

TRANSCRIPT :

**Task Force on Changes to the Maine Indian Land Claims Settlement
Implementing Act**

Third Meeting : September 13, 2019

Civil Jurisdiction

Sen. Michael Carpenter:

With that in mind, and I think that's a very important point, I flip back to Paul's chart on page eight that talked about settlement. Not a grant of new authority, was a restriction on authority they already had. I think that's important to keep in mind going forward.

All right. I would now like to ask the Tribal attorneys to go back to their presentation, which is item two on the orange, I guess, agenda. If we'd like to have whoever's going to make that presentation come forward. I would just ask you once again to introduce yourselves, whoever's going to be presenting. According to the agenda that I received, and we were all given some handouts ... as soon as I find the agenda I'll be all set. There we go. We're going to start with a civil jurisdiction of Tribes and States under Federal Indian law. First was going to be the jurisdiction of a generation of governmental revenue through gaming, then jurisdiction over the protection and exploitation of natural resources, including hunting, trapping and fishing, then criminal jurisdiction. Are you still planning to go in that order?

Kaighn Smith Esq, Counsel for Penosbcot Nation, :

Yes.

Sen. Michael Carpenter:

Okay. You have the floor. No, the other microphone. Thank you.

Kaighn Smith Esq, Counsel for Penosbcot Nation:

Okay.

Sen. Michael Carpenter:

So we have this handout here for the Task Force members. It's the civil jurisdiction example, raising governmental revenue through gaming. Okay?

Kaighn Smith Esq, Counsel for Penosbcot Nation:

Good morning. This is Kaighn Smith. Just wanted by way of introduction to say that there have been five attorneys involved in this process. Cory Albright, counsel for the Houlton Band of Maliseet Indians, is likely listening by telephone. Unfortunately, he's in Seattle so he can't readily fly to Maine to participate, but he's been a major actor in this process. Mark Chevarree, in house counsel for the Penobscot Nation, has been heavily involved. Mark is to my right. Allison Binney of Akin Gump has also been heavily involved in this process.

Kaighn Smith Esq. Counsel for Penobscot Nation

And Cory, we wanted to put all four of us up here together, but there's not enough room at the table, particularly a man of the height and stature of Corey Hinton is with us, but Cory will be presenting as well and it's been involved in working on these matters, as you know. Cory is a citizen of the Passamaquoddy Tribe.

I wanted to say at the outset of that we are providing this material to the Task Force with the understanding that this is a legal summary intended for the sole purpose of facilitating discussions of the Task Force. It's not intended, and anything we say here today is not intended to represent or otherwise reflect the legal position of any member of the Task Force or any Tribal Nation and really shall not be construed in that manner. And I have to say that because we are unfortunately in some bitter litigation as we speak.

There is a case in the Federal court called Maine v. Wheeler, also known as Maine v. EPA, which is a fight about water quality standards and Federal authorities and Tribal authorities within reservation and Indian territory waters in the State of Maine. There's pending before the US Court of Appeals for the First Circuit as we speak, a petition for rehearing en banc, which has been pending for over two years, having to do with the scope of the Penobscot Indian Reservation within the Penobscot River. And it's unfortunate. Just as attorney Thibeault said, we have been in these very difficult battles since 1980 to sort out some very, very important issues of jurisdiction and land rights pursuant to the Settlement Acts, which aren't a model of clarity.

So pursuant to the joint resolution of the legislature and all the work that has gone into this since, I'll just remind us that the joint resolution of the legislature, back in June I believe, was that we were to engage here in a collaborative process to, "Develop amendments to the Act to implement the Maine Indian Claims Settlement and the Federal Maine Indian Claims Settlement Act of 1980 that would clarify that the Maine Tribes enjoy the same rights, privileges, powers, and immunities as other Federally recognized Indian Tribes within the United States." That is the charge that we understand we are here to accomplish. And indeed, at the request of Sara Gideon and Troy Jackson, the Tribes held long workshops to iron out what they thought were necessary for this process to work, and they said that for this process to work in a letter to Sara Gideon and Troy Jackson in May of this year, that there would have to be amendments to establish that the laws of the State shall not apply to the Tribes or their lands except as agreed to by the State and the Tribes.

