TESTIMONY OF KAIGHN SMITH JR., ESQ.,
COUNSEL FOR THE PENOBSCOT NATION,
ON AN ACT TO IMPLEMENT THE RECOMMENDATIONS OF THE TASK FORCE ON CHANGES TO THE MAINE INDIAN CLAIMS SETTLEMENT IMPLEMENTING ACT
(L.D. 2094)

I. RESPONSE TO THE TESTIMONY OF JOHN PATERSON AND

II. TESTIMONY ON CIVIL JURISDICTION WITHIN TRIBAL LANDS

Public Hearing, February 19, 2020

Good morning, my name is Kaighn Smith Jr. I am a shareholder at Drummond Woodsum & MacMahon, where I lead the firm's Tribal Nations Service Group. We represent Indian tribes and their enterprises across the country, including in the states of Maine, California, Washington, New Mexico, Michigan, and Connecticut. I have served as litigation counsel for the Penobscot Nation in the Tribal, State, and Federal Courts for over 25 years. I teach *Federal Indian Law* at the University of Maine School of Law, and I serve as an Associate Reporter for drafting the American Law Institute's ("ALI") *Restatement of the Law of American Indians*.

I have been asked by Penobscot Nation Chief, Kirk Francis, to testify in response to the testimony you received this morning from John Paterson and to provide perspectives on civil jurisdiction within Tribal Lands. I make this submission solely on behalf of the Penobscot Nation.

Response To John Paterson's Views Of Federal Indian Law And Tribal Sovereignty

Mr. Paterson made the claim that the concept of restoring the powers, privileges, and immunities generally available to federally recognized Indian tribes to the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians under principles of federal Indian law was "deceptively simple." In a similar vein, he also said the tribal sovereignty should be likened to "ether." His position is not grounded in the law and I'd like to explain why.

The American Law Institute will soon publish the RESTATEMENT OF THE LAW OF AMERICAN INDIANS. The "Black Letter Law" of the Restatement distills longstanding, well-established principles of federal Indian law that govern tribal civil jurisdiction as well as the allocations of civil jurisdiction between tribes and states over activities in Indian Country (what is defined as "Tribal Lands" in L.D. 2094).

The application of this law across virtually every state, other than Maine, has not led to anywhere near the load of lawsuits that have beset tribal-state relations in Maine for the last 40 years.

Currently, the boundary between tribal and state jurisdiction for the Penobscot Nation and the Passamaquoddy Tribe is largely set by a provision of the Maine Implementing Act that provides that "internal tribal matters" (undefined) shall not be subject to regulation by the State, but the Tribes are otherwise subject to the duties and immunities of municipalities of the State of Maine. *See* 30 M.R.S.A. § 6206(1).[1]

This provision has generated unrelenting litigation. Accounting only for cases that have reached the Maine Supreme Judicial Court and the U.S. Court of Appeals for the First Circuit, the list includes: *Maine v. Johnson*,

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[1] The imposition of duties and immunities of state municipalities upon the Passamaquoddy Tribe and the Penobscot Nation is contrary to the most fundamental principles of federal Indian law and has led to protracted litigation as described in the text. Senior Ninth Circuit Judge William Canby, one of the most respected commentators in the field explains:

> [T]ribes [are] sovereign and free from state intrusion on that sovereignty. . . .
>
> Because a tribe is sovereign, it is in a very different position from a city or other subdivision of a state. When a question arises as to the power of a city to enact a particular regulation, there must be some showing that the state has conferred such power on the city; the state, not the city, is the sovereign body from which power must flow. [A] tribe's right to establish a court or levy a tax is not subject to attack on the ground that Congress has not authorized the tribe to take these actions; the tribe is sovereign and needs no authority from the federal government.

WILLIAM C. CANBY, JR., AMERICAN INDIAN Law 76 (6th ed. 2015).

498 F.3d 37 (1st Cir. 2007); *United States v. Newell,* 658 F.3d 1, 9 (1st Cir. 2011); *Penobscot Nation v. Georgia-Pac. Corp.,* 254 F.3d 317 (1st Cir. 2001); *Penobscot Nation v. Fellencer,* 164 F.3d 706 (1st Cir. 1999); *Akins v. Penobscot Nation,* 130 F.3d 482 (1st Cir. 1997); *In re Children of Mary J.,* 2019 ME 2, 199 A.3d 51; *Francis v. Dana-Cummings*, 2008 ME 184, 962 A.2d 944; *Tomer v. Maine Human Rights Comm'n*, 2008 ME 190, 962 A.2d 335; *Francis v. Dana-Cummings*, 2007 ME 16, 915 A.2d 412; *Winifred B. French Corp. v. Pleasant Point Passamaquoddy Reservation*, 2006 ME 53, 896 A.2d 950; *Francis v. Dana-Cummings*, 2005 ME 36, 868 A.2d 196; *Francis v. Dana-Cummings*, 2004 ME 4, 840 A.2d 708; *Great N. Paper, Inc. v. Penobscot Nation,* 2001 ME 68, 770 A.2d 574; *Francis v. Pleasant Point Passamaquoddy Hous. Auth.*, 1999 ME 164, 740 A.2d 575; *Penobscot Nation v. Stilphen,* 461 A.2d 478 (Me. 1983).

