

September 2010

## Tribal-State Relations

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### Recommended Citation

John Dieffenbacher-Krall, *Tribal-State Relations*, 28 Pace Env'tl. L. Rev. 366 (2010)

Available at: <https://digitalcommons.pace.edu/pelr/vol28/iss1/14>

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## SYMPOSIUM

### Tribal-State Relations

JOHN DIEFFENBACHER-KRALL\*

I am the Executive Director of the Maine Indian Tribal-State Commission, a position that I assumed on September 6, 2005. The Maine Indian Tribal-State Commission known by its acronym MITSC, is a body, as Professor Robinson noted, formed under the Maine Implementing Act, State of Maine companion legislation to the 1980 Maine Indian Claims Settlement Act.

Originally, MITSC comprised nine commissioners, two representing the Passamaquoddy Tribe, two from the Penobscot Indian Nation, and four commissioners appointed by the State of Maine. The eight commissioners elect a chair.

Last year MITSC was expanded to create two seats for the Houlton Band of

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\* In his remarks, Mr. Dieffenbacher-Krall extended thanks as follows:

I want to thank the Pace University School of Law, the International Council of Environmental Law, and the George Gustav Heye Center of the National Museum of the American Indian for inviting me to speak to you this afternoon. I also want to thank Professor Nicholas Robinson - just a little correction, I'm not quite that old, Nick, but actually my first salaried job was with the environmental planning lobby in 1985. I was hired by Judith Enck, who is now the EPA administrator for Region II. She hired me to create a door-to-door canvass at that time. I also want to thank Nick's assistant, Ms. Karen Ferro, for answering my questions and helping me in a number of ways. I am extremely honored to once again be in the company of Chief Oren Lyons and Tonya Gonella Frichner. We were together March 1st up at the Maine conference talking about the Doctrine of Discovery. And I also am pleased to meet Angelique Eaglewoman today and to hear her remarks. She speaks strongly from the heart - something I can relate to. And I am also thrilled that my son, Nicholas Dieffenbacher-Krall, my sister, Suzanne Krall, and my cousin, Christopher Gill, have honored me by coming here to hear me speak today. And I also want to give my congratulations to Oren Lyons on his award and Ambassador Hilario G. Davide, Jr. on the honor that he will receive today. John Dieffenbacher-Krall, Remarks at the Symposium on Indigenous Rights: Tribal-State Relations 72-73 (May 13, 2010) (transcript on file with the PACE ENVIRONMENTAL LAW REVIEW and available in the archives of the Pace University School of Law Library).

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Maliseet Indians, the other Wabanaki signatory to the agreement, and, in order to maintain Wabanaki-Maine representational parity, two additional seats were added for the State of Maine.

So today, MITSC consists of thirteen commissioners. The chair position is currently vacant.

MITSC's responsibilities include continually reviewing, "the effectiveness of this Act and the social, economic and legal relationship between the Houlton Band of

Maliseet Indians, the Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine."<sup>1</sup> The negotiators of the settlement agreement viewed MITSC as a body that could examine disputed provisions of the Maine Implementing Act and offer potential solutions to disagreements that might arise between the signatories.

Though MITSC possesses some explicit regulatory authority involving specific border waters and other powers dealing with adding land to certain types of Wabanaki land holdings, the Commission functions in a largely advisory capacity.

The invitation extended to me to speak here today caused MITSC to begin discussing the U.N. Declaration on the Rights of Indigenous Peoples for the first time. MITSC intends to use this presentation today as the beginning of an in-depth examination of what the U.N. Declaration on the Rights of Indigenous Peoples means in relation to the

Maine Indian Claim Settlement Act and the Maine Implementing Act. The Commission finally decided on April 26th to have me officially represent them.

