

**Matt Manahan, attorney with Pierce Atwood
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.**

Matt Manahan represents a coalition of municipal and corporate wastewater discharge licensees on the Penobscot River, who are intervenors on the side of the State in the ongoing case Penobscot Nation v. Mills.

<https://www.pierceatwood.com/experience/favorable-ruling-penobscot-nation-v-mills-first-circuit-court-app-eals>

<https://bangordailynews.com/2014/08/06/opinion/contributors/role-reversal-how-the-penobscot-nation-is-suing-maine-and-has-the-upper-hand/>

Matt Manahan:

Good afternoon Chair Bailey, members of the judiciary committee, Chair Carson, member of the Natural Resources Committee, and the Committee in Inland Fisheries and Wildlife. My name is Matt Manahan and I represent a coalition of municipalities, sanitary and sewer districts, and companies that have concerns about the potential ramifications of this bill, especially with respect to displacing the state's jurisdiction to regulate land and natural resources.

A list of our coalition members is attached to my written testimony, which you should be receiving or have received. Unfortunately, our coalition was excluded from participation on the task force that made these recommendations. Rather than making the Maine Implementing Act clearer, we believe LD 2094 will create more confusion and disagreement resulting in more litigation and expense for all parties involved.

By way of background, I'm including with my written testimony, a copy of an Article I co-authored several years ago summarizing the genesis of the Settlement Acts and some of the Tribes' efforts over the years to displace state regulation of natural resources. At the end of the article, I wrote that it may be appropriate to amend the Settlement Acts, but then in doing so, we must first understand the ramifications relating to Maine's economy and make sure that any legislation amending the Settlement Acts is clear.

Our concern is that this legislation is unclear and too broad, and completely guts the delicate balance the Settlement Acts have achieved over the last 40 years. This will result in yet more litigation and another spiral into legal uncertainty. I'm going to skip some of my written testimony to move along, understanding the time limit here. This bill would allow the tribes to create their own environmental regulations separate from the state's environmental laws and regulations, and the tribes would not be subject to state laws. This dual system of environmental regulations would present a real risk that Maine municipalities, companies, and citizens could be subject to regulation by the tribes.

These proposed amendments would allow any Maine tribe to add land under any Maine river to its territory, and then to regulate the uses of that land and water without state oversight. So it's an end run around all the court cases that have developed over the past 40 years. In addition, if a tribe adds land beneath a river to its territory, and the EPA grants treatment as a state authority under the Clean Water Act, the tribe could argue that towns and businesses that discharge into the river at an upstream location and have DEP permits to do so must also comply with the tribes water quality standards, even if it costs millions of dollars to comply with those standards. The tribes would have the authority to set water quality standards without considering non-tribal members economic interests.

If you amend the MIA now and later find out that the amendments have created a jurisdictional nightmare and that the state has lost control of its environmental destiny, you cannot simply repeal or revise those amendments. Section 6(e)(1) of the Federal Maine Indian Claim Settlement Act allows for amendments to the MIA, but only if both the state and the tribes agree. And in closing, I would just say the LD 2094 would disregard the state's legitimate interest in having a uniform system of environmental laws that apply throughout the state, and would result in many more decades of contentious litigation to resolve new disputes about the scope of tribal authority to displace Maine's authority. At a minimum, given the many uncertainties about the potential effect of the bill, the attorney general's office should be given time to thoroughly analyze its potential effects and to report back to you before you move forward. Thank you. I'd be happy to answer any questions.

Chair Representative Bailey:

Thank you. Questions from the committee? Representative Evangelos.

Rep Evangelos:

Thank you, Madam Chair. Thank you, sir, for your testimony. I'm looking at the article that you authored, Mr. Manahan. I have the quote from it, but Maine, however, is not like other states. You know, it's a curious statement, to be honest with you. We have a 14th Amendment to the United States Constitution called an Equal Protection Clause. Wouldn't you agree that no state has a right to discriminate against any of its people in regards to equal protection?

Matt Manahan:

Yeah, Maine is not like other states in the sense that it and a few other states, like Alaska, have a unique Indian Claim Settlement Act. In that sense, it's unique, and we are not, depending on your position, I believe, fortunately subject to all that morass of federal law that Mr. Smith was talking about earlier, which took many, many years to develop the restatement, frankly, that he's talking about. There's a lot of uncertainty out there. There's many, many more cases involving the ambiguities of federal law than there has been in Maine.

So my point is we actually have a Settlement Act that is clear, that has been litigated over the years so that it's clear now, and to throw it open would just waste all that effort, frankly.

Rep Evangelos:

Well, I understand your concern about litigation going forward, but we've had a lot of litigation since 1980 haven't we?

Matt Manahan:

We have, and it's done a good job in establishing the parameters of the Settlement Act. Frankly, we've had less litigation than other states and other areas of the country which don't have this confined Settlement Act to draw from.

Rep Evangelos:

The last question, in regards to clients you've represented, when people that are living downriver from your clients and suffering the effects of pollution that is effectively poisoning their people, why would you have a problem that they regulate their portion of the river more stringently?

