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96TH CONGRESS 2d Session } SENATE { REPORT No. 96-957

AUTHORIZING FUNDS FOR THE SETTLEMENT OF INDIAN CLAIMS IN THE STATE OF MAINE

SEPTEMBER 17 (legislative day, JUNE 12), 1980.—Ordered to be printed

Mr. MELCHER, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 2829]

The Select Committee on Indian Affairs, to which was referred the bill (S. 2829) to authorize funds for the settlement of Indian claims in the State of Maine, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

AMENDMENT TO S. 2829 IN THE NATURE OF A SUBSTITUTE

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Maine Indian Claims Settlement Act of 1980".

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) Congress hereby finds and declares that:

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Maliseet Tribe are asserting claims for possession of lands within the State of Maine and for damages on the ground that the lands in question were originally transferred in violation of law, including, but without limitation, the Trade and Intercourse Act of 1790 (1 Stat. 137), or subsequent reenactments or versions thereof.

(2) The Indians, Indian nations, and tribes and bands of Indians, other than the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, that once may have held aboriginal title to lands within the State of Maine long ago abandoned their aboriginal holdings.

(3) The Penobscot Nation, as represented as of the time of passage of this Act by the Penobscot Nation's Governor and Council, is the sole successor in interest to the aboriginal entity generally known as the Penobscot Nation which years ago claimed aboriginal title to certain lands in the State of Maine.

(4) The Passamaquoddy Tribe, as represented as of the time of passage of this Act by the Joint Tribal Council of the Passamaquoddy Tribe, is the sole successor in interest to the aboriginal entity generally known as the Passamaquoddy Tribe which years ago claimed aboriginal title to certain lands in the State of Maine.

(5) The Houlton Band of Maliseet Indians, as represented as of the time of passage of this Act by the Houlton Band Council, is the sole successor in interest, as to lands within the United States, to the aboriginal entity generally known as the Maliseet Tribe which years ago claimed aboriginal title to certain lands in the State of Maine.

(6) Substantial economic and social hardship to a large number of landowners, citizens, and communities in the State of Maine, and therefore to the economy of the State of Maine as a whole, will result if the aforementioned claims are not resolved promptly.

(7) This Act represents a good faith effort on the part of Congress to provide the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians with a fair and just settlement of their land claims. In the absence of congressional action, these land claims would be pursued through the courts, a process which in all likelihood would consume many years and thereby promote hostility and uncertainty in the State of Maine to the ultimate detriment of the Passamaquoddy Tribe, the Penobscot Nation, The Houlton Band of Maliseet Indians, their members, and all other citizens of the State of Maine.

(8) The State of Maine, with the agreement of the Passamaquoddy Tribe and the Penobscot Nation, has enacted legislation defining the relationship between the Passamaquoddy Tribe, the Penobscot Nation, and their members, and the State of Maine.

(9) Since 1820, the State of Maine has provided special services to the Indians residing within its borders, including the members of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians. During this same period, the United States provided few special services to the respective Tribe, Nation, or Band, and repeatedly denied that it had jurisdiction over or responsibility for the said Tribe, Nation, and Band. In view of this provision of special services by the State of Maine, requiring substantial expenditures by the State of Maine and made by the State of Maine without being required to do so by Federal law, it is the intent of Congress that the State of Maine not be required further to contribute directly to this claims settlement.

(b) It is the purpose of this Act—

(1) to remove the cloud on the titles to land in the State of Maine resulting from Indian claims;

(2) to clarify the status of other land and natural resources in the State of Maine;

(3) to ratify the Maine Implementing Act, which defines the relationship between the State of Maine and the Passamaquoddy Tribe and the Penobscot Nation, and

(4) to confirm that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

(a) "Houlton Band of Maliseet Indians" means the sole successor to the Maliseet Tribe of Indians as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in interest. The Houlton Band of Maliseet Indians is represented, as of the date of the enactment of this Act, as to lands within the United States, by the Houlton Band Council of the Houlton Band of Maliseet Indians;

(b) "land or natural resources" means any real property or natural resources, or any interest in or right involving any real property or natural resources, including but without limitation minerals and mineral rights, timber and timber rights, water and water rights, and hunting and fishing rights;

(c) "Land Acquisition Fund" means the Maine Indian Claims Land Acquisition Fund established under Section 5(c) of this Act;

(d) "laws of the State" means the Constitution, and all statutes, regulations, and common laws of the State of Maine and its political subdivisions and all subsequent amendments thereto or judicial interpretations thereof;

(e) "Maine Implementing Act" means Section 1, Section 30, and Section 31, of the "Act to Implement the Maine Indian Claims Settlement" enacted by the State of Maine in Chapter 732 of the Public Laws of 1979;

(f) "Passamaquoddy Indian Reservation" means those lands as defined the Maine Implementing Act;

(g) "Passamaquoddy Indian Territory" means those lands as defined in the Maine Implementing Act;

(h) "Passamaquoddy Tribe" means the Passamaquoddy Indian Tribe, as constituted in aboriginal times and all its predecessors and successors in interest. The Passamaquoddy Tribe is represented, as of the date of the enactment of this Act, by the Joint Tribal Council of the Passamaquoddy Tribe, with separate Councils at the Indian Township and Pleasant Point Reservations;

(i) "Penobscot Indian Reservation" means those lands as defined in the Maine Implementing Act;

(j) "Penobscot Indian Territory" means those lands as defined in the Maine Implementing Act;

(k) "Penobscot Nation" means the Penobscot Indian Nation as constituted in aboriginal times, and all its predecessors and successors in interest. The Penobscot Nation is represented, as of the date of the enactment of this Act, by the Penobscot Nation Governor and Council;

(l) "Secretary" means the Secretary of the Interior;

(m) "Settlement Fund" means the Maine Indian Claims Settlement Fund established under Section 5(a) of this Act; and

(n) "transfer" includes but is not limited to any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources.

APPROVAL OF PRIOR TRANSFERS AND EXTINGUISHMENT OF INDIAN TITLE AND CLAIMS OF THE PASSAMAQUODDY TRIBE, THE PENOBSCOT NATION, THE HOULTON BAND OF MALISEET INDIANS, AND ANY OTHER INDIANS, INDIAN NATION, OR TRIBE OR BAND OF INDIANS WITHIN THE STATE OF MAINE

SEC. 4. (a)(1) Any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, and any transfer of land or natural resources located anywhere within the State of Maine, from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians, including but without limitation any transfer pursuant to any treaty, compact, or statute of any state, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including but without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, Sec. 4, 1 Stat. 137, 138), and all amendments thereto and all subsequent reenactments and versions thereof, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer: *Provided, however*, that nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian (except for any Federal common law fraud claim) which is pursued under any law of general applicability that protects non-Indians as well as Indians.

(2) The United States is barred from asserting on behalf of any Indian, Indian nation, or tribe or band of Indians any claim under the laws of the State of Maine arising before the date of this Act and arising from any transfer of land or natural resources by any Indian, Indian nation, or tribe or band of Indians, located anywhere within the State of Maine, including but without limitation any transfer pursuant to any treaty, compact, or statute of any state, on the grounds that such transfer was not made in accordance with the laws of the State of Maine.

(3) The United States is barred from asserting by or on behalf of any individual Indian any claim under the laws of the State of Maine arising from any transfer of land or natural resources located anywhere within the State of Maine from, by, or on behalf of any individual Indian, which occurred prior to De-

cember 1, 1873, including but without limitation any transfer pursuant to any treaty, compact, or statute of any state.

(b) To the extent that any transfer of land or natural resources described in subsection (a)(1) of this section may involve land or natural resources to which the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, or any other Indian, Indian nation, or tribe or band of Indians had aboriginal title, such subsection (a)(1) shall be regarded as an extinguishment of said aboriginal title as of the date of such transfer.

(c) By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians or any of their members or by any other Indian, Indian nation, tribe or band of Indians, or any predecessors or successors in interest thereof, arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy, shall be deemed extinguished as of the date of the transfer.

(d) The provisions of this section shall take effect immediately upon appropriation of the funds authorized to be appropriated to implement the provisions of Sec. 5 of this Act. The Secretary shall publish notice of such appropriation in the Federal Register when such funds are appropriated.

ESTABLISHMENT OF FUNDS

SEC. 5(a) There is hereby established in the United States Treasury a fund to be known as the Maine Indian Claims Settlement Fund in which $27,000,000 shall be deposited following the appropriation of sums authorized by Section 14 of this Act.

(b)(1) One-half of the principal of the Settlement Fund shall be held in trust by the Secretary for the benefit of the Passamaquoddy Tribe, and the other half of the Settlement Fund shall be held in trust for the benefit of the Penobscot Nation. Each portion of the Settlement Fund shall be administered by the Secretary in accordance with reasonable terms established by the Passamaquoddy Tribe or the Penobscot Nation, respectively, and agreed to by the Secretary: *Provided*, That the Secretary may not agree to terms which provide for investment of the Settlement Fund in a manner not in accordance with Section 1 of the Act of June 24, 1938 (52 Stat. 1037), unless the respective Tribe or Nation first submits a specific waiver of liability on the part of the United States for any loss which may result from such an investment: *Provided, further*, That until such terms have been agreed upon, the Secretary shall fix the terms for the administration of the portion of the Settlement Fund as to which there is no agreement.

(2) Under no circumstances shall any part of the principal of the Settlement Fund be distributed to either the Passamaquoddy Tribe or the Penobscot Nation, or to any member of either Tribe or Nation: *Provided, however*, That nothing herein shall prevent the Secretary from investing the principal of said Fund in accordance with paragraph (1) of this subsection.

(3) The Secretary shall make available to the Passamaquoddy Tribe and the Penosbscot Nation in quarterly payments, without any deductions except as expressly provided in subsection 6(d)(2) and without liability to or on the part of the United States, any income received from the investment of that portion of the Settlement Fund allocated to the respective Tribe or Nation, the use of which shall be free of regulation by the Secretary. The Passamaquoddy Tribe and the Penobscot Nation annually shall each expend the income from $1,000,000 of their portion of the Settlement Fund for the benefit of their respective members who are over the age of sixty. Once payments under this paragraph have been made to the Tribe or Nation, the United States shall have no further trust responsibility to the Tribe or Nation or their members with respect to the sums paid, any subsequent distribution of these sums, or any property or services purchased therewith.

(c) There is hereby established in the United States Treasury a fund to be known as the Maine Indian Claims Land Acquisition Fund in which $54,500,000 shall be deposited following the appropriation of sums authorized by Section 14 of this Act.

(d) The principal of the Land Acquisition Fund shall be apportioned as follows:
(1) $900,000 to be held in trust for the Houlton Band of Maliseet Indians;
(2) $26,800,000 to be held in trust for the Passamaquoddy Tribe; and
(3) $26,800,000 to be held in trust for the Penobscot Nation.

The Secretary is authorized and directed to expend, at the request of the affected Tribe, Nation or Band, the principal and any income accruing to the respective portions of the Land Acquisition Fund for the purpose of acquiring land or natural resources for the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians and for no other purposes. The first 150,000 acres of land or natural resources acquired for the Passamaquoddy Tribe and the first 150,000 acres acquired for the Penobscot Nation within the area described in the Maine Implementing Act as eligible to be included within the Passamaquoddy Indian Territory and the Penobscot Indian Territory shall be held in trust by the United States for the benefit of the respective Tribe or Nation. The Secretary is also authorized to take in trust for the Passamaquoddy Tribe or the Penobscot Nation any land or natural resources acquired within the aforesaid area by purchase, gift, or exchange by such Tribe or Nation. Land or natural resources acquired outside the boundaries of the aforesaid areas shall be held in fee by the respective Tribe or Nation, and the United States shall have no further trust responsibility with respect thereto. Land or natural resources acquired within the State of Maine for the Houlton Band of Maliseet Indians shall be held in trust by the United States for the benefit of the Band, *provided*, that no land or natural resources shall be so acquired for or on behalf of the Houlton Band of Maliseet Indians without the prior enactment of appropriate legislation by the State of Maine approving such acquisition, *provided further*, that the Passamaquoddy Tribe and the Penobscot Nation shall each have a one-half undivided interest in the corpus of the trust, which shall consist of any such property or subsequently acquired exchange property, in the event the Houlton Band of Maliseet Indians should terminate its interest in the trust.

(4) The Secretary is authorized to, and at the request of either party shall, participate in negotiations between the State of Maine and the Houlton Band of Maliseet Indians for the purpose of assisting in securing agreement as to the land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band. Such agreement shall be embodied in the legislation enacted by the State of Maine approving the acquisition of such lands as required by section 5(d)(3). The agreement and the legislation shall be limited to:

(A) provisions providing restrictions against alienation or taxation of land or natural resources held in trust for the Houlton Band no less restrictive than those provided by this Act and the Maine Implementing Act for land or natural resources to be held in trust for the Passamaquoddy Tribe or Penobscot Nation;

(B) provisions limiting the power of the State of Maine to condemn such lands that are no less restrictive than the provisions of this Act and the Maine Implementing Act that apply to the Passamaquoddy Indian Territory and the Penobscot Indian Territory but not within either the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation;

(C) consistent with the trust and restricted character of the lands, provisions satisfactory to the State and the Houlton Band concerning:

(i) payments by the Houlton Band in lieu of payment of property taxes on land or natural resources held in trust for the Band, except that the Band shall not be deemed to own or use any property for governmental purposes under the Maine Implementing Act.

(ii) payments of other fees and taxes to the extent imposed on the Passamaquoddy Tribe and the Penobscot Nation under the Maine Implementing Act, except that the Band shall not be deemed to be a governmental entity under the Maine Implementing Act or to have the powers of a municipality under the Maine Implementing Act;

(iii) securing performance of obligations of the Houlton Band arising after the effective date of agreement between the State and the Band.

(D) provisions on the location of these lands. Except as set forth in this subsection, such agreement shall not include any other provisions regarding the enforcement or application of the laws of the State of

Maine. Within one year of the date of enactment of this Act, the Secretary is directed to submit to the appropriate committees of the House of Representatives and the Senate having jurisdiction over Indian Affairs a report on the status of these negotiations.

(e) Notwithstanding the provisions of Section 1 of the Act of August 1, 1888 (25 Stat. 357), as amended, and Section 1 of the Act of February 26, 1931 (46 Stat. 1421), the Secretary may acquire land or natural resources under this section from the ostensible owner of the land or natural resources only if the Secretary and the ostensible owner of the land or natural resources have agreed upon the identity of the land or natural resources to be sold and upon the purchase price and other terms of sale. Subject to the agreement required by the preceding sentence, the Secretary may institute condemnation proceedings in order to perfect title satisfactory to the Attorney General of the United States and condemn interest adverse to the ostensible owner. Except for the provisions of this Act, the United States shall have no other authority to acquire lands or natural resources in trust for the benefit of Indians or Indian nations, or tribes, or bands of Indians in the State of Maine.

(f) The Secretary may not expend on behalf of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians any sums deposited in the Funds established pursuant to the subsections (a) and (c) of this section unless and until he finds that authorized officials of the respective Tribe, Nation, or Band have executed appropriate documents relinquishing all claims to the extent provided by Sections 4, 11, and 12 of this Act and by Section 613 of the Maine Implementing Act, including stipulations to the final judicial dismissal with prejudice of their claims.

(g) (1) The provisions of Section 2116 of the Revised Statutes shall not be applicable to (A) the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians or any other Indian, Indian nation, or tribe or band of Indians in the State of Maine, or (B) any or natural resources owned by or held in trust for the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians or any other Indian, Indian nation or tribe or band of Indians in the State of Maine. Except as provided in subsections (d) (4) and (g) (2), such land or natural resources shall not otherwise be subject to any restraint on alienation by virtue of being held in trust by the United States or the Secretary.

(2) Except as provided in paragraph (3) of this subsection, any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory, except (A) takings for public uses consistent with the Main Implementing Act, (B) takings for public uses pursuant to the laws of the United States, or (C) transfers of individual Indian use assignments from one member of the Passamaquoddy Tribe or Penobscot Nation to another member of the same Tribe or Nation, shall be void *ab initio* and without any validity in law or equity.

(3) Land or natural resources within the Passamaquoddy Indian Territory or the Penobscot Indian Territory or held in trust for the benefit of the Houlton Band of Maliseet Indians may, at the request of the respective Tribe, Nation, or Band, be—

(A) leased in accordance with the Act of August 9, 1955 (69 Stat. 539), as amended;

(B) leased in accordance with the Act of May 11, 1938 (52 Stat. 347), as amended;

(C) sold in accordance with Section 7 of the Act of June 25, 1910 (36 Stat. 857), as amended;

(D) subjected to rights-of-way in accordance with the Act of February 5, 1948 (62 Stat. 17);

(E) exchanged for other land or natural resources of equal value, or if they are not equal, the values shall be equalized by the payment of money to the grantor or to the Secretary for deposit in the Land Acquisition Fund for the benefit of the affected Tribe, Nation, or Band, as the circumstances require, so long as payment does not exceed 25 per centum of the total value of the interests in land to be transferred by the Tribe, Nation, or Band; and

(F) sold, only if at the time of sale the Secretary has entered into an option agreement or contract of sale to purchase other lands of approximate equal value.

(h) Land or natural resources acquired by the Secretary in trust for the Passamaquoddy Tribe and the Penobscot Nation shall be managed and administered in

accordance with terms established by the respective Tribe or Nation and agreed to by the Secretary in accordance with Section 102 of the Indian Self-Determination and Education Assistance Act (88 Stat. 2206), or other existing law.

(i) (1) Trust or restricted land or natural resources within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. In the event that the compensation for the taking is in the form of substitute land to be added to the reservation, such land shall become a part of the reservation in accordance with the Maine Implementing Act and upon notification to the Secretary of the location and boundaries of the substitute land. Such substitute land shall have the same trust or restricted status as the land taken. To the extent that the compensaion is in the form of monetary proceeds, it shall be deposited and reinvested as provided in paragraph (2) of this subsection.

(2) Trust land of the Passamaquoddy Tribe or the Penobscot Nation not within the Passamaquoddy Reservation or Penobscot Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. The proceeds from any such condemnation shall be deposited in the Land Acquisition Fund established by Section 5(c) and shall be reinvested in acreage within unorganized or unincorporated areas of the State of Maine. When the proceeds are reinvested in land whose acreage does not exceed that of the land taken, all the land shall be acquired in trust. When the proceeds are invested in land whose acreage exceeds the acreage of the land taken, the respective Tribe or Nation shall designate, with the approval of the United States, and within 30 days of such reinvestment, that portion of the land acquired by the reinvestment, not to exceed the area taken, which shall be acquired in trust. The land not acquired in trust shall be held in fee by the respective Tribe or Nation. The Secretary shall certify, in writing, to the Secretary of State of the State of Maine the location, boundaries, and status of the land acquired.

