

Chief Kirk Francis, Penobscot Nation

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Reaction to Governor Mills' Nomination of Jerry Reid for Commissioner of Maine Department of Environmental Protection

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Sunlight Media:

Thank-you for speaking with us again, Chief Francis.

So, newly sworn in Governor Janet Mills has made efforts to strike a more conciliatory tone in regards to her relationship with the tribes, but in her position prior as Attorney General, she was active in action and rhetoric in opposition to the Tribes, most prominently in the still unsettled court case *Penobscot Nation v. Attorney General Janet Mills*, concerning Penobscot sovereignty in regards to the Penobscot River and sustenance fishing rights, and in her lawsuit against the federal EPA in opposition to stronger water quality protections in tribal sustenance fishing waters in Maine.

Now she has nominated Assistant Attorney General Jerry Reid to head the Department of Environmental Protection. Jerry Reid has been the lead legal council in the case *Penobscot Nation versus Attorney General Mills*. Chief Francis, we would like to hear your concerns and perspective on this appointment to Maine's highest environmental position.

Chief Kirk Francis, Penobscot Nation:

Sure. Obviously given the years of battles over the Penobscot River in the case and Jerry Reid being a central figure in those fights, we have some serious concerns about that appointment. The Maine Department of Environmental Protection and the Penobscot Nation kind of work seamlessly together on water quality sampling, for example, and other issues. We feel like that department can have a huge impact on tribal

territory. And given his views in those cases, specifically around the River Case is, again, concerning for the Tribe when we think about a guy who in oral arguments says the Tribes really weren't Tribes, we just kind of wandered around and didn't have a specific territory, we were never in the river fishing, which is a ridiculous statement, and just overall has questioned the inherent authority of the Tribe, has fought tribal sovereignty, a whole host of things. And currently in the fight against the EPA and the water quality standard issue is saying that there's no such thing as Indian territory.

So I don't know how we get a unique and distinct protection from a department when its head has those types of views. So, we're going to try to vet those things out and see where he stands on things like re-classification of Maine waters, that are being proposed for the benefit of the Penobscot River, and those types of issues, initially to see where he is in his new role, which Janet Mills and others including him have said these will be different roles for us and we can have different approaches and those things. So we'll have to see substantively how that works out.

Sunlight Media:

And how do you foresee that happening? Are you formally or informally making overtures to recommend someone different, or how are you vetting, as you said, and exploring how he might be on these issues? And then after hearing those issues, are you prepared to have an opposition or some sort of suggestion...?

Chief Kirk Francis:

Yeah, so, two things really going on right now is we're starting to talk to members of the Natural Resource Committee that will be doing the appointment for that position (note: the final vote goes to the full Senate) and also having our department head at Natural Resources reach out to them to get their formal position on these issues. And it's not just our department here, but in conjunction with our friends and allies, NRCM for example and other groups that are also wondering where he'll be on some of these things. So, it's our hope that it's a new day for him and a new

point of view and a new responsibility that understands the magnitude, or the diversity of the people that he's going to represent in this decision-making in that position. Same thing with the Governor. I think these are new roles with much different responsibilities.

Sunlight Media: Anything else more that you'd like to say on that appointment?

Chief Kirk Francis:

Just that, again, I think that there's a body of work over recent years that has to concern the Tribe, and environmental groups, quite frankly, when we look at a clean water act application that's denied on different points, but you're still fighting that agency to make sure that you can lessen those standards. He will probably say he's out of that case now, but that's been the body of work. So I think overall we will formally file our concerns with the committee so they can be vetted during the approval processor, and also directly communicate with them.

Case Updates:

Sunlight Media:

We can come back if you have more thoughts on that, but if you can briefly give us the status of the two cases we've referred to here - the *Penobscot Nation v Mills* and the EPA case where the state is suing the EPA. We know there's been some changes there. Do you expect changes with those cases under the new leadership, as you said, Mills saying that she wishes to take a different tact? Also, was Reid the lead in the EPA suit as well?

Chief Kirk Francis:

Yes. Yeah. And so, *Penobscot Nation v. Mills* case is in the First Circuit waiting for a decision on *en banc* review. The Tribe has hired an appellate firm to fight that case at this level, because we all know what the next step is and hopefully, the First Circuit, who's had this request for over a year

now, I hope that's a good sign. So it just sits there, waiting for all the judges to decide if they're going to re-look at it. We think we've made good arguments to do that and we haven't, there's no regular communication process with the First Circuit. It just sits there until they make their decision. So, we're hoping that'll happen soon.