Matt Manahan:

Well, fundamentally I disagree with your premise that discharges from wastewater treatment plants for municipalities. I represent many municipalities, some companies, frankly, most of the paper companies that previously discharged on the Penobscot River are shut down now. But municipalities and those citizens deserve to understand what regulation applies to them. Right now, they understand that Maine DEP is the regulator, and the Maine DEP is answerable to EPA.

So frankly, the State of Maine has some of the most stringent environmental laws in the country. We've gotten to where we are today because Maine has stricter environmental laws than other areas of the country. My clients, all the towns and cities that I represent, deserve to know what regulation applies, regardless of whether it's more stringent or less stringent. They just deserve to know and to be able to look and find one set of laws that applies. This is going to create uncertainty about that.

Rep Evangelos:

Did you ever represent Lincoln Public Paper?

Matt Manahan:

Uh...Yes, I have.

Rep Evangelos:

Okay, thank you.

Chair Bailey:

Representative DeVeau.

Rep DeVeau:

Thank you, Madam Chair. Morning, or afternoon. The way I understood it is you felt that the Maine Indian Claim Settlement Act, as it is, is a good bill. Is that what my understanding is?

Matt Manahan:

The current law that we have?

Rep DeVeau:

Yes.

Matt Manahan:

Well, it was negotiated by both tribes and the state and the federal government. They all came to consensus on what makes the most sense. You know, it was a compromise. It was a settlement. I think, as we've heard before, it may not be perfect. Over the years we saw that there were some imperfections. What is an internal tribal matter? What isn't? But now that we're 40 years on, it's gotten to a point where we can understand it. So I guess I would say it's a tough question, because it probably wasn't perfect at the outset. But it's gotten to the point where now we know what it is. So it's a good place to be able to rely on right now.

Rep DeVeau:

Okay. I appreciate the clarification, because one of the things that was brought to my attention today that I wasn't aware of was one of the comments made by the Attorney General at the time, and I'm just going to read the last sentence. "The proposal before you not only avoids such situation, but recovers for the state much of the jurisdiction over existing reservations that is lost in recent litigation." Now, that was the Cohen comment that Representative Evangelos brought to my attention earlier today during testimony. So I don't know that it was actually a very good deal or was on the level. I do-

Matt Manahan:

Well, I would just say that the tribes agreed to it as a compromise. There was uncertainty as to some 60% of the state's lands, under the Indian Nonintercourse Act of 1790, the court found that there was at least reasonable cause to move forward with the tribes claims that the state had taken that land impermissibly. That was never resolved, but this was a settlement of those claims. And so, what Attorney General Cohen was saying was we've now made clear, and this was very important to the state in negotiating, made clear that the state has jurisdiction over those resources. In terms of the fund to buy land, those lands had already been transferred out of tribal ownership. Whether those claims would have been validly upheld ultimately in court or not, this was a settlement to address those claims.

Rep DeVeau:

It was definitely beneficial for the state. Yes, I agree. But, the last thing is, is there concern that the tribes are unable to do the right thing that they've been doing to this point?

Matt Manahan:

I'm sorry, I don't understand.

Rep DeVeau:

Is there concern that the tribes with their departments now that are currently doing the water treatment and the natural resources and working with the U.S. Fish and Wildlife, Maine DEP, U.S. EPA, and all of the other departments, do you have reason to believe that they will be unable to do that if this is passed?

Matt Manahan:

If this has passed? No. The concern is not that they don't have the capacity to adopt regulations. They have. They have regulations. The concern is that those regulations may be applied, and they've already attempted over some of the litigation that's gone on over the last 40 years has been the tribal efforts to apply their regulations to non-tribal members. I talked about the treatment of the state authority under the Clean Water Act. The Penobscot Nation has applied several times for treatment as a state authority, which would allow it to regulate indirectly, or directly if the discharge is into their reservation, and this bill would allow them to change their reservation lands or their tribal lands, I should say, to be able to regulate non-tribal members. So the issue is not that they don't have the capacity to regulate or they don't have robust environmental programs. That's not the issue here. The issue is whether non-tribal members in the state will be subject to more than one source of regulation, and whether the state is giving up its control over its natural resources.

Rep DeVeau:

Okay. I brought this up earlier today. There seems to be a consultation problem. Okay? You're making assumptions, and you're bringing it to us that this is going to change, and it could be really bad for areas that the tribes could possibly affect. My question is, have you actually sat down and talked to the tribes about what the possibility of this could mean for your people or for your group that you're ...

Matt Manahan:

We were not invited to participate in the Task Force. In fact, we sought to participate in the Task Force..

Rep DeVeau:

I'm sorry, sir. I didn't ask that question. I asked, did you consult with the tribes?

Matt Manahan:

We don't have control over the state laws. So, no. I did not consult with the tribes. But I should say that we were more than willing to work with the Tribes as part of the Task Force to talk about change of the Settlement Act. We're still willing to do that, and we think that would be productive. We were not allowed to participate in the Task Force's deliberations.

