

Attorney General Aaron Frey speaks at the legislative Judiciary Committee's public hearing for LD 2094: "An Act To Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act". February 14, 2020.

Chair of Judiciary, Senator Mike Carpenter (Houlton -D- Senate District 2)

I would now turn to Attorney General Aaron Frey. Welcome.

Attorney General Aaron Frey:

Good morning, Senator Carpenter, members of the judiciary committee. My name is Aaron Frey and I presently serve as Maine's Attorney General. Thank you for this opportunity to speak today on LD2094. You're receiving a packet now. I'm not going to read all 22 pages. I don't think I can fit that into three minutes. I'm not going to try. So just as a guideline, I'm going to read the introduction and then just sort of highlight a couple of the questions that are brought up here. So again, good morning, I do appreciate this opportunity to speak.

This bill does propose a different jurisdictional relationship between the State of Maine and the Passamaquoddy Tribe, the Penobscot Nation, the Houlton band of Maliseet Indians (collectively the Tribes), recognizing that the Micmacs are not involved in this particular bill. And the present jurisdictional relationship that, at least the Attorney General's Office has been representing the State of Maine under and that these groups have been working under, was the result of some compromise reached in the 1980s to settle Tribal Land Claims. Now this Settlement is memorialized in two statutes, the State Maine Implementing Act and the Federal Maine Indian Claims Settlement Act, and LD2094 seeks to make substantial changes, particularly to the Maine Implementing Act.

Now ultimately whether or not (and this is very important, I want to communicate this certainly to the committee and to those who are listening to me) that the decision to amend the Maine Implementing Act and to alter this jurisdictional relationship between Maine and the Tribes is purely a matter of policy for the Legislature, and it's very important to me that as the Attorney for the State that I'm not intruding upon that policy decision, and the invitation that I hope is taken away, what I hope is being heard, is that we're prepared to do what Attorneys do, and that is provide advice on what the legal effects may be for any changes that the Legislature seeks to make to the Maine Implementing Act, and how that might work.

I also want to note that some of the aspects that are proposed in 2094 will require some approval by Congress, because remember Congress was involved in part of this when it implemented the Maine Indian Claims Settlement Act.

I also want to qualify that we did the best we could in the time that we had, in the office, to process LD2094, and what you have before you is what we were able to do in that time. Please

don't take it as an all-inclusive document of our advice. The invitation, again, is that the Office stands ready to help the Legislature understand the legal effects of what's proposed, and ideally any amendments that the Legislature wants to proceed with.

Finally, I do want to highlight, in the introduction, that it's important to note that while often the Legislature is able to modify Legislation in future years when it may not be working as intended or it may result in consequences that were not initially intended, the Legislature's authority to amend the Maine Implementing Act, it's limited, because any amendments to the MIA require both the Tribes and the State to agree to that amendment. And so it is just a little bit different than if a law's not working, we're going to strike it. Again, that's not a reason to do it or not to do it, but it should be important to consider that it may take a little bit more to get to that place of correcting anything that maybe didn't work out as intended.

So that's the introduction. What I hope the committee will take time to understand in what we presented is that the goal of implementing Federal Indian Law, understanding that that is one of the key---or that creating that relationship that may be more identical to what Tribes are experiencing all across the United States---that brings with it a broad body of law. And no matter what law you have, there's going to be litigation, about what terms mean, about how it applies. And keeping in mind, too, that the extent to which this will be a different way that Maine and the Tribes will be relating, there may be litigation involved just to determine exactly how that's going to play out. And I hope folks will keep that in mind, that just because it's a different body of law, it doesn't mean that it's not vulnerable to significant litigation.

There are going to be different natural resource and land use considerations, and part of what I talk about in what I presented, is that there are some statutes that exist that address fishing and hunting by Tribal members off Tribal lands that may be part of the consideration for the committee. If certain things are being changed in the MIA, there is the other side of it which is there are laws that have been passed to deal with this separately that maybe need to be considered as well. And just how decisions of the State and the Tribes will now work when it comes to natural resource use...There may be some, um, a different relationship that should be considered.

