

Kaighn Smith, Counsel for Penobscot Nation 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.

Kaighn Smith, Counsel for Penobscot Nation:

Thank you very much, Representative Bailey, the members of the committee. My name is Kaighn Smith Jr. I am a shareholder at Drummond Woodsum and McMahon. And I have served as litigation counsel for the Penobscot Nation for over 25 years.

I lead our firm's Tribal Nations Practice Group. As a result, we represent Tribes across the country from the Northwest and Washington State, New Mexico and elsewhere. I teach federal Indian law at the University of Maine, School of Law and I serve as an associate reporter for the American Law Institute's Restatement of the Law of American Indians, which will be finally completed this May.

I prepared a presentation for three minutes and it became more and more rushed as I worked through it. I will try to stick within that framework as best I can, but I wanted to just clarify that those of us who are testifying on behalf of the Penobscot Nation have expected to submit written materials to you all. And we understand that the due date for that is the 19th, so I would ask for your indulgence that we supplement our oral positions including that of Professor Prins' with our written statements by next week.

Rep. Bailey:

You can always submit written testimony at any time. But yes, we are having another public hearing on the 19th. That'll be fine.

Kaighn Smith:

I should note that Tribes have governmental authority not only on Tribal lands that is dry lands, but within waters. And one of the minor amendments we will be making as part of a red line to the proposed bill is to clarify that.

The commendable purpose of this bill is to restore the sovereign authority of the Penobscot Nation, the Passamaquoddy Tribe, Houlton Band of Maliseet Indians to where it stood in 1979. At that time, court decisions, actually, had confirmed that these Tribes exercise the same governmental authority over their lands and waters as other Tribal Nations across the country. The preservation of that governmental authority is absolutely critical for the physical and cultural survival of Indigenous peoples.

As a Supreme Court has said, "Hunting and fishing practices are not less necessary to the existence of the Indians than the atmosphere they breathe." The cultural resources are the identity of Indigenous peoples. And you heard from Professor Prins and you heard from John Banks. These individual Tribal members are identityless unless they can exercise these practices in a robust manner.

I just want to give you some empirical data. From time immemorial, we know for centuries that the Penobscot people have eaten from the River. They take their food sources from the River, and those practices are their cultural practices. In the 1990s, as John Banks explained, Tribal members woke up to the fact that there was extraordinary contamination of these food resources and they started to pull back their consumption. But at that time, and we have, we will make this part of our written submissions, Penobscot families were relying upon fish, eel, and other food sources from the River up to four meals per week. Two to three pounds of food material per meal. That has now been suppressed as a result of the contamination of the River over the years.

So given the critical importance of hunting and fishing for Tribal existence, one of the most fundamental principles of federal Indian law is that Tribes retain inherent authority exclusive of states, actually, to regulate the exploitation of natural resources within their lands and waters. If they are deprived of that opportunity, they're subject to exploitation. So it's one of the most fundamental principles of federal Indian law.

Unfortunately, since 1980, the Maine Attorney General's office has consistently, consistently sided with corporations to fight the Maine Tribes over water quality issues. One such corporation, Lincoln Pulp and Paper, now bankrupt, dumped dioxin into the Penobscot River leading to warnings that the fish in the River were dangerously contaminated. This bill will end to ambiguity's that have led to this kind of wasteful, protracted litigation, not to mention all of the unfortunate animosity that's gone with it. It will restore the dignity of the Tribe to exercise stewardship over the resources that define them as a unique people. And so doing, it will protect the environment for all Mainers.

I would just add that our written comments will suggest minor changes that we believe are consistent with the intent of the Task Force to clarify sustenance fishing authorities more precisely and to delete state eminent domain powers over Tribal lands, which is unseen anywhere else in the country. I'm not sure why the Task Force missed that, but it would certainly be within the spirit of the purpose of this bill and the Task Force charge to eliminate state eminent domain, the ability to take Tribal lands.

Rep. Bailey:

Thank you. Questions from the committee? Representative Fay.

Rep. Fay:

Thank you Madam Chair. I think I want to ask the same question that I asked Mr. Banks. More on the hunting side and less on the sustenance fishing water quality standards side. I appreciate and understand the philosophical change, but I did want to try to get at some answers to some of the concerns that Mr. Dreyhan had. So if currently Tribes already have the authority to regulate hunting specifically within the boundaries, how would this change that in practice? Like I said, I understand the philosophical difference, but just in terms of those hunting and hunting regulations and the way that that works.

Kaighn Smith:

Well, it would make it perfectly clear that the Tribes have the authority that other Tribes in the country have. It would just make it perfectly clear. All right? And that means that the Tribes, John Banks's Natural Resources Department at the Penobscot Nation could decide that they are going to limit the taking of certain resources and where in the hunting, just say, hunting for ducks. The Tribe might decide, "Look, the duck population has been decimated and our Tribal members are needing that more for their sustenance. We're going to limit the take by non-Tribal citizens within our reservation and trust lands."

