

MEMORANDUM

TO: Senator Muskie

June 21, 1978

FROM: Jim Case

RE: Administration's Indian Bill

The attached draft legislation encompassing part A of the Task Force proposal has been provided by Eliot for your and Senator Hathaway's informal comment. Minor drafting revisions will be made but this is essentially the bill which the White House will submit to Congress.

Eliot requests our comments on the bill as drafted as well as on how and when transmittal and introduction should be handled.

Eliot now plans to send copies of the bill to the Governor, the Attorney General and the major landowners with a cover letter advising that the bill will be introduced soon & welcoming comments. The bill would be transmitted to Congress shortly thereafter.

The bill ratifies all transfers of Indian land as of the date of transfer and extinguishes aboriginal title as of the date of transfer except for parcels larger than 50,000 acres. State land in the claim area remains subject to litigation.

The bill as drafted includes as landowners with more than 50,000 acres, the same 14 landowners listed at the time the Joint Memorandum was released. Thus the Pingree Heirs, John Cassidy Timberlands, Webber Timberlands and the Webber Family would remain subject to litigation. It appears that these entities hold undivided but divisible interests in excess of 50,000 acres.

As you may recall we have been contacted by representatives of these landowners questioning their status under the White House proposal. We have referred those letters to the White House task force for clarification. Attached are sample copies of our correspondence. It is unfortunate that the status of these family holdings add an unnecessary and muddy issue to the legislation. Tom tureen takes the position that their inclusion was part of the trade off for release of other claims but if you wish to take a strong stand on this part the administration might be willing to exclude these landowners.

Sec. 7(A) of the draft statutorily recognizes the Passamaquoddy and Penobscot Tribes for purposes of federal services. This provision is likely to raise red flags with the Attorney General as prejudging the status of the tribes in any subsequent

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litigation. Tureen maintains that the District Court and Circuit Court decisions in Passamaquoddy v. Morton decided this issue. If Tureen is right this provision is unnecessary and should be stricken. If Tureen is wrong Joe Brennen's concerns are legitimate and the provision should be stricken. I believe the White House is amenable to this also.

Open
The language in the statement of findings may be unnecessarily offensive to the state and the private landowners. I would suggest that it is only necessary to describe what Congress is doing, i.e., removing the cloud over small land owners and not describe what is not being, i.e., leaving the state and private landowner subject to suit.

Sec. 6(b) and Sec. 8(b) are somewhat unclear to me. They represent an attempt to head off litigation against the same land by other Indians or Indian tribes, i.e., the Mic Macs and the Maliseets. It is critical that such suits be foreclosed but the approach used in the draft seems awkward and leaves the private landowners in the claim area subject to any claims from other tribes if they exceed \$25,000,000.

It is probably inappropriate to ask the White House to finally address the issue of potential Mic Mac or Maliseet claims. The state is concerned about this issue, however, and Ron Banks has suggested that Mic Mac or Maliseet claims would be better founded than Passamaquoddy claims.

Senator Hathaway would like to request the President to investigate claims by other tribes in Maine. He has suggested the attached joint letter to the President. If you wish to join Senator Hathaway in seeking clarification of this issue I recommend a shorter more general letter.

There is a threshold question as to what extent you wish to become involved in the drafting of this bill. If we insist on certain changes we may create an assumption in the administration that we will support the bill they send up. You may wish to discuss this situation with Lipshutz to avoid misunderstanding as we proceed at a staff level.

I will pursue these points with the Administration or provide additional details to you as you wish.

A B I L L

To provide for the settlement of certain land claims of the Passamaquoddy and Penobscot Indian Tribes of Maine, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as "The Passamaquoddy and Penobscot Indian Claims Settlement Act of 1978."

CONGRESSIONAL FINDINGS AND DECLARATION OF POLICY

Sec. 2(a) Congress hereby finds and declares that --

(1) The Passamaquoddy and Penobscot Indian Tribes are asserting claims for damages and for possession of large areas of land in the State of Maine, on the ground that the original transfers of the lands by the Tribes to the States of Massachusetts and Maine were made in violation of the Trade and Intercourse Act of 1790, or subsequent versions thereof.

(2) Congress recognizes that substantial economic and social hardship to a large number of landowners in the State of Maine, and therefore to the economy of the State as a whole, will result if parts of the Tribes' claims are not resolved immediately.

(3) At the same time, it is the desire of Congress to preserve, for the present time, the Tribes' claims to at least a portion of the areas to which they assert rights, pending a comprehensive solution to the Tribes' overall claims.

(b) Therefore, it is the purpose of this Act to remove the cloud on the titles to millions of acres of land in Maine resulting from the Tribes' claims, while at the same time preserving the Tribes' opportunity to assert their claims with respect to certain lands held by the State of Maine and tracts held by private landowners in excess of a minimum acreage.