Sunlight Media: And again, the *en banc* review, they're supposed to be looking at whether Federal Indian Law was applied appropriately in this case?

Chief Kirk Francis: So, they look at several different things. Federal Indian Law, whether ambiguity sides with the Tribe under the Canons of Construction, also court precedence... So they'll look at things in the Circuit Court that maybe their decision conflicts with, or Supreme Court decisions that it conflicts with, which is an automatic Supreme Court review if things are in conflict with how the Supreme Court has ruled on cases. Like the Pacific fisheries case, for example and others. So we think we have really good arguments that puts the First Circuit in a position to really have to spend some time analyzing their decision, with such a strong dissent in that decision, ([link to First Circuit Court of Appeals 2017 decision against Tribe; dissenting opinion starts page 30:](http://media.ca1.uscourts.gov/pdf.opinions/16-1424P-01A.pdf) <http://media.ca1.uscourts.gov/pdf.opinions/16-1424P-01A.pdf>) and also with so much case history out there. The last thing the Circuit's going to want is a ripe case for a Supreme Court review. So, we're hopeful that they will review it and if they don't, we're going to request that review to the Supreme Court.

Sunlight Media:

And on the EPA case, if you can reiterate Reid's position as lead council and the involvement of Mills... Any hopes that that will change now under new leadership? What is the status there?

Chief Kirk Francis:

So the status of the EPA case is...To back up ... Maine sued the EPA. The Tribe wasn't a party to that case originally. It was a straight Clean Water Act application, where the EPA came back and said there aren't stringent enough water quality standards to meet the subsistence and sustenance-based rights of the Tribe within Indian territory and determined that sustenance fishing was a determining factor under the Clean Water Act. This has only happened one or two times in the history of Clean Water Act reviews. And so, a substantial win for the Tribe, I would say, for the River and our water. And the standards still wouldn't meet the tribal criteria, but they were a significant increase. As we sit here, there are federal standards in Maine waters now, through a rule issued by the EPA after Maine refused to adjust their water quality standards. So even though the case is still going on, those standards will stay in place until that's resolved. So we're happy about that.

As the Trump administration came into office, the state of Maine petitioned the administration to re-look at their position on this. We worked with Department of Interior and the Office of Management Budget, where the state of Maine also went to to try to get them to write a negative fiscal note or whatever it was to EPA to try to knock it down, which they didn't do. We met with them and made a really compelling case to the ONB and I think they saw that there was no negative side to this.

So DOI again reiterated their support for the Tribe up to EPA. EPA did look at it for, I think, 90 days they had to look at it, where we met with them several times. At the end of that review, they decided nothing should change. And so the case moved forward. There were multiple attempts by the state to get the EPA to back off. EPA implemented the standards and currently the EPA, back in May, asked for a meeting with us where the Department of Interior reissued a memo that we had gotten from the solicitor two years earlier, but with adjusted language in it. It didn't seem on its face to change much for the Penobscot Nation and Passamaquoddy Tribe, but had significant impacts on Houlton Band of Maliseet and the Aroostook Band of MicMacs . It basically said, they had no fishing rights.

So that memo moved up to EPA, and EPA said that they were going to

pause the case. They asked the court to pause the case for 30 days because they were entering into productive settlement talks with the state of Maine. The state of Maine refused to allow the Tribes at the table for those negotiations. So, basically they would negotiate and then we would have a call with our federal partners on the following Friday. So we had really no say in that negotiation process. Thankfully and probably predictably, there was no agreement. And after 30 days, the EPA asked the court to remand it back to the agency, which we fought vigorously because they asked for that remand a day before their brief was due.

Sunlight Media: The agency being?

Chief Kirk Francis:

EPA. And it's my firm belief that Jerry Reid and Janet Mills, and all of them, were involved in those negotiations, those telephone calls for weeks. I believe we weren't allowed on those calls so we wouldn't know where the line in the sand was in the middle of a political campaign.

But at the end of the day, nothing happened from those negotiations, except maybe the state requested the agency to remand it back and look at the rule again. So as we sit here. The court case is on hold. The EPA has the rule back in their agency. They'll have to go through a whole host of public process again if they're going to make substantive changes.

The court, against Maine's request, left the standards in place. Jerry Reid argued that this would be harmful to Maine and that he wanted them lifted immediately while they were considering this. The court said, no changes without notifying the court and you have to report back by December of this year. So, that's where we stand with that case right now.