I'll just summarize further that this provision of 1735-B restricting the application of beneficial Federal laws to the Tribes would have to be reversed and the Tribes would have to benefit from Congress's intentions to better Tribal communities. So those have been the working premises of the Task Force as far as the Tribal leaders and their counsel is concerned.

And at your request, we did provide you with amendments to the Maine Implementing Act that would accomplish those goals. We worked very hard to do that. All five attorneys were deeply

engaged with our respective Tribal leadership to iron that out upon presentation to the committee at our last-

Sen. Michael Carpenter:

Hey, could you hold on just a second? Cool. Forgive me, the Maliseet attorney is on the phone, but we don't have him on yet. Do we? Are you? Okay. I'm sorry?

Rep. Donna Bailey:

He's on speaker.

Sen. Michael Carpenter:

Are you there, Cory?

Corey Albright Esq. Counsel for the Houlton Band of Maliseet Indians:

Yes, I am. Thank you.

Sen. Michael Carpenter:

Can you hear us all right?

Corey Albright Esq. Counsel for the Houlton Band of Maliseet Indians

You know, I think I'm going to keep listening online. The audio quality is far better. But I will keep the phone live, if that's all right.

Sen. Michael Carpenter:

That's fine. Yes, thank you.

Corey Albright Esq. Counsel for the Houlton Band of Maliseet Indians:

Thank you.

Sen. Michael Carpenter :

My apologies.

Kaighn Smith Esq. Counsel for Penosbcot Nation:

No problem.

Sen. Michael Carpenter:

And before you go any further, because we have a number of sections to go through here, I would propose that we plan to break around 12:30 PM wherever we happen to be in, and we'll take a short break for lunch, then we'll come back and pick it up and continue on through the various sections, if that's okay.

Kaighn Smith Esq. Counsel for Penosbcot Nation

Absolutely.

Sen. Michael Carpenter:

If you're done with this and we're done with you, then we can go to lunch at 12:15 PM, or we'll play it by ear just to give you an idea.

Kaighn Smith Esq. Counsel for Penosbcot Nation::

Sounds good.

Sen. Michael Carpenter:

Go ahead. Sorry.

Kaighn Smith Esq. Counsel for Penosbcot Nation:

So just to refresh, at our last session with the Tribes having presented the amendments to the Maine Implementing Act that we thought would meet the objectives of the joint resolution and the objectives iron at with Sara Gideon and Troy Jackson, we laid all of that out. Appropriately, you then asked, "Well, how will have things operate under Federal Indian law?" Because that's not something that then Maine representatives readily understand.

So what we have done is laid out the principles by means of two charts then some working papers or discussion papers if you will. The first chart is a default rules of civil jurisdiction and land use in Indian Country, which lays out the general principles of Federal Indian law with respect to Tribal and State jurisdiction within Indian Country. I was just calling that to your attention. I'm not asking you to focus on it necessarily right now. Our apologies that we couldn't get it to you sooner. This took a lot of work to pull together, and obviously we didn't really get it out until late yesterday afternoon, but we will be reviewing the broad principles generally as we go through this.

You had thrown out a number of different subjects and we thought that it might make sense to break them down by giving you first a broad overview of civil jurisdiction in Indian Country with respect to Tribal and State relations, then within that umbrella provide you with the general principles governing the raising of governmental revenue through gaming. We know that, that's an important issue and we thought we should discuss it, and it's a good one just to provide as an example of how civil jurisdiction works in Indian Country generally. Corey Hinton will be presenting that.

Then secondarily under the rubric of civil jurisdiction in Indian Country, we thought the regulation of natural resources would be a good example to get into because of the importance of that currently in the courts and otherwise and as a subsection of that, hunting, trapping, and fishing regulatory interests in Indian country.

So that's the civil jurisdiction part of our presentation coming up, then we would turn to the rules of criminal jurisdiction in Indian Country. Allison Binney is going to present that part of the presentation and that will be a broad overview of how criminal jurisdiction works in Indian Country. Then as a subset of that, she's going to discuss the Violence Against Women Act and the efforts that are being made to apply that law here in the State of Maine.

Are there any general questions as to that introduction and our intentions? If not, I will just, I'll dive in.

Sen. Michael Carpenter:

All right.