It's not clear the extent to which the State can just say that Federal law is deemed to apply. So one of the concerns, that I believe the Legislature is working to get at here, is bringing in Federal law that provides benefits for Tribal members and for Tribes. But it's not clear that the State can just say that these laws will apply, without Congress also agreeing to that. And just an example of that is when it comes to the Indian Gaming Regulatory Act, the First Circuit has already determined that it doesn't apply in Maine, and whether or not Maine deeming it to apply in Maine, it may not, and there may be some litigation that would have to clear that up. And I just offer that as part of the considerations.

There also needs to be the question about the extent to which Congress will consent to the amendments. The Maine Implementing Act, the Federal Act, does allow for consent between

the Tribes and the State to agree to amendments. But there are some limitations to which that consent can work. And so these are just, these are not trying to put cold water on anything. This is just---we want to stand ready to help and that means not only working with the Legislature, we're happy to engage with certainly the Tribal representation, the executive branch, to have a constructive conversation that helps the Legislature get to the place, and the Tribes to the place, that provide more confidence in how this jurisdictional relationship works. Happy to answer any questions.

Chair, Senator Carpenter:

Thank you, Mr. Attorney General. I think that, I haven't had a chance to go through the document you provided, but obviously legal analysis of the downrange impacts, if you will, of what we do here is always extremely important, so. And I would point out to the members of the public and also members of the committee that Chris Taub, the head of the Litigation Division, Attorney General's Office, sat on the Task Force and was a huge asset to us. So. Okay. Are there any questions of the Attorney General? Representative DeVeau?

Representative John DeVeau (Caribou - R - House District 149):

Thank you, Mr. Chair. Thank you, Attorney General, for being here. Yesterday we were having issues with 766 on some wording. Part of that wording was "Indian country" or "reservation" or "Tribal land." And in that, while I was doing my homework last night, I noticed that the definition was already defined and was going to be part of this package, in section 2, and then referenced seven other times. Why was that not brought up last night?

AG Aaron Frey:

I regret that I don't understand the question. We were not talking about 2094 last night. We were talking about 766 notes providing answers to the question about how I understand-

Rep. DeVeau:

We were talking about the definition-

Chair Carpenter:

Let him finish his answer, please. Go ahead.

Rep. DeVeau:

I'm sorry-

AG Aaron Frey:

Well, as I was just finishing, I was talking about, actually that I did not know the answer to the question last night about how Indian country was going to work in relationship to 766. I was not factoring in 2094 last night in talking about the "Indian country," that was the term that was used in 766.

Chair Carpenter:

Are there questions?

Rep. DeVeau:

Yes, I do. So, 1980 Federal government gave the State jurisdiction over the Tribes. Is that correct?

AG Aaron Frey:

Yes. The Maine Indian Claims Settlement Act provided for how the relationship could be established.

Rep. DeVeau:

Have they re-taken any of that back?

AG Aaron Frey:

Not to my knowledge.

Rep. DeVeau:

So a lot of the questions that we're talking about, and I've seen some heads shaking, "No", when you were saying some certain things—um, would it be fair to say that Maine actually does have the ability to do the majority of this, seeing as how that they were already given the power to do these things in 1980?

AG Aaron Frey:

Well, the Maine Indian Claims Settlement Act does provide the ability for the Tribes and the State to agree to amendments to the Maine Implementing Act that would allow...um, but there's limitations on that, and I don't have them off the top of my head, I do include them in this testimony, but there are some limitations that may act to making these consent agreements.

Rep. DeVeau:

So the Congress consenting to jurisdictional changes, as you were talking about. Can you give me some more information about that? How is it that you came up that could be a challenge in criminal issues?

