

**Tim Woodcock, Eaton Peabody Attorney for Maine Forest Products Council speaking in opposition to LD 2904: "An Act To Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act" on the first day of public hearings, February 14, 2020.**

*Woodcock served as minority staff counsel on the Senate Select Committee on Indian Affairs and was actively involved in the drafting and enactment of the 1980 Maine Indian Claims Settlement Act.*

**Tim Woodcock:**

I'm Tim Woodcock. I'm a lawyer with Eaton Peabody. I appreciate the opportunity to present views of the Maine Natural or the Maine, excuse me, the Maine Forest Products Council. I've submitted prepared remarks for the Council, and in the interest of time, a lot of what Matt Manahan has covered are the same concerns that the Maine Forest Products Council has. In particular, we know that an aspect of what the Tribes are seeking here would result through this legislation in them having "treatment as a state" status. That would give them the opportunity to come in with an entirely different regulatory regime. I would like to emphasize there is a legal possibility that they could come in with more stringent regulations. Of course, we don't know what they would do, but we do know how things work under the current regime.

Under the current regime, it does promote a lot of cooperation between the Tribes and the state and stakeholders, so we don't know, once people get more power, how they will react in the future with that power, particularly as it goes on into future years. That is a concern. The Maine Forest Products Council, and I should have provided you with a membership list, I'll supplement the record with a membership list. Generally, in many, many areas of the state, members of the Maine Forest Products Council have land that is adjacent to or right nearby Tribal land. Over the years they've worked out cooperative arrangements for things like firefighting or fighting insect infestation. The relationship has been a good relationship for council members over the years, and they very much value that relationship.

I think the council members would have appreciated in this Task Force review a more inclusive process. I think they would've liked the opportunity to offer views. I appreciate the opportunity to do so now, but we think this sweeps much too broadly. This essentially takes the jurisdictional construct of the Maine Implementing Act and repeals it. It replaces it with federal Indian law. If you look at the definition of federal Indian law, it would be nice if there was actually a site you could go to, and that would tell you what federal Indian law is, but there isn't. It's even interesting within the definition of federal

Indian law that there's an exclusion in the definition itself for federal Indian law. What is accepted is Public Law 83-280 states. There are six states that are Public Law 83-280 states. Those states suffered what was called termination legislation, which was in vogue with the federal government in the 1950s.

They have since been restored, but they have diminished rights. I think to generalize, the definition of federal Indian law as I'm seeing it in this statute, to me, is fraught with difficulty and would end up being its own source of litigation. I'd be happy to answer questions about that. The last point which I will raise, which has been made, I think, a number of times today is when the Maine Indian Claims Settlement Act was passed in 1980, it was signed into law by President Jimmy Carter on October 10, 1980. It had a provision in it, Section 61, which has been codified at 25 USC 1725 E1, whereby Congress gave its authority, its permission, for the state legislature to amend the Maine Implementing Act provided it had the approval of the Tribes.

If you pass this legislation as is and a year or two down the road you decide it's not working out or it's created unseen ramifications, the legislature cannot come back and amend that unilaterally. It could only amend it with the approval of the Tribes. If the Tribes say no, you cannot amend it. The only other way you could amend it would be to go to Congress and have Congress override it because under Article 1 Section 8 Clause 3 of the Commerce Clause of the US Constitution, Congress has plenary power over Indian Affairs, so that would be the recourse that you have. The council understands that over the last 40 years there may have been issues that have arisen with the Maine Implementing Act in the Indian Claims Settlement Act would need to be addressed, and they certainly want to hear the Tribe's concerns on that, but they would like to be part of a process whereby focused resolutions in which all people have participated are developed and presented in a true and broad consensus of those people who are interested and affected, so thank you for these remarks.

**Chair, Representative Bailey:**

Thank you. Representative DeVeau?

**Rep. DeVeau:**

Thank you, Madam Chair. One thing, I'm going to make a recommendation first and then a question or two, if I can. First recommendation, obviously several of the comments you made would lead me to ask you to come to the work session, so that you can (as I've been using) consult with the Tribes.

**Tim Woodcock:**

I appreciate that.

**Rep. DeVeau:**

The second question is more direct. The second one is, is you're talking about the fear that the Tribes, which we recognize as quasi-sovereign right now because they're truly not sovereign.

**Tim Woodcock:**

They are sovereign.

**Rep. DeVeau:**

I would beg to differ because as a sovereign nation, outside of work abilities...

**Tim Woodcock:**

They're sovereign.

**Rep. DeVeau:**

They would have the opportunity to be able to do the same thing that the state would. Why wouldn't there be the ability, or why shouldn't there be the ability for the Tribe to say, "No, I don't agree with you," and we have to go to Congress to change it if this were ratified.

