

Sen. Mike Carpenter:

Representative Bailey, I'll recognize you first. You're on.

Rep. Donna Bailey:

No, I just wanted to let you know, because you came in late, we have only concluded Chief Francis' remarks.

Sen. Carpenter:

Ah. My apologies.

Rep. Bailey:

You may want to open up questions for Chief Francis, but Senator Moore and I have not spoken yet.

Sen. Carpenter:

So we're going to continue the presentations by the members of the Task Force, and then we'll take questions, so I would turn to Senator Moore, and we'll leave my co-chair last.

Sen. Marianne Moore:

Sure. Thank you very much, Senator Carpenter, and thank you Chief Francis for those very good words that were spoken. I'm Marianne Moore, and I represent Senate District number 6. That is all of Washington County as well as Gouldsboro, Winter Harbor, and Sullivan and Hancock County as well. It's quite a big territory, but I also very proudly served on the Task Force for this joint order. As the Chief, I had the title written here, and I'm glad you've said the words that went with that.

What I'm going to do today is just kind of explain the process that we went through, and then I'll turn it over to Representative Bailey to actually walk through the recommendations of the consensus of it.

The Task Force itself, the joint order, that consisted of two members of the Senate, three members of the House of Representatives, Chief or the Chief's designee from each of the Tribes, as well as non-voting ex-officio members from the Governor or the Governor's designee, the Attorney General or the Attorney General's designee, and the Managing Director of the Maine Indian Tribal State Commission.

The Task Force convened its first meeting on July 22nd, 2019, with approval to meet on four occasions with a report back date of December the 4th, 2019. We found ourselves having to

request for additional meetings because we realized as we dug into the information that it was going to take us a little longer than that, with a report back date of December the 30th, and we are reporting back today the results of our Task Force.

As we went through the discussion, you can imagine it was very, very difficult and very complicated material. I thought I knew a little bit about Indian law, and I realized I knew nothing about Indian law. We had a very steep learning curve. We all went about educating ourselves through the Task Force as well as on our own reading levels. We were taught or had a presentation of fundamentals of federal Indian law and its application to Maine, kind of Indian Law 101. Professor Matthew Fletcher, who is a citizen of the Grand Traverse Band of Ottawa Indians, and founder of the indigenous law clinic at Michigan State University; very knowledgeable, very interesting, and really gave us a good background, a good foundation for us to begin looking at where we were and what all was involved with the Indian law.

We also had a presentation of the historical context of the Maine Indian Land Claim Settlement, presented by Paul ... I never can pronounce his name.

Paul Thibeault:

Thibeault.

Sen. Moore:

Thibeault ... I'm sorry, Paul ... Managing Director for Maine Indian Tribal State Commission. He gave us a really good background as to the Settlement Act itself, the procedure, the policy, how it all came together. We also were provided copies, summaries of the Operation of Federal Indian Law presentation that was prepared by the Tribal attorneys, about civil jurisdiction of Tribes and states under federal Indian law, such as gaming and the protection and exploitation of natural resources, including hunting, trapping, and fishing.

Externally, we had reading materials. As Chief Francis mentioned, we all were provided copies of the American Indian Law in a Nutshell, which was very helpful, constantly referring back to the different sections to try to even understand as we were progressing through the conversations regarding the Settlement Act and the federal Indian law itself. We also used as reference material the Cohen's Handbook of Federal Indian Law that was written by Nell Jessup Newton, and NCSL's, the National Council of State and Local Government's Government to Government: Models of Cooperation Between States and Tribes.

In addition, there were some external meetings with local Tribal members. I know Representative Anne Perry and myself met with some of the citizens in Pleasant Point and had some really good conversations about their feelings and where they were coming from, and how it affected their Tribal efforts there with the Settlement Act.

We also met with MITSC [Maine Indian Tribal-State Commission] to better understand the impact of the current Settlement Act; again, MITSC was a commission that was established with the initial Settlement Act; so it was good to meet those folks and hear their input and their feelings for the Settlement Act.

But more, they were providing us information that we needed; any kind of research information that we might have. So it was not taken lightly, the work that we did as the Task Force. It was taken very serious. We were soliciting Tribal recommendations for consideration, and I think we worked together very, very hard. It was just trying to understand where we needed to be.

It was a very deliberate process. At the very beginning, after the initial meeting, and you have minutes I think of the meetings in your binders there, we asked them to come back and share with us what were some of the concerns they had; what were some suggestions that they might have.