AG Aaron Frey:

I'm going to have to take that question back, Representative, because I want to make sure I'm thorough and I want to make sure I'm correct and I want to make sure there's no head-shaking behind me about being wrong. So I'm going to respond in writing to you and to the committee about the answer to that question, if that's okay, because I don't want to give you incorrect information.

Rep. DeVeau:

I appreciate that. Thank you. I'm sure we'll have more questions to work out.

Chair Carpenter:

I think the Attorney General in his testimony made it very clear, and on the front page, that whether to alter or amend the Maine Implementing Act and reset, if you will, the jurisdictional relationship is purely a policy decision in the Legislature. Is that something that only the Legislature controls? No. There may be Federal ramifications to that, but ultimately it's going to be up to us whether or not we make the decision to change the relationship, and it's right there. Representative Evangelos.

Rep. Jeffrey Evangelos (Friendship - I - House District 91):

Thank you, Mr. Chair. Good afternoon, Mr. Attorney General. I just have a um, I want to come to an understanding of one item, one thing, and I think it will be helpful for everybody to grasp that. It's a separation of powers question. You're elected by the Legislature. We have testimony here from the Executive branch, and obviously we have a Judicial branch, but in your role as Attorney General, it sounded like you are going to assist the Judiciary Committee to help facilitate discussions and provide some legal advice, but you're not advocating for any particular branch of government, are you?

AG Aaron Frey:

I'm not. And I want to highlight that. So as I see my job, it's to provide advice on legal effects to the Legislature, and to the Executive branch, and I, we've worked really hard in the Office, and I appreciate hearing from Senator Carpenter about the experience with Deputy Attorney General, Chris Taub. We're not telling anybody what to do or what not to do. This is, we'll provide advice, we did do some work as well, or we did have conversations with others to help understand issues outside of the Legislature, right. So to the extent that there were Attorneys for the Tribes or other interested parties with information that was of use. We will help with that conversation, but it's very important to note that I do not see it as a job of the Attorney General's Office to say, "This is what should be done."

Chair Carpenter:

Other questions of the Attorney General? Representative Babbage?

Rep. Christopher Babbage (Kennebunk - D - House District 8):

Yeah. Two questions. First one, regarding the role of the Attorney General and the Task Force. It was the voting members (five legislators, five leaders of the Tribes) and you and the Chief Executive were represented on the Task Force as non-voting members. How would you characterize your Office's participation on the Task Force? Were they a resource if asked, were they proactive to bring up past concerns that might have to be dealt with? I'm just, I did not attend any of these meetings, but I'm just wondering, because I do see you stepping back

somewhat, saying this is a policy question, and the Legislature dictates the people's will, through policy.

But I'm just interested in finding out if...I mean, I'll tell you where I'm coming from. I would like to know as many problems now, so that those of us that represent the entire State of Maine might approach the Tribes with the potentiality of this difficulty so that we could take care of that issue or minimize that issue for the future. Consequence is the great burden of change, and going to that with eyes open is our responsibility. So I'm just asking, the relationship and the Task Force, how proactive or were you reactive to requests?

Chair Carpenter:

Yep. May I jump in before you do, Mr. Attorney General? Because he didn't attend the Task Force meetings. I'll just speak for myself and, well I speak for myself, anybody else who was on the Task Force can correct. Deputy Attorney General Taub sat down here to my right, and was there at every meeting. A Representative from the Governor's office, from the Executive branch, from the VEP actually, was over here to my left. And as we went through the various component pieces, as we got to them, oftentimes Mr. Taub or the lady, whose last name escapes me, from VEP, would offer their thoughts. I try always to ask them at the end of the discussion about their thoughts, if they hadn't weighed in. So they were there as a resource. Obviously we were talking about big chunks at a time, so I knew at that time that we weren't getting a true legal analysis from Mr. Taub on any particular subject. But yeah, they were active participants, were called upon often, or called, or raised—

Chair, Rep. Donna Bailey (Saco- D- House District 14):

—Volunteered.