By contrast, in those states where tribal-state relations are governed by the established principles of federal Indian law, state and federal court cases involving disputes over the allocation of tribal and state jurisdiction are few. For example, in the 1980s and 1990s, Congress restored a number of tribes to federal recognition, using such language as "*all Federal laws of general application to Indians and Indian tribes . . . shall apply with respect to the [Tribe] and its members*" and the Tribe "*shall have jurisdiction to the full extent allowed by law*" over its reservation or lands taken into trust on its behalf by the United States. *E.g.*, 25 U.S.C. §§ 1300j-1, 1300j-7 (Pokagon Band of Potawatomi Indians Restoration Act) (emphasis added); §§ 1300k-2(a), 1300k-3 (LTBBOI and LRBOI Restoration Act); §1300l(a) (Auburn Indian Restoration), § 1300m-1(a)-(b) (Paskenta Band of Nomlaki Indians of California Restoration Act), § 1300n-2(a)-(b) (Graton Rancheria Restoration).

Your Office of Policy and Legal Analysis can readily confirm that there has been a dearth of litigation over tribal and state civil jurisdiction under these Restoration Acts, or under land claims settlement acts outside of Maine, where civil jurisdiction within Tribal Lands is governed by established principles of federal Indian law. *See, e.g.*, 25 U.S.C. §§ 1747(a) (Florida (Miccosukee)); 1752(3) and 1754(b)(7) (Connecticut); 1771c(a)(1)(A) and 1771d(a) (Massachusetts); 1772d(a) and (c) (Florida) (Seminole)); and 1775c (Mohegan (Connecticut)).

Perspectives On Civil Jurisdiction Within Tribal Lands

Section 2 of L.D. 2094 states the intent of the law as follows: "to establish that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians enjoy the rights, privileges, powers, duties, and immunities similar to those of other federally recognized Indian tribes within the United States," and to that end states, "[e]xcept as otherwise specified in this chapter, federal Indian law applies with regard to the rights, privileges, powers, duties and immunities of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians."

Committee members expressed an interest in the "Black Letter Law" being developed by the ALI.

The principles of federal Indian law governing the civil regulatory and adjudicatory authority of Indian tribes within their tribal lands are straightforward. Indian tribes are sovereign governments pre-dating the constitution. As such, they retain all of the attributes of a sovereign government unless surrendered by treaty or abrogated by an express Act of Congress. *United States v. Wheeler,* 435 U.S. 313, 322-5 (1978); *State of R.I. v. Narragansett Indian Tribe,* 19 F.3d 685, 694 (1st Cir. 1994); *Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1065–66 (1st Cir. 1979).

States have no power to divest Indian tribes of their inherent sovereign authority within their Tribal Lands. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g,* 476 U.S. 877 (1986) ("in the absence of federal authorization, . . . all aspects of tribal sovereignty [are] privileged from diminution by the States"). Further, a Tribal Nation's sovereign powers cannot be "lost" if not exercised. As the Supreme Court has said, "even when unexercised, [a tribe's sovereign authority over activities within its Tribal Lands] is an enduring presence, . . . and will remain intact unless surrendered in unmistakable terms." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148 (1982). *See also Bottomly v. Passamaquoddy Tribe,* 599 F.2d 1061, 1065-1066 (1st Cir. 1979) (the Passamaquoddy Tribe did not lose "one aspect of [its] sovereignty, its immunity from suit," by virtue of Maine's presumed authority to govern its affairs).

Committee members have suggested that it would be helpful to see the draft "Black Letter Law" of the ALI's draft RESTATEMENT OF THE LAW OF AMERICAN INDIANS regarding civil jurisdiction over Tribal Lands. They are provided below in context of specific questions that have arisen before the Committee.

What is the scope of the civil regulatory authority of Indian tribes?

