Remarks of Paul Bisulca
Briefing to the Maine Legislature on the
Maine Indian Claims Settlement Act, Maine Implementing Act,
Maine Indian-Tribal State Commission, and Current Tribal-State Relations
January 17, 2008

Honorable members of the Maine Senate and Maine House, 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 in 1980. We refer to this commission as MITSC.

With me today are Paul Thibeault, an attorney with Pine Tree Legal Assistance, and John Dieffenbacher-Krall, executive director of MITSC. For the next forty-five minutes the three of us will explain to you what MITSC is, provide you with a brief overview of the 1980 Settlement between Maine and the Penobscot, Passamaquoddy and Maliseet Tribes, the 1991 Settlement for the Aroostook Band of Micmacs, and explain why we are here today talking about MITSC and the 1980 and 1991 Settlements.

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 James Nimon, Director, Office of Business Development, Department of Economic and Community Development. Tribal representatives include Hilda Lewis from Pleasant Point; Donald Soctomah, Passamaquoddy Tribal Representative representing Indian Township; John Banks, Director of Natural Resources for the Penobscot Nation; Bonnie Newsom, Tribal Historic Preservation Officer, Penobscot Nation; Linda Raymond, Maliseet Tribal Council Member; and Brian Reynolds, Maliseet Education Director and Tribal Council Member.

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) Recognizing that there would likely be post-Settlement disagreements, MITSC was created, according to Butch Phillips, Penobscot negotiator, *"to be the liaison between the tribes and the state, listen to disputes and try to come up with resolutions"*. (Butch Phillips, Nov 19, 2007 Tribal-State Work Group meeting) Lead negotiator for the State, John Paterson, agreed, *"I think the goal was to have a forum in which issues could be aired."* (John Paterson, Nov 19, 2007 Tribal-State Work Group meeting)

The Maine Indian Tribal-State Commission (MITSC) was created by Maine's Act to Implement the Maine Indian Claims Settlement not as a state agency but as an intergovernmental entity to monitor the creation of a new jurisdictional relationship between the State and those Tribes within the boundaries of Maine and to address the unintended consequences about which Governor Brennan spoke. Accordingly, it was charged with continually reviewing the effectiveness of the Maine Implementing Act and the social, economic and legal relationship between the State and the Passamaquoddy Tribe, the Penobscot Nation and the Maliseet Band of Indians, which last year was included within MITSC. In discharging its responsibilities MITSC does not strictly interpret the law as a court would do but concerns itself more with the overall intent of the Settlement and the formulation of policy recommendations that lead to better relations.

MITSC's other responsibilities are 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

In addition to those responsibilities established in the Settlement Act, MITSC 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 tribe, the Micmac.

To understand how MITSC is expected to fulfill its responsibilities, I give you two quotes from the 1980 hearing before the U.S. Senate Select Committee on Indian Affairs. Maine 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, addressing what may be unintended consequences and working out future destinies.

Despite the best efforts of some very capable people, MITSC, unfortunately, never effectively played a role in guiding from a State perspective Indian policy in Maine in the last twenty plus years, and the same could be said from the Indian perspective regarding State policy. The result has been what I believe was avoidable litigation and tension between the Tribes and the State of Maine. In 2003, the tribes in frustration 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 those constituents who had lost confidence in MITSC.

Presently, a Tribal-State Work Group, formed by this legislature is at work addressing problems that are now affecting tribal-state relations. John will discuss the Work Group in his portion of the orientation.

His orientation will offer 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 a different way to look at them. 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 approach, 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 what we have done to improve the way MITSC functions and what MITSC is doing that should be of interest to you: why we are here talking about MITSC and the 1980 Settlement.

Remarks of Paul Thibeault
Briefing of the Maine Legislature on the
Maine Indian Claims Settlement Act, Maine Implementing Act, Maine Indian-Tribal State Commission, and the Current Tribal-State Relations
January 17, 2008

I will give you an overview of the 1980 Maine Indian claims settlement concerning the Penobscot Nation, Passamaquoddy Tribe, and the Houlton Band of Maliseets, as well as the 1991 settlement for the Aroostook Band of Micmacs. I will describe the legal/political relationship that existed between the tribes, the state and the federal government before the settlements, and the major provisions of the settlements, including the unusual jurisdictional structure that was created.