Rep DeVeau:

That wasn't, again, that wasn't the question I asked. You don't need permission to go to a Tribe. They got an open door. There's no gates on the roads.

Matt Manahan:

I have not spoken to the Tribes.

Rep DeVeau:

Thank you.

Chair Bailey:

Senator Bellows.

Senator Bellows:

I think to follow up on what Representative DeVeau was asking, what I'm reading here is that your concern is that the tribal regulations could be stronger than the state regulations, and that this-

Matt Manahan:

Not necessarily.

Senator Bellows:

... adoption with ... so when I read here, the tribe could argue that towns and businesses that discharge in their river to upstream location must comply with tribe's water quality standards, even if it costs millions of dollars to comply with those standards, this may be more protective and more costly than the State of Maine regulations. Is that your concern?

Matt Manahan:

I think it's both, exactly. A, you don't know. You've got to basically answer to more than one authority potentially. So it could be just different, or areas of regulation that are not the same as the state. But there is the concern about more stringent regulation. The state has very stringent regulations, and they go through rulemaking processes and legislative processes that consider the interest of municipalities and businesses and citizens. The tribes would not be required to do that. They can adopt water quality standards without considering any non-tribal members input, or concerns, or economic impacts. So our concern, and I cited in my testimony, I wasn't able to talk about it particularly, but there are cases like this. In the City of Albuquerque case, which I mentioned in my materials from 1996, was a 10th circuit case. In that case, the tribe downstream of the City of Albuquerque adopted standards for arsenic in water that was a thousand times stricter than the state water quality standards, and was more stringent than background levels. The court said that because the tribe had treatment of state authority, the State of New Mexico had to require that the City of Albuquerque's wastewater treatment plant upstream of the tribal waters had to meet that downstream discharge. That cost tens of millions of dollars to upgrade the city's wastewater treatment plant.

Matt Manahan:

That's the kind of thing we're concerned about here, is that the tribe could get treatment as a state authority under this amendment. Then the Maine DEP would, under EPA's treatment of the state requirements, have to make sure not only that they meet the state water quality standards, but that they meet downstream tribal water quality standards. The tribe could also get into trust under this law, under this bill, new land that may actually be directly in an area where a non-tribe member either discharges, there's some runoff, and they would then directly have to comply with tribal water quality standards, as well as the DEP standards.

Chair Bailey:

Senator Bellows.

Senator Bellows:

So to follow up on that, we heard from Mr. Banks about how sustenance fishing changed when tribal members, who had been consuming, on average, four meals a week from Penobscot fish populations discovered contamination by dioxins from upstream contaminants, including the mill, and then found increased rates of cancer. So what you're saying is if we had, hypothetically, adopted this statutory and legal framework instead of the Settlement Act in 1980 the tribes could have held the upstream polluters responsible for those dioxins.

Matt Manahan:

So let's just be clear. We have a fundamental disagreement about whether what Mr. Banks said is scientifically accurate. There are some studies that show that there may have been some increased ingestion, and that that may have caused health issues. There are other studies that don't show that same thing. But the fundamental point is that the State of Maine has caused those discharges to stop. The Maine DEP's environmental regulations has prevented any pollution, any contaminated fish consumption levels that cause human health problems. So to say that we need the tribes to help us to regulate the state's natural resources, I think is a false premise.

Senator Bellows:

I have one final question. You also attached this article as an amendment to your testimony, and one of the things that surprised me the first time I read this article, which was about a month ago, was some of the tone of the article. In the article you cite, used some humor, and some mocking humor about the tribes. You wrote-

Matt Manahan:

That was not my intent.

Senator Bellows:

"Time passed and the Maine tribes no longer wanted to be unique. "What did you mean when you said that or wrote that in this article?"

Matt Manahan:

What I meant was why we're here today. That they believe that we should throw out, that you should throw out the Settlement Act. They believe that now that either they've already gotten the benefit of the Settlement Act, that they no longer like the situation of the Settlement Act. Frankly, that's up to you guys. That's up to the legislature and the governor. You can amend the Settlement Act. I'm not suggesting you can't or even shouldn't amend the Settlement Act. My point is you should do so very carefully, and with very close judgment as to how you're doing it. This bill would essentially throw everything out and just gut the Settlement Act. There may be areas that make sense from the state's perspective and an environmental perspective, and in my client's perspective, the municipalities and other users of the resource.

But we should do so in a way that is, A, allows everyone to participate, which has not happened here and did not happen with this task force. And B, is a very cautious, careful review of what the ramifications are to these changes. And that hasn't been done. And I can tell you, in looking at this, that it would completely throw out Maine's jurisdiction. It would render very uncertain future areas of tribal jurisdiction vis a vis Maine's jurisdiction, therefore lead to a lot of litigation about the scope of that. So I just think that this is not the way to go about amendments.

Chair Bailey:

Representative Cardone.

Rep Cardone:

Thank you, Mr. Manahan. I think it's fair to say that if we enact this LD as proposed, it's, at the very least, going to create uncertainty as to what the water quality standards are and what the fair uses of the river are, correct?

