

TRANSCRIPT

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

Third Meeting : September 13, 2019

Natural Resources

Mark Chavaree, Esq. Penobscot Nation Legal Counsel:

Kaign is going to do the overview and then I'm going to focus on hunting, trapping, and fishing. So I'll still defer to him for the moment.

Kaighn Smith Esq. Counsel for Penobscot Nation:

Okay, so we're shifting back to civil jurisdiction, and I just wanted to lay a little groundwork before we dive back in here. What we're talking about here, in general, is the relationship between Tribes and States, with respect to their exercise of governmental authority in Indian Country. And as Chief Justice Marshall said from the beginning, the Tribal Nations, here, were full fledged governments. They were Nations, with all the attributes that any government exercises, including full criminal jurisdiction within their lands and full civil jurisdiction within their lands, although those are somewhat European concepts. That's how the Tribes were viewed from the very beginning. And the Supreme Court has always said that if any attribute of a sovereign is to be taken away, it's to be done by Congress. So unless and until Congress acts, the attributes of sovereignty are intact.

That's why we've been talking about these examples of sovereignty. The right to generate governmental revenue within the boundaries of Tribal lands is an attribute of inherent sovereign authority, and from time to time we have these conflicts with States attempting to get into the mix, and exercise their sovereign authority in competition with Tribal sovereignty. And that's where we end up with these clashes. Hopefully we've given you a pretty good flavor of how that works, with respect to gaming with the Cabazon decision, which affirmed the inherent sovereign authority of an Indian Tribe to generate governmental revenue through gaming. And then after that decision came down, Congress decided to step into the fray to balance out some of the State interests that might be involved in that process.

But we're really talking about the competition between Tribes and States with respect to the exercise of governmental authority. And again, for Tribes, and unless, until that governmental authority is taken away by Congress, it's deemed to continue to exist. The Supreme Court did say that Tribes lost their inherent sovereign authority to prosecute non-Indians in a case in 1978, but that was largely due to looking at the Acts of Congress that essentially had taken that away.

Kaighn Smith Esq, Counsel for Penobscot Nation:

So now getting back to the specifics we wanted to give you some examples of how these principles operate with respect to natural resources in general, and then under the umbrella of natural resources, to talk about tribal fishing, hunting, and trapping rights within Indian Country in specificity.

Natural resources, and I think within the subject of natural resources, we're talking about the control of the exploitation of natural resources, not only sort of how one manages natural resources in general, but also the extraction of natural resources. But also I put under that category the exploitation of natural resources includes the pollution of a natural resource. So if a River, for instance, is receiving pollutants, that's the use, that's the exploitation of that natural resource.

Rena Newell read some remarks from her great-grandfather at the outset, and those were then stated in Passamaquoddy earlier by Dwayne Tomah. And you may have heard in that context, there was some discussion about timber, timber resources, and the wealth that has been generated through the exploitation of timber resources within this State. And that has particularly occurred at the expense of the Indigenous peoples. And I would be remiss if I did not recount some of the history, at the Penobscot, in Penobscot territory with respect to the exploitation of the Penobscot River. It's laid out in your materials, but I thought I should just offer it up for context. The Penobscot Nation is the River. The origin stories for Penobscots are all centered on the Penobscot River. The names of Penobscot families are derived from the River. The resources of the River have not only sustained Tribal members physically, but they are the cultural resources of the Tribe as well. All of the cultural symbols of the Tribe center around the creatures of the River.

At the time the Settlement Act, Tribal members were continuing, the Tribe has always sustained itself from the River, the resources from the River. And at the time time of the Settlement Act, and well into the 1990s, Tribal members were feeding their families, relying upon the fish, eel, and other food sources from the Penobscot River for up to four meals per week, at the tune of two to three pounds of material per meal. That's how serious the River is for the survival of the Penobscot people. They were not fully apprised or aware of the toll that the pollution of the River was taking upon the resources. They continued to use it well into the 90s, until education and perceptions about the health risks of eating from the River were penetrating the community. And I wanted to just let you know that the Penobscot River was really basically an open sewer. From the time of the harvesting of timber, the mills on the River, it was used as an open sewer.

