REMARKS OF JOSEPH E. BRENNAN TO THE INDIAN CLAIMS SEMINAR
UNIVERSITY OF MAINE PORTLAND-GORHAM - - OCTOBER 29, 1977

MR. CHAIRMAN, LADIES AND GENTLEMEN:

I appreciate being invited to speak at the seminar today to give the State's perspective on this case. What I intend to do is to briefly explain for you the legal and factual defenses of the State and then make some general observations about the various matters of policy which this case has raised.

As has been explained to you from the opening remarks, the claim by the Maine tribes arises under the so-called Indian Tradeand Intercourse Act. That Act, originally passed by Congress in 1790 and which has in one form or another been in effect continuously ever since, provides that no one may obtain title to Indian land without the approval of the Federal Government. The tribes in Maine contend that somewhere between 5 to 12 million acres were obtained from them by the State and its citizens, pursuant to treaties or agreements made by Massachusetts and Maine in 1794, 1796, 1818, 1832 and the series of small transactions from 1820 to the 1950's. Our historic and legal research has persuanded me beyond doubt that the claim as I have outlined it will not be successful because (1) the Trade and Intercourse Acts were not intended by Congress to be applicable to and were never applied by the Federal Government to the New England States or any states outside of Indian country as that territory was first conceived in 1790, (2) regardless of whether the Nonintercourse Act was applicable to Maine, the tribes had been divested of their "aboriginal title" by conquest in 1760, (3) that even if the Act applied to Maine and even

if Maine acquired land from the tribes, by virtue of admission of Maine to the union, Congress approved the treaties, and (4) that the continuing exercise of jurisdiction by Maine over the tribes and the expressed and tacit concurrence in such actions by the Federal government constitutes an implicit ratification of Massachusetts and Maine's Act.

Having thus briefly stated our position, let me elaborate somewhat on each of them.

First, we believe that the legislative history of the Non-Intercourse Act indicates beyond doubt that it was not intended to apply to the Eastern United States, including New England and Maine. While it has been asserted by the attorneys for the tribe and the Federal government that this issue has been determined by the Circuit Court decision in Passamaquoddy v. Morton, I think that that assertion is plainly incorrect. The Circuit Court established a trust relationship only, it did not rule on the applicability of the Act to the treaties in issue. Let me quote for you what the Circuit Court said:

> "In reviewing the District Court's decision that the tribe is a tribe within the meaning of the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the Act affords relief from or even extends to the tribes land transactions in Maine."

It seems to me relatively clear from that quote taken from the Court's opinion in Passamaquoddy v. Morton that the question of whether or not the Nonintercourse Act even applies to Maine is a matter which is still unresolved. The contentions by tribal attorneys that the hardest part of the case has been won by their victory in Passamaquoddy

v. Morton is, I believe, a serious overstatement. In fact, little has been established by that case other than the existence of a trust relationship between the United States government and the Maine tribes. Thus we believe that the issue of whether the Act applies to the territory of Maine is still unresolved.

Given the fact that this issue is still open, what then is the proper interpretation of the Act? The tribal attorneys contend that since the Act refers to "any Indian" that it applies to the Maine tribes. This contention overlooks relevant legislative history and administrative interpretations of the Act.

Research done to date by historians and attorneys in my office, research not before the Court in Passamaquoddy v. Morton, indicates quite clearly that Congress never intended the Indian Trade and Intercourse Acts to apply to New England. We believe that interpretation is supported by extensive legislative and administrative history.

The Indian Trade and Intercourse Act and its predecessor, the Indian Ordinance of 1786, which ordinance was enacted by the government under the Articles of Confederation, were largely the product of the efforts of Henry Knox of Massachusetts. Knox was a General in the Revolutionary Army and from 1784 through 1794 was Secretary of War with primary responsibility for the management of Indian affairs. Communications from Knox and later George Washington to Congress about the Act indicate that they never intended the Act to apply to Indians within any of the states. Moreover, the administrative framework under both Acts indicate that Congress, acting on Knox's proposal, never intended to apply the Act to states except where land within

those states was considered to be within the western frontier. The concern of both Washington and Knox was peace on the western frontier.

Under the Act of 1783 and the Trade and Intercourse Acts, Congress established administrative structures supervising Indian affairs, but never created a division within the government to supervise eastern Indians. While there was an eastern Indian Agency from 1777 through 1783, the charter of that agency as established by Congress was applicable only to tribes of Nova Scotia.

This limited scope of Federal concern was wholly consistent with late colonial and pre-federal Indian policy under the British crown and the Articles of Confederation Government. The Royal Proclamation of 1763 and the Resolve of 1775 both evidenced that the concern of those governments was with tribes on the western frontier. Knox and Washington framed an act designed to continue this policy.

Our research has also uncovered correspondence from George Washington to Archbishop John Carroll, First Roman Catholic Bishop of the United States, in 1792, in which Washington responded to Bishop Carroll's request for governmental assistance for education and religion to the tribes of Maine. Washington's response to Carroll was that the tribes of Massachusetts were the responsibility of that state and not of the Federal government. The administration of all Federal Indian policy thereafter followed Washington's lead and was focused only on the western frontier.

Throughout the late 18th and early 19th century, the War Department made various reports about the condition of Indian affairs

throughout the country. Those reports demonstrate that the United States government knew of the New England Indians, including the Passamaquoddy and Penobscots, specifically, knew of their relationship to the eastern states, and so advised Congress. Debates in Congress in the early 1830's over Indian legislation again confirmed that Congress knew that the Act in fact never had been applied to New England. When a modified version of the Act was considered in 1834, the congressional committee report states that its intent was "to continue" the policy of the earlier Act to apply the Act to Indians not within any state. All the reports to the Congress make it clear that Congress tacitly approved the executive's administration of the Act.

In the course of our research, and in an effort to further explore the background of the Act, we have also done research on the people who were involved in negotiating the early treaties between Massachusetts and the Maine tribes, or who were otherwise involved in dealings with the Maine tribes. Among other things, we find involved in those events such people as Daniel Davis, William Lithgow, Benjamin Lincoln, and John Allen. Davis negotiated the 1796 treaty between Massachusetts and the Penobscot and a mere three weeks later was appointed United States District Attorney for Maine by President George Washington. He served in that capacity through 1801 and was United States Attorney in 1797 when Massachusetts ratified the treaty that he had negotiated. William Lithgow was predecessor to Daniel Davis as United States Attorney for the District of Maine. He submitted a report to the Massachusetts Legislature in

the 1780's which concluded, among other things, that the Penobscots had lost any legitimate claim to the lands in the State of Maine. Benjamin Lincoln was Secretary of War from 1782 to 1784. He, along with Henry Knox, submitted a report to the Massachusetts General Court in 1784 which, like the Lithgow Report, concluded that the Penobscots had lost any legitimate claim to land in Maine. John Allen was United States Indian Agent to the tribes of Nova Scotia, and long time ally of the Passamaquoddy Indians. Among other things, he negotiated on behalf of the State of Massachusetts the 1794 treaty with the Passamaquoddy. Interestingly enough, John Allen has been cited at length in Justice Department and Interior Department memoranda as an accurate source of information on the aboriginal territory of the Passamaquoddy and has been represented by them to be a champion of the tribes' interest throughout the latter half of the 18th century. Why John Allen would at one and the same time serve as the principal historical resource for the Indians' modern claim yet at the same time be responsible for having illegally divested the tribe of several million acres of land, is an historical anomaly which neither the tribes nor the Federal government have answered.

Without giving further details about these historical events, suffice it to say that to conclude that the States of Maine and Massachusetts were subject to and violated the Nonintercourse Acts requires that the Federal Government show either that all of these Federal officials, plus at least two United States Presidents, 5 Secretaries of War, and 2 United States Attorneys, all directly or indirectly participated in or knew of this violation of Federal law, or that all

of these same officials who were contemporaries of and some of whom participated in the drafting of the Trade and Intercourse Acts were grossly negligent in interpreting that Act. I seriously doubt if either of those propositions are sound. Rather, I think what we have is further evidence of our initial proposition. That is, the Act was not looked to in Maine not out of ignorance or intentional illegibility but because it did not in fact apply.

Having discussed that point, let me go on briefly to discuss a second argument. Our examination of the historical record causes us to conclude that in 1790, the operative date of the first Indian Trade and Intercourse Act, neither the Penobscot nor the Passamaquoddy had any legal claim to land in Maine. I should first point out that the kind of title that the Indians are claiming is technically known as "aboriginal title." Aboriginal title is a form of interest in land, which right is subject to extinction exclusively by the sovereign. The tribes in the current claim allege that they had aboriginal title of most of Maine in 1790 and that they were divested of the same by the treaties of the 18th and 19th centuries. I believe that their claim does not withstand historical analysis.

