

MAINE STATE LEGISLATURE

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129th MAINE LEGISLATURE

SECOND REGULAR SESSION-2020

Legislative Document

No. 2118

H.P. 1512

House of Representatives, February 25, 2020

**An Act To Establish an Enhanced Process for Tribal-State
Collaboration and Consultation and To Develop a Process for
Alternative Dispute Resolution**

Reported by Representative BAILEY of Saco for the Joint Standing Committee on
Judiciary pursuant to Joint Order 2019, H.P. 1307.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint
Rule 218.

A handwritten signature in cursive script that reads "Robert B. Hunt".

ROBERT B. HUNT
Clerk

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 30 MRSA §6215** is enacted to read:

3 **§6215. Consultation with tribes prior to state action**

4 **1. Consultation required.** Each state agency shall consult with the Passamaquoddy
5 Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians, referred to
6 collectively in this section as "the tribes" and individually as "tribe," in the development
7 of a proposed action. For the purposes of this section, "proposed action" means a
8 proposal by a state agency to develop rules, agency testimony presented at public
9 hearings before joint standing committees of the Legislature or proposed legislation and
10 other policy statements or actions, including but not limited to guidance documents and
11 directives, regarding issues that may directly affect one or more of the tribes, including
12 tribal rights in land or other natural resources; the relationship between the State and the
13 tribes; and the jurisdiction and responsibilities of the State and the tribes with respect to
14 one another.

15 **2. Request for consultation.** A state agency shall request government-to-
16 government consultation with each tribe that may be affected by a proposed action to
17 ensure a complete mutual understanding of the proposed action and to identify and
18 address tribal concerns.

19 **A.** A request for consultation must be sent by certified mail and e-mail to the chief of
20 each tribe and to the person designated by each tribe to receive consultation requests.
21 The request must provide no less than 30 days from the date of actual receipt or 35
22 days after the date of mailing, whichever is earlier, for the tribe to either elect to
23 engage in or decline consultation. The request must provide clear information about
24 the proposed action, clearly state the deadline and preferred method for response and
25 provide contact information for the tribal liaison under subsection 5.

26 **B.** If a statute of limitations, court rule or other law or rule requires a proposed action
27 to be resolved in less than 30 days, the request for consultation must clearly state the
28 deadline and identify the source of the deadline. The state agency shall make every
29 reasonable effort to consult with the tribe within the time available.

30 **C.** If a tribe does not respond by the deadline established in the request for
31 consultation, the state agency may conclude that the tribe has declined consultation
32 on the relevant proposed action.

33 **3. Consultation procedures.** If a tribe elects to engage in consultation with a state
34 agency in accordance with subsection 2, paragraph A, the state agency may not make a
35 formal public proposal or decision, including engaging in rulemaking, submitting agency
36 testimony presented at public hearings before joint standing committees of the
37 Legislature, proposing legislation or issuing policy statements or actions, on a proposed
38 action until after the consultation has occurred. Consultation must include, at a
39 minimum, the following:

1 A. The state agency shall provide the tribe with a preliminary draft or explanation of
2 the proposed action as soon as possible following receipt of the tribe's acceptance to
3 engage in consultation;

4 B. Unless otherwise agreed to by the tribe and the state agency, a consultation must
5 be held in person, either on the tribe's tribal lands or at a mutually agreeable location;

6 C. Consultation is not satisfied by and must be separate from public comment and
7 public hearing processes;

8 D. Consultation must be meaningful, be timely and involve employees of the state
9 agency who have a direct role in the proposed action and decision-making process;
10 and

11 E. Consultation must be conducted in a manner that ensures the ability of the tribe to
12 provide detailed feedback on the proposed action.

13 After consultation, the state agency shall carefully consider the input of the tribe and,
14 upon reaching a decision regarding the proposed action, shall notify the tribe in writing of
15 its decision and the rationale in support of its decision.

16 **4. Consultation rules.** By October 15, 2020, every state agency shall adopt and
17 thereafter amend, as necessary, rules or policies that promote effective communication,
18 collaboration and consultation between the state agency and the tribes; promote robust
19 government-to-government relationships between the State and the tribes; promote
20 culturally competent practices; establish methods for notifying state agency employees of
21 their responsibilities under this section; and require that all relevant agency employees be
22 provided with a copy of any rule or policy that the state agency adopts pursuant to this
23 subsection. State agencies shall consult with the chiefs of each tribe or the chiefs'
24 designees throughout the process of developing the tribal consultation rules or policies.
25 Rules adopted pursuant to this subsection are routine technical rules as defined in Title 5,
26 chapter 375, subchapter 2-A.

