

TRANSCRIPT :

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

Third Meeting : September 13, 2019

**Paul Thibeault, Maine Indian Tribal State Commission (MITSC)
Historic Perspective on Settlement Act and Implications**

Sen. Michael Carpenter:

... Mr. Thibeault, you want to go front and center for us?

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC):

Good morning. Again, I'm Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission. I'm going to be providing some historical perspective at the request of the Task Force. I just want to point out materials that I brought. I've provided the Task Force members with hard copies of a PowerPoint. I'm not using a screen. I didn't want to have a screen as an intermediary between us. I wanted to have a direct conversation, so as we go along, I'm going to be asking you to follow along with me on the printed copies of the PowerPoint.

I also brought a timeline leading up to the Maine Indian Land Claims Settlement that you've been provided with, copies of it were placed out here for others. I brought some handouts that I've previously created in other contexts regarding some basic concepts of federal Indian law that I thought might be useful, so I also brought those. I prepared a text outline of the PowerPoint, that's the green sheet that is here available for others to see the text of the PowerPoint, so.

I want to say at the beginning, when I was first asked to do this, I was contemplating that I might try to cover a larger time period, both the pre-Settlement and then talk some about post Settlement and efforts that MITSC has made over the years to address some of the same issues we're talking about today. But it quickly became apparent to me that within the timeframe that I probably should stick to the period leading up to the Settlement at this point. So I won't be trying to go into the post Settlement period, except that at the very end I have one slide that starts to get into that.

I'm going to ask you to put something in your mind that may seem a little strange on the context, but at the end I think it'll be clear why I brought it up. So imagine you're watching a football game. There's a whistle, the clock keeps running for a while. Finally, the referees get together,

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

they huddle up together and the head referee comes out and makes the call, then he says, "We need to restart the clock." So I want you ... and he says, "We need to set the clock at such and such a time." I ask you to keep that image in your mind as I get near the end of this presentation.

So for the Task Force members, I'm on page two of the PowerPoint materials. Historic relationship between the Tribes, the State of Maine, and the United States government. The relationship between the Federal Government and the Wabanaki Tribes has been fundamentally

different than the relationship between the so-called Western Tribes and the Federal Government. Up until the Morton decision in 1975 the Federal Government did not honor its trust responsibility to the Tribes in Maine. There was almost no Federal funding provided during that period up until 1975. There were a couple of small instances where some Federal money was provided for a couple of things, but in general, the Federal Government did not provide funding for the Tribes.

In the meantime--during that period from the formation of Maine up until the 70s--the State assumed that it had pervasive authority over the Tribes and Indians in Maine. The State created a Maine Department of Indian Affairs. There were many State laws concerning the details of Indian life, welfare, housing, education, and so forth.

When the Tribes first asserted their land claims in the 70s alleging that their Tribal lands had been acquired by the State in violation of the Non-Intercourse Act, they first had to overcome the contention by the State that they really weren't bonafide Tribes at all. That they really weren't Indian Tribes within the meaning of Federal Indian law.

Page three. This is court decisions prior to the 1980 settlement, and as a groundwork for that, the Indian Trade and Intercourse Act of 1790 provided the fundamental basis for the claims that were made in the 70s. That act, the Non-Intercourse Act, codified a fundamental choice that had been made at the Constitutional Convention that the States had no role to play in Indian Country. That hadn't been the case under the Articles of Confederation, and a lot of problems arose. When they formed the constitution the framers made it clear that relations with Indian Tribes were a federal responsibility, and that is encompassed essentially on the Indian Commerce Clause of the US Constitution.

In 1972 the Morton case was initiated by the Passamaquoddy Tribe. The final decision by the Court of Appeals was in 1975. That case found that the Federal Government did in fact have and it always had a trust responsibility to the Tribe.

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

The Morton decision had several significant effects on the relationship between the Tribes and the State. First, pursuant to the new to the newly recognized trust relationship, a fiduciary duty was imposed upon the Federal Government to require it to act on behalf of the Tribes to investigate the validity of their land claims against the state of Maine. And second, the continuation of Maine's jurisdiction over the Tribes began to be seriously questioned because

the Tribes could potentially invoke the application of other Federal statutes on their behalf with respect to the State.

Page four. Following Morton and following the line of logic from the Morton case, there were two other very important decisions, one in State Court and one in Federal Court, that were both made in 1979 prior to the Settlement. In State V. Dana, a Maine Supreme Judicial Court case, the Court held that the State of Maine lacked criminal jurisdiction over crimes committed by Tribal members on Tribal lands. Essentially, they held that the Passamaquoddy reservation was Indian Country for the purposes of Federal Indian law.

