Statement of Attorney General Richard S. Cohen to the Joint Select Committee on Indian Land Claims

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RICHARD S. COHEN TO THE JOINT
SELECT COMMITTEE ON INDIAN
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Members of the Committee:

I am pleased to be here this morning to present to you for your consideration the Act to Implement the Maine Indian Land Claims Settlement. Although I have previously spoken to the entire Legislature about the Settlement proposal and have provided an outline of its contents to all legislators, I think it appropriate to offer some further observations and remarks about the pending proposal.

The decision to recommend this settlement to the people of the State of Maine and to you as their elected representatives was not one I made lightly. Rather, it was made after a very careful analysis of the claim, an assessment of the risks involved in proceeding to trial and after extended consultation with experienced trial counsel retained by us. When I took office in 1979 one of my first tasks was to familiarize myself with the land claim case. I conferred at length with my staff and retained the services of James St.Clair, one of the most respected trial attorneys in the country, to review the case. My conclusion, and that of my advisors, was and is that if the matter went to trial, the State would probably prevail. Nevertheless, my advisors and I recognized that we were dealing in probabilities and that there was a serious chance that the State and some of its citizens might have some substantial liability. While I cannot state with precision the degree of that risk, given the complexity of the suit and the size of potential

liability, I concluded that there was and is a real and serious risk that could not be ignored.

It is important to understand that while the State has a number of good defenses, we are dealing in a very unsettled area of the law. The Supreme Court has never definitively ruled on many of the issues involved in this case. There has never been, so far as we know, an actual trial in a land claim case as large and as complicated as this.

I should also point out that the case cannot be viewed entirely as an either/or proposition. A trial might not necessarily result in a complete win or loss for either side. Certain aspects of the Tribes claims are stronger than others, and certain areas of the State are more vulnerable than others. It is quite possible that neither side would win completely but that the State and some of its citizens might suffer a significant loss if the matter went to trial.

During the past twelve months there have been a number of court decisions which have also influenced my assessment of the case. In 1979 the U.S. Circuit Court of Appeals for the First Circuit decided in Bottomly v. Passamaquoddy that, on the facts of that case, the Passamaquoddy Tribe was a sovereign tribe and immune from suit. That same year the Maine Supreme Judicial Court in State v. Dana and Sockabasin held that the Passamaquoddy Reservation was "Indian country" and that State criminal laws did not apply and could not be enforced within the reservation. While in 1979 the United States Supreme Court indicated in Wilson v. Omaha Indian Tribe that certain provisions of the Indian Trade and Intercourse Act might not apply to eastern

states, nevertheless, the United States District Court in Connecticut later held in Mohegan Tribe v. Connecticut that the land provisions of that Act were applicable to eastern Indians. In each of these cases the State of Maine participated either as a party or as a friend of court. In all of them we were on the losing side. While none of these decisions has dealt with precisely the same issues involved in the Maine land claim, they did deal with related matters. The combined effect of those decisions caused me to reevaluate the desirability of settlement.

Finally, in reaching the conclusion to recommend this settlement to you, I could not be unmindful of the costs to the State if the matter went to trial. A trial on the merits with subsequent appeals to the United States Supreme Court could take roughly 5 to 6 years at a cost to the State alone, not including private defendants, of more than $1 million in legal and expert witness fees. In my judgment, once a lawsuit is filed against the landowners in the claim area, those landowners and the State would experience serious economic and social disruption with land titles in turmoil and bond issues being unmarketable.

In case any of you have any doubts about the potentially catastrophic consequences of litigation should this settlement fail, I think you only need to look to the experience of the Town of Mashpee, Massachusetts. In that Town a land claim suit was filed in 1976 by the so-called Mashpee Tribe claiming

title to all private property in that town. From the date the suit was filed until recently titles and mortgages have been frozen in that town. Title insurance companies would not insure property titles. Municipal bonds could not be sold by the town. Even though the Town eventually won the trial and even though the United States Supreme Court refused to consider an appeal by the Indians, some uncertainty about titles remain, because of the threat of another suit. Mr. St.Clair tried that case for the town and can confirm these facts to you. As incredible as it seems, the Town of Mashpee remained in an economic stranglehold despite its victory in litigation. Those who oppose this settlement should seriously consider the experience of Mashpee before they vote against this proposed settlement.

Given all the foregoing factors and considering the risks of the people of the State losing a substantial amount of land, the possibility of the State and its citizens being required to pay millions of dollars in trespass damages, I concluded that I had a duty to look for a reasonable and prudent settlement. I firmly believe that the proposal I have given you is such a prudent settlement.

With that background and risks in mind, I think I should offer a few comments about the contents of this proposal. All of you have previously seen the proposal, have received the summary distributed last week and heard my remarks to the entire Legislature. I do not think that it is necessary to restate for you the contents of the bill. Let there be no mistake, however, this proposed settlement does not create any "Nation within a Nation." I understand that there are many people who

honestly disagree with the wisdom of some provisions of the Maine Implementing Act. But everyone should understand that by any measure the framework of laws in this Act is by far the most favorable State-Indian jurisdictional relationship that exists anywhere in the United States. As a general rule, States have little authority to enforce State laws on Indian lands. Tax laws, water and air pollution laws, zoning laws, health laws, contract and business laws, and criminal laws--all those State laws are usually unenforceable on Indian lands. More than half the States in the United States have Indian lands within their borders and most of those States are engaged in continual battles with Indian Tribes over the question of whether State laws apply to those lands. In fact in Maine, the State Supreme Court has recently ruled that Maine cannot enforce its criminal laws on the existing Indian reservations and lacks jurisdiction over those reservations. Although we appealed to the United States Supreme Court, it refused to hear the appeal. In my judgment it is unlikely that if the matter were litigated we could enforce other State laws on the reservations. If the Indians were successful in the land claim and recovered some land, not only would we lose the land, but also we would probably be unable to enforce state laws on those lands. I believe such a result would be intolerable. The proposal before you not only avoids such a situation but recovers for the State much of the jurisdiction over the existing reservations that it has lost in litigation.