**Tim Woodcock:**

Oh, of course. If the law were passed in its current form, and a year or two down the road it created unseen problems, and the legislature decided it should be amended, of course the legislature and the stakeholders in the Tribe could sit down and try and work that out.

**Rep. DeVeau:**

Isn't that what sovereign-to-sovereign would be, or is?

**Tim Woodcock:**

That's an aspect of sovereignty, yes. [crosstalk] But what I'm telling you is that if the Tribes were not to agree [crosstalk] I'm trying to answer your question.

**Chair, Representative Bailey:**

Yeah, Representative DeVeau, let him [crosstalk]

**Tim Woodcock:**

I'm trying to answer your question.

**Rep. DeVeau:**

Okay.

**Tim Woodcock:**

Do you want the answer to the question? If the Tribes were to say no, your only recourse would be to go to Congress. I'm not predicting what the Tribes would do. I'm telling you the potential consequences of finding yourself in a position where you see a problem with the Act as amended and the Tribes will not agree, which could happen because they have that authority to withdraw their approval, your only recourse would be to go to Congress. I'm just trying to give you an idea of that is an aspect of what you're doing.

**Rep. DeVeau:**

Again, wouldn't that be the typical response for sovereign-to-sovereign?

**Tim Woodcock:**

The typical response from sovereign-to-sovereign, they have the ability to negotiate with one another. I would like to make something clear here. These tribes are sovereign. They have a sovereignty that predates this country. It goes back literally 1,000, 10,000 years. They have an Aboriginal sovereignty that has never ever been extinguished, and they are sovereign. The question with every Indian Tribe, and this dates back to frankly well before this country was founded, but as this country took on its own legal form with the Constitution, and then began to interact particularly initially through the federal government primarily with western Tribes, which in those days weren't that far west initially. Actually some of the prominent decisions came out of Georgia in the 1830s. The doctrine that was developed out of the Supreme Court under John Marshall recognized that these Tribes had never lost sovereignty.

The question was what elements of sovereignty had they retained? Essentially the rule began to develop over court decisions that the Tribes possess that sovereignty, which has not either been taken away from them by virtue of treaty or statute, or has been lost by necessary implication, and an example of that would be Tribes don't have the authority to coin money. They don't have the power to declare war on a foreign nation. Congress hasn't taken those powers away from them, but they don't have those powers because they lost them by necessary implication. Penobscot, Passamaquoddy Tribe, the Houlton Band and the Aroostook Band [of Mi'kmaq] , these are Tribes, these are self-organized communities. Their sovereignty dates back to time immemorial. No one

should on this committee should be in any doubt about that. When the Senate Indian Affairs Committee considered the legislation, the Maine Indian Claims Settlement Act, it wrote a very extensive committee report, which I actually provided to you folks because the Task Force didn't provide it to you.

It's something you should see, but it includes a very extensive discussion of Section 6H, which is one of the controversial sections, Section 1725H, that you folks have dealt with, and Section 6E and Section F, but in that committee report, the committee staff wrote that the sovereignty exercise by the tribes under the Maine Indian Claims Settlement Act and the Maine Implementing Act was their inherent reserved sovereignty. To illustrate the point, it cited the case of Wanaka versus Campbell, which actually interestingly enough was an Arizona appellate court case. But the question is not whether these Tribes are sovereign; they are sovereign. The question is how do you define the limits of that sovereignty?

The limits of the sovereignty were defined by a combination of the municipal reference in the Maine Implementing Act and Congress's approval of the municipal reference in the Maine Indian Claims Settlement Act, along with the internal Tribal Affairs matter provision in the Maine Implementing Act. That's how you determine its sovereignty. But they are sovereign. I'm very frustrated. I've heard a lot of testimony here today that the Tribes are not sovereign. They are; it's a legal fact, and the exercising to the extent they have jurisdiction, they are exercising the same source of authority that they exercised before any European set foot on this continent.

**Rep. DeVeau:**

Let me ask you this. Back when the Friendship Treaty was signed and nations were sovereign and flourished throughout the nation, do they still have that same sovereignty now, or is it more of a dictatorship over the Tribes?

**Tim Woodcock:**

Are you talking about Maine?

**Rep. DeVeau:**

Yes.

**Tim Woodcock:**

Or the whole nation?

**Rep. DeVeau:**

We'll just go with Maine.

**Tim Woodcock:**

Well, Tribes of Maine have been through a number of iterations there. Before the Maine Nonintercourse Act, that suits were filed. The state of Maine had a long tradition of claiming essentially complete authority over Tribes to the point where the State of Maine would claim the authority to come in and actually take over Tribal government and run Tribal government. It was a very extensive and pervasive claim of authority. Frankly, one of the things that the Tribes acquired through a series of court decisions was the court decisions, which by the way, never reached the point where there was a final authoritative decision, but the Tribes had won a series of decisions that backed out that strong claim of state authority. One of the things the Tribes secured through the Maine Implementing Act and the Maine Indian Claims Settlement Act is the complete expulsion, the complete surrender by the State of Maine of any claim going forward of the right to run Tribal government as they had done in the past.