In Bottomly, a Federal case--Bottomly v. Passamaquoddy Tribe--the same year 1979, the Court held that the Maine Tribes retained, not obtained, but retained the full attributes of sovereignty defined by Federal Indian law. That in effect they had all the same rights and powers as other Federal Indian Tribes.

I mean, essentially these cases collectively revealed, they did not establish, they revealed that federal Indian law applied in Maine and it always has, and it still applies. Federal Indian law applies everywhere in the United States. The Settlement that we have wasn't possible without the consent of Congress. And that Settlement, it is important to remember, is a creature of Federal Indian law, and it exists because Congress says so. Congress ratified it and it could not have happened without the consent of Congress.

Page five. What is the Federal trust responsibility that Morton applied in Maine? Basically that the United States government has a responsibility to protect Tribal resources and act in the best interest of Tribes and their members. That's the responsibility that the Federal Government had not lived up to until the Morton decision.

Page six. So what was the jurisdictional structure in Maine before the Morton decision and the other decisions in the 70s? In other words, from the period from 1820 when Maine became a State up till 1975. Well, the Maine constitution had then and still has a provision, article 10 **Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC)** : section 5, that states, "The new State shall," that is Maine, "As soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of the Commonwealth," that being Massachusetts, "Towards the Indians within said district of Maine, whether the same arise from treaties or otherwise."

That provision was in the Maine Constitution in 1820. It is still part of the Maine Constitution. It is still in effect. However, in 1873 the legislature elected to remove that provision from the printed versions of the Maine Constitution. But when they made that decision, they expressly said that the provision remains and in effect, it just will not be included from that on in the printed versions of the constitution, and that remains the case.

Now, what were the Maine courts saying about the State's authority over Tribes? Over time, the Maine Courts evolved a rationale for the exercise of pervasive State authority. It is my understanding that up until the latter part of the 19th century the State didn't interfere a lot with Tribal people conducting traditional activities like hunting. These were remote areas for the most part. But in 1892 a case came up where a Passamaquoddy Tribal member by the name of Newell was charged with violating State hunting law. In that case, the Maine law court then articulated really completely the rationale for the pervasive authority that that Maine claimed over Tribes and Indians.

Basically, well, the case said, "Whatever the status of Indian Tribes in the West may be, all the Indians of whatever tribe remaining in Massachusetts and Maine have always been regarded by those States and by the United States as bound by the laws of the State in which they live. Their political and civil rights can be enforced only on the Courts of the State. What Tribal organization they may have is for tenure of property and the holding of privileges under the laws of the State. They are as completely subject to the State as any other inhabitants can be."

Page seven. In this here I address the background in Federal that was going on around the country in other areas as we approach the time of the Maine Indian Claims Settlement and the negotiations that led to the Settlement. Now, if some of you have been doing your homework in the Canby case in the Canby book, you know that that Federal policy towards the Indians had vacillated back and forth between various positions from the 1800s right up until 1970. At various times the Federal Government supported Tribal governance, at other times they sought to dissolve Tribal governments.

There was a determination in the 40s and early 50s Federal policies favored termination of Tribes, and a number of times where we're actually terminated by the Federal Government. The threat of termination was real in Indian people's minds, even in the 70s and up to the time of the Settlement. Public law 280 was passed in 1953, which is seen by some people as another

aspect of termination. That Federal law granted to a number of States civil and criminal law authority over Tribes and Indians that they did not previously have under Federal Indian law,

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

and there was no consent requirement from the Tribes. That law was imposed on Tribes in any State that chose to activate public law 280.

In 1968 because of the history that had happened under public law 280 and that extension of State jurisdiction, it was amended in the Indian Civil Rights Act of 1968 so that from that point on, Tribal consent would be required for any extension of public law 280 jurisdiction over the Tribes. The act was further limited by the Supreme Court case of *Bryan v. Itasca County* in 1976, which basically said that public law 280 had been misinterpreted and over applied and the States had been exercising civil regulatory authority under the auspices of public law 280 that they didn't really have and that, that's not what public law 280 meant. So, that's background. There was still recent history of that time.

In 1970 the Nixon administration instituted a new Federal policy of truly supporting Tribal self-government. Now, up to that time, as I said, there had been a lot of vacillation in Federal policy regarding the Tribes, and of course in 1970 you could wonder, "Well, is this just another vacillation?" But of course we now know that it's been 49 years since then and the Federal Government has essentially followed that new approach established in 1970 of supporting Tribal self-government.