But first I want to disclose the viewpoint from which I look at the settlements. I am an attorney in the Native American Unit of Pine Tree Legal Assistance. I have never been a lawyer for Indian tribes, tribal officials or the state. As a Legal Services attorney and Public Defender working in Indian Country in Maine, Minnesota and North Dakota I have represented Indian people living in poverty. It has been my experience that when tribal and state governments become bogged down in jurisdictional disputes, the people who suffer the most are not the governmental leaders or bureaucrats, and certainly not the lawyers. It is Indians living in poverty, neglected citizens of both their tribes and the state, who suffer most from the inefficiency of government services and lack of economic development.

Second, it is often said that the relationship between the State of Maine and the Indian Tribes within its borders is unique. However, in 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. 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. That having been said, I do not believe that the Maine settlements have lived up to either their advance billing or their dynamic potential to create a flexible, effective relationship between the tribes and the state. Whatever view one has on particular issues, I think it is fair to say that none of the parties could have predicted that the 1980 settlement would remain essentially unmodified for all these years; that so many issues would be submitted to the courts instead of being worked out between the parties; or that the courts would interpret jurisdictional language in the particular ways that they have.

Historical Background

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. The latter relationship was federalized in nature as the central government of the United States established direct relationships with "frontier" tribes through treaties and executive agreements. By contrast, the federal government had few direct dealings with the tribes in Maine and did not extend formal recognition to those tribes. The State of Maine actively

regulated the affairs of Indians within its borders for almost 160 years, creating hundreds of laws relating to Indians. As a result, when the Maine tribes asserted land claims in the 1970's, they first had to overcome the claim by the state that they were not really bona fide Indian tribes at all.

The decision in the Morton case in 1975 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 a central principle 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.

In the years immediately preceding the 1980 settlement the Maine tribes had won a string of important 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 never been legally 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. The Maine Supreme Judicial Court decision in State v. Dana held that the state lacked criminal jurisdiction over crimes by tribal members on tribal lands. The federal court opinion in Bottomley v. Passamaquoddy Tribe revealed that the Maine tribes retained the full attributes of sovereignty as defined by federal Indian Law rather than any reduced type of tribal sovereignty watered down by local Maine history. In short, if there had been no settlements, and no other Congressional action limiting tribal authority, today the tribes in Maine would possess and exercise the full degree of sovereignty that we usually associate with "western" tribes. Under the jurisdictional provisions of the settlement, the state was able to regain some of the control that it had exercised before the court decisions cast doubt on the legal basis for such state control. But that extension of authority to the state could happen only because Congress approved it.

Basic Principles of Federal Indian Law

What are the basic concepts of federal Indian law that provided the legal context in which the critical court cases were decided in the 1970's and the Maine settlements were enacted? It starts with the recognition of tribes as governments that have a unique place within our constitutional framework. 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 government-to-government relationship with the United States. A central component of that relationship 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.

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). However, internal sovereignty (e.g. powers of local self-government over tribal territory) survived unless expressly limited by treaty or federal legislation, or implicitly limited by the nature of the tribes' domestic dependent status. Thus, the Maine settlements could not and did not create the sovereign powers of the tribes. The settlements modify those powers, but are not their historical or legal source.

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.

Judicial Canons of Construction in Federal Indian Law- The U.S. Supreme Court has fashioned special rules of construction, including that ambiguities in statutes enacted for Indians' benefit are resolved in Indians' favor. However, in interpreting the specific Maine settlement legislation the state and federal courts have not consistently found the Indian law canons of construction to be applicable or determinative.

Maine Indian Claims Settlements - Basic Elements

The Maine Indian Land Claims Settlement of 1980 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.

The Passamaquoddy Tribe, Penobscot Nation, and the Houlton Band of Maliseets received $81.5 million from federal funds, the largest settlement of its kind and the first to include provisions for the reacquisition of land.

Federal and State Recognition

The Maliseets obtained federal recognition and the Penobscot Nation and Passamaquoddy Tribe continued to be recognized, while creating a new jurisdictional relationship with the State. The tribes and their members became eligible for federal benefits and programs, including housing, health care, education and resource protection.

Repeal of State Laws

The terms of the settlement allowed the State to repeal most of the state laws specifically relating to the tribes. The Maine Department of Indian Affairs, which acted as an advocate and liaison with other state agencies, was abolished.

Disposition of Land Claims

MICSA ratified 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 had 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 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 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.

Trust Funds

A Settlement Fund of $27 million was established: $13.5 million each for the Penobscot Nation and the Passamaquoddy Tribe to be held in trust by the U.S. government. Interest from $1 million for each tribe is designated for the benefit of tribal elders. No trust fund of that kind was established for the Houlton Band of Maliseets.

