

**TESTIMONY OF EVAN RICHERT
DIRECTOR, STATE PLANNING OFFICE
TO JOINT STANDING COMMITTEE ON THE JUDICIARY
OPPOSING LD 1255
AN ACT PROVIDING FOR REGULATION OF THE USES OF SURFACE WATERS
WITHIN OR AFFECTING PASSAMAQUODDY TERRITORY**

Sen. Longley, Rep. Thompson, and members of the Committee, my name is Evan Richert. I am director of the State Planning Office and am testifying on behalf of the King Administration in opposition to LD 1255 as it is written. However, we would support the amended version of this bill that has been prepared by the Maine Indian Tribal State Commission.

There is merit to the idea that, since the Indian tribes are the ones most affected by the surface use of Great Ponds that are wholly within their territories, or whose shorelines are half or more within their territories, they should have a greater voice in the regulation of surface use. There are approximately two dozen such Great Ponds.

The question is how to provide that greater voice. As written, LD 1255 would give the Passamaquoddy Tribe exclusive authority to regulate the use of surface waters of ponds surrounded entirely by Passamaquoddy Indian territory. It also would give MITSC such authority over the surface use of ponds that are as little as 10% within Passamaquoddy Indian territory. This approach to regulating a particular natural resource parallels the approach in the Indian Claims Settlement Act relating to hunting and trapping within Indian territory.

However, we oppose this approach. Great Ponds, wherever they are located, belong to all the people of the state. When, pursuant to the Indian Claims Settlement Act, the Passamaquoddies acquired Indian territory, they did not at the same time acquire the Great Ponds that are within that territory; those remained a trust held by the state for all the people of the state. We believe it would be an unwise precedent to give up authority over them in a way that does not allow any person who wishes to participate in the decisions about their use a formal voice.

The alternative approach is to follow a second model that also is embodied in the Settlement Act. This approach is used for the regulation of fishing. Under this approach, it is MITSC that establishes the regulations following the same APA procedure as any state agency would follow. This would provide a fair and meaningful opportunity for any member of the public to participate in the decision making.

This alternative approach has been prepared by MITSC as an amendment to LD 1255. The amendment also provides for a report by MITSC to the Legislature on the effectiveness of this approach after three years of experience under it. We support MITSC's proposed amendment and would be pleased to discuss it further during work session.

Thank you. I would be happy to answer any questions.

MAINE INDIAN TRIBAL-STATE COMMISSION

Testimony Neither For Nor Against LD 1255

An Act Providing for Regulation of the Uses of Surface Waters
within or Affecting Passamaquoddy Territory

April 6, 1999

Introduction. Good afternoon, Senator Longley, Representative Thompson, and other members of the Joint Standing Committee on Judiciary. I am Cushman Anthony, the Chair of the Maine Indian Tribal-State Commission (MITSC) and a former member of your Committee. I am here today to testify neither for nor against LD 1255, a bill sponsored by Representative Soctomah relating to the regulation of the surface use of waters in Passamaquoddy Territory.

Civil Law Review. We provided an update on discussions about regulating the surface use of waters in Indian Territory in our December 15, 1998 report to the Legislature entitled *Impact of Maine Civil Laws on the Wabanaki: 1998*. To review:

- ⇒ During the first Assembly of Governors and Chiefs in 1997, there was discussion about Round Mountain Pond, a small pond used for fishing in Penobscot Territory. MITSC thought it had jurisdiction to regulate the use of motors as a method of fishing, but the Department of Attorney General disagreed. The Governors and Chiefs agreed that there ought to be a way to figure out the regulation of motors and that MITSC should review issues relating to the surface use of waters in Indian Territory.
- ⇒ At MITSC's January 1998 meeting, members agreed to ask the 118th Legislature to consider an amendment to LD 1730, the Great Ponds Task Force bill. The proposal amended the Maine Implementing Act to authorize MITSC to regulate the use of motors on ponds of less than 200 acres within Indian Territory and used for fishing. The 200 acres was based on LD 1730's proposal to regulate jet skis on all Maine ponds of 200 acres or less. The Legislature enacted this provision as part of PL 1997, chapter 739, subject to approval by the Passamaquoddy Tribe and the Penobscot Nation, adding a further requirement that the waters must be entirely within Indian Territory.
- ⇒ In June 1998, MITSC held a workshop at the Penobscot Community Building at Indian Island to explore tribal concerns about the surface use of tribal inland waters. Thirty-one people attended, including both Passamaquoddy Governors and both Tribal Representatives. It became clear that the Tribes were not going to ratify the new provision. Tribal participants questioned why anyone other than the Tribes should regulate the surface use of waters within Indian territory. There was reluctance to amend the Maine Implementing Act, and tribal participants in the workshop, stated their preference for a cooperative agreement approach.

⇒ As foretold during the workshop, the Tribes did not ratify the provision to authorize MITSC to regulate motors and horsepower on waters of 200 acres or less and entirely within Indian territory. Meanwhile, the Maine Land Use Regulation Commission adopted new rules which prohibit the use of personal watercraft on all great ponds, including five great ponds that are totally within Indian Territory.