Tribes can enact and enforce laws to regulate all aspects of economic activity within their reservations and trust land ("Tribal Lands"), including laws governing commercial transactions, employment and labor relations, corporations and business association, commercial transactions and security interests, civil rights, land use and environment protection, taxation and governmental economic enterprises to generate governmental revenues through gaming or other means as state governments do through their lotteries and state liquor stores. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Outside of Tribal lands, Indian tribes and their members are subject to state and local laws, but absent an express waiver by Congress (or by the Tribe) they retain sovereignty immunity from suit, an attribute of their inherent sovereignty. *See Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014)

The "Black Letter Law" of the American Law Institute's draft RESTATEMENT OF THE LAW OF AMERICAN INDIANS, provides as follows:

> § 52. Tribal Regulatory Powers on [Tribal] Lands
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> Unless limited by Congress (see § 22), Indian tribes have the power to enact and enforce laws governing economic activity within Indian lands (§ 15), including authority to:
> (a) tax (§ 28);
> (b) generate revenue to support governmental services through gaming and other enterprises;
> (c) regulate land use, natural-resources exploitation, and environmental protection (§§ 29, 30);
> (d) regulate labor and employment relations;
> (e) create, license, and regulate business organizations; and
> (f) regulate contracts and other economic obligations.

AMERICAN LAW INSTITUTE, COUNCIL DRAFT NO. 6, RESTATEMENT OF THE LAW OF AMERICAN INDIANS (Dec. 2, 2019) (Black Letter § 52).

What is the scope of the state civil regulatory authority over Tribal Lands?

The "Black Letter Law" of the American Law Institute's draft RESTATEMENT OF THE LAW OF AMERICAN INDIANS, provides as follows:

> § 55. State Authority
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> States generally lack regulatory authority over economic activity over which Indian tribes exercise authority described in §§ 52 . . . unless the state authority at issue is:
> (a) expressly granted by Congress or
> (b) asserted over nonmembers of the tribe and is [not preempted by federal law].

AMERICAN LAW INSTITUTE, COUNCIL DRAFT NO. 6, RESTATEMENT OF THE LAW OF AMERICAN INDIANS (Dec. 2, 2019) (Black Letter § 55). Under the federal Indian law preemption standard, states must show very strong interests in regulating the activities of non-tribal citizens on a tribe's lands in order to assert authority. *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 332–33 (1983); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980).

What is the scope of the civil adjudicatory authority of Indian tribes over activities within Tribal Lands?

The Supreme Court has said that Tribes' civil adjudicatory powers over are essentially on a par with their regulatory powers. *See Strate v. A-1 Contractors,* 520 U.S. 438, 453 (1997). Tribes retain power to adjudicate causes of action arising within their tribal lands, whether they involve their own tribal citizens or non-citizens. *Williams v. Lee,* 358 U.S. 217 (1956). *See also Iowa Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 18 (1987) ("Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty [and] [c]ivil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.").

The "Black Letter Law" of the American Law Institute's draft RESTATEMENT OF THE LAW OF AMERICAN INDIANS, provides as follows:

> § 53. Tribal Adjudicatory Powers on [Tribal] Lands
>
> Unless limited by Congress, Indian tribes have subject-matter jurisdiction to adjudicate through their courts or other adjudicatory bodies:
> (a) violations of their laws governing economic activity on Indian lands (§ 15), including the regulatory matters described in § 52 (a)-(f), and
> (b) [] common-law causes of action, including breach of contract and torts, arising on Indian lands.

AMERICAN LAW INSTITUTE, COUNCIL DRAFT NO. 6, RESTATEMENT OF THE LAW OF AMERICAN INDIANS (Dec. 2, 2019) (Black Letter § 53).

What is the scope of the state civil adjudicatory authority over activities on Tribal Lands?

The "Black Letter Law" of the American Law Institute's draft RESTATEMENT OF THE LAW OF AMERICAN INDIANS, provides as follows:

> § 39. State Civil Adjudicatory Jurisdiction over Claims Arising in Indian Country
> (a) Absent authorization by federal law, states lack civil adjudicatory jurisdiction over causes of action arising on Indian lands (see § 15) against an Indian tribe or its members.
> (b) States generally have civil adjudicatory authority over causes of action arising in Indian country against nonmembers.
> (c) A state has civil adjudicatory authority over a contract claim arising in Indian country against an Indian tribe or an "arm of the tribe," a tribal enterprise with sovereign immunity (see § § 59-62), if the tribe or the enterprise consents to be sued on the claim in the state court as set forth in § 63(a).

AMERICAN LAW INSTITUTE, COUNCIL DRAFT NO. 6, RESTATEMENT OF THE LAW OF AMERICAN INDIANS (Dec. 2, 2019) (Black Letter § 39).

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From the foregoing, it is clear that state civil regulatory and adjudicatory authority over the activities of a Tribe's own tribal citizens within the Tribe's reservation or trust lands ("Tribal Lands") is extremely limited. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331–32 (1983) (in "exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members.") (footnote with citations omitted).

Likewise, however, a Tribal Nation's exclusive civil regulatory and adjudicatory jurisdiction over the activities of non-tribal citizens on Tribal Lands turns on balancing tribal and federal interests against state interests. *See id.* at 335; *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).