A report from the EPA in 1968 said as follows, quote, "The Penobscot River received the untreated industrial wastes, discharged nonstop, by seven pulp and paper mills. Five of which flowed directly into the main stem of the River." The main stem being the the portion of the River

Kaighn Smith Esq, Counsel for Penobscot Nation:

from Indian Island, near Old Town, up to Medway, which is really the home of the, aboriginal home of the Tribe, where their villages have been from time immemorial. In 1964, this was the equivalent to quote "untreated domestic sewage load produced in one day by about 5 million people thereby" quote, quote unquote, "thereby depressing quote dissolved oxygen levels to as low as zero."

That's one part of the story. Another part of this story is that dioxin contamination of the Penobscot River led to fish warnings up and down the main stem. I believe some of them are still in place. John Banks, the Natural Resources Director of the Penobscot Nation can confirm that. But they essentially said, "due [to] dioxin contamination of the Penobscot River that you can only consume minimal amounts of fish from the River." In the 90s, the Department of the Interior looked into bringing a natural resources damages action against what was considered to be the principal culprit of the dioxin poisoning of the Penobscot, which was Lincoln Pulp & Paper, a craft paper mill. The byproduct of that production was dioxin. In a 1999 report, commissioned by the Bureau of Indian affairs, the conclusion was reached that quote, "the Penobscot Nation has been deprived of its rightful use of the Penobscot River. And the estimated value of that loss use, forgone use, was between 34.9 and \$62.7 million."

In 2001, likely recognizing the threat of a natural resources damages claim, Lincoln Pulp & Paper filed for Chapter 11 bankruptcy, to discharge all of its natural resources damages. United States of America, as trustee for the Penobscot Nation, filed a proof of claim in that proceeding to recover quote "damages suffered by the Penobscot Indian Nation for the loss of its sustenance fishing right and cultural use do the due to the contamination of the waters and sediments of the Penobscot River, which includes the Nation's reservation." So that's the backdrop for the context in which the Penobscot Nation faces a challenge of how to preserve its cultural and subsistence resources on a river that it has occupied from time immemorial.

Going to the principles of Federal Indian law, that are amendments to the Maine implementing Act, would achieve for application here in Maine, the basics are as follows. As I said earlier, tribes, as governments, exercise the inherent attributes of sovereignty that all governments exercise. And one doesn't need to even stop for a minute to recognize that one of the most important exercises of governmental authority is over the exploitation of resources within your jurisdiction. And for the Penobscots, that's obviously critical. United States Supreme Court has held in no uncertain terms that Tribal Nations have inherent sovereign authority to govern the exploitation of the resources within Indian Country. It's just plain as day. So it's there, and it exists as a matter of inherent Tribal sovereignty, and has been confirmed as such by several Supreme Court decisions which are cited in your materials.

But it has also been the goal of Congress to give Tribes the same power as States have under some of the congressional enactments that are particularly protective of the environment. The

Kaighn Smith Esq, Counsel for Penobscot Nation:

landmark legislation, largely led by Senator Muskie of this state, of Clean Water Act, Clean Air Act. In those acts, Congress, as I think probably most folks know, lodges the central authority over the regulation of air and water pollution in the EPA. But recognizes that over time as States, and Tribes, become equipped to oversee that regulation themselves, that the authority originally lodged in the federal government would be delegated to the States or to the Tribes. So there's a term of art used with respect to that delegation of authority to the Tribes called Treatment as a State. So Tribes are quote, treated as States under the Clean Air Act and under the Clean Water Act. Which basically says that, within Indian Country, Tribes get to take over the Clean Water Act programs on their own accord, just like States would in their territories for both the Clean Water Act and the Clean Air Act.

Well, of course, with what Senator Carpenter flagged as 1735 B, and some of the broad language in the Land Claims Settlement Acts, granting Maine regulatory authority over environmental matters and natural resources within Indian Country, the Tribes have been hard pressed to take advantage of the treatment of the State, as a State provisions of the Clean Water Act and the Clean Air Act. I think it's probably fair to say that, right now, there's the perception that they're locked out from those opportunities.