In the 70s, in addition to the Nixon administration issuing that policy at the executive level, Congress enacted many new laws, new Federal laws, that supported Tribal self-government, including the Indian Self-Determination Act in 1975 under which Tribes today operate many different kinds of programs, and numerous other laws that support Tribal self government, including the Indian Healthcare Improvement Act, the Indian Child Welfare Act, and many, many other laws that were supportive of Federal self government. Effectively, now we know that the Federal vacillation on Indian policy really ended in the 70s and that the Federal Government has pursued a consistent policy of supporting Tribal self government since then.

On the other hand, in 1980 with the Settlement in Maine, Maine moved in the opposite direction from this new Federal support of Tribal self-determination, and effectively with the Maine Implementing Act, the jurisdictional provisions of the Maine Implementing Act, the State largely regained the control over Indians that it had previously asserted that it had in the prior historical period.

I think you can look at this as basically the State's approach or desire in the time with respect to the jurisdiction provisions in the Settlement was that the Morton and Bottomly and Dana had revealed that the jurisdictional structure that they had been operating under and assuming they had was built on legal quicksand, and Morton and Dana and Bottomly really undermined that

whole structure. So you can see the state's desire to, in the jurisdictional discussions in the Settlement, as an attempt, to a large extent, to place firm legal footings under a structure and to

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

rebuild that structure that had been revealed to have been built on unfirm ground by the Court decisions.

Page eight. So what was the legal status of the Tribes as of 1979 just prior to the Settlement and after the series of Court decisions that had gone in favor of the Tribes? Well, before the Settlement then the State and Federal courts had clarified that the Tribes in Maine were already sovereign Tribal nations within the United States as defined in Federal Indian law. The Tribes already had obtained Federal recognition by that time. They did not get recognition as part of the Settlement. Several years before the Settlement, they obtained Federal recognition, essentially as a result of the Morton case, and were being treated by the Federal Government accordingly as Federally recognized Tribes.

It's important to emphasize conceptually the Settlement was not a grant of new authority to the Tribes. It was, in fact, a significant restriction of the jurisdiction that the Courts had established they already possessed. It's also important to note that it is part of Federal Indian law. Federal Indian law, we're having discussions in this Task Force about the extent to which we would amend the act to make Federal Indian law, the controlling provisions and so forth. But it's important to remember that Federal Indian law applies. It always applies. The Settlement is Federal Indian law, exists only because Congress enacted it, and it exists as long as Congress wants it to exist.

By that I mean the Settlement, which was a settlement of a lawsuit, and the Court decisions interpreting that Settlement have effectively become the State's governing Indian policy. Now I before taking this job I spent 43 years in active practice as a lawyer. I'm trying very hard not to be a lawyer now. But, it's my experience that lawsuits are not a good vehicle for creating good relationships. They're good vehicles for ending relationships or complicating relationships. You can't litigate your way into an effective intergovernmental relationship. And unfortunately, a lot of what's gone on, since the Settlement Act, I think could be described in that way. So, this Task Force has an opportunity, presents an opportunity for the State to work with the Tribes to adjust policy. Not having the Courts do it. Not relying just on what was done 39 years ago in that strict language. But to adjust policy to fit the current circumstances that exist within the State of Maine and with the Tribes. I have one slide on page nine, a brief description of the basic, the two basic pieces of the Maine Indian Claims Settlement, the Federal component and the State component. The Federal component, the Maine Indian Claims Settlement Act extinguished the lands claims, compensated the Tribes for the claims, ratified the Maine Implementing Act and importantly limited the application of existing and future Federal Indian laws in Maine. The State component, the Maine Implementing Act was an agreement between the State and the Tribes

that was enacted by the Maine legislature and later ratified by Congress and could not take effect without ratification from Congress. This statute outlines the laws that are applicable to Indians and Indian lands in Maine. Importantly, it's important to remember that where there is

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

any conflict between the State law and the Federal law, the Federal controls. The Federal law specifically says that. Page ten, this states the provisions that are in the Federal component of the Settlement regarding the applicability of Federal Indian laws in Maine, now I'm not going to read all of that.

Basically, section 1725(h) of the Federal act deals with the applicability of Federal Indian laws that were already existing at the time and limits the applicability of those laws. Most importantly section 1735(b) which was added very close to the end of, very close to the final adoption of the Federal Act and which has been detailed in the Suffolk University Law report that you all have copies of, that section added late in the process states that

Federal Indian laws for the benefits of Tribes won't apply in Maine if they preempt or affect the jurisdictional arrangement unless Congress specifically makes them applicable to Maine. Many Federal laws that would benefit Tribes have been passed since 1980 and many of those laws are not applying in Maine because of section 1735(b). It is important to note that no test has really even been developed to determine what new Federal laws affect, quote affect or preempt the jurisdictional structure that gives authority to the State.