(3) The State of Maine shall have initial jurisdiction over condemnation proceedings brought under this section. The United States shall be a necessary party to any such condemnation proceedings. After exhaustion of all State administrative remedies, the United States is authorized to seek judicial review of all relevant matters in the courts of the United States and shall have an absolute right of removal, at its discretion, over any action commenced in the courts of the State.

(j) When trust or restricted land or natural resources of the Passamaquoddy Tribe, the Penobscot Nation or the Houlton Band of Maliseet Indians are condemned pursuant to any law of the United States other than this Act, the proceeds paid in compensation for such condemnation shall be deposited and reinvested in accordance with subsection (i) (2) of this section.

APPLICATION OF STATE LAWS

SEC. 6. (a) Except as provided in section 8, subsection (e), all Indians, Indian nations, tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

(b) (1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the Tribe, Nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act and that Act is hereby approved, ratified, and confirmed.

(2) Funds appropriated for the benefit of Indian people or for the administration of Indian affairs may be utilized, consistent with the purposes for which they are appropriated, by the Passamaquoddy Tribe and the Penobscot Nation to provide part or all of the local share as provided by the Maine Implementing Act.

(3) Nothing in this section shall be construed to supersede any Federal laws or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine unless expressly provided by this Act.

(4) Not later than October 30, 1982, the Secretary is directed to submit to the appropriate committees of the House of Representatives and the Senate having jurisdiction over Indian affairs a report on the Federal and state funding provided the Passamaquoddy Tribe and Penobscot Nation compared with the respective Federal and state funding in other states.

(c) The United States shall not have any criminal jurisdiction in the State of Maine under the provisions of Sections 1152, 1153, 1154, 1155, 1156, 1160, 1161, 1162, 1163, and 1165 of Title 18 of the United States Code. This provision shall not be effective until 60 days after the publication of notice in the Federal Register as required by subsection 4(d) of this Act.

(d)(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; and Section 1362 of Title 28, United States Code, shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians; *Provided, however,* That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act.

(2) Notwithstanding the provisions of Section 3477 of the Revised Statutes, as amended, the Secretary shall honor valid final orders of a Federal, State, or territorial court which enters money judgments for causes of action which arise after the date of the enactment of this Act against either the Passamaquoddy Tribe or the Penobscot Nation by making an assignment to the judgment creditor of the right to receive income out of the next quarterly payment from the Settlement Fund established pursuant to Section 5(a) of this Act and out of such future quarterly payments as may be necessary until the judgment is satisfied.

(e)(1) The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penabscot Nation: *Provided,* That such amendment is made with the agreement of the affected Tribe or Nation, and that such amendment relates to (A) the enforcement or application of civil, criminal or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the tribe or Nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the Tribe or Nation; or (C) the allocation of jurisdiction between tribal courts and State courts.

(2) Notwithstanding the provisions of subsection (a) of this section, the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the Band or its members.

(f) The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.

(g) The Passamaquoddy Tribe, the Penobscot Nation, and the State of Maine shall give full faith and credit to the judicial proceedings of each other.

(h) Except as otherwise provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (2) which affects or preempts the civil, crimial, or regulatory jurisdiction of the State of Maine, shall apply within the State.

(i) As Federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians. The Passamaquoddy Tribe, the Penobscot Nation,

and the Houlton Band of Maliseet Indians shall be treated in the same manner as other Federally recognized tribes for the purposes of Federal taxation and any lands which are held by the respective Tribe, Nation, or Band subject to a restriction against alienation or which are held in trust for the benefit of the respective Tribe, Nation, or Band shall be considered Federal Indian reservations for purposes of Federal taxation.

TRIBAL ORGANIZATION

SEC. 7. (a) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for their common welfare and adopt an appropriate instrument in writing to govern the affairs of the Tribe, Nation, or Band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act and the Maine Implementing Act. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall each file with the Secretary a copy of its organic governing document and any amendment thereto.

(b) For purposes of benefits under this Act and the recognition extended the Houlton Band of Maliseet Indians, no person who is not a citizen of the United States may be considered a member of the Houlton Band of Maliseets, except persons who, as of the date of this Act, are enrolled members on the Band's existing membership roll, and direct lineal descendants of such members. Membership in the Band shall be subject to such further qualifications as may be provided by the Band in its organic governing document or amendments thereto subject to the approval of the Secretary.

IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT

SEC. 8. (a) The Passamaquoddy Tribe or the Penobscot Nation may assume exclusive jurisdiction over Indian child custody proceedings pursuant to the Indian Child Welfare Act of 1978 (92 Stat. 3069). Before the respective Tribe or Nation may assume such jurisdiction over Indian child custody proceedings, the respective Tribe or Nation shall present to the Secretary for approval a petition to assume such jurisdiction and the Secretary shall approve that petition in the manner prescribed by Sections 108(a)–(c) of said Act.

(b) Any petition to assume jurisdiction over Indian child custody proceedings by the Passamaquoddy Tribe or the Penobscot Nation shall be considered and determined by the Secretary in accordance with Sections 108(b) and (c) of the Act.

(c) Assumption of jurisdiction under this section shall not affect any action or proceeding over which a court has already assumed jurisdiction.

(d) For the purposes of this section, the Passamaquoddy Indian Reservation and the Penobscot Indian Reservation are "reservations" within Section 4(10) of the Act.

(e) For the purposes of this section, the Houlton Band of Maliseet Indians is an "Indian tribe" within Section 4(8) of the Act, provided, that nothing in this subsection shall alter or effect the jurisdiction of the State of Maine over child welfare matters as provided in subsection 6(e)(2) of this Act.

(f) Until the Passamaquoddy Tribe or the Penobscot National has assumed exclusive jurisdiction over the Indian child custody proceedings pursuant to this section, the State of Maine shall have exclusive jurisdiction over Indian child custody proceedings of that Tribe or Nation.

EFFECT OF PAYMENTS TO PASSAMAQUODDY TRIBE, PENOBSCOT NATION, AND HOULTON BAND OF MALISEET INDIANS

SEC. 9. (a) No payments to be made for the benefit of the Passamaquoddy Tribe, the Penobscot Nation, or the Houlton Band of Maliseet Indians pursuant to the terms of this Act shall be considered by any agency or department of the United States in determining or computing the eligibility of the State of Maine for participation in any financial aid program of the United States.

(b) The eligibility for or receipt of payments from the State of Maine by the Passamaquoddy Tribe and the Penobscot Nation or any of their members pursuant to the Maine Implementing Act shall not be considered by any department or agency of the United States in determining the eligibility of or computing payments to the Passamaquoddy Tribe or the Penobscot Nation or any of their

members under any financial aid program of the United States: *Provided*, That to the extent that eligibility for the benefits of such a financial aid program is dependent upon a showing of need by the applicant, the administering agency shall not be barred by this subsection from considering the actual financial situation of the applicant.

(c) The availability of funds or distribution of funds pursuant to Section 5 of this Act may not be considered as income or resources or otherwise utilized as the basis (1) for denying any Indian household or member thereof participation in any Federally assisted housing program, (2) for denying or reducing the Federal financial assistance or other Federal benefits to which such household or member would otherwise be entitled, or (3) for denying or reducing the Federal financial assistance or other Federal benefits to which the Passamaquoddy Tribe or Penobscot Nation would otherwise be eligible or entitled.

DEFERRAL OF CAPITAL GAINS

SEC. 10. For the purpose of subtitle A of the Internal Revenue Code of 1954, any transfer by private owners of land purchased or otherwise acquired by the Secretary with moneys from the Land Acquisition Fund whether in the name of the United States or of the respective Tribe, Nation or Band shall be deemed to be an involuntary conversion within the meaning of Section 1033 of the Internal Revenue Code of 1954, as amended.

TRANSFER OF TRIBAL TRUST FUNDS HELD BY THE STATE OF MAINE

SEC. 11. All funds of either the Passamaquoddy Tribe or the Penobscot Nation held in trust by the State of Maine as of the effective date of this Act shall be transferred to the Secretary to be held in trust for the respective Tribe or Nation and shall be added to the principal of the Settlement Fund allocated to that Tribe or Nation. The receipt of said State funds by the Secretary shall constitute a full discharge of any claim of the respective Tribe or Nation, its predecessors and successors in interest, and its members, may have against the State of Maine, its officers, employees, agents, and representatives, arising from the administration or management of said State funds. Upon receipt of said State funds, the Secretary, on behalf of the respective Tribe and Nation, shall execute general releases of all claims against the State of Maine, its officers, employees, agents, and representatives, arising from the administration or management of said State funds.

OTHER CLAIMS DISCHARGED BY THIS ACT

SEC. 12. Except as expressly provided herein, this Act shall constitute a general discharge and release of all obligations of the State of Maine and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of Indian, any Indian nation, or tribe or band of Indians or the United States as trustee therefor, including those actions now pending in the United States District Court for the District of Maine captioned *United States of America* v. *State of Maine* (Civil Action Nos. 1966–ND and 1969–ND).

LIMITATION OF ACTIONS

SEC. 13. Except as provided in this Act, no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, or to grant implied consent to any Indian, Indian nation, or tribe or band of Indians to sue the United States or any of its officers with respect to the claims extinguished by the operation of this Act.

AUTHORIZATION

SEC. 14. There is hereby authorized to be appropriated $81,500,000 for the fiscal year beginning October 1, 1980 for transfer to the Funds established by Section 5 of this Act.

INSEPARABILITY

SEC. 15. In the event that any provision of Section 4 of this Act is held invalid, it is the intent of Congress that the entire Act be invalidated. In the

event that any other section or provision of this Act is held invalid, it is the intent of Congress that the remaining sections of this Act shall continue in full force and effect.

CONSTRUCTION

SEC. 16. (a) In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern.

(b) The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would materially affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian Nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

PURPOSE

The purpose of S. 2829 is to provide Congressional ratification and implementation of a settlement of land claim which have been raised by three Maine Indian Tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians to as much as two-thirds of the lands comprising the State of Maine and on which more than 250,000 private citizens now reside. The settlement embodied in this Act was negotiated by the three Main Tribes, the State of Maine, and those private landowners who are willing to transfer portions of their holdings to fulfill its purposes.

HISTORICAL BACKGROUND

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians were first contacted in the area which is the State of Maine and the Province of New Brunswick by the earliest explorers of the North American continent.

All three tribes are riverine in their land-ownership orientation. The aboriginal territory of the Penobscot Nation is centered on the Penobscot River. The aboriginal territory of the Passamaquoddy Tribe is centered on the Saint Croix River and the smaller river systems to the west. The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River.

When the Revolutionary War broke out, General George Washington requested the assistance of these tribes and, on June 23, 1777, Colonel John Allan, of the Massachusetts militia who was the director of the federal government's Eastern Indian Department, negotiated a treaty with these Indians, pursuant to which the Indians were to assist in the Revolutionary War in return for protection of their lands by the United States and provision of supplies in times of need. This treaty was never ratified by the United States, although Allan's journals indicate that the Indians played a crucial role in the Revolutionary War.

Despite requests from the Maine Indians, the federal government did not protect the tribes following the Revolutionary War. In 1794, the Passamaquoddy Tribe entered into an agreement with the Commonwealth of Massachusetts (which then had jurisdiction over all of what is now Maine), in which the tribe relinquished all but 23,000

acres of its aboriginal territory. Subsequent sales and leases by the State of Maine further reduced this territory to approximately 17,000 acres. The Penobscot Nation lost the bulk of its aboriginal territory in treaties consummated in 1796 and 1818. A sale to the State of Maine in 1833 resulted in the loss of four townships by the Penobscot Nation.

History of Litigation

The validity of these agreements with the Tribes was not seriously questioned until, in 1972, the Governors of the Passamaquoddy Tribe asked the United States to bring suit on behalf of their Tribe on the ground that its agreement with Massachusetts was invalid because it had never been approved by the federal government as required by the Nonintercourse Act.

The Nonintercourse Act—which is also known as the Trade and Intercourse Act—was first enacted by the newly-formed Congress of the United States in 1790 and was subsequently re-enacted five times. It consisted of many provisions regulating a wide spectrum of activities between American Indians and Indian Tribes and the non-Indian citizens of the United States. Salient among those provisions was a section which prohibited the transfer of any lands from Indians or Indian tribes without the approval of the United States. As reenacted in 1793, this section read, in pertinent part:

> * * * no purchase or grant of lands, or any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution * * *.

A fine of up to one thousand dollars and imprisonment for up to one year were provided for violation of this section. All the subsequent reenactments of the Nonintercourse Act included this section in one form or another. In 1834, it was enacted in its present form and is currently codified at Title 25, section 177 of the United States Code. The importance of this provision to federal Indian policy is critical and it has been described as "the linchpin of federal Indian law."

The tribe's request was denied by the United States on grounds that the Nonintercourse Act does not apply to nonrecognized tribes and on the grounds that there was, thus, no trust relationship between the United States and the Maine Tribes. The Passamaquoddy Tribe then brought a declaratory judgment action against the Secretary of the Interior and the United States Attorney General. In 1972, the tribes won an order forcing the United States to file a protective action on its behalf. In 1975, the United States District Court for the District of Maine held that the Indian Nonintercourse Act applies to all tribes, including those which are not federally-recognized, and that the Act creates a trust relationship between the United States and all such tribes. Later that year, the United States Court of Appeals for the First Circuit unanimously reaffirmed the *Passamaquoddy* decision, holding that the trust relationship created by the Act includes, at minimum, an obligation to investigate and take such action as may be warranted under the circumstances when an alleged violation of the Nonintercourse Act is brought to the government's attention.

The issues raised in the *Passamaquoddy* case were reaffirmed in two subsequent decisions involving Maine Indians: *Bottomly* v. *Passamaquoddy Tribe*, 599 F. 2d 1061 (1st Cir. 1979) (holding that Maine Tribes are entitled to protection under the federal Indian common law doctrines) and *State of Maine* v. *Dana*, 404 A. 2d 551 (Me. 1979), cert. denied 100 F. Ct. 1064 (Feb. 1980) (holding that reservation land of dependent Maine Indian Tribes constitutes Indian country as that term is used in federal law).

History of Settlement Discussions

The settlement process began in March of 1977 when President Carter appointed retired Georgia Supreme Court Justice William Gunter to study the case. After substantial study of the merits of the claims and the defenses to them, Justice Gunter recommended that the case be settled. The White House acted on this suggestion by appointing a three-person work group to develop a settlement plan which consisted of Eliot Cutler, Associate Director of the Office of Management and Budget for Energy, Natural Resources and Science; Leo Krulitz, Solicitor of the Department of the Interior; and A. Stephens Clay, Judge Gunter's law partner. Negotiations between this work group and the tribes produced an agreement between the tribes and the administration, which was announced in February, 1978. An agreement between the administration and officials of the State of Maine was announced in November, 1978. But it was not until March, 1980, that an agreement supported by all parties was announced.

Following its March announcement, the current agreement was approved by the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. The agreement was then adopted by the Maine legislature and signed into law by the Maine Governor Joseph Brennan, on April 2, 1980. The proposal was introduced in Congress on June 13, 1980, by Senator William Cohen and Senator George Mitchell of Maine.

Need

After the Court of Appeals affirmed the District Court decision the Justice Department undertook an analysis of the Tribes' claim. In a memorandum written in 1977, the Department described the case as "potentially the most complex litigation ever brought in the Federal courts with social costs and economic impacts without precedent and incredible litigation costs to all parties." This conclusion was based on the size of claim, the number of persons living within the disputed area, and the native of the legal issues involved. For, the Tribes claim up to 12.5 million acres, or 60 percent of the State of Maine and, in the nearly two hundred years that had intervened between the time the first agreement was reached and the present day, more than 350,000 people had moved onto the now disputed land.

If the case were to be litigated, it would involve a host of novel issues and, given the magnitude of the claim each side would be certain to appeal each ruling of the court. Moreover, the court would be required to decide questions of fact concerning events which began before this country was founded. Estimates of the time it would take to litigate such a case range from five to more than fifteen years. In the meantime, according to testimony offered to this Committee, titles to

land in the entire claim area would be clouded, the sale of municipal bonds would become difficult if not impossible, and property would be difficult to alienate. Although the State of Maine estimates its chances of succeeding, if the case were to be litigated, at 60 per cent, all the parties agree that such a victory would be pyrrhic. In July of this year, Secretary of the Interior Cecil Andrus, in testimony before this Committee, described this legislation as "critical" and urged its passage.

Special Issues

Testimony before the Committee and written materials submitted for the record reveal the following concerns about the settlement embodied in S. 2829 and the Maine Implementing Act, all of which the Committee believes to be unfounded:

1. *That the settlement will terminate the three Maine Tribes.*—In July 1, 1980, testimony, Interior Secretary Cecil Andrus stated that the setlement does not terminate the three Tribes in Maine. The Committee agrees with the Secretary. Numerous provisions of S. 2829 and the Maine Implementing Act make reference to the Maine Tribe as tribes, and Sec. 6(h) specifically provides

> That as Federally recognized Indian tribes the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations or tribes or bands of Indians, to same extent and subject to the same eligibility criteria as are generally applicable to other Indians, Indian nations or tribes or bands of Indians.

2. *That the settlement amounts to a "destruction" of the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation.*—Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to change these laws or even terminate these tribes. In 1979, however, it was held in *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979), that the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States. The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in *State* v. *Dana*, 404 A.2d 551 (Me. 1979), *cert. denied*, 100 S.Ct. 1064 (Feb. 19, 1980). While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with these decisions the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.

The settlement also protects the sovereignty of the Passamaquoddy Tribe and the Penobscot Nation in other ways. For example, Secs.

6206(1) and 6214, and 4733 of the Maine Implementing Act provide that these Tribes, as Indian tribes under the United States Constitution, may exclude non-Indians from tribal decision-making processes, even though non-Indians live within the jurisdiction of the tribes. Other examples of expressly retained sovereign activities include the hunting and fishing provisions discussed in paragraph 7 below, and the provisions contained in Title 30, Sec. 6209 as established by the Maine Implementing Act and Sec. 6 in S. 2829 which provide for the continuation and/or establishment of tribal courts by the the Passamaquoddy Tribe and the Penobscot Nation with powers similar to those exercised by Indian courts in other parts of the country. Finally, Sec. 7(a) of S. 2829 provides that all three Tribes may organize for their common welfare and adopt an appropriate instrument to govern its affairs when acting in a governmental capacity. In addition, the Maine Implementing Act grants to the Passamaquoddy Tribe and Penobscot Nation the state constitutional status of municipalities under Maine law. In view of the "homerule" powers of municipalities in Maine, this also constitutes a significant grant of power to the Tribes.

3. *The settlement provides none of the protections that is afforded other tribes.*—One of the most important federal protections is the restriction against alienation of Indian lands without federal consent. Sections 5(d)(4) and 5(g)(2) and (3) of S. 2829 specifically provides for such a restriction and, as was made clear during the hearings, this provision is comparable to the Indian Non-Intercourse Act, 25 U.S.C. § 177. Sections 6 and 8 of S. 2829 also specifically continue the applicability of the Indian Bill of Rights of the 1968 Civil Rights Act, the Indian Child Welfare Act, and all other federal Indian statutes to the extent they do not affect or preempt authority granted to the State of Maine under the terms of the settlement.

