. The Maliseet People in Maine who are not part of the Houlton Band and the Micmacs were not federally recognized in the settlement. Thus, those Indians in Maine who were left out of the settlement also lost services that had been provided by the State, without gaining any services from the federal government. It was not until 1991 that the Aroostook Band of Micmacs secured federal recognition.

Repeal of State Laws

The terms of the settlement allowed the State to repeal the Maine Department of Indian Affairs and most of the state laws specifically relating to the tribes.

Disposition of Land Claims

MICSA ratifies all land transactions in which any Maine Indians lost their lands by treating such transfers of land as though they were done in accordance with the laws of the United States. This has the effect of extinguishing all other Indian land claims in Maine.

Tribal Acquisition of Land

Of the $81.5 million provided under the settlement, $54.5 million was established as a Land Acquisition Fund: $26.8 million each for the Penobscot Indian Nation and the Passamaquoddy Tribe and $900,000 for the Houlton Band of Maliseets.

The first 150,000 acres of land acquired by the Passamaquoddy Tribe and the first 150,000 acres acquired by the Penobscot Indian Nation are eligible for inclusion as part of their respective territories and are held in trust by the United States for the benefit of the tribes. Land purchased outside these designated areas is owned by the tribes in the same manner as non-Indians.

Trust Funds

Out of the $81.5 million settlement, a Settlement Fund of $27 million was established: $13.5 million each for the Penobscot Indian Nation and the Passamaquoddy Tribe to be held in trust by the U.S. government. The income is distributed quarterly. Interest from $1 million for each tribe is designated for the benefit of tribal elders over 60 years of age.

Although the Houlton Band of Maliseets received federal recognition under the settlement and $900,000 for land purchase, it gained no trust fund.

Jurisdictional Issues

As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Indian Nation, the Houlton Band of Maliseets, and (most recently) the Aroostook Band of Micmacs are eligible for all federal Indian benefits. Federal laws concerning Indians apply in Maine unless they are contrary to settlement terms. One of the terms in MICSA is that any federal law enacted after the date of the Settlement for the benefit of Indians which would materially affect the application of the laws of the state shall not apply in the State of Maine, unless Congress makes it specifically applicable to Maine.

The following areas of jurisdiction are spelled out in the settlement in relation to the Penobscot Indian Nation and the Passamaquoddy Tribe:

- The federal act states that the tribes, their members, and lands or natural resources owned by them or held in trust for them shall be subject to state jurisdiction to the extent provided in the Maine Implementing Act.

-The tribes may adopt constitutions consistent with the Settlement.

- The Indian Child Welfare Act, a federal law designed to protect Indian families and communities from losing their children, applies to them, thereby recognizing the exclusive jurisdiction of the tribes over Indian children living on their reservations.

- The tribes may sue and be sued, but retain sovereign immunity subject to some restrictions.

- The tribes may operate their own courts with exclusive jurisdiction over misdemeanors, minor juvenile offenses, minor civil disputes, divorce, and child custody matters for their members. The Tribe and Nation are required to apply the State of Maine's definition of criminal offenses and applicable punishments.

- The tribes may make the rules for hunting and trapping in their Indian territories and for fishing on any pond that is entirely within the territory and is less than 10 acres in area. The rules cannot discriminate against non-Indians allowed to hunt and fish in the territories, except that there may be special rules allowing individual members of the Tribe or Nation to hunt, trap, or fish for their own sustenance. The State Commissioner of Inland Fisheries and Wildlife can overrule the Passamaquoddy and Penobscot fish and wildlife regulations, if it can be proved that they cause a significant depletion of fish and wildlife outside the Indian territories.

- The tribes are required to make payments to the state in lieu of taxes, but Indian lands cannot be taken under the state tax laws.

