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March 30, 2016

Honorable Henry John Bear
State Representative, Houlton Band of Maliseet Indians
41 Elm Street
Houlton, Maine 04730

Re: The Application of *California v. Cabazon Band of Mission Indians* to Maliseet Indians

Dear Representative Bear,

You requested my opinion on a letter from Maine Attorney General Mills dated March 22, 2016, regarding the application of the Supreme Court decision in *California v. Cabazon Band of Mission Indians* (480 U.S. 202, 1987) to the Maliseet Indians in Maine. I have reviewed that letter and provide you with my analysis below.

Here is some information regarding my background. I have been practicing Federal Indian law for almost 25 years. I have experience in addressing a wide range of Tribal matters including: sovereignty issues, economic development matters, treaty rights, water rights, tribal government structure and services, environmental law, Indian Child Welfare Act matters and code drafting. I have assisted Tribal governments reclaim their historic lands, assert, establish and promote their sovereign authorities and governmental infrastructure and support their economic development plans. From1993-1994 I was the Acting Manager of the US EPA Region I Indian and Federal Facility Program and from 1997-1999 I was the Co-Coordinator of the US EPA Region I Office of Environmental Stewardship /Tribal Enforcement Office.

I started my Indian law career studying the 1980 Maine Settlement Acts and I am familiar with every facet of these Acts, including the issues I address herein. My background also includes substantial work researching and writing about the Treaty of Watertown (1776) and other treaties entered into by Eastern North American tribes.

I am licensed to practice law in Massachusetts and Wisconsin and I am admitted to practice in the First Circuit Court, DC Circuit Court and the United States Supreme Court.

Issue:

The AG in her letter argues that the decision in *California v. Cabazon Band of Mission Indians* (480 U.S. 202, 1987) does not apply in Maine for the following reasons: 1) Maine's gambling laws were found applicable in *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784 (1st Cir 1996). 2) Cabazon predates both the Passamaquoddy case and the Indian Regulatory Gaming Act which supersede Cabazon; 3) If Cabazon is still good law Cabazon is blocked by the 1980 Settlement Acts and that Maine's gambling laws are criminal in nature not regulatory.

Short Answer: Based on the actual Supreme Court's determinations in Cabazon, the express language and legislative history of the 1980 Maine Settlement Acts and Maine's gaming statutes, it is my opinion that Attorney General Mills analysis is flawed and that the Cabazon decision applies to the Maliseet Tribe in Maine.

Statutes and Cases Referred to By the Attorney General

1980 Maine Settlement Acts

In 1980, Congress enacted the Maine Indian Claims Settlement Act (25 USC §1721 et. seq.) (MISCA) to settle the Maine land claims of several Indian tribes and to ratify the Maine Implementing Act (30 MRSA§6201 et seq.) (MIA). MICSA allocates some federal jurisdiction over tribes to the State, but it neither terminates the Maliseet Tribe, nor provide exclusive jurisdiction over the Maliseet Tribe to Maine. MICSA's legislative history also clearly demonstrates that Congress intended the Tribe retain its governmental authority and for its lands to be immune from state laws like other federally recognized tribes,

> It is stated [in the MIA] that the "The Houlton Band of Maliseet Indians and its lands is wholly subject to the laws of the state." ... It differs from S. 2829 in that the Federal legislation will extend Federal recognition to the Maliseet. In addition, S. 2829 will provide that Maliseet land must also be taken into trust once acquired . . . which will entail some exemptions from state laws. Report to the Senate Select Committee on Indian Affairs, Authorizing Funds for the Settlement of Indian Claims in the State of Maine, S. 2829), Report Number 95, 95th Cong., 2nd Sess. Page 35, (September 17, 1980).

MICSA Section 1725(h) acts to preclude "the laws and regulations of the United States which are generally applicable" to the Maliseet from applying in Maine. Nonetheless, it is generally understood that federal "laws and regulations" refers to statutes and regulations and not federal Indian policy or common law like the Cabazon decision. (See https://www.usa.gov/laws-and-regulations)

Moreover, while MIA Section 6206-A purports to remove all civil and criminal jurisdiction from the Maliseet, this provision was enacted after MICSA in violation of 25 USC 1725(e)(2) without the consent of the Maliseet. It cannot now be used by the State to deprive the Tribe of its own governmental authority.

Under MICSA, the Maliseet Tribe is a legitimate Tribal government with the commensurate powers and authority to provide for the economic well being of its government and people as it sees fit.

California vs. Cabazon Band (480 U.S. 202, 1987)

In *California v. Cabazon Band of Mission Indians*, the Supreme Court established that, 1) Tribal governments have legitimate economic resource needs (*id* at 217-8), 2) Tribal self-determination and self-sufficiency are "compelling" federal interests (*id* at 217-8), 3) Gaming is a legitimate Tribal economic development strategy strongly supported by the federal government (*id* at 217-8), and 4) When states only "regulate" gaming and do not "prohibit" it entirely, the Tribal and federal interests block state regulation of Tribal gaming,

> "We conclude that the State's interest ... does not justify state regulation of the tribal ... enterprises" in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government,..." *id* at 221-222

Passamaquoddy Tribe v. State of Maine, 75 F.3d 784 (1st Cir 1996)

The Passamaquoddy Tribe argued that it should be allowed to avoid Maine's gaming laws and operate a Tribal casino "behind the shield of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721" *id* at 784. The court disagreed and found that the Indian Gaming Regulatory Act (IGRA), did not apply in Maine. This decision does not address Cabazon and says nothing about its application in Maine.

Cabazon Impact On Maine Gaming Laws

Cabazon determined that tribes can operate gaming facilities free from state interference when a state does not prohibit all forms of gambling. *See Cabazon* at 221. The Court based its determination solely on whether state gaming is "prohibited" or "regulated" and not whether the state's gaming laws are found in its criminal code,

> That an otherwise regulatory law is enforceable (as here) by criminal as well as civil means does not necessarily convert it into a criminal law.... *id* at 212.

In Cabazon, the Court ruled that when a state with a criminal gaming statute even allows a limited amount of gambling, like a state lottery, that is enough to allow high-stakes casino gambling on Indian lands free from state interference. *id* at 211

Maine has state licensed gambling facilities, a State lottery and racetrack betting, which places it squarely under the Cabazon rule. Maine's gaming laws carry criminal penalties that are no different than the state laws at issue in Cabazon, and similar gaming cases, that found state gaming laws do not apply to Tribal gaming. *See Cabazon* at 212, *Seminole Tribe of Florida v Butterworth* 658 f.2d 310, Note 1, (5th Cir. 1981) and *Barona Group of Capitan Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185 (CA 9 1982), cert. denied, 461U.S. 929 (1983)

Conclusion

In summary, 1) the fact that Maine's gambling prohibitions are found in its criminal code is no defense against the application of Cabazon in Maine, 2) *Passamaquoddy v Maine* only addresses the application of IGRA and says nothing about Cabazon. Since IGRA cannot displace Cabazon in Maine, Cabazon still applies to control the relationship between State and Tribal gaming, 3) the 1980 Settlement Acts preserves Maliseet Tribal government authority and does not prohibit the application of Cabazon, and 4) The Supreme Court was crystal clear that placing a state gaming law in a criminal code does not make it a "criminal" law under Cabazon, that requires the total prohibition of gaming in the state, which Maine does not do.

Based on the above, I also believe there are substantial arguments in support of the Maliseet position regarding the application of Cabazon in Maine.

If you would like to discuss the above or have any questions, please feel free to contact me.

Sincerely,

Douglas J. Luckerman