Tribes across the country do this. You can't step onto a Pueblo as a non-Pueblo and assume that you can go and hunt. Those are the resources, the meager resources, mind you, because Tribes across the country have been pushed onto the reservations and their lands have been taken and taken and taken. So the resource that sustained Tribes today are meager. They're limited. The Tribes need those resources for their own subsistence practices to feed themselves and for their cultural practices. They're both tied together. So this would clarify and empower. And I would say that the word to use is dignify the Tribes in their ability to exercise those authorities.

Rep. Bailey:

Representative Cardone.

Rep. Cardone:

Thank you. Thank you, Mr. Smith. I have a couple of questions. I don't know if you were in the room earlier when I asked about the section... 62O72A. The regulation by the states solely for conservation purposes regarding fishing and hunting by Indians off-Tribal lands. I don't understand what this means. Can you tell me?

Kaighn Smith:

Sure. But I would probably have to give you a lecture on two Supreme Court cases in order to get you there. So I'll give you those two Supreme Court cases and you can read them for yourself.

New Mexico versus Mescalero Apache Tribe, 462 U.S. 324 (1983) Supreme Court decision.

Rep. Cardone:

I'm sorry. 462 U.S.-

Kaighn Smith:

462 U.S. 4... I'm sorry, 462 U.S. 324 unanimous-

Rep. Cardone:

What was the date on it?

Kaighn Smith:

1983. The other cases, Puyallup Tribe versus Department of Game of State of Washington. And that's at 433 U.S. 165. It's a 1977 decision. That's the one from which is derived this notion of conservation necessity. That case involves sort of a special situation. It was a treaty-based fishing right of Tribal members with certain documented non-Tribal interests within Tribal lands.

So there was an overlap between Tribal interests and non-Tribal interests. In that particular setting, and the Supreme Court said that if the state could show that the exploitation of resources by Tribal members within those lands was going to harm, just to give an example, downstream take of the same resource, then this state could have a limited opportunity to regulate those activities of Tribal members, okay? So it's a very specific, fact-specific case.

Rep. Cardone:

I read this is to talk about regulation off-Tribal land.

Kaighn Smith:

Off. Off, which is a much more precise and legally supported proposition than the facts specific case of Puyallup. It's just so happens that that notion derived from the Puyallup case. So there are "off reservation" hunting and trapping and fishing rights and treaties in the State of Washington. The treaty say that the Tribal members have the right to take fish at their usual and accustomed places. That was a condition for the treaty in which the Tribes ceded most of their lands.

So when those Tribal members are off of what remained for them in the treaty reservation engaging in those fishing practices under the Puyallup decision, the state gets to regulate those activities to the extent that there's a conservation necessity.

Rep. Cardone:

But that applies only in the State of Washington?

Kaighn Smith:

No, it may well, very well, apply here because the Passamaquoddy Tribe, for example, has some treaty rights with respect to engaging in fishing practices and other practices. We can explain that further with our written materials. And we were careful not to end the opportunity for Tribal members to engage in their treaty fishing rights even if they aren't within the reservation.

Rep. Cardone:

Okay. I'm sorry, may I continue?

Rep. Bailey:

Yes.

Rep. Cardone:

The intent of this Act does not bother me in terms of some reconciliation and recognition of the Tribes and the ability of the Tribes to better themselves economically in terms of [sustenance].

What bothers me a lot is the wording of this document because it consistently refers to federal Indian law or in a manner consistent with federal Indian law. As I understand federal Indian law, and it's much inferior to your knowledge, we're talking about congressional action in terms of federal statutes and acts. We're talking about treaties that may or may not apply countrywide. And we're talking about case law that is case specific and may or may not be applicable to various situations.

So I have two concerns that result from that. First is if the state is giving over this jurisdictional right to the Tribes and to the federal government, how do we know what we're getting in return? We don't have a consistent static body of federal Indian law that we can go from this statute to this statute and say, "Okay, that's what this is." Because it's going to change over time. Either Congress will enact another Act or there'll be a case law that changes or maybe even treaty rights, I don't know. So that's the first thing.

The second is to the extent that this statute is to be put in place to try to diminish legal actions. I am concerned that it's just going to open up even more uncertainty and create more court cases in trying to figure out what the federal Indian law is that is applying to the State of Maine. So I'd like to hear your response to that.

Kaighn Smith:

Thank you. The federal Indian law is not as amorphous as you might presume. We have just completed the American Law Institutes Restatement of the Law of American Indians, which restates the fundamental principles of federal Indian law that are universally applied to all federally recognized Indian Tribes.