4. *Individual Indian property and claims by Indians who hold individual use assignments will be taken in the settlement.*—The settlement envisions four categories of Indian land in Maine: individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian territory." Only newly-acquired land within Indian territory and newly-acquired tribal land to be held in trust for the Houlton Band of Maliseet Indians will be taken in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in common by the Tribe as a whole, will not be taken by the United States in trust. These lands will simply be subject to a federal restriction against alienation which will prevent their loss or transfer to a non-tribal member. Sec. 5(f)(2)(C) of S. 2829 provides that the Department of the Interior will have no role in transfers of individual tribal property from one tribal member to another, and Sec. 18 of the Maine Implementing Act, ends the power of the Maine Commissioner of Indian Affairs to interfere with such internal transfers.

The settlement will also have no effect on claims by inividual Indian land owners or individual Indian assignment owners. Section 4 of S. 2829 and Title 30, Sec. 6213 as established by the Maine Implementing Act specifically protect claims which individual Indians

have for causes of action arising after December 1, 1873. For these reasons, trespass actions brought by individual Indians will not be affected.

5. *The Settlement will subject tribal lands to property taxation.*—Sec. 6208 of the Maine Implementing Act specifically prohibits the imposition of such a tax. The confusion over this issue apparently comes from two provisions of the settlement: Title 30, Sec. 6208(2) as established by the Maine Implementing Act, which provides for payments in lieu of taxes on lands within Indian Territory, and Sec. 6(h) of S. 2829 which provides that lands held in trust for the Passamaquoddy Tribe or the Penobscot Nation or subject to a restriction against alienation, shall be considered "Federal Indian reservations for purposes of federal taxation."

Title 30, Sec. 6208 as established by the Maine Implementing Act does not impose any taxes on any land within Indian territory. A tax is a charge against property which can result in a taking of that property for non-payment of the tax. Section 6208 does not provide for such a tax, and S. 2829 forbids such a tax. The actual workings of this provision are explained in detail in the Committee section-by-section analysis of the Maine Implementing Act which appears in this report. That analysis explains, among other things, that these payments in lieu of taxes will most likely be paid with funds provided to the tribes by the federal government.

Sec. 6(h) of S. 2829, which treats the Passamaquoddy and Penobscot Indian Territories as federal reservations for purposes of federal taxes is designed to insure that activities within these Territories are entitled to the same Federal tax exemptions which apply on reservations of other Federally recognized tribes. The provision is intended only to benefit the Tribes.

6. *That the provision for eminent domain takings will lead to a rapid loss of Indian land.*—While Sec. 6205(3), (4), and (5) of the Maine Implementing Act and Sec. 5 (h) and (i) of S. 2829 provide a mechanism for takings for public uses, these provisions impose preconditions on such takings which are more stringent than any other known to the Committee. Before a taking could ever be effectuated within the reservations, an entity proposing such a taking must demonstrate that there is no reasonably feasible alternative to the taking. No taking, whether within or without the reservation, can lead to a diminution of Indian lands, and any taken land must be replaced. The settlement provides machinery for adding such substitute lands to the reservation or Indian territory from which they are taken.

7. *Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement.*—Prior to the settlement, Maine law recognized the Passamaquoddy Tribe's and the Penobscot Nation's right to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time. Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the

newly-acquired Indian territory as well. The power of the State of Maine to alter such rights without the consent of the affected tribe or nation is ended by Sec. 6(e)(1) of S. 2829. The State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse effect on stocks in or on adjacent lands or waters. This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in Title 30, Sec. 6207(6) as established by the Maine Implementing Act, the State will only be able to make use of this residual power where it can be demonstrated by substantial that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal land.

8. *The lands and trust funds provided in the Settlement will not benefit the Indians because of the lack of adequate controls.*—In testimony before the Committee, one of the Indian opponents to the bill stated his belief that the Indians would receive no benefits from the trust fund established under the settlement, and that all income would be used by the Secretary of the Interior. This fear is unfounded. Section 6(b) of S. 2829 requires the Secretary to make all trust fund income available to the respective Tribe and Nation quarterly, and provides that he may make no deduction for the United States' expense in the administration of the fund.

Fears that the Tribes will not have adequate control over the management of the trust funds are equally unfounded. The legislation specifically provides that the funds shall be managed in accordance with terms put forth by the Tribes. As is explained elsewhere in this report, the Secretary must agree to reasonable terms put forth by the tribes, and through the Administrative Procedure Act, the Tribes may obtain judicial review of any refusal by the Secretary to agree to reasonable terms. While the United States will not be liable for losses which result from investments that the Tribes request which are outside the scope of the Department of the Interior's existing authority, such investments cannot be made except at the request of the Tribe or Nation which seeks such an investment.

9. *The Settlement will lead to acculturation of the Maine Indians.*—Nothing in the settlement provides for acculturation, nor is it the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the Settlement offers protections against this result being imposed by outside entities by providing for tribal governments which are separate and apart from the towns and cities of the State of Maine and which control all such internal matters. The Settlement also clearly establishes that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.

Summary of Major Provisions

S. 2829 provides congressional implementation and ratification of the terms of the settlement negotiated among the parties; that is, the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, the State of Maine, the private owners of large tracts of land, and the United States.

Section 4 of the bill provides for the extinguishment of the land claims of the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians in the State of Maine, including damage claims associated with these land claims, upon appropriation of $81.5 million to implement the provisions of Section 5 of this Act.

Section 5 provides that the United States will establish a Maine Indian Claims Settlement Fund into which will be deposited $27 million which the bill authorizes to be appropriated: $13,500,000 of this fund will be held for the benefit of the Passamaquoddy Tribe, and $13,500,000 of this fund would be held for the Penobscot Nation. The fund would be administered in accordance with reasonable terms put forth by the respective Tribe or Nation and agreed to by the Secretary of the Interior.

The settlement also provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them. The United States also agreed in its Memorandum of Understanding with the Passamaquoddy Tribe and Penobscot Nation, dated February 10, 1978, that the tribes shall be eligible to receive all federal Indian services and benefits to the same extent and subject to the same eligibility criteria as other federally recognized tribes. The Tribes' agreement with the State of Maine includes various other guarantees concerning jurisdictional matters and entitlement to state services.

In addition, Section 5 provides that the United States will also establish the Maine Indian Lands Acquisition Fund into which will be credited $54,500,000 which the bill authorizes to be appropriated. It is expected that this amount of money will be sufficient to acquire 150,000 acres of land for the Passamaquoddy Tribe, 150,000 acres of land for the Penobscot Nation, and 5,000 acres of land for the Houlton Band of Maliseet Indians all of which is now privately held. These lands will be held by the United States in trust for the three tribes subject to restraints on alienation except as specified in Section 5. Acquisition of lands for the Houlton Band of Maliseet Indians is deferred pending negotiation with the State on their location and other matters of concern to the parties.

Section 6 governs the application of the laws of the State of Maine to all Indians, Indian nations, or tribes or bands of Indians, including the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and any lands held by them or for their benefit. Subsection 6(b) adopts and ratifies the Maine Implementing Act and subsection 6(e) provides that the State may amend the provisions of that Act only with the prior consent of the Passamaquoddy Tribe and Penobscot Nation. The Maine Implementing Act sets forth the terms of agreement between the Tribe and Nation with the State of Maine with respect to the jurisdiction of the Tribe, the Nation, and the State and the legal status of these Tribes under State law.

Essentially, the Maine Implementing Act accords the Passamaquoddy Tribe and Penobscot Nation the status of municipalities under State law; it provides for the application of State law to persons and property within the Penobscot Indian Territory and the Passamaquoddy Indian Territory; it provides for the Tribes to make payments in lieu of taxes on real and personal property within

the Indian territory; it provides that the Tribe and Nation will adopt certain laws of the State as their own but the independent legal status of the Tribes under Federal law is recognized; it establishes the authority of the Tribe and Nation to enact ordinances applicable to all persons within the Indian territory; it provides that the State shall enforce tribal ordinances as to offenses by non-members or offenses by members committed within either reservation where the potential penalty exceeds imprisonment for six months or a fine of $500.00; it reserves to the Tribe or Nation exclusive authority over internal tribal matters, jurisdiction over minor offenses and juvenile offenses committed by members within either reservation, and reserves to the Tribes small claims civil jurisdiction and matters of domestic relations including support and child welfare involving their own members.

To facilitate implementation of the Maine Act, subsection 6(d) provides that the Passamaquoddy Tribe, Penobscot Nation, and the Houlton Band of Maliseet Indians, and their members may, subject to the limitation on internal affairs contained in Sec. 6206(1) of the Maine Implementing Act, sue and be sued in State and Federal courts to the same extent as any other person or entity, provided that principles of immunity applicable to municipalities in the State of Maine are equally applicable to the Tribe and the Nation and their offices when acting in their governmental capacities. Since the trust and restricted lands and trust fund of the Tribe and Nation will be exempt from levy or attachment or from alienation, provision is made for payment by the Secretary of income from the Trust Settlement Fund in satisfaction of valid, final orders of the courts. The trust and restricted lands of the Band will also, when acquired, be exempt from levy or attachment or from alienation. Subsection 5(d)(4) provides that the State and the Band shall enter negotiations following the enactment of this Act to seek a method by which the Band may satisfy obligations which it may incur.

Subsection 6(h) provides that the general laws of the United States which are applicable to Indians because of their status as Indians are applicable to the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, except that no such law which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine shall be application within the State. The Tribe, Nation, and Band are specifically recognized as eligible to receive benefits provided by the United States to Indians because of their status as Indians.

Section 7 authorizes but does not compel the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseets to adopt organizational documents and file same with the Secretary.

Section 8 provides for the implementation of the Indian Child Welfare Act of 1978 by the Tribes.

Section 9 provides that payments made to the Tribe, Nation, or Band under this Act shall not be considered by Federal agencies in determining or computing the eligibility of the State of Maine for parltication in Federal financial aid programs. It further provides that tribal eligibility for receipt of payments from the State of Maine shall not be considered by Federal agencies in determining eligibility

of the Tribes or their members to participate in Federal programs except that where eligibility for benefits is dependent upon a showing of need the Federal agency receiving the application will not be barred from considering the actual financial situation of the applicant. Finally, the availability of funds or distribution of funds from the Settlement Fund established under Section 5 of this Act shall not be considered as income or resources for purposes of denying or reducing Federal financial assistance or other Federal benefits to which the Passamquoddy Tribe or Penobscot Nation or their members would otherwise be entitled.

Section 10 provides for a deferral of capital gains for private property owners transferring lands to the United States under this Act by providing that such transfers of land shall be deemed involuntary conversions within the meaning of Section 1033 of the Internal Revenue Code of 1954, as amended.

Section 11 provides for the transfer of tribal trust funds from the State of Maine to the Secretary of the Interior.

Section 12 provides for the general discharge of the State of Maine from existing or further claims.

Section 13 provides that this Act shall not be construed as conferring jurisdiction upon any Indian, Indian nation, or tribe or band of Indians, to sue the United States except as provided in this Act.

Section 14 authorizes the appropriation of $81.5 million to implement the provisions of Section 5.

Section 15 provides that if the extinguishment provisions of Section 4 are held invalid, then the entire Act shall be invalidated.

Section 16 provides that in the event of a conflict between this Act and the Maine Implementing Act, this Act shall govern. It also provides that federal statutes enacted subsequent to this Act which are designed for the benefit of Indians or Indian tribes and which materially affect or preempt the laws of the State of Maine, including the Maine Implementing Act, shall not apply within the State unless they are specifically made applicable to the State.

Legislative History

S. 2829 was introduced on June 13, 1980 by Senators Cohen and Mitchell and was referred to the Select Committee on Indian Affairs. The Committee held hearings on July 1 and 2 at which the Department of the Interior, the affected tribes and other interested parties testified. A companion bill, H.R. 7919 was introduced in the House and the House Interior and Insular Affairs Committee held hearings on August 25, 1980.

Committee Recommendations and Tabulations of Votes

The Select Committee on Indian Affairs, in open business session on September 16, 1980, with a quorum present, recommends by unanimous vote that the Senate pass S. 2829, as amended.

Committee Amendments

The Committee recommends an amendment in the nature of a substitute.

SECTION-BY-SECTION ANALYSIS

Section 1. Short Title

Sec. 1. provides that the Act may be cited as the "Maine Indian Claims Settlement Act of 1980."

Section 2. Congressional Findings and Declaration of Policy

Sec. 2(a)(1) describes the basis of the claim the Passamaquoddy Tribe, Penobscot Nation, and the Houlton Band of Maliseet Indians have raised against the State of Maine and private landowners owning land in certain areas of the State of Maine. Subsections 2(a)(3) through (6) find that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians are the sole successors of those aboriginal entities that once exercised or claimed aboriginal rights of use and occupancy over certain lands located in the State of Maine.

Subsection 2(a)(7) finds that other tribes, nations, or bands which may once have held aboriginal title within the State of Maine have long ago abandoned their holdings.

Subsection 2(a)(8) refers to the Maine Implementing Act which was passed by the Maine State Legislature on April 3, 1980, and embodies various jurisdictional agreements between the parties.

Subsection 2(a)(9) makes findings with respect to contributions the State of Maine has made to the welfare of the three Tribes since 1820. According to recent court decisions, Maine was never required to make these contributions and, in light of these decisions, the State of Maine is not being required to make further direct financial contributions to this settlement.

Section 3. Definitions

Section 3 contains definitions of terms used throughout the Claims Settlement Act. Of particular importance among these definitions are:

Subsections (1), (8), and (11) define the Tribes participating in this settlement. They state that the Tribes are now represented by certain governing bodies and that they are the successors in interest to those aboriginal entities which once exercised or claimed aboriginal rights of use and occupancy over certain areas of the State of Maine.

Subsection (2) defines "land or natural resources." This term is to be interpreted consistent with the term "land and other natural resources" in the Maine Implementing Act.

Subsections (7) and (9) define the terms Penobscot Indian Territory and Passamaquoddy Indian Territory by reference to the definitions of these terms contained in the Maine Implementing Act. The Maine Act specifically describes approximately 400,000 acres of land within the State from which the Secretary of the Interior may acquire 150,000 acres on behalf of the Passamaquoddy Tribe and the Penobscot Nation respectively. Upon their selection and acquisition, such land, together with the Tribes' existing reservations, will become the "Territory" of the respective Tribe or Nation.

Subsection (14) defines the word "transfer." It is intended to have a comprehensive meaning and to cover all conceivable events and circumstances under which title, possession, dominion, or control of land or natural resources can pass from one person or group of persons to another person or group of persons.

Section 4. Approval of Prior Transfers and Extinguishment of Indian Title and Claims of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, and any other Indians, or Tribe or Band of Indians within the State of Maine

Section 4 consists of four subsections.

Subsection 4(a)(1) provides Congressional approval and ratification of all prior transfers of land or natural resources located anywhere in the United States by or on behalf of the Passamaquoddy Tribe, Penobscot Nation, or Houlton Band of Maliseet Indians, and of all prior transfers of land or natural resources located in Maine by or on behalf of any other Indian, Indian nation, or tribe or band of Indians, and specifies that all such transfers, including transfers made pursuant to any treaty, compact, or statute of any state shall be deemed to have been made in accordance with all laws of the United States, including specifically the Trade and Intercourse Act. Such approval of these prior conveyances will remove the cloud of Indian claims against all present-day landowners in Maine who trace their titles back to the transfer being approved. It is the opinion of the Department of the Interior this language, taken together with the language contained in subsections 4 (b) and (c), will effectively and completely extinguish the Maine Indian land claims and all related tribal claims that may have arisen prior to the date of enactment of the legislation. The proviso to subsection 4(a)(1) ensures that the personal claims of individual Indians (other than Federal common law fraud claims) that are based on laws of general applicability that protect non-Indians as well as Indians are not affected by the language of subsection 4(a)(1). Thus, any claim by an individual Indian that might be asserted by a non-Indian under generally applicable Federal or state law is not intended to be extinguished and may be brought under the same conditions and limitations as would apply if a non-Indian brought a similar claim.

Subsection 4(a)(2) bars the United States from asserting any claims based on the transfer of land or natural resources by treaty, compact, or in any other manner which may have occurred in violation of laws of the State of Maine.

Subsection 4(a)(3) bars the United States from asserting any individual claims arising from violation of State law prior to December 1, 1873.

Subsection 4(b) makes clear that the approval of transfers of land or natural resources effected by subsection 4(a)(1) effects an extinguishment of any aboriginal title that may have existed or may have been claimed with respect to such land or natural resources.

Subsection 4(c) extinguishes all claims for damages by the Maine Tribes or their members arising from the allegedly illegal use and occupancy of the land since the transfers were effected.

Subsection 4(d) provides that the extinguishing and barring provisions shall take effect immediately upon the appropriation of the funds necessary to implement Section 5 of the Act. It also provides that, once the funds are credited to the Land Acquisition Fund and the Settlement Fund, the Secretary shall publish a notice to that effect in the Federal Register.

Section 5. Establishment of Funds

Section 5 consists of 10 subsections.

Subsection 5(a) establishes a Settlement Fund for the benefit of the Penobscot Nation and Passamaquoddy Tribe in the amount of $27 million, $13.5 million to be held in separate accounts for each tribe respectively.

Subsection 5(b) describes the manner in which the Settlement Fund shall be allocated and how it shall be managed. The principal of the fund shall in no event be distributed to the Passamaquoddy Tribe or Penobscot Nation or any individual members of those Tribes. The Secretary of the Interior is protected from unwarranted liability in administering the settlement trust fund in subsections 5(b) (1) and (3).

The Settlement Fund will be divided into two equal shares, one to be held in trust by the Secretary for the benefit of the Passamaquoddy Tribe and the other to be held in trust by the Secretary for the benefit of the Penobscot Nation. The Secretary will invest and administer each share in accordance with terms applicable to it as established by the Passamaquoddy Tribe or the Penobscot Nation, as the case may be, and agreed to by the Secretary. The Secretary is obligated to agree to any reasonable terms for investment and administration proposed by such Tribe or Nation. Such terms need not be the same for each. The standard of reasonableness as applied to the terms of investment and administration should be determined by reference to standards by which endowment funds are invested and administered in the United States in accordance with standards set forth in the Uniform Management of Institutional Funds Act.

It is not intended that the Secretary or the Department of the Interior would necessarily make the investment decisions or carry them out. It might be reasonable, for example, for the Passamaquoddy Tribe or the Penobscot Nation to establish an investment committee and charge it with responsibility for (A) setting investment policies; (B) selecting one or more professional investment managers to carry out those policies; (C) monitoring both the policies and the managers; and (D) effecting changes in policies and managers from time to time as circumstances and experience may warrant. The committee might include, in addition to tribal members, representatives of the Secretary and persons experienced in the management of endowments, including, in particular, the establishment of policies and the selection of investment managers.