**Rep. DeVeau:**

I guess it didn't answer my question.

**Tim Woodcock:**

It's not a dictatorship. The Tribes-

**Rep. DeVeau:**

What would you consider it then if they had full reign of everything that was within their territory in Maine back when the agreement with the first treaty was signed, compared to now? [crosstalk] You have sovereign where they have complete control of everything.

**Tim Woodcock:**

Right.

**Chair, Representative Bailey:**

[crosstalk] Allow him to answer the question.

**Tim Woodcock:**

But there are degrees of sovereignty. One of the interesting things about this country is when this country came together under the Constitution, there were many who believe that you couldn't divide sovereign power. We did divide sovereignty. We created a confederated country where we had a central government of limited powers, and we had states with reserve powers. The states are not existing under a dictatorship. They

don't have the same sovereignty they had before they entered into the Constitution. They have more limited sovereignty. The Indian Tribes throughout the United States, not just Maine, but throughout the United States, do not have the sovereignty that they had before the federal government, or in some cases, the states came in and subordinated them to a degree to state or federal authority.

There are degrees of authority, and if you were to read Cherokee Nation by Justice Marshall, which I would recommend that you read, he talks about this extensively. He cites all kinds of international sources. He gives historical examples of different kinds of sovereignties, all of which he then blends together and worked into the formula that he identified that fit the Indian Tribes in the United States, which was that of domestic dependent sovereigns. That's essentially what he said they were, that they have sovereign power that has never been extinguished. They simply do not have the full range of sovereign power, but that's not a dictatorship.

**Chair, Representative Bailey:**

Representative Cardone.

**Rep. Cardone:**

Thank you. Mr. Woodcock, I realize you're here on behalf of the Maine Forest Products Council, but I want to take advantage of your history with the Indian Land Claims Settlement Act and the Implementation Act, because you're one of the few people I know personally who was to some extent in the room when this was being negotiated. There has been some question and some confusion about Section 1735-B of the Federal Act, which I hope I'm stating this right, the clause that excludes federal law from applying in Maine. I think even our Task Force report said it's unclear how or why this happened. Do you have firsthand knowledge of what went on?

**Tim Woodcock:**

Yes, I do.

**Rep. Cardone:**

Could you tell me what's the evolution of this section? Why is it there?

**Tim Woodcock:**

Yes, and just for the committee's understanding because it wouldn't be obvious otherwise, Representative Cardone is right. I was involved in both the initial review, the hearings and the redrafting of S2829, which was the Senate bill that eventually made its way to President Carter's desk as the Maine Indian Claims Settlement Act. The reason I

had that position was I was a minority staff counsel on the Senate Indian Affairs Committee of the US Senate. Just to put it in further context, following in the next year, in 1980, that was the presidential election year, Ronald Reagan won. For my purposes, the more significant event was the Republicans took the Senate, and I stayed on for another two and a half years in the position of staff director of the Senate Indian Affairs Committee, the Senate Select Committee on Indian Affairs, and during that period of time, had a very deep and an intensive exposure to federal Indian law.

But to get to Representative Cardone's question, so everybody understands we were working on the committee in Washington when the Settlement Agreement was announced by the parties. It was announced by the Joint Tribal Negotiating Committee, which was a very impressive group of people. I've heard testimony today about how these people were not impressive. The paper who are on the Joint Tribal Negotiating Committee were very impressive people, and their chairman, Andy Akins, was a terrifically talented man, and takes second seat to no one. Their attorney was Tom Tureen, who was a Native American Rights Fund lawyer, and who by the way, did not get a contingent fee out of the settlement. That's clear; that's something that we knew. He got no contingent fee out of that. He was on a salary with the Native Americans, Rights Fund.

They came down with the state. John Patterson was the deputy attorney general and Richard Cohen, who was the attorney general, and Governor Brannon and his counsel, David Flanigan. They came down and said, "Here's the settlement. We have the settlement." And they told us, I remember Tom Tureen telling me, "You can't change a word in this settlement because it's an agreement; it's settlement. We've agreed. Stuff we don't like, stuff we like, but we've agreed. It's a compromise. You can't change a word." Congress does have its own authority and responsibilities, but essentially we began to take testimony on this bill. The bill had a provision in it. Originally it was in 6G of the bill, and essentially it said general federal Indian law will not apply in Maine. But it did have a proviso for what it called financial benefits. When Cecil Andrus, who was Under-Secretary of the Interior, came up to the committee, he flagged that as an issue.