The short amount of time between April 26 and today did not afford sufficient time to the Commission to engage the Wabanaki-Maine signatories to the Settlement Act and learn their positions on the relevance of the Declaration to the agreement. But I am genuinely encouraged by the strong interest expressed by all MITSC Commissioners, regardless of the government they represent, to conduct a thorough analysis of the implications of the Declaration on the Settlement Act.

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1. ME. REV. STAT. ANN. tit. 30, § 6212 (2010).

The Commission will also explore what the State of Maine might do to conform its actions and policies, given the 2008 resolution passed by the Maine Legislature. I believe Maine may have been the first legislative body at the state level to pass such a resolution supporting the Declaration.

I am hoping and requesting that an even more substantive report will be published in the proceedings of this award ceremony that will reflect this deeper examination. But I can't tell you anything definitive about the Wabanaki-Maine signatories' positions on the Declaration's relevance to the Maine Indian Claims Settlement. I do want to offer some thoughts on the topic I am billed as addressing - "First Nations and States Reflections on Intergovernmental Relations."

Before I address the topic, I want to ensure everyone present knows a little more about the governments and peoples that I represent. The federally recognized tribes residing within the present-day borders of the State of Maine are known as the Wabanaki - the People of the Dawn Land, or the People of the Dawn. The Wabanaki Tribes within Maine's borders consist of the Aroostook Band of Micmacs, Houlton Band of Maliseet Indians, Passamaquoddy Tribe, and Penobscot Indian Nation. All of the Wabanaki Tribes share a common Algonquin language root, though each Wabanaki language is distinctive and unique. Many more Maliseet and Micmac governments and settlements exist in Canada. An additional Passamaquoddy community also exists in the Canadian Province of New Brunswick.

The fledgling United States signed its first foreign treaty, the Treaty of Watertown, with the Maliseets and Micmacs of the region on July 19, 1776. The Wabanaki often say their governments represent some of the oldest continuous governments in the world. The State of Maine did not come into existence until 1820, the 23rd state in the Union. Before that year, Maine was part of the Commonwealth of Massachusetts. I point this out because of Maine's geography as the most easterly state might lead some people to assume that it was one of the original thirteen states. It was not.

As the person - and the one employee back in the Maine Indian Tribal-State Commission, and that's me - the person responsible for promoting better Wabanaki-Maine relations, what

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do I see as some of the greatest challenges? A primary one involves the failure of the non-Indian public to recognize Indian Tribes as or sovereign governments. I believe non-Indians don't view the federally recognized tribes as nations despite their recognition as such by the United States Constitution Article I, Section 8, Clause 3 and numerous treaties.

For many non-Native people, Indian Tribes don't comport with our general understanding of a nation. When we consider the idea of a nation, we think of a governmental entity outside the borders of the United States. We also generally attribute certain qualities to that external status, such as a different currency, language, and culture. Our cognitive mental model likely also associates a country with a military.

When a person considers the Wabanaki, concentrations of Maliseet, Micmac, Passamaquoddy, and Penobscot people live in five communities within the borders of the six municipalities found within the State of Maine. Many more Wabanaki people live outside their Tribal communities.

Signage generally exists near Wabanaki reservations indicating the presence of Wabanaki communities. Yet a large percentage of Wabanaki land consists of trust lands scattered across the northern half of Maine. A person could cross a road entering this land without knowing it. No border crossings exist or other trappings that we generally associate with entering a foreign country.

While each Wabanaki Tribe has a distinct history and culture, a casual, brief encounter a non-Indian might have 'with a Wabanaki citizen may not reveal the many unique cultural aspects distinguishing that Native person. The Wabanaki use U.S. currency, often a distinguishing feature of a country. Many Wabanaki People choose to dress in contemporary Western clothes. Numerous Wabanaki People work outside the reservations in a variety of occupations.

I can recall a parishioner at my church, which is generally supportive of the Penobscot Nation, whose reservation lies a short distance from St. James I Episcopal Church in Old Town, tell me, "They use the U.S. Postal Service." Yes, the Wabanaki and other Indigenous Peoples use many modern conveniences and services.