The term "income" as used in Section 5 means the return in money or property derived from the use of the assets in the Settlement Fund, including net appreciation, both realized and unrealized.

Subsection 5(c) establishes a Land Acquisition Fund in the amount of $54.5 million.

Subsection 5(d) provides that the monies in the Land Acquisition Fund shall only be used to acquire land or natural resources for the tribes and provides that it shall be apportioned as follows: Passamaquoddy Tribe, $26.8 million; Penobscot Nation, $26.8 million; Houlton Band of Maliseet Indians, $900,000. The $900,000 allocated for land acquisition for the Houlton Band of Maliseet Indians is derived from land acquisition funds originally agreed to be provided the Passama-

quoddy Tribe and Penobscot Nation. For this reason, the Tribe and Nation are each given a one-half undivided reversionary interest in any trust property acquired by the United States on behalf of the Band, now or in future transfer acquisitions, out of these funds. The reversionary interest shall not attach to any one piece of land, but rather follows the trust. In the event the Houlton Band shall terminate its interest in the trust property or the trust should terminate, then the corpus of the trust will revert to the Passamaquoddy Tribe and the Penobscot Nation.

Subsection 5(d) (4) has been agreed to by the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the State of Maine. The Houlton Band remains concerned, however, about the provisions of Section 5 requiring that it reach agreement with the State securing the performance of obligations, both public and private, that it may incur after the enactment of this Act. The basis for this concern is that since, at present, the Band has no assets other than the lands which will be acquired for it under this Act, it may prove difficult to fully satisfy the State's concern over the satisfaction of future obligations incurred by the Band and the Band's ability to meet payments in lieu of property taxes or other fees imposed under State law. Thus, the Band is concerned that, if it and the State fail to resolve these questions, the State may unreasonably withhold its consent to the acquisition of trust land for the Band. In that event, the Band's claim will have been extinguished without it having received the compensation contemplated for it by this Act.

It is the purpose of this Act to settle all Indian land claims in Maine fairly. The Houlton Band is impoverished, it is small in numbers, it has no trust fund to look to, and it is questionable whether the land to be acquired for it will be utilized in an income-producing fashion in the foreseeable future. Immunity from taxation, financial encumbrance, or alienation without the consent of the United States is the very essence of the trust character. It is recognized that acquiring land for the Band, in a location satisfactory to both the Band and the State, and not at the same time providing protection against the alienation of that land, would create a substantial risk that the land would fall into private hands. In extinguishing the claims of the Band and in appropriating the monies for the acquisition of land to compensate the Band for its land claims within the State of Maine, it is the intent of the Committee that this does not occur. For, should the land which is intended to constitute satisfaction of the Band's legal claims come into the possession of a third party, the intent of this Act in this regard will have been defeated. Under no circumstances should the inability of the State and the Houlton Band to reach agreement on these issues in any way result in the diminution, diminishment, or weakening of those restraints on alienation necessary to ensure that, once the land is acquired, it will remain held for the benefit of the Houlton Band. In some respects, of course, this requires the State to agree that lands to be acquired for the Houlton Band will be exempt from some state laws such as those laws providing for levy and sale of lands for nonpayment of taxes or satisfaction of judgments. The Committee also recognizes the legitimate interest of the State in seeking to assure that the obligations of the Band will be met and that fees and in-lieu payments due the State are paid.

Congress has a continuing interest in the progress of the negotiation of the issues which have been described above. The Committee expects that both the State and the Band will work diligently and conscientiously to devise practical arrangements to resolve them. Consequently, this Committee will monitor the negotiations to ensure to its satisfaction that the parties have met these standards.

Subsection 5(e) empowers the Secretary to perfect title to the land acquired through normal condemnation procedures provided the owner of the land has agreed upon the identity, purchase price, and other terms of purchase, or valuation. The Secretary is limited in his ability to acquire land or natural resources for any Indians or Indian Tribes in Maine to the authorities provided in this Act. This Act, through its ratification of the Maine Implementing Act, authorizes the Secretary to take in trust only those lands which are authorized pursuant to Section 6205 of the Maine Implementing Act to become Passamaquoddy Indian Territory or Penobscot Indian Territory, and lands to be acquired with the consent of the State of Maine for the Houlton Band of Maliseet Indians. These lands include the first 150,000 acres to be acquired prior to January 1, 1983 for the Passamaquoddy Tribe within the area designated as eligible to become Passamaquoddy Indian Territory, the first 150,000 acres to be acquired prior to January 1, 1983 acquired for the Penobscot Nation within the area designated as eligible to become Ponobscot Indian Territory, lands acquired with the funds authorized in subsection 5(d) to be appropriated for the benefit of the Houlton Band of Maliseet Indians, and any other lands authorized for inclusion within Passamaquoddy Indian Territory or Penobscot Indian Territory pursuant to Section 6205(5) of the Maine Implementing Act.

The term "ostensible owner" is intended to include a party who is in possession or who, purporting to be the owner, has granted possession to a lessee or other party, or who otherwise appears to be the owner, as distinguished from the holder of an interest under an alleged title defect.

Subsection 5(f) would prohibit the Secretary from expending any sums for the benefit of the Penobscot Nation, the Houlton Band of Maliseet Indians, or the Passamaquoddy Tribe either from the Settlement Fund or the Land Acquisition Fund until he determines that the Tribes have executed appropriate documents relinquishing all claims covered by this Act.

Subsection 5(g)(1) provides that the Non-Intercourse Act (R.S. 2116, 25 U.S.C. § 177) shall not apply to any Indian, Indian nation, or tribe or band of Indians in the State of Maine, including the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, or to any lands held by or in trust for any Indian, or any Indian nation, tribe or band of Indians in the State of Maine.

Subsection 5(g)(2) provides that all land acquired for the Passamaquoddy Tribe or Penobscot Nation which falls within the bounds of their reservations or is included within the Indian Territory of either tribe shall be subject to a restraint against alienation which is comparable in character to the restraints in R.S. 2115, 25 U.S.C. § 177. See discussion under Subsection 6(b)(1).

Subsection 5(g)(3) permits the lands and natural resources within the Passamaquoddy and Penobscot Indian Territory and lands held in trust for the Houlton Band of Maliseet Indians to be used in certain ways or conveyed under certain circumstances, pursuant to established federal law governing Indian trust lands. Subclause (E) of that section establishes the right to exchange parcels of land within Indian Territory for land of equal or nearly equal value. This provision closely tracks the language of the Federal Land Policy and Management Act (43 U.S.C. § 1716). Subclause (F) of subsection 5(g)(3) requires that the Secretary locate a willing seller of land and effect a contract or option with him before selling any land within Indian Territory.

Subsection 5(h) permits the Secretary and the Penobscot Nation and Passamaquoddy Tribe to set the terms under which the land acquired under this Act shall be administered.

Subsection 5(i)(1) provides that trust and restricted land held for the benefit of the Passamaquoddy Tribe and Penobscot Nation and located under the Passamaquoddy Reservation or the Penobscot Reservation may be taken for public uses under State law as provided in the Maine Implementing Act. Section 6205 of the Maine Implementing Act provides a procedure for acre-for-acre compensation for the taking of reservation land.

Subsection 5(i)(2) provides generally that the State of Maine may condemn land held by the tribes in Indian Territory as provided in the Maine Implementing Act. Monetary compensation for a taking of lands in Indian Territory shall be reinvested through the Land Acquisition Fund.

Subsection 5(i)(3) provides that in the event of a taking of trust or restricted lands within the Indian Territory the United States shall be a necessary party to any proceeding. This subsection requires an exhaustion of the administrative process of condemnation as provided by State law. Upon appeal to the courts of the State of Maine, the United States shall have an absolute right of removal, at its discretion, to the courts of the United States.

Subsection 5(j) provides that, in the event land held for the benefit of any of the three Tribes is condemned under federal law, the compensation received for the land taken shall be reinvested through the Land Acquisition Fund.

Section 6. Application of State Laws

Section 6 has eight subsections.

Subsection 6(a) provides that except for the Passamaquoddy Tribe, Penobscot Nation, and their members, all Indians, Indian nations, or tribes or bands of Indians and their lands or natural resources, shall be subject to the laws of the State of Maine. However, subsection 5(d)(4) requires negotiations between the Houlton Band of Maliseet Indians and the State which among other things will result in trust restrictions being placed on land to be acquired for the Band and this will necessarily entail some exception to the application of the laws of the State. In addition, subsection 6(e)(2) authorizes compacts or agreements between the State and the Band which may effect their jurisdictional relationship. Finally, subsection 8(e) provides that the provisions of the Indian Child Welfare Act of 1978 shall be applicable

to the Houlton Band and its members, but this shall not oust the State from its underlying jurisdiction over child welfare matters.

Subsection 6(b)(1) provides that the Passamaquoddy Tribe, the Penobscot Nation, their members, and their lands and natural resources which are held by the United States in trust for them, or which are held by them subject to a restriction against alienation, or which are held in fee by the Tribe or Nation or their members, shall be subject to the jurisdiction of the State to the extent and in the manner provided in the Maine Implementing Act. The jurisdiction which the State may exercise over the trust or restricted lands or natural resources of the Tribe or Nation is limited by Subsections 5(d)(4) and 5(g)(2) of this Act. The application of Maine law cannot jeopardize or impair the clear title of the United States to the trust lands held on behalf of the Tribes or obligate the United States to pay taxes or fees except as provided in subsection 6(d)(2). Nor can it jeopardize or impair interests of the tribes in their restricted property. Section 6208 of the Maine Implementing Act specifically exempts all real or personal property of the Tribes within Indian Territory, including restricted and trust lands of the three Maine Tribes, from taxation by the State.

Provision is made for payments by the two tribes in lieu of taxes and subsection 6(d)(2) of this Act provides a means for payment of such in-lieu obligations from income from the Settlement Fund in the event of default. Subsection 5(g)(2) of this Act specifically prohibits alienation of tribal trust or restricted lands except as provided in subsection 5(g)(3). This restriction is comparable to 25 U.S.C. § 177 which it replaces. Subsection 5(g)(2) specifically states that any transfer of lands or natural resources outside the terms of this Act "shall be void *ab initio*". This effectively exempts these trust or restricted lands from any financial encumbrance which could cloud title and bring about forced sales or alienation including, for example, tax or commercial liens or attachments. Laws of the State such as adverse possession or creditors' liens are not applicable to these trust or restricted lands or natural resources.

On the other hand, State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.

Subsection 6(b)(2) provides that funds appropriated for the benefit of Indian people or for the administration of Indian affairs may be utilized by the Passamaquoddy Tribe and the Penobscot Nation to match state funds where laws of the State require funds to be raised by local or municipal governments as a condition to receiving State financial assistance. Utilization of these funds and restrictions on the amount of the State contribution are governed by Section 6211 of the Maine Implementing Act. The impact of Section 6211 on provision of Federal funding was the subject of intense scrutiny by this Committee. The exact manner in which this section of the state Act will apply is set forth in this report in the section entitled "Analysis of the Maine Implementing Act."

Insofar as general Federal law is concerned, it is the intent of this subsection of this Act that Federal funds used by the Tribe or Nation as local matching funds shall be considered as local funds for purposes of any maintenance of effort requirements imposed by Federal law or regulation. An example of such a Federal statute requiring "maintenance of effort" is Title IV of the Indian Education Act, 20 U.S.C. § 241ee(6).

In addition, to the extent that the State of Maine or a political subdivision or instrumentality of the State which seeks a tax, fee, or payment in lieu of taxes from a tribe, provides services to such tribe which the Federal government would otherwise provide pursuant to subsection 6(i), such tribe will be entitled to use Federal funds, consistent with the purpose for which they are appropriated, to pay all or part of any such tax, fee, or payment in lieu of taxes. For example, Federal funds could be used to pay the Maine Forest District tax pursuant to which the State provides fire protection and fire suppression services for woodlands. To this extent, utilization of Federal funds for payment of such tax or fee should be no different from the use by another tribe of similar funds under the Indian Self-Determination and Education Assistance Act (Act of Jan. 4, 1975; 88 Stat. 2203) for purposes of subcontracting such services from a state.

Subsection 6(b)(3) is a savings clause to make clear that the provisions of this Act shall not be construed as superseding any Federal statutes or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine except as expressly provided in this Act.

Subsection 6(b)(4) directs the Secretary of the Interior to submit, no later than October 30, 1982, to the appropriate committees having jurisdiction over Indian affairs a report on the Federal and State funding provided the Passamaquoddy Tribe and Penobscot Nation. This provision is needed because of the eligibility of the Tribe and Nation to participate as municipalities under the Maine Implementing Act. The relationship created by this eligibility and the provisions of Section 6211 of the Maine Implementing Act is unique. The purpose of this subsection is to assure a full review by the appropriate Federal agencies and the Congress of the Federal and States funding efforts in comparison to Federal and state funding efforts in other states.

Subsection 6(c) provides that the Federal government is barred from asserting criminal jurisdiction in the State of Maine which is based on federal statutes pertaining to certain Indian offenses contained in the Major Crimes Act. This avoids problems of concurrent State and Federal criminal jurisdiction.

Subsection 6(d)(1) establishes that the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians may sue and be sued in the State of Maine and in the courts of the United States just as any person or entity within the State might sue or be sued to the extent permitted in the Maine Implementing Act. The Penobscot Nation and Passamaquoddy Tribe are acknowledged to be immune from suit when they or their officers are acting in their governmental capacities to the same extent that municipalities and their officers are immune from suit within the State of Maine.

Subsection 6(d)(2) provides that, notwithstanding any provision of the Anti-Assignment Act, the Secretary of the Interior is empowered to take notice of valid judgments against the Penobscot Nation and Passamaquoddy Tribe and to satisfy the creditors with the income received from the Settlement Fund, once such judgments are final and the time for taking an appeal has expired.

The Anti-Assignment Act (31 U.S.C. § 203), generally, precludes Federal officials from honoring an assignment of funds payable by the United States to an assignor.

Subsection 6(e)(1) permits the State of Maine and the Penobscot Nation and the Passamaquoddy Tribe to enter into agreements amending the Maine Implementing Act. A proviso in this subsection limits the subject matter of those agreements to three specific areas. This subsection is similar to the provisions of S. 1181 introduced in the 96th Congress, 1st Sess. It "authorizes" agreements on jurisdictional issues between the State and the Tribes. It does not constitute Congressional "ratification" of such future agreements nor does it elevate such agreements to the status of Federal law.

Subsection 6(e)(2) extends the authority to enter into agreements with the State of Maine to the Houlton Band of Maliseet Indians over jurisdictional issues, including the governmental status of the Band under laws of the State. Until any such agreement is made with the Houlton Band, it and its members are subject to all the laws of the State of Maine except those from which they will necessarily be exempt under subsection 5(d)(4).

Subsection 6(f) recognizes the authority of the Passamaquoddy Tribe and Penobscot Nation to exercise judicial powers as provided by the Maine Implementing Act.

The treatment of the Passamaquoddy Tribe and Penobscot Nation in the Maine Implementing Act is original. It is an innovative blend of customary state law respecting units of local government coupled with a recognition of the independent source of tribal authority, that is, the inherent authority of a tribe to be self-governing. *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978).

Section 6206 of the Maine Implementing Act provides that the Passamaquoddy Tribe and Penobscot Nation shall have all the powers, immunities, and obligations of any municipality under state law; it obligates the Tribe and Nation to extend to non-members residing within the Passamaquoddy Indian Territory or the Penobscot Indian Territory the services and benefits provided by them as municipalities; and it extends to the Tribe and Nation the same protections and exposure that any municipality or municipal official enjoy with respect to suit in the courts of the State or the United States.

At the same time, Section 6206 of the Maine Implementing Act specifically provides that persons who are not tribal members shall not be entitled to vote in tribal elections; it provides specific immunities from state regulation of internal tribal matters; and Section 6209 treats the judicial authority of the Tribe and Nation on the premise that their courts are instrumentalities of the tribes as separate sovereigns.

Under the Maine Implementing Act, the Tribe and Nation agree to adopt the laws of the State as their own. Such adoption does not violate

the principles of separate sovereignty. Though identical in form and subject to redefinition by the State of its laws, the laws are those of the tribes. *Wauneka* v. *Campbell*, 22 Ariz. App. 287, 526 P. 2d 1085 (C.A. 1974).

Under Section 6209 of the Maine Implementing Act, procedures in the courts of the tribes are to be governed under Federal law, not State law. In addition, principles of double jeopardy and collateral estoppel shall not apply as between the tribal and State courts. This is entirely in keeping with the principles enunciated in *U.S.* v. *Wheeler*, 435 U.S. 313 (1978) describing the relationship between tribal courts and Federal courts.

It is this separate and independent status which this subsection recognizes.

Subsection 6(g) provides that the courts of the State of Maine and the courts of the Penobscot Nation and Passamaquoddy Tribe shall accord full faith and credit to the judgments of the courts of each other.

Subsection 6(h) provides that, unless otherwise provided in this Act, the general body of Federal Indian law specially applicable to Indians, Indian nations, or tribes or bands of Indians, and Indian trust lands and natural resources shall be applicable to the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, their members and their lands and natural resources, and to any other Indians, Indian nations, or tribes or bands of Indians within the State of Maine. However, the application of such Federal law is limited in that, to the extent provisions of such Federal law would affect or preempt the application of the civil, criminal, or regulatory jurisdiction of the State of Maine, such provisions of Federal law or laws shall not be applicable.

On the other hand, it is not the intent of this subsection to invalidate other provisions of this Act regarding the application of federal laws in Maine. For example, Section 8 of this Act specifically provides for application of the Indian Child Welfare Act of 1978 and will not be affected by this subsection. Nevertheless, for purposes of clarification of this provision, the Indian Child Welfare Act provides an example of provisions in a Federal law which materially affects the application of Maine State law and, but for the specific provisions in Section 8, would not be applicable within the State of Maine. Aside from the jurisdictional provisions of that Act, the Indian Child Welfare Act also imposes stringent evidentiary standards, requires new procedures, and provides substantive rights to litigants which must be followed in proceedings in the courts of the states. But for Section 8, however, subsection 6(h) would prohibit the application of the Indian Child Welfare Act in Maine since it would affect the civil jurisdiction of the State over child custody proceedings.

