

annotated + corrected.
9/8/80 TCW

Calendar No.

(NOTE.—Fill in all blank lines except those provided for the date, number of parts, and Calendar number.)

96th CONGRESS }
2nd-- SESSION }

SENATE

Further Revisions
Sheldon Hackberg 9/9/80
REPORT No. _____

Further revisions to
Don Perkins 9/10/80

S. 2829 — Ordered to be printed

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

REPORT

[To accompany S. 2829]

Select The Committee on Indian Affairs, to which was referred the bill joint resolution (S. 2829)

To provide for the settlement of land claims of Indians, Indian nations and tribes and bands of Indians in the State of Maine, including the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and for other purposes.

having considered the same, reports favorably thereon with ^{out} amendment (s) and recommends that the ~~bill~~ ^{bill} ~~joint resolution~~ (as amended) do pass.

1. Issues have never been litigated before
2. Justice memo.
3. Thousands of innocent land owner
4. State aid Resolve

PURPOSE:

S. 2829 is intended to ~~extinguish~~ claims raised by three Maine tribes, the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians, ~~pursuant to allegations~~ that certain ~~land transfers embodied in~~ ^{with} treaties between the States of Massachusetts and Maine in which the tribes surrendered their aboriginal title to land are invalid for having been made in violation of the Federal Trade and Intercourse Act of 1790, also known as the Non-Intercourse Act, and its successor legislation. The applicable provision of this Act is now codified in Section 177, Title 25 United States Code and reads as follows:

Maliseet
 Maliseet
 should
 reflect

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

simplify
 T&A

The Maine claims are the largest of several claims that have been raised in states on the East coast. At issue are land ~~transfers~~ ^{area} involving as much as 12.5 million ^{acres}, or more than 60% of the State, on which more than 350,000 people now reside.

If these claims were fully litigated it would doubtless cause a serious adverse economic impact in the State of Maine. It has been estimated that it would take from six to ten years to ~~fully~~ litigate these claims, including exhaustion of appeals. ~~The Attorney General of the State has estimated the chances of success by the State at 60% 40% in the States favor.~~ Independent counsel for the State, ~~Mr.~~ James St. Clair, ~~he~~ believes the odds are a little better. Counsel for the tribes, needless to say, would reverse the odds.

the time required for

he

Everyone agrees that a negotiated settlement is in the best interests of all parties concerned. The purpose of S. 2829 is to *to Provide Congressional ratification + implementation* ~~Congressional~~ ratify the agreements which have been reached by the Indian tribes, the State of Maine, and certain owners of private property from ^{Whom} which settlement lands are to be acquired. The United States, ^{executive branch} through the Department of the Interior, Department of Justice, and White House representatives, participated in these settlement negotiations and supports this settlement.

BACKGROUND AND NEED

Additional language is being added to correct and clarify these parts

History of Litigation:

In 1972, the Governors of the Passamaquoddy Tribe asked the United States to bring suit on behalf of their tribe, pursuant to the Indian Nonintercourse Act.

The tribe's request was denied by the United States on grounds that the Nonintercourse Act ~~does~~ ^{did} not apply to non-recognized tribes, ^{the} ~~and on the grounds that there was, thus, no trust relationship be-~~ ~~any trust responsibility to the Passamaquoddy Tribe and that~~

~~tween the United States and the Maine Tribes.~~ The Passamaquoddy Tribe then brought a declaratory judgment action against the Secretary of the Interior and the United States Attorney General. In 1972, the tribe won an order forcing the United States to file a protective action on its behalf. In 1975, the United States District Court for the District of Maine held that the Indian Nonintercourse Act applies to all tribes, including those which are not federally-recognized, and that the Act creates a trust relationship between the United States and all such tribes. Later that year, the United States Court of Appeals for the First Circuit unanimously affirmed the Passamaquoddy decision, holding that the trust relationship created by the Act includes, at minimum, an obligation to investigate and take such action as may be warranted under the circumstances when an alleged violation of the Nonintercourse Act is brought to the government's attention.

The issues raised in the Passamaquoddy case were reaffirmed in two subsequent decisions involving Maine Indians: Bottomly v. Passa-

Tom's book - Larry's role of Passamaquoddy

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

Subsequent to the decision in Joint Tribal Council of the Passamaquoddy Tribe - Passamaquoddy v. Morton, 528 F. 2d. 370 (1st Cir. 1975), aff'd, 388 F. Supp. 649 (D. Me. 1975), the Department of Justice reviewed the merits of the Maine Indian claims. In December, 1975, the Interior Department submitted a litigation request to the Department of Justice and, in January, 1976, the Justice Department notified the United States District Court for the District of Maine of its intention to proceed with litigation on behalf of the Passamaquoddy Tribe and the Penobscot Nation, unless an out of court solution could be agreed upon. The report included a detailed analysis of the merits of the Indian claims.