John Paterson has already outlined for you in considerable detail the facts surrounding the conquest of the tribes by Massachusetts - in 1760. I will not repeat that historical argument. Suffice it to say that the historical documents show that Massachusetts declared the tribes conquered and their lands forfeited in 1760. The tribes acknowledged this fact. The English government was informed and approved

of these acts of conquest. Massachusetts had full authority, with Royal approval, to extinguish "Aboriginal Title." This it did in 1759 and 1760.

It should also be noted that the position of the State of Massachusetts that the tribes were conquered in 1760 was confirmed by the actions of the early Federal government. In 1783 John Jay, John Adams and Benjamin Franklin relied on Pownal's Declaration of Conquest in negotiating the terms of the treaty to end the Revolutionary War with Britain. While discussing the terms of the treaty with Great Britain in Paris, a dispute arose as to the easterly boundary of the United States and Canada. The British argued for the Penobscot River as the boundary between those countries; the Americans argued for the St. Croix, John Adams produced Pownal's 1759 document as evidence of Massachusetts' victory in the French-Indian War, thereby establishing Massachusetts' possession of all the lands in Maine. The American view of the boundary prevailed. The United States negotiators thus relied on the truth of Pownal's Declaration of Conquest in important international dealings.

Assuming, however, that the State of Maine was unsuccessful in asserting either of the preceding two arguments, we come to our third argument. It is clear that by virtue of the admission of Maine to the Union in 1820, Congress effectively ratified any treaties to that date. In 1819 Massachusetts enacted the Act of Separation. That Act authorized Maine to become a separate state on certain conditions including the condition that Maine assume all obligations, including

treaty obligations, running from the State of Massachusetts to the Indians. After the enactment of the Act of Separation, the Maine constitution was adopted, which constitution incorporated by reference the Massachusetts Act of Separation in Article X, Section 5. I should point out for the lawyers in the audience that the current Maine Consitution still includes the Act of Separation, although modern reprints of the Constitution do not reproduce it. In 1820 the Act to admit Maine to the Union was passed by Congress. During debates on that Act the Massachusetts Act of Separation and the Maine Constitution were read in their entirety on the floor of the United States Senate. The preamble to the Act admitting Maine refers to both the Act of Separation and the Maine Constitution.

We have examined United States Supreme Court decisions dealing with the legal significance of the admission of a state to the union, including, for example, the admission of West Virginia and Kentucky. In both those cases, the Supreme Court made it clear that in admitting a new state to the union, Congress was deemed to consent to the terms of the compacts between the new state and the old state. In other words, the Supreme Court said that the provisions under which the mother state authorizes a district to split off are considered to be legally ratified by Congress when Congress admits the new state to the union. Justice Joseph Story in his definitive treatise on the Constitution said precisely that when he discussed this principle in his treatise. He also said that the principle was applicable to the new State of Maine. Inasmuch as the Maine Constitution requires Maine to abide by all existing treaties, it seems logically

inescapable that Congress in approving the Maine Constitution legally ratified the prior treaties.

The suggestion that Congress might have overlooked the Indian issue in admitting Maine is a specious one. In 1819 Congress, when debating the admission of Alabama, discussed at great length the jurisdiction of Alabama over Indians. Ultimately, Congress admitted Alabama but with special conditions regarding that state's jurisdiction over the Indians. In considering Maine's admission a year later, and despite being on notice regarding Indians in Massachusetts and Maine, there was not even any debate on the subject of Indians.

Even if we go so far, therefore, as to assume that the Indians in Maine still had aboriginal possession after 1790 to 12 million acres of land and that Maine took the land without Federal approval, and even if we further sssume that the Trade and Intercourse Act applied to the New England Indians, I think it is clear that by admitting Maine to the union in 1820 Congress approved all the agreements and treaties up to that time.

Our final legal argument relates to the conduct of the United States government and the State of Maine over the last 157 years. Even if we lose all the preceding arguments, we think it clear that the conduct by the Federal government constitutes an implicit ratification of Massachusetts and Maine's Acts. In the recent case of Rosebud Sioux v. Kneip, decided on April 5, 1977, the United States Supreme Court established certain principles of law which I believe are applicable to the case in Maine. In Rosebud Sioux, the question was whether or not an Act of Congress in the 20th century had the effect

of reducing the size of the Sioux reservation established during the 19th century. The reservation had been established pursuant to a treaty between the Federal Government and the Sioux Nations, which treaty provided among other things, that the reservation boundaries should never be altered without the approval of the tribe. In the 20th century, some 90 years later, Congress enacted a law which allotted certain tribal lands to non-members of the tribe. The tribe brought suit contending that the reservation boundaries remained unchanged and that the tribe had jurisdiction over the allotted lands since the Congress had never obtained from the Rosebud Sioux the consent required by the original treaties. Since the Congressional Act in issue was not clear in its face, the question was whether Congress had intended to reduce the reservation boundaries without the consent of the tribe thus abrogating the treaties. The court noted at the outset that in construing Indian treaties and statutes affecting Indians, ambiguities were to be construed in favor of the tribes since they were generally considered to be weak and defenseless wards of the government. Nevertheless, the Supreme Court, having recited that general rule of construction, went on to construe the Act in question as having reduced the reservation and thereby modified the treaty. In making its statutory analysis, the Supreme Court relied heavily on the Doctrine of Jurisdictional History. The Supreme Court said:

> "Although the jurisdictional history of the Act is not entirely clear, the single most salient fact is the unquestioned actual assumption of state jurisdiction over the lands in issue.

> Since state jurisdiction over the area within a reservation's boundaries is quite limited, the fact that neither Congress nor the Department of Indian Affairs has sought to exercise its authority in this area or to challenge the State's exercise of authority, is a factor entitled to weight as a part of the jurisdictional history. The long-standing assumption of jurisdiction by the State over an area that is over 90 percent non-Indian both in population and land use not only demonstrates the parties' understandings of the meaning of the Act, but has created justifiable expectations which should not be upset by such a strained reading of the Acts of Congress as the tribe urges."

The concept of jurisdictional history as articulated in Rosebud Sioux clearly applies in this case. The general jurisdictional history of the Trade and Intercourse Acts has already been discussed at length. Congress never made a treaty except in Indian country and never attempted to apply the Act in New England. The New England states and its citizens never sought Federal approval for their actions outside Indian country. Beyond that, particular facts in the Maine case make the jurisdictional history argument a particularly compelling one. In the last 197 years Maine and Massachusetts have enacted approximately 400 separate acts dealing with Indians. Maine alone has enacted some 350 pieces of separate legislation. This legislation covers tribal government, use and disposition of tribal lands, representation in the Legislature, appropriations for living needs, education, housing, indigent Indians, roads, water supplies,

pollution control and the like. According to figures compiled by the executive branch, state expenditures exclusively for Indians over the years now totals in the range of $12 - 15 million. The State has had an extensive administrative framework for management of Indian affairs and supervision since 1820. For the entire history of Maine the Federal government has acted as if all of Maine, except the limited reservations set aside by Massachusetts and Maine for the tribes, belong to the non-Indian occupants. As in Rosebud Sioux, all of the area now subject to the current tribal claim was subject to the unquestioned jurisdiction of the States of Maine and Massachusetts. Neither Congress nor the Department of Indian Affairs nor the tribes themselves objected to this state jurisdiction over an area more than 99% non-Indian in population and land use. Moreover, unlike Rosebud Sioux, the United States did not merely sit back silently and let the State act. The Federal Government itself participated with non-Indian occupants in the improvement and development of the land in eastern Maine. The United States has acquired from non-Indians lands for parks, including Moosehorn National Wildlife Refuge, Acadia National Park, military bases, post offices, courthouses, armories and other Federal facilities. It has given grants to local and State

agencies to acquire and maintain lands for parks, highways, urban renewal, schools, water and sewage treatment facilities and the like. The United States has provided financial assistance directly to citizens of the State and corporations to develop or use land through HUD, FMHA, EDA and SBA. The United States has and is planning massive public works projects such as Dickey-Lincoln, the Quoddy Tidal Power Project and Over the Horizon Radar Sites in Maine. Federal regulatory agencies such as the FCC, the FAA, the ICC have now and do currently license or regulate projects in the claim area that involve the use of land by non-Indians, including several dams which are flooded islands originally reserved for the tribes under the agreements of 1794 and 1796. President Ulysses S. Grant personally came to Maine in the 1800's to open the railroad from Bangor to Vanceborough, a railroad licensed by the ICC and running directly through the heart of the territory now claimed by the tribes. On no occasion has it ever been suggested that compensation be paid to or approval be received from any tribe for such use or whether any tribal interests were at stake.

