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TESTIMONY OF MICHAEL KEBEDE, ESQ.

LD 2007 – Ought To Pass

An Act to Advance Self-determination for Wabanaki Nations

Joint Standing Committee on Judiciary

February 26, 2024

Senator Carney, Representative Moonen and distinguished members of the Joint Standing Committee on Judiciary, greetings. My name is Michael Kebede, and I am Policy Counsel for the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our members, I urge you to support LD 2094 because it is necessary to correct a fundamental inequity in Maine's relationship with Wabanaki Nations.

Since the federal Maine Indian Claims Settlement Act ("MICSA") and state Maine Implementing Act ("MIA") were passed in 1980, Maine has treated Wabanaki Nations not as the sovereigns they are, but as municipalities with a legal status akin to that of Bangor, Lewiston, and other Maine towns and cities. This status has meant that as other Indigenous nations have had sovereign-to-sovereign relationships with states with which they share borders, Wabanaki Nations have been treated as less than sovereigns.

This bill would help correct that lopsided relationship. If enacted, this bill would make substantial changes to the Maine Implementing Act (MIA).[1] 30 MRS § 601 *et seq.* These changes come from a painstaking, thorough, and bi-partisan 2020 task force that produced 22 consensus recommendations to help settle the litigious and unfair relationship between the State of Maine and Wabanaki Nations.[2] In the time since, we now also have the benefit of another study showing the benefits of legislation like this: a 2022 Harvard report shows that enhancing

[1] Also known as the Act to Implement the Maine Indian claims Settlement Act.

[2] *See generally*, *Report of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act*, January 2020, available at https://legislature.maine.gov/maine-indian-claims-tf.

Wabanaki sovereignty would generate economic benefits for rural Maine.[3] This would particularly benefit Maine's rural communities. This is one more reason to vote *ought to pass*.

Indigenous Sovereignty

Any discussion of LD 2007 must begin with sovereignty. "Sovereignty is a legal word for an ordinary concept – the authority to self-govern."[4] Indigenous nations operated as self-regulating sovereign governments long before the United States was a country or Maine was a state. The U.S. Constitution recognizes Indian tribes as distinct governments, U.S. Const. art. I, § 8, cl. 3, and "only Congress can abrogate or limit an Indian tribe's sovereignty." *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999). Early in Supreme Court jurisprudence, the Court recognized Indian tribes as "nations" that entered into treaties with the federal government. *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-17 (1831). The Supreme Court continues to acknowledge tribes as separate and independent from states. *See, e.g., Plains Commerce Bank v. Long Family Land & Cattle Co*., 554 U.S. 316, 327 (2008) ("For nearly two centuries now, we have recognized Indian tribes as 'distinct, independent political communities.'") (internal citations omitted).

Over the years, the Supreme Court has recognized "[t]he tradition of Indian sovereignty over the reservation and tribal members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143–44 (1980) (citing *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463, 481–483 (1976)). "[T]his tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." *Id.* (citing, *e.g.*, Indian Financing Act of 1974, 25 U.S.C. § 1451 *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 *et seq.*; the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq*.). The purpose behind the Indian Reorganization Act, for example, was to provide "a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, 73d Cong., 2d Sess., 6 (1934)). Overall, "[a]mbiguities in federal law have been construed generously in order to comport with these traditional notions of

[3] Medford, Amy Besaw, Joseph Kalt, and Jonathan B. Taylor. 2022. "Economic and Social Impacts of Restrictions on the Applicability of Federal Indian Policies to the Wabanaki Nations in Maine", *available at* https://ash.harvard.edu/publications/economic-and-social-impacts-restrictions-applicability-federal-indian-policies.

[4] National Congress of American Indians, Tribal Governance, *available at* http://www.ncai.org/policy-issues/tribal-governance (last viewed on Feb. 22, 2024).

sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe*, 448 U.S. at 144 (citations omitted); *see also id.* (stating "notions of sovereignty that have developed from historical traditions of tribal independence").

Indigenous sovereignty is also good policy. Furthering tribal sovereignty "enables tribes to be self-determining governments, with ability to tailor their laws to suit their unique cultures and traditions and to govern their lands without external interference."[5] Other states' experiences have "shown that the exercise and recognition of tribal sovereignty is beneficial to tribal-state relations and to all state citizens because it allows states and tribes to operate in an atmosphere of mutual respect and thereby to cooperate in mutually beneficial ways."[6]

The Bill Ought to Pass, Despite Previously Raised Concerns

L.D. 2007 ought to pass. The bill aligns with the nationwide trend toward enhancing tribal sovereignty and arises from a detailed and thorough task-force process.[7] Several concerns, however, have been raised over the years about the recommendations of this bi-partisan taskforce.[8] With respect, the bill ought to pass despite these concerns.

One concern is that the bill's incorporation of "Federal Indian law" could increase the risk of litigation between the state and Wabanaki Nations.[9] Yet, federal statutory, treaty, and common law are the default laws governing almost all of the federally recognized tribes in the country.[10] Federal Indian law incorporates a large body of precedent that can guide the resolution of any disputes that may arise. By contrast, current Maine law imposes a unique state-centered approach that makes disputes more difficult to resolve outside of court, due to the absence of any comparable body of precedent. Adopting Federal Indian law as the framework governing Wabanaki-State relations would provide a broader and more stable foundation for resolving any

[5] Letter from Chief Francis, Chief Sabattis, Chief Peter-Paul, Chief Nicholas, and Chief Dana, Task Force Report (Jan. 2020) at Appendix J.