The phrase "civil, criminal, or regulatory jurisdiction" as used in this section is intended to be broadly construed to encompass the statutes and regulations of the State of Maine as well of the jurisdiction of the courts of the State. The word "jurisdiction" is not be be narrowly interpreted as it has in cases construing the breadth of Public Law 83-280 such as *Bryan* v. *Itasca County*, 426 U.S. 373

(1976). As a practical matter, the phrase "civil, criminal or regulatory jurisdiction" is to be given the same meaning as the phrase "laws of the State" as defined at subsection 3(d) of this Act. The phrase "laws of the State" was not used in this subsection because it was believed to be susceptible to an interpretation which would have rendered inapplicable federal laws according the Tribes special rights with respect to the government of the United States. An example of such a law is that which empowers the United States Attorney to represent Indian Tribes in suits at law and in equity (25 U.S.C. § 175). It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, for example, although the federal Clean Air Act, 42 U.S.C. § 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

Subsection 6(i) provides that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians are federally recognized tribes and that, as such, they are eligible to receive all Federal benefits which the United States provides to other Federally recognized tribes to the same extent and subject to same eligibility criteria as other federally recognized tribes. Subsection 6(i) provides that for purposes of federal taxation, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be treated as other federally recognized tribes and that their lands which are held in trust or subject to restrictions against alienation shall be considered reservation land for federal tax purposes. However, any exemption from federal tax laws does not entitle the Tribes to exemption from payment of State taxes or, in the case of restricted or trust lands, payments in lieu of taxes.

Section 7. Tribal Organization

Subsection 7(a) empowers, but does not require, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, respectively, to adopt an appropriate instrument to govern affairs of each tribe. Section 16 of the Indian Reorganization Act (IRA) (Act of June 18, 1934, 48 Stat. 984), provides that any tribe which has not voted to reject that Act may, if it chooses, organize and adopt a constitution as provided in that Section. It does not appear that any of these tribes have voted to reject that Act. Consequently, they may choose to organize under Section 16 of the IRA. However, adoption of the IRA constitution is not a prerequisite for federal recognition of a tribal government and the Tribe, Nation, and Band are not, in this Section of this Act, required to adopt such a constitution. Each must, however, file with the Secretary a document describing its organizational structure.

Subsection 7(b) limits participation in the Maine Indian Claims Settlement Act by the Houlton Band of Maliseet Indians to those Maliseet Indians who are citizens of the United States or who, as of the

date of this Act, are enrolled members of the Band. Membership in the Band shall entitle members to benefits available from the United States by virtue of federal recognition of the Band. It is recognized that some Band members will retain their Canadian citizenship and that as "status" Indians under Canadian law will continue to be eligible to receive benefits from the government of Canada or its political subdivisions. It is the intent of this section that no Band member who is actually receiving benefits because of his or her status as an Indian from a government in Canada shall be entitled to receive benefits under Federal law which extends benefits to Federally recognized Indians because of their status as Indians. The Band is empowered to establish further criteria to govern its membership, but these shall be subject to the approval of the Secretary.

Section 8. Implementation of the Indian Child Welfare Act

Subsection 8(a) authorizes the Penobscot Nation and the Passamaquoddy Tribe to assume exclusive jurisdiction over Indian child custody proceedings under the Indian Child Welfare Act of 1978 (Act of November 8, 1978; 92 Stat. 3069).

Subsection 8(b) provides that the Secretary shall review petitions for the assumption of jurisdiction over Indian child custody proceedings which are made by the Penobscot Nation or the Passamaquoddy Tribe as provided in sections 108(b) and (c) of the Indian Child Welfare Act.

The Committee notes that the Penobscot Nation currently operates a tribal court, that the Department of the Interior has established a Court of Indian Offenses for the Passamaquoddy Tribe, and that both courts are currently exercising jurisdiction over child welfare matters. Subsection 8(b) is not intended to affect the validity of any orders which are issued by these courts prior to the enactment of the bill. Nor is subsection 8(b) intended to interrupt the continued jurisdiction over child welfare matters which is now exercised by these courts. It is expected that the Secretary will approve, effective as of the date of enactment of this bill, any petition which is submitted pursuant to this subsection by a tribe which, as of the date of enactment, is exercising jurisdiction over child welfare matters.

Subsection 8(c) provides that where a state or tribal court already has jurisdiction in a pending proceeding involving an Indian child, this section shall not affect the procedure in or jurisdiction of such court.

Subsection 8(d) provides that, for purposes of this section, the reservations of the Passamaquoddy Tribe and Penobscot Nation are reservations under section 4(10) of the Indian Child Welfare Act. Lands within the Indian territory of either Tribe lying outside either reservation are not considered part of the Tribes' reservations under that Act.

Subsection 8(e) provides that the Houlton Band of Maliseet Indians is an Indian Tribe within the meaning of subsection 4(8) of the Indian Child Welfare Act. The proviso makes clear that this subsection does not disturb the jurisdiction of the State of Maine or its courts over child welfare. Consequently, subsections (a), (b), and (d) of Section 101 of the Indian Child Welfare Act are not applicable to the Houlton Band. Subsection 8(e) also refers to subsection 6(e)(2)

which authorizes future agreements between the State and the Band which may, by their terms, affect the jurisdiction of the State and the Band.

Section 9. *Effect of Payments to Passamaquoddy Tribe, Penobscot Nation, and Houlton Band of Maliseet Indians*

Section 9 has three subsections.

Subsection 9(a) provides that the receipt of income by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall not be considered by any agency of the federal government in determining the eligibility of the State of Maine for federal financial assistance.

Subsection 9(b) provides that, the receipt of payments from the State of Maine or the simple eligibility for payments by the State of Maine by the Passamaquoddy Tribe and the Penobscot Nation shall not be computed by the federal government in determining the eligibility of the Penobscot Nation and Passamaquoddy Tribe or any of their members for federal assistance. A proviso to this subsection permits the federal agency reviewing the application to consider the actual need of the applicant if the financial assistance is dependent on a showing of need.

Subsection 9(c) provides that funds which are forthcoming to the Tribes and their members under the terms of this Act are not to be used to deny or reduce benefits to any Indian household or member of that household under any federally assisted housing program. Funds available to the tribes under this Act are also not to be used to deny or reduce federal assistance or benefits to either tribe. The provisions in this subsection are the same as the provisions contained in the Act of October 17, 1975 (89 Stat. 579) conveying submarginal lands to Indian tribes.

Section 10. *Deferral of Capital Gains*

Section 10 provides that landowners who are transferring lands under this Act are authorized to treat those transfers as involuntary conversions under section 1033 of the Internal Revenue Code. Section 1033 permits a landowner who has sustained a loss of his property involuntarily to defer the capital gains tax which would otherwise be due on whatever compensation he received for the property lost for a period of three years. If, during this period, the landowner invests in property which is "similar" to that which he lost, he may apply the basis of the property lost to the newly-acquired property and need not pay the capital gains tax until the newly-acquired property is sold. If, on the other hand, he fails to invest in similar property within the three year period, he must amend the return he filed in the year he claimed the section 1033 treatment and pay the capital gains tax which would have fallen due in that year plus interest.

The provisions of Section 10 of this Act are necessary to achieve a fair settlement of claims. An integral part of this settlement is the participation of those who willingly transfer their land to fulfill its terms. Furthermore, but for the existence of the claims of the Maine Tribes, many of the landowners participating in this settlement would not transfer their land at all. In fact, the present option contracts on the lands which are to be acquired through the Land Acquisition Fund established by Section 5 of this Act are expressly conditioned on the transfer of the land being treated as a Section 1033 event.

Section 11. *Transfer of Tribal Trust Funds Held By the State of Maine*

Section 11 pertains to a State trust fund now operated for the benefit of the Passamaquoddy Tribe and Penobscot Nation by the State of Maine. The monies in this Fund are, by the operation of Section 11, to be transferred to the Settlement Fund established pursuant to subsection 5(b) of this Act. The receipt of these funds is intended to effect a general release of claims which might otherwise be raised against the State of Maine or its officials regarding the administration of the State trust fund. Once the Secretary receives the trust funds from the State, he is authorized and required to execute general releases of the State of Maine and its officials from any claims which either tribe or the United States might otherwise raise concerning the administration and management of the trust.

Under the provisions of subsection 5(f), the Secretary is prohibited from expanding any monies deposited in the Funds established by Section 5 until the appropriate officials of the three Tribes have executed documents relinquishing all claims to the extent provided in Sections 4, 11, and 12 of this Act. It is the intent of this section that the Tribes will execute relinquishments of any claims against the United States based on its acceptance of these funds from the State.

Section 12. *Other Claims Discharged By This Act*

Section 12 releases the State of Maine from any obligations it may have pursuant to any treaty or agreement with any Indian, Indian nation, or tribe, or band of Indians. The court cases which the United States has filed on behalf of the Penobscot Nation and Passamaquoddy Tribe against the State of Maine and which are pending in the United States District Court for the District of Maine are specifically included herein.

Section 13. *Limitation of Actions*

Section 13 provides that, except as provided in this Act, nothing in this Act shall be interpreted either as a jurisdictional act, or to confer jurisdiction to bring suit, or to represent the implicit consent of the United States or its officers to be sued by any Indian, Indian nation, or tribe or band of Indians if the claims extinguished by this Act are the basis for such suit.

Section 14. *Authorization*

Section 14 authorizes the appropriation of $81.5 million to implement the provision of Section 5 of this Act.

Section 15. *Inseparability*

Section 15 provides that if any portion of section 4, the extinguishment section, is found to be invalid, it is the intent of Congress that the entire Act fail. Should any other portion of the bill be held invalid, however, it is the intent of the Congress that the rest of the Act remain in force.

Section 16. *Construction*

Subsection 16(a) simply provides that in the event of any conflict between the provisions of this Act and the Maine Implementing Act, the provisions of this Act shall govern.

Subsection 16(b) provides a rule of construction to govern interpretation of Federal statutes enacted after the date of enactment of this Act. Unless specifically made applicable within the State of Maine, provisions of future Federal legislation enacted for the benefit of Indians, Indian nations, or tribes or bands of Indians, or which relates to trust lands or natural resources, shall not be applicable within the State of Maine if such provisions would materially affect or preempt the application of Maine State law.

Section-by-Section Analysis of the Maine State Implementing Act

All sections in this analysis refer to Section 1 of the Maine Implementing Act that enacts Title 30, Part, of the Maine Revised Statutes, unless otherwise indicated.

Section 6201. Short Title

The Act may be cited as "An Act To Implement the Maine Claims Settlement."

Section 6202. Legislative Findings and Declaration of Policy

This section simply notes that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians are asserting claims to lands in the State of Maine, the prosecution of which will cause economic hardship in the State. The findings state that the Indian claimants and the State have reached an agreement the terms of which are embodied in the Implementing Act. This statement is slightly inaccurate inasmuch as the Maliseets did not reach full agreement with the State. However, authorized representatives of the Houlton Band appeared before the Maine Legislature in public hearings and testified in favor of the Maine Implementing Act. The Findings section states that the Passamaquoddy Tribe and the Penobscot Nation "have agreed to adopt the laws of the State as their own to the extent provided in this Act."

It is stated "The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State." As a "Finding" or statement of "Policy", this statement does not constitute a substantive assertion of jurisdiction over the Maliseets. It differs with S. 2829 in that the Federal legislation will extend Federal recognition to the Maliseets. In addition, S. 2829 will provide that Maliseet land must also be taken in trust once acquired with the consent of the Maine legislature, which will entail exemptions from some state laws.

Section 6203. Definitions

This section provides definitions for thirteen different terms used in the Act. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians are defined. The Houlton Band of Maliseets is defined as including the entire Maliseet Tribe as constituted on March 4, 1789, which are now represented "as to lands within the United States" by the Houlton Band of Maliseet Indians.

A unique feature of this Act is the distinction between "Indian Territory" and "Indian Reservation". The Maine Act recognizes and defines the existing Passamaquoddy and Penobscot "Reservations".

It further provides that new lands to be acquired in a designated area shall be Passamaquoddy and Penobscot "Territory". These distinctions are relevant to the application of certain state land laws and to jurisdiction of the tribes.

Section 6204. Laws of State to Apply to Indian Lands

This section provides that, except as otherwise provided in the Act, all Indians and lands or other natural resources owned by them or held by the United States for them are subject to the civil and criminal jurisdiction of the State. Although the State of Maine contends that it now has complete civil and criminal jurisdiction over the Reservations, the exact status of the reservations has not been finally determined. This section resolves those questions and extends, to the extent specified in the Maine Implementing Act, State authority over Indian persons and property. There are specific protections for property and limitations of jurisdictional authority which make this an acceptable tradeoff.

Section 6205. Indian Territory

Subsections 1 and 2 provide specific territorial descriptions comprising about 400,000 acres from which the Passamaquoddy and Penobscot tribal trust land base may be established as "Indian territory." Each tribe may select 150,000 acres within the designated area. The existing reservations, plus the first 150,000 acres acquired for each tribe by the Secretary of the Interior shall be the tribal "territory", provided that such land must be acquired prior to January 1, 1983.

There is a serious problem with respect to the date of acquisition. The Attorney General has committed himself to seeking an extension of this date to accommodate the need for orderly land acquisition if through no fault of the tribes the land acquisition process is unduly delayed.

Subsection 3(A) provides that, to effectuate a taking of lands by condemnation within either the Passamaquoddy or Penobscot Reservations, the entity taking such property must (1) demonstrate that there is no reasonably feasible alternative to the proposed taking, (2) conduct a hearing, and (3) acquire, by purchase or otherwise, comparably valued property contiguous to the reservation which shall automatically become a part of the reservation. This provision applies to allotted as well as tribally owned property.

Subsection 3(B) provides that whenever lands within the Indian territory, but outside the reservation, is taken for public purposes, the proceeds shall be invested in other lands of equal acreage "within an unorganized or unincorporated area of the state" and such lands shall be included within the respective Indian territory without further approval of the State.

Subsection 4 provides that in the event of a taking by the United States of lands within the Indian territory, land acquired with the proceeds of such taking shall be governed under subsection 3(b).

Subsection 5 provides that, except as provided in the above four subsections, lands acquired in trust for the Passamaquoddy and Penobscot Tribes outside the designated "Indian territory" area shall not be made a part of the Indian territory except with the consent of the state legislature and any affected city, town, village or plantation.

Section 6206. Jurisdiction of Tribes Within Indian Territory

Subsection (1) provides that the Passamaquoddy Tribe and the Penobscot Nation, within their respective territories, shall have all of the powers, immunities, and obligations of any municipality under state law, including the power to enact ordinances and collect taxes, provided that (1) persons who are not members of the Tribe or Nations may not participate in internal tribal matters nor are such matters subject to State regulation, (2) that non-members shall be entitled to receive municipal benefits but not be entitled to vote, (3) that persons who are not members of either Tribe and who are not Indians shall not be entitled to receive benefits accorded under Federal law to Indians because of their status as Indians.

Subsection (2) provides that the Passamaquoddy Tribe and the Penobscot Nation and their members may, subject to the limitation on internal affairs contained in subsection (1), sue and be sued in state courts, to the same extent as any other entity or person, provided, however, that tribal officials and the Tribes enjoy the immunity of governmental officials and political subdivisions of the state when acting in their governmental capacities.

Subsection (3) provides that the Passamaquoddy Tribe and the Penobscot Nation each has the right to exercise exclusive jurisdiction within its respective Indian territory over violations by members of either tribe or nation of tribal ordinances adopted pursuant to this section or Section 6207 providing for regulation of fish and wildlife resources. In the event either Tribe chooses not to exercise its exclusive jurisdiction over tribal members, the State retains exclusive jurisdiction to enforce the tribal ordinances against non-members of the Tribe.

Section 6207. Regulation of Fish and Wildlife Resources

This section is broken down into eight subsections. The Passamaquoddy Tribe and Penobscot Nation shall have exclusive authority to regulate hunting, trapping or other taking of wildlife within their respective territory and exclusive authority to regulate sustenance fishing within their respective reservations and any fishing in any pond less than ten (10) acres in surface area where the pond lies entirely within the boundaries of the Indian territory of either Tribe. The tribal regulations must not be discriminatory except they may provide special provisions for sustenance hunting and fishing rights of tribal members.

The Tribes shall maintain registration stations to keep track of the wildlife taken in order to coordinate with state authorities. A specially created Tribal-State Commisison is authorized to promulgate regulations for fishing on rivers and streams passing through or bordering on the Indian territories and on "great ponds", i.e. ponds which are of 10 or more surface acres in size. The State Commissioner of Inland Fisheries and Wildlife is vested with authority to conduct fish and wildlife surveys within the Indian territories and where game management practices are found to have or are likely to have an adverse effect which would "significantly deplete" the fish and game outside the Indian territory he may, after a public hearing, order the enforcement of generally applicable State fish and game laws within the Indian territory.

Any such decision by the Commissioner is reviewable, and in any such challenge the burden of proof is on the Commissioner as to all issues, and the Commissioner must prove his case by substantial evidence.

Section 6208. Taxation

This section is broken into three subsections and relates only to taxation authority of the State. Funds or income derived from the Federal "Settlement Fund" which is distributed to the Passamaquoddy Tribe or Penobscot Nation or their members is exempt from state taxation. The Tribes are to make "payments in lieu of taxes" on all real and personal property within their respective Indian territories except that property used or held predominantly for governmental purposes enjoys the same immunity from taxation as any municipality. Since the Tribes are vested with municipal authority, the taxing authorities to which their property might be subject will be a county, a district, or the State. And, since nearly all Maine property tax is collected by municipalities, it is anticipated that the in-lieu tax on the trust property will be de minimis. Sections 5 and 6 of S. 2829 exempt trust property from encumbrances or alienation by operation of any State tax. The only recourse in the event of a failure by a tribe to make its in-lieu payments is to the income derived from the settlement trust fund.

For all other purposes, the Passamaquoddy Tribe, Penobscot Nation and their members, and all other Indians or Indian tribes within the State are subject to payment of the same taxes as all other citizens or residents of the State including, for example, sales, excise, and income taxes. Either Tribe or Nation "when acting in its business capacity as distinguished from its governmental capacity, shall be deemed to be a business corporation organized under the laws of the State and shall be taxed as such."

That the Tribe, Nation or Band may be exempt from federal taxation will not exempt the Tribe, Nation or Band from taxation under Maine law. Thus, for example, while Indian tribes are, under Revenue Rulings of the Internal Revenue Service, not considered to be taxable entities, such Ruling would not exempt any tribe from Maine income taxes imposed under the laws of the State of Maine.

Finally, although the fee in tribal trust land will be in the United States, the Tribe and Nation will be liable to make payments or pay fees is lieu of property taxes or other taxes, including, for example, excise taxes, which payments, fees or taxes may be assessed as an incident of ownership of land or natural resources.

Section 6209. Jurisdiction over Criminal Offenses, Juvenile Crimes, Civil Disputes and Domestic Relations

This section is divided into five subsections. The Passamaquoddy Tribe and Penobscot Nation are recognized to have exclusive jurisdiction over criminal offenses committed by members of either Tribe against another member of either Tribe within the boundaries of their respective reservations (as distinct from their territories) in which the maximum potential term of imprisonment does not exceed six months and the maximum potential fine does not exceed $500.00. Each Tribe also has exclusive jurisdiction over juvenile offenses of members of either Tribe committed within their respective reservations including certain juvenile offenses defined by State law.

