

Presentation Task Force morning Audio 1-14-2020

Rep. Chris Babbidge:

Folks, we have a quorum. I'm calling together the Committee on Judiciary to today hear a report of the Task Force on Changes to the Maine Indian Land Claims Implementing Act, a report that's fresh off the press. My name is Chris Babbage. The House Chair is part of the presentation today, so I have the honor of sitting here, but I want to first say that the staff who are serving us for this presentation is Sam Senft behind me and Susan Pinette. I would ask at this time if the members would introduce themselves, starting with Representative Cardone.

Rep. Barbara Cardone:

Barbara Cardone, House 127, Bangor.

Rep. Thom Harnett:

Good afternoon and welcome. My name is Thom Harnett. I represent House District 83 which is the city of Gardiner and the town of Farmingdale. I would just like to thank the Aroostook Band of Micmacs, Chief Peter-Paul and Vice Chair Richard Silliboy for their hospitality yesterday in hosting us and showing us around your nation. Thank you very much.

Rep. Lois Reckitt:

My name is Lois Reckitt and I represent District 31 which is the ocean end of South Portland and I too want to second my compatriot's thank yous for yesterday's visit. It was really informative and I've woken up finally from the drive. It's a long way. Anyway, thanks so much for your hospitality.

Sen. Shenna Bellows:

I'm Senator Shenna Bellows. I represent Senate District 14 in southern Kennebec County. I want to thank the Chiefs and members of the Tribes for being here with us today and for this collaborative process.

Rep. Chris Babbidge :

I don't have to hit that.[mic button] My name is Chris Babbidge. I represent House District 8 which is Kennebunk. I'm delighted to be here in what I think is a historic moment. To be here in what I think is a historic moment.

Rep. Donna Bailey:

Thank you and good after ... no, still good morning. My name is Donna Bailey. I represent House District 14 which is part of the beautiful city of Saco. I am the House Chair of the Judiciary, but today since I'll be presenting I won't be presiding over the committee.

Rep. Rachel Talbot Ross:

Good afternoon and welcome. My name is Rachel Talbot Ross. I represent House District 40 which is part of Portland. I just want to add my appreciation to all traveled to be here today and for all the work that happened over the last several months. I hope we can make some progress. Thank you.

Rep. John Deveau:

Good morning. My name is John DeVeau. I represent Caribou, New Sweden and Westmanland, and just wanted to ask the Chief if he drove down today or last night.

Chief Kirk Francis:

This morning.

Rep. Deveau:

Rough drive, huh?

Chief Francis:

Yeah, rough drive.

Rep. DeVeau:

Thank you.

Rep. Babbidge:

Well, thank you. At this time I ask Representative Bailey and whoever it's going to be or ...

Rep. Bailey:

Chief Francis and Senator Moore.

Rep. Babbidge:

Chief Francis and Senator Moore, if she is here, to step forward. Chief Francis, welcome. I'm going to ask the two of you to introduce yourselves in a minute, but as far as running the presentation, would you prefer questions wait until the end of your presentation or during?

Chief Francis:

I don't have a preference on that at all.

Rep. Babbidge:

Okay, thank you. Would you introduce yourselves and we'll begin.

Chief Francis:

Sure. My name is Kirk Francis. I am the elected Chief at Penobscot Indian Nation, very proudly. It's an honor to be here today.

Rep. Bailey:

Once again, I am Donna Bailey representing House District 14, and now in my role as a presenter of the Task Force study and recommendations.

Rep. Babbidge:

You may proceed.

Chief Kirk Francis, Penobscot Nation:

Good morning, Mr. Babbage and members of the Committee. Again, thank you for having us here. I think today, using your words, is truly a historic day. Before I get started, it was a little weird coming in this room after seven months and sitting down here. I said, what's Senator Bellows doing in my seat? Anyway, but I did want to acknowledge some of the Tribal leaders that are here today. We have Chief Peter-Paul, Chief Clarissa Sabattis, Chief Billy Nicholas and Vice Chief Maggie Dana from Pleasant Point, members of our Council here, Craig (Sanborn) and a lot of people that worked really hard over the last seven months to try to find a compromise on these issues and create a lot. I hope my presentation helps you understand a little bit about the work that went into it.