Tribal-State Commission

The settlement established the Maine Indian Tribal-State Commission, the role and structure of which Paul and John are describing today.

Jurisdictional Issues

Federal laws concerning Indians apply in Maine unless they are contrary to settlement terms. One of the unusual terms in MICSA that has become controversial because of what the tribes see as unintended negative consequences is the proviso that any federal law enacted after the date of the 1980 settlement for the benefit of Indians which would materially affect or preempt the application of the laws of the state shall not apply in the State of Maine, unless specifically made applicable within Maine by Congress.

The federal act, i.e. MICSA, states that the Maine 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. In turn, section 6204 of the Implementing Act states that:

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

The following areas of jurisdiction are spelled out in the 1980 settlement in relation to the Penobscot Nation and the Passamaquoddy Tribe:

-The tribes may adopt constitutions consistent with the settlement.

- The tribes may assume exclusive jurisdiction over Indian child custody proceedings pursuant to The Indian Child Welfare Act.

- The tribes may sue and be sued, but retain limited sovereign immunity.

- 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 definitions 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 Penobscot Nation and Passamaquoddy Tribe are required to make payments in lieu of taxes, but Indian lands cannot be taken under the state tax laws. Pursuant to the Houlton Band of Maliseet Indians Supplementary Claims Settlement Act of 1986 land purchased by the federal government in trust for the Houlton Band is exempt from taxes, but the Band is required to make payments in lieu of taxes. For that purpose the Secretary of the Interior manages the Houlton Band Tax Fund.

-Control over internal tribal matters and municipal powers. Section 6206(1) of the Maine Implementing Act. This language is not applicable to the Houlton Band of Maliseets; and no similar provision is included in the Aroostook Band of Micmacs settlement. Section 6206(1) 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.***

Soon after the 1980 settlement a fundamental disagreement emerged between tribal and non-tribal parties concerning the “internal tribal matters” and “municipality” language, resulting in ongoing litigation, including cases that are currently pending. Parties on all sides of the issue maintain that properly defining the scope of the “internal tribal matters” language is critical to the workability of the new inter-governmental relationships established in 1980.

Most recently, on August 8, 2007 the First Circuit Court of Appeals decided State of Maine v. Johnson. That case involved a decision by the Environmental Protection Agency (EPA) which gave the State of Maine permitting authority, under the Clean Water Act and MICSA, with regard to discharge of pollutants into territorial waters of the tribes, but exempted two tribal-owned facilities from the State's permitting program. Despite a detailed Opinion Letter from the Department of the Interior supporting the tribes' claims, the court upheld the State's authority to regulate all of the disputed sites, including the two sites owned by the Penobscot Nation and situated on tribal land which the EPA had found to have insignificant consequences for non-members of the Nation. With respect to the "internal tribal matters" exemption from state regulatory authority, the court stated that discharging pollutants into navigable waters is not of the same character as those things which were intended to be shielded from state authority such as tribal elections, tribal membership or other exemplars that relate to the structure of Indian government or the distribution of tribal property. Significantly, the court held that the issue at hand was not even a close call and therefore did not require consideration of the balancing tests and factors that the First Circuit had previously applied in the Akins and Fellencer cases.

Built-In Flexibility

The 1980 settlement was intended to create new, on-going relationships 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 concerning the allocation of jurisdiction, including concurrent jurisdiction. This provision was added to MICSA at the request of the Secretary of the Interior who explained the amendment's purpose as follows:

> ***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.***

The language that was added to MICSA to allow for future flexibility was as follows:

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

The Aroostook Band of Micmacs Settlement

The 1980 settlement legislation did not specifically refer to the Aroostook Band of Micmacs. Nevertheless, the Band subsequently produced documentation to support their own claim which resulted in the passage of the state Micmac Settlement Act in 1989, 30 M.R.S.A. § 7201-7207. That statute by its terms was to become effective only if the Tribal Council certified its approval within 60 days of the Legislature's adjournment and if corresponding federal legislation ratifying the state statute was subsequently enacted by Congress. The state legislation would have accorded the Aroostook Band generally the same treatment as the Maliseets under the 1980 settlement. However, the Tribal Council never certified its approval of the state Micmac Settlement Act.