The Tribes also have exclusive jurisdiction over small claims civil actions arising on the reservations between members of either Tribe who reside on the reservation; Indian child custody proceedings to the extent authorized by Federal law; and domestic relations matters, including marriage, divorce and support between members of either Tribe or Nation both of whom reside on the Indian reservation of the respective Tribe.

Crimes and punishments are defined by State law, but the Tribes are deemed to be enforcing tribal law when acting under this section. In other words, the Tribes have adopted State law as their own. Procedures are governed by Title 25, sections 1301–03, United States Code (Indian Civil Rights Act of 1968) and any other applicable federal law. As to cases over which the State has jurisdiction (those with punishments greater than six months in jail or a fine in excess of $500.00), the State also has jurisdiction over lesser included offenses which would otherwise be subject to exclusive tribal jurisdiction. Principles of double jeopardy and collateral estoppel are not applicable as between the State and Tribal courts.

With the exception of those crimes over which the Tribes are given exclusive jurisdiction, the laws of the State relating to criminal offenses and juvenile crimes apply and the State is given exclusive jurisdiction over other offenses notwithstanding the Major Crimes Act (18 U.S.C. 1153).

Subsection 5 of this section provides for the establishment of "extended reservations" within the Indian territory. Any 25 or more adult members of either the Passamaquoddy Tribe or the Penobscot Nation may petition the Tribal-State Commission for the establishment of such extended reservation and upon approval of the Commission and the State legislature such extended reservation shall be created.

Section 6210. Law Enforcement on Indian Reservations and Within Indian Territory

This section is broken into four subsections. Passamaquoddy and Penobscot police officers are vested within exclusive authority within their respective territories to enforce ordinances adopted by the Tribes under their authority pursuant to Sec. 6206 and hunting and fishing regulations adopted pursuant to Sec. 6207(1); and to enforce the criminal, juvenile, civil and domestic relations laws over which the Tribes have exclusive jurisdiction in Sec. 6209(1).

Both Tribal and State law enforcement officers are vested with authority to enforce regulations of the Tribal-State Commission respecting hunting and fishing adopted pursuant to Sec. 6207(3) and all laws of the State other than those over which the Tribes have exclusive jurisdiction under Sec. 6209.

Ordinances enacted by the Passamaquoddy Tribe and the Penobscot Nation under Sec. 6206 and 6207(1) apply to non-members of the Tribes as well as to members. Sec. 6206(3) provides that the State retains exclusive jurisdiction to enforce Tribal ordinances against non-members. Tribal police officers under this section are thus vested with authority to arrest non-members but judicial proceedings must be through the State courts which are empowered to enforce Tribal ordinances against non-members under Sec. 6206(3).

Law enforcement officers appointed by the Tribes shall possess the same powers and shall be subject to the same duties, limitations, and training requirements as municipal police officers under the laws of the State. Provision is made for Tribal-State agreements for cooperation and mutual aid between police forces.

Section 6211. Eligibility of Indian Tribes for State Funding

Section 6211 of the Maine Implementing Act sets forth provisions for funding the Passamaquoddy Tribe and Penobscot Nation as municipalities and provides additionally for participation of residents of the Indian territory of the respective Tribe or Nation in State programs.

This section is broken into four subsections. Subsections one and three provide that the Passamaquoddy Tribe and the Penobscot Nation shall be eligible for participation in State programs which provide financial assistance to State municipalities, including discretionary grants or loans, to the same extent and subject to the same conditions as any other State municipality. To the extent local matching funds are required, the Tribes may use funds from any source available, including Federal funds. Subsection four provides further that individuals residing within their Indian territories are eligible for and entitled to receive State grants, loans, or other social service entitlements on the same basis as all other citizens of the State.

Subsections two and four provide limitations on eligibility of the Passamaquoddy Tribe or Penobscot Nation or their members for State funds based on receipt of Federal benefits. Subsection two provides:

> Any moneys received by the respective tribe or nation from the United States within substantially the same period for which state funds are provided, for a program or purpose substantially similar to that funded by the State, and in excess of any local share ordinarily required by state law as a condition of state funding, shall be deducted in computing any payment to be made to the respective tribe or nation by the State.

Subsection four provides:

> In computing the extent to which any person is entitled to receive any such funds, any moneys received by such person from the United States within substantially the same period of time for which state funds are provided and for a program or purpose substantially similar to that funded by the State, shall be deducted in computing any payment to be made by the State.

If these provisions of State law were to be broadly construed, they could have an adverse impact on the cost to the United States in providing assistance to the Tribes or their members under programs designed to aid Indian tribes or persons or under other general programs designed to aid local governments or individuals regardless of legal status. The supplanting provisions could result in a dollar for dollar reduction of State aid for every dollar of special assistance, over and above any local share under a State-local cost sharing formula, offered the Indian Tribes or their members by the United States

because of their status as Indians or as otherwise provided under more general programs.

In testimony before this Committee on July 1, 1980, the Secretary of the Interior expressed concern regarding the application of this provision in the Maine Implementing Act and its impact on the cost to the United States in providing services to the Indian tribes and individuals in the State of Maine. He also expressed concern with regard to the precedential aspects of the Maine "supplanting" provision on delivery of services to Indians in other states.

The Maine Implementing Act is a codification of an agreement reached by the Passamaquoddy Tribe and Penobscot Nation with the State of Maine. By letter of August 22, 1980, Attorney General Richard Cohen of the State of Maine explained the intended reach of Section 6211 of the Maine Act. This letter is printed in full elsewhere in this Committee report. The following excerpts are relevant to understanding the intent of Section 6211 and the construction to be afforded it.

> It was * * * understood * * * that treating the Tribes as municipalities could place the Tribes in a unique position with respect to their eligibility for Federal funds. As recognized Indian Tribes, the Passamaquoddy Tribe and Penobscot Nation will be eligible for funds and services available to Indian Tribes (*e.g.*, Johnson-O'Malley Act and Snyder Act funds from the Bureau of Indian Affairs). * * * In addition, since the Maine Tribes would be municipalities under Maine law, it was thought that the Tribes might also be eligible for Federal funds available to municipalities (e.g., Federal municipal revenue sharing). The possible availability of these Federal funds in conjunction with State "municipal" entitlements made it apparent that in some circumstances the Passamaquoddy Tribe or Penobscot Nation would be eligible for multiple funding of Tribal programs from both the State and Federal governments. This multiple State/Federal funding would not be available to other municipalities in Maine nor to the Indian Tribes elsewhere in the United States. Because of this, the State and Tribes agreed that if a basic service was funded by the Federal government, as a result of the Tribes' special status under Federal law, then duplicate funding by the State would be inappropriate. It was with that end in mind that Section 6211 was drafted.
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> (I)t was the understanding of the parties that the set-off provisions in Section 6211(2) and (4) of the Implementing Act were intended only to encompass Federal funds that would be actually received by the Tribes and their members by virtue of their status as recognized Indian Tribes and their status as Indians under Federal law. Since the State had agreed to treat the Tribes as municipalities for State funding purposes, it was anticipated that any moneys received by Tribes as municipalities would not be treated any

differently than similar moneys received by any other municipality. However, since the Tribes' status as recognized Indian Tribes would in all probability make them eligible for additional Federal moneys unavailable to other citizens and municipalities, such Federal funds received by them as recognized Tribes would be treated differently and would be subject to the set-off provisions.

(I)n drafting Section 6211, it was not the intention of the parties to alter the effect of Federal law. It was understood among all the parties that to the extent the United States provides funds for a program which are required by Federal law to be supplemental to and not to supplant State and local funds, that the set-off provisions in Section 6211(2) and (4) would not apply to such Federal funds. The term "substantially similar purpose" as used in Section 6211 of the Maine Implementing Act was not intended to refer to such Federal funds that enhance, enrich or supplement programs provided for under Maine law. Such Federal funds received by the Tribes would be outside the scope of Section 6211 entirely and would neither be deemed to be eligible to initiate a State match under Section 6211 (1) not would they offset or supplant any State match or State funds under Section 6211(2) and (4). Consistent with the foregoing, the usual State participation in the State/Federal cost sharing of social services such as AFDC, Medicare and Food Stamps would be unaffected by Section 6211(2) or (4).

From this letter, the following salient points emerge:

(1) the supplanting provisions of Section 6211 apply only to Federal funds provides the Tribe or Nation or their members because of their status as Federally recognized Indians. Federal funds provided either Tribe or its members which are generally available to other local governments or persons are not subject to the supplanting provisions of Section 6211.

(2) the purpose of Section 6211 is not to establish a basis for withdrawal of State funding from the Tribes or their members by virtue of the Federal recognition and their eligibility for Federal Indian services, but rather it is to avoid duplicate funding by both the State and the Federal government of the same or substantially similar programs.

(3) in the absence of Federal funding in excess of the local share ordinarily required by State law as a condition of State funding, the State contribution to the Tribe or Nation and their members will be equal to that provided other municipal governments and their citizens, and

(4) there will be no withdrawal or diminishment of effort by the State based on Federal funding of programs which enhance or enrich basic programs and which are required by Federal law or regulation to be supplemental to and not supplant State and local funds.

The Department of the Interior has expressed concern that the supplanting features of Section 6211 of the Maine Implementing Act may be counter to the policies pursued by the Department, and

indeed all Federal agencies, over the past 20 years which require states to provide services to their Indian citizens on the same basis as they provide services to all other citizens of the states.

The supplanting provisions of Section 6211, however, do not appear to result in any difference in treatment of individual members of the tribes from other citizens of the State or difference in treatment of the tribes from other municipalities for State funding purposes. The supplanting provisions of Section 6211 are triggered only when the Federal funds provided the tribes for the same or substantially similar program exceed the local or municipal share ordinarily required by State law as a condition of State funding. The objection of Interior that the supplanting provision may deny the tribes or their members equality of treatment with other State municipalities or citizens does not appear well founded. It would appear the real objection to the supplanting provision is that it may make it impossible for the United States to fulfill its commitment to the Passamaquoddy Tribe and Penobscot Nation to provide funding or services to the Tribe or Nation on a level commensurate with that provided other Federally recognized tribes without supplanting State funding.

The treatment accorded the Passamaquoddy Tribe and the Penobscot Nation as units of State government under the laws of the State of Maine for funding purposes is unique in Federal Indian law. So far as this Committee is aware, no other State accords the Indian tribes within its boundaries this status. Under general Federal law governing Indian affairs, Indian tribes are considered for all purposes domestic dependent sovereigns. Their sovereignty is recognized through Federal treaties and statutes and it pre-dates the U.S. Constitution or the organizational documents of the individual states where they may be located. The Indian tribes are dependent upon the United States for their protection. They do not constitute a unit of local government of the state in which they are located. *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832); *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978).

In recent years, there has been a growing tendency in Federal legislation to include the Indian tribes on the same basis as other units of local governments for purposes of Federal funding. However, the States do not treat Indian tribes as political subdivisions of the State and to the extent State funds are provided their local governments, Indian tribes do not participate. The provisions of the Maine Implementing Act are unique in this respect. The Committee does not believe the contribution of the State of Maine toward its Indian citizens should be any less than that of other states with a Federally recognized Indian population. On the other hand, it is very possible that the extent of State participants in the provisions of funds to the Indian tribes in that State for governmental operations and the provision of general services will exceed that provided by other states with Federally recognized Indian tribes or populations.

It is noted that many of the programs specifically provided for Indians or Indian tribes specifically provide against diminishment of State funding. Examples of this are found in Title II of the Indian

Child Welfare Act of 1978 (92 Stat. 3076, 42 U.S.C. §§ 620, 1337) and the Indian Elementary and Secondary School Assistance Act (20 U.S.C. Subchapter III, 241 aa et seq.). In addition, program agencies have promulgated regulations to provide similar restrictions on use of Federal funds to diminish state effort. See, for example, 25 C.F.R. 273.34(a) restricting use of Indian education monies under the Johnson-O/Malley Act (48 Stat. 596, 25 U.S.C. §§ 452–454). Other regulations provide for extension of services only when alternative sources are not available. See, 42 C.F.R. Chapter 1, Subpart C restricting delivery of contract health care by the Indian Health Service and 25 C.F.R. Chapter 1, Subpart A, Sec. 20.3 establishing the policy of the Bureau of Indian Affairs in delivery of general assistance. To the extent Federal program monies are intended to be supplemental to State program monies, it would appear the various Federal agencies have adequate authority to promulgate regulations which would specify such limitations on use and would be uniformly applicable throughout the United States.

Under the circumstances, the Committee believes the Maine Implementing Act should be ratified without modification. In the event it should be shown that the effort of the State of Maine does not match that provided by other states, or that delivery of Federal programs to the tribes and their members is impeded or restricted and cannot be effectively addressed through regulation, the Congress retains the authority to amend the provisions of this Act to provide equitable funding provisions.

Section 6212. Maine Indian Tribal-State Commission

This section provides that any transfer of land or natural resources by any Indian tribe, nation or band of Indians prior to the date of the State Act shall be deemed to have been made in accordance with the laws of the State. With respect to individuals, any transfer made prior to December 1, 1873, is deemed to have been made in accordance with State law. The purpose of this section is to extinguish Indian claims arising under State law as opposed to Federal law.

HOUSEKEEPING PROVISIONS

The remaining provisions of the Maine State Implementing Act are housekeeping in nature. Provision is made for the continuation of Tribal school committees, Tribal housing authorities, and provision for Indian housing mortgage insurance. It is also provided that violation of Tribal fish and wildlife ordinances shall constitute a violation of State law and be enforceable in State courts.

Section 30 of the housekeeping provisions states that in the event section 6204 extending the laws of the State to the Tribes' Indian territories is held invalid, then the entire Act is invalidated; that in the event section 6209, subsections 3 or 4 providing for State jurisdiction over lesser included offenses and non-application of principles of double jeopardy and collateral estoppel are held invalid, then all of section 6209 shall be deemed invalid; and providing further that, except for these limitations, if any other section of the Act is held invalid it shall have no effect on the remaining provisions of the Act.

Finally, this Committee takes note of the hearings before, and report of, the Maine Joint Select Committee on Land Claims and acknowledges the report and hearing record as forming part of the understanding of the Tribe and State regarding the meaning of the Maine Implementing Act.

Cost and Budgetary Considerations

The Congressional Budget Office submitted the following cost estimate on S. 2829, as amended:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., September 17, 1980.

Hon. John Melcher,
Chairman, Select Committee on Indian Affairs,
U.S. Senate,
Washington, D.C.

Dear Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 2829, the Maine Indian Claims Settlement Act of 1980, as amended and ordered reported by the Senate Select Committee on Indian Affairs, September 16, 1980. The bill authorizes the appropriation of $81.5 million to provide for the settlement of land claims of Indians, Indian nations and bands of Indians in the State of Maine. Upon appropriation of the authorized amount, $27 million would be transferred to a new Maine Indian Claims Settlement Fund, with investment income (but not the principal) to be regularly distributed to the Passamaquoddy Tribe and the Penobscot Nation. The remaining $54.5 million would be transferred to a new Maine Indian Claims Land Acquisition Fund, with both principal and income to be spent to acquire lands for specified Indian groups.

Because of the trust responsibility placed on the Secretary of the Interior by the bill, the outlays resulting from the bill would differ from the appropriation. Monies held in trust by the federal government result in net outlays to the federal budget only when principal is disbursed. Since Section 5(b)(2) prohibits any distribution of principal held in the Settlement Fund, the only net outlays to the federal budget would occur when principal of the Land Acquisition Fund is used to acquire land pursuant to the Act. Assuming that the monies authorized are appropriated by the 96th Congress, it is expected that all $54.5 million will be outlayed in fiscal year 1981 to purchase approximately 300,000 acres of land on which interested parties already hold purchase options.

In addition, this bill would make designated Maine Indians eligible for benefits available through a number of discretionary federal programs. Thus, while no additional expenditures are mandated by this section of the bill, relevant federal agencies would be required to include these groups among those eligible for benefits and may seek additional funds in order to provide such benefits.

Sincerely,

Robert D. Reischauer,
(For Alice M. Rivlin, Director).

Regulatory Impact Statement

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 2126 will have no regulatory impact and only minimal paperwork impact.

Executive Communications

The pertinent communications received by the committee from the Department of the Interior and others setting forth recommendations relating to S. 2126 follow:

U.S. Department of the Interior,
Office of the Secretary,
Washington, D.C., September 10, 1980.

Hon. John Melcher,
Chairman, Select Committee on Indian Affairs,
U.S. Senate,
Washington, D.C.

Dear Mr. Chairman: This supplements our report of August 8, 1980, on S. 2829, a bill to settle Indian land claims in the State of Maine. In our earlier report we enclosed a proposed amendment to S. 2829 in the nature of a substitute. The proposal was developed in the course of discussions with tribal and State officials in an effort to achieve agreement on substitute language which would clarify governmental responsibilities in implementing the land claims settlement. Our proposed amendment reflected a large measure of agreement, but at the time of its submission discussions had not been concluded with respect to Section 6(b) of the bill. Those discussions have now been concluded and this is to provide you with our recommended language for that provision.

Section 6(b) of S. 2829 as introduced provides:

> (b) The Passamaquoddy Tribe, the Penobscot Nation, their members, and the land owned by or held for the benefit of the Passamaquoddy Tribe, the Penobscot Nation, and their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act. The Maine Implementing Act is hereby approved, ratified and confirmed, and the provisions of the Maine Implementing Act which hereafter become effective including any subsequent amendments pursuant to subsection (d), are incorporated by reference as fully as if set forth herein. The Maine Implementing Act shall not be subject to the provisions of Section 1919 of Title 25 of the United States Code.

As we mentioned in the course of our testimony at the Committee's July 1 hearings on the bill, one of our principal concerns with the settlement proposal is the language of Section 6211(2) and (4) of the Maine Implementing Act which would allow the State to reduce funding to the Passamaquoddy Tribe, the Penobscot Nation, and their members in circumstances where the Tribes or individual members are recipients of Federal funds "within substantially the same period for

which state funds are provided, for a program or purpose substantially similar to that funded by the State. . . ." Section 6(b) of S. 2829 would approve, ratify, and confirm the provisions of the Maine Implementing Act, including Section 6211.

Because we feared that ratification of these provisions in the State Act could result in the abuse of Federal financial assistance by allowing the State to use Federal funds to supplant State funding of programs which benefit its Indian citizens, and would therefore set a potentially dangerous precedent for the use of Federal funds nationwide, we asked State officials to provide the Committee with a letter clarifying the meaning and intent of Section 6211(2) and (4) of the Maine Implementing Act.

Maine Attorney General Richard S. Cohen sent the Committee a letter dated August 22, 1980, which assists in the interpretation of those provisions of the State law. However, this letter, while helpful, did not completely allay our concern, as expressed at the July 1, 1980 hearings, that Congressional ratification of the Maine Implementing Act pursuant to Section 6(b) of S. 2829 may be viewed as sanctioning, even if only in limited circumstances, the practice of supplanting each dollar of State aid to the tribes with a dollar of Federal aid.

