

**Testimony of Kirk E. Francis
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Before the House Committee on Natural Resources
Subcommittee on Indigenous Peoples of the United States**

**Hearing on H.R. 6707, to amend the Maine Indian Claims Settlement Act of 1980 to
advance equality for Wabanaki nations, and for other purposes**

March 31, 2022

Thank you for inviting me to testify on H.R. 6707, a bill to amend the Maine Indian Claims Settlement Act of 1980 to advance equality for Wabanaki Nations, and for other purposes. The Penobscot Nation is one of the four federally recognized Wabanaki Nations located within the boundaries of the State of Maine. The Penobscot Nation has approximately 2,400 citizens and over 123,000 acres in land holdings, of which nearly 91,000 acres are held in trust by the United States. Within our land holdings are about 200 islands located within approximately 80 miles of the Penobscot River. Most of our land is undeveloped forestland, and Indian Island is our largest island and contains our seat of government and our largest housing community. We are a non-gaming tribe and rely on the federal government to meet its trust responsibility by providing us with federal funds for certain programs that we then use to leverage additional grant funding and economic development.

Today, I am here to testify in support of H.R. 6707, but before I speak to the language of bill, I think it is important to provide some background.

In the early 1970s, the Passamaquoddy Tribe and the Penobscot Nation requested the federal government, as their trustee, to assert legal claims on their behalf to a large portion of land in Maine. Our claims were based on claims that the tribal nations retained title to such lands because the federal government never approved any treaties or conveyances of tribal land as required by the Indian Non-Intercourse Act. The federal government initiated litigation on behalf of the tribal nations in 1972, and settlement negotiations began after the First Circuit Court of Appeals issued a decision confirming that the Indian Non-Intercourse Act applied to the Passamaquoddy Tribe.¹

In 1980, the State of Maine, the federal government, and the Passamaquoddy Tribe, Penobscot Nation, and Houlton Band of Maliseet Indians negotiated a settlement. The Maine Indian Claims Settlement Act of 1980² (“Settlement Act”) was enacted by Congress and signed into law on October 10, 1980. The corresponding Act to Implement the Maine Indian Claims Settlement³ (“Maine Implementing Act”) become effective upon ratification by the federal government. The Maine Implementing Act was negotiated first, and then the federal Settlement Act was negotiated and approved by Congress.

¹ See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975).

² Pub. L. No. 96-420, 94 Stat. 1785 (Oct. 10, 1980).

³ P.L. 1979, ch. 732.

Broadly speaking, the two settlement acts set forth parameters whereby the Wabanaki Nations are subject to state civil and criminal jurisdiction, but retain their inherent sovereignty not otherwise limited by the settlement acts. Two of the Wabanaki Nations – the Passamaquoddy Tribe and Penobscot Nation – also enjoy powers of municipalities under the Maine Implementing Act.

Over the 40 years since the Settlement Act and Maine Implementing Act have been in place, the Wabanaki Nations and State have been at odds and engaged in litigation over various provisions of these laws. This litigation often involved disagreements about the extent of the limitations placed on the Wabanaki Nations' inherent sovereign authorities by the settlement acts. Often times, the Wabanaki Nations faced limitations on their inherent sovereignty that were never expressly discussed or fully understood during the course of the negotiations. Much of the disagreements between the State and Wabanaki Nations involved what the tribal nations viewed as unintended consequences of the settlement acts because they were not fully understood by the tribal leaders or people in 1980.

An example of these unintended consequences are the implementation of two provisions contained in the federal Settlement Act. The first provision is section 6(h) which states:

Except as otherwise provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

This provision was intended to preclude certain federal laws and regulations enacted before October 1980 from applying within the State of Maine.

The second provision is section 16(b), which states:

The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

This provision was intended to restrict federal laws enacted for the benefit of Indian country after October 1980 from applying within the State, unless the law expressly indicated that it was applicable in Maine.

Together, sections 6(h) and 16(b) of the Settlement Act have the potential to prevent any federal law enacted for the benefit of Indian Country from applying to the tribal nations in Maine if such law at all “affects” Maine law. There is no definition for the term “affects” in the Settlement Act, and the general definition of the term is incredibly broad. The two provisions have resulted in complete uncertainty as to which federal laws intended to benefit Indian Country are applicable to the tribal nations in Maine, and they have resulted in the State being able to prevent application of any federal law by merely asserting that such federal law “affects” Maine law.