It is frankly difficult to envision a case more amenable to the principles of jurisdictional history as set forth in Rosebud Sioux. At least two United States Presidents, five Secretaries of War, three Commissioners of Indian Affairs and numerous Congressmen and Senators and virtually every federal agency knew of the Maine tribes, knew that Maine had exercised exclusive jurisdiction over them, knew the Trade and Intercourse Act had never applied, and acquiesced to the State's exercise of exclusive jurisdiction. Congress could have acted differently, could have amended the statute to clarify its intentions and clearly apply it to all Indians. It did not. But as the Supreme Court said in Rosebud Sioux:

> "Much has changed since the enactment of the original law, and if Congress had to do it over again, it might well have chosen a different course. . . . 'Our task here is a narrow one. . . . We cannot remake history.'"

That, in a nutshell, is our case. Of course, there are numerous other procedural, legal and factual issues to be litigated. I have not mentioned all of those issues today.

Now that I have outlined for you at some length our legal case, let me review for you the status of Judge Gunter's report. Judge William E. Gunter, retired Georgia Supreme Court Justice, spent several months looking into this case at the request of President Carter, having met with us and the tribes; and having reviewed the documentation submitted to him, the Judge issued a report which said, first of all, that he was not deciding the merits of the dispute. Nevertheless in the interest of avoiding unfortunate economic dislocations in Maine as a consequence of the suit, he

recommended a settlement which contained approximately eight elements. The three most essential provisions were as follows:

1. A federal payment of $25,000,000 to the tribes and the concomitant extinguishment of any claim by the tribes to privately-owned lands.

2. An award by the State of 100,000 acres of land and a concomitant extinguishment of any tribal claim to State-owned lands.

3. A promise by the State to continue the same level of social services to the tribes that have existed for the last several years.

As most of you know, we have largely accepted this proposal. We advised Judge Gunter that if the Federal Government wishes to pay $25,000,000 to the tribes to extinguish the private claims, that we could live with that proposal. We think that a $25 million payment to the Maine tribes can justly be viewed as a long over-due delivery of services to the tribes by the Federal Government, since the United States Government has ignored these tribes and has failed to deliver to them the same level of benefits that it has to western tribes. In addition, I believe this action would remove the cloud on title on privately-owned lands that now exist and would avoid a repetition of the economic problems that Maine experienced in the summer and early fall of 1976 resulting from this claim.

With respect to the proposal that Maine continue in the future the same level of funding to the tribes, I do not believe that as a matter of constitutional power the State can bind itself to continue forever any legislatively authorized programs. Each Legislature has the complete constitutional authority to continue or discontinue previously authorized legislative appropriations. Moreover, as a matter of policy, I believe it is inappropriate to guarantee a

continuing level of State social services to any segment of our society, the tribes included, if the recipients of those social services subsequently do not need State assistance, since there are other worthy programs in the State of Maine that could well use State funds. I do not believe that the State should irrevocably commit itself to automatic funding for Indian programs for the indefinite future.

With respect to the proposed contribution of 100,000 acres of State land to the settlement, I have indicated to Judge Gunter that we could not go along with that recommendation. We have indicated instead our desire to exercise an option contemplated by his report of litigating for public lands. Our reasons for that position are several.

First, I feel very strongly about our legal and factual defenses and believe it is in our long-range interest to litigate the issue of ownership of public lands rather than to contribute to a settlement which I believe to be historically and legally unjustified.

Second, the present citizens of the State of Maine are no more responsible for the events of 200 years ago than any other people in the United States. They ought to bear no separate or unique responsibility or burden for settlement of this problem apart from their burden and responsibility as citizens of the United States.

Third, even assuming, for the sake of argument, that current citizens of the State have some separate and unique burden and responsibility for the Maine tribes and for settlement of the litigation, this responsibility has been more than met by Maine citizens through their past expenditures for the Maine Indian tribes. The State has made a substantial contribution of the

support of the tribes over the last 10 years. That contribution has totalled approximately $12-15 million, which contribution constitutes satisfactory repayment for any arguable historic debt.

Fourth, a contribution of a 100,000 acres from the State, using replacement costs of approximately $100 to $150 an acre, represents a cost to the State of roughly $10 to $15 million. This is a disproportionately high contribution by the State to the settlement when compared to the recommended $25 million from the Federal Government to the tribes. It represents a burden to the State of nearly 40% of the total proposed settlement.

Finally, Maine's public lands are a precious commodity. Maine ranks 44th in the nation in the percent of publicly-owned lands in the State as a whole. Among those states with a forest products industry, Maine is the last in the country in the percent of publicly-owned lands. We rank below the State of Georgia in that regard. The requested contribution of public lands by the State would constitute nearly 1/5 of all publicly-owned lands in the claim area.

For all of those reasons, I have advised the Governor, the Legislature and the people against settlement.

Having summarized for you the State's position on the claim and Judge Gunter's proposed settlement, I think it would be appropriate for me to make a few concluding remarks and observations about this claim.

I have from time to time heard tribal representatives observe that this case is a test of the American legal system. I agree, but for different reasons. As most of you will recall, in the fall of 1976 when the impact of the claim first came to public attention, the State experienced serious problems in the marketing of its

bonds. This was not merely some minor problem for the State, but rather was an extremely serious problem which was potentially harmful to many innocent people in the State. What was at stake was the construction of schools, hospitals, roads and other needed municipal facilities. In some cases construction was halted in projects already under way when bond financing failed. More than one payroll was late in payment. Beyond that we faced a freeze in FMHA mortgage financing, a freeze in municipal tax anticipation borrowing and the resulting cessation of all municipal services, a possible adverse rating by federal bank regulators of all banks holding mortgages in the claim area, which adverse rating might have triggered the collapse of these banks with untold consequences for the State's economic and financial structure. It was about the most serious crisis I have ever seen in my years in government. In an effort to seek some interim procedural accommodation with the tribes that would permit us to litigate the claim without crippling the State, the Governor and my staff met with tribal representatives on several occasions. The only response we got from the tribes was an offer to negotiate. I think it goes without saying that we found that wholly unacceptable. Nevertheless, we found ourselves in a situation where we appeared to have no choice but to negotiate a claim we would have rather litigated, not because we feared a litigation loss, but because the people of the State could not withstand the financial pressures resulting from the mere pendency of the suit.

When efforts to resolve the matter with tribal representatives failed, the Governor and I requested the Maine Congressional Delegation to introduce legislation that would extinguish the claims, but that would have permitted the tribes to sue the Federal Government for money damages stemming from the breach of trust obligation to the tribes. The contention that this Act would have done away with any claim by the tribes is a patent misrepresentation. The purpose was to clear the titles clouded by the suit so that the State would not come to a halt. That effort has been much criticized as evidence of my desire to undermine the constitutional and moral rights of the tribes to have their day in court.

I find that criticism both factually misleading and personally offensive. I do not intend at this forum to defend my record as a defender of civil liberties. But I think I should point out the facts that have been overlooked in this repeated criticism of me.

I do not fear a loss in this lawsuit. I think our position is sound. Even assuming, however, that the tribes won the lawsuit, I think Maine citizens could and would accept the judgment of the Courts. The more serious question which my critics have ignored is the question whether there is any way in which claims of this sort can be asserted and litigated without visiting upon the defendants and innocent third parties devastating economic consequences. Can our system tolerate the existence of a claim which by its very assertion potentially cripples the ability of the defendant to competently and fairly get his day in Court? Just as the Tribes are entitled to a day in Court, so is the State.

Since the fall of 1976 the State's ability to market bonds has been restored, real estate transactions now continue and several large developments which have been delayed by the litigation are now apparently proceeding forward. Nevertheless, the potential for significant interference with the State's economy exists should the tribes reelect to file an actual claim against all or part of the land area which they claim. If the Tribes' demand for an adequate settlement is not satisfied, nothing would prevent them through their attorneys from asserting their claim for land and throwing us into the situation of last fall. I do not make that statement to inflame feeling, but it is a fact; and it is precisely that fact which I contend raises a serious question about whether there is any way in which claims of this sort can be litigated in view of the financial consequences to defendants in cases such as this. Some of you may be familiar with the problems of Mashpee, Massachusetts. Real estate

in that community had been totally unmarketable until recently when the Tribes agreed to modify their claim and not ask for recovery of residential properties of under one acre.

I suggest to you that the righteous indignation of tribal representatives is self-serving, misleading and unfair to thousands of innocent Maine residents who have been and may be badly hurt if a similar suit were filed in Maine that involved all residential property of over an acre.

Both the tribes and the people have a right to their day in court. At the same time innocent Maine citizens have a right to lead their lives free of any devastating cloud on their title while the legal system decides the issues. I do not have any easy answer for how we balance these interests. But I do not believe some of the public remarks about this aspect of the case have helped to shed any light on this most serious problem.

A second observation I should make relates to our decision to litigate for public lands rather than settle. As I told you a moment ago, we have advised Judge Gunter that rather than contribute a hundred thousand acres of state land to the Tribes, we would rather see the matter proceed through litigation. Tribal representatives have characterized that choice as being foolhardy; others have suggested that the State does not have to contribute a hundred thousand acres of its public land but rather could "assemble" a hundred thousand acres of land from the large timberholding interests in the State.