The language is there, affects or preempts but there's never really been any test, you know created to determine when that ought to be triggered or not triggered. Page 11, the Settlement Act was intended to be a flexible document. Section 1725(e) of the Federal Act is a remarkable and unusual provision in the context of Federal Indian law, as these quotes from Interior Secretary Andrus and from Tim Woodcock from the Senator Cohen's staff addressing the Tribal State Work Group in 2007, as those quotes indicate it was contemplated that the Act would have flexibility in it so that the State and the Tribes had advanced approval from Congress to alter the jurisdictional framework. That and again I repeat, within the context of Federal Indian law that's a truly unusual and remarkable provision to put that advanced approval in a Federal statute. Congress is the ultimate authority when it comes to federal Indian law and the relationship between Tribes and States within Federal Indian law.

So, that provision gave the State and Tribes a great opportunity to revise the jurisdictional arrangement as time went on, as circumstances changed. And, but in fact, there have been no substantive changes to the jurisdictional structure since 1980. Page 12, the Maine Settlements have not succeeded in creating flexible and effective relationships between the Tribes and the State. I'm going to stick strictly to the text that I've written here, whatever view one has on particular issues, it is fair to say that none of the parties could've predicted that the 1987 law 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. Page 13, starts us with a disclaimer. Up to now this has all been basically history leading up to the Settlement. This is the one, in this slide I come to the present. Maine has not developed an Indian policy.

Now, I ask you to go back to that weird football image, the clock stopped, the referee says we're going to restart the clock but we have to reset the clock. If the Settlement Act is revised in the various ways that are being discussed, it's important to remember that we're not just restarting

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

the clock. Because we've been frozen in time. The Settlement has essentially frozen in time what should've been, in my view, should've been developing relationships and developing policies. We've been stuck in time. And, if you're going to restart the clock, look at the things that have been successful. Keep those in mind. There are many areas in which on the ground there have been successful collaborations and relationships between the Tribes in Child Welfare, in law enforcement, in natural resources. There are numerous examples of successful relations between the State and the Tribes. So, don't throw them out. Build on those, so when you incorporate them into a new arrangement, as you reset the clock just think through exactly where you need to set the hands and keep in mind the things that have been positive over the last number of years. That concludes my presentation.

Sen. Michael Carpenter:

Thank you, Mr. Thibeault. I have a couple of questions. Are there questions of Mr. Thibeault of his historical overview? It occurs to me, Paul I think you're right. I think that at a time, it appears that at a time when the Federal Government is moving more towards Tribal self-determination in the late 1970s, the Settlement Act seems to have almost gone the other way. Do you have any sense of why that was? In part, the reason that I'm curious about it, I'm not sure I want to admit this, but you all know that I was around here back in those days. It seemed to me that for lack of a more artful term, the Tribes were holding most of the cards in that game, at that time. The Courts had recognized in Morton, had put the State in a difficult position in Morton. The Settlement Act was an attempt to bargain our way to something that was acceptable to both sides.

We kind of went, whew, okay, the title to the land is clear again which was a real big issue. But there was no mechanism set up going forward to make this a flexible arrangement. We were just sort of, as you say, sort of stuck with this, and everybody walked away. Why was that? Do you have a sense of that and where did 1735(b) come from, do you know? Do you have a sense?

Well it's actually not all that clear. It's why we, I wasn't here at the time, but it's why the Tribal State Commission presented that issue to the judiciary committee and out of that came the effort to have that study done by Suffolk Law School. And it provided a lot of information, but it still leaves kind of unanswered exactly how that came in or where it came from. But we do know now that the studies have been done, that it came in very late, very late in the process, and long after the State Act had been passed and yet it had a tremendous impact in terms of the jurisdictional arrangement between the State and the Tribes. As far as the, I don't feel completely comfortable doing Monday morning quarterbacking, because like you I was around but I was a young attorney working with Pine Tree Legal back then, and paying close attention

to the news about the Settlement and the negotiations and so forth, but I wasn't in any way directly involved with any of that.