Chair Carpenter:

Thank you. Volunteered their own thoughts, now.

Rep. Babbage:

Thank you.

Chair:

Is that okay?

Rep. Babbage:

Yeah. That's really, it's probably unfair to ask him. I don't know what his directive to his Office representative was, but unless you have something else to add—

AG Aaron Frey:

—I did attend two of the commission meetings. So I did attend some and I listened in, but the Senator Governor, he did—

Rep. Babbage:
—Thank you. Okay.

AG Aaron Frey:
But let me add that there was also the opportunity, there was some work with OPLA as well, in which, because the Attorneys for the Tribes and the Attorney's Office were asked to help understand certain concepts, and we did have the opportunity to weigh in and so both Chris Taub and another Attorney in the Office, Kimberly Patwardhan, as well as myself, had the ability to weigh in that way as well.

Chair:
And I just want to add also, because I know there are Tribal Attorneys here, there were a number of occasions I remember during the Task Force where, either at the breaks or whatever, that the Tribal Attorneys and the Deputy Attorney General were, had their heads together talking. And so I think that my sense of that was it was a very good relationship.

Rep. Babbage:
Thank you. Thank you for that.

Chair:
Do you have any other questions?

Rep. Babbage:
The follow-up was, I at some point today am going to ask for a clarification of land designation and land use. Like for instance, I was looking at the maps last night and came across a lot of Maine Public Reserve Lands, or is it Reserve Public lands? I mean Little Squaw Mountain, Sugar Island at Moosehead, where I used to live—do you know the status of those lands today? What can and can't be done on those lands?

AG Aaron Frey:
That would be an answer, part of an answer, that Representative DeVeau's questions would capsule. There was an area last night where I said that, and I did not take last night—

Rep. Babbage:
—Okay. And where I was going from is, definition and public use or use of land regarding Reservation Trust Lands and Fee Lands. Thank you.

Chair:
Representative DeVeau, do you have a question?

Rep. DeVeau:
No.

Chair:

Representative Talbot Ross?

Rep. Talbot Ross:

Mr. Chair, sir, Senator. You may not, this may not be a fair question to you, but it is information I wouldn't mind having for the work session, which is—this is not the first Task Force to take a look at these issues. There've been several other reports with lots of recommendations that have come before the State Legislature prior to today, and I believe your Office has participated, your Office now, the Attorney General's Office, participated in those Task Force of the past. So I'm trying to connect the dots here and try to...I know in your testimony at the very end you say that you don't question the merits of making changes to the relationship between the State and the Tribes, but "changes should be made consciously and deliberately, with careful consideration given to all possible consequences."

Rep. Talbot Ross:

So what I'm interested in is, we didn't just arrive, this is not a brand new day. We've had previous work done in the past. Some of those recommendations have carried forward. And so I want to understand, from your perspective, how much longer we need to wait, to deliberate what needs to be done, if this is the last iteration of a lot of work over a great period of time. So if you can help me understand the previous reports, of which your Office was involved in, up to present day, and articulate more clearly, what are the pieces that we need to be so cautious about, since we've studied this and made Task Force, and had opinions and recommendations over and over and over again—what now needs to be cautiously and deliberately attended to?

AG Aaron Frey:

Well, Representative, as you know, I've been Attorney General for a year, and I understand that that means that even though I wasn't involved in these prior Task Forces, as the Steward of the Office I carry any, I'm going to say baggage, for lack of a better word, that the Office may have carried in the past. As a private practice Attorney, I would provide the same kind of advice to a client who's making a very serious decision that's going to provide significant legal effects, to make sure that you deliberate and do exactly what it is that you intend to do when you take action. I'm not saying it's going to take a year. I'm not saying it's going to take five minutes.