When they came back to us, it was very, very well thought out, very well put together, by the Tribal attorneys, and we quickly realized that we didn't know enough. We didn't know what we didn't know, is really what the saying goes. A lot of it was referencing the federal Indian law, and I know one of my questions was, "What is the federal Indian law?" That caused us to pause a little bit and think that we needed to be educated a little bit more. We needed more of an orientation as to what was the difference between the federal Indian law and the Settlement Act that was before us that we were taking a look at as a Task Force.

At that point in time, we identified we were going to need additional meetings, and that's when the chairs actually required additional meetings; and we were approved for four additional meetings knowing that we hadn't even begun to look at what we needed to do. We still were educating ourselves and becoming familiar with that.

Again, as I mentioned, it was a very deliberate process, and why we requested the extended meetings and a later report back date.

We also worked very hard to methodically arrive at the consensuses that are included in our recommendations. Representative Bailey will be going over those. We worked really hard. We had diversity of input from the Attorney General's office; we had Indian law experts that helped us out with that; and then our research findings compiled by the Human Rights and Indigenous Peoples Clinic at Suffolk University Law School; that was very helpful. It was very informative, and it gave us a good understanding of all of the different laws that were out there, and maybe some of the things that our Act did not include. It gave us some really good background and they did fabulous research on that. I believe that study is also in your packets themselves.

We identified that it was a huge task to take on, so we decided to break it down. Instead of going section to section to section in the Settlement Act itself, we decided to do it by categories. We together as a Task Force identified what was going to be our priorities and what topics did

we actually want to address; not necessarily in the order that they were addressed, however. But we decided that we were going to look at criminal jurisdiction, civil jurisdiction, fishing and game, land use, education, healthcare and social services, taxing authority, and gaming. We identified those were going to be our priorities.

Charts were developed for each of these topics, which I believe you also have copies of those with your packets. We identified the individuals or the groups over whom the jurisdiction is exercised, initially. We also had a column, and my request especially to "What is the default federal Indian law," just so that we could understand it or I could understand it myself. Then we actually had another column that actually showed the law currently applied in Maine. And then finally a column for the Task Force recommendations. Believe that is your Appendix L, I believe in your packets there.

I will add a note: due to time restraints, education and healthcare and social services were really not addressed. While those are important issues and important items, they seem to be working fairly well, so we did not spend the time working on those and chose to spend time on the other topics instead.

At this point, I will turn it over to Representative Bailey, who will actually, I believe, walk through the consensus of the Task Force itself.

Sen. Carpenter:

Thank you, Senator Moore, and certainly one of the members of the Task Force, if there's any question about whether something was said or presented, Senator Moore certainly didn't miss a thing the whole...

Sen. Moore:

Thank you.

Sen. Carpenter:

was here at every moment for every...

Sen. Moore:

Tried to be.

Sen. Carpenter:

Thank you, Senator. Representative Bailey.

Rep. Bailey:

Thank you, Mr. Chair. First of all, I'd like to say that it was a great honor to serve on this Task Force, and I, again, commend all the members. I think we all did a really heartfelt job and worked really hard, put in a lot of hours, and I'm very proud of the final product.

What I would say just overall in terms of the recommendations, there are two overarching themes. The first is, remember the joint order creating the Task Force was for us to look at changing the Implementing Act to bring the Maine Tribes more in line with federal Indian law. The recommendations are pretty consistent in that we are recommending that the Maine Tribes move towards being more in line with the other Tribes across the country, quite frankly, and defaulting to federal Indian law.

The other overarching theme was that it was a surprise to me to learn that in different portions of the Implementing Act that the Maine Tribes themselves were sometimes treated differently, and there would be two provisions that the Penobscot and Passamaquoddy Tribes were treated one way, and the Maliseets and Mi'qmaks were treated another way. I was just quite shocked to learn that, but it was the case in more than one place. So that is another overarching theme, is that we wanted all Maine Tribes to be treated the same. We didn't see any reason to differentiate between any of the Tribes.

I am just going to go through each of the recommendations, and if people have questions just for clarification on what the recommendation means, I'm more than happy or any of us can try to answer those. I'm looking at the Executive Summary, because I think that that's the most concise list, starting at Roman numeral II, which is II in your book.

The first recommendation is: Amend the Maine Implementing Act to establish an enhanced process for Tribal-state collaboration and consultation, as well as a process for alternative dispute resolution. Allow stakeholders to meet in January to delineate the contours of the Task Force's general recommendation on these issues.