Nevertheless, all of the parties apparently treated the state Act as having been enacted and in 1991 Congress approved the Aroostook Band of Micmacs Settlement Act (ABMSA) which included a finding that the Micmacs should be accorded the same settlement as the one earlier provided to the Maliseets, and stated that one of its purposes was to "ratify the state Micmac Settlement Act which defines the relationship between the State of Maine and the Aroostook Band of Micmacs." ABMSA also granted federal recognition to the Micmacs and provided a land acquisition fund of $900,000.

Unlike MICSA, ABMSA itself does not contain any direct language concerning the applicability of state law to the Micmacs. It does not repeat the language on that topic from either MICSA or the state Micmac Settlement Act. As a result, in the context of complaints to the Maine Human Rights Commission by former tribal employees, the Band has contended that because the state Micmac Settlement Act was not certified the Band is not subject to state law. Aroostook Band of Micmacs v. Ryan. In April of 2007 the First Circuit Court of Appeals held that the non-certification of the state Micmac Settlement Act was immaterial because the general language in §1725(a) of MICSA about the applicability of state law to Indian tribes made the Aroostook Band of Micmacs subject to state law. The court also held that ABMSA was not in conflict with and did not implicitly repeal §1725(a) of MICSA as to the Micmacs. The Micmacs sought review in the U.S. Supreme Court on the grounds, among others, that the First Circuit's decision violated basic principles of federal Indian law, but the Supreme Court declined to hear the case.

Remarks of John Dieffenbacher-Krall
Briefing of the Maine Legislature on How the Maine Indian Tribal-State Commission (MITSC) Increased Its Effectiveness, How Its Enhanced Effectiveness Benefits Tribal-State Relations, and Some of the Biggest Challenges Looming in Tribal-State Relations
January 17, 2008

As Paul Bisulca stated in his opening remarks, I will address how MITSC achieved a dramatic increase in its effectiveness over two years, how that enhanced effectiveness benefits tribal-state relations, and identify some of the biggest challenges looming in tribal-state relations that should most concern the Maine Legislature.

MITSC Turnaround

I became MITSC Executive Director September 6, 2005. MITSC was in a weak organizational condition when I assumed the Executive Director position. It had last held an official meeting on November 6, 2003, two days after Maine voters rejected a joint Passamaquoddy/Penobscot casino for Sanford. At that November 6 MITSC meeting, the Passamaquoddy representatives told their fellow Commissioners that they had been instructed by their Tribal Governments to make a statement announcing their withdrawal from MITSC. The Penobscot representatives, in solidarity with their fellow Wabanaki, also withdrew from the meeting.

Besides the fact that MITSC had not held an official meeting for almost two years, it had no chair when I assumed the executive director position. Cushman Anthony, a former member of the Maine House, resigned in December 2004 before the conclusion of his second term. MITSC had also operated without an executive director since the August 2004 resignation of Diana Scully. To her considerable credit, Diana continued to work part-time for MITSC while holding another full-time job to deal with certain administrative functions. Though MITSC had some money because it had operated at a very minimal level for two years, its future funding prospects did not appear promising. In addition to these internal challenges, a bill had been introduced to abolish MITSC and reconstitute it in the hopes of making it more effective.

Though many indicators suggested MITSC was ready to die in September 2005, a little less than two and a half years later any informed observer of MITSC would agree it has never been more effective or politically relevant. In fact, this Legislature asked MITSC last June to staff the Tribal-State Work Group which will report to you in three days about possible changes to the Maine Implementing Act and Micmac Settlement Act that could greatly enhance tribal-state relations.

Last January I identified during MITSC's address in the House Chambers ten principal reasons MITSC had not been effective. I want to report to you on what MITSC has done to change those factors that had been hindering its effectiveness.

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

MITSC has enhanced its credibility as a forum for dispute resolution. We achieved a major breakthrough with the Atlantic Salmon Management Cooperative Agreement. This is an agreement first signed by Maine, the US Fish and Wildlife Service, and NOAA Fisheries in 1998 to delineate how the State and Federal natural resource agencies would collaborate to restore Atlantic salmon within the State of Maine. The agreement expired in 2003. An impasse had developed over inclusion of the Federal Agencies' trust responsibility to the Tribes within the language of the agreement. MITSC Commissioner John Banks, who also serves as the Penobscot Nation's Natural Resources Director, asked us to become involved to see if we could resolve the issue.