27 **5. Agency liaisons.** By November 1, 2020, every state agency shall designate a
28 tribal liaison, who reports directly to the head of the state agency, to assist the head of the
29 state agency with developing and ensuring the implementation of the consultation
30 required by subsection 1 and to serve as a contact person. The tribal liaison shall
31 maintain ongoing communication between the state agency and the tribes and shall ensure
32 that the training required under subsection 6 is provided to the relevant agency
33 employees.

34 **6. Training required.** A state agency shall ensure that all employees responsible for
35 tribal consultation or communication receive training regarding employee responsibilities
36 under this section. The training must, at a minimum, include instruction in effective
37 communication, the development of positive tribal-state government-to-government
38 relations and cultural competency.

39 **7. Tribal contact information.** The Office of the Governor and the commission
40 shall maintain and update a list of names and contact information, including telephone
41 numbers, mailing addresses and e-mail addresses, of the chiefs of each tribe and the
42 chiefs' designees, as well as of the tribal liaisons under subsection 5.

1 **8. Report required.** Each state agency shall provide annually by February 1st a
2 report on tribal consultation under this section to the Governor, the chiefs of each tribe
3 and the commission. The report must include the following information:

4 A. The number of times the agency requested consultation from each tribe, including
5 information regarding the subject of each requested consultation;

6 B. The number of times each tribe accepted or declined consultation, including
7 information regarding the subject of each accepted or declined request; and

8 C. A description of the outcome of each accepted request for consultation, including
9 a description of the agency decision regarding tribal input on a proposed action.

10 **Sec. 2. 30 MRSA §6216** is enacted to read:

11 **§6216. Tribal consent required for certain actions**

12 In addition to consulting with the Passamaquoddy Tribe, the Penobscot Nation and
13 the Houlton Band of Maliseet Indians as required under section 6215, a state agency shall
14 obtain the free, prior and informed consent of each affected tribe before taking an action
15 that could cause substantial or irreparable harm to tribal communities, tribal rights or
16 both, including but not limited to an action affecting reserved treaty rights and other tribal
17 rights in land or other natural resources.

18 **Sec. 3. 30 MRSA §6217** is enacted to read:

19 **§6217. Tribal-state cooperative agreements**

20 The State and its officers, departments, agencies and political subdivisions are
21 authorized to enter into cooperative agreements with federally recognized Indian tribes
22 within the State to facilitate cross-jurisdictional cooperation and the delivery of
23 government services and to avoid disputes on issues of mutual interest, including but not
24 limited to criminal jurisdiction and law enforcement, taxation, environmental regulation
25 and natural resources. A tribal liaison designated under section 6215, subsection 5 may
26 negotiate and enter into cooperative agreements with federally recognized Indian tribes
27 within the State.

28 **Sec. 4. 30 MRSA §6218** is enacted to read:

29 **§6218. Assemblies**

30 By December 15, 2020, and annually thereafter, the Governor shall convene an
31 assembly of the Governor and chiefs of the Passamaquoddy Tribe, the Penobscot Nation
32 and the Houlton Band of Maliseet Indians to discuss issues relating to the relationship
33 between the State and the Passamaquoddy Tribe, the Penobscot Nation and the Houlton
34 Band of Maliseet Indians.

35 On a biennial basis, during each first regular session of the Legislature, the
36 commission shall organize a legislative assembly to discuss the relationship between the
37 State and the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of
38 Maliseet Indians. In consultation with the chiefs of each tribe, the commission shall

1 invite Legislators and tribal council members from each tribal government in the State to
2 participate in the assembly.

3 **Sec. 5. Dispute resolution.** The Maine Indian Tribal-State Commission shall
4 study alternative dispute resolution options appropriate to tribal-state disputes, including
5 identifying best practices, developing mutual respect, working on a government-to-
6 government basis, respecting the sovereignty of the Passamaquoddy Tribe, the Penobscot
7 Nation and the Houlton Band of Maliseet Indians and the State and any existing culturally
8 appropriate models. No later than November 15, 2020, the commission shall submit a
9 report to the chiefs of the Passamaquoddy Tribe, the Penobscot Nation and the Houlton
10 Band of Maliseet Indians, the Governor, the Attorney General and the Joint Standing
11 Committee on Judiciary that includes its findings and recommendations, including
12 suggested legislation. The joint standing committee of the Legislature having jurisdiction
13 over judiciary matters may report out legislation to the First Regular Session of the 130th
14 Legislature based on the recommendations of the commission.