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

I mean I guess I can say it's always been my understanding that even though as you say the Tribes have won some very important legal victories and had some cards, there was also real pressure on them to reach a Settlement while President Carter was still in office and so I wouldn't presume to second guess the decisions that were made on either side. But I think, it certainly has always been my understanding that the Tribes, the negotiators acted in the context of tremendous pressure and made the decisions they thought they had to make at that time. Just to follow up on that and maybe this is an unfair question, it seems to me when those kinds of provisions like 1735 are inserted into a statute, they're put there to protect some interests. I can't for the life of me figure out what that interest would've been, from my perspective, the State perspective or from the Tribal perspective. Do you have a sense of what interest that was designed to protect?

Well I mean I guess I read it as basically trying, an effort, it's a savings clause. I mean it's intended to freeze the compromise, to freeze that jurisdictional compromise where it was so that subsequent developments at the Federal level wouldn't alter to the State's authority I guess you could argue that it also meant from the Tribal standpoint that it wouldn't be altered. I've always seen it as essentially something that preserved the State's jurisdiction. I look at the Settlement as, as I said in my presentation I don't mean it in a pejorative sense, I look at it as the jurisdictional discussion was brought into that by the State. It was a land claim.

I mean it wasn't initially a jurisdictional negotiation. It wasn't the two sides sitting down to work out a jurisdictional framework. It was with the Federal government it was land claim and it was a lawsuit. Then the jurisdictional piece was brought in, I think it's fair to say largely at the insistence of the State, beginning with Governor Longley I believe and so the State you know wanted to and I think Richard Cohen the Attorney General was quite frank about it, they were seeking to recover things, jurisdictional authority that the cases had basically said they didn't have.

When you look at it that way I think the 1735(b) can be seen as a logical extension of that, as having achieved that jurisdictional agreement they were trying to set it in stone. That statute 1735(b) has very general terms. It says affects or preempts, you know any new Federal law that affects or preempts, preempts, okay that's kind of a term of art for lawyers within Federal Indian law but affects, that can be very broadly construed and I think it has been broadly construed. I think the practical impact has been to severely restrict the application of new Federal Indian laws that could've benefited not only the Tribes but also the State of Maine. I think it really, it makes sense to take another look in how that's working and whether that really is in the interest of Maine as well as the Tribes.

It seems to me, this is a pretty homely metaphor but this was a divorce and one party got property, one party got money and then all of a sudden they reached out and pulled in

something that the parties had done years prior and adjusted that going forward in the future forever.

Well, I guess I wouldn't necessarily disagree with that.

Chief Kirk Francis, Penobscot Nation:

I have a question, Mr. Thibeault.

Paul Thibeault, Managing Director of the Maine Indian Tribal State Commission (MITSC) :

Yes, Chief Francis.

Chief Kirk Francis, Penobscot Nation:

Paul, thank you for the presentation and the history. I think it's important in listening to what you're saying throughout this presentation that people understand, I think there's a misperception out there a lot of times that the Tribes went from having nothing to be given everything in 1980 as to where we exist today. I think what those Court cases show and what the history shows is that the Tribes always enjoyed all the privileges, immunities and powers of every Federally-recognized Tribe and whether some authority was being illegally exercised over them or not, those are clearly the facts. This effort here, I hope that this history and these conversations will not only start to move us towards action but with the mindset that this is the restoration of rights to Indian people in the State, not a granting of those rights. I think that's extremely important.

In terms of the 1735(b) thing which admittedly drives me nuts, I think having a demographic of people that laws passed by Congress don't apply to, I don't know where that happens in America where you just pick out a group of Indians in one State and say we're going to pass laws that clearly benefit this demographic of people but they're not going to apply there simply because we want to get caught up in who has authority over what. I think that provision was not a negotiated provision in the Settlement Act. When we talk about the Tribes holding the cards in terms of the Court decisions and all of that, we have to remember as presentation points out that Congress is the ultimate authority.

It happens if you look at things for example like the Indian Game and Regulatory Act, people think that's a granting of a right to game to Tribes. It was actually a reaction to restrict gaming on Tribes from a court decision that gave carte-blanche authority to Tribes as a sovereign practice, to be an inherent sovereign authority to do that. Congress can do those things and if that threat is there under their plenary authority, you can imagine the duress that causes especially when an incoming administration is going to say, we're not even going to entertain this Settlement and the issue of termination starts to get discussed. There's a lot of moving parts. It's not just the Courts it's the ultimate authority to be able to overturn those Court decisions was Congress. That's the pressure I think the Tribes, but thank you for presentation.

Sen. Michael Carpenter:

Thank you, Chief. Other questions of Mr. Thibeault, if not thank you very much.

Chief Kirk Francis, Penobscot Nation:

Thank you.