President Carter responded by appointing a personal representative, the recently-retired Justice of the Georgia Supreme Court William Gunter, who, after substantial study, recommended a settlement of the claims. The White House then appointed a three-person work group to develop a settlement for the claims. This group consisted of Eliot Cutler, Associate Director of the Office of Management and Budget for Energy, Natural Resources and Science; Leo Krulitz, Solicitor of the Department of the Interior; and A. Stephens Clay, Judge Gunter's law partner. Negotiations between this work group and the

tribes produced an agreement between the tribes and the Administration, which was announced in February, 1978. An agreement between the Administration and officials of the State of Maine was announced in November, 1978. But it was not until March, 1980, that an agreement supported by all parties was announced.

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

Legislative implementation of the agreement

Federal Legislative implementation

Background of the Claim:

These tribes were first contacted in their present location by the earliest European explorers of the North American continent. All three tribes are riverine in their land-ownership orientation. The aboriginal territory of the Penobscot Nation is centered on the Penobscot River. The aboriginal territory of the Passamaquoddy Tribe is centered on the Saint Croix River and the smaller river systems to the west. The aboriginal territory of the Houlton Band of Maliseet Indians is centered on the Saint John River.

ambiguous

All three of these tribes played an important role in the Revolutionary War. General George Washington requested the assistance of these tribes and, on June 23, 1777, Colonel John Allan, the director of the federal government's Eastern Indian Department, negotiated a treaty with these Indians, pursuant to which the Indians

misleading
Geographical Pursuit?

were to assist in the Revolutionary War in return for protection of their lands by the United States and provision of supplies in times of need. This treaty was never ratified by the United States, although Allan's journals indicate that the Indians played a crucial role in the Revolutionary War.

Journals

In its first session in 1790, the Congress of the United States enacted a series of statutes regulating a wide variety of activities between native Americans and the non-Indian settlers. These statutes were known collectively as the Trade and Intercourse Act and perhaps the most important of them was the Nonintercourse statute. Currently codified at 25 USC 177, ~~the Nonintercourse statute is a restraint on alienation which~~ prohibits Indian tribes from conveying their lands without the ~~express~~ approval of the federal government.

provisions, currently

In explaining the 1790 version of the law to the ^{Seneca} various Indian tribes, President George Washington wrote:

The United States must be present in any treaty, by their agent, and their presence will be your security that you will not be defrauded in any bargain you make, that besides the aforementioned security for your land you will perceive, by the law of Congress for regulating Trade and Intercourse with the Indian Tribes, the fatherly care the United States intends to take of the Indians.

did not

Despite requests from the Maine Indians, the federal government failed to protect the tribes following the Revolutionary War. In 1794, the Passamaquoddy Tribe entered into a treaty with the Commonwealth of Massachusetts (which then had jurisdiction over all of what is now Maine), in which the tribe ceded all but 23,000 acres of its aboriginal territory. [Subsequent sales and leases by the State of Maine further reduced this territory to approximately 17,000 acres. The Penobscot Nation lost the bulk of its aboriginal terri-

1833
↑

tory in treaties consummated in 1796 and 1818. A sale to the State of Maine resulted in the loss of four townships by the Penobscot Nation.

The Maine Indians received services under the Civilization Act of 1819, but these services were discontinued in 1832. Since that time, by and large, these tribes have been ignored by the federal government.

Other State
Although the Trade and Intercourse Act was the subject of continuing Congressional attention being reenacted in different form four times in the succeeding 12 years, its application within the boundaries of the thirteen original states was a matter of great controversy. [New York, North Carolina, and Georgia are notable in that federal agents made repeated attempts to force the States to comply with the Nonintercourse in making treaties with Indian tribes within their western frontiers.) The Committee is unaware of any evidence, however, that the federal government ever attempted to apply the restraint on alienation to Massachusetts or Maine, which was a part of Massachusetts until 1820.

Clean: 9/10/88

This entire section might well be consolidated.

SPECIAL ISSUES

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

1. That the settlement will terminate the three Maine Tribes. In July 1, 1980, testimony Interior Secretary Cecil Andrus stated that the settlement does not terminate the three Tribes in Maine. The Committee agrees with the Secretary. Numerous provisions of S. 2829 and the Maine Implementing Act make reference to the Maine Tribes as tribes, and Sec. 6(h) specifically provides "That as Federally recognized Indian tribes the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations or tribes or bands of Indians, to same extent and subject to the same eligibility criteria as are generally applicable to other Indians, Indian nations or tribes or bands of Indians."

2. That the settlement amounts to a "destruction" of the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation. Until recently, the Maine