And again, it's a concerning position. One, not to recognize Indian territory in this state. It's a lot more than just about water quality. It's about not recognizing a unique and distinct people within the state of Maine, and so that's concerning.

Sunlight Media:

So just to understand where it is, a little more specifically, those higher

water quality standards that the EPA initially recommended are what's on the books and are supposed to be adhered to, and the state needs to be reporting back in December that they are adhering to that. But the EPA, at the same time, is re-examining them under the recommendation, or taking into account the state's concerns? Or they're supposed to be looking at it again and then making another ruling about what standards are supposed to be in place?

Chief Kirk Francis:

Right. So, the EPA, it's unclear to me what they're going to do. They just say they want to look at it again. I don't know if they felt like they had some litigation risk or if they're pandering to a request from the state of Maine, I don't really know that. But I know that it's concerning to have it there under this administration and this EPA. But at the same time, we feel like we have a pretty good team that can stay in touch at the federal level and work with our friends at the Department of Interior to educate the EPA on fishing rights and why that's important.

The EPA has said, over and over, under this administration they don't interpret treaties, they don't interpret tribal rights, they just look at environmental protections. So the people that do that is our most important trustee at the Department of Interior, who has Indian Affairs under that department. So we're going to hope to work with all of them to get a favorable outcome. So that's kind of where it sits.

The state of Maine can't make changes. The court said if the EPA is going to make changes, that they need to report to the court, and they need to report back to the court by December anyway. That's all the court allowed them for time.

The court can rule in December, you've had enough time, where are you on this? It can disallow what they're trying to do, or it can allow them (the EPA) to move forward with a public process to change the standards again. So it's our hope that that won't happen, but there will still be some legal recourse there. And what's odd about that is the EPA and the tribes are on the same side in that case. So it was kind of weird to be at an oral argument where they're sitting at the same table but taking different

positions, our attorneys. But they understand that, and so we'll see how that all goes.

Thoughts on Governor Mills at Start of Term:

Sunlight Media: In closing, the all-encompassing question. What are your hopes and concerns for the Mills' governorship, in relation to tribal issues going forward and hopes for tribal state relations in general?

Chief Kirk Francis:

My hopes and concerns are the same as they've always been. I think we've always been a Tribe that's very passionate about our issues, but also very reasonable. I think that we did a very good job through the ambassador of the Tribe and other folks during the campaigns this year of making tribal issues a central issue within those campaigns. And that's really historic and it's credit to a lot of people. So I think the needle got moved a little bit with her and her position. I think she understands more broadly now how important these issues are, not just to the Tribes, but to a lot of Maine citizens as well.

My hope is that she's true to her word when she says she'll be looking through another lens as governor, and that she's committed to improving this relationship. The only way that that's really going to happen is to overcome a lot of mistrust. I think there's a body of work with her that needs to be overcome. I think the best way that that can happen is to address these territorial issues of the Tribe, you know where our authority is, what the state's concerns are, what concurrently we can work out, get committed to those things. Get us away from litigation and negotiating as sovereigns.

The Tribe's never said that it doesn't have to recognize it's neighbors, right. We're open to those negotiations and those talks as long as we're coming to the table as equals. And I think that that's easy to say you respect sovereignty. It's easy to say I want a better relationship and it's easy to do those things. But when the rubber meets the road on jurisdiction, on Tribal authority, the protection of our cultural traditions,

the protection of our rivers and waters and who gets to manage that, and all of that, that's really where the test will be.

So I hope that she will institute a consultation policy with Tribes. I hope that she will recognize Tribal authority within our territory, and hopefully we can work out a situation where we're getting away from endless litigation and focusing more on building a successful relationship.

I think it's going to take some real action on her part to be able to overcome the mistrust and the things that have happened in the past. Fair or unfair, she was the face of those issues and I think she understands that.

So, I'm hopeful that with the new Attorney General, who's saying some good things, to our many friends in the legislative body at the state level, that we can be productive and make some headway.

We're not going to get it all back overnight, but I think that if there is a step in grade commitment to these issues from her office, I think it'll build trust and hopefully we have a solid four years together working on ... The fact of the matter is she's the governor now and we just can't ignore opportunities to help the Tribe move forward. So, if she's committed to that, fine. If she's not, I mean, we didn't talk to this governor for eight years. We're going to be fine either way. So we're not going to enter those talks or enter those forums without being who we are, and being respected for that.