First, I find it amusing that tribal representatives would publicly belittle our desire to litigate for public lands while continuing to assert confidence in the Tribe's case. If, indeed, they believe in the strength of the Tribe's litigation position, their clients stand to benefit far more from my decision than they would were I to recommend settlement.

With respect to the suggestion that the State could assemble public lands from the companies, I think that assertion is based on two faulty assumptions. First of all, it assumes that the State ought to bring pressure to bear on the companies. Frankly, I don't think the companies have any greater degree of moral responsibility for settlement of the claim than does any other property owner. Paper companies and other major landholders are no more responsible for the events of 200 years ago than any other citizen of the State. I don't believe in a moral or legal double standard. While there are many policies of paper companies with which I differ, I don't believe they have any obligation to give their assets to the Tribes to settle these cases. The second fallacy in the assertion is the assumption that the state could pressure the companies into giving over their lands without the State having to compensate the companies. I think it is naive in the extreme to assume that paper companies or timber interests that use the land for economic purposes would donate that land to the State in order that the State might give it to the Tribes. While it is entirely likely that the companies might be willing to sell the land to the State, the cost to the State is the same whether it gives public lands to the Tribes or whether it buys additional land from the companies for that purpose.

Apart from the transitory issues raised by the Maine case, there is lurking a deeper issue. I think that issue is whether or not this country has a responsibility to pay reparations, either in land or money, to the American Indian for the events of 150 to 200 years ago. Some people have suggested that since the United States owes the American Indian a moral debt, Maine ought to negotiate this claim and agree to give some amount of land or money to the Tribes. I disagree. I do not believe that the State of Maine owes such a moral debt.

I believe that our society and government has an obligation to be just to all its citizens, and to provide to each person an equal opportunity to improve his or her life. But I do not believe that our society or government has an obligation through the payment of reparations to right all past wrongs that may have been committed by prior generations. I do not believe it is possible to create a system of perfect historical moral accounting that requires monetary payment for asserted ancient wrongs. I do not suggest that this view justifies the treatment of the American Indian by former generations. This country's record of dealings with its Native Americans may not be a proud one, but to argue whether the actions of our ancestors were right or wrong begs the question. The issue is not the morality of the actions, but whether this generation must be held accountable for them. My answer is that it should not be.

The Maine Indians are surely not alone in claiming a moral debt from society. Other religious, racial and ethnic minorities have been wronged by our society and government. Little more than a

hundred years ago the United States Supreme Court in the Dred Scott decision said that blacks were not people. Even today we are still fighting the battle for equal rights for women. If one argues that reparations are due for past wrongs, why not begin with these more recent wrongs. Beyond that, where do we stop? Should we go about creating a moral balance sheet that tallies up for each racial ethnic and minority group, the wrongs committed by andupon that group to determine whether they had been more sinned against than sinned? I think not. I think that task is impossible to perform and is a morally unnecessary one.

One of the peculiarities of this claim is that there is absolutely no statute of limitations on any Tribe bringing a claim either for land or money against any citizen of the United States regardless of how old that claim is. The omission of a general statute of limitations for Indian claims is unique in Anglo-American jurisprudence. Indians appear to be the only group in this country that can bring a suit against other citizens for damages, to recover use or ownership of land or to control water rights based on ancient legal claims without any limitation of time for bringing of such suits. I think this raises some very fundamental questions about our legal system. I do not believe that a claim, regardless of its nature, or the group or individuals asserting it, should have an indefinite life. It is a basic tenent of our system of justice that at some point in time a claim must expire. The concept of a limitation of time to assert a claim, whether statutory or in common law pervades our legal system. This concept is presumably predicated upon the belief that a stable society and system of justice ought not and cannot remedy old wrongs. I believe that a principle

of law which has such widespread acceptance and such uniform application ought to apply to all of our citizens, Indian and non-Indian alike.

If an Indian were to occupy your land for 20 years, he would acquire title to it by adverse possession. The converse is not true. If you were to occupy Indian land for 20 years, you would not acquire title by adverse possession. I think it is plain that we have developed a legal double standard in regard to Indian claims. This legal double standard is a historical accident unsupported by any ethical or moral basis.

It is sometimes argued that the Indians' claim to land and the right to recovery of a portion of it is different from other people's since, it is said, their ancient love of the land gives to them a unique moral claim. Again, I disagree. The assumption that the American Indian because of his ancient connection to the land has a greater moral claim to it than non-Indians is an assumption which I do not believe is supported by fact. Indians, like other Americans, are 20th century people, albeit with their own special traditions and cultures. But ancient customs and lifestyles have changed. Indians no longer trap, fish and hunt for their existence. They are no longer a nomadic people, travelling around the state on a seasonal basis dependent upon the forces of nature for their survival. They live in homes heated with oil and wired for electricity; they drive automobiles and go to work like the rest of us. The ancient traditions and cultures which grew out of a lifestyle that, in Maine at least, no longer exist, give to the American Indian no greater moral claim to the land than the farmer in Aroostook County who has for generations depended upon the productivity of the soil for his existence, the

woodlot owner who manages the land for his own needs, or the citizen of the State who uses park land for physical recreation and spiritual regeneration. Most modern American Indians have adopted values and lifestyles which bear no relationship to that of their ancestors. The sacredness of land to the ancient Indian tribes was almost exclusively a result of their dependence on land for their very survival. With the change in lifestyle, the status of land in the Indian community has changed. Indian lands throughout the United States are mined, drilled, subdivided and developed for the economic betterment of the tribes. I don't pass moral judgment upon those actions. I merely point them out as a fact of life, and to place in perspective the argument that ancient tribal cultural values are necessarily determinative of these modern Indians claims.

As I said before, I recognize that our national history and the treatment of our native Americans has not been a proud one. But in recent years our nation, and certainly the State of Maine, has made great strides in trying to remedy the economic and social injustices of the past. The State of Maine alone provides extensive social, welfare and educational assistance to the tribes of our State. Maine spends two or three times as much per pupil on the education of an Indian child as it does a non-Indian child; provides an array of social programs, to Indians, including State aid for the construction of Indian housing. Maine was the first state in the country to establish a State Department of Indian Affairs. All of those programs must continue since they are right and necessary apart from this case.

I do not believe, however, that refusing to pay reparations in land or money and refusing to negotiate this claim is inconsistent with the notion of social justice and equality of economic opportunity for all our citizens. I suggest that it may be an even greater injustice to permit unasserted tribal claims to live indefinitely and to be asserted against future generations, particularly claims which involve the potential removal of current occupants of land. At some time the potential for endless lawsuits against ourselves, our children and their children, must come to an end. I believe that the solution to social injustice can and should come about through continued and increased assistance to Indians and other people in our society for social, medical, educational and other programs. I am ready to litigate this case. I think it should be litigated. Nevertheless, I do not think we can avoid these basic issues that this claim raises. I believe that we should decide that after hundreds of years of reliance by individual citizens, ancient claims should be put to rest. We must still continue our efforts to make ours a just society, but we should not litigate forever these claims which arise out of the actions of our forebears.

REMARKS OF JOHN M. R. PATERSON TO THE INDIAN CLAIMS SEMINAR
UNIVERSITY OF MAINE PORTLAND-GORHAM, October 29, 1977

Mr. Chairman, Ladies and Gentlemen:

I appreciate being invited to speak today at this seminar on Indian land claims. I have been asked by Jim Purcell to give you the State's perspective on the most significant historical events that form the actual background against which this litigation takes place. Before I discuss all those historical events, I would first like to share with you some of my own experiences since my involvement with the case and also to summarize the methodology of our research.

My involvement with this case began in March of 1976, about two months after the decision of the First Circuit Court of Appeals in Passamaquoddy v. Morton became final. As you probably know, Passamaquoddy v. Morton was a suit brought by the Passamaquoddy Tribe against the Secretary of Interior in which the tribe was asking the court to declare the existence of a trust relationship under the Nonintercourse Act. The State had intervened in that suit in 1972 and after a decision by the District Court it had been appealed to the Circuit Court of Appeals. The Circuit Court of Appeals ruled that the Nonintercourse Act indeed did create such a trust relationship.