I was asked to give a Tribal perspective on the Task Force, kind of how we got to the Task Force, what we tried to do in terms of our contribution to the Task Force once that was created, and then give you a perspective on kind of why this conversation is not only timely but very much needed. With that, I'll get going, and again, speaking on behalf of all the Tribal communities in Maine. It was kind of difficult to put everything into one page. I just hope you'll

bear with me for a little bit, but I want to thank you for having me, first of all, today. Before we present the recommendations of the Task Force, I want to share with you some of the views of the Tribal Nations who participated in this process. Additionally, I ask that this written statement from Chief Peter-Paul and the Aroostook Band of Mi'kmaq also be given to you today. For the sake of time, we won't read that, but we will provide it for the Committee.

The Task Force was a creation of the legislature, as we all know, through a joint order last Spring. To be honest, it was not something that any of the Tribes asked for. It was not an effort that I had a whole lot of faith in at first, to be honest. I've been through a lot of these different efforts with the Tribal State Work Group, et cetera. We're always looking at this with a little less than optimism, but to be honest, there were plenty of times in the past where Tribes had asked for this type of dialogue with the state to fix what we viewed the Settlement Act as a failed experiment that left the Tribal nations of Maine stagnant in the past, with limited opportunities to achieve self-sufficiency in an archaic restriction on Tribal sovereignty that few other Tribes in the country endure.

Essentially, we view the Settlement Act as a legislative effort to terminate us as governments. I did not have much hope or faith in the Task Force, as I mentioned. In April of 2019, House Speaker Gideon and Senate President Jackson hosted a meeting with Tribal leaders and asked us to provide them with a letter to set out our goals for this process to work. Over the course of several days, the Tribal leaders met to prepare our response.

By letter dated May 9th, 2019, we wrote to Speaker Gideon and President Jackson and stated the following, "The leadership of the Tribes have a consensus that for this process to work there must be a commitment to accomplish the following as to all Tribes: amendments to establish that the laws of the state shall not apply to the Tribes on their respective land, except as agreed to by the state and the Tribes or as provided by federal law, amendments to confirm that the Tribes shall exercise and enjoy the same rights, powers, privileges and immunities as other federally recognized Indian Tribes, except as agreed by the state and the Tribes, and amendments to confirm that acts of Congress intended to benefit federally recognized Indian Tribes in general apply to the Tribes in their lands, except as agreed to by the state and the Tribes."

You will notice that a fundamental theme of our May letter was the requirement that any amendments to the Settlement Act must be agreed to by the state and the Tribes. The Tribes have long had a belief that they didn't agree to a lot of things that were in the original Settlement Act. We agreed to settle the land claims. This is not in question, but there remain significant questions about whether the Penobscot people and citizens of the other Tribal nations fully understood or agreed to the terms of the settlement beyond the land claims. Whereas changes were made in both the state and federal Settlement Acts prior to passage, they were not vetted or approved by Tribal citizens. These settlements were essentially forced upon us when the state legislature passed its Implementing Act and the federal Congress subsequently ratified the Settlement and the state Implementing Act.

I provide you this background so that you understand that from our perspective, the restrictions upon our inherent sovereign rights that are contained in the federal and state Settlement Acts were suspect to begin with. The only reason why the restrictions in the state Implementing Act are valid is because the federal Congress ratified them, over objections of many Penobscot people and the people of the other Maine Tribes. Some of our initial concerns and suspicions with the Task Force were alleviated though in June of last year when the legislature passed a joint resolution to support the development of mutually beneficial solutions to conflicts arising from the interpretation of an act to implement the Maine Indian Land Claim Settlement and the Federal Maine Indian Claim Settlement Act of 1980. That has to be the longest bill title ever.