It was very important to me and other members of the Task Force that once this is implemented, these changes, whatever the Legislature decides to enact, that there be a process going forward to try and reduce litigation and enhance discussion and collaboration between the state and the Tribes going forward. Kind of build on the momentum?

Chief Francis:

Mm-hmm (affirmative).

Rep. Bailey:

It's right at the very, very beginning. There you go.

That's what that first recommendation, and that's why we put it as Recommendation #1, because we feel pretty strongly that that needs to be put in place going forward.

The next recommendations are regarding criminal jurisdiction. Recommendation #2. Amend the Maine Implementing Act to recognize the jurisdiction of the Tribal courts over certain criminal and juvenile offenses committed on the following Tribal lands: any land held now or in the future by the Secretary of the Interior in Trust for the relevant Tribe in any restricted fee land held now or in the future by the relevant Tribe.

I would just say as an aside, that definition of Tribal lands is a new definition, if you will. It is certainly the federal Indian law definition that is recognized, and throughout these recommendations and throughout any of the recommendations of the Task Force, when we say "Tribal lands", that is the definition we mean, whether it's actually in the recommendation or not. But we were pretty clear as a Task Force that that federal definition of Tribal lands is what should be used.

Recommendation #3. Amend the Maine Implementing Act to equate the exclusive criminal...

Sen. Carpenter:

Representative Bailey, hold on a second.

Rep. Bailey:

Oh. Sorry.

Rep. Babbidge:

[Crosstalk]

Sen. Carpenter:

Sure. Representative Babbidge. He has a question about a definition.

Rep. Babbidge:

Yes. I'm sorry, but I'm not quite sure I understand...

Sen. Carpenter:

Your microphone, Chris.

Rep. Babbidge:

Oh, thank you very much.

Rep. Babbidge:

Thank you, Mr. Chairman. I'm not sure I understand what a restricted fee land is. Could you help us with that, to understand that recommendation?

Rep. Bailey:

That is essentially reservation land, correct?

Rep. Bailey:

That's essentially reservation.

Rep. Babbidge:

So a lot of the Tribes, like-

Sen. Carpenter:

Chris, turn your mic on, please.

Chief Francis:

Thank you. Like Penobscot, our reservation territory is actually in restricted fee protected against alienation, so it's a different status. It's totally under the control of the Indian Tribe, but it's a different status than Trust land status, for example. That's held by the Department of Interior on behalf of Tribes.

Sen. Carpenter:

Thank you. Representative Bailey.

Rep. Bailey:

Thank you. Consensus #3 Part One. Equate the exclusive criminal jurisdiction of the Passamaquoddy Tribal Court and Houlton Band of Maliseet Indians Tribal Court with the exclusive criminal jurisdiction of the Penobscot Nation Tribal Court over offenses committed by Indian defendants.

Rep. Bailey:

Again, this is one of those recommendations to bring all the Tribes in line amongst each other.

Part Two. Recognize the authority of the Tribal courts in Maine to impose the maximum penalties. Other Tribal courts are authorized to impose under the Federal Tribal Law and Order Act of 2010, as long as the due process protections required by that act are observed.

I'm going to just keep going, unless someone interrupts me, okay?

Sen. Carpenter:

Yes. Please do.

Rep. Bailey:

Thank you.

Sen. Carpenter:

I'd prefer that to keep the questions until we're done, if we can.

Rep. Bailey:

Okay. Consensus Recommendation #4. Enact and implement LD 766, An Act Regarding the Penobscot Nation's and Passamaquoddy Tribe's Authority To Exercise Jurisdiction under the Federal Tribal Law and Order Act of 20-

Rep. Bailey:

2010 and the Federal Violence Against Women Reauthorization Act of 2013, as it is ultimately amended by agreement of the Tribes and the State, to amend the Maine Implementing Act to grant Tribal courts jurisdiction over certain domestic violence criminal offenses committed by non-Indian defendants on Tribal lands against Indian victims.

LD 766, as probably committee members are aware, was currently recalled from the Governor's desk, and the discussions continue on finalizing that. But it was the Task Force recommendation to support whatever the agreement was to enact LD 766.

Sen. Carpenter:

Before you go further, Representative Bailey, I don't know who's on the phone.

Sen. Carpenter:

I'm sorry.

Rep. Bailey:

Oh, from Washington State.

Chief Francis:

I don't think he realizes that we're running late, because we were supposed to have another meeting in here after the 11 o'clock so that's probably what's going on.