Section 6206(1) of the Maine Implementing Act states as follows:

> *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.*

Tribal-State Commission

The settlement established the Maine Indian Tribal-State Commission about which Paul Bisulca spoke. The Commission faces many challenges, as John will describe in more detail. One major example of the challenges that the Commission faces stems from the profound disagreement that emerged between tribal and non-tribal parties after the Settlement concerning the intent and jurisdictional impact of the "internal tribal matters" provision in the Maine Implementing Act. Differing views of the meaning of that phrase have generated most of the post-Settlement litigation, including cases that are currently pending. No attempt will be made here to fully characterize the contending positions of the parties, but in general it seems that the disputes have centered on the extent to which the Settlement was intended to limit the inherent sovereign

powers of the tribes, especially in activities that may involve non-Indians and have potential impact outside of the tribal communities. Parties on both sides of the issue maintain fervently that properly defining the scope of the "internal tribal matters" language is critical to accomplishing the overall purposes of the new inter-governmental relationship that was established in 1980. One factor that makes this issue especially difficult for MITSC is that the contending parties disagree not only about the intended parameters of this critical jurisdictional provision, but also about the basic analytical approach that should be used to determine those parameters, including the legal rules of statutory construction that should be applied.

Conclusion

As Paul Bisulca has noted, and John will elaborate on, the Settlement intended to create new, on-going relationships. It was designed to be flexible and to respond to changing circumstances. The express language of MICSA anticipated and consented in advance to future amendments to the Maine Implementing Act by agreement between the tribes and the state concerning the allocation of jurisdiction, including concurrent jurisdiction. This provision was added as an amendment to MICSA at the request of Secretary of the Interior Cecil D. Andrus in response to concerns that had been raised in a Maine newspaper editorial about the possibility that the Settlement language would "foster an unrelenting chain of legal disputes in the years ahead." Secretary Andrus explained the amendment's purpose in a letter dated August 19, 1980 to the Chairman of the Select Committee on Indian Affairs, as follows:

> ***We have examined the language …and have offered language by way of amendment to the federal bill to clarify this jurisdictional relationship. Based on the understanding which State and tribal officials now have, we fully expect that this relationship will prove to be a workable one. Furthermore, our proposed amendment to the bill would give Congress' consent to future jurisdictional agreements between the State and the Tribes. Thus, there is flexibility built into this relationship. While we cannot guarantee that there will be no litigation over the meaning of the jurisdictional provisions of the State Act, we can say with certainty that without any agreement there would be a great deal of litigation.***

MITSC was created with the express mission to continually review the effectiveness of the Settlement. Unfortunately, as John will discuss in more detail, MITSC has never been allowed to fulfill its legitimate role. As an advocate for poor people, I believe that supporting the strong role that was originally intended for MITSC is in the best interests of the many Native people in Maine who still live in poverty 27 years after the Settlement.

I will be followed by John Dieffenbacher-Krall who will speak more about MITSC and its activities. Thank you.

Remarks of John Dieffenbacher-Krall
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As Paul Bisulca stated in his opening remarks, I will address why MITSC has not been effective, what the Commission is now doing to change the way MITSC functions, and what MITSC is doing that should be of interest to you: why we are here talking about MITSC.

Why MITSC Has Not Been Effective

I have identified ten principal reasons MITSC has not been effective, especially regarding its role to seek resolution of possible unintended consequences that become evident through differences in interpretation of the Maine Implementing Act and to do that without the parties needing to resort to litigation.

1. MITSC Has Not Been Viewed By All Of the Parties To The Settlement Act As A Forum To Settle Disputes Despite The Intent Of The Act

The Tribes regularly bring issues to MITSC for its consideration. The State of Maine does not bring grievances to MITSC and more often has sought resolution of Settlement issues through the courts. Because the State has chosen not to submit issues to MITSC, the Commission's effectiveness and usefulness to all of the parties, their respective governments, and their peoples is degraded.

2. Parties To The Settlement Act Have Bypassed MITSC When Disputes Have Arisen And Gone Directly To Court, A Route All Of The Parties Say They Want To Avoid

MITSC was envisioned by the negotiators of the Settlement Act to be a forum where disputes concerning interpretations of the Act or unforeseen issues regarding jurisdiction or powers of the parties could be settled. MITSC can succeed in this area as demonstrated by our recent involvement in resolving a dispute over the renewal of the Cooperative Agreement Between the U.S. Fish and Wildlife Service and NOAA Fisheries and the Maine Atlantic Salmon Commission. Unfortunately, the history has been for parties to ignore MITSC and proceed directly to court. When MITSC has deliberated upon issues subject to litigation, its findings have been ignored. Perhaps the best example is MITSC's finding that the Maine Freedom of Access Act does not apply in the Great Northern Paper v. Penobscot Nation decision issued May 1, 2001.