And we've made progress. I mean right now, I think as folks know, Maine has seen fit to enact water quality standards that are largely protective of sustenance fishing rights. This is a very new development with the Mills' administration, and Jerry Reed at the helm of the Department of Environmental Protection. And we're delighted to see these developments, and hoping that they will be permanent, but they're coming from the State. In a sense there's harm to the dignity, if you will, of Tribal sovereignty in a setting where we have to go hat in hand to the State for these kinds of changes that are protective of the most intimate and important resources, culturally and economically for the Tribes. I'll stop there.

Mark Chavaree, Esq. Penobscot Nation Legal Counsel:

Good afternoon. My name is Mark Chavaree. If I'm not speaking loud enough, give me a cue because I tend to speak low. Plus I'm not feeling 100%, but anyway, thank you for this opportunity. As Kaighn talked about the ability of the Tribes to regulate their natural resources as part of their inherent authority as a government, and under Federal Indian Law that authority is fairly broad. I'll quote from a 1979 decision, which interestingly is only year before the Maine Indian Claim Settlement Act, in the Supreme Court, in that case regarding a Tribal fishing rights, wrote "that subsistence practices in their traditional territories are not much less necessary to the existence of the Indians than the atmosphere they breathe." And that, I think, was the attitude of our negotiators in the Settlement Act.

And I think that's why this is one of the areas where we're not that far behind the other Federally recognized Tribes across the country. Because hunting and fishing were integral to us in our culture as a riverine people. And so our negotiators were very strong and clear that those rights should be recognized in this Act. And they were able to secure those. And I, again, as everybody else has invited you to really thoroughly read through the paper that was put together for you to kind of educate you on these issues in this area.

These aren't romantic notions of the distant past, Penobscot families names and their totems, all relate. A lot of them relate to the River. And our families have relied upon eel, the fish, and other food sources, as Mr. Smith noted, for up to four meals per week to the tune of two to three pounds per meal. And that's supported by affidavits of Penobscot Tribal members.

Also, something I would like to note is that during the time of the Settlement Act, there were hearings at the congressional level. And even with this language, that was supportive of Tribal rights in this area, there was still concerns among tribal members. And one of those members, testifying at the Senate hearings on the Settlement, and it's quoted in your material, but I'll quote it here too. "My son hunts and fishes my islands to help provide for our family and if we are to abide by State laws, my family will endure hardship because of the control of the taking of deer and fish. You know as well as I, inflation has taken its toll and at the present time I am unemployed and have a family of five to support. Two of these children are going to college. I brought them up myself." So this was not a concept of, this was an impact of everyday life. And a lot of our members, the resources of this River and the cultural way in which we have lived, was how they supported themselves and still do.

So as I said, our, under the terms of the Maine Implementing Act, we do have exclusive jurisdiction over the taking of wildlife within our territory, and the right to govern sustenance fishing in the taking of fish by our Tribal members. Unlike the Federal Indian Law, however, the Maine Implementing Act provides that the prosecution of violations of the Tribes hunting and fishing regulations, by non-members, goes to State Court rather than Tribal Court. And the Maine Indian Tribal State Commission has exclusive authority to promulgate regulations governing fishing by non-members on reservation and trust lands. Under existing principles of Federal and Maine law that those would normally be exclusively within the jurisdiction of the Tribal Nations. So in closing, the changes, that we've proposed, and are important to the Tribes in trying to preserve our culture and to live our culture are here.

Also, there's not as big a gap, but they're still important for us to kind of continue along those lines. And that would enhance our Tribal members ability to access these resources, and for us to protect these resources, so that we are eating healthy fish, and that we are taking animals that are healthy. And so it is very much about protecting our members and feeding their families and practicing our culture as we have for thousands of years. So if there's any questions, I'm certainly open to taking those, but this is clearly an area where I think the Settlement Act didn't miss the mark that much, but there's still areas for improvement.

Senator Michael Carpenter:

Thank you, Mark. Are there questions of Mr. Chavaree? Thank you.

Senator Michael Carpenter:

Kaighn.

Kaighn Smith Esq. Counsel for Penobscot Nation:

I would just say that although we focused on the Penobscot Nation, we are convinced that everything that we have said with respect to the Penobscot nation applies to the Passamaquoddy Tribe, Houlton Band of Maliseet Indians, and the Micmacs as well.