15 **Sec. 6. Bicentennial Accord.** The Governor shall collaborate with the chiefs of
16 the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet
17 Indians in establishing an agreement, to be known as "the Bicentennial Accord," in order
18 to institutionalize general principles governing tribal-state relations, including:

- 19 1. Respect for the sovereignty of the Passamaquoddy Tribe, the Penobscot Nation
20 and the Houlton Band of Maliseet Indians and the State;
- 21 2. A framework for the government-to-government relationship between the State,
22 through the Governor and the State's departments and agencies, and the
23 Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet
24 Indians;
- 25 3. Delineation of the commitment by the Passamaquoddy Tribe, the Penobscot
26 Nation and the Houlton Band of Maliseet Indians and the Governor to implement
27 government-to-government relationships to enhance and improve communication and
28 consultation and facilitate the resolution of issues;
- 29 4. An outline of a process for implementation of the Bicentennial Accord;
- 30 5. A commitment to specific tasks that will translate the current government-to-
31 government relationship into a more efficient, improved and mutually beneficial
32 relationship;
- 33 6. A commitment to strengthen the Wabanaki studies provisions of the Maine
34 Revised Statutes, Title 20-A, section 4706;
- 35 7. Development of a comprehensive public education initiative to inform the citizens
36 of the State about tribal history, tribal culture, treaty rights, contemporary tribal and
37 state government institutions and relations and the contribution of the Wabanaki
38 Confederacy to the State;
- 39 8. A commitment to work in collaboration to engender mutual understanding and
40 respect and to recognize and address discrimination and racial prejudice;

1 9. A framework for coordination and cooperation to enhance economic and
2 infrastructure opportunities, protect natural resources and provide educational
3 opportunities and community social services that meet the needs of all citizens; and

4 10. Updating the Bicentennial Accord at an annual assembly of the Governor and
5 chiefs of each tribe under the Maine Revised Statutes, Title 30, section 6218.

6 The Maine Indian Tribal-State Commission shall provide logistical support and
7 technical assistance in developing the Bicentennial Accord and shall report on its
8 implementation and effectiveness at the annual assembly of the Governor and chiefs and
9 at the biennial legislative assembly, pursuant to the Maine Revised Statutes, Title 30,
10 section 6218, regarding the relationship between the tribes and the State.

11 **Sec. 7. Contingent effective date.** Those sections of this Act that enact the
12 Maine Revised Statutes, Title 30, sections 6215 to 6218 do not take effect unless, within
13 90 days of the adjournment of the Second Regular Session of the 129th Legislature, the
14 Secretary of State receives written certification by the Tribal Chief and Tribal Council of
15 the Penobscot Nation, the Tribal Chiefs and Tribal Councils of the Passamaquoddy Tribe
16 and the Tribal Chief and Tribal Council of the Houlton Band of Maliseet Indians that the
17 tribes have agreed to the provisions of this Act, pursuant to 25 United States Code,
18 Section 1725(e), copies of which must be submitted by the Secretary of State to the
19 Secretary of the Senate, the Clerk of the House of Representatives and the Revisor of
20 Statutes; except that in no event may those sections of this Act that enact the Maine
21 Revised Statutes, Title 30, sections 6215 to 6218 become effective until 100 days after
22 the adjournment of the Second Regular Session of the 129th Legislature.

23 **SUMMARY**

24 This bill reflects the recommendations of the Passamaquoddy Tribe, the Penobscot
25 Nation and the Houlton Band of Maliseet Indians to establish a formal government-to-
26 government consultation process between the tribes and the State.

27 The bill establishes a requirement that state agencies consult with the tribes prior to
28 engaging in any proposed action that may directly affect the tribes. It requires state
29 agencies to request tribal consultation in writing and to provide the tribes with at least 30
30 days to respond and to agree to or decline consultation. If a state agency is required by
31 outside legal factors to act earlier, the State must provide as much time for consultation as
32 possible. If a tribe agrees to consultation, the State must provide preliminary drafts or
33 proposals to the tribe and engage in meaningful and timely in-person consultation. The
34 State must explain in writing to the tribe how it has or has not addressed tribal concerns.

35 The bill requires tribal consent prior to proposed actions that could cause substantial
36 or irreparable harm to tribal communities or tribal rights, including but not limited to
37 reserved treaty rights and other tribal rights in land, water and other natural resources.

38 The bill authorizes the State to enter into cooperative agreements with federally
39 recognized Indian tribes within the State to facilitate cross-jurisdictional cooperation and
40 the delivery of government services and to avoid disputes.

1 The bill establishes the annual assembly of the Governor and chiefs of each tribe and
2 the biennial legislative assembly to discuss issues relating to the relationship between the
3 State and the tribes.

4 The bill directs the Maine Indian Tribal-State Commission to report, by November
5 15, 2020, on its study of alternative dispute resolution options and best practices for
6 facilitating resolution of tribal-state disputes. It authorizes the joint standing committee of
7 the Legislature having jurisdiction over judiciary matters to report out legislation based
8 on the recommendations of the commission.

9 Finally, the bill directs the Governor to work with the chiefs of each tribe to establish
10 the Bicentennial Accord in order to institutionalize general principles governing tribal-
11 state relations. It directs the Maine Indian Tribal-State Commission to provide logistical
12 support and technical assistance in developing the Bicentennial Accord.