3. MITSC Has Not Done Enough To Ensure Its Decisions And Findings Are Implemented

MITSC has undertaken its responsibility to decide questions related to the Settlement Act or issues associated with it. Detailed minutes are kept of its meetings explicating why it has reached certain decisions. MITSC meeting minutes have been used in court proceedings. After considerable work reaching decisions, MITSC historically has not done much beyond presenting

its findings or decisions to the signatories of the Settlement Act. MITSC has felt frustrated and disappointed that decision makers have ignored its findings. Yet MITSC solely has an advisory role in the area of disagreements regarding the meaning of the Settlement Act.

While MITSC does lack official authority in this area, it has not always utilized its stature to the fullest extent. It has also tended to acquiesce when it has been ignored instead of attempting through other forums, especially the public, to educate and to stress the importance of its decisions. If MITSC's goal is to effect political agreement through persuasion, then it must do a better job utilizing those tools that help reach that end.

4. MITSC Has Limited Authority, Mostly Advisory, Especially On The Key Questions Of Implementing Act Language Responsible For Much Of The Litigation Connected To The Act

Though MITSC can and is doing more to make itself politically relevant, it does have limited power in the area of its most important responsibility. None of the parties to the Settlement Act have to abide by MITSC decisions. In the Tribal-State Work Group created by an executive order of Governor Baldacci last July, Work Group members discussed possible ways to enhance MITSC's authority. Some ideas discussed included adding members of the Maine Legislature and possibly others to MITSC to mandating disputed provisions in the Settlement Act be presented to MITSC prior to taking them to court.

5. MITSC Is Provided Insufficient Funding To Fulfill Its Responsibilities

From its initial conception, MITSC has been plagued by the parties who created it badly underestimating the amount of funds necessary for its successful operation. The Maine Implementing Act originally called for MITSC to operate on $3,000 per year taken from the budget of Inland Fisheries and Wildlife. Fortunately, that provision was deleted in the 1980s. Today, MITSC operates on annual contributions from the State of Maine, Passamaquoddy Tribe, and Penobscot Nation. For many years, the State of Maine has flat funded MITSC at $34,277. The Tribes have recently flat funded MITSC at $11,900 from each Tribe. On a per capita basis, the Tribes are contributing about $5 per Tribal member to support the work of MITSC. The State of Maine is contributing less than 3¢ per person. The Federal Government is contributing nothing. MITSC needs to significantly increase the size of its budget to continue to perform some of the work that once fell to Maine's Department of Indian Affairs and to do the job that the parties to the Settlement have asked it to do.

6. The Parties Failed To Build On The Good Will Engendered From The Negotiation Process

The negotiators of the Settlement Act understood the successful negotiation of the agreement as the beginning of a new era in tribal-state relations. Though racist remarks and threatened violence characterized some of the public and official reaction to the Settlement Act negotiations, valuable good will and understanding was also built between the parties. Negotiators and the officials who agreed to the Settlement Act hoped the relationship would be strengthened.

Instead, the Settlement Act has functioned as an end. In fact, some people are quick to make the statement, "A deal is a deal." What is forgotten is that the deal is to continually review the effectiveness of the Settlement Act. The Settlement Act, or any other agreement, can never substitute for genuine human relations. Any relationship requires nurturing. The good will and atmosphere of optimism that relations can be better has been eroded by the litigation and certain political acts that have transpired since 1980. Now, even when sincere gestures are made to do something to assist other Settlement parties, the offer is often viewed with suspicion and cynicism instead of trust and openness.