In that resolution, the legislature resolved as follows: to recognize that the Maine Tribes should enjoy the same rights, privileges, powers and immunities as other federally recognized Indian Tribes within the United States and to support a collaborative process to develop amendments to enact to implement the Maine Indian Land Claim Settlement to accomplish that goal. We appreciated the subsequent resolution of the state legislature and decided to participate in the Task Force. We were also pleased with the individuals and leadership of the Task Force who clearly spent the extra time needed to better understand the national scheme of federal Indian law and the inequities that apply to the Tribal nations of Maine. I think most of the Task Force members even went and bought their own American Indian Law Handbooks. We got through some pretty complicated subject matter. I appreciate their attention to that.

That's kind of how we got to the Task Force. In terms of the past history, we thought it was really important right from day one to really correct a lot of misunderstandings that are out there. The initial meetings of the Task Force really focused on setting the record straight on certain historical facts that are often ignored or misunderstood. I would like to do that today for you, as many of you may not have listened to the recordings of the Task Force meetings. First, the inherent sovereign rights of the Tribal nations in Maine do not derive from the 1980 Settlement Act. We are Indigenous nations who have lived in our homelands since time immemorial. Our inherent sovereignty predates the United States Constitution and the formation of Maine. Beyond the land claims, the 1980 Settlement Act is a restriction on our inherent authorities. Second, this 1980 Settlement Act could never go into effect without the approval of the United States Congress, which again, evidence is the federal condition that the Tribes were under pre 1980.

The Supreme Court long ago established that states generally have no authority over Tribal Nations and their lands, and the only way they can get that authority is with an express grant from Congress. Third, our inherent sovereign rights and rights to our lands were affirmed by the federal courts prior to the Settlement Act. Our ancestors fought in the American Revolutionary War under the promise that upon the formation of the United States, the Tribe would be protected in the occupation of their aboriginal homelands by the new federal government. After the war, that promise was never honored. Our lands and resources were encroached upon, and

when faced with destitution, we agreed to cede most of our lands for next to nothing to Massachusetts and later to Maine.

These massive land cessions were in violation of federal law, the 1790 Non-Intercourse Act, which rendered void any land cessions by Tribes not approved by the federal government. It was not until the early 1970s that the Tribes discovered these violations and asked the United States to fulfill its promise and sue Maine to recover these lands. In 1975, in a case of Joint Tribal Council of the Passamaquoddy Tribe versus Secretary of Interior Morton, US District Court Judge Edward Gignoux confirmed that the United States owed a trust responsibility to the Tribes and could proceed with filing land claims against the state of Maine. The United States filed land claims in federal court against Maine soon after. These claims put a cloud over a title of two-thirds of the state of Maine.

The late 1970s brought significant victories for the Tribal Nations, confirming our sovereignty and undermining the power that Maine had presumed to wield over us. In *Bottomly versus Passamaquoddy Tribe*, the US Court of Appeals ruled that the Passamaquoddy Tribe retained its inherent sovereign powers, in that case, both sovereign immunity from suit. In *State versus Dana*, the Maine Supreme Court held that the Passamaquoddy Reservation constituted Indian Country, and as a result, criminal jurisdiction over an alleged arson committed on the reservation rested exclusively with the United States, not Maine.

The *Bottomly* and *Dana* decisions had implications for all Maine Tribes, not just the Passamaquoddy Tribe, essentially confirming that Maine's presumed power no longer existed, that the Maine Tribes enjoyed the inherent sovereign powers that all other Tribal nations possess. Everyone understood going into the settlement, the Maine Tribes had the full status of Tribal nations as in all other parts of the country. This is evidence upon the introducing of the Maine Implementing Act to the legislature where Senator Samuel Collins Jr, the cosponsor of the Act, explained, "The premise of this bill and the entire settlement agreement is that the Indians are federal Indians. This means that the Indians and their lands are within the exclusive jurisdiction of the federal government and its Indian laws. Under this premise, the state has no jurisdiction at all." In summary, this was the situation that existed immediately prior to the Settlement Acts passing into law. There was no authority derived from the Settlement Act to the Tribes of Maine. It hadn't pre-existed the settlement.