We devoted several MITSC meetings to the issue. MITSC consulted with Pat Keliher from the Atlantic Salmon Commission (now Director, Bureau of Sea Run Fisheries and Habitat, Maine Department of Marine Resources), Attorney General Steve Rowe and his assistants, and the Federal natural resource agency staff working on Atlantic salmon recovery in Maine. MITSC achieved resolution of the issue by having the Federal Agencies issue a letter to the Tribes affirming their trust responsibility in exchange for the Tribes agreeing to drop the trust responsibility language in the agreement. This dispute would not have been resolved without MITSC's persistent intervention.

The Tribal-State Work Group, both its initial configuration under Governor Baldacci's executive order and current construction under your legislative resolve, represents a huge diplomatic and political breakthrough. For decades, the State of Maine had refused to discuss the intensifying dissatisfaction of the Maliseets, Passamaquoddy Tribe, and Penobscot Nation with how the Maine Implementing Act had been implemented and interpreted. MITSC insisted that the most disputed provisions of the Maine Implementing Act, internal tribal matters and the municipality language found in section 6206, get discussed at the 2006 Assembly of Governors and Chiefs. At that Assembly, Governor Baldacci and Tribal Leaders agreed to create the Tribal-State Work Group. This legislative session will determine the fate of the Tribal-State Work Group recommendations. But MITSC believes convincing the State to discuss what has most bothered the Tribes about their government-to-government relationship represents real progress.

Last spring both the Maine Attorney General and some representatives of the Aroostook Band of Micmacs asked MITSC to explore becoming involved in resolving an internal political dispute within the Tribe. To have these parties often opposed to each other both approach MITSC is more evidence of the rising confidence in MITSC to serve as a credible, fair and effective mediator.

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 now attempts to prevent parties from resorting to litigation by promoting early discussion and resolution of disputes through government-to-government communication.

MITSC will employ all of the diplomatic means available to promote discussion and resolution of issues instead of confrontation and litigation.

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

During much of its history, MITSC has made many well thought out recommendations, some the product of many months or even years of deliberation and work, only to have them ignored by the signatories to the Settlement Act. MITSC has consciously focused during the last two years on ensuring the implementation of its recommendations.

The new approach begins with MITSC's acceptance that it has a responsibility to use all its resources and connections to implement its recommendations. If something is recommended, MITSC is prepared to do more than initially presenting the recommendation to the appropriate party or parties. MITSC now strives to focus on how to implement its recommendations instead of complaining about being ignored.

When necessary, MITSC builds alliances within and outside the signatory governments to advance its agenda. MITSC also takes into account public opinion and shaping it through effective use of the media. MITSC undertakes extensive networking and keeps a broad range of individuals and interests informed about its work.

An example of this new approach is our successful work to convince the Town of Stockton Springs to comply with not just the letter but the spirit of Maine's offensive place names law. The law prohibits the use of the words nigger, squaw, or squa in geographic place names. In the late summer of 2006, an article was published in the Bangor Daily News reporting that the Piscataquis County Commissioners had written a letter to Governor Baldacci seeking an exemption from the State law in part due to its unequal enforcement. The article caused MITSC to examine compliance with the law. Stockton Springs was the last community that persisted using the word squaw and then squa for three geographic place names within the community.

MITSC effectively used the press and its connections with NGOs, especially Maine People's Alliance, to exert pressure on the town's leaders. We met with the Stockton Springs Selectpeople on October 16 with the Maine Human Rights Commission serving as a facilitator and convinced them to work more amicably with their Indian neighbors. It worked.

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

Despite limited authority we have found ways to have a greater advisory role with the respective governments. We don't have statutory authority but we do have diplomatic influence. We find all six governments increasingly turn to MITSC with a variety of communication, etiquette, diplomatic, information and policy needs.

5. MITSC Is Provided Insufficient Funding To Fulfill Its Responsibilities

MITSC applauds this body and Governor Baldacci for heeding our concern about insufficient funding. You decisively addressed this issue by more than doubling the State's contribution to MITSC operations for both fiscal years 08 and 09. MITSC can now function far more effectively knowing it has secure funding until June 30, 2009. Though the original Maine Implementing Act required Maine to fund all MITSC operations, the Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Nation voluntarily support MITSC operations.

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

The lost opportunity to continue to improve tribal-state relations after President Carter signed the Maine Indian Claims Settlement Act on October 10, 1980 was recently underscored by the principal State negotiator, former Maine Deputy Attorney General John Paterson. John Paterson told the Tribal-State Work Group on November 19, 2007,

> "Fortunately in late 1976 – early 1977- two important things happened. The Tribes much to their everlasting credit announced and made it quite clear that their intention was only to seek money not to seek the return of land. It was less clear as to how they felt about state land but it was certainly in respect to privately owned land they indicated they were not interested in throwing anybody off their land. That was an extraordinary gesture in view of the enormous leverage they had by virtue of the existence of that claim and I think we're all forever indebted to them for that act of statesmanship."