7. Maine Has Not Developed An Indian Policy Or Other Supporting Policies Guiding Interactions With The Tribes Outside Of The Settlement Act

The Settlement Act has terribly hobbled tribal-state relations by *De facto* defining nearly every aspect of the relationship. Governor Baldacci recognized this deficiency when he stated at the Assembly of Governors and Chiefs held May 8, 2006, "We have a Settlement Act that arrived due to the need to settle a lawsuit that *De facto* has become the Native American policy for the State." In the environment of tension and litigation that has developed, the executive and legislative branches of State Government have been sidelined from their proper roles in guiding this relationship as State leaders have deferred to the Attorney General's interpretation of the law. The Attorney General has a constitutional responsibility to uphold the laws and constitution of the State of Maine but devising Maine's relationship with the Wabanaki must fall to the executive and legislative branches of State Government.

8. Parties To The Settlement Act, Especially The State, Have Failed To Recognize The Benefits Of A More Harmonious, Productive Relationship

Maine's self-interest alone is served by a better relationship with the Tribes. All the leaders who attended the Assembly of Governors and Chiefs May 8, 2006 lamented the squandering of money on litigation that could be better spent on economic development and services to benefit the parties' respective peoples. Better tribal-state relations would result in less litigation and more cooperation.

I know all of the legislators in this room want to spur economic development. The sleeper economic engines waiting to be awakened in Aroostook, Washington, and Penobscot Counties are the Tribes. Already they employ hundreds of people, making them some of the largest employers in their respective regions. If Maine and the Tribes can increase their cooperation and collaboration, the Wabanaki will be better able to utilize certain advantages afforded to them as federally recognized tribes to attract new businesses both on and off their reservations. The combination of federal contracting preferences and tax advantages that the Tribes can offer probably surpass any incentives that Maine can offer prospective employers. Maine should begin thinking of the Tribes as key partners in its economic destiny.

9. State Of Maine Policy Makers And People Fail To Recognize Or Choose To Ignore The Tribes' Unique Cultures, Histories, Languages, Traditions, and Governments, Hindering Tribal-State Relations

The overwhelming motivation of the Tribes is to preserve their place as unique peoples with their own culture, language, history, spirituality, and traditions. They are not minority groups within the State of Maine. They are aboriginal people, the first people of this land.

Maine does not need to feel threatened by the Tribes' assertion of their right to exist and to survive. From a Tribal perspective, the most important aspects of the Settlement Act were not the 150,000 acres given back to the Passamaquoddy Tribe or Penobscot Nation or the $13.5 million each Tribe received. It was the recognition by the Federal Government that they are Indian Tribes and that the settlement would not lead to their acculturation and assimilation. Maine would strengthen its relationship with the Tribes if it would recognize and accept the Tribes' need for survival as distinct peoples.

10. Intent, Goals, Prioritization, Commitment

For the State of Maine and the Tribes to have a stronger relationship, each party must desire that outcome. Tribes can speak more clearly to this question through their chief/governor and tribal council. Maine is comprised of many more parts. State Representative Sharon Treat, then House Chair of the Judiciary Committee, said in 1996, "Who is the State anyway? It is more complicated than sitting down with Governors, since the State has three branches of government." (Statement of Sharon Treat, *At Loggerheads The State of Maine and the Wabanaki Final Report of the Task Force on Tribal-State Relations*, January 15, 1997, p. 23.) They need to act with the same intent, whether the executive, legislative, judicial, or attorney general's office. It must be the deliberate intent of the Aroostook Band of Micmacs, Houlton Band of Maliseets, Passamaquoddy Tribe, Penobscot Nation, State of Maine, and US to want better relations.

Resources and energy, which are finite, are best used when goals are mutually agreed upon and understood. The Assembly of Governors and Chiefs held last year set some clear goals and agreed upon actions. That joint type of work must be continued and expanded.

I know you have many, many demands competing for your time. For tribal-state relations to improve, it must be a priority for all involved. Too often issues related to tribal-state relations have been an afterthought. Such prioritization gets predictable results.

If the commitment to a more just, harmonious, mutually beneficial relationship is genuine and strong, relations will improve. Commitment sustains an individual and/or institution during periods of stress and adversity. The Tribes and the State of Maine must recognize there will be periods, though they should be relatively short, when the respective governments may have higher short-term priorities. But with a genuine commitment to tribal-state relations, the work will always resume with a fervor and urgency that it deserves.