Kaighn Smith Esq. Counsel for Penobscot Nation:

Okay. I'm not going to necessarily follow the chart or the discussion papers. I want to give you, in terms of the broad outline of civil jurisdiction and Tribal-State relations in Indian Country, some of the history, and I want to talk about a couple of cases, then we can get into the specifics. So Federal Indian law is what we're talking about. Federal Indian law by its nature is an attempt to put a just gloss on something that is fundamentally unjust, and I don't think that one can dispute that colonization and the exploitation that goes with it is fundamentally unjust. So when you read Federal Indian law, you are reading the development of law to attempt to come to grips with this process, and it's not easy. There are undertones of flat-out racism in the development of this law.

So for example, the discovery doctrine, which is this doctrine that suggests that the discovery in European Christian Nations upon coming to America could plant their flag and take title, subject to the extinguishment of the Tribe's occupation, they could claim title because they were superior to the occupying Indigenous peoples and they were superior to the occupied Indigenous peoples because they were Christian, A, and they knew how to work the land. This was the presumption behind the discovery doctrine.

The Supreme court has also described Federal Indian policy as schizophrenic, and you see this through time. Attorney Thibeault did a very nice job of summarizing some of these shifts in Federal policy, and these shifts have gone from the view that Tribes should be flat out terminated, extinguished as if they were just a blight on the land--that was the actual description of Federal Indian policy--to other times where the notion has been, well, let's just have Tribes assimilate into the dominant culture, and of course assimilation had with it the notion that language should be obliterated, culture should be obliterated, and the Indian people should all walk, talk, and look like European white people. They had a boarding school system that literally was to end the whole notion of culture and language.

Kaighn Smith Esq. Counsel for Penosbcot Nation:

That all shifted in 1934 with the Indian Reorganization Act in the Roosevelt administration. There was a recognition that there was time to change, that this was not working. It was a colossal failure. So there was a whole renewal of the notion that Tribal self-determination should rule, and Tribal self determination had to be based on Tribal self-government. There was a brief backlash in the 50s, so-called termination era, but since the early 70s federal Indian policy has been deeply committed to Tribal self government and the acts of Congress and the executive branch have reflected this deep commitment that Tribes should thrive through self-governance. I just wanted to give you that history because, as Mr. Thibeault said, somehow Maine got stuck in what we might generally described as an assimilation mode. The notion that Tribal self-government would be subordinated to State domination. So here we are.

Okay. Tribal-State relations in Indian Country are basically marked by two principles, then I will give you a summary of what the law is generally. The first derives from The Constitution itself, and it's Article I, Section 8, Clause 3 vests the Federal Government with exclusive authority over relations with Tribal Nations. It goes hand in hand with the Federal Government's exclusive authority. It's actually Congress's exclusive authority over relations with Tribal Nations and foreign nations. So Tribes were coupled with foreign nations in terms of recognition of their government-to-government relationship with the United States, but expressly through Congress.

That's the first principle, and as a result of that principle States don't have that power. The power rests with the Federal Government, not with the States. The second is that what comes with the history of the treatment of the Federal Government towards the Tribes, and that constitutional requirement is that there's an agreement that the United States has a trust responsibility to Tribes to prevent the encroachments upon them by States, the Supreme Court in a case called the United States v. Kagama said that the States where the tribes are found are their deadliest enemies.

The reality behind colonization is that the struggle for resources happens at the local level. If you think of it as a funnel with the Federal Government at the top in this colonization process and at the bottom of the funnel where things get quite narrow, that's where you have more cramped populations, and that's where there's a fight for resources. So, colonization was in a state of anarchy without oversight by the Federal Government. So, it's schizophrenic in the sense that the Federal Government oversees colonization. So, ultimately within the Non-Intercourse Act, there could be no land transactions with Tribes without Federal approval, because otherwise you have chaos on the ground.

So, there's two sides to that Federal trust responsibility. On the one hand, the Federal Government's supposed to protect Tribes from encroachments by States, but on the other hand, the Federal Government actually had been involved in the colonization process itself. So it's this dual role and it's reflected in that that zigzag course through history where you have this

Kaighn Smith Esq. Counsel for Penosbcot Nation:

termination tendency, this assimilationist tendency, but now commitment to Tribal self-government.