In March of 1976 I took over the case from the attorney in our office who had been previously principally responsible for the case. The first thing I did was to begin review of the files, both to gain some understanding of the case and to begin to assess the

consequences of losing Passamaquoddy v. Morton. One of the first things I noticed in the file was a report by the Department of Interior which had been submitted to the State through the United States Department of Justice in 1973. The report was very interesting. It had been prepared by Michael Smith, an employee of the Department of Interior who the Justice Department characterized as an expert. He had been asked by the Department of Justice during the preparation of the government's case in Passamaquoddy v. Morton to assess for the Department of Justice whether or not the Non-Intercourse Act had been violated in Maine with respect to the Passamaquoddy Tribe. The essential thrust of Mr. Smith's report was that even if the Nonintercourse Act were declared to be applicable to the territory of the State of Maine, in his review of the documents it appeared that the tribe had lost it's claim to aboriginal title prior to 1790, the operative date of the first Trade and Intercourse Act, and that the so-called treaty of 1794 between Massachusetts and the Passamaquoddy was in truth a grant of land by the State of Massachusetts to the landless Passamaquoddy Tribe.

After discovering this memorandum in our files in 1976, I attempted to contact the staff of the Department of Interior to refresh their memory about what their own historian said. We had discovered that in the spring of 1976 Interior was assessing their responsibility in light of Passamaquoddy v. Morton and we of course were concerned lest the Interior Department should recommend to Justice a suit against the State of Maine. My opinion upon reading

Mr. Smith's 1973 report was, naturally enough, that Interior would not make such a recommendation. Nevertheless, prudence seemed to require that I refresh Interior's memory.

I soon discovered that the Interior Department would neither return my phone calls nor answer my letters. It was not until mid-summer of 1976, in fact, that, after requests through the Maine Congressional Delegation and rather pointed correspondence from our office to the then Secretary of Interior and Attorney General, we could even get a reasonably polite response from the Department of Interior.

Well, to make a long story short, in the late summer of 1976 the Department of Interior advised us that they had, with the assistance of experts who had been working on the case for several years at least one of whom had been retained by the Native American Rights Fund, concluded that Massachusetts and Maine had indeed violated the Nonintercourse Act in their transactions with the Penobscot and Passamaquoddy. At our insistence, Interior agreed to provide us with copies of draft historical summaries prepared by them in connection with their research and to let us review those reports and comment on them before making a recommendation to the Department of Justice. In the fall of 1976 therefore, the Interior Department gave us two reports, one on the Passamaquoddy and one on the Penobscot Tribe. You have received copies of those reports in the packet of materials that was distributed to you today. Now mind you, those reports represented at least a year's worth of work

by employees in Interior and experts retained by them through the tribes. The Interior Department agreed to give us exactly one week to review and respond to those reports. Needless to say, since our own research effort had at that point just begun, it was an absolute impossibility for us to make any kind of meaningful response to Interior's research. That being the case, Interior simply went ahead and recommended a suit be filed against the State of Maine and 350,000 residents in the eastern half of the State of Maine. Shortly after that report was submitted to the Justice Department, Justice agreed to meet with us and discuss Interior's recommendation. Although our research was under way, we had achieved nowhere near the sophisticated degree of understanding about the events of 200 years ago and for all practical purposes the meeting was a useless one.

Since then most of the events are a matter of well known public record. The Justice Department after a fairly perfunctory review of Interior's report agreed with most of it and advised the United States District Court that unless the matter were settled by the parties, it intended to proceed forward with the litigation as requested.

I think there is one other point that might be of interest to you. Those historical summaries which Interior prepared in 1976 after a years worth of research, are not quite what they seem to be. If they seem to be too pat, it is because they were intended to be. We found out in fact, in early 1977, that Interior's so-called historical summaries which they gave to us in the fall of 1976 were

prepared exclusively for our consumption. Indeed, Interior subsequently admitted to the Justice Department that the reports completely omitted any reference to any fact which might undercut the strength of the tribe's case. We found that out not because Interior Department told us, but because some of the correspondence which Justice later turned over to us revealed that fact. I think it goes without saying that it is truly astonishing that the Department of Interior would have acted in such a fashion.

Now let me go on and discuss with you some of our research. Since the summer and early fall of 1976 we have had about five attorneys working on the case full or part time. The matter of time devoted to the case obviously depends upon the particular subject under investigation at any particular time, but we have devoted a substantial portion of the resources of our staff to legal research on a myriad of issues related to the case. Our historical research which did not really get under way with any degree of seriousness until January of 1977, involves three historians and one anthropologist plus several graduate research assistants helping those gentlemen. Generally our history has focused on three principal topics; (1) the background and history of the Nonintercourse Act, (2) the history of Massachusetts/Maine relationships with each of the tribes and (3) anthropological issues, or research on matters involving tribal existence, aboriginal territory and early tribal lifestyle. On each of these subjects the time period under investigation ranges roughly from 1700 to 1850.

You are probably wondering why our research effort did not begin seriously until 1976 or 1977. The answer is quite simple, nobody in the State took the case seriously except the Attorney General's Department. In 1973 Attorney General Jon Lund asked the Maine Legislature for money to hire historians to undertake research. The Legislature turned him down flat. Frankly, it's ridiculous to think that the State could do a serious job in a case such as this without devoting substantial resources to it. I would estimate that the case is costing our office something on the order of $100 - $200,000 a year depending on how you compute the time spent by attorneys on our staff.

A particular problem which we have encountered in undertaking our research is a phenomemn which I describe as the "I don't want to get involved syndrome." I have had the experience on several occasions of historians or anthropologists explaining to me that although they personally found the State's position to be sympathetic and although they professionally had an opinion that the State's analysis was correct, they personally did not want to get involved in the case, either because it would harm their standing in the liberal academic community or it would compromise their relationship with Indian tribes on whom they depended for source material. Several years ago there was an article in the American Journal of EthnoHistory which reported on the same phenomenon in cases handled by the Justice Department before the Indian Claims Commission. Indians are sympathetic plaintiffs and the State

is not. Most people do not think of the State as anything more than an abstract entity that interferes with their lives. Working to defend the State against Indian claims is not glamorous or sympathetic. I don't know if Tom Tureen has had the same problem for the tribes, but I can assure you that I have had this problem for the State and it is serious and real.

Now having explained to you that background let me now treat the substance of what I was assigned to discussed today. Jim Purcell said that I was supposed to give an objective summary of the history. I told Jim that I would do the best I could but that he should understand that history was not a science. Unlike chemistry, you don't mix historical facts in a test tube and come up with an observable scientific phenomonon that historians will agree on. History is subject to interpretation not only by different individuals but by different disciplines. The anthropologist's view of history is markedly different than the historian's.

What I am going to give you today is my summary. Tom Tureen and the tribal leaders can speak for themselves. I am an advocate and Mr. Tureen is an advocate and after you have heard us both speak you can judge for yourself.

I would first like to review for you the relationship between Massachusetts and the Penobscot Tribe up to about 1820, then review for you the Massachusetts/Passamaquoddy relationship up to 1820 and then briefly carry you from there to the present day. The history of both tribes will be parallel but not identical. They were different tribes inhabiting different territories and have similar but different histories.

In 1691 Massachusetts was granted a charter by the Royal Crown to all the land within the present day boundaries of the State of Maine, as well as lands formerly possessed by the French and known as Acadia. In 1697 Massachusetts lost much of that territory to the French by the Treaty of Ryswick, but later gained back title to all of the territory to the St. Croix River by the Treaty of Utrecht in 1713.

Between 1693 and 1752 Massachusetts concluded a series of treaties with the eastern Indians, which included all of those Indians located between the Piscataqua River and the St. John River in New Brunswick. There were treaties in 1693, 1698, 1702, 1713, 1717, 1725, 1727, 1749, and 1752. Those treaties, usually coming at the end of hostilities between the Colony and the Tribes, generally included provisions under which:

1. Massachusetts agreed to recognize lands claimed to be within the territory of the various tribes, the boundary lines being vague, and varying from treaty to treaty.
2. The tribe agreed to submit itself to the dominion of the laws of the Crown, that is to become British subjects, and
3. The tribes pledged not to ally themselves with the French in wars against the English nor to allow the French to use their lands as a sanctuary or base for conducting war against the English settlements.

The details of each treaty varied, but in general that summarizes their content.

By the 1750's the writings of the Colonial Governors of Massachusetts indicate that they were of the opinion that the policy of treaty making with the Penobscots had failed to insure the allegiance of that tribe to English authority and that only by ending tribal occupancy rights to the area between the Penobscot River and the St. Croix could the Crown insure that the area would be secured against French intrusion. Correspondence from Governor Shirley to the Massachusetts General Court (i.e. Legislature) in 1748 and from Governor Pownal to the Massachusetts General Court in 1759 confirm that view. With the outbreak of the French-Indian War in 1755, the Massachusetts Colony declared war upon the Penobscots, viewing them as allies of the French.

In 1759 Governor Pownal sent a message to the Massachusetts General Court seeking authority to take a mission up the Penobscot River to secure the lands from any claim by the Penobscot Tribe and the French. Pownal told the Massachusetts General Court "You know that as long as an Indian has any claim to these lands the French will maintain a title to them." Pownal argued for the necessity of establishing Massachusetts and English dominion over these territories. Prior to leading his expedition up the Penobscot, Pownal obtained authorization from Lord Jeffrey Amherst, Commander of British forces in North America, and sent to him a copy of his request to the Massachusetts General Court. Pownal had also previously informed Sir William Pitt of his intention to secure the land for Massachusetts

and advised Pitt that his expedition would "effectually secure the property to the province from any pretense of claims either from French or Indians."

