Testimony of Kirk E. Francis

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on LD 2004, An Act to Restore Access to Federal Laws Beneficial to the Wabanaki Nations

before the Joint Standing Committee on the Judiciary

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Good morning Senator Carney, Representative Moonen and members of the Committee. Thank you for allowing me to testify in support of LD 2004, An Act to Restore Access to Federal Laws Beneficial to the Wabanaki Nations. I am Kirk Francis, Chief of the Penobscot Nation. I have been Chief for the past 17 years and in elected office for the Penobscot Nation off and on since 1992. 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.

I am testifying in support of LD 2004 because the bill will begin to mitigate some of the harms done to the Wabanaki Nations and surrounding communities caused by two provisions in the Maine Indian Claims Settlement Act that prevent any federal Indian law from applying to the Wabanaki Nations if it affects or preempts State jurisdiction. This exclusion is unique to the Wabanaki Nations – no other federally-recognized tribes are subject to such a sweeping exclusion from federal Indian laws. It is an exclusion full of ambiguity because we never know if a federal Indian law affects or preempts State jurisdiction until the State says something, and sometimes the State does not say anything until years later.

The language of LD 2004 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 will have to advocate for language expressly excluding application of any Federal Indian law in Maine. We believe the State is better equipped to ask for exclusion of any laws that it sees as problematic. The State actively monitors legislation pending in Congress and this Legislature and history shows that the State is able to obtain colloquies and other legislative statements expressing to exclude the Wabanaki Nations. Most importantly, we think it is unreasonable for the State to be able to continue to object to the application of Federal Indian laws without any time restrictions or a process for evaluating whether the State's objections are reasonable. As described in this testimony, continuing the status quo will continue to harm the Wabanaki Nations both economically and socially, and will continue to harm Maine's rural communities.

<u>History of Settlement Acts and Provisions at Issue in LD 2004</u>

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 the fact that the federal government never approved any conveyances of tribal lands as required by the federal 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 tribes.[1]

In 1980, the State of Maine, the federal government, and the Passamaquoddy Tribe and Penobscot Nation negotiated a settlement. The Maine Indian Claims Settlement Act of 1980[2] ("Settlement Act") was enacted by Congress and signed into law on October 10, 1980. The corresponding State Act to Implement the Maine Indian Claims Settlement[3] ("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.

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.

Over the 42 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, 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.

[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.

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.

Questionable History of Sections 6(h) and 16(b)

A review of the historical record surrounding sections 6(h) and 16(b) of the federal Settlement Act shows that these provisions were ripe with ambiguity and controversy from the beginning. [4] A 2017 report by Suffolk University found that the U.S. Interior Department was on record as expressing significant concerns with the broadness of the language of section 6(h). In a letter from the Interior Department to U.S. Representative Moe Udall, Interior stated that it "found this provision troublesome and confusing in that Federal financial benefits to Indian tribes would be divorced from general Federal statutes applicable to Indians."[5] And, Interior suggested that it would be better for Congress to enumerate the specific federal laws that would be excluded from applying to the Wabanaki Nations in Maine. Ultimately, Interior's suggestion was rejected and final version of section 6(h) remained overly broad.

While the historical record suggests that the Penobscot Nation was aware of and reluctantly agreed to section 6(h) in the federal Settlement Act, Suffolk University's review of the record found no such awareness of section 16(b), and no documents in the historical record discussing section 6(h) or whether the tribes or Interior Department agreed to its inclusion. Additionally, Suffolk University found that section 16(b) was added to the federal legislation just days before the U.S. Senate and House of Representatives voted on the legislation and after public hearings on the legislation took place. The Penobscot Nation did not agree to this provision being added,

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[4] The Drafting and Enactment of the Maine Indian Claims Settlement Act: Report on Research Findings and Initial Observations," https://maineindianclaims.omeka.net/items/show/104.

[5] See Transcript of Markup Session for Maine Indian Claims Settlement Bill H.R. 7919, House of Representatives, Committee of Interior and Insular Affairs (09/17/1980), Section 6(h) of the attached bill and p. 6 (sec. 6(g)) of the attached Section-by-Section Analysis, Committee on Interior & Insular Affairs, Legislative Files: House Bills, HR 7919, Box 139, Folder "Full Committee mark-up 9/17/1980", 96th Congress Records of the U.S. House of Representatives, RG 233, National Archives, Washington, DC (NARA020), available at http://maineindianclaims.omeka.net/items/show/24.

and we view it as one of the most problematic provisions in the federal Settlement Act. Suffolk University conducted a review of the historical record and the timing in which the provision was added to the federal legislation and found no evidence that the Wabanaki Nations agreed to it.