The United States had sued Maine on our behalf to recover nearly two-thirds of the land mass of the state, and both the federal and state courts recognized that within our aboriginal homelands we were free from state authority, just like other Tribal Nations, and that we could exercise the inherent sovereign power similar to other Tribal nations in the country. Now, that's the history on leading up to the Settlement Act and how the Tribes were viewed and the rights we had back then. We spent a lot of time in the Task Force talking about that because I think that's a big misunderstanding when we talk about the Settlement Act. I think people think the Tribes of Maine were kind of created in 1980. We all know there's a long history before that and there's been a lot of court cases that have affirmed the Tribes' views before this act.

Now we get to the Settlement Act era, and I promise I'm getting there, and the failures of the Settlement Act. The restrictions on our inherent sovereign authorities contained in the Settlement Act fail for two principle reasons. First, we cannot progress like other Tribal nations under federal law, and that undermines our dignity as sovereign tribal governments, but also our ability to provide services to our people, protect those who live and work on our lands, and our ability to create an economy that benefits our community and the nearby communities. Second, uncertainties and ambiguities contained in the Settlement Act have led to costly litigation and continuing conflicts between the tribes and the state. At times, with the state and certain corporations that are polluting our waterways, often are aligned against us. Additionally, provisions in the Settlement Act exclude us from federal laws that benefit every other Tribal Nation in the country.

Here are some examples of the litigation and inequities caused by the Settlement Act. We have a federal and state court litigation on whether the Penobscot Nation and the Passamaquoddy Tribe are subject to the Maine Freedom of Information Act, such that we must allow corporations, that again are discharging pollutants into Tribal waters, to enter Tribal offices and access information about the efforts to protect ourselves. That condition exists nowhere else. Federal court litigation involving EPA, Maine and corporations on whether Congress granted Maine authority to issue permits for pollution discharges into Tribal waters under the Clean Water Act. Tribes often have the authority to do that under the Clean Water Act as a treatment of state.

State and federal court litigation over whether the Tribes have authority to engage in gaming to generate badly needed revenues to support our Tribal governmental services. Again, people think the right of Tribes to conduct gaming is a result of the Indian Gaming Regulatory Act. That is actually not a beneficial act to Tribes. That's a restrictive act to Tribes. Tribes have a right to game because the Supreme Court ruled that it's an inherent right of Tribes to conduct that activity, *carte blanche*. The Indian Gaming Regulatory Act is Congress's attempt to restrict that right.

No less than three appeals to the Maine Supreme Court to determine whether a Tribal member's trespass claim against the Tribal Housing Authority arising on the Passamaquoddy reservation is within the sole jurisdiction of the Passamaquoddy Tribal Court. Here you have a trespass on reservation in that community with a court of jurisdiction. Again, that condition does not exist anywhere else. Exclusion from the Federal Violence Against Women Act so that we were unable to prosecute domestic violence crimes committed by non Indians on our land. Additionally, exclusion from this federal law, to give a Penobscot example, and I'm sure most all the Tribes sitting in here, has deprived the Penobscot nation of several million dollars since 2014 in funding that would have expanded the capacity of our Tribal court, law enforcement and victim services. Exclusion from the federal Stafford Act. We were the only Tribe in America formally excluded from this act on the United States Senate floor, which would have allowed us to declare emergencies on our land to simply seek assistance from the federal government.

Failing to receive any financial assistance from the state to help us to address the opioid abuse occurring within our communities. We actually had to lobby Congress for a Tribal set aside, had some success with that. To this day we still do not receive any state dollars. At least speaking for my Tribal community, and I would dare say very similar for everyone else, we are about 98 to 99% federally funded. This really leads to a point of typically when governments exercise authority over Indian Tribes, like the federal government who has plenary authority, there's also a trust fiduciary responsibility with that, which includes protecting Tribes and their rights as well as funding.