He thought that was problematical. The question began to revolve around the room, does that mean every time Congress creates a program, for example, for Indian education or Indian health or environmental issues or whatever it may be, governmental support, that it has to specifically include Maine in order to make sure it applies because general federal Indian law is not going to apply to Maine, and so that sounded like it was not workable. Secretary of the Interior Andrus flagged that for us. We ended up, the parties were all discussing these things because there could not be a settlement unless

everybody agreed. That's the nature of a settlement. We ended up having discussions on this, and at one point the special counsel on our committee, Peter Taylor, raised in a negotiating session, "Well, how about if we reverse it?"

How about if we take that language, because he said to the state, "What are you worried about?" The state said, "Well, we want to regain and retain our jurisdiction, so we have clarity of law in Maine." That was some of the tribes that agreed to. Peter said, "Well, what if you reverse it? What if you say general federal Indian law does apply, except to the extent it would preempt or affect the civil criminal regulatory jurisdiction of the State of Maine?" To the credit of the state, because they didn't have to agree to this and the Tribes were as good as their word, they would have stood with the bill as it was, the state said, "Okay, we'll consider that." Because of that, Section 6G, which is now 6H of the bill or 1725-H of the bill, was revised into its current form where it says general federal Indian law does apply except to the extent it would affect or preempt the civil criminal regulatory jurisdiction of the State of Maine.

The state agreed to that when it didn't have to agree to that. But when that agreement was made, the state needed its own proviso, which was to ensure that Congress, which legislates generally in the area of Indian affairs all the time, did not unwittingly undo the jurisdictional settlement, so they added 16B, which is now 1735-B under Title 25, which essentially says that when Congress legislates in the area of jurisdiction, if it would affect or preempt the jurisdiction of the State of Maine, it will not apply unless Congress says so. That proviso was intended to make sure that Congress knew what it was doing, that it not unwittingly undo the settlement act. That was something everybody knew about. That's what everybody agreed to. There has been discussion that that was not known, that this was legislation that was done in the middle of the night. That's not the way Congress works.

We have to do our work in the daylight. Moreover, this was a settlement, so all the parties had to agree. There isn't a clear record as to how this came into being, I'll grant you that, but that is where it came from, and you can trace it back to the initial concerns raised by Cecil Andrus and the fact that Section 6G as originally introduced is now reversed. It's 180 degrees different as 6H. You can see it right in the bill. This was a matter of so much concern, and this is one of the reasons why I provided you with the Senate reports. This was a matter of so much concern that when the Senate committee sat down to draft up the report language that would go with the bill, there's an extensive discussion of the origins of Tribal power. To get to your point, that's where the citation to Wanaka versus Campbell came in because we wanted to make it clear that even

though the Tribes, it was unique that they were taking on this municipal reference point for their governmental powers.

But we want it to be clear, they were not becoming municipalities. They were Indian Tribes as much as any Tribe was, and the origins of their power came from their ancient time immemorial organization as a community and their consent to be governed as such. That was confirmed. There was also a very extensive discussion of Section 6H and how that worked where it was described as an innovative blend of federal and customary state law. Now, I didn't write that part of the bill. That part of the bill was written by Peter Taylor. I'll just stop for a minute on who Peter Taylor is because he's somebody people should be aware of, particularly as they're talking about this piece of legislation being somehow underhanded.

Peter Taylor was the counsel to the American Indian Policy Review Commission. The American Indian Policy Review Commission was set in motion under the Nixon administration for the purpose of reviewing the whole range of relationships between this vast group of disparate Tribes and the United States and states as well. Literally they were probably 20 volumes that came out of that work, and the work of the American Indian Policy Review Commission has become the foundation stone for the current way in which the federal government reviews its relationship with the Indian Tribes. Peter Taylor, beyond serving on that, was the principle author of the Indian Child Welfare Act. He was the one who prevailed upon Senator Mark Hatfield to make sure that Act included congressional findings, which have proved critical in the implementation of congressional attempt of that Act.

I was talking to John Banks a minute ago, because I remember that Peter went up shortly after the Settlement Act to Indian Island in Old Town and met with John. That's where I first heard of John Banks because Peter came back and he said, "You got to meet this guy, John Banks. He's great," and he is great. But Peter is a terrific person and a very straightforward person. Our bill came out of committee on September 17 of 1980, the whole bill, essentially the law as you have at now under Title 25-1721 came out of our committee, published in the congressional record with the report attached to it. It went over to the house; the house stripped it out and put their bill in, which was essentially the same thing. I've never figured out why they did that, but they did. They came out with their report on September 19, and that went in the congressional record.