In 1759 Pownal led an expedition up the Penobscot, placed a leaden plate at the head of tide and declared the territory under the dominion of the Province of Massachusetts Bay and Great Britain. Pownal returned to Boston in 1759 and reported his doings to General Amherst. Pownal also wrote a letter to William Pitt in 1759 informing him of his expedition and conquest.

Following the act of conquest, in 1760 the Massachusetts General Court created two new counties in Massachusetts, one of which, Lincoln County, embraced all the lands between the Penobscot and St. Croix Rivers.

In March of 1760, five Penobscot Indians approached the Commander of Fort Pownal claiming to represent the whole tribe and asked from the Commander the terms under which they would obtain peace with Massachusetts and England. The Commander gave to them the terms of peace which had previously been prepared for him by Governor Pownal. The Penobscots took the document and returned to their families promising to bring them to the Fort in three weeks, but indicating that they could not guarantee the peace terms would be acceptable to all members of the tribe. Two months later, in April of 1760, four Penobscots travelled from the Penobscot River to Boston and met with Governor Pownal. There they signed a document indicating their agreement to the terms and conditions prepared by the Governor for peace. Among other things, the document signed by them contained the following language:

> "That as we have been in open rebellion and hostility, and have thereby forfeited all our lands; and as possession has been taken of all our lands in this our time of open rebellion, and is now rightfully held, that we acknowledge this right, and relinquish all claim to settle lands, and only pray that we may have a privilege to hunt, fowl and fish within such limits as shall be assigned us but not to the exclusion of any other of his majesty's subjects, and also to erect wigwams and other buildings, to dwell in, and to plant, or otherwise improve such lands as may be assigned for our support."

The meeting with the Governor and the tribal members was reported on the front page of all the Boston papers in 1760 and was an event of considerable notoriety.

As most of you will recall, the discovery of this document was reported in the press about a year ago. The response of the United States Department of Interior was to demean the document on the grounds that the four tribal members who signed it had no authority from the tribe to act on their behalf. One can only wonder what four Penobscots would have been doing undertaking an incredibly long journey from Bangor to Boston in 1760 without having authority from other members of their tribe to act on their behalf.

In any event, in May 1760 Pownal informed Lord Jeffrey Amherst of the meeting with the four representatives of the tribe. At the same time, Pownal sent a copy of the terms of the agreement to the Boards of Trade and Plantations in England. The Board of Trade and Plantations was that organization established by the English Crown to manage the affairs of the Crown colonies.

In the next few years succeeding governors of the State of Massachusetts continuedto take the position established by Pownal in 1760. Lt. Governor Hutchinson in 1762 in a report to the Massachusetts General Court again asserted that the Penobscots had been dispossessed by Massachusetts of their aboriginal territory. In 1763 Governor Bernard in an official proclamation again reasserted the Colony's conquest of the tribes and the tribes' loss of territory in the French-Indian War.

In 1763 representatives of Penobscot and Passamaquoddy Tribes traveled to Boston to meet with Governor Barnard. The accounts of the meeting report that the representatives who appeared came "with full power from the Penobscot and Machias Indians and from the Passamaquoddy Indians to talk with" the Governor. In the meeting with the tribal chiefs Bernard told them that "the English conquered your country in time of war." Bernard went on, however, to offer to the tribes a spot of land within which he would protect them from intrusion by whites. At the request of the representatives, Governor Bernard ordered Chadwick to mark out a line beyond which the white inhabitants of the territory were not to settle "for the present time." Bernard's order to Chadwick indicated that the line was a flexible one to be moved as settlements were extended by the white inhabitants.

In 1764 the Board of Trade inquired of all colonial governors as to whether they had complied with directives from the Crown in regard to the management of Indian affairs. Governor Bernard responded to the Board of Trade saying that the Massachusetts Colony took the position that "the English have conquered the Penobscot territory

from them as well as from the French and that they hold their possessions by grace and favor more than by right." The Board of Trades indicated no disagreement with Bernard's position.

Throughout this period while asserting the colonies dominion over the tribes' former lands, Bernard was urging upon the colonial government the adoption of what was then considered enlightened Indian policy. In the same message to the Board of Trade Bernard said "It is in the interest of Great Britain to grant all that they ask, that is, to maintain them in their hunting against the encroachments of the English, as it is the most proper employment for the Indians and a very improper one for Englishmen. The preventing the country being settled too far up will be always in his majesty's power, and there is no danger of it at present."

In July 1769 Bernard had another meeting with Penobscot representatives. Again, according to published accounts of the meeting of which there are no contradictory records, the Penobscot representatives said,

> "We acknowledge that we have sided with your enemies and that they and we have been conquered and that we are become subjects of that great King George. We do now in the name of our whole tribe recognize it and do declare that we are now and always will be ready to obey as called upon any duty whatever. We pray his majesty to extend his pity to us and grant us so much land as will give us and our families subsistence in the way of life which we have been used to."

The accounts of the meeting indicate that it ran for two days at the close of which Governor Bernard agreed to assign for them two

townships of land along the Penobscot for their exclusive use for hunting and fishing.

In May 1775 the Revolution had begun. Throughout the War Massachusetts as well as the other colonies would be especially sensitive to the need for keeping the Indians from joining the forces of Britain. This was especially true in regard to the Indians east of the Penobscot and into eastern Canada, since their support was deemed crucial to the balance of forces in that area. Accordingly, in May 1775, Massachusetts requested the eastern Indians to support their cause. In June 1775 Massachusetts met with the Penobscots at Watertown, Massachusetts, the site of the Massachusetts provincial Congress. The Penobscots complained of encroachment on their ancient lands and from accounts of the meetings apparently were taking the position that they were still entitled to occupy all of their ancient territory. While the basis for their complaint is not clearly set out in the documents, it appears that the Penobscots at least were asserting tribal rights that preceded Pownal's conquest in 1759. This was the beginning of a fundamental dispute which went to the very heart of the Indians' land tenure. The Provincial Congress did not directly resolve this dispute but instead passed a resolve forbidding any persons from trespassing on any lands or territories of the tribes beginning at the head of tide of the Penobscot River and extending six miles on each side of the River. The resolve did not make clear the northern boundary of the territory so protected. The purpose for the resolve was apparently to temporarily placate the Penobscots and thus secure their allegiance in the war against Britain. In

subsequent years the resolve itself added to the confusion between Massachusetts and the Penobscot Tribe over the scope of the territory which the tribes were entitled to occupy. For example, in 1778 Chief Orono of the Penobscots complained to John Allen, the agent of Congress to the Nova Scotian Indians that Whites were settling on lands along the Penobscot River which had been granted to the tribe. Apparently Orono took the position that the 1775 Watertown Resolve was a grant of land to the Penobscot.

At the close of the Revolution Massachusetts embarked on a policy of encouraging settlements on a public domain between the Penobscot and St. Croix Rivers. Surveys were conducted with the intent of placing thousands of families in that area. Land lotteries were held to encourage the settlement of Whites. Throughout that period the Penobscots, however, remained restless and unhappy over their situation and continued to assert title to their original territory prior to Pownal's actions in 1759. By now 25 years had passed since Pownal's expedition. Colonial authorities who shaped policy before 1775 were no longer around. The basis for and reasons behind actions of early governments were already becoming hazy.

Apparently the Massachusetts General Court, anxious to eliminate any unhappiness of the Penobscots, if for no other reason than to quiet the anxieties of settlors who might not go eastward if it meant confronting an Indian problem, became concerned over the fact that the Penobscots were asserting title to vast territories of land. Accordingly, in July 1784 the Massachusetts General Court appointed two commissioners to meet with the Penobscots to settle the dispute. The

first two commissioners recommended that prior to meeting with the tribes a further study should be done to determine the legal basis for the Penobscot's claim. Two new commissioners, Henry Knox and Benjamin Lincoln, met with the tribe to discuss their claim. Accounts of the meeting indicate that the Penobscot tribe was now bottoming their claim on the 1775 Watertown Resolve. That is, they were claiming territory along both sides of the Penobscot indefinitely upriver from the head of tide. Knox and Lincoln reported to the Massachusetts General Court that in their view the tribe's demands were unsupported in law. Knox and Lincoln reported

> "Had the tribe recollected their acknowledgments and quit claim to Governor Pownal, they must in the opinion of your commissioners have been convinced that they could not avail themselves of their prior occupancy and had they fully understood the force of the doings of the Provincial Congress, they must have known that the resolution of that body forbidding any person trespassing on the lands beginning at the head of the tide of Penobscot River and extending six miles on each side of the same was not a grant of the said lands."