DEFINITIONS

Sec. 3 For the purposes of this Act, the term --

(a) "Partial Settlement Area" means those areas identified on the attached Map A, which is hereby made a part of this Act, and generally defined as:

(1) that portion of the Penobscot River watershed in the State of Maine above Eddington Bend;

(2) that portion of the St. Croix River watershed in the State of Maine above Baring Plantation; and

(3) that portion of the Kennebec River watershed east of the eastern shore of Moosehead Lake.

(b) "Passamaquoddy and Penobscot Indian Reservations" means that portion of the Passamaquoddy Indian Reservation and the Penobscot Indian Reservation in the possession of the Passamaquoddy or Penobscot Indian Tribe or their members as of February 10, 1978, as identified on the attached Map B, which is hereby made a part of this Act.

(c) "Indemnification Area" means those areas identified on the attached Map C, which is hereby made a part of this Act, and generally defined as:

[Note: This area, which is approximately 10 million acres, needs to be identified by the Tribes.]

(d) "Titleholder" means a private individual, corporation, trust, county, municipality, or other entity, not including the State of Maine, which holds record title to real property in the State of Maine. A tenant in common, joint tenant, or any other person who holds an undivided interest in a tract of real property shall be deemed to be a titleholder to the extent of his undivided interest in the entire unpartitioned tract. A titleholding subsidiary and its titleholding parent shall be regarded as a single titleholder.

(e) "Secretary" means the Secretary of the Interior.

(f) "Land or natural resources" means any real property or natural resources, including but not necessarily limited to minerals, timber, water and water rights, and rights to hunt and fish.

(g) "Transfers" includes but is not necessarily limited to any sale, grant, lease, allotment, partition, conveyance, or any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance.

RATIFICATION OF PRIOR TRANSFERS
AND EXTINGUISHMENT OF INDIAN TITLE

Sec. 4(a) Except as provided in subsection (c), any transfer of land or natural resources located anywhere within the United States, other than in the Passamaquoddy and Penobscot Indian Reservations, from, by or on behalf of the Passamaquoddy or Penobscot Indian Tribe or any member thereof, including but not limited to a transfer pursuant to any statute of any state, shall be deemed to have been made in accordance with the Constitution and all laws of the United States that are specifically applicable to transfers of land or natural resources from, by or on behalf of any Indian, Indian nation, or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Ch. 33, §4, 1 Stat. 138, and all amendments thereto and all subsequent versions thereof), and Congress does hereby approve and ratify any such transfer effective as of the date of said transfer.

(b) To the extent that any transfer of land or natural resources described in subsection (a) may involve land or natural resources to which the Passamaquoddy Indian Tribe or Penobscot Indian Tribe had aboriginal title, subsection (a) shall be regarded as an extinguishment of such aboriginal title as of the date of said transfer.

(c) Within the Partial Settlement Area, subsections (a) and (b) shall apply only to 50,000 acres of real property, and rights incident thereto, per record titleholder as of February 10, 1978, for which application has been approved under Section 5(c).

(d) By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or an extinguishment of aboriginal title effected thereby, all claims against the United States, any state or subdivision thereof, or any other person or entity, by the Passamaquoddy or Penobscot Indian Tribe, or any individual member thereof, arising subsequent to the transfer involving such land or natural resources, and based on the Constitution or laws of the United States specifically applicable to transfers of land or natural resources from, by or on behalf of any Indian, Indian nation, or tribe of Indians, including but not limited to claims for trespass damages or claims for use and occupancy, shall be regarded as extinguished as of the date of the transfer.

ADMINISTRATIVE IMPLEMENTATION

Sec. 5(a) Within thirty (30) days after the date of enactment of this Act, the Secretary shall cause to be published in the Federal Register a list of all titleholders who held title to more than 50,000 acres of land in the Partial Settlement Area as of February 10, 1978. The Secretary may amend the list to correct errors at any time prior to final approval of designations pursuant to subsection (c).

(b) Any titleholder identified in subsection (a), or any successor in interest thereto, may, within sixty (60) days of publication of the list specified in subsection (a) or any subsequent amendment of the list pertaining to such titleholder, file an application with the Secretary designating which 50,000 acres of the titleholder's total holdings should be subject to section 4(c) of this Act.

(c) After notice and opportunity for hearing, the Secretary shall approve the applications filed under subsection (b) if he finds that they conform to the extent possible with the following general criteria:

(1) tracts should be selected in such a way as to minimize checkerboard patterns of ownership;

(2) the most densely populated areas of a titleholder's total holdings should be included within the 50,000 acre exemption;

(3) ongoing business operations, including but not limited to millsites, should be included within each 50,000 acre exemption; and

(4) any timber lands included within each 50,000 acre exemption should be representative of the titleholder's overall holdings.

If the Secretary concludes that any application does not satisfy the foregoing general criteria, he may modify the titleholder's proposed designation to the extent necessary to achieve substantial conformity with those criteria. The Secretary shall then approve the designation as modified.

(d) Any person aggrieved by the Secretary's approvals or modified designations may seek judicial review by filing a petition for review in the United States Court of Appeals for the First Circuit not later than sixty (60) days after publication of the Secretary's approvals or modified designations. The Secretary's determinations shall not be set aside unless they are found to be arbitrary, capricious or an abuse of discretion.