After a careful study of the programs which might be affected by this provision in the Maine Implementing Act, we have arrived at the following language as a proposed amendment to Section 6(b):

> (b) (1) The Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseets, their members, and the land and natural resources owned by or held in trust for the benefit of the Tribe, Nation or Band, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act: *Provided, however*, that nothing in this section shall be construed as subjecting lands held by the United States in trust to taxation, encumbrance, or alienation. The Maine Implementing Act is hereby approved, ratified and confirmed to the extent that it is not inconsistent with the provisions of this Act. The Maine Implementing Act is not an agreement within the meaning of Section 109 of the Indian Child Welfare Act of 1978.
>
> (2) Funds appropriated for the benefit of Indian people or for the administration of Indian affairs may be utilized, consistent with the purposes for which they are appropriated, by the Passamaquoddy Tribe and the Penobscot Nation to provide part or all of any local share required by Maine State law. Federal funds used by the Tribe or Nation as local matching funds shall be considered as local funds for purposes of any maintenance of effort requirements imposed by Federal law or regulation.
>
> (3) Nothing in this Act shall be construed to supersede any Federal laws or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine unless expressly provided by this Act.

Paragraph 6(b)(1) of our proposed amendment is substantially similar to the provision in S. 2829. The proviso is intended to clarify the understanding of the parties that lands acquired by the United States in trust shall not be subject to taxation and are subject to the

restrictions against alienation of section 5(f)(2) of our proposed amendment (section 5(e)(2) of S. 2829). To the language ratifying the Maine Implementing Act we have added the phrase, "to the extent that it is not inconsistent with the provisions of this Act". While we have no intention of altering the substance of the jurisdictional agreement between the State of Maine and the Passamaquoddy Tribe and Penobscot Nation, to the extent that anyone in the future perceives a discrepancy between the federal and state legislation we feel it is important to recognize that the federal legislation should control.

Paragraph 6(b)(2) is a reflection of our examination of the interplay of federal and state funding of Indian programs under this new arrangement. Because lands in Passamaquoddy and Penobscot Indian territory will be tax-exempt, those Tribes may wish to rely on federal funds to match state funds available to them as municipalities. As provided in Section 6211(1) of the Maine Implementing Act, "[t]o the extent that any . . . program requires municipal financial participation as a condition of state funding, the share for either the Passamaquoddy Tribe or the Penobscot Nation may be raised through *any source of revenue available.*" (emphasis added). For example, consistent with the Maine Implementing Act and our proposed amendment, funds received by the Tribes under a contract authorized by the Johnson-O'Malley Act (25 U.S.C. Section 452 *et seq.*) may be used as the local share to match state educational assistance if that use is otherwise consistent with the provisions of the Johnson-O'Malley Act. Thus, regardless of whether or not certain funding sources may be prohibited by federal law or regulation from supplanting state funds under Section 6211(2) or (4) of the Maine Implementing Act, such funds may be used to provide the local share for matching purposes.

Paragraph (3) of our proposed section 6(b) would make it clear that nothing in the Settlement Act, including the ratification of the Maine Implementing Act, should be read to supersede any federal laws or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine, unless expressly provided by that Act.

The Maine Attorney General is amending his August 22 letter to provide further explanation of Section 6211 of the Maine Implementing Act. It is our understanding that the State's interpretation is that Section 6211 (2) and (4) will not authorize the supplanting of Federal funds where such supplanting is prohibited by either Federal law or regulation.

It is the Department's intention to structure our funding programs in such a manner that no funds will be supplanted by the operation of Section 6211 of the Maine Implementing Act. This structuring may include the amendment of our regulations to prevent supplanting of funds by states. However, such regulations, if promulgated, will have effect on a national basis and will in no way treat the State of Maine differently from any other state in such funding matters.

We have also been requested to consider the addition of the word "reasonable" to the language of Section 5(b)(1) of our proposed amendment. That sentence would then read as follows:

> Each portion of the Settlement Fund shall be administered by the Secretary in accordance with reasonable terms established by

the Passamaquoddy Tribe or the Penobscot Nation, respectively, and agreed to by the Secretary.

We have no objection to the inclusion of this word so long as the standard of conduct applicable to those charged with investment responsibility is consistent with Section 6 of the Uniform Management of Institutional Funds Act. That Section requires the governing board to exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. Those charged with investment management of the funds would be obligated to act in the utmost good faith and to exercise ordinary business care and prudence in all matters affecting its administration.

The Office of Management and Budget has advised that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

CECIL D. ANDRUS,
Secretary.

STATE OF MAINE,
DEPARTMENT OF THE ATTORNEY GENERAL,
Augusta, Maine, August 22, 1980.

Re S. 2829 "The Maine Indian Claims Settlement Act."

Hon. JOHN MELCHER,
Chairman, Select Committee on Indian Affairs, U.S. Senate, Washington, D.C.

DEAR CHAIRMAN MELCHER: At the request of Secretary Andrus, we are writing to explain in detail the understanding of State officials as to the meaning and intent of § 6211 of the Maine Implementing Act, Chapter 732 of the Public Laws of Maine, 1979. That section sets forth the mechanism under which the Passamaquoddy Tribe and Penobscot Nation, as municipalities, will receive monies under State programs. The statement below represents my view as Attorney for the State and reflects my understandings of the intent and representations of the parties during the extended negotiations. I understand that this letter will be included in the Committee's records. Since I believe it helps in understanding the interrelationship of this bill and the Maine Implementing Act, I believe it would be useful to also include this letter in the Congressional history of the bill.

In drafting and negotiating the Maine Implementing Act, the Tribes and State agreed that the powers, duties and rights of the Tribes in Maine would be defined by reference to the powers, duties and rights of municipalities in Maine, (See Section 6206(1) of the Maine Implementing Act). Because municipalities are an important and essential unit of government in Maine and, under the principles of "home rule" in the Maine Constitution, are accorded significant power of self-government, this approach was believed to be an important element of the Implementing Act. At the same time, it was understood that this provision would make the Tribes eligible for funds from the State in basically the same manner as cities and towns in Maine. This availability of State funds to the Tribes, as municipalities, was viewed by the State as a unique and substantial provision of the settlement

with long-range cost implications to the State. It was included because it was consistent with one of the fundamental premises of the Implementing Act; i.e., that the Maine Tribes were to be subject to general State law as other citizens with certain limited exceptions in recognition of their unique cultural or historic interest. So far as we know, no other State in the Nation treats Indian Tribes in a like fashion for funding purposes.

It was also understood, however, that treating the Tribes as municipalities could place the Tribes in a unique position with respect to their eligibility for Federal funds. As recognized Indian Tribes, the Passamaquoddy Tribe and Penobscot Nation will be eligible for funds and services availably only to Indian Tribes (e.g., Johnson-O'Malley Act and Snyder Act funds from the Bureau of Indian Affairs). Although at the time that the Implementing Act was negotiated the exact extent of this funding was unknown, it was understood that it would be significant and that it would be provided to the same extent and on the same terms that Federal funds were provided to Indian Tribes elsewhere in the United States. In addition, since the Maine Tribes would be municipalities under Maine law, it was thought that the Tribes might also be eligible for Federal funds available to municipalities (e.g., Federal municipal revenue sharing). The possible availability of these Federal funds in conjunction with State "municipal" entitlements made it apparent that in some circumstances the Passamaquoddy Tribe or Penobscot Nation would be eligible for multiple funding of Tribal programs from both the State and Federal governments. This multiple State/Federal funding would not be available to other municipalities in Maine nor to the Indian Tribes elsewhere in the United States. Because of this, the State and Tribes agreed that if a basic service was funded by the Federal government, as a result of the Tribes' special status under Federal law, then duplicate funding by the State would be inappropriate. It was with that end in mind that § 6211 was drafted.

Having thus summarized the basic thinking behind § 6211, several additional points should be made. First, § 6211 was intentionally drafted using broad language of general applicability rather than specifically cross-referencing particular Federal or State laws. Since the parties were conscious of the fact that existing State or Federal funding laws could be changed in the future and new programs created, and on the expectation that future amendment of the Maine Implementing Act might not be easily achieved to conform it to future changes in other laws, it was believed that use of general language was a preferable drafting approach instead of discussing the operation of each specific source of funding.

Second, it was the understanding of the parties that the determination of the amount of State monies to which the Tribes or its members would be eligible would be determined in the first instance, using the provisions of State law ordinarily applicable to other municipalities or citizens. In other words, statutory formulas in Maine law would serve as the initial starting point in determining Tribal entitlements from the State. In some respects those existing statutory formulas already contain provisions for the treatment of Federal funds, which provisions would be equally applicable to the Maine Tribes.

Third, it was the understanding of the parties that the set-off provisions in § 6211(2) and (4) of the Implementing Act were intended only to encompass Federal funds that would be actually received by the Tribes and their members by virtue of their status as recognized Indian Tribes and their status as Indians under Federal law. Since the State had agreed to treat the Tribes as municipalities for State funding purposes, it was anticipated that any Federal monies received by the Tribes as municipalities would not be treated any differently than similar monies received by any other municipality. However, since the Tribes' status as recognized Indian Tribes would in all probability make them eligible for additional Federal monies unavailable to other citizens and municipalities, such Federal funds received by them as recognized Tribes would be treated differently and would be subject to the set-off provisions.

Fourth, in drafting § 6211 it was not the intention of the parties to alter the effect of Federal law. It was understood among all the parties that to the extent the United States provides funds for a program which are required by Federal statutes or regulations to be supplemental to and not to supplant State and local funds, then the set-off provisions in § 6211(2) and (4) would not apply to such Federal funds. The term "substantially similar purpose" as used in § 6211 of the Maine Implementing Act was not intended to refer to such Federal funds that enhance, enrich or supplement programs provided for under Maine law. Such federal funds received by the Tribes would be outside the scope of § 6211 entirely and would neither be deemed to be eligible to initiate a State match under § 6211(1) nor would they offset or supplant any State match or State funds under § 6211(2) or (4). Consistent with the foregoing, the usual State participation in the State/Federal cost sharing of social services such as AFDC, Medicare and Food Stamps would be unaffected by § 6211(2) or (4).

Fifth, since many programs in Maine are shared State-municipal responsibilities, it was understood that the Tribes, as municipalities, would have to raise their local share which would be computed in the manner provided by Maine law generally. Insofar as State valuation was a factor in determining the Tribal share, the land in Indian Territory would be valued in the same manner in which privately owned land was valued in any other municipality. Since it was understood that the Passamaquoddy Tribe and Penobscot Nation could, but probably would not, choose to have a local tax, it was agreed that Federal funds could first be credited to the Tribe's share of any shared State-local programs with the balance credited to the State. Thus, the offset provisions of § 6211(2) would apply if and only if Federal funds in a particular program exceeded any local share necessary to trigger a State match under State law.

It is important to understand that § 6211 was negotiated with and agreed to by the Tribes. Insofar as it reduces the total amount of State funds to which the Tribes might be eligible, that consequence was understood at time of agreement. In addition, nothing in § 6211 increases the obligation of Federal agencies to fund Tribal programs in Maine. Those decisions will be made using the normally applicable criteria in Federal law and regulations. However, in determining eligibility for

Federal funds, it was also understood that the Maine Tribes would be treated no differently than other Tribes elsewhere in the United States, and would not be penalized nor receive less Federal funds by virtue of their eligibility for State funds under the Maine Implementing Act.

This latter point regarding future Federal funding for Tribal programs in Maine is one about which I wish to express my serious concern. It has been the States and Tribal expectation that, to the extent the United States funds a program for Indians elsewhere in the country, so also would it fund it in Maine. However, during the course of our negotiations with the Tribes and in all our dealings with the Department of Interior we have had serious difficulty in determining exactly what programs will be provided to the Maine Tribes and in what amounts. Expected levels of funding once estimated by B.I.A. have to date not been forthcoming. For example, estimates of Federal funding prepared in 1979 by the Eastern Regional Office of B.I.A. indicated that nearly $1.3 million would be provided in FY 1981 for education alone, even if no State funds were provided. This report was in fact provided to the Maine Legislature. We relied on such B.I.A. estimates in negotiating § 6211 of the Maine Implementing Act. We have only recently learned, however, that the actual figure for FY 1981 may be far less than B.I.A.'s earlier estimate. In addition, we are unable to obtain any confirmation of what B.I.A. or Indian Health Services funding levels may be or how they might be computed in subsequent fiscal years. This now raises serious concern that the Maine Tribes may not be appropriately funded in the future by the Federal government. Just as the Federal government is concerned that State funds not be unfairly reduced to these Tribes, so also we are gravely concerned that Federal funding not be reduced to these Tribes by virtue of their eligibility for State programs. In agreeing to treat the Tribes as municipalities, the State of Maine and the Passamaquoddy Tribe and Penobscot Nation have achieved an unusual relationship and one about which we are very optimistic. It would be extremely unfair to the Tribes and the State and inconsistent with our reliance on earlier B.I.A. reports if, as a result of this creative effort, the Federal government were to provide programs and funds to the Tribes on any different terms or amounts than it did to Indian Tribes elsewhere in the United States.

Very truly yours,

RICHARD S. COHEN,
Attorney General.

NATIVE AMERICAN RIGHTS FUND,
Portland, Maine, September 6, 1980.

Hon. JOHN MELCHER,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MELCHER: Secretary Andrus has asked me to write to you to explain the Passamaquoddy Tribe's and the Penobscot Nation's understanding of Sec. 6(g) of S. 2829 and Sec. 6211 of the Maine Implementing Act. Section 6211 deals with the eligibility of the Maine Tribes for State funding. Sec. 6(g) provides in relevant part that the

Maine Tribes "shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians." My clients' understanding of these provisions is best explained by outlining the manner in which they developed.

Negotiations concerning settlement of the Maine Indian land claims began in the spring of 1977 when President Carter appointed Justice William B. Gunter to evaluate the claims and recommend a course of action for the Administration. Justice Gunter studied the legal aspects of the case and discussed with the parties their views concerning settlement. The Tribes raised federal Indian services as an issue of major importance to them. The State of Maine was expected to discontinue the services which it was providing to the Tribes, and the United States had never provided the Maine tribes the level of services which it provides other Indian tribes. The Tribes were determined to make certain that any settlement contain a provision ensuring that full federal Indian services be provided to them and that they not have to use income obtained from settlement funds and property to pay for services which the Federal Government provides other tribes. At one point during these discussions the Department of the Interior suggested to Justice Gunter that the services issue be dealt with by providing the Maine Tribes with a lump sum payment in lieu of such services, but this suggestion was rejected. Justice Gunter's July 7, 1977 recommendation, a copy of which is enclosed, met the Tribe's objectives in this regard. The Justice recommended creation of a trust fund for the Tribes, acquisition of trust lands for the Tribes, and the provision of federal Indian services. Paragraph C(3) of the recommendation says that the United States should "[a]ssure the two tribes that that normal Bureau of Indian Affairs benefits will be accorded to them by the United States in the future."

Justice Gunter's recommendation led to detailed negotiations with a White House Work Group composed of Eliot R. Cutler, Associate Director of the Office of Management and Budget, Leo M. Krulitz, Solicitor of the Department of the Interior, and A. Stephens Clay, Justice Gunter's law partner. The Tribes took the same position in these negotiations concerning the services issue as they did in their discussions with Justice Gunter. These negotiations produced an agreement between the Tribes and the President on February 10, 1978. That agreement, which was embodied in a document titled Joint Memorandum of Understanding, a copy of which is enclosed, approached federal Indian services in a manner similar to that recommended by Justice Gunter. In Section 7(c) the federal government pledges:

> that the tribes will be considered fully federally recognized tribes and will receive all federal services, benefits and entitlements on the same basis as other federally recognized tribes.

The agreement between the Tribes and the White House led to still further negotiations in which the Tribes were asked by the Maine Congressional Delegation to reach an agreement with the State of Maine concerning jurisdictional matters. An agreement with the State was ultimately reached which provided that in addition to their status

as federally-recognized tribes, the Passamaquoddy Tribe and the Penobscot Nation would also have municipal status for various purposes under Maine law. As part of this agreement, and in return for concessions made by the Tribes, the State committed itself to fully include the Tribes in its municipal funding system. Under the terms of the agreement the Tribes are permitted to use federal funds to supply any local share which is required for funding by the State.

At the time the Tribes were negotiating with the Federal Government there was no discussion concerning services to be provided by the State of Maine. It was assumed by those participating in the negotiations that Maine would discontinue the Maine Department of Indian Affairs and cease its prior funding of the Tribes through that agency. It was also assumed that Maine would provide services to Maine Indians as citizens of the State. There was no discussion, however, as to how this was to be done, even though the funding of members of federally-recognized tribes by states was then a matter of dispute between the Federal Government and various states. As a result, the agreement to guarantee full Federal Indian funding was not conditioned on provision of a particular level of funding by the State.

My clients are pleased that the agreement which they negotiated with the State of Maine may reduce to some exent the cost to the Federal Government of providing full services to them. They understand Sec. 6211 of the Maine Implementing Act to prohibit duplicate funding by the State and the Federal Government. They also understand that the supplanting provision of Sec. 6211 does not apply to federal programs which by statute or regulation are deemed supplemental. They understand Sec. 6(g) of S. 2829 to be a guarantee, consistent with that bargained for in the Joint Memorandum of Understanding, that the Federal Government will provide them with full federal funding regardless of the level of funding provided by the State of Maine. They also understand that the Administration has a desire to obtain maximum participation by the State of Maine in meeting the Federal Government's obligation to the Maine Tribes, and fears that Sec. 6211 might hinder this goal. Specifically, they understand that the Administration is concerned that because the Federal Government funds various programs for Indians at levels higher than those provided by most states, that in order to meet its obligation to fund Maine tribes at the same level as other tribes it might be obliged under Sec. 6211 to supplant Maine's contribution to particular programs. After studying various Maine programs, however, it appears that the Federal Government will be able to meet its obligation of providing full federal funding to the Maine Tribes without supplanting Maine funds. This will require careful attention to existing federal statutes and regulations, and may require adoption of new regulations. The Tribes are prepared to cooperate with the appropriate officials on these issues, and will assist in the preparation of remedial legislation if it develops that the Federal Government is bearing a disproportionate share of the cost of providing full federal Indian services to them.

Many thanks for your assistance in this matter.

Sincerely,

THOMAS N. TUREEN.

Enclosures.

KILPATRICK, CODY, ROGERS, MCCLATCHEY, & REGENSTEIN,
Atlanta, Ga., July 15, 1977.

Recommendation to: President Carter.
From: William B. Gunter.
Re: Passamaquoddy and Penobscot tribal claims—Maine.

A. MY ASSIGNMENT

My assignment was to examine the problem created by these claims for approximately ninety days and then make a recommendation to you as to what action, if any, you should take in an attempt to bring about a resolution of the problem.

I have not acted as a mediator in this matter; my role has been more that of a judge; I have read the law and examined the facts; I have met and conferred with affected parties and their representatives; I have attempted to be objective, realizing that no one person can ever attain total objectivity; I have tried to come forth with a recommendation that, in my own mind, is just and practical; and I now proceed with a brief statement of the problem and my recommendation.