It would be an overstatement to say that there will be no difference between Indian lands and non-Indian lands under this proposal. But I do believe it is fair to say that by and large this proposal is generally consistent with my belief that all people in the State should be subject to the same laws. While there are some exceptions which recognize historical Indian concerns, in all instances, the State's essential interest is protected. I am convinced that the Implementing Act is a remarkable document and represents a fundamental protection of State sovereignty and yet deals fairly with our Indian citizens. I believe that if ratified by the State this Act may well become a model to which other states may look in the future to reorder State-Indian relationships.

Finally, I think I should offer some comments about the cost of this settlement. This settlement involves no direct appropriation of State monies and no State lands. The amount proposed to be appropriated by Congress is an amount which was negotiated between the Tribes and landowners and represent the value that they, through their negotiations, have placed on 300,000 acres of land. Whether in fact the value of $54.5 million is fair cannot be judged by me. The ground rules under which I have operated with the Tribes were, first, if we could negotiate a satisfactory jurisdictional agreement, then I would recommend to Congress that it appropriate sufficient monies for the Tribes to purchase 300,000 acres and second, that any land acquired by the Tribes come from willing sellers at fair market value.

Accordingly, the State has not been involved in the negotiations over land values and locations. I understand this to be consistent with the State's position from the outset.

It should be clear to this Committee, however, that enactment of the Maine implementing Act by the Maine Legislature does not constitute its endorsement of a payment of $81.5 million or any other specific amount to the Tribes. Enactment of this bill creates the legal framework applicable to any Indian lands in Maine. If this bill is enacted by the Maine Legislature, it is up to Congress to judge how much money is fair compensation for the Tribes. We are all acutely aware of the limits to federal and State funds and frankly, I cannot judge how much money Congress will appropriate for this settlement. Many searching questions will be asked of the Tribes and landowners during that process. If you have questions today about the value and location of lands, I would respectfully suggest that you can get more complete answers by directing your inquiries to the Tribal and landowner representatives who will be testifying today.

For your assistance, I have had prepared a map showing the location of lands, the acquisition of which is being negotiated between the Tribes and landowners. The map you have received depicts lands in unorganized territory of the State, which if acquired by the Tribes before January 1, 1983, will be considered to be within the Indian Territories. Only those lands shown are eligible for inclusion in the Indian Territories. If other lands are bought, and the Tribes are free to buy any land they wish as is any person, those other lands would have no special legal status and would be treated the same as any other land in the State.

It is also important to clearly understand that no one has to sell land to the Tribes. The Tribes will have to buy land from willing sellers. If you don't want to sell, you don't have to. If they buy land, it will have no special legal status unless it is both outside an existing city, town or plantation and is in certain pre-determined areas specified in the Implementing Act and shown on the maps.

This settlement will result in no direct cost to the State. As to indirect costs, we have every reason to believe that the State will realize a substantial net savings by treating the Indian Territories as municipalities. Currently the State appropriates $1,718,000 per year for the State Department of Indian Affairs, for Indian Education and for the Maine Indian Housing Authorities. All of these appropriations would cease, except for possibly some transitional expenses. In the future, the Indian Territories would be treated as municipalities for funding purposes, using the same formula used for any other towns. The more expensive of the State-funding requirements would be education and road maintenance. In both those areas we anticipate that the Tribes will receive substantial federal financial assistance. Under the Implementing Act money received by the Tribes from the federal government for a program funded by the State, after deducting any mandatory local share required to be raised by the Tribes, would be deducted from the funds to be provided by the State. Thus the State cost in treating the Indian Territories as municipalities would be less than the cost of state funding to an ordinary municipality of comparable size and assessed valuation. I am confident that the State

therefore will realize a substantial net financial gain from this settlement.

As I said at the beginning, the decision to initiate negotiations was not one I made easily. I did so, however, after a full assessment of the risks, potential liability and possible interim economic damage to the State. Having worked for 13 months to negotiate the proposal before you, I am convinced it is sound and prudent and is very favorable to the State and its citizens. I want it to be clear, however, that it is because I see this proposal as favorable to the State, that I recommend its enactment by you. I am not advocating settlement on any terms. If this settlement was less favorable to the people of the State I would not recommend it to you, but would recommend that we go to trial.

No one ever likes a settlement, including me. But we ought to be fully aware of the risk we are running if it is not enacted. If this proposal fails, then we should be prepared to go to trial. If this proposal fails, we should be prepared to appropriate at least one million dollars for defense of the claim. If this proposal fails, we should be prepared to live with the possible interim economic and social harm to the State and its citizens.

There are no easy or simplistic solutions to this problem. Regardless of how one feels about the merits or fairness of the claim, the plain fact is that it will not go away by ignoring it. Like many, I do not think that it is fair to permit people to raise

200 year old claims, but whether it is fair is not the point. The claim is real, it is here and it must be faced. As Attorney General I am firmly convinced that the merits of this settlement far outweigh the enormous risk of a trial, and I urge you to support this bill.