Those are the two fundamentals. There's the trust responsibility and The Constitution vests the Federal Government with that power. I want to read what Judge Canby said in a Ninth Circuit decision that he wrote. It's Washington versus EPA over environmental regulations in Indian Country. This is what Canby wrote, "States are generally precluded from exercising jurisdiction over Indians in Indian Country unless Congress has clearly expressed an intention to permit it. This rule derives in part from respect for the plenary authority of Congress in the area of Indian affairs," that would be under The Constitution, "Accompanying the broad congressional power is the concomitant Federal trust responsibility toward the Indians. That responsibility arose largely from the Federal role as guarantor of Indian rights against State encroachment." So, that's your Judge Canby with our nutshell articulating in a very nutshell fashion the fundamental principles that operate.

Getting into how the rules operate now in 2019, we sort of start with a series of Supreme Court decisions, which I think will help you understand, because you can't divorce the state of the law from history. History here is so incredibly important. I wanted to just give you three cases through history to show where we've come.

The first one is probably the most important decision in Federal Indian law. It was written by Chief Justice John Marshall in 1832 and it's called Worcester v. Georgia. Anyone who studies this field, anyone will know about Worcester v. Georgia. So, Samuel Worcester was a Vermont missionary who was friendly with the Cherokee Nation in Georgia and he was on Cherokee land working his ways in full cooperation with the Cherokee, and Georgia decided that it had authority to license anyone who enters Cherokee territory. Because Mr. Worcester did not have a license from the State of Georgia, he was thrown in jail. So, Mr. Worcester sued the State of Georgia to enjoin the State from imposing its laws and trying to prevent any non-Indian from entering that territory without a State license.

What the Supreme Court more recently described as one of Chief Justice Marshall's most, "Courageous and eloquent decisions," Chief Justice Marshall held the Supreme Court unanimously, but under his pen, held that Mr. Worcester prevailed and Georgia was without power to assert this licensing authority for him to be on those lands and he was to be released pursuant to the court's ruling. And I'll just give you a few quotes from this decision, which are quite powerful.

"The Indian Nations had always been considered as distinct independent political communities retaining their original natural rights as the undisputed possessors of the soil from time

Kaighn Smith Esq. Counsel for Penosbcot Nation:

immemorial." You often hear the term time immemorial because the Indigenous peoples have been occupying the lands of the United States from time immemorial and they have exercised their powers of government from time immemorial, and Justice Marshall repeated that. It's been repeated ever since.

I'll continue, "The very term Nation so generally applied to them means a people distinct from others. The Constitution by declaring treaties already made, as well as those to be made to be the Supreme law of the land, has adopted and sanctioned the previous treaties with the Indian Nations and consequently admits their rank among those powers who are capable of making treaties to government-to-government relationship. We have applied them to Indians and have applied them to other Nations of the Earth. They are applied to all in the same sense."

And this is the penultimate paragraph of his decision. "The Cherokee Nation then is a distinct community occupying its own territories with the boundaries accurately described in which the laws of Georgia shall have no force and which the citizens of Georgia have no right to enter, but with the ascent of the Cherokees themselves or in conformity with the treaties and acts of Congress. The whole intercourse between the United States and this Nation is by our Constitution and laws vested in the government of the United States.

Andrew Jackson was in charge of Georgia at the time and it has been said that Andrew Jackson heard of the decision and said, "The Court has issued its decree. Now let it try to enforce it." And of course we have the sorry story of the trail of tears and the resulting removal of the Cherokee from Georgia and other Tribes from the Southeast.

So that was the most important decision issued by the Supreme Court, probably in the field of Federal Indian law, but in particular with respect to Tribal-State relations. The next most important case is *Williams v. Lee*, a decision that came down from the Supreme Court, another unanimous decision, but a very short one.

In 1959 *Williams v. Lee* involved a non-Indian grocery store owner on the Navajo reservation who decided to sue in State court to collect a debt from Navajo citizens who had an outstanding bill. The case went right through the Arizona Supreme Court and the Arizona Supreme Court held that the State had jurisdiction over this dispute, went to the Supreme Court, and the Supreme Court said, "No." Supreme Court said that this was a matter that had arisen within the Navajo Nation. It was a dispute that was a very much intimate to the goings on there, and that the State Court lacked jurisdiction and jurisdiction rests solely with the Navajo Nation.