AG Aaron Frey:

I do think that any, um...I think it warrants enough conversation—whether it be 10 minutes or whether it be another work session, or—I just, I'm imploring the committee to make sure that when it votes to allow for X, Y and Z, or to reject X, Y and Z, that there's confidence that it has all the information that it needs to make that decision. Maybe the Legislature already has it, but I don't think I'm providing any advice that any Attorney wouldn't provide their client about making sure that they understand exactly what it is that...to make sure that they're doing exactly what it is that they intend to do.

Rep. Talbot Ross:

And I absolutely respect this, I respect your opinion, and will wait for the analysis. I'm just wondering how much longer we're supposed to study this and put recommendations before a Legislative body. How much longer do you want the Tribes to wait for another analysis that may have said the exact same thing that the previous Task Force have said and we have enacted, and it's not a direct question to you, it's more of a comment that I think we have enough and it's time to move on. But thank you very much for your words.

AG Aaron Frey:

Right. I understand that it may not have been a question, but I think it did take something from my testimony that was not there, and so I do want to respond to it. And that is that I have made it clear that I am not telling the Legislature what it should or shouldn't do. And we're here to answer questions. And if the Legislature decides that it doesn't want to ask any questions of the Attorney General's Office, that's perfectly within the prerogative of the Legislature. But I am not saying that the Legislature should wait a day, a week, should ask these questions. I made the invitation that we are available and the Legislature can choose, or the Executive Branch can choose to accept that or reject that, that's completely within the purview of the Legislature as to how much time it wants to spend before it puts something forward and takes a vote.

Rep. Talbot Ross:

Alright. I'm so sorry, because I thought it said that you needed more time. I want to qualify the below analysis by pointing out that "my [AG] Office has had less than two weeks to review LD2904." So I took that as, you need more time.

AG Aaron Frey:

As, uh..No.

Rep. Talbot Ross:

Oh, okay.

AG Aaron Frey:

So I appreciate that and I'm going to clarify that as I had hoped to communicate, but I didn't apparently didn't do well... Just want to let everybody know that this is not a complete—so like to the extent that folks have questions and say, "Well, it's not addressed in this document so it must not be an issue." Just that we're going to continue to be available. We're going to continue to process the bill and this was not meant to be a, "We're going to come forward with more, so give us time," statement. It's a, "Please don't take this as a complete everything, just because we did everything we could to get to this point," and that was the intention that I meant to communicate by that statement.

Rep. Talbot Ross:

I appreciate that clarity. For the work session though, and I don't know if we have it already, Chairs, but the previous Task Force and reports.

Chair:

Good idea. Good idea.

Rep. Talbot Ross:

Okay. I would love to bring all of that forward so that this committee understands the context of which this particular set of recommendations exist in. There was already a history and a precedent of meeting and studying and bringing forth recommendation, that we're ignoring at this point, and I would like to have that information for full consideration as we move forward. Thank you, Mr. Attorney General.

Chair:

Senator Keim.

Sen. Keim:

Thank you, Mr. Chair. Welcome. So I was wondering if the State or local police, so if we pass this bill as it is, if they would still be able to enforce criminal law on Tribal Lands. And then, I don't know if that question is complicated further by if it matters who has committed a crime, whether it's actually a Tribal member or non-Tribal member. And if that's something we need to find out later, then that, you know, if you need to just look into that more...

Sen. Keim:

And then, the other question I had as well is just—and possibly it's in the information and I haven't found it yet, but I feel the need to have something enumerated about Federal Indian Law. Just there, if Federal law, I think. "statutes, regulations and case law, subsequent amendments there to," I just, I think that what we're trying to do is replace that, and I think it might cover some, a range of things that I'm not familiar with. What the rights, privileges, powers, duties and immunities of Federally Recognized Indian Tribes, and just maybe the practical way that that plays out here in Maine.