Nonetheless, the fact that Wabanaki People choose to use certain technology, or do not, does not lessen their Indigenous identity. Unfortunately, for some uninformed non-Native people with a simplistic understanding of cultural and national identity, it does.

The fact that the Wabanaki Tribes' governments don't comport with many non-Indian individuals' general understanding of a nation can undermine public acceptance of Wabanaki nationhood. During the politically contentious period following the filing of the Passamaquoddy and Penobscot land claims in the early summer of 1972 until the signing of the agreement on October 10, 1980, some Maine politicians publicly derided the notion of Wabanaki nationhood. Maine Governor James Longley, who served one term from 1975 until 1979, vowed to resist the idea of a "nation within a nation."

Other elected officials openly called for the acculturation and assimilation of the Wabanaki during the same political period.

Another challenge to the general non-Native population accepting Wabanaki sovereignty consists of the nearly 160-year history of the Wabanaki's treatment as wards of the State of Maine. From Maine's inception as a state in 1820 until a series of court cases in the 1970s ended the State of Maine's political control of the Wabanaki, the Wabanaki experienced little independence. The prevailing state of legal and political affairs for the period is reflected in a portion of the opinion in the 1842 Maine Supreme Court case, *Murch v. Tomer*: "Imbecility on their part, the Indians, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; In disregard of some at least, of abstract principles of the rights of man."<sup>2</sup> Maine enacted many laws solely pertaining to the Wabanaki, controlling Wabanaki resources, elections, and even determining Wabanaki citizenship for the purpose of public school enrollment. Though not often publicly discussed in Maine, the signatories to the

Settlement Act are still adjusting their relationship to reflect the current recognition of inherent Wabanaki sovereignty within

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2. *Murch v. Tomer*, 21 Me. 535, 538 (1842).

a framework of multi-governmental jurisdictions. As stated in the Tribal-State Work Group (TSWG) report commissioned and published by the Maine Legislature in January of 2008, Wabanaki representatives in that process made clear that, “The Maine Indian Claims Settlement and later the Aroostook Band of Micmacs Settlement Act were intended to end Maine control over Indian lives and restore some of the freedom that the Wabanaki previously enjoyed prior to Maine statehood.”<sup>3</sup> The report further states, “Tribes expected the settlement acts to strengthen their governments, improve their living conditions, and help sustain themselves as unique peoples.”<sup>4</sup>

The Maine Indian Claims Settlement consists of state and federal legislation. Though initiated by the Passamaquoddy Tribe and Penobscot Nation, the Houlton Band of Maliseet Indians joined the negotiations during the latter stages of the process. Eleven years later, the Aroostook Band of Micmacs entered into a separate settlement agreement with the U.S. patterned after the Maliseet settlement. The Federal portion of the Maine Indian Claims Settlement provided \$81.5 million. A Maine Indian Claims Land Acquisition Fund was created with \$54.5 million that made the Passamaquoddies and Penobscots eligible to place up to 150,000 acres each into trust in return for voluntarily dismissing their land claims. In addition, the Act established a “Maine Indian Claims Settlement Fund with a deposit of \$27 million divided in half for the Passamaquoddy Tribe and Penobscot Nation to be held in trust by the Secretary of Interior.”<sup>5</sup>

Political circumstances and good will compelled the Passamaquoddy Tribe and

Penobscot Nation to share \$900,000 from their settlement with the Maliseets to provide them with a land acquisition fund. While the Federal Government agreed to fund the settlement, it conditioned its monetary contribution on the State of Maine and three Wabanaki Tribes resolving their jurisdictional issues. The

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3. JOHN DIEFFENBACHER-KRALL, FINAL REPORT OF THE TRIBAL-STATE WORK GROUP 7 (2008), *available at* <http://www.mitsc.org/library.php?do=section&name=Reports>.