Kaighn Smith Esq. Counsel for Penosbcot Nation:

I'll quote from this decision. This is the one that described Chief Justice Marshall's decision as one of the most courageous and eloquent decisions that he had ever written. Court in passing says, "Essentially absent governing acts of Congress, the question has always been whether the State action infringed on the right of reservation Indians to make their own laws and be ruled by them." So here we have a dispute obviously arising on the Navajo reservation and it puts immediately into question what law governs and what law should govern in a setting like this.

The court goes on to say, "There can be no doubt that to allow the exercise of State jurisdiction here would undermine the authority of the Tribal Courts over reservation affairs, and hence would infringe on the right of the Indians to govern themselves. It is immaterial that the respondent is not an Indian. He was on the reservation and the transaction with an Indian took place there. The cases of this Court have consistently guarded the authority of Indian governments over their reservations."

The court then went on to say, "Look, if there's going to be a change here, let Congress make that change. The Court's not going to be active in this setting," with this backdrop and history of *Worcester v. Georgia* and the trust responsibility of protecting Tribal self-government, the Court was not going to interfere in this matter unless Congress gave it some direction. *Williams v. Lee*, still the law to this day. If there's a transaction just like *Williams v. Lee*, non-Indian against Indian arising on an Indian reservation, it's within the exclusive jurisdiction of the Tribal Courts.

The third case is a more modern day case, *White Mountain Apache Tribe v. Bracker*. This is a case, unlike *Williams v. Lee*, involving State authority over a non-Indian's activities on a Tribal reservation. In this case, it was an attempt by the state of Arizona to impose motor vehicle taxes, fuel taxes on a timbering operation, a non-Indian timbering operation at the White Mountain Apache Tribe. This is written by Thurgood Marshall, who probably more than any other modern day Supreme Court Justice understood his predecessor John Marshall and articulated principles of Federal Indian law in a very coherent fashion.

In any event, he said for a unanimous Court that, "When on reservation conduct involving only Indians is at issue State law generally is inapplicable, for the State's interest is likely to be minimal, and the Federal interest of encouraging Tribal self-government is at its strongest." Court then goes on to say that, "More difficult questions arise whereas here the State asserts authority over the conduct of non-Indians engaging activity on the reservation."

Here the Court is going to apply two tests. One is the infringement test that comes out of *Williams v. Lee*, would the imposition of State authority infringe upon the right of the Tribal Indians to make their own laws and be ruled by them. But the second test that the Court develops is what's become now known as the preemption test, and that is whether Federal and

Kaighn Smith Esq. Counsel for Penosbcot Nation:

Tribal interests are such when balanced against State interests that they would trump the state interests. That involves a particularized inquiry into the Federal and Tribal interests at stake and a determination about whether the State interests could somehow outweigh them.

The Court was quick to point out that the preemption analysis, and I'm sorry this is getting quite nerdy, but the preemption analysis in Federal Indian law is very different than general preemption analysis. In other words, the Courts rejected the proposition that in order to find a particular State law to have been preempted by operation of Federal law an expressed congressional statement to that effect as required. That's the general rule in preemption analysis. There has to be an expressed statement by Congress. In the Indian law context, the court was very clear. You don't have to find that because the backdrop of the protection of Tribal sovereignty and the trust responsibility is so strong that you're going to approach it differently, and it's a balancing test to figure out the Tribal and Federal interests at stake, including the Federal commitment to Tribal self-government.

The result of Backer was that the timber operations of the White Mountain Apache Tribe are very important to Tribal self-government and economic development. There's Federal support for those timber operations, and the imposition of a State tax on the non-Indian enterprise engaged in those timber operations would infringe upon Tribal self-determination and would harm ultimately the Federal and Tribal interests at stake. So the State tax was deemed preemptive.

Those are the general backdrop cases that have developed in the field. We have provided you with the chart that you can study at your own leisure that lays out how these, you know, it's basically a restatement of what has been set out in these cases. There are nuances here and there, but I think this is probably a good time to stand back and pause before we shift gears into the specifics of Tribal-State relations over the raising of governmental revenue through gaming. See if there's any questions.

Sen. Michael Carpenter:

Thank you, Mr. Smith. Other questions at this point of Mr. Smith's presentation? That's helpful. Thank you.