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Testimony of Rep. Rachel Talbot Ross supporting

LD 2094, An Act To Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act

Before the Joint Standing Committee on Judiciary

Senator Carpenter, Representative Bailey and distinguished colleagues of the Joint Standing Committee on Judiciary, my name is Rachel Talbot Ross, and I represent House District 40, which comprises the Portland neighborhoods of Parkside, Bayside, East Bayside, Oakdale, and the University of Southern Maine campus. I am pleased to come before you today in support of **LD 2094, An Act To Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act**.

The State of Maine actively regulated the affairs of Indians within its borders for almost 160 years, creating hundreds of laws relating to Indians. As a result, when the Maine tribes asserted land claims in the 1970s, they first had to overcome the claim by the state that they were not really bona fide Indian tribes at all.

The decision in the federal court case, Joint a Tribal Council of the Passamaquoddy Tribe v. Morton, in 1975 led to the enactment of several eastern land claims settlement acts, including the Maine Indian Claims Settlement Act (MICSA). All of these settlements were based on a central principle of federal Indian law: that only the federal government has the authority to convey or extinguish tribal rights to aboriginal land or to restrict the historical sovereign powers of Indian tribes.

In the years immediately preceding the 1980 settlement, the Maine tribes won a string of important court decisions that established that, notwithstanding the long period of time during which the State of Maine had, without a solid legal basis, treated them as "State Indians," their historical sovereignty had never been legally diminished. The decision in the Morton case led the U.S. Department of the Interior to extend federal recognition to the Tribes before the settlement. The Maine Supreme Judicial Court . decision in State v. Dana held that the state lacked criminal jurisdiction over crimes by tribal members on tribal lands. The federal court opinion in Bottomley v. Passamaquoddy Tribe revealed that the Maine tribes retained the full attributes of sovereignty as defined by federal Indian Law rather than any reduced type of tribal sovereignty watered down by local Maine history.

In short, if there had been no settlements and no other Congressional action limiting tribal authority, the Wabanaki tribes in Maine would have continued to possess and exercise the full degree of sovereignty that we usually associate with "western" tribes.

But, under the jurisdictional provisions of the settlement, the state was able to regain control that it had exercised before the court decisions undermined the legal basis for pervasive state control. Attorney General Richard Cohen explicitly urged the Maine Legislature to approve the Settlement because it allowed the State to reclaim most of the extensive authority over Indians that the court cases had found to be invalid. Prior to the Settlement, the tribes already had secured federal recognition and were being treated accordingly by the federal government.

The settlement was not a grant of new authority to the Tribes. It was a restriction of the jurisdiction they already possessed. With the Settlement, Maine moved in a dramatically different direction from the rest of the country at a time when federal policy had begun to strongly encourage and support tribal self-determination, a policy that continues to the present day.

But with the Settlement, Maine moved in the opposite direction from federal support of tribal self-determination. Former state control over Indians was largely reinstated by the Settlement.

The 1980 settlement was intended to create new, on-going relationships and to respond to changing circumstances. The express language of MICSA anticipated and consented in advance to future amendments to the Maine Implementing Act by agreement concerning the allocation of jurisdiction, including concurrent jurisdiction. This provision was added to MICSA at the request of the Secretary of the Interior who explained the amendment's purpose as follows:

> *Based on the understanding which State and tribal officials now have, we fully expect that this relationship will prove to be a workable one. Furthermore, our proposed amendment to the bill would give Congress' consent to future jurisdictional agreements between the State and the Tribes. Thus, there is flexibility built into this relationship.*

Despite this farsighted and extraordinary language in the federal legislation, despite the many changes in circumstances, and despite the substantial advancements in governmental capacity that the Tribes have made since 1980, there have been no substantive changes to the jurisdictional framework in the Maine Implementing Act.

The Maine settlements have not succeeded in creating flexible and effective relationships between the Tribes and the State. Whatever view one has on particular issues, it is fair to say that none of the parties could have predicted that the 1980 Settlement would remain essentially unmodified for all these years, that so many issues would be submitted to the courts instead of being worked out between the parties, or that the courts would interpret jurisdictional language in the particular ways that they have.

Maine has not developed an Indian policy based on government-to-government relations. The Settlement and court decisions effectively became the State's only governing Indian policy. The State has failed to recognize the potential benefits of more harmonious and effective Tribal-State relations

based on mutual respect for governmental sovereignty. The State has approached Tribal-State relations as a zero-sum game.

When Tribal and State governments do not have cooperative and effective relationships, the people who suffer the most are Indians and non-Indians living in poverty on the reservations and in neighboring communities. They mutually experience the negative impact of ineffective government services and lack of economic development.

Some feel that the 1980 Maine Indian Claims Settlement Implementing Act should not be changed. Some say a deal is a deal. As legislators, we know that society progresses. With that progress comes change. The United States Constitution, the foundational document of our country, has been amended 27 times. If we can change the U.S. Constitution, surely we can change the Settlement Act.

Every day in this building, we change laws. That is all we are doing here.

There are also some people who will say we are moving too quickly. We are not moving too quickly. The issues are known. They have been known because the issues have been litigated for 40 years between the State and the Tribes. In these 40 years, there have been three task forces, which have recommended changing the Settlement Act. Two of those made recommendations never were passed. The third convened over the past year. That task force has led to the document before us today, LD 2094.

No, we are not moving too quickly. I would say this has been forty, if not four hundred, years in the making.

We should not be asking why we should not make changes. We should be asking why these changes are beneficial and to whom.

These changes will not only benefit the Tribes. These changes will benefit rural Maine as well. The Tribes are currently an economic engine. For instance, the Houlton Band of Maliseet are one of the largest employers in their area. When they build, they hire local businesses. Their employees shop in the local stores and buy homes in the area. But we have stifled the Tribes' economic potential, not only for themselves but rural Maine.

These changes are also a matter of fairness. The Tribes in Maine are hindered like no other tribe across the country. Where other Tribes in the country essentially abide by federal Indian Law, Maine Tribes must contend not only with federal regulations but also Maine state regulations. This hampers opportunity for the Tribes in Maine to attract economic investments. What investor would subject themselves to additional regulations when they can go to any other Tribe across the country and have more certainty?

Most importantly, we are suffocating the Tribes' ability for self-determination. They are not asking for special rights. They are asking for rights like any other Tribe in the country. They are asking we restore

the rights they had before 1980 when they were under federal Indian Law. They are asking for fairness, respect and an opportunity to succeed.

The Task Force recommendations present an opportunity for the State, after being frozen in place for 40 years, to work with the Tribes to adjust its Indian policy to fit current circumstances. On the bicentennial of Maine, we have an opportunity to right a wrong. We have an opportunity to allow the Tribes to flourish and, in so doing, so will all of Maine.