The House bill came back to us on September 30, and George Mitchell was president pro-tem of the Senate at the time, and he signed the bill. Then, because he's such a gracious man, he sent a letter over to me with one of the pens they used to sign that bill

to get it sent on its way to the White House and thanked me for the work that I had done even though I was just a lowly staff person. But that was the kind of man George Mitchell was. Nobody was putting anything over on anyone, and any statement that suggests that this was done in the dark of night and people didn't know what was going on, it's simply untrue. I don't think people are necessarily saying things they know to be untrue, but that they become to be believed. But it remains a fact that this bill, essentially the one that is the law of land for the last 40 years from the federal government standpoint, came out of our committee and was a public document from September 17, 1980, including 6H and 16B, until the time Jimmy Carter signed it on October 10.

As far as I know, virtually every member of the Joint Tribal Negotiating Committee and Tom Tureen and the state, Richard Cohen and John Patterson and others went down to the White House for that signing ceremony and all that legislative language was in it. Five years after that, five years after October 10, 1980, the Penobscot Tribe had a celebratory dinner to celebrate the passage of the Maine Indian Claims Settlement Act, and they invited John Patterson-

**Chair, Representative Bailey:**

Mr. Woodcock, is this relevant to the question because I think you answered the question.

**Tim Woodcock:**

It may be. I guess I had been going on until I get interrupted.

**Representative Bailey:**

Consider yourself interrupted.

**Tim Woodcock:**

The question really was that 16B-

**Chair, Representative Bailey:**

Right. [crosstalk] You did answer how it came about.

**Tim Woodcock:**

It's relevant to the sense that I think what prompted the question was that people were suggesting that Tribal members did not know that those provisions were in the bill. They not only knew they were in the bill, five years after the fact, they had a celebratory dinner on the very same act.

**Chair, Representative Bailey:**

Thank you.

**Tim Woodcock:**

These concerns about it being done in the dark of night, these are not coming from people who were there.

**Rep. Cardone:**

A couple more. I just wanted to follow up on a couple of other things that had come up earlier, that there had been some discussion about whether the State of Maine contributed to the settlement. Do you know what the various contributions from the federal and state government work?

**Tim Woodcock:**

Sure. The state took the position that essentially what the state was saying to the federal government is, "Look, you passed the Trade and Intercourse Acts back in 1789," which included in it, by the way, that's a comprehensive spectrum of acts. It had one provision in it that survived to the current day, which is a restraint on alienation. That's what we call the Nonintercourse Act, but essentially the state was saying to the United States, "Well, you passed this law, and if you're now saying it applies, you never enforced it, and so you kind of led us down a primrose path here, and now you're saying 200 years after the fact, 'Oh, you were wrong. These were invalid land transfers.'" The state said, "Well, you should come forward with the monies, but you should give us credit for the fact that the last 175 years you've provided no support to these Tribes," and we have provided support to the Tribes. The United States essentially agreed to credit the State of Maine with the contributions that it had made to support the Tribes in the previous 175 years.

But there was another aspect to it as well. that was because the Tribes were taking on municipal equivalent status, they were going to become eligible for state funding. Everybody understood this. In other words, the state was going to contribute, continue to contribute to the Tribes. In fact, one of the aspects of the settlement that was really problematical was how federal funding would interrelate with state funding because the people who drafted that had not anticipated that. I will tell you here and now that I credit Senator George Mitchell himself personally, having worked through the details of that interrelationship of state and federal funding to make sure that the Tribes didn't essentially end up getting federal funding and state money for the same thing. State

funding tends to come in first. Federal funding tends to come in second, but that's George Mitchell's approval.

**Chair, Representative Bailey:**

Mr. Woodcock, just because we only have a half hour, we have other people.

**Tim Woodcock:**

I hear you.

**Chair, Representative Bailey:**

Can you just... The testimony we heard was that the federal government provided the funds and the state did not pay any money. Can you just verify, is that accurate?

**Tim Woodcock:**

[crosstalk] That's correct. The state paid no money out of pocket.

**Chair, Representative Bailey:**

Thank you.

I have one more question, I'm sorry. We had heard some testimony regarding, and maybe you've already covered this in your Section 1735, but we heard some testimony regarding this jurisdiction and municipal model not being to the Tribes' liking. Did you have any understanding as to where that came from, where that model came from, and whether it was agreed to by both parties?

**Mr. Woodcock:**

Well, the municipal model had been agreed to before I became involved. They brought the Settlement legislation down to us, but of course we had testimony on where it came from. Essentially what the Tribes and the State... The question for the State was, "We don't want to have the very vague and general body of Federal Indian Law become the jurisdictional reference point for us because we don't know where that's going." There is... It's essentially common law made law.