Paterson also stated on November 19,

> "I must say, however, that even through those most difficult times the tenor of the discussions was extraordinarily civil. And I know for the Tribes that this was a matter of great emotion and I did then and I do now again give them extraordinary credit for the decency with which they approached those negotiations."

Why has the tribal-state relationship generally deteriorated instead of steadily improved during the last 25 years? The answer is the failure to address unresolved and emerging disputes dealing with jurisdiction and governmental powers between the signatories. When discussions took place in early 2005 on how to restore a functioning MITSC, Tribal representatives to those discussions clearly stated unless these fundamental underlying jurisdictional issues were addressed the relationship was destined for continued friction and confrontation.

Governor Baldacci created a political opening to change that dynamic by consenting at the 2006 Assembly of Governors and Chiefs to discussing the governmental relationship questions most severely bothering the Tribes. This body has built on that opportunity by passing LD 1263, a resolve that transformed the Tribal-State Work Group from an executive branch entity to a legislative creation. MITSC considers the fact that the issues the Tribes want to discuss are at

least being considered in the Tribal-State Work Group a diplomatic victory. However, the good will created by the Tribal-State Work Group will quickly dissipate if some substantive changes sought by the Tribes are not made to the Maine Implementing Act and Micmac Settlement Act.

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

Governor Baldacci said at the May 8, 2006 Assembly of Governors and Chiefs, "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." For 27 plus years the Maine Implementing Act has defined and dictated the relationship between the State of Maine and the Tribes in ways the negotiators may have never intended. The Maine Implementing Act is a legal framework but not a substitute for a healthy government-to-government relationship.

All three branches of Maine Government should consider adoption of a formal policy to govern its relations and interactions with the Tribes. Models exist and MITSC can help with the development of appropriate policy for the Maine-Wabanaki relationship.

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

Governor Baldacci and all five Wabanaki Leaders have expressed their personal desire and commitment to improving the tribal-state relationship. MITSC has observed conscious efforts by Governor Baldacci and the Tribal Leaders to exercise restraint in their public statements to avoid inflaming the other parties. MITSC has encouraged this rhetorical restraint on all sides.

Tribal-state relations could make a quantum leap forward if the economic development assets of the Tribes were better supported by the State. Maine economic development specialists have offered encouragement and some tangible support to the Tribes. But what has been tried to date has not worked. The Tribes have mostly criticism for State economic development efforts intended to assist them.

Maine and the Tribes need to break out of this pattern of tentative gestures by the State that fail and replace this experience of failure with economic development success. The two final items on my list of ten things hindering tribal-state relations are key to state-tribal economic collaboration.

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

No doubt commonalities exist in sound economic development principles whether one is attempting to improve a corporation's, cooperative's, sole-proprietorship's, town's, state's, country's, or Indian Nation's economic performance. Yet there are unique aspects of Tribal economic development that must be understood if true assistance is to be made available to the Wabanaki. The Harvard Project on American Indian Economic Development finds that

sovereignty, institutions, culture, and leadership are fundamental to Tribal economic development success. Maine's economic development assistance must be geared specifically to the Tribes and what they require for success.

10. Intent, Goals, Prioritization, Commitment

This room is filled with successful people. When you reflect on the successes that you have achieved, the four words I mentioned above may have helped you get to where you are today. If there is no intent on the part of the State and Tribes to enjoy better tribal-state relations, it will not happen. I have already told you that Governor Baldacci and the five Wabanaki Leaders have repeatedly expressed this intention. Senate President Edmonds, Senate Minority Leader Weston, and House Speaker Cummings have also expressed similar sentiments to MITSC in meetings we have held with them during the last year.

You have an existing forum for mutual goal setting, the Annual Assembly of Governors and Chiefs, which grew out of a recommendation made by a special task force commissioned by the 117th Maine Legislature. MITSC organizes that event for the State and the Tribes. The 2008 event will happen sometime this spring or summer.

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. The decision by many of you to visit Indian Island yesterday demonstrated the importance you ascribe to the relationship. I know Speaker Cummings and his staff are working on a multi-day legislative trip to all five Tribal communities to be possibly held later this year. I encourage you to continue to prioritize this relationship and take advantage of all opportunities to learn more about each other.

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.