Each of the Wabanaki Nations has been negatively impacted by these two provisions, but there are two examples that the Penobscot Nation would like to describe for the Subcommittee Members. First, in 2012, Congress passed amendments to the Robert T. Stafford Disaster Relief and Emergency Assistance Act that would allow federal recognized tribal nations to submit requests for major disaster or emergency declarations directly to the President of the United States. The purpose of the amendments were to improve response times and recovery of disasters in Indian Country while better respecting tribal sovereignty. Indian Country had long requested these amendments so that tribal nations could directly access federal disaster and emergency assistance without having to go through the state Governors. There are numerous examples of tribal nations encountering disasters and it taking months for the state to put a request into FEMA, or for a Governor to deny the tribal nation’s request and, therefore, no federal assistance was provided. Additionally, failing to allow direct access by tribal nations to the federal government delayed reimbursements to the tribal nations, which would often times result in further harm to other tribal programs and services during a disaster or emergency.

So, the Penobscot Nation participated in the larger advocacy effort by Indian Country to Congress to pass amendments to the Stafford Act in 2012 that would allow tribal nations to directly petition the President for disaster and emergency declarations. However, unbeknownst to the Penobscot Nation, while the bill was pending in the Senate, the State reached out to one of the Maine senators and requested legislative confirmation that the Stafford Act amendments would not apply to the tribal nations within Maine since the amendments did not expressly include the Maine tribes. The result was a colloquy between one of the Maine senators and the bill sponsor confirming their understanding that the tribal amendments to the Stafford Act would not be applicable within or to the State of Maine. According to the colloquy this meant “that, even after the enactment of this legislation, if any of the tribes of Maine wished to obtain a declaration from the President that a major disaster existed, they would have to bring their request to the Governor of Maine, who would have to consider the request in accordance with existing standards and procedures but who would retain the discretion to deny that request.”⁴

In early 2020, when the COVID-19 pandemic hit the United States, the Penobscot Nation was not able to directly access assistance from FEMA. We had to work through the State, which was focused on the larger population centers and obtaining its own

⁴ 158 Cong. Rec. S8274 (2012) (statement of Sen. Susan Collins)

emergency assistance from the federal government. I do not say this in any way to disparage the State, but merely to provide an example of how difficult it can be for any tribal nation to be prioritized and obtain federal assistance when there is a statewide emergency taking place. All states seemed to focus on their high population areas initially during the COVID-19 pandemic, which I understand, but it does not help my community which had its own outbreaks and had to shut down. But, this is exactly why Congress passed the 2012 amendments to the Stafford Act to allow tribal nations to directly petition the federal government for assistance. As it turned out, the Penobscot Nation, and other Wabanaki Nations, were able to obtain direct federal assistance through Congress' appropriation of COVID relief funds to tribal governments. And, we have established a good working relationship with FEMA over the years, so the regional FEMA officials were quick to respond to us and did not wait for the State to request assistance on our behalf.

The second example I want to share with Subcommittee Members relates to the federal Violence Against Women Act ("VAWA"). In 2013, Congress included an entire title on *Safety for Indian Women* that restored back to tribal courts special domestic violence criminal jurisdiction over non-Indian offenders who commit (1) domestic violence, (2) dating violence, or (3) violate a protection order on tribal lands. The Penobscot Nation has long had a tribal court and we helped to advocate to Congress for this restoration of limited criminal jurisdiction. After the law passed, we applied to the U.S. Department of Justice to be chosen as one of the pilot tribes to implement the special domestic violence criminal jurisdiction. However, we were told by the Justice Department that the State of Maine objected to our application because of section 16(b) of the Settlement Act prevented the tribal provisions of VAWA from applying in Maine since Maine was not expressly included in the law. Thus, we were not chosen to be a pilot project tribe and lost out on several million dollars that would have strengthened our tribal court and law enforcement and increased public safety efforts within our community.

We then spent the next 9 years advocating to Congress to include language in VAWA making the tribal provisions expressly applicable in Maine. This took a significant amount of time and resources, and eventually we were able to get Congress to include language in the recently enacted VAWA law that specifically makes the tribal provisions applicable in Maine. As grateful as we are to Congress for doing this, it took a great amount of time and resources.