It's a body of common law that applies to every federally-recognized Indian Tribe. And to give you an example of how simple it is, at the same time that the Penobscot Nation, the Passamaquoddy Tribe had their land claims settlement, they had already been federally recognized and already had the attributes of sovereignty under federal Indian law that we're hoping to apply now. As it turned out, there was a series of obstacles or whatever that occurred that caused this very hybrid type of relationship to develop that's now unique to Maine.

Other Tribes were going through the same process at the same time. The Mohegan Tribe of Connecticut, the Mashantucket Pequot Tribal Nation, a couple of years later, there are a number of Tribes that were restored to federal recognition that had been ignored by the federal government for 30 years over just negligence over times when during termination policies and things like that. Almost every single one of those statues says nothing but this. I'll give you an example of a Tribe we represent in Michigan.

"The Pokagon Band of Potawatomi Indians is hereby restored to federal recognition and shall have all of the rights, privileges, and powers of all federally recognized Indian Tribes as a matter of law. Period. Its service area shall be the following counties. It shall have the opportunity to take land into trust pursuant to the Indian Reorganization Act. It shall also have the opportunity to enact a constitution in accordance with its laws that may be approved by the Secretary of the Interior. Three sections of the law. Period"

Everything is working splendidly for the Pokagon Band of Potawatomi Indians. It's also working splendidly for the Little River Band of Ottawa Indians, another restored Tribe with precisely the same language. Things are working very well in Connecticut from Mashantucket Pequot that also has similar language. It's as simple as that. And no one's tearing their hair out.

I would submit to you if you went and you looked at the litigation on the books, you probably see five to 10 times more strife and litigation over the Maine Indians Land Claim Settlement Act and the meaning of it than you would for any of those restored Tribes or Pequot or Mohegan.

So it's a body of law that's readily discernible. Every member of the Task Force took it on to read Ninth Circuit Judge William Canby's Nutshell on American Indian law. It's a terrific book, breaks things down in a very simple manner. I can't promise there won't be litigation as there is across Indian Country with respect to some of the gray areas. It just is what it is. But we will bring clarity to the relationship and we will bring most, in my view, as an advocate for the Penobscot Nation, dignity. Long overdue dignity to the Tribes in this state by enacting this law.

Rep. Bailey:

Representative Evangelos.

Rep. Evangelos:

Thank you, Madam Chair. Thank you. Mr. Smith. I've got two questions and they don't relate to your firm or your legal representation of the Tribes. But in the 1970s, the Tribes won several lawsuits, which resulted in them being granted two-thirds of the land holdings in the state. Am I the only person that think it's odd that they had to use the \$60 million in the settlement to buy their own land?

Kaighn Smith:

Sure. I mean, it's the way things worked out. At the end of the day, the state refused to pay a dime. There were a lot of very powerful land owners that had powerful political connections at

the time. I think that Congress saw fit given the failure of the federal government to abide by its promises dating back to the Revolutionary War to protect the Tribes from encroachments. The many encroachments that occurred without federal approval in violation of the Indian Non-Intercourse Act, the treaty sessions for very meager amounts. I think the federal government decided that it had an obligation to step up and to help the settlement along. It agreed to fund the so called Land Acquisition Fund, so the Tribes ended up using federal funds to buy the lands back. There are ironies everywhere. It's an ironic history.

Rep. Evangelos:

And second question. Briefly, one of the things we do in this committee is explore effective legal counsel. I'm just wondering if you could find out for me, if you don't know the answer, do you know if the Tribe's attorney in 1980 was working on a contingency basis or was working on a fee basis?

Kaign Smith:

I do not know. I've never asked that question. But my assumption has always been, given the facts that I know, that action was originally brought by Pine Tree Legal Services. It was a legal aid phenomena. Let me put it this way. I've never seen evidence that Mr. Tarin had a contingency fee, representation agreement for the Tribes. I've never seen evidence of that.

Rep. Bailey:

Representative Haggan.

Rep. Haggan:

Thank you, Madam Chair. Representative Cardone asked brilliantly that question. I've been thinking about it for a few weeks. So am I to interpret your answer, I just want to know if I get it right, on federal Indian law that all of it, the case law, Congress, whatnot, in one easy spot that I can go and I can just look up all federal Indian law in one neat spot. That's it right there.

Kaign Smith:

I would highly recommend the Canby [American Indian Law in a] Nutshell. I should've brought with me Professor Matthew Fletcher's Summary of Federal Indian Law as well. I took it off my bookshelf, looked at and thought, "Well." There's a second source that I'll provide to the committee as well.

Rep. Haggan:

Thank you.

Rep. Bailey:

Further questions from the committee? Seeing none. Thank you very much.

Kaign Smith:

Thank you very much. Representative Bailey.