Knox and Lincoln concluded their report by stating their view that nothing would bring the matter to a conclusion unless the State agreed to set aside for the tribe such quantity of land as might be necessary to placate the tribe. That report was submitted to the Massachusetts General Court in 1785. Upon receipt of the report, another committee was appointed to again reexamine the legal basis behind the tribe's claim to land on the Penobscot River. That report was prepared by William Lithgow, Jr. an eminent attorney of the time. Lithgow again concluded on the basis of his examination of the documents that the tribe had lost their claim of aboriginal title by virtue of their

defeat in the French-Indian War and that contrary to the tribe's contention, the declaration of the Provincial Congress in 1775 was not a grant of land of title, but merely a right to hunt and fish unmolested in a given territory. Lithgow concluded that the tribe had neither a legal nor equitable claim to land but went on to urge the General Court to assign to the tribe a tract of land to call their own, thus settling the claim once and for all.

In 1785 another committee was appointed by the Massachusetts General Court to meet with the Indians, ascertain their claims and set aside territory for their exclusive possession. Over the next few years the composition of the committee altered, but finally in 1786 an agreement in principle was reached between the Massachusetts government and the tribes, setting aside for the tribes a tract of land six miles on each side of the Penobscot River beginning at the Piscataquis River on the west and the Mattawamkeag River on the east running upstream to the head of the river. Again, the only written accounts of these transactions indicate that the State of Massachusetts took the position that the tribes were not relinquishing any land which was rightfully theirs, but were rather being granted by the State of Massachusetts a territory of land which they could call their own exclusively. The proposed agreement was submitted by Governor Hancock to the Massachusetts Legislature in 1786. Over the course of the next few years, however, the agreement in principle was not consummated by the exchange of documents. In fact, it was not until 1796 that the documents were finally signed by representatives of the tribe. In February 1796 three commissioners were appointed to

meet with the tribe and finalize the agreement. The Commissioners included Nathan Dane, William Shepard and Daniel Davis. Dane and Davis were distinguished lawyers of their day. Nathan Dane endowed the first chair at Harvard University which at his direction was occupied by Justice Joseph Story. Dane was also author of a nine volume legal treatise entitled "A General Abridgment and Digest of American Law", published in 1823. The second commissioner, William Shepard, was a Revolutionary War General who in 1797 served as a federal commissioner to negotiate with the New York Indians under the Trade and Intercourse laws. He served as a member of the United States Congress from 1797 to 1803. The third commissioner, Daniel Davis, was a lawyer specializing in criminal law. A mere three weeks after the signatures on the 1796, document Davis was appointed United States Attorney for the District of Maine by George Washington. He was United States Attorney during 1797 when the Massachusetts General Court ratified the agreement that he had helped to finalize. In 1801 Davis was appointed Solicitor General of Massachusetts, a position which he held until his death in 1832. It hardly seems conceivable that persons of national repute, including two experts in American law and with no personal interest in the outcome of the negotiations with the Penobscots, would be participants in a violation of federal law and for no personal gain. It is the agreement of 1796 which forms the basis for the Penobscot Tribe's modern claim that they were divested of land in 1796 without the approval of the federal government, since by its terms it contains a relinquishment of any "claim" by the Indians to lands other than those reserved to them by the terms of the agreement.

Over the course of the next 20 years the State of Massachusetts enacted numerous laws to provide benefits to the Penobscots to provide for the supervision of their lands and to prevent the tribe from selling those lands which had been granted to them by the State without authorization from the State Legislature. During that period of time timber was sold from the tribe's land by the tribe and leases granted by the tribe for up to 999 years to portions of their lands. Governor Sullivan expressed concern about the tribes in the early 19th century and urged the Legislature to undertake steps to protect them. In 1818 the Penobscot Tribe sent delegates to the Massachusetts General Legislature with a petition from the tribe asking the Legislature for authorization to sell 10 more townships to the Commonwealth. Interestingly enough, the petition contains another acknowledgment by the tribe that the land that they then held was by virtue of a grant to them from Massachusetts. In 1818, in response to the petition from the tribe, the Massachusetts Legislature appointed three Commissioners to meet with the tribe and negotiate the requested sale. The three Commissioners included Mark Hill, a member of the Massachusetts Legislature who was elected to the United States Congress in 1818, the same year as the agreement; Edward Robbins, a member of the Governor's Executive Council, and Daniel Davis, now Solicitor General of Massachusetts and who as we previously discussed was United States Attorney for Maine from 1796 to 1801. Again, all three negotiators were distinguished public officials who made no personal gain from the transactions.

Under the agreement of 1818 the tribes sold to the State all of their remaining lands on the Penobscot River and reserved for them four townships of land in the general vicinity of present day Millinocket and Mattawamkeag and Woodville and all of the rivers in the Penobscot River beginning at modern Old Town, in return for which Massachusetts paid the tribes $400 and promised to acquire two acres of land in the Town of Brewer, to provide an instructor in the art of agriculture, and establish a trading post on Old Town Island. This agreement was ratified by the Massachusetts General Court in 1819.

What I have given you thus far is largely a summary of relationships between Massachusetts, Maine and the Penobscot. The story of the Passamaquoddy is similar but not the same.

On the whole, considerably less is known about the Passamaquoddy Tribe than the Penobscot because of their further geographic distance from Boston. Examination of historical documents in this country and in Canada indicate that during the 100 year period prior to the Revolution, the tribe had more official contact with the British colonial authorities under Nova Scotia than with the colonial authority in Massachusetts. The state of anthropological research with respect to the tribes is very sparse. A lack of official contact with the tribe by Massachusetts authorities is paralleled by a lack of extensive anthropological research on the tribe, its origins and tribal territory. The state of our own research to date causes us to believe, however, that the Passamaquoddy were a tribe whose aboriginal territory may have existed solely within the bounds of current day New Brunswick in the

vicinity of the St. John River. Thus, it may well be that in fact the tribe was not a Massachusetts-Maine tribe at all, but was a tribe whose territory was centered around 18th century Nova Scotia.

Many of the treaties I reviewed between Massachusetts and the Penobscot Tribe between 1700 and 1750 applied also to the Passamaquoddy. In addition, there were several other treaties that the Passamaquoddy made with Nova Scotia, with two in 1749 and one as late as 1760.

In 1776 George Washington wrote to the St. John and Passamaquoddy Indians soliciting their assistance in the war of revolution, offering to them the chain of friendship in return for their alliance, but warning them not to break with the colonies in the war. In 1777 with the war now underway, Congress established an Eastern Indian Agency and appointed John Allen as its agent. The terms of Allen's commission directed him to be the agent "for the Indians in Nova Scotia and the tribes to the northward and eastward thereof." Nothing in Allen's commission mentioned the Passamaquoddy by name. The fact that the commission by its terms was limited to Nova Scotia and areas east and north indicates that in fact Allen's commission was not as a domestic Indian agent but a foreign Indian Agent. Allen himself chose to include the Passamaquoddy within the scope of his authority. One can logically conclude therefrom that Allen believed that the Passamaquoddy were indeed a Nova Scotian tribe.

In the same year that Allen was appointed a federal eastern Indian agent for Nova Scotian tribes, Massachusetts appointed Allen

as their domestic Indian agent to recruit Indians into the service of Massachusetts. He thereafter wore two hats during the duration of the war. Allen established himself at Machias and worked to keep the Indians of the eastern tribes contented by supplying them with goods. At various times Allen dealt with Micmacs, St. John, Penobscot, Passamaquoddy and even Mohawks who assembled and camped under his direction. He would travel to Passamaquoddy Bay for conferences with Indians camped at St. Andrews on the Nova Scotian side. Most of Allen's correspondence refers to St. John Indians, with references to the Passamaquoddy seldom appearing in his letters and documents as a distinct group. In referring to the tribes Allen almost always called them "the Indians." In several conferences with the tribe the Passamaquoddies were mentioned. In 1777 Allen concluded a trade agreement with the St. John, Micmac and Passamaquoddies. In 1777 Allen met with the leaders of the St. John and Passamaquoddy tribes and made an agreement with them under which they would remove from their territory, that is Nova Scotia, to within the jurisdiction of the United States to assist in defense of eastern Maine.

It is fair to say that the Passamaquoddies assisted the United States in the defense of eastern Maine during the war, though according to Allen's own correspondence in 1793 their contribution was relatively small. Allen said:

> "The Passamaquoddy tribe comparatively have the least claim both as to numbers and attention in time of difficulty and in the late war there were five others to one of them."