ESTABLISHMENT OF FUND AND INDEMNIFICATION

Sec. 6(a) The Secretary of the Treasury shall establish a trust fund account for the Passamaquoddy and Penobscot Indian Tribes and shall transfer \$25,000,000 from the

general funds of the Treasury into such account following the appropriation authorized by section 9 of this Act. The Secretary of the Interior shall be the trustee of such fund and shall administer such fund in accordance with terms established by him and agreed to by the Tribes, except that no part of the principal of the fund shall be distributed among the members of the two Tribes on a per capita basis. The Secretary of the Interior shall make available to the Tribes, without liability to the United States, any income derived from such fund, which income shall be divided equally between the two Tribes and the use of which shall be free from regulation by the Secretary.

(b) The principal of the fund established by this section shall be invested only in securities of the United States until the expiration of the statute of limitations provided for in section 8(b) of this Act, or until every action brought pursuant thereto and involving claims within the Indemnification Area, has been determined by a final order of a court of competent jurisdiction which is no longer subject to appeal, whichever is later, In the event that by final order of a court of competent jurisdiction which is no longer subject to appeal, such a claim within the Indemnification Area is upheld and an award made to the plaintiff, the \$25,000,000 deposited in the fund established by this section shall, under procedures established by the Secretary, be used to pay the award or to indemnify the defendant(s) to the extent of the value of the award.

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SERVICES AND ASSISTANCE TO TRIBES

Sec. 7(a) The Passamaquoddy and Penobscot Tribes and the members of those tribes are deemed to be "Indian tribes" and "Indians," respectively, within the meaning of Federal statutes authorizing the provision of services and assistance to Indians because of their status as Indians by or through any department, agency or instrumentality of the United States.

(b) The provisions of the Act of June 18, 1934 (48 Stat. 484), as amended, are extended to the Passamaquoddy and Penobscot Tribes and to the members of those Tribes.

LIMITATION OF ACTIONS

Sec. 8(a) Notwithstanding any other provision of law, any action to contest the constitutionality of this Act shall be barred unless the complaint is filed within one hundred eighty (180) days of the date of enactment of this Act. Exclusive jurisdiction over such actions is hereby vested in the United States District Court for the District of Maine.

(b) Notwithstanding any other provision of law, any and all other claims involving or in any way relating to land or natural resources within the State of Maine, by or on behalf of any Indian, Indian nation or tribe of Indians, arising under the Constitution or laws of the United States that are specifically applicable to transfers of land or

natural resources from, by or on behalf of any Indian, Indian nation or tribe of Indians (including but not limited to the Trade and Intercourse Act of 1790, Ch. 33, §4, 1 Stat. 138, and all amendments thereto and all subsequent versions thereof), shall be barred unless filed in a court of competent jurisdiction on or before April 1, 1980. Upon expiration of this period, the provisions of sections 4(a), (b) and (d) of this Act shall apply to any such claim which has not been filed.

AUTHORIZATION

Sec. 9 There is hereby authorized to be appropriated \$25,000,000 to carry out the purposes of this Act.

INSEPARABILITY

Sec. 10 In the event that any provision of Section 4 of this Act is held invalid, it is the intent of Congress that the entire Act be invalidated.

Dear Mr. President:

As you know, claims by the passamaquoddy and Penobscot Indian tribes for the return of over 1/2 of the State of Maine have preoccupied the state and its residents for nearly two years.

A suit by off reservation Passamaquoddy and Penobscot Indians against the state was recently filed. Regardless of the merits or strength of this claim, it raises the issue as to whether there are other inchoate Indian land claims in the state which may be brought in future years, even though these principal claims may have been resolved.

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The question has frequently been raised as to whether the Micmacs and the Maliseets might have any aboriginal claims to land which they could bring against the state or its landowners. Such suits, even if smaller in scope, could threaten the same type of economic disruption which the mere pendency of the present claims has brought. [A statute of limitations on the time when any such suits might be brought in the state would be a useful step, but does not help to finally resolve the threat of additional Indian land claims in the state.]

Your Administration has supported the efforts to find a workable resolution of the existing claims. As you know, I agree with the need to find an end to the uncertainty and cloud on title which the claims have brought to the state. I feel that it is important, however, that the issue of all Indian claims in the state be addressed as soon as possible. The first step in addressing that issue is to do a thorough investigation of what other Indian claims there may be and whether such claims, if they potentially exist, have any legal merit.

It may be that such an investigation has been done by your Administration. If so, I would appreciate knowing the results of that investigation. If it has not been done, I ask that you undertake such an inquiry as soon as possible. It may well be that there is no basis for any other claims, or that such claims would have little or no legal merit. If that is the case, it would be very useful to know. On the other hand, if there are other potential claims, such an investigation and evaluation would give both the Administration and the Congress the opportunity to deal with those potential claims in an informed manner.

I very much appreciate your continuing concern on this problem, and your efforts to help resolve these claims.

With best wishes,

[Handwritten initials]

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