AG Aaron Frey:

Addressing the second question first, the Task Force did have some resources that were made available that may be resources that could also be accessed. I think there's a nutshell, I wish I remembered the name because just saying nutshell probably doesn't give it the weight that it should give it, but that talked about the way in which Federal Law was working with respect to these other Tribes. Happy to be a resource to help talk about that, and I'm sure that there are others who will be able to help understand that as well. I know that's a basic answer. I guess I have to think about whether or not there might be some way that we could organize that material that's already been pulled together, that might provide some confidence that the Senator is looking for. And I would like a little bit of time on that State and local law enforcement question, I believe there is a part...it is addressed in some way in the material that I'm providing, but just to be safe I can provide an answer in writing, specifically addressing that question.

Sen. Keim:
Thank you.

Chair:
Mr. Attorney General, I think maybe Representative Bailey is about to clarify.

Rep. Bailey:
Well no, I was just going to mention the other resource that is going to be available to the committee are the charts. The Task Force, for each different area—criminal jurisdiction, civil jurisdiction, taxation, all of them—had the legal analysts working with other interested parties, including the Attorney General's Office. That's another way that they participated, and helped put together charts that set forth and said, "This is the current law. This is what it would be under Federal law." So you can have that side by side in kind of a condensed version, and those are going to be made available to the committee members and we're going to have them as we do each section, but also obviously for work session.

Chair:
Great. Okay. Hold that thought. Senator Bellows is next, then Representative Hagan.

Sen. Bellows:
So, thank you for being here, Mr. Attorney General, we appreciate it, and we appreciate the Assistant Attorney General in participating in the Task Force. So the question that I have, following up on Representative Talbot Ross's questions, the consensus recommendations that we have here, and indeed most of them unanimous, are two to three sentences each, and they're fairly simple in terms of the principle, even though it would be a dramatic and, I think, important shift in the relationship between the Tribes and the State. Your testimony is very detailed. Are your, are the concerns or the flags that you're raising related to the translation of the recommendations into statutory language and the specifics about the statute? Is that where your caveat about the two weeks surfaces? Because when you take the principles, and then actually write the statute, you suddenly start to think more deeply about the details? Or do you have substantive concerns about the recommendations that were arrived at over a series of months?

AG Aaron Frey:
So it's the former, and that is to say that, translating the recommendations to the letter of the law, making sure that that's consistent with what it is that everybody intended, that's really the space that I'm attempting to operate in. It is not intended to be, and I hope it wasn't meant to be the latter, which was saying, "This is a bad idea or a good idea with respect to the recommendations." At least, that was not the intent. And again, it really is about that implementation, if the legislature chooses to go in that direction.

Sen. Bellows:

So, to follow up on that, given the level of expertise in your office, and particularly in interpreting statute and utilizing statute, would your office be available to work with Tribal attorneys, and with the analysts, to try to refine any of the statutory language if the committee conveyed to you that it was the consensus goal of the committee to adopt the consensus recommendations of the Task Force? And we're just trying to get to "yes," on how we implement these values in a way that's mutually beneficial and acceptable.

AG Aaron Frey:

Happily. And just, and to back that up, again, as Senator Carpenter mentioned earlier, I believe there were some constructive conversations between, particularly between Chris Taub and legal representatives for the Tribe. So, yes.

Sen. Shenna Bellows:

Okay. Thank you.

Chair Carpenter:

Representative Haggan.

Rep. David Haggan:

Thank you, Mr. Chair. Question for Representative Bailey. Will we get those charts? Can we get them today?

AG Aaron Frey:

Right there, in the folder.

Rep. Hagan:

Oh, they're in the folder? Okay.

Rep. Bailey:

Thank you.

Chair Carpenter:

Other questions of the Attorney General? If not, thank you.

AG Aaron Fry:

Thank you for your attention. And happy Valentine's Day. Thank you for the candy.

Chair Carpenter:

I guess. Okay.

AG Aaron Fry:

Thank you.