Matt Manahan:

Absolutely. In your earlier discussion with Mr. Smith, you hit upon that, and he talked about how these federal cases are all very fact specific and fact sensitive. That's absolutely right. They don't apply universally. It's depends on which tribe, which state. It depends on which resource. You can't just say, we're going to apply federal Indian law in Maine, and that's simple. It's far from that. It's much, much more complicated. So it would create a lot of litigation.

Rep Cardone:

Okay. I'm looking at your list of the coalition members, your client coalition members. It looks to me like most of them are from Northern Penobscot, Piscataquis, and Washington Counties. Are you in a position to comment what the uncertainty could do or would do to the economic development viability of these areas?

Matt Manahan:

Well, I mean, I'm not an economist, but what I can tell you is that in 1980 when there was so much uncertainty about the tribes claims, banks stopped writing loans on land. They wouldn't do it anymore because they said we don't know whether these claims, whether the tribes might take this land away basically. So there was so much economic uncertainty that the state felt it had to resolve these claims. It couldn't go to litigation, frankly, because it had to resolve the claims sooner rather than later.

That's the kind of thing we're facing here, where my clients in Northern Maine, but all of the state. Everybody is looking for investment. Everybody's looking for certainty. What companies look for when they invest in towns is, it's not necessarily is the law too strict? Is it too stringent? It's more what is the law? Do I know what it is? Can I rely on it? And therefore, can I make an investment and know what I'm getting into? What this would do is open up so much uncertainty that a company looking to maybe invest in Millinocket might say, I don't know what I might be subject to. So I think it would create serious problems with respect to economic investment.

Rep Cardone:

Looking at, I know three mills, Lincoln, East Millinocket, and Millinocket, three paper mills have closed. In a way, I suppose that's good for the health of the river, but I also know that those towns are looking for re-investment, economic development. I'm concerned about the lack of certainty in what a potential investor would be facing in terms of regulation.

Matt Manahan:

That's our concern. It would be, as I say, decades of, I think, litigation to try to figure that out. During those decades, companies looking to invest in the state would say we're going to wait and see how it gets resolved, if it ever does get resolved.

Rep Cardone:

Thank you.

Chair Bailey:

Thank you. So are you aware of any other states where the tribes have their sovereignty, that there's been any effect on economic development?

Matt Manahan:

Well, I think you have to understand that in those states, each of those states has had litigation that they've gone through. We..you're comparing apples and oranges, because in those states, the states and the tribes for the last 200 years have tried to resolve and litigate. That's the type of litigation that Mr. Smith was talking about. So in Maine now, we've had 40 years under this law, the Settlement Act. So what would happen here now is, if we did this, we're saying, let's bring that federal law in here. But it doesn't apply directly. You can't apply it to Maine because of the unique circumstances of those tribes.

Chair Bailey:

So you're saying Maine Tribes should never be restored their sovereignty?

Matt Manahan:

I'm not saying that.

Chair Bailey:

Do you believe that the Maine Tribes should be restored their sovereignty?

Matt Manahan:

The tribes have sovereignty, alright? They are sovereign in the sense that they can control their internal tribal matters. They have the authority of the Maine municipality under the Settlement Act. The question of what is sovereignty, if by that you mean they should not be subject to regulation by State of Maine, or the land and natural resources should not be subject to regulation by the State of Maine, I do not personally believe that they should be able to regulate independent of the State of Maine. That's correct. That was a fundamental premise of the state's position in the negotiations in 1980.

Chair Bailey:

Thank you. Senator Bellows.

Sen Bellows:

So how should we adopt these acts? What is to stop your clients from reviewing the regulations and the statutes that Penobscot Nation, for example, has on their books and then complying in terms of any externality that then touches on tribal lands with that? Like how does that differ from... you know, I represent 11 different towns and some of those towns have concurrent or share water bodies that cross those towns and have different ordinances with regards to discharge or land use. And yet those towns are able to... There's inter-governmental relationships among municipalities just as there might be between the town of Millinocket, hypothetically, and Penobscot Nation. So what I hear you saying is that it has to be frozen in time as it was in 1980, but aren't the laws changing every year? And don't those intergovernmental relationships evolve over time in lots of different ways? What makes us different is it that Penobscot Nation keeps all their statutes locked up tight in a cabinet and no one can look at them and understand what they mean?

Mr. Manahan:

So I'm not saying that it should be frozen in time. The changes are appropriate, may be appropriate. What I'm seeing is that the tribes in adopting... That we wouldn't know whether the tribes would be regulating non-tribal members, because there'd be going through a process to do that either by acquisition of tribal trust lands under this law or potentially, the First Circuit could reverse the decision... The Tribes have asked for re-hearing in the First Circuit about whether the Tribe's reservation includes the Penobscot River. The tribes say that it does. The state of Maine says that it doesn't. If the First Circuit , en banc, decides that it does, the reservation would then be the Penobscot River and they could control and regulate the whole

river. We don't know that. It's uncertain. And the tribes don't have to listen to any non-tribal member in adopting their regulations.