It has been 40 years since the Settlement Act was enacted into law. Upon review, it is clear that the restrictions contained in the act that subject the Tribal nations to state law and try to make us wards of the state, have been an utter failure. I think we can all agree. We all get to its failure in a different way, in a different thought process I think, but I don't think anyone can call it a success. While other Indian Tribes throughout the country can show significant progress in developing infrastructure, creating economies and expanding on government services since 1980, here in Maine we remain stagnant with limited access to federal resources and archaic restrictions on our ability as governments to build foundations that will allow us to someday become self-sufficient.

If you look at other Tribal nations throughout the country, you will see that when Tribal nations thrive, so do the surrounding non-Indian communities. When there are good relationships between state governments and Tribal governments, they are able to work together and find and develop mutually beneficial opportunities. The Tribal nations in Maine are very different from corporations that come into this state and leave when a profit is no longer easy to attain. We are the original inhabitants of this place. We care about this state and these lands far more than anyone else.

Our ancestors are buried here. We will be buried here and our children and grandchildren will, yet our ability to help this state, our people and the people of Maine have been severely limited for the past four decades. We are pleased with the results of the Task Force and commend Senator Carpenter and Representative Bailey for their leadership of it. The recommendations being presented today are not perfect, but they will build a foundation on which we can begin the work that should have been started 40 years ago. We look forward to the Joint Standing Committee reporting the recommendations out and the legislature enacting them into law. I again want to thank you for allowing me a little more time than you're used to here. This is a very complicated subject, a very serious subject, and one that has the ability and potential to have tremendous impacts on some highly disadvantaged people and some very proud governments. Being over 40 years from self-determination being passed, the Tribes have worked really hard on their nation-building, self-governing, on self-determination, building towards self-sufficiency. Thank you all.

Sen. Carpenter:

Thank you, Chief Francis. This is Senator Mike Carpenter for those listening in. I've been able to make it here. I apologize. I was on the phone with the court in Aroostook County all this time. My apologies for ... my thanks. I'm sorry.

Chief Francis:

Two others.

Sen. Carpenter:

Oh, two others. Okay, we'll get back to that in a second. I want to thank Representative Babbage for chairing the committee in my absence, others who have maybe come in late. Go ahead, Representative Evangelos.

Rep. Jeffrey Evangelos:

Good afternoon, everyone and welcome. I wanted to thank everyone who worked unbelievably hard on this and I congratulate you all, Senator Carpenter and Representative Bailey and all the Chiefs and Tribes. It was a herculean effort. Representative Jeffrey Evangelos, House District 91, Friendship.

Sen. Carpenter:

Who else was ... Senator Keim.

Sen. Lisa Keim:

Good afternoon and welcome. My name is Lisa Keim and I proudly represent Senate District 18, which is much of northern Oxford County and two communities in Androscoggin.

Sen. Carpenter:

Chief, could we have a copy of your remarks that you just-

Chief Francis:

I-

Sen. Carpenter:

Oh, awesome. Thank you. You made some very specific references there and I wanted to make sure we had those. I want to thank the Task Force members, Representative Anne Perry,

Senator Moore. I'm just going to name the legislators, Representative Dillingham, who I don't think is present, and the Tribal members. We worked hard. It's an imperfect document put together by imperfect people. I think it's a step in the right direction and hopefully a step down a road where we'll have a happy ending. Again, I know we've done this before, but I turned and looked at the staff, Sam and Janet, who have masterfully staffed this Task Force all Summer and put together this document, which is just incredible. Then now turning it over to Peggy, who's going to magically make it appear.

Peggy:

They're staying on.

Sen. Carpenter:

Oh, they're staying on. Okay. They're going to stay and help us. At this point, if the members of the committee have questions of the three members up there or anybody else for that matter, I'd welcome those questions. I would ask that you keep them relatively general because we're going to have lots of time to chew on this as we go through the process and we can get perhaps too far down in the weeds today.