Sen. Carpenter:

Oh, okay.

Sen. Carpenter:

Thank you. Go ahead and continue, Representative Bailey.

Rep. Bailey:

Consensus Recommendation #5. Amend the Maine Implementing Act to recognize the concurrent jurisdiction of Tribal courts over offenses committed on Tribal lands by Indian defendants against non-Indian victims, subject to the maximum penalty provisions and due process requirements of the Tribal Law and Order Act of 2010.

Consensus Recommendation #6. Amend the Maine Implementing Act to recognize each Tribal government's authority to define all crimes and juvenile offenses committed on its Tribal lands over which its Tribal court has exclusive or concurrent criminal jurisdiction, but retain the authority of the state to define all crimes and juvenile offenses committed on Tribal lands over which State courts have exclusive or concurrent jurisdiction.

Moving on to Fish and Game, Consensus Recommendation #7. Amend the Maine Implementing Act to recognize federal law regarding the exclusive jurisdiction of Tribes to regulate fishing and hunting by Tribal citizens of all federally recognized Tribes on Tribal lands, using the expanded definition of Tribal lands described in Consensus Recommendation #2.

Consensus Recommendation #8. Amend the Maine Implementing Act to restore and affirm the exclusive jurisdiction of Tribes to regulate fishing and hunting by non-Tribal citizens on Tribal lands using the expanded definition of Tribal lands described in Consensus Recommendation

#2, but do not cede any of the Maine Indian Tribal State Commission's authority to regulate hunting and fishing under current law to the State.

Consensus Recommendation #9. Amend the Maine Implementing Act to relinquish the State of Maine's jurisdiction with respect to the regulation of fishing and hunting by both Tribal and non-Tribal citizens on Tribal lands, except that solely for conservation purposes, the State of Maine may regulate Tribal members engaged in such activities off Tribal lands to the extent permitted under general principles of federal Indian law and in a manner consistent with reserved Tribal Treaty rights.

Moving on to Land Use and Natural Resources, Consensus Recommendation #10. Amend the Maine Implementing Act to restore and affirm the Tribes' rights to exercise regulation of natural resources and land use on Tribal land to the fullest extent under federal Indian law.

Moving on to Taxing Authority, Consensus Recommendation #11. Amend the Maine Implementing Act to recognize federal law providing that Tribes have exclusive jurisdiction to tax Tribal members and Tribal entities on Tribal lands, including entities owned by a Tribe or Tribal member, using the definition of Tribal lands described in Consensus Recommendation #2.

Recommendation 12. Amend the Maine Implementing Act to recognize federal law providing that Tribes, Tribal members, and Tribal entities are not subject to state and local sales taxation on Tribal lands, using the definition of Tribal lands described in Consensus Recommendation #2.

#13. Amend the Maine Implementing Act to recognize federal law providing that Tribal members who live on Tribal lands are not subject to state income tax for income earned on Tribal lands, using the definition of Tribal lands described in Consensus Recommendation #2.

#14. Amend the Maine Implementing Act to recognize federal law providing that Tribal lands are not subject to state and local real property tax, using the definition of Tribal lands described in Consensus Recommendation #2.

#15. Amend the Maine Implementing Act to recognize federal law providing that Tribes have concurrent jurisdiction to tax nonmembers on Tribal lands, using the definition of Tribal lands described in Consensus Recommendation #2.

#16. Amend the Maine Implementing Act to recognize federal law providing that state and local governments have concurrent jurisdiction to tax nonmembers on Tribal lands, unless their jurisdiction is preempted under a fact-specific, federal common law balancing test.

Moving on to Gaming. Consensus Recommendation #17. Amend the Maine Implementing Act to render the Federal Indian Gaming Regulatory Act applicable in Maine.

Moving to Civil Jurisdiction, #18. Amend the Maine Implementing Act to restore to the Tribal Nations the exclusive authority to exercise civil legislative jurisdiction over Indians and non-Indians on Tribal land. To the extent that a Tribal Nation does not exercise or terminates its exercise of exclusive civil legislative jurisdiction, the state has exclusive jurisdiction over those matters.

Consensus Recommendation #19. Amend the Maine Implementing Act to restore to the Tribal Nations the exclusive authority to exercise civil adjudicatory jurisdiction over Indians and non-Indians on Tribal land. To the extent that a Tribal Nation does not exercise or terminates its exercise of exclusive civil adjudicatory ... I cannot say that word ... jurisdiction, the state has exclusive jurisdiction over those matters.