Negative Impacts of Sections 6(h) and 16(b) of Settlement Act

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. Below are just a few of the examples:

Around 2005, the Penobscot Nation was working with an energy company on developing a wind farm on Penobscot Nation trust lands. This energy project would have provided significant economic benefits to the Penobscot Nation, but it would have also enhanced Maine's transmission capacity by building a transfer station in Alder Stream Township. The Tribe had developed its own permitting regulations and attempted to work with the State on a joint permitting process, but the State objected saying that only its permitting process was applicable even though the project was to be built on tribal trust land. The company ultimately walked away because of the lack of clarity about which laws applied on tribal trust land and because the company did not want to get into a jurisdictional fight between the Tribe and State. Penobscot Nation had invested more than 5 years into this project, which included feasibility studies, wind testing, and securing an economic partner.

In the 2000s, the Penobscot Nation promulgated its own water quality standards for waters within the Tribe's territory. We did a statewide public hearing effort in developing these standards. Ultimately, the State objected to our standards applying to waters within our territory saying that the federal Clean Water Act did not apply in Maine. Penobscot went to the federal Environmental Protection Agency but the federal agency did not want to get in the middle of a jurisdictional fight between the State and Tribe. Eventually, however, the federal Environmental Protection Agency rejected Maine's proposed water quality standards for the State's waters. This led the State to work with the Tribe on the development of state-wide water quality standards that everyone could agree to.

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 and obtain federal assistance for disaster on tribal land. 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 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."[6]

After the Stafford Act amendments passed, Penobscot Nation experienced an ice storm that caused significant damage to our community center, which housed our tribal court, youth program, finance department and other tribal programs. FEMA said it couldn't work directly with the Tribe because the Tribe was not able to declare its own disaster declaration since the federal law did not apply within Maine.

In early 2020, when the COVID-19 pandemic hit the United States, the Penobscot Nation was not initially able to directly access assistance from FEMA. We were told we had to work through the State, which was focused on the larger population centers and obtaining its own emergency assistance from the federal government. Eventually, we got FEMA to work directly with us and ignore the prior history of the State objecting to the Stafford Act provisions applying in Maine. Additionally, we were able to advocate to Congress, along with other tribal nations, for direct federal assistance through Congress' appropriation of COVID relief funds to tribal governments.

In 2013, Congress included in the reauthorization of the Violence Against Women Act (VAWA) 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

[6] 158 Cong. Rec. S8274 (2012) (statement of Sen. Susan Collins).

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 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. The Justice Department did not want to get in the middle of a jurisdictional fight between the State and Tribe, so 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 in 2022 that specifically makes the tribal provisions applicable in Maine. Since Maine is the only place where such a broad exclusion of Federal Indian law exists, the congressional committees had a hard time understanding that we needed specific language added to VAWA in order for it to apply to us. Congressional staff thought language included in the 2013 reauthorization law saying "Notwithstanding any other law" was sufficient for those tribal provisions to be applicable in Maine. But, we had to explain the language of the settlement acts and how our only option for clarity was to litigate or ask Congress for to expressly add us to law.

We do not have the resources to consistently advocate to Congress to expressly include us in every federal bill intended to benefit the larger 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 incredibly difficult and time consuming and requires significant financial resources.

In December 2022, Harvard University released a report describing the economic and social impacts on the Wabanaki Nations resulting from the past 42 years of restrictions on the applicability of Federal Indian laws in Maine.[7] A key finding in the report was that per capita income of other tribes in the lower 48 states grew by 61% between 1989 and 2000, but only by 9% for the Wabanaki Nations. Additionally, the report found that the Wabanaki Nations continued to lag far below the rest of Maine in important areas. The per capita income in the Penobscot Nation is $18,809; whereas Maine's per capita income is nearly double that at $34,593. Education attainment rate for Penobscot people was on par with the rest of Maine, but the lack of well-paid jobs available to Penobscot people in our community is a significant contributor to the lag in per capita income.