So it's a lack of due process. It's non participation. We wouldn't be allowed to participate or we may not be allowed to participate in the adoption of their regulations. So for all those reasons, it's uncertainty about what regulation would apply. But yet, I mean, fundamentally your point, yes, I am concerned that the tribes may adopt standards, as happened in the Albuquerque case that are a thousand times stricter than the DEP because the tribes don't have a stake in the economic survival of some of the upstream companies and interests of upstream discharges. So yes, it could be unnecessarily restrictive. And again, the state of Maine DEP has extremely stringent environmental regulations, appropriate environmental regulations, and they listen to the input of all the citizens of the state, including the municipalities and companies, and the tribes wouldn't be required to do that.

Chair Bailey:

Representative Talbot Ross.

Rep Talbot Ross:

Thank you, Madam Chair. I see a lot of my colleagues with their hands up based on your last comments. And I guess Senator Bellows did a great job about asking this question, but I'm still not certain. Maybe it's... I just don't know, I'm just surprised at what I'm hearing. And so we'll go to your testimony and that is, you say that the Tribes would have the authority to set water quality standards without considering non-tribal members comments or economic interest. But your answer to Representative DeVeau's question awhile ago was that you haven't, aside from not being on the Task Force, you actually haven't tried... I want to get clarity... You actually haven't tried to engage with the Tribes on this before? So that's number one.

And number two, your evidence, that they would not consider non-tribal comments or economic interest, is based off of this article in which the Penobscot Nation wanted the highest and best degree of wastewater treatment practicable. So you're saying that you haven't engaged with them, but you doubt that they would consider non-tribal comments and economic interests and your proof of that is because they wanted higher quality standards, of which would be more protective and costly than what is currently required by the state of Maine?

Mr. Manahan:

I'm not sure I understand your question. You're asking if we didn't or we should engage with the tribes on adoption of the water quality standards?

Rep Talbot Ross:

I'm sorry. You answered Representative DeVeau's question about whether or not your council members, on behalf of your council members, you've engaged with the Tribes about these issues in the past. You said no, and your answer was, "No, we weren't part of the Task Force." He said, "I didn't ask you about the Task Force." Have you been in any engagement prior to

now with them about these issues? Because your testimony says that you're against it because they wouldn't consider your input.

Mr. Manahan:

I'm not understanding why we would engage with the Tribes when they adapt water quality standards that don't apply to us. What you're suggesting is that we should go to the Tribes and comment on their water quality standards, but the Settlement Act is clear right now that those water quality standards do not apply to us. What I'm suggesting is we'd be happy to work with the tribes and the state to amend the Settlement Act in a reasonable way to suggest amendments that might work for everyone, but it wouldn't make sense for us, and frankly the Tribes have adopted water quality standards using their own systems. We have not been invited and nor would we have a reason to participate in those because they don't apply to our members right now.

Rep Talbot Ross:

But your testimony isn't about now. Your testimony is, if the Tribes were to have this authority. You're saying that you object to this, because if the Tribes had the authority, you're implying here that they would not consider your input.

Mr. Manahan:

What I'm saying is-

Rep Talbot Ross:

That's what you've said.

Mr. Manahan:

No, I didn't. I didn't say that. If I can correct you. They would not be required to consider our input.

Rep Talbot Ross:

They would not be required.

Mr. Manahan:

They would not be required to. That's a fundamental difference. Maybe they would, but we don't know that they would, and that's different than the state. We're regulated by the state of Maine.

Rep Talbot Ross:

Have you asked? We don't know if they would. Have you asked?

Mr. Manahan:

Well, what we would need is something in the law that requires them to consider input.

Rep Talbot Ross:

No, I'm not asking... I'm just asking one simple question.

Mr. Manahan:

No.

Rep Talbot Ross:

Have you asked?

Mr. Manahan:

No. And there would be no point in asking, because if they say that they would consider our input, we would need that in the law.

Rep Talbot Ross:

Why would you need that in the law?

Mr. Manahan:

Just like it's in the law for the DEP. The laws for the DEP say they shall consider our input in adopting their rules. That's the whole point we're making an economic investment earlier is in order to have certainty, you need to have laws and rules that protect the regulated community.

Rep Talbot Ross:

But for the record, do you know, have you asked if they would not consider? Do you know that they would not consider, as a fact?

Mr. Manahan:

No. I do not know that.

Rep Talbot Ross:

Because your testimony says that you're in opposition to it because here it is, because you're saying in writing that they would not.

Mr. Manahan:

That they would not be required to is what I said in my testimony.

Rep Talbot Ross:

Thank you very much for making it really clear about your position.

Chair Bailey:

Senator Carson.

Sen. Carson:

Thank you, Mr. Chair. I have a number of questions, but I would like to help clarify the situation that we're in at this moment and I may be able to.

Mr. Manahan,, you're aware, I believe that during the first regular session of the 129th, the Environment and Natural Resources Committee did a lot of work on the question of whether or not to set a sustenance fishing rights, health protective standards. Is that correct?