Moving on, Consensus Recommendation #20. Amend the Maine Implementing Act to specify that, for the purposes of Section 6H and Section 16B of the Federal Settlement Act, federal laws enacted for the benefit of Indian Country do not affect or preempt the laws of the State of Maine. This was the way for the Task Force to recommend that the federal laws that have been passed that affect or benefit Tribes across the country but are not applicable in the State of Maine because of the Implementing Act, that this would allow those laws to apply in the State of Maine.

Moving on to Trust Land Acquisition, Consensus Recommendation #21. Amend the Maine Implementing Act to recognize the ability of all Maine Tribes to acquire Trust land in accordance with their settlement acts and federal laws, like the Indian Reorganization Act and its implementing regulations.

Consensus Recommendation #22. Amend the Maine Implementing Act so that consistent with federal law, state and local governments do not have veto power over Trust acquisitions, and eliminate time constraints on Trust land acquisitions as included in the Maine Implementing Act.

I would just like to say something about the process that Senator Moore went through, and the steep learning curve. I think that part of the reason for the steep learning curve is because of the Implementing Act. That the State of Maine, quite frankly, we've never really dealt with federal Indian law because we've been governed by this static, dead document that's been in place for 40 years, and as things have evolved across the country, we've kind of been stuck in 1980, if you will. And I would just share with you that in all my years going to law school, practicing law, I have never read [American Indian Law in] A Nutshell, cover to cover. I would not recommend it to anyone.

But what I did find out, which I've never realized before, that was very helpful, actually, that usually when you look at A Nutshell, you're looking up a specific topic or you're studying for an exam on a specific topic, so you just read that section and familiarize yourself with the overall law and then look up the cases or whatever; that's how you kind of use A Nutshell. But reading it cover to cover, I never realized there's a lot of duplication and a lot of repetition because some

things show up in all different areas. But that was very helpful for someone like me, who, again, was learning this stuff from scratch, to read the same thing five different times in five different sections. It's like, "Okay, I think I finally now understand what that case means." That was just a personal experience being on the Task Force.

But again, usually my husband and I, whatever we're reading, we discuss it and, "Oh, how's your book," and "Oh, yeah. I like this piece," or whatever. Yeah, we didn't have any of those conversations for about 10 days in my house as I was reading this.

Happy to answer questions.

Sen. Carpenter:

Thank you, Representative Bailey. At this point, if members of the Committee have any general questions about the process or whatever ... We'll get to the specifics here before we're done. Just bear with us. But it was not my expectation today that we'd get too far into the weeds here.

I do want to say a couple of things about the process, and one of them is a pithy little story, so please bear with me, but I think it's significant.

Early on in the process, I think the very first meeting we were trying to figure out how we're going to get our arms around this bear. My friend, the Chief of the Mi'qmaks, Charlie Peter-Paul, said, "Why don't you just give us back the sovereignty that we've been exercising for hundreds and hundreds of years?" Well, maybe that made sense. But we're so quick to say no.

Years ago, I used to take my small grandson, Tommy, out on Saturday morning. We'd go for breakfast at Ye Olde Elm Tree Diner in Houlton, Maine. One day, at five years old he called me Beebee. He said, "Beebee, can I go sit by myself over there?" I said, "No. No. Stay with me, here." I thought about that for a few minutes, and then I thought, "Why not?" So every Saturday morning, we'd go in the diner and he'd sit by himself and I'd sit by myself.

Maybe he didn't like me, I don't know. I'd go help him get his food. But it made me think about how quick we are to say "No" when it's something that's not in our comfort zone. It's just so easy to say no. And there was no reason why he couldn't do that, and that literally changed the way that I look at things in my life.

I ask you as we go through this and try to formulate legislation, before you say, "No, we can't do it," say, "Is there a real good reason why we can't do it?" That's the reason, from my perspective, that we got to most of these ... Or my vote on most of these ... Was I couldn't come up with a good reason not to do it. It would have been a lot easier to say, "I don't ... No, we can't do it. We've never done it that way." Well, that's not the way somebody else expects us to do it, or whatever. But I just ask you to keep an open mind. We're going to be moving out of our comfort zone on some of these issues, pretty clearly; and it's an imperfect document, and I don't

have any problem whatsoever with seriously considering changes to it; but before we say no, let's make sure there's a good reason to say no.

One group of people I forgot to thank were the Tribal attorneys, who were immensely helpful. Immensely helpful in this process, and not adversarial at all, but very, very, very, very helpful.