[6] *Id.*

[7] The trend in Federal law in recent decades has been to enhance tribal sovereignty and self-determination. *See, e.g.*, Report on Federal Laws Enacted After Oct. 10, 1980, 2020 Commission Report Appendix N., *available at* https://www.congress.gov/117/meeting/house/114558/witnesses/HHRG-117-II24-Wstate-FrancisK-20220331-SD007.pdf. L.D. 2007 would extend the protections of these laws to the Tribal Nations. *See* L.D. 2007, Sec. 25-27.

[8] *See, e.g.*, Atty. Gen. Testimony on LD 2094, 129th Legislature (Feb 14, 2020); Governor Testimony on LD 2094, 129th Legislature (Feb. 14, 2020), *both available at* https://www.mainelegislature.org/legis/bills/display_ps.asp?PID=1456&snum=129&paper=&paperId=l&ld=2094.

[9] *See* Atty. Gen. Letter on LD 2094, 129th Legislature, at 2.

[10] National Congress of American Indians, Tribal Nations & the United States: An Introduction, available at http://www.ncai.org/about-tribes (last accessed Feb. 22, 2024).

future disputes. Additionally, this bill would help resolve many of the complaints that have led to litigation between Wabanaki Nations and the State of Maine.

Another set of concerns is that the federal Maine Indian Claims Settlement Act could impose ongoing restrictions on Wabanaki nations despite the clear intent of L.D. 2007.[11] To the extent this is a concern,[12] it provides no reason for setting aside the proposed bill. At a minimum, L.D. 2007 is necessary to move beyond the old framework of the Maine Implementing Act—a framework that has unduly restricted Wabanaki sovereignty for decades. Leaving the existing law in place is a surefire way to prevent any progress. To move forward to a new and better framework, L.D. 2007 ought to pass.

Finally, there is the concern that aligning Wabanaki Nations with the law governing other federally recognized tribes could have negative consequences for Maine's tax revenue, small businesses in the state, and state environmental oversight.[13] Yet Tribal Nations across the country operate under the rules proposed in L.D. 2007, without incident. As to environmental protections, Tribal Nations routinely exercise inherent power to protect the environment.[14] Indeed, there can be no better steward for clean waters than sovereigns that have historically relied on sustenance fishing. By recognizing this authority, L.D. 2007 would "enhance the Tribal Nations' ability to regulate the environments in which they have lived since time immemorial."[15] These concerns provide no reason for the Committee to reject the advancements in L.D. 2007.

Conclusion

The recommendations of the Task Force are a laudable starting place to enhance Wabanaki sovereignty. For at least the past 25 years, the United States, numerous state and local governments, and countries around the world have dedicated themselves to protecting and promoting the rights of Indigenous peoples. This is reflected, for instance, in the signing of the United Nations Declaration on the Rights of Indigenous Peoples by every member of the United Nations (including the United States). This commitment stems from a recognition that many

[11] *See* Atty. Gen. Testimony on LD 2094, 129th Legislature, at 4-6, 9, 18-20.

[12] Skilled experts in Federal Indian law, such as counsel for Wabanaki Nations, would be in the best position to assess this risk. As these perspectives were already included on the task force, it seems reasonable to assume that these risks have already been considered and addressed in the language of L.D. 2007. For example, despite the Attorney General's concern whether the legislative can "deem" that federal law does not affect or the application of federal law not to preempt or affect state law, Atty. Gen. Testimony on LD 2094, 129th Legislature, at 20, the MICSA itself uses the same tool. *See* Pub. L. 96-420, § 4(a)(1).

[13] *See* Atty. Gen. Testimony on LD 2094, 129th Legislature, at 7-11; Governor Testimony on LD 2094, 129th Legislature, at 2.

[14] *See* Issue Paper on Regulation of Natural Resources, 2020 Task Force Report at Appendix L at 5.

[15] *Id.*

Indigenous peoples were historically treated unjustly and unfairly, and that all of us have an obligation and moral duty to promote Indigenous recovery and recognize Indigenous rights. In Alaska, for instance, as recently as 1988, the Alaska Supreme Court held that the Native villages in Alaska are "not self-governing or in any meaningful sense sovereign." *Native Village of Stevens v. Alaska Management & Planning*, 757 P.2d 32, 34 (Alaska 1988). Eleven years later, however, that court reversed itself and held that the Native villages in the State possess the inherent powers of self-government. *John v. Baker*, 982 P.2d 738 (Alaska 1999). Wabanaki Nations are among those whose right to self-government has been eroded; this bill would help end that erosion.

L.D. 2007 will restore some of the rights and powers the Wabanaki Nations enjoyed long before this place was ever called Maine. It would put an end to many of the deliberate harms of 1980 legislation and finally move our federally recognized tribes closer to the same footing as all others. We urge you to vote *ought to pass*.