B. THE PROBLEM

The pending court actions based on these tribal claims have the unfortunate effect of causing economic stagnation within the claims area. They create a cloud on the validity of real property titles; and the result is a slow-down or cessation of economic activity because property cannot be sold, mortgages cannot be acquired, title insurance becomes unavailable, and bond issues are placed in jeopardy.

Were it not for this adverse economic result, these cases could take their normal course through the courts, and there would be no reason or necessity for you to take any action with regard to this matter. However, I have concluded that this problem cannot await judicial determination, and it is proper and necessary for you to recommend some action to the Congress that will eliminate the adverse economic consequences that have developed to date and that will increase with intensity in the near future.

I have concluded that the Federal Government is primarily responsible for the creation of this problem. Prior to 1975 the Federal Government did not acknowledge any responsibility for these two tribes. Interior and Justice took the position that these two tribes were not entitled to federal recognition but were "State Indians". In 1975 two federal court decisions, one at the trial level and another at the appellate level, declared that the Constitution adopted in 1789 and a Congressional enactment of 1790 created a trust relationship between the Federal Government and these two tribes. In short, the Federal Government is the guardian, and the two tribes are its wards. After the appellate decision, Interior and Justice concluded that the tribal claims would be prosecuted against private property owners owning property within the claims area and against the State of Maine for the properties owned by it within the claims area. Therefore, we have the unusual situation of the Federal Government being, in my mind, primarily responsible for the creation of the problem, and it is now placed in a position by court decisions of having to compound the

problem by court actions that seek to divest private property owners and Maine of title to land that has heretofore been considered valid title. The prosecution of these cases by the Federal Government brings about the adverse economic consequences already mentioned.

I have concluded that the states of Maine and Massachusetts, out of which Maine was created in 1820, bear some responsibility for the creation of this problem. The states procured the land in the claims area, whether legally or illegally I do not now decide, and sold much of it. The State of Maine now owns, I am informed, somewhere between 400,000 and 500,000 acres of land in the claims area.

I have concluded that the two tribes do not bear any responsibility for the creation of the problem, and I have concluded that private property owners owning property within the claims area do not bear any responsibility for the creation of the problem.

The problem is complex and does not lend itself to a simple solution because it is old and large. The factual situation giving birth to the problem goes back to colonial times and the early years of our life as a nation under the Constitution. Adding to the complexity is the fact that the problem is social, economic, political, and legal.

Enough about the problem—I move on to my recommended solution.

C. THE SOLUTION

I have given consideration to the legal merits and demerits of these pending claims. However, my recommendation is not based entirely on my personal assessment in that area. History, economics, social science, justness, and practicality are additional elements that have had some weight in the formulation of my recommendation.

My recommendation to you is that you recommend to the Congress that it resolve this problem as follows:

(1) Appropriate 25 million dollars for the use and benefit of the two tribes, this appropriated amount to be administered by Interior. One half of this amount shall be appropriated in each of the next two fiscal years.

(2) Require the State of Maine to put together and convey to the United States, as trustee for the two tribes, a tract of land consisting of 100,000 acres within the claims area. As stated before, the State reportedly has in its public ownership in the claims area in excess of 400,000 acres.

(3) Assure the two tribes that normal Bureau of Indian Affairs benefits will be accorded to them by the United States in the future.

(4) Request the State of Maine to continue to appropriate in the future on an annual basis state benefits for the tribes at the equivalent level of the average annual appropriation over the current and preceding four years.

(5) Require the Secretary of Interior to use his best efforts to acquire long-term options on an additional 400,000 acres of land in the claims area. These options would be exercised at the election of the tribes, the option-price paid would be fair market value per acre, and tribal funds would be paid for the exercise of each option.

(6) Upon receiving the consent of the State of Maine that it will accomplish what is set forth in numbered paragraphs (2) and (4) above, the Congress should then, upon obtaining tribal consent to

accept the benefits herein prescribed, by statutory enactment extinguish all aboriginal title, if any, to all lands in Maine and also extinguish all other claims that these two tribes may now have against any party arising out of an alleged violation of the Indian Nonintercourse Act of 1790 as amended.

(7) If tribal consent cannot be obtained to what is herein proposed, then the Congress should immediately extinguish all aboriginal title, if any, to all lands within the claims area except that held in the public ownership by the State of Maine. The tribes' cases could then proceed through the courts to a conclusion against the state-owned land. If the tribes win their cases, they recover the state-owned land; but if they lose their cases, they recover nothing. However, in the meantime, the adverse economic consequences will have been eliminated and Interior and Justice will have been relieved from pursuing causes of action against private property owners to divest them of title to land that has heretofore been considered valid title.

(8) If the consent of the State of Maine cannot be obtained for what is herein proposed, then the Congress should appropriate 25 million dollars for the use and benefit of the tribes (see paragraph numbered (1)), should then immediately extinguish all aboriginal title, if any, and all claims arising under an alleged violation of the 1790 Act as amended, to all lands within the claims area except those lands within the public ownership of the State. The tribes' cases could then proceed through the courts against the state-owned land. If the tribes win their cases they recover the land; but if they lose their cases they recover nothing against the state of Maine. However, in the meantime, they will have received 25 million dollars from the United States for their consent to eliminate economic stagnation in the claims area and their consent to relieve Interior and Justice from pursuing causes of action against private property owners to divest them of land titles that have heretofore been considered valid.

It is my hope that the Congress can resolve this problem through the implementation of numbered paragraphs (1) through (6) above. Paragraphs (7) and (8) are mere alternatives to be utilized in the event consensual agreement cannot be obtained.

Respectfully submitted,

WILLIAM B. GUNTER.

[Press release from the Office of the White House Press Secretary, February 10, 1978]

THE WHITE HOUSE

JOINT MEMORANDUM OF UNDERSTANDING

For several months, representatives of the Passamaquoddy and Penobscot Tribes and a White House Work Group comprised of Eliot R. Cutler, Associate Director, Office of Management and Budget; Leo M. Krulitz, Interior Department Solicitor; and A. Stephens Clay, Washington attorney, have been meeting to discuss the tribes' land and damage claims in Maine and the federal services to be extended to the tribes in the future. These discussions have produced agreement with respect to both a partial settlement of the claims and future

federal services. The parties hope that the terms and conditions described here also will serve as a vehicle for settlement of all the tribes' claims.

A. The Basic Agreement: A Partial Settlement

The Administration, through the White House Work Group, agrees to submit to the Congress and to seek passage of legislation which would provide the two tribes with the sum of $25 million in exchange for (1) the extinguishment of the tribes' claims to 50,000 acres per titleholder of such land within the 5 million-acre revised claims area (Area I)[1] to which title is held as of this date by any private individual(s), corporation(s), business(es), or other entity(ies), or by any country or municipality;[2] and (2) for the extinguishment of all their claims in the 7.5 million additional acres (Area II) in the claims area as originally defined (Areas I and II). Thus, *every* landholder within Area I would have his title cleared of all Passamaquoddy and Penobscot land and damage claims up to 50,000 acres,[3] and *all* titles in Area II would be totally cleared of such claims.

The tribes will execute a valid release and will dismiss all their claims with respect to Area II and with respect to landholders with 50,000 acres or less in Area I. The legislation will not clear title with respect to any of the holdings of any private individual, corporation, business, or other entity which are in excess of 50,000 acres in Area I, nor to any lands in Area I held by the State of Maine.

By preliminary estimate, the $25 million to be paid by the federal government would clear title to approximately 9.2 million acres within the original 12.5 million-acre claims area. All claims against householders, small businesses, counties and municipalities would be cleared. Approximately 3.3 million acres in Area I out of the original 12.5 million-acre claim would remain in dispute. About 350,000 acres of the disputed land is held by the state; the remaining 3.0 million acres is held by approximately 14 large landholders.

B. Proposed Settlement of the Tribes' Remaining Claims Against the State of Maine and Certain Large Landholders

The tribes and the White House Work Group recognize the desirability of settling the tribes' entire claim, if possible. However, direct discussions between the tribes and the State of Maine or between the tribes and the large landholders either have not occurred or have not been successful.

In an effort to promote an overall settlement, the White House Work Group has obtained from the tribes the terms and conditions on which the tribes would be willing to re-

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[1] This acreage description of the revised claims area is based on information taken from maps and not from surveys. The final revised claims area, to be determined by the Department of Justice based on information furnished by the Department of the Interior, may vary from this description by ±5%.

[2] For purposes of such extinguishment, titleholding, whether direct or indirect, partial or complete, is deemed to include control, or ability to control, through subsidiaries, partnerships, trusts, or other entities.

[3] For any landholder with holdings in excess of 50,000 acres, the 50,000-acre exemption would apply to lands which are representative of the overall holdings of such landholder.

solve their claims against the State of Maine and against the large landholders whose titles would not fully be cleared by the Basic Agreement. The tribes have authorized the Work Group to communicate these terms and conditions to the appropriate representatives of the State and the affected landholders. In this context, the Work Group serves primarily as an intermediary with limited authority to settle the remaining claims on the terms set forth by the tribes.

1. *Claims Against the State of Maine.*—The tribes have claims against the State of Maine for approximately 350,000 acres of State-held lands in Area I and for trespass damages. Rulings on several of the defenses originally available to Maine already have been made by the courts in the tribes' favor.

The State of Maine currently appropriates approximately $1.7 million annually for services for the Penobscot and Passamaquoddy Tribes. The tribes are willing to dismiss and release all their claims for land and damages against Maine in exchange for an assurance that Maine will continue these appropriations at the current level of $1.7 million annually for the next 15 years. The appropriations would be otherwise unconditional and would be paid to the United States Department of the Interior as trustee for the tribes. Should the State agree to give this assurance, the legislation to be submitted to the Congress by the Administration would provide for the extinguishment of all tribal claims to the affected State-held lands and all trespass damage claims when the last payment is made.

2. *Claims Against Large Private Landholders.*—In exchange for the dismissal, release and extinguishment of their claims to approximately 3.0 million acres within Area I held by the large landholders as described in the Basic Agreement, and in exchange for a dismissal and release of all trespass claims against said individuals or businesses, the tribes ask that 300,000 acres of average quality (approximately $112.50 per acre) timber land be conveyed to the Department of the Interior as trustee for the tribes, and that they be granted long-term options to purchase an additional 200,000 acres of land at the fair market value prevailing whenever the options are exercised. The tribes also ask for an additional $3.5 million to help finance their exercise of these options.

In recognition of the desirability of achieving an overall settlement, the Administration will recommend to the Congress the payment by the federal government of an additional $3.5 million for the tribes, if the affected private landholders will contribute the 300,000 acres and the options on 200,000 acres as set forth in the tribes' settlement conditions. Additionally, the Administration will recommend the payment of $1.5 million directly to the landholders contributing acreage and options to the settlement package. The $1.5 million would be divided proportionately according to the contribution made by the respective landholders.

If a settlement of the tribes' claims against the large landholders can be accomplished on the terms specified above, the

Work Group has agreed to use its best efforts to acquire easements permitting members of the tribe to hunt, fish, trap and gather for noncommercial purposes and to obtain brown and yellow ash on all property from the large landholders within Area I. The tribes will be subject to applicable laws and regulations in the exercise of easement rights. Additionally, it is agreed that the exercise of easement rights shall in no way interfere with the landholder's use of his property, either now or in the future. If the Work Group's efforts to acquire these easements are unsuccessful, the tribes have reserved the right to reject a settlement with the large landholders.

C. Other Terms and Conditions

(1) Nothing in this agreement is intended by the parties to be an admission with respect to the value of these claims. If settlement can be accomplished, it will reflect a compromise from every perspective. The tribes regard their claims as worth many times more than any consideration to be received under this agreement. The State of Maine, on the other hand, has taken the position that the tribes' claims are without merit.

The Administration has chosen to evaluate the claims not merely on the basis of their merit and their dollar value, but also in light of the facts that the claims are complex; they will require many, many years to resolve; and the litigation will be extremely expensive and burdensome to everyone and could, by its mere pendency, have a substantial adverse effect on the economy of the State of Maine and on the marketability of property titles in the State.

With these considerations in mind, any settlement will reflect a shared understanding of the reality created by the litigation, rather than one party's view of the equity of the claims. The claims are unique, and resolution of them on any basis other than litigation similarly must be unique.

(2) If a settlement can be reached with the State of Maine, with the large landholders, or with both on the terms described above, the White House Work Group has the option of implementing a settlement on those terms, rather than on the terms of the Basic Agreement specified in Section A. The Work Group has agreed to consult with the tribes before choosing any of the alternatives provided by this agreement.

(3) The tribes recognize that in no event shall the federal government's cash contribution to any settlement exceed $30 million; the federal government will pay $25 million to achieve the Basic Agreement, and an additional $5 million to facilitate a settlement of all claims against private landholders.

(4) The location of the 300,000 acres must be satisfactory to the tribes. However, it is agreed that the 300,000 acres may be in several tracts, so long as the timber land is of average quality. It is also agreed that land will be selected in such a manner as to not unreasonably interfere with the large landholders' existing operations.

(5) The cash funds to be obtained in the settlement shall be paid in trust for the benefit of the tribes on terms agreeable to them and the federal government. No part of the capital will be distributed on a per capita basis. The terms of the trust shall not preclude reasonable investment of the principal, nor shall they affect in any way the right of the tribes to dispose of income. The right to dispose of income shall be wholly a matter for tribal discretion.

(6) All property and cash obtained pursuant to this settlement shall be divided equally between the two tribes.

(7) The federal government pledges that the tribes will be considered fully federally recognized tribes and will receive all federal services, benefits and entitlements on the same basis as other federally recognized tribes.

(8) All lands acquired by the tribes and land currently held by the tribes shall be treated for governmental purposes as other federally recognized tribal lands are treated. The consent of the United States will be given to the exercise of criminal and civil jurisdiction by the State of Maine pursuant to 25 USC 1321, 1322, provided that the United States shall effect a retrocession within four years upon request of the tribes.

(9) If a settlement can be reached with the State of Maine, the White House Work Group will use its best efforts to obtain for the tribes assured access under mutually agreeable regulations to a designated place in Baxter State Park for religious ceremonial purposes. If the Work Group's efforts to obtain such assured access are unsuccessful, the tribes have reserved the right to reject a settlement with the State of Maine.

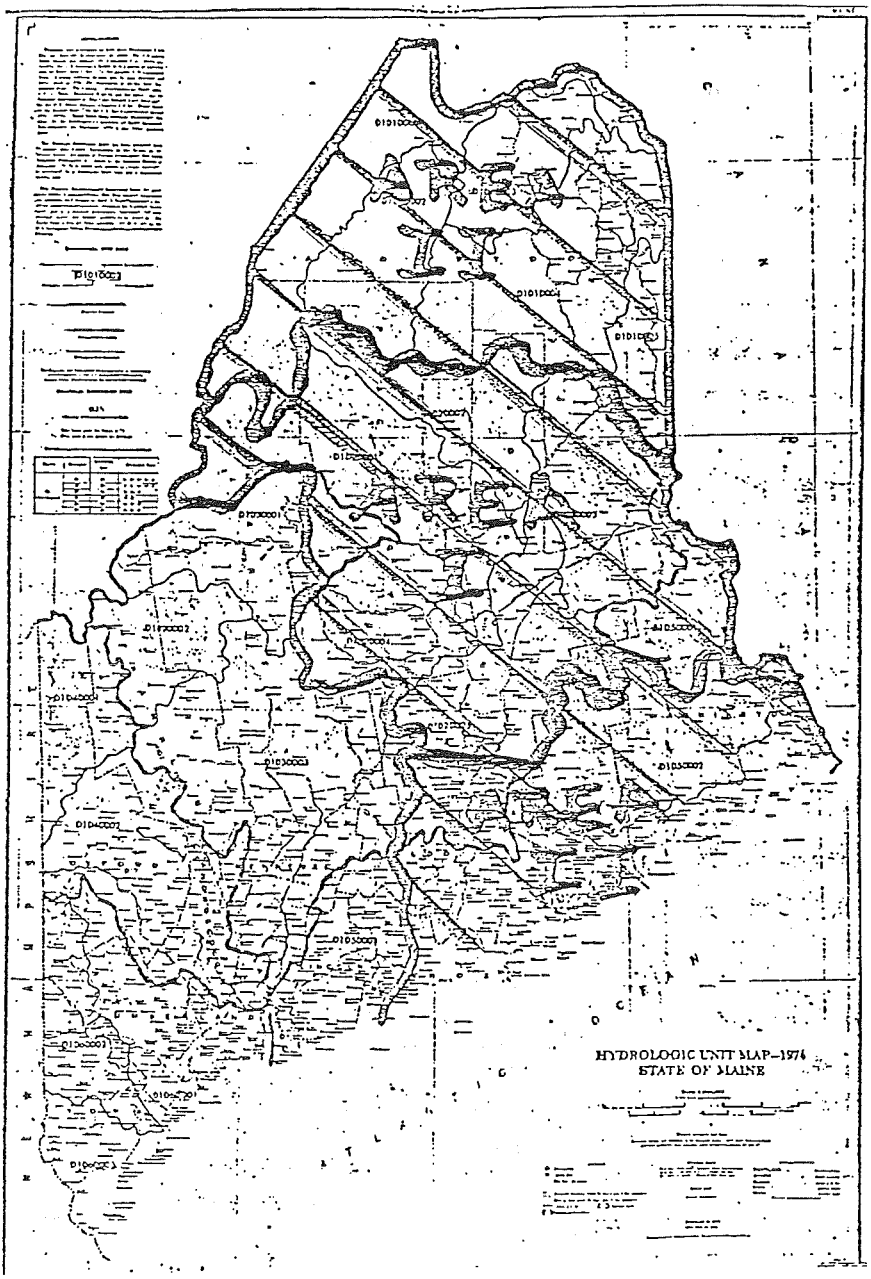
(10) With respect to settlement of the tribes' claims against the State of Maine and large landholders within Area I, the White House Work Group has 60 days to accomplish an agreement. If such a settlement cannot be accomplished within that period, the parties will proceed with the Basic Agreement outlined in Section A, above.

(11) The settlement agreement will be executed in a form appropriate to effectuation of the terms of the agreement and will preclude further litigation with respect to all claims settled. Suitable procedural safeguards will be adopted and implemented by court order in the pending litigation to assure that the parties' intent with respect to this settlement agreement is accomplished.

(12) The White House Work Group and this Administration pledge their vigorous support to settlement on the terms and conditions specified in this memorandum.

(13) This agreement is subject to ratification by the tribes on or by February Ninth, Nineteen Hundred and Seventy Eight.

For the administration:	For the Tribes:
Eliot R. Cutler.	———— ————.
Leo M. Krulitz.	———— ————.
A. Stevens Clay.	———— ————.



Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the committee notes that no changes in existing law are made by S. 2829 as amended.

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