Much has been made by the Departments of Justice and Interior of John Allen's statements in the ensuing years after the war as evidence of the tribe's claim to some portion of land within the United States. Selective citations to Allen's correspondence would cause the unsophisticated reader to believe that indeed the Passamaquoddy had relinquished their lands in Maine during the war in return for some smaller portion of land. We believe, however, that Allen's works, taken as a whole, indicate clearly that the land which the Indians had relinquished during the war was not Massachusetts land at all but was land within ancient Nova Scotia. For example, in 1783 Allen wrote to Thomas Mifflin, then President of the Continental Congress, and advised him that the tribes in Maine were anxious for a grant of land. He said:

> "They relied that the bounds [of the land to be granted to them] would not be further westward than the ancient river St. Croix where they might support themselves."

Since the land which the tribes wished to be granted was logically to the east of the St. Croix River, the land which the tribes were concerned about was obviously not American soil, but rather Nova Scotian.

In 1784 Allen wrote again to Mifflin arguing the case for a grant of land to the Passamaquoddy. Interestingly enough, Allen says that he has had nothing to do with the Penobscots since they are the concern of Massachusetts, implying that his concern has been solely with the tribes outside the lands of Massachusetts including the Passamaquoddy.

In 1792 John Allen on behalf of the eastern tribes petitioned the Massachusetts General Court on behalf of the Passamaquoddy. In the petition he wrote for the Tribe:

> "In the time of war the Indians resigned the claim of those lands which our forefathers so long occupied only on condition of enjoying our religion unmolested and exclusive rights to the beaver hunt, suitable residence for our families, and such other benefits in proportion to which our brethren were entitled to."

In that same letter, Allen, writing for the chiefs, indicated that the territory of ground on which the tribe had formerly resided was now English ground and that the tribe was now anxious to reside within "this country," meaning the United States. Their former lands referred to as being English, the Passamaquoddy must logically have been a Nova Scotian Tribe.

There were, of course, numerous other communications from Allen to the federal and state authorities. They are not models of clarity or consistency. Taken as a whole, however, we believe that they indicate the position on Allen's part that the Passamaquoddy, Micmac and St. John were tribes that resided within ancient Nova Scotia.

In any event, in 1793, in response to this tribal request for land, the General Court of Massachusetts created a committee of three, consisting of Steven Jones, Alexander Campbell and George Stillman to meet at some convenient place to confer with the tribe of Indians on the subject of their request. The three commissioners met and reported back to the legislature on their efforts, which were at that time unsuccessful, since the offer that they made was unacceptable to the tribe. In 1794 the General Court appointed three new

commissioners, including Stillman and Campbell and this time one John Allen. That same John Allen from whom so much of the information regarding the Penobscots was gleaned by the United States Department of Interior and Justice and who is represented by them in various documents submitted to us as being a champion of the tribes' cause within the United States. Allen, Campbell and Stillman met with representatives of the Maliseet, Passamaquoddy and Micmac tribes in 1794 offering to purchase for them and locate tracts of land to be used exclusively by the tribe. The committee noted that during the conference the chiefs of the St. John and the Passamaquoddy spoke alternately "No distinction was observed nor would they allow any settlement wherein they were not equally concerned as well as those residing in the Micmac Country." The commissioners thereafter agreed to set aside some land in the vicinity of present Indian Township and to purchase from John Frost 100 acres of land in Pleasant Point for the tribe. The agreement was made in 1794 and was ratified by the Massachusetts legislature. It is important to point out that the grant of land by Massachusetts was not to the Passaquoddy alone, but to them and others connected with them and that Massachusetts viewed the grant as the fulfillment of promises made by John Allen to the eastern tribes during the Revolution on behalf of the United States government and the State of Massachusetts. It is also useful to note again that the Commissioners, including Allen, were distinguished public officials who had no personal stake in the results of the negotiations.

The total parcel of land granted to the Passamaquoddy by the State of Maine was approximately 23,000 acres. During the course of the next 180 years the size of the reservation was diminished in size to its present day 17,000 acres. The missing 6,000 acres largely consists of land sold the State of Maine and Massachusetts sometimes with and sometimes without tribal consent. Some of the reservations lands are now occupied by railroad rights of way and United States highway Route 1, a highway which I should point out is maintained with federal financial assistance.

I have now brought you up to about 1820 with both tribes. Thereafter other events occurred that effected both tribes equally. In 1819 the Massachusetts General Court enacted a law entitled "An Act Relating to the Separation of the District of Maine from Massachusetts Proper and Forming the Same Into an Independent and Separate State." Among other things, the act had several provisions relevant to this case. These provisions provided that (1) all unconveyed public lands in Maine were to be divided between Maine and Massachusetts, one-half to each state, (2) Maine was to assume all obligations of Massachusetts running to the Indians whether arising from treaty or otherwise in return for which Massachusetts agreed to pay Maine $30,000 and (3) all grants of land and all contracts for the sale of land made by Massachusetts within the District of Maine should remain in full force and effect. In the fall of 1819 the constitutional convention met in Portland, at which time a constitution was proposed. The constitution included in Article X, Section 5 all of the above provisions in the Act. In addition to the foregoing provisions of the Articles of Separation

which were incorporated by reference in the Maine Constitution, several additional references appeared in the Maine Constitution referring to Indians, including Article IV, Part 2, Section 1 and Article IX, Section 14. The latter provision specifically referred to Indian trust funds. In fact Indian trust funds had previously been established for the tribes using proceeds of earlier land sales.

In the spring of 1820, an act to admit Maine to the Union was introduced in Congress. During the debate in the United States Senate the Constitution of Maine was read in full and referred to Committee. The Act itself was adopted in 1820. The preamble to the Act of Admission contained specific reference to the Act of Separation and the Maine Constitution which has been previously noted contains specific provisions obligating Maine to assume all of the Indian treaties heretofore existing in Massachusetts.

Since the Maine Constitution contained particular provisions about the status of public lands in Maine, it is interesting to briefly review what had transpired prior to 1820 in Maine regarding disposition of public lands. In 1783 the Massachusetts Legislature had created a Committee for the Sale of Eastern Lands. The principal purpose of the committee was to sell public lands in Maine to provide a source of income for the state and to encourage settlement in eastern Maine. At the time it was estimated that the District of Maine contained 17 million acres of uninhabited public lands that were available for sale by the Legislature. In 1784 the committee reported to the Massachusetts Legislature on a scheme to dispose of these lands. It recommended that townships be lotted out each six miles square between

the Penobscot and the St. Croix River, such lots to be sold at set prices. By 1786 sales were slow and the committee created a land lottery for 50 townships between the Penobscot and St. Croix, the so-called lottery lands. By 1790 the committee had managed to sell or lottery away approximately 375,000 acres in the District of Maine and in the claim area. After 1790 sales became more brisk. Between 1790 and 1820 more than 5 million acres of land were sold in the District of Maine, principally in the claim area. Other lands not sold were given away to charitable or educational institutions. Between 1783 and 1820 more than six million acres of public lands in the eastern part of the District of Maine had been sold or granted by Massachusetts. The remaining unsold portions of land were largely in Aroostook County and the northern most portions of present day Penobscot, Piscataquis and Somerset Counties. The balance at the time of admission of Maine to the Union was estimated at between 9 and 11 million acres which, pursuant to the Act of Separation, Maine and Massachusetts divided evenly. Contemporaneous maps show the territory divided into townships with every other township set marked for Massachusetts. These lands continued in that sort of ownership until 1853 when Maine purchased the remaining public lands from Massachusetts.

The facts which I have just related to you of the total acreage conveyed by 1820 is particularly interesting when viewed against the terms of the Maine Act of Separation. As I noted to you before, the Maine Constitution specifically provided that all prior existing grants of land and contracts for the sale of land were to remain in full force and effect.

In 1820 after Maine became a state, it immediately began to enact a series of statutes managing and regulating Indian affairs. The statutes were not fabricated out of whole cloth but in large measure were duplicates of identical legislation previously enacted by Massachusetts. Massachusetts had during the 40 odd years between the Revolutionary War and Maine's admission in 1820, enacted a series of statutes regulating Indian affairs, appropriating money and otherwise regulating Indian affairs in both Maine and Massachusetts. Maine also enacted legislation creating Indian agents and limiting the ability of tribes to alienate their land without State approval. Between 1820 and 1977 the State of Maine enacted more than 350 pieces of separate legislation affecting Indians, covering everything from the tribal government, appropriations, education, housing, indigent relief, roads, water supplies, use and disposition of tribal lands and representation of the tribes in the Maine Legislature. Many appropriations were made to the tribes from general state funds.

The last major transaction between the State and the tribes with respect to land was in 1833 when the State legislature at the request of the Penobscot tribe purchased 100,000 acres of land consisting of four townships in the Millinocket, Mattawamkeag and Woodville area from the Penobscot Tribe for $50,000. The consideration of 50¢ an acre was a fair market price for land at the time.

What I have given you is a very brief summary of the more important events. I have necessarily omitted some facts in the interest of time. But these facts should be enough to give you some flavor of the case. Attorney General Brennan will discuss the legal significance of these facts for you.