It's fact specific. You heard Kaighn Smith talk about, for example, the Puyallup Tribe and there you have a very specific treaty that governs their fishing rights. Would that decision apply in Maine? Who knows? And you end up litigating those kinds of issues because all the case law in the Indian country is case specific. State didn't want to go there. The Tribes took the position initially, according to Tom Tureen's testimony before our committee, that they didn't want to exceed to that, but later they took the position

that they did want to exceed to it because, in reviewing Federal Indian Law generally they felt that Indian Tribes in the West were placed at a disadvantage vis-a-vis the Federal government and they did not want to be in that position. So they eventually came around on their own hook to concluding that they didn't want general Federal Indian Law to apply to Maine either.

**Chair, Rep Bailey:**

Thank you. Senator Carpenter.

**Chair, Senator Carpenter:**

Thank you, Madam Chair. Mr. Woodcock, I'm sorry I was out for the beginning of your testimony and thank you for the historical perspective. I have two questions, brief questions, I think, because the Chair has indicated we don't have much time.

You gave us, I think, an extraordinary definition of sovereignty. But would you agree with me that the concept of sovereignty is a nullity, is a nullity, if you can't exercise jurisdiction? You finished, you closed your comment about a definition of sovereignty with these words, "...to the extent that they have jurisdiction."

**Mr. Woodcock:**

Yeah.

**Chair, Senator Carpenter:**

So would you agree with me that while, in theory, the sovereignty of the Tribes has never been taken away, the superstructure (for lack of a better term) that was imposed upon them as a part of the Settlement Act severely restricts the jurisdiction that they can exercise? And I'm want to read a quote that was quoted earlier today from then Attorney General Richard Cohen.

It says that, generally speaking, "As a general rule, States have little authority to enforce State laws in Indian lands." It said, "All those State laws are largely unenforceable on State Indian lands. I believe," meaning him, "...such a result would be intolerable." The proposal before you," the one you were just talking about, "...not only avoids such a situation but recovers, for the State, much of the jurisdiction over the existing reservations that it," meaning the State, has lost in recent litigation. Would you agree with that?

**Mr. Woodcock:**

That's true.

**Senator Carpenter:**

Okay.

**Mr. Woodcock:**

Much of the litigation—much of the jurisdiction.

**Senator Carpenter:**

Pardon?

**Mr. Woodcock:**

Much of the jurisdiction. Not all of the jurisdiction.

**Senator Carpenter:**

Okay. So then, that brings me to my second question, which I think is pretty simple also.

Would you agree that the State of Maine, perhaps with having to work with Congress, but we are the primary policy drivers with regard to this and that we can, could if we decide to, restore that jurisdiction? Take apart the superstructure that was put in place by your committee. Can we or can't we? I guess is what, I'm trying to say...

**Mr. Woodcock:**

I think that's a good question. For the most part I'd say you can, but I do see there's an aspect of this proposed legislation that Attorney General Frey addressed earlier and that is this question of whether you can deem that laws that are jurisdictional and not jurisdictional. And because the jurisdictional provisions of the Maine Indian Claims Settlement Act are Federal law. So, I think that's... Do you have authority over that? I think that's an open legal question.

**Chair, Senator Carpenter:**

All right. One last follow up. But would you agree with me that in the routine run of things, if a State wants to change a Settlement relationship with its Tribes, generally speaking, the Congress is going to acquiesce to that?

**Mr. Woodcock:**

You know, it's difficult to generalize it. There are, um... I would say, for example.. I mean Maine's unusual in that it has this prospective congressional consent to amend, and that was in recognition of the fact that everybody understood this relationship is going to change over the years and that it might need to be adjusted. Most Settlement Acts don't

have those provision in them. I would say for example, if the Mashantucket Pequot in the State of Connecticut or the Narragansett in the State of Rhode Island came down to Congress and said, "We all agree we want to change this, we want you to change this." They probably would, provided that it didn't cost them any money.

**Chair, Rep Bailey:**

Representative Evangelos.

Representative Evangelos:

Thank you Madam Chair and thank you Mr. Woodcock. I wasn't actually going to pursue this line of questioning as long as the testimony was restricted to the Forest Products Council, but now that we've opened the door up to the sovereignty discussion, um... I have a memo, actually. Not written just by Richard Cohen, but I have a memo written by you. You wrote a memo to Senator Cohen, and I'm going to quote it.

**Mr. Woodcock:**

Go ahead.

**Representative Evangelos:**

"The municipality concept was adopted because it was believed to be the best device to ensure that the Tribes remained under Maine law and did not take on the substantial attributes of sovereignty, which characterize many of the Tribes in the West. The State believed that it was avoiding the creation of a Nation within a Nation, which Governor Longley had vigorously decried. The best device to ensure that the Tribes remain under Maine law and did not take on the substantial attributes of sovereignty." So, you wrote that memo, correct?

**Mr. Woodcock:**

You know, I don't, I'm not looking at it. When did I do that? Believe it or not, I don't have total recall.

**Representative Evangelos:**

You wrote it in August, 1980.