The combination of the Stafford Act and VAWA amendments efforts made us realize what an unworkable situation sections 6(h) and 16(b) of the Settlement Act created for the Wabanaki Nations. We do not have the resources to consistently advocate to Congress to expressly include us in every federal bill intended to benefit Indian Country. Educating each Member of Congress as to why we have to be expressly included in legislation, unlike any other tribe in the country, is confusing and difficult to explain. That is why in 2019, when we were invited by the leadership of the Maine Legislature to participate in a task force that would review and develop recommendations for modernizing the Maine Implementing Act, we decided to commit to participating in that process.

In 2019, the Maine State Legislature established a Task Force on Changes to the Maine Indian Claims Settlement Act (“Task Force”).⁵ The purpose of this Task Force was to review the various settlement acts and make recommendations to the Legislature on any suggested changes needed to the Maine Implementing Act.⁶ Additionally, the Task Force was to develop legislation for consideration by the Legislature to implement its recommendations. The Task Force completed its final report in January 2020⁷ and legislation was presented to the Joint Standing Committee on the Judiciary shortly thereafter.

The Task Force specifically reviewed sections 6(h) and 16(b) of the Settlement Act and their impacts on the Wabanaki Nations over the 40 years since 1980. At the request of the Task Force, Suffolk University Law School prepared a report identifying potential federal laws precluded from applying to the Wabanaki Nations as a result of section 16(b) of the Settlement Act.⁸ The report identified approximately 151 federal laws passed by Congress since October 1980, and which may not apply in Maine if such law “affects” Maine law. These laws cover a range of topics and included some major laws intended to benefit Indian Country such as the Indian Civil Rights Act, the Indian Self-Determination Act, American Indian Religious Freedom Act, Indian Gaming Regulatory Act, Native American Graves Protection and Repatriation Act, Esther Martinez Native American Languages Preservation Act, Indian Healthcare Improvement Act, Tribal Law and Order Act, and the Violence Against Women Act.

The Task Force found sections 6(h) and 16(b) to be overly broad and had the potential to render inapplicable in Maine all of the 151 federal laws passed by Congress for the benefit of Indians. However, the Task Force recognized that an outright elimination of these sections requires Congressional action. Nevertheless, in its final report, the Task Force recommended that the Maine Legislature amend the Maine Implementing Act to specify that, for the purposes of section 6(h) and 16(b) of the federal Settlement Act, federal laws enacted for the benefit of Indian country do not affect or preempt the laws of the State of Maine.⁹ The Task Force believed that it may be possible to render sections 6(h) and 16(b) of the federal Settlement Act inoperable by enacting legislation that affirmatively provides, as a matter of state policy, that federal laws enacted for the benefit of Indian country do not affect or preempt the laws of the State of Maine. According to the Task Force’s final report, “such legislation would eliminate the argument that

⁵ Materials related to the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act, Office of Policy and Legal Analysis, State of Maine, 129th Legislature, First Regular Session (Jan. 2020) can be found at <https://legislature.maine.gov/maine-indian-claims-tf>

⁶ Neither the Joint Order or the Joint Resolution establishing the Task Force intended any review of or disturbance of the portions of the settlement acts that relate to the resolution of land claims or extinguishment of aboriginal title. None of the Wabanaki Nations involved in the Task Force sought to have these provisions reviewed.

⁷ A copy of the Final Report of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act, Office of Policy and Legal Analysis, State of Maine, 129th Legislature, First Regular Session (January 2020) (“Task Force Report”) is attached and can be found at <https://legislature.maine.gov/doc/3815>.

⁸ *See Report on Federal Laws Enacted After October 10, 1980 for the Benefit of Indians or Indian Nations*, prepared by the Human Rights and Indigenous Peoples Clinic of Suffolk University Law School for the State of Maine Task Force on Changes to the Maine Indian Claims Settlement Implementing Act (Dec. 2019).

⁹ *See* Task Force Report, Consensus Recommendation #20 at 55.

application of any federal law enacted for the benefit of Indian country either affects or preempts state law, because state law would specifically condone application of that federal law within the State.”¹⁰ The Task Force recognized that drafting legislative language to implement this recommendation would be difficult, but that doing so “will go a long way toward allowing Maine’s tribes to ‘enjoy the same rights, privileges, powers and immunities as other federally recognized Indian tribes within the United States.’”