Three Options. Over the fall and winter, MITSC has been exploring three options for regulating the surface use of water within Indian territory: 1) amending the Maine Implementing Act to piggyback onto MITSC's regulatory authority over fishing, 2) amending the Implementing Act to piggyback onto the Tribes' regulatory authority over hunting and trapping, or 3) entering into a cooperative tribal-state agreement. MITSC did not forward any recommendations to the 119th Legislature for legislation, because the State preferred the first option and the Tribes favored either the second or third option.

Draft Amendment. LD 1255 provides that the Passamaquoddy Tribe will regulate surface water use. The Passamaquoddy and Penobscot MITSC members support the bill, while the State MITSC members oppose it. The State MITSC members are not against the idea that Tribes should have more control over surface use, but they oppose the way of doing it in LD 1255. In an effort to find common ground, MITSC has developed a draft amendment which:

- ⇒ States that MITSC has jurisdiction over the regulation of surface water use on great ponds (those of 10 acres or more) within Indian Territory;
- ⇒ Specifies that MITSC may delegate this regulatory authority to the Passamaquoddy Tribe for great ponds with 50% or more of shoreline within Passamaquoddy territory and to the Penobscot Nation for great ponds with 50% or more of shoreline within Penobscot territory;
- ⇒ Lists the factors to be considered and the process to be followed in rule-making; and
- ⇒ Requires the Commission to submit a report on the effectiveness of this approach and any recommendations, including legislation, to the 121st Legislature by December 15, 2003.

From the view of MITSC's State members, this draft amendment preserves the principle that great ponds are owned by all the people of Maine. During its meeting of March 16, 1999, MITSC voted to approve this amendment contingent on approval by both Tribes. MITSC has not yet heard whether the Tribes will support this amendment.

Thank you for your consideration.



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TESTIMONY IN SUPPORT OF LD 1255

March 6, 1999

"An Act for Regulation of the Use of Surface Waters within or Affecting Passamaquoddy Territory"

Senator Longley and Representative Thompson and members of the Judiciary Committee
Good afternoon,

I am Representative Donald Soctomah, and I am submitting LD 1255 "An Act for Regulation of the Use of Surface Waters within or Affecting Passamaquoddy Territory". This Bill addresses the use of outboard motor size and the use of jet skis on waters within Passamaquoddy Territory. The effect of controlling the surface of these bodies of water is one way of protecting the water, land and wildlife. The Tribe does have Tribal Game Wardens who enforce fishing regulations, but because of the current language they can not enforce boating laws. Currently, the fishing regulations are set by the Maine Indian Tribal State Commission with input from both the Tribe and the State, on waterbodies (Great Ponds) 50% or more surrounded by Tribal lands. It is in our best interest to limit the size of outboard motors on certain lakes, and to eliminate outboard motors on some lakes and promote the use of canoes on other lakes.

I would like to amend the original bill to be more uniform with the current fishing law set in the Maine Indian Land Claims Settlement, that is to change the line 10 in section 2 by stating that AMITSC has exclusive authority to regulate the use of surface water of great ponds when at least 50% but less than 100% of the shoreline of a great pond is within Passamaquoddy Indian territory. The Passamaquoddy Tribe has exclusive authority to regulate the use of surface water of great ponds surrounded entirely by the Passamaquoddy territory.

Another agency that has duties relating to monitoring of water quality is the Tribal environmental department, they also are a lead agency in compiling water regulations. The Passamaquoddy Tribe is capable of managing, setting and enforcing regulations to control surface use of Great Ponds.

All rules shall be equally applicable on a nondiscriminatory basis to all persons regardless of whether or not a person is a member of the Tribe.

Thank you, Rep. Donald Soctomah



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Testimony in OPPOSITION to

L.D. 1255, "An Act Providing For Regulation Of The Uses Of Surface Waters Within Or Affecting Passamaquoddy Territory."

Senator Longley, Representative Thompson and Members of the Joint Standing Committee on Judiciary, my name is Abby Holman. I am the Executive Director of the Maine Forest Products Council, the state's largest forest products trade association representing the largest industry in this State – the forest products Community.

We are speaking in opposition today to LD 1255. LD 1255 would expand the rights of the Passamaquoddy Tribe beyond what the Indian Land Claims Settlement Act currently provides.

LD 1255 would provide significant authority either to the Tribe or to the Maine Indian Tribal State Commission to regulate surface water uses. The term surface water uses is not defined and could be read broadly to reach beyond recreational and boating uses to regulate water levels, water withdrawals for agriculture, silviculture, drinking water, and other domestic, commercial, or industrial uses, and discharges to surface water.

Needless to say, the broad authority that this bill is proposes causes serious concerns to those landowners and forest products workers that have business or own land on or around these waters. Regardless if the term "surface water" is defined broadly or narrowly, this is a significant step beyond the Settlement Act and we question the need and appropriateness of this legislation.

For these reasons, Maine Forest Products Council opposes LD 1255.

April 6, 1999

Abigail M. Holman
Executive Director



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