Mr. Manahan:

Yes. I'm aware of that.

Sen. Carson:

Was this coalition in existence at that time?

Mr. Manahan:

Yes.

Sen. Carson:

It was?

Mr. Manahan:

Yes.

Sen. Carson:

Did you represent them?

Mr. Manahan:

Yes.

Sen. Carson:

Did you testify before our committee?

Mr. Manahan:

No.

Sen. Carson:

Do you know whether we heard testimony from East Millinocket, Millinocket and some of the other economic interests from the Millinocket, the Katahdin region on the question of sustenance fishing, water quality standards and consumption standards, that would protect the health of members of tribal and others who do a lot of fishing? Are you aware of that?

Mr. Manahan:

I don't know the answer to that question, but I will tell you that we supported the DEP's and the state's position on that. We thought that that was a reasonable approach to ...[crosstalk]..Let me just say Senator Carson, in order to reach basically an accommodation or an understanding, a settlement with the tribes on those issues, the tribes had sued the state of Maine saying that

their sustenance fishing standards was not protected adequately by state water quality standards. And as a result of that litigation, the Mills administration proposed essentially a stricter water quality standards in order to protect sustenance fishing and to change as you know, to change the designated use essentially for sustenance fishing. And that was a compromise, which I thought made sense.

Sen. Carson:

Are you aware of the work that Commissioner Jerry Reed, John Banks and others representing interested parties did in order to arrive at the legislation that we ultimately enacted?

Mr. Manahan:

I'm not aware of that. I'm sure they must have-

Sen. Carson:

Well, that would suggest that you cannot stand here before us and say that the Penobscot Tribe or any other Native American tribe would be so unreasonable as to force a position that is going to cost millions of dollars just to protect the health of the Native American tribes. Isn't that correct?

Mr. Manahan:

Isn't what correct? That I'm not in a position to stand here and tell you that? I wasn't involved in those discussions right-

Sen. Carson:

But your testimony is that they could and perhaps would demand water quality standards in Maine that would cost quote, millions of dollars if they had separate jurisdiction, when the evidence in their negotiations with the Mills administration and Commissioner Jerry Reed was, they worked hard to arrive at a standard that not only worked to protect the Native American Tribal health and others who do a lot of fishing, but all downstream communities while not crippling industry or the ability of industry or a municipality like Millinocket to invite new industry.

I apologize for the compound question, but I'm finding your comments to scare the Committee not to do anything here because you fear the Tribes will be unreasonable in their determination to protect the health and wellbeing of their own citizens.

Mr. Manahan:

Senator Carson, I'm just stating the facts. The evidence as you just referred to, the evidence is that the tribes, the Penobscot Nation have sought "treatment as a state" authority, which would allow them to regulate discharges of the entire river, to allow them to acquire the DEP to impose those standards. The evidence is that the standards that the Tribes have adopted, in some respects are stricter than the DEP standards, would set two different layers of regulation. The evidence is that the Tribes have not considered or have not solicited, in adopting their

standards, any other input from non-tribal members. So I can't tell you what they would or wouldn't do, as I responded earlier, but I can tell you they are not required to do that. That's all I'm saying.

Sen. Carson:

You can't tell us what they would or wouldn't do, but the evidence which you have not contradicted in the question that I asked you was-

Mr. Manahan:

I have contradicted it.

Sen. Carson:

I'm sorry. I have just one final question. Do you have any evidence that in the setting of the sustenance fishing rights standard designed to protect the health of Native American Tribal members and others who eat a lot of fish, involve the Tribes asking for unreasonable water quality standards costing millions of dollars? Yes or no?

Mr. Manahan:

Yes. The tribes did ask for unreasonable fish tissue standards initially and in fact the EPA standard that they were going to propose was much more stringent that was ultimately approved by in settlement with Commissioner Reid and the Tribes. That standard is a much more reasonable standard than the Tribes had initially proposed. So yes, I think they would try to propose standards that are not reasonable.

Sen. Carson:

I have no further questions at this time, Madam Chair.

Chair Bailey:

Thank you Senator Carson. Representative DeVeau.

Rep. DeVeau:

Thank you Madam Chair. Touching on Senator Carson's questions to you. You kept repeating that, yes, they have tried to do this, in talking about enforcing higher standards. How many times?

Mr. Manahan:

The tribes have applied... Well, the tribes have water quality standards right now. They've applied for treatment as a state authority from the EPA.

Rep. DeVeau:

That's not what I asked.

Mr. Manahan:

I don't know how many times. Mr. Banks could better answer that question than I could. Four times. I'm not sure. [crosstalk].

Rep. DeVeau:

Out of 40 years.

Mr. Manahan:

Well, they only need it once. They only need standard authority one time to be able to regulate other discharges and they haven't gotten full treatment state authority yet because they're subject to state's regulation. This bill would allow them to get treatment of state authority.

Rep. DeVeau:

Again, going back to the fact that you've not consulted with the Tribes, you're coming in here, again, like Senator Carson said, basically fear-mongering that, oh my gosh, four times in the past 40 years, the Tribes actually tried to make water cleaner than what the state is made for a standard because you're representing organizations that may or may not, because you haven't consulted with them either, lose economically. Is that true?

Mr. Manahan:

No, it's not true.

Rep. DeVeau:

I'm sorry. That's my impression of that again. [crosstalk].

Rep Cardone:

[inaudible].

Chair Bailey:

Point of order.

Rep Cardone:

This is a public hearing. This is not a debate. This is getting to argumentative issues that ought to be saved for a work session. We were instructed, asked to be treating all people who are testifying politely and in a dignified manner and I would ask that the chair enforce that request.

Chair Bailey:

Okay. I didn't hear anything that was inappropriate. They were difficult questions, but if I hear anything inappropriate-

Mr. Manahan:

Madam Chair, let me just be clear. I'm not trying to fear monger and if that's what's being suggested, I think it is inappropriate. I'm just trying to state the facts from my clients' perspective. And if members of the committee think that I'm fear-mongering, A, I apologize for

that. I'm not trying to do that. I'm just trying to state the facts. But B, I would ask that you point out exactly how I'm fear-mongering. I'm really just trying to represent my clients here.

Chair Bailey:

I don't think we need to go down that path. Do you have another question Representative DeVeau?

Rep. DeVeau:

I just have more of a statement than a question. I would definitely invite you to the work session, so that you can actually come in with possibly some facts to back this up. Not only that, but to be in consultation with us and the Tribes to be able to make a factual decision on what's going to happen from this point forward. The fact that there's been lack of consultation in here, we've got a wide open door when it comes to a work session. I would definitely invite you to come with those interests from your representatives.

Mr. Manahan:

Thank you. I'll try to attend.

Chair Bailey:

Thank you. Representative Harnett, you are next.

Rep Harnett:

Thank you Madam Chair. Thank you, Mr. Manahan. I was struck by something you said when you were talking about sovereignty and the Tribes and I think I am quoting you accurately. You said, you recognize they have sovereignty, they have the same sovereignty as municipalities in the state of Maine. You said something to that effect. Correct?

Mr. Manahan:

They have sovereignty over internal tribal matters as well as as a governmental, treated like a municipality, under the Settlement Act.

Rep Harnett:

I served as the mayor of the city of Gardiner for six years. We were never treated as a sovereign. We were never treated by the state as a sovereign, we 're treated as a municipality.

There are 560 tribes, at least 560 tribes in the United States that operate under a completely different system with a level of sovereignty that is recognized by state and federal government. Are you suggesting that the sovereignty of a municipality equates to the sovereignty that is recognized in those 560 tribes throughout the United States?

Mr. Manahan:

Well, not necessarily. First off, let's just be clear. Sovereignty is a term that's thrown around and means a lot of different things, which is why when I talk about municipal sovereignty, that is a

type of sovereignty because under Maine's constitution, the home rule authority is an extremely valuable part of our governing doctrine in this state. Home rule authority that means that unless the state says you can't do something, municipalities can basically do whatever they want to do. That's true on the federal tribal level as well. Unless the federal government says tribes can't do something, they can basically do what they want to do, but the federal government does strictly regulate all those tribes that you just talked about.

And so in that sense, they're not sovereign any more than the Maine tribes are sovereign. It's just a different entity that regulates certain aspects. Frankly, in some respects the Maine tribes are more sovereign because the Settlement Act makes very clear that they can completely regulate their own internal tribal matters without any regulation from the state of Maine. And that's clear in the Settlement Act.

Rep Harnett:

I understand that. And I understand home rule and the state can take away home rule (snaps), like that.

Mr. Manahan:

Sure. And the-

Rep Harnett:

The 560 tribes in the rest of the country, the level of sovereignty that is recognized by the states in which they coexist as equals, not as up here and down there, as equal forms of government is immensely different than what you're calling the sovereignty of municipalities in Maine.

Mr. Manahan:

Okay. Well, I appreciate your comment and our basic point, without getting into what sovereignty means or what it should mean, our basic point is we think the state of Maine should regulate lands and natural resources throughout the state of Maine and that it shouldn't give up its ability to regulate uncertain areas that might in the future be acquired by the tribes and trust, which this will do.

Rep Harnett:

You've made that clear and I understand that.

Mr. Manahan:

Okay.

Rep Harnett:

It's was the next step that troubled me. Thank you.

Chair Bailey:

Representative Evangelos.

Rep. Evangelos:

Thank you Madam Chair. Two brief questions, sir. I heard you say that Maine's environmental standards have resulted in improved condition of the Penobscot River. And wouldn't you agree that the bankruptcy of Lincoln Pulp and Paper and the closing of the two mills North of that were contributing factors?

Mr. Manahan:

Well, I think you have to balance. First off, Lincoln Pulp and Paper complied with its DEP permits, the state has made standards more strict over the years. You know, I think we need to balance our economy and our environment. And short answer is, I think even with the Lincoln Pulp and Paper mill in existence today, complying with the DEP environmental laws, the water quality of the Penobscot River would still be vigorously protected.

Rep. Evangelos:

But closing three paper mills certainly would be a contributing factor. Secondly, in a answer to Representative DeVeau, you said that in relation to the lands, you said that that land had already been transferred to the state at some point in our history. [crosstalk] So I wanted to know what were the circumstances of that transfer?

Mr. Manahan:

Well, so this gets into the whole genesis of the Settlement Act. Basically the Settlement Act and I'm not going to... It would take a long time. There are law school courses that could cover this, but the short answer is, from even before 1820 Massachusetts, but after 1820, the state did exercise dominion or control over tribal lands. Some of those lands were taken. In some ways that was wrong, obviously. There was a lot of wrongs that went on. And what happened was, in 1980, is the party... Prior to that, 1976 or whatever it was, the Tribes, the Passamaquoddy Tribe, sued the state of Maine and said, "All that land that you guys took from us, be it ex-dominion or control or actually taking it, that you violated the Indian Nonintercourse Act of 1790." And the judge said, that they stated a claim. It wasn't resolved but the circumstances there were such that that land had been transferred effectively, but that if the Tribes had won that lawsuit, it would have had to go back to the Tribes, in theory anyway, that would have been what would theoretically happen.

Mr. Manahan:

But that's what the Settlement Act resolved.

Rep. Evangelos:

I understand. Thank you for acknowledging that prior to 1980, in the 19th century and later, that the native Tribes lands were taken, were effectively stolen.

Mr. Manahan:

Well..well...

Rep. Evangelos:

And that's really at the heart of part of what we're talking about here today is redressing these grievances and redressing the circumstances that led to a Settlement Act that, as Representative Harnett has pointed out, only conferred a municipal sovereign status onto our nations, where 560 other tribes have it a different way across the country. But anyways, you answered what I was getting at in reference to Senator DeVeau's question and I thank you for that.

Chair Bailey:

Representative Babbidge

Rep Babbidge:

I think I'm last. Thank you Madam Chair. Mine are easy in comparison. I've heard a lot. So I think I know where you are and what you are basing your comments on. My question about your coalition is geographically specific. I wondered if the concerns that you represented had mostly to do with river water quality under the sustenance provision or was it also involved with trust lands in that area?

Mr. Manahan:

Well, our coalition is primarily related to issues of regulation of water resources. Particularly the Penobscot and the St Croix, the Meduxnekeag, historically we've dealt with those issues. But over my 30 plus years of practicing as an environmental lawyer, I've dealt with tribal issues having to do with conflicts on regulation of hydropower projects, including trust lands, potential trust land issues involved.

Rep Babbidge:

Okay. Yeah. I'm sure some of those waterways go through trust lands.

Mr. Manahan:

Yes. Correct.

Rep Babbidge:

Can you just help me to understand. The federal government is involved in trust property. Is that right? I don't know how, if you could explain that to me and I'd like to know how difficult is it to acquire, create a new trust land versus, and also dispense of it.

Mr. Manahan:

Well, so yes, the Department of the Interior is the trustee for federal trust lands. They purchase trust lands on behalf of a tribe and they're the trustee for the tribe and federal trust lands. So they are involved and there is a process to take lands into trust. But the short answer is, it's not

that hard. It's pretty easy if the Bureau of Indian Affairs wants to take land into trust for the Tribe, they can do it without too much difficulty.

Under the current Settlement Act, there's certain listed lands that can, under our Settlement Act, lands that are listed that trust lands are restricted to those lands. It can't go outside of that. The amendments that you're looking at, would open up the entire state to trust lands anywhere in the state. So the Department of the Interior could take claims into trust for the Tribes, the Tribes would then be able to regulate those lands or control those lands. They would not be subject to regulation by the state. And that's a fundamental concern for us.

Rep Babbidge:

So my understanding is you're saying if the Tribes had the funds, they could use the Department of Interior to purchase under a trust relationship? What's the advantage for them to do that?

Mr. Manahan:

Well, they could regulate those lands. They become part of their Tribal resources. They could-

Rep Babbidge:

Rather than it being a private purchase that would be under the jurisdiction of whatever municipality they bought it in-

Mr. Manahan:

They may be able to, particularly for trust lands, they may be able to use federal funds to acquire some of those lands. That's certainly a possibility. There are funds available, but again, they'd have to apply for those funds. There's a process they would have to go through. I'm not an expert in that process. You could talk to Mr. Banks and Mr. Smith. I'm sure they know a lot more about that than I do believe me, but the short answer is that it would benefit them to take them into trust because if their fee lands, it would just be like you or me owning the land.

Rep Babbidge:

And is there a specified land use for trust lands?

Mr. Manahan:

Is there specified? It depends on what the trust document says, but the Department of the Interior would allow them to be used for Tribal, whatever the Tribe applied for.

Rep Babbidge:

And is there precedent for the sale of trust lands so that it's no longer in trust for the tribe?

Mr. Manahan:

It has happened. It has happened. It's rare, but it has happened. Yup.

Rep Babbidge:

Okay. Thank you.

Chair Bailey:

Further questions from the committee?