The Harvard report noted that the rest of Indian Country has experienced extraordinary economic growth since 1970 when President Richard Nixon announced a new national policy of Indian self-determination that would focus on strengthening tribal nations' autonomy by increasing

[7] Kalt, Joseph P., Amy Besaw Medford, and Jonathan B. Taylor. "Economic and Social Impacts of Restrictions on the Applicability of Federal Indian Policies to the Wabanaki Nations in Maine." Harvard Project on American Indian Economic Development Research Report, December 2022 .

opportunities for education, economic development, and self-governance. Although Nixon announced the new federal policy in 1970, the first federal law enacted to begin implementation of this new policy did not occur until 1975 with passage of the Indian Self-Determination and Educational Assistance Act (P.L. 93-638). The report found that by the end of the 1980s, "economic development in Indian Country began to take root as tribes built enterprises in, for example, ski tourism, light Defense Department manufacturing, forestry and wildlife management, livestock and crop agriculture, and gaming." Tribal economies have continued to grow over the decades, and the Harvard report found that this was primarily a result of Federal policies of tribal self-determination through self-government. The report concluded that Maine and the Wabanaki Nations remain an "outlier" because of the State's continued fight to maintain the restrictions in the settlement acts. According to the Harvard report, the Wabanaki Nations and Maine have "no where to go but up" in terms of eliminating the restrictions on tribal self-determination and self-governance contained in the settlement acts.

Solutions to the Problems

The language of LD 2004 is not something that was just thought of this year. The language is a result of several years of research and dialogue with the Maine Legislature.

In 2019, the Maine State Legislature established a Task Force on Changes to the Maine Indian Claims Settlement Act.[8] 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.[9] Additionally, the Task Force was to develop legislation for consideration by the Legislature to implement its recommendations. The Task Force completed its report in early 2020[10] and legislation was presented to the Joint Standing Committee on the Judiciary.

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.[11] 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

[8] Materials related to the Task Force and its final report can be found at https://legislature.maine.gov

[9] Neither the Joint Order or the Joint Resolution establishing the Task Force intended any review of 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.

[10] 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") can be found at https://legislature.maine.gov/doc/3815.

[11] 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).

Act, American Indian Religious Freedom Act, Indian Gaming Regulatory Act, Native American Graves Protection and Repatriation Act, Indian Tribal Economic Development and Contract Encouragement 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 since 1989. 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.[12] 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 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."[13] 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.'"

LD 2004 seeks to implement the recommendation of the Task Force but also begin to mitigate the significant harms caused by these two provisions in the settlement act. Hindsight over the past 42 years shows that the federal Interior Department was right to express concerns about the language of section 6(h), and section 16(b) has proven to be even more problematic. Enough research has been done to justify the need for the Legislature to address this matter.

Governor Janet Mills' office has indicated that she would object to a categorical approach to making federal laws applicable in Maine because doing so would erode the settlement acts' foundational jurisdictional compromise. But, 42 years' experience with the settlement acts has shown that such jurisdictional compromise is harming Maine's tribal people and rural communities. The Governor's office has said that questions of whether federal statutes should be made applicable in Maine should be answered on a case-by-case basis so that the effects of each such decision on tribal lands and adjacent non-tribal communities can be thoroughly evaluated and understood.[14] We strongly disagree with this viewpoint because it continues to maintain the current restrictions in the settlement acts, which require that the Wabanaki Nations be specifically written into federal legislation if the law would impact the State's jurisdiction. This status quo places an

[12] *See* Task Force Report, Consensus Recommendation #20 at 55.

[13] Task Force Report at 56.

[14] Testimony of Gerald D. Reid, Chief Counsel to Governor Janet T. Mills on H.R. 6707, "Advancing Equality for Wabanaki Nations Act," (Apr. 14, 2022) at 4.

undue burden on the Wabanaki Nations and promotes inequality. Instead, the Wabanaki Nations should have to be specifically excluded from any beneficial federal legislation for it not to apply to us. It is fairer for the State to explain why we should be treated differently than other tribes under beneficial federal Indian laws versus us having to advocate to Congress merely to be treated the same as other tribes. The Governor's suggested approach continues to give the State virtual veto power over the application of any federal law to the Wabanaki Nations and perpetuates the lack of clarity we have around the applicability of such laws because the State can raise a jurisdictional objection at any time with no meaningful justification or need to show a harm caused to Maine citizens or communities.

It is time for the State to stop treating the Wabanaki Nations as enemies and start treating us as the partners and neighbors that we are. The Wabanaki Nations have been on this land since time immemorial, and we are not leaving Maine. All we are asking for is the ability to govern the people, natural resources, and activities that occur within the boundaries of our land. We want the same things as every community in this State: economic opportunity for our families and safer and healthier communities. LD 2004 will finally provide us some access to the full opportunity to obtain that.

On behalf of the Penobscot Nation and all Maine citizens and communities who have been harmed by these settlement act provisions, I urge this Committee to take action on LD 2004 this First Session of the 131st Legislature.