Shortly after the Task Force filed its final report in January 2020, legislation was introduced in the Maine legislature to implement the full recommendations of the Task Force. If enacted, the legislation would significantly modernize the Maine Implementing Act and restore back to the Penobscot Nation much of our inherent sovereignty and rights, privileges, powers and immunities exercised by most other federally recognized tribal nations in the country. The legislation includes provisions implementing the recommendation of the Task Force to deem that all federal laws enacted for the benefit of, or that accord special status or rights to, Indians and Indian tribes do not affect or preempt Maine law.

That legislation is still pending in the Maine Legislature, but the Attorney General for the State has expressed concern about whether the language seeking to address sections 6(h) and 16(b) of the Settlement Act can effectively be dealt with in State law. Specifically, the Attorney General’s testimony on the State legislation said:

It is not clear whether the Legislature can simply “deem” that all federal laws enacted for the benefit of, or that accord special status or rights to, Indians and Indian tribes do not affect or preempt Maine law. A court may conclude that if a federal law does, in fact, preempt or affect the application of Maine law, it makes no difference whether the Legislature has deemed otherwise. Further, in the event of a conflict between [the Maine Implementing Act] and [the Settlement Act], [the Settlement Act] will control.¹¹

The Attorney General’s testimony and the Task Force’s prior acknowledgement that an outright elimination of section 6(h) and 16(b) requires Congressional action, led us to begin a conversation with our Congressional representatives about amending the Settlement Act to address this one issue. After many months of discussions with Representatives Jared Golden and Chellie Pingree, they agreed to introduce legislation to amend the Settlement Act so that when Congress passes laws intended to benefit Indian Country *in the future* those laws will apply to the Wabanaki Nations unless expressly excluded.

To be clear, we are not asking Congress to change the overall jurisdictional framework that exists between the Wabanaki Nations and the State; that is a separate effort we are working on with the Governor and State Legislature. H.R. 6707 only addresses the application of *future* laws passed by Congress to benefit Indian Country. The language of

¹⁰ Task Force Report at 56.

¹¹ Testimony of Atty. Gen. Aaron Frey on L.D. 2094, “An Act to Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act,” (Feb. 14, 2020) at 20.

H.R. 6707 shifts the burden from the Wabanaki Nations having to educate Congress and obtain inclusion of language expressly covering us in every bill to the State who we believe is better equipped to ask for exclusion of any laws that it sees as problematic. The State actively monitors legislation pending in Congress and history shows is able to obtain colloquies and other legislative statements expressing the intent of Congress to exclude the Wabanaki Nations. Whereas, it took years for us to get Congress to include language expressly including us in the VAWA law.

H.R. 6707 is narrowly tailored and intended to provide the Wabanaki Nations with clarity moving forward as to whether a federal law enacted for the benefit of Indian Country applies to us. We will no longer have to worry about whether a law “affects” Maine law before we can access its benefits. We understand that the State of Maine may not want some federal beneficial acts to apply in Maine. But, we believe that debate should occur while the bill is pending in Congress, and not be left to interpretations of whether Maine law is affected after enactment. Shifting the burden of the Settlement Act to require that the Wabanaki Nations be expressly excluded from any federal law provides certainty to the stakeholders and is more consistent with the general intent of Congress when they pass such laws to benefit all of Indian Country.

H.R. 6707 does not impact the application of any existing federal law to the Wabanaki Nations. We understand that we will have to address any existing laws, such as the Stafford Act, on a case-by-case basis to be included. Should Congress pass any future amendments to the Stafford Act that provide new benefits to Indian Country, we would expect those new benefits to apply to us, unless we are expressly excluded. But, any existing provisions of current laws will not apply to us unless we come back to Congress and obtain language expressly making such provisions applicable.

Since 1970, the federal government’s policy with respect to Indian affairs has been focused on self-determination. That can be seen in the more than 150 federal laws enacted for the benefit of Indian Country since 1980, as identified by the Suffolk University report. The continued passage of federal laws to benefit Indian Country shows that the policy of self-determination is working; it is working for tribal nations but also for those surrounding communities. The Wabanaki Nations only seek through H.R. 6707 the opportunity to benefit from any future federal laws intended to benefit Indian country.

I appreciate the Subcommittee holding today’s hearing on the bill and am available to answer any questions about the legislation. Thank you.