

TESTIMONY OF ALISON BEYEA, Esq.

**LD 2094 – Ought to Pass**

**An Act To Implement the Recommendations of the Task Force on Changes to the  
Maine Indian Claims Settlement Implementing Act**

Joint Standing Committee on Judiciary

February 19, 2020

Senator Carpenter, Representative Bailey and members of the Joint Standing Committee on Judiciary, good afternoon. My name is Alison Beyea, and I am executive director 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 through advocacy, education, and litigation. It is the general policy of the ACLU to support tribal self-government. *See* ACLU Policy 313. Since the 1970s, ACLU policy has explicitly supported the rights of Native American peoples to tribal self-government, retention of cultural and religious heritage, and a tribal land base and appurtenant natural resources. ACLU Policy 313(a). On behalf of our members, we support of LD 2094, which has the purpose of assuring that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians enjoy the same rights, privileges, and immunities as other federally-recognized Indian tribes across the country.

After centuries of abuse and discrimination against indigenous communities across this country, governments at the state and federal level have recently been reversing course. Recent decades have seen numerous efforts at the federal level to restore and enhance the sovereignty of Indian tribes, as well as efforts at the state level to prohibit discrimination. This proposal is another step in that long journey to justice, and we applaud the work of the task force that has brought it forward. As a matter of basic fairness, Maine’s tribes deserve no less control over their own destiny than those enjoyed by other tribes in other states.

### *Tribal Sovereignty*

Any discussion of LD 2094 must begin with tribal sovereignty. “Sovereignty is a legal word for an ordinary concept – the authority to self-govern.”<sup>1</sup> For long before the United States became a country or Maine became a state, the tribes operated as self-regulating sovereign governments. 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. Fellencher*, 164 F.3d 706, 709 (1st Cir. 1999). Early in Supreme Court jurisprudence, the Court recognized Indian tribes as “nations” who 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

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<sup>1</sup> National Congress of American Indians, Tribal Governance, available at <http://www.ncai.org/policy-issues/tribal-governance> (last viewed on Feb. 18, 2020).

traditional notions of 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”).

Tribal 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.” Letter from Chief Francis, Chief Sabattis, Chief Peter-Paul, Chief Nicholas, and Chief Dana, Task Force Report (Jan. 2020) (hereinafter 2020 Commission Report) at Appendix J. 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.” *Id.*

***The Bill “Ought to Pass,” Despite Recently Raised Concerns***

L.D. 2094 ought to pass. The bill aligns with the nationwide trend toward enhancing tribal sovereignty, and arises out of a detained and thorough task-force process.<sup>2</sup> 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 their indigenous peoples. This is reflected, for instance, in the signing by every member of the United Nations (including the United States) of the United Nations Declaration on the Rights of Indigenous Peoples. This commitment stems from a recognition that many indigenous peoples were treated unjustly and unfairly and that all of us have an obligation and moral duty to promote their recovery and recognize their inherent 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

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<sup>2</sup> 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. L.D. 2094 would extend the protections of these laws to the Tribal Nations. *See* L.D. 2094, § 24.

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). The Tribes in Maine are among those who suffered mightily at the hands of the United States, and in some respects, they still do. The improvements provided by the bill are both reasonable and modest, and not a single one of them is different than the benefits the vast majority of other Tribes already possess.

Several concerns, however, have recently been raised about certain provisions of the bill. *See* Atty. Gen. Testimony (Feb 14, 2020); Governor Testimony (Feb. 14, 2020). 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 the Passamaquoddy Tribe, Penobscot Nation, and Houlton Band of Maliseet (hereinafter “Maine Tribes”). *See* Atty. Gen. Letter at 2. Yet, as described above, the Federal statutory, treaty, and common law is the default law governing the 574 federally recognized tribes in the country.<sup>3</sup> 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. Incorporating Federal law would provide a more solid foundation for resolving any future disputes. By enhancing tribal sovereignty, moreover, passing the bill would help to resolve many of the well-founded complaints that have led to litigation.

Another set of concerns is that the federal Maine Indian Claims Settlement Act could impose ongoing restrictions despite the clear intent of L.D. 2094. *See* Atty. Gen. Testimony at 4-6, 9, 18-20. To the extent this is a concern at all<sup>4</sup>, it provides no reason for

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<sup>3</sup> National Congress of American Indians, *Tribal Nations & the United States: An Introduction*, available at <http://www.ncai.org/about-tribes> (last accessed Feb. 18, 2020).

<sup>4</sup> Skilled experts in Federal Indian law, such as the Maine Tribes and counsel for the tribes, 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. 2094. For example, despite the Attorney General’s concern whether the legislative can “deem” that federal law does not affect or

setting aside the proposed bill. At a minimum, L.D. 2094 is necessary to move beyond the old framework of the Maine Implementing Act—a framework that has unduly restricted tribal 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. 2094 ought to pass.

Finally, there is the concern that aligning Maine Tribes with the law governing other federally recognized tribes could have negative consequences for Maine’s tax revenue, for small businesses in the state, and for state environmental oversight. *See* Atty. Gen. Testimony at 7-11; Governor Testimony at 2. Yet tribes across the country operate under the rules proposed in L.D. 2094, without incident. Plus, businesses operating on tribal lands currently face the handicap of having to pay state and local taxes, on top of any tribal fees; removing that triple taxation would merely level the playing field. As to environmental protections, Tribal Nations routinely exercise inherent power to protect the environment. *See* Issue Paper on Regulation of Natural Resources, 2020 Task Force Report at Appendix L. Indeed, there can be no better steward for clean waters than sovereigns that have historically relied on subsistence fishing. By recognizing this authority, L.D. 2094 would “enhance the Tribal Nations’ ability to regulate the environments in which they have lived since time immemorial.” *Id.* Accordingly, these concerns provide no reason for the Committee to turn its back on the important advancements in L.D. 2094.

***Conclusion***

The recommendations of the Task Force are a laudable starting place to enhance tribal sovereignty for Maine’s tribes. I urge you to not only to vote *ought to pass*, but to remember that your work for Tribal rights –our work as relative newcomers to this region of the world – neither started with this bill, nor ends with it.

Thank you.

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the application of federal law not to preempt or affect state law, Atty. Gen. Testimony at 20, the MICSA itself uses the same tool. *See* Pub. L. 96-420, § 4(a)(1).