4. *Id.*

5. *Id.* at 6.

Maine Implementing Act constitutes that agreement. The Passamaquoddy and Penobscot Tribes enjoy distinct rights and powers under the Maine Implementing Act as compared to the Maliseets.

The State of Maine and the Wabanaki agreed in the Tribal-State Work Group process to end these discrepancies over time. For the Wabanaki, the Maine Implementing Act embodies an agreement to protect them from, “anyone ever again telling them what to do on their lands.”<sup>6</sup> The State of Maine obtained an agreement to provide some certainty in their dealings with the Maliseets, Passamaquoddies, and Penobscots. Three key Maine Implementing Act provisions affect Wabanaki sovereignty; Section 6204 of the Maine Implementing Act states:

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes, and bands of Indians in the State, and any lands or other natural resources owned by them, held in trust for them by the United States, or by any other person, or entity shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person, or lands, or other natural resources therein.<sup>7</sup>

The State of Maine feared Wabanaki Tribes exercising unfettered tribal sovereignty. This section of the Maine Implementing Act gave the State comfort its laws would apply, except for certain notable exceptions delineated in other sections of the Act.

Section 6204 has become the bane of the Wabanaki in terms of them exercising complete sovereignty. Section 6206 of the Maine Implementing Act contains two other critical and much litigated provisions affecting powers of Wabanaki self-rule. Negotiators of the agreement created a unique legal phrase, “internal tribal matters,” to my knowledge used nowhere else in law to distinguish the powers that the Passamaquoddy and Penobscot could exercise completely unhindered by other governments. The Maine Implementing Act defines internal, tribal matters as, “including membership in the respective tribe

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6. *Id.* at 7.

7. ME. REV. STAT. ANN. tit. 30, § 6204 (2010).

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or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.”<sup>8</sup>

Immediately preceding this section is a provision that confers on the Passamaquoddy Tribe and Penobscot Nation, the rights and responsibilities of a municipality.

Both the internal tribal matters and municipal powers provisions of MIA have caused considerable disagreement, with the Passamaquoddies and Penobscots holding one view and the State of Maine asserting a different perspective. For the two Wabanaki Tribes, the internal tribal matters language constitutes the guarantee that never again would any outside authority dictate what would happen on their reservations.

The Passamaquoddies and Penobscots read the list of powers following internal tribal matters as examples, not as the complete sum of the powers. To the dismay of the Passamaquoddies and Penobscots, courts have tended to read the powers afforded by the internal tribal matters language as somewhat more restrictive related to the examples.

On the municipal powers language, Wabanaki negotiators to the agreement claim the language was included to allow the Tribes to access some of the same federal funding sources utilized by municipalities. These same negotiators vociferously state the language should not be read as providing for the transformation of Tribal Governments into municipalities. State negotiators in this period assert the municipal powers language was included to provide Maine with some certainty concerning the powers that the Passamaquoddies and Penobscots could exercise upon enactment of the Settlement. Maine had only experienced for a brief period two Wabanaki Tribes exercising complete sovereignty akin to some federally recognized tribes west of the Mississippi River. Maine had a 160-year experience with municipal government that provided some predictability concerning what the Wabanaki could and couldn't do going forward.

Though the actual language of the Maine Indian Claims Settlement Act and the Maine Implementing Act represents a

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8. *Id.* § 6206.

critical political compromise to resolve the high-stakes litigation, perhaps a more important outcome of the agreement embodied the hope for the continuation of a new relationship between the Maliseets, Passamaquoddies, Penobscots, and the State of Maine. No longer would one government, the State of Maine, wield exclusive authority over the others, the Wabanaki. The settlement recognizes the sovereignty of each signatory. The prospect for a new relationship based on mutual respect and prosperity represented the greatest potential achievement of the Settlement. During the Senate Select Committee on Indian Affairs hearing held in July 1980 on the Maine Indian Claims Settlement, Maine Attorney General Richard Cohen told the Committee:

I cannot promise you that the adoption of this settlement will usher in a period of uninterrupted harmony between Indians and non-Indians in Maine. But I can tell you, however, that because we sat down at a conference table as equals and jointly determined our future relationship. In my view, there exists between the State and the tribes a far greater mutual respect and understanding than has ever existed in the past in the State of Maine. I can also tell you that if this matter is litigated over a period of years, the atmosphere in Maine certainly will be quite different. I cannot put a price tag on human relationships, nor am I suggesting that that factor alone justifies the enactment of the legislation before you. I am asking only that you give appropriate consideration to the historical significance, not only of the settlement itself, but also of the manner in which it was reached.<sup>9</sup>

Tom Tureen, principal attorney for the Passamaquoddies and Penobscots during the settlement negotiations, echoed Attorney General Cohen's words at the same hearing:

I would agree with what Dick Cohen said earlier - that the negotiations in this case all around were characterized by a mutual respect and were carried on in a commendable

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9. JOHN DIEFFENBACHER-KRALL, A SUMMARY OF THE ACTIVITIES OF THE MAINE INDIAN TRIBAL-STATE COMMISSION (JULY 1, 2007 – JUNE 30, 2008) 6 (2008), *available at* <http://www.mitsc.org/library.php?do=section&name=Reports>.

atmosphere. It was not always harmonious, but commendable. You should understand that Indian tribes are inherently conservative. They are very concerned about their futures. They are very concerned about the long view. The general body of Federal Indian law is excluded in part because that was the position that the State held to in the negotiations. It was the State's view that the destiny of the Maine tribes as much as possible in the future should be worked out between the State and the tribes.<sup>10</sup>

The applicability of all this to the U.N. Declaration on the Rights of Indigenous Peoples? I believe that the Declaration recognizes that 500-plus years of relations between primarily Western European countries and their colonies and the Indigenous Peoples of the world must no longer be based on the dehumanization and domination of Indigenous Peoples, as highly evolved Christians told us earlier.

The mutual respect and understanding achieved by the Maine Indian Claim Settlement negotiators at the conclusion of their protracted negotiations, embodies the same spirit infused throughout the Declaration. Article 3 of the Declaration states, "Indigenous Peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development."<sup>11</sup> We must replace nation state relations characterized by power over Indigenous Peoples with consensual decision-making.

European Christendom conducted much of its colonization under the Christian

religious principle the Doctrine of Discovery. This principle, as recently discussed in the preliminary study submitted by Tonya Gonella Frichner to the U.N. Permanent Forum on Indigenous Issues, forms the basis of U.S. and international law sanctioning what I believe today an increasing number of people worldwide recognize as evil and anathema to any moral code.

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10. *Id.*

11. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), available at <http://www.un.org/esa/socdev/unpfii/en/drip.html>.

The Wabanaki-Maine relationship has suffered during the last 30 years as the parties have perhaps forgotten that mutual respect and understanding forged by October 10, 1980, the day President Carter signed the Maine Indian Claims Settlement

Act. Ideally, that respect and understanding with a joint goal of mutual prosperity comes to permanently characterize the Wabanaki-Maine relationship.

My final observation is any type of relationship needs continual attention if it is going to succeed. In Maine, Wabanaki-Maine relations too often fall into periods of relatively little contact between the respective governments' leaders. Then some political crisis might force the leaders to deal with one another. Unfortunately, these types of political high-stakes situations do not lend themselves to forming relationships of trust, mutual understanding, and genuine friendship. So in Maine, the United States, and the world, relations between nation states and their Indigenous Peoples should consist of regular, substantive communication at all levels to build the understanding and trust that will permit the parties to resolve peacefully and beneficially the misunderstanding that will occur.

Governments must stop dictating to one another and recognize the inherent sovereignty of the parties derived from an authority higher than what any particular government might believe it grants to another.

Thank you.