What The Commission Is Doing Now To Change The Way It Functions and To Improve Tribal-State Relations

1. Regain Credibility With The Parties

Paul Bisulca has described the need for MITSC to win back its constituents. We have focused on ensuring decisions and/or recommendations we have made, or tasks which we have been assigned, are implemented or completed. Governor Baldacci placed the idea of creating a Tribal College on the agenda of the May 8, 2006 Assembly of Governors and Chiefs. MITSC followed that meeting by working with Tribal and State leaders to hold a forum at the University of Maine with experts knowledgeable in difference aspects of Tribal Colleges to provide more information to decision makers. We helped convene two meetings of Tribal Leaders in the fall of 2006 to facilitate refinement of the idea and helped the Tribes form a Wabanaki Education Task Force to work on the Tribal College idea.

The Penobscot Nation requested we help resolve a dispute blocking renewal of the Atlantic Salmon Cooperative Agreement. We held numerous discussions with the Tribes, Maine Atlantic Salmon Commission, Attorney General's Office, Federal natural resource agencies, and MITSC Commissioners to resolve the dispute. Our understanding is the differences have been resolved and the agreement stands ready to be signed.

The Passamaquoddy Tribe asked MITSC to become involved to support the work of the Sipayik Criminal Justice Commission. MITSC has attended meetings with Legislative and Dept. of Corrections leadership and ensured agreed upon actions have taken place.

2. Secure Adequate Funding

When the Tribes suspended their participation in MITSC in 2003, they stopped supporting it financially. Both Tribes have paid their 2006 assessments and both intend to pay their 2007 contributions. The State of Maine has flat-funded MITSC at the level of $34,277 for several years at the same time MITSC has become far more active. We requested $40,000 in the Supplemental Budget to fill a budget deficit caused in part by work we performed staffing and otherwise supporting issues resulting from the May Assembly of Governors and Chiefs. Governor Baldacci has committed to increasing our funding by $25,000 in fiscal year 2007. We sought a $38,000 increase in our annual State appropriation for each year of the 2008-2009 biennium to support our projected workload. The Governor's budget continues to fund MITSC at $34,277 per year. MITSC is also exploring financial support from the Federal Government. We have met with Representatives Allen and Michaud, have requests to meet with Senators Collins and Snowe, and continue to press for supplemental federal support for MITSC's work.

What MITSC Is Doing That Should Be Of Interest To You:
Why We Are Here Talking About MITSC

Pressure has been building to address certain provision of the Maine Implementing Act causing conflict between the Tribes and the State of Maine. Previous Maine Governors have refused to even hear Tribal concerns regarding contentious language in the Maine Implementing Act. Governor Baldacci has rejected the "deal is a deal" stance in favor of discussing the disputed provisions of the Maine Implementing Act. At the Assembly of Governors and Chiefs held May 8, 2006, he said, "Let's review it, then make recommendations, work on them, come back with recommendations. I don't think we have looked at it in 25 years."

Governor Baldacci, in agreement with the five Wabanaki Leaders, signed an Executive Order July 10, 2006 creating the Tribal State Work-Group. He charged the Work-Group with "study(ing) differences in the interpretation and understanding of the Settlement Acts. The Work Group shall develop recommendations for how the 123rd Legislature might reconcile the issues in a manner that benefits both the Tribes and the State." The Executive Order created a 13 member group comprised of two State Senators, Libby Mitchell and Kevin Raye, four State Representatives, Dick Blanchard, Joan Bryant-Deschenes, Joan Nass, and Deb Simpson, representatives from the five Tribal Governments, a representative from the Governor's Office, Daryl Fort, and Paul Bisulca. The group met three times and issued a report December 6, 2006.

The Work Group recommends in its report adding the Maliseets to MITSC, holding the legislative orientation taking place right now, and continuing its work to address the provisions of the Maine Implementing Act subject to repeated dispute and litigation. Representative Blanchard has sponsored a legislative resolve to continue the Work Group with hopefully the same membership and expand it to include two more House members and both Tribal Representatives.

MITSC asks you to be open to the possible changes that the Tribal-State Work Group may propose. All the parties will gain if the Maine Implementing Act is amended to produce a document more universally understood and accepted.

Linda Sikkema will now speak and help place these issues that we have outlined in a national perspective.