**Mr. Woodcock:**

I know I did write a very extensive memo in August of 1980, so I'm assuming you're quoting it correctly.

**Representative Evangelos:**

I have actually the footnote reference on it too. So I just want to, in responding to the testimony and questions just delivered by Senator Carpenter, that we have now two pieces of evidence on the record that the behind the scenes negotiations that were going on, on the State side, that were not shared with the Tribes, because I've checked with the Tribes and the Tribes never saw these memos. These were internal memos.

**Mr. Woodcock:**

Uh, uh...)(inaudible)... Cohen...

**Representative Evangelos:**

Let me finish. These were internal memos that the Tribes were not aware of. And it speaks to motive. And that's one reason why we're here today. That when we have a memo that says that they "did not take on the substantial attributes of sovereignty" and it was "the best device." It speaks to the fact that what Representative Harnett was talking about... So, you've answered my question. You did write that memo.

**Mr. Woodcock:**

I'm sure I did. And you're representing that I wrote that memo. I don't have total recall of that memo.

**Representative Evangelos:**

It appeared in the Suffolk University Law School study—

**Mr. Woodcock:**

—I'm familiar with the Suffolk University Review.

**Representative Evangelos:**

And the other thing I wanted to get clarified regarding all of the consultations that were going on, and I understand things were going on in the Spring, Summer, and Fall... But I read the book "Restitution" that was published by Northeastern University, and it's true that once the congressional players found out that Ronald Reagan was way ahead in the polls and he indicated that he was not going to go for any Settlement (and for the Maine Indian Land Claims). He said it was "no deal," and then everything went into a rush job. Isn't that true?

**Mr. Woodcock:**

I would say this—I think people were aware, everybody was aware that there was an upcoming presidential election and I think there was a concern that because of the price tag on the Settlement of 81.5 million dollars (which I think is far and away the largest

Settlement that the United States has gotten into, I'm putting to one side judgment settlement issued by the Indian Claims Commission or the US Court of Claims. That's a different matter) that Ronald Reagan would not approve that and they would not get those kinds of numbers. And the numbers were important to the Tribes because the 54.5 million dollars that was put in the bill was driven by the Tribes wanting 300,000 acres, and they had priced those acres and the price tag for 300,000 acres was 54.5 million dollars. That's where that figure came from.

If that number had been reduced, the potential to create a really substantial Tribal land base would have gone. And the Tribes were also committed to a 27.5 million dollar trust fund split evenly between—or 27 million dollar trust fund between the two Tribes.

So I'll take your point one further. After Ronald Reagan was elected, the Mashantucket Pequot legislation was passed. The Mashantucket Pequot legislation had 900,000 federal dollars in it. He vetoed it. He vetoed it—

**Chair, Rep Bailey:**

Mr. Woodcock. And Representative Evangelos. No, I'm feeling I need to reign everybody in here and I understand that I did allow some questions, but really this is supposed to be focused on natural resources and land use. And I think we've gotten so far ahead.

**Representative Evangelos:**

Just 10 seconds. He opened the door to it, ma'am. I just want to make clear that the urgency to get something done was created by the indication that Reagan wasn't going to honor a Settlement. Just "yes" or "no"?

**Mr. Woodcock:**

That all parties shared that concern. Yes. Everybody shared that concern.

**Chair, Rep Bailey:**

So, representative Cardone, do you have a question about land use and natural resources?

**Representative Cardone:**

I had a followup to what Senator Carpenter had asked about the jurisdiction.

The quote by Attorney General Cohen saying that the State got the jurisdiction back. I had understood that quote to mean, got the jurisdiction back from the Federal

government not took jurisdiction away from the Tribes. Am I misunderstanding that quote?

**Mr. Woodcock:**

I think what... Well, I think what he was saying, and I'm trying to remember the context of that, but I think what he was saying was that the court decisions up to that point had essentially turned parts of Maine into the equivalent of Indian country. So for example, the General Crimes Act which applies throughout Indian country, was passed in the late 1880s, that was now applicable to Maine. So for example, and there was a case, I think it was State vs. Dana, was the one where there was an arson on the Pleasant Point Reservation, the State was prosecuting, and based on the law court decision that ended up being Federal jurisdiction, that ended up having to be Federally prosecuted.

So that's, I think, what he was addressing, was that... Now there was a question that was going along with that and that is (and I think is a natural part of that question) is what is Tribal jurisdiction as well? So I don't think it was just a question of whether the State gets to assert jurisdiction. It was also a question about what were then, and still are, ongoing clashes between the States and Tribes over where Tribal sovereignty stops and State sovereignty begins. Those battles continue to rage out in the West and, frankly, I don't think anybody wanted a part of that.

**Representative Cardone:**

Thank you.

**Chair, Rep Bailey:**

Thank you, for the questions concerning land use.

Senator Carson.

**Senator Carson (Committee on Environment and Natural Resources):**

Thank you Madam chair. I have three brief questions directly related to the Maine Forest Products Council, which I honestly believe can be answered "yes" or "no", if we can persuade Mr. Woodcock to answer them that way.

**Chair, Rep Bailey:**

I would direct Mr. Woodcock to please try and limit your answers.

**Mr. Woodcock:**

I hear you.

**Senator Carson :**

Thank you. Firstly, welcome Mr Woodcock.

**Mr. Woodcock:**

Thank you.

**Senator Carson :**

We were in law school together.

**Mr. Woodcock:**

Yes, we were, and College.

**Senator Carson :**

I understand the thrust of your question to be that with increased Tribal power in the Regulation of Natural Resources Council, there would be greater uncertainty for the Forest Products Council. Is that the thrust of your testimony?

**Mr. Woodcock:**

It is.

**Senator Carson :**

Okay. Second, many Forest Products companies do business in a variety of different States. We used to have a lot of multinationals. We have less in Maine. So there is some inherent uncertainty for any major Forest Products industry in what's going to happen with regard to the regulatory authority in different States. Wouldn't that be accurate?

**Mr. Woodcock:**

Which they deal with on a State by State basis.

**Senator Carson :**

Okay. Finally, isn't a fundamental sovereign right of any governing body (in this case, a Tribal, a Native American Tribe) the police power to protect the health and welfare of its own citizens, so that if a Tribal authority chose to have a stricter water quality standard, that would be a legitimate expression or use of its sovereign powers?

**Mr. Woodcock:**

It's a legitimate expression, but where you have the potential for conflict between competing jurisdictions, the line should be clear.

**Senator Carson :**

And if we had four, pardon the fourth. If we had four Federally recognized Native American Tribes in Maine, we might have four duly enacted separate water quality standards, and the Forest Products industry would simply deal with the Penobscots on theirs and the Passamaquoddys on theirs, and with the State of Maine on ours, where they each apply? Isn't that accurate?

**Mr. Woodcock:**

Well, if that then became the law, they would have no choice.

**Senator Carson :**

Thank you.

**Chair, Rep Bailey:**

Thank you. Representative Hagan. You're all set? Thank you. Representative Harnett.

**Representative Harnett:**

Thank you. At the risk of drawing the ire of the House chair, my colleagues and the audience, I do have a question and it is land use related.

This is a statute that we're talking about. It's a statute that has been on the books for 40 years. It's a unique statute because it also represents a Settlement of multiple parties. If after 40 years, one side to that Settlement feels it is no longer working anymore, say in terms of environmental regulations, why not sit and talk about those things?

We're talking about amending a statute. There are layers, as you've said, you know, there might be some Federal action that needs to be taken, but we amend statutes all the time. We do it every day. And I thank you for your service in Washington. I'm sure you saw a lot of amendments too. When something isn't working, you sit down and revisit it. Would you agree that that's good public policy?

**Mr. Woodcock:**

I would agree. It's not only good public policy, but as I said in my prepared remarks, the council would like to participate in that process. And we think it was, perhaps not deliberate, but was an unfortunate oversight that the Task Force process was not more inclusive.

And so I would say at this point, your point is not only well taken, it's absolutely right. And the council would very much like to participate at the table in the very discussion you're suggesting.

**Representative Harnett:**

But would you agree the council was not at the table when this came together? They were not a signatory to any Settlements?

**Mr. Woodcock:**

Well, it wouldn't have been a signatory. This was a Settlement among three different types of sovereigns.

**Representative Harnett:**

Correct.

**Mr. Woodcock:**

Those were the parties that were at the table. Now obviously the land owners were at the table because they were selling the land and they had to sell the land. So they had a right to participate. But it was only to the extent that the facilitation of a transaction went through.

**Representative Harnett:**

But in the initial discussion, if you're bringing the parties to the original agreement back together to see what's working, what's not working, what challenges there are, what might work better, it makes sense for it to be those original parties. And here we had the sovereigns and we had the State Legislature on this Task Force.

**Mr. Woodcock:**

Yes. And typically in those situations, at least in my experience, when the legislation affects many other interests, the other interests are called in to the table and actually have the kind of discussion you're talking about, not being presented with what is close to a legislative final product, or at least appears to be, and then get an opportunity to participate. They would like to participate. They have no doubt, the council has no doubt the Tribes have real grievances here and real issues and they'd like to work with them on those issues and work with you folks on those issues.

**Representative Harnett:**

Thank you.

**Mr. Woodcock:**

Thank you.

**Chair, Rep Bailey:**

Thank you. Further, questions from the committee? Seeing none, thank you.

**Mr. Woodcock:**

Thank you. I appreciate your patience. Thank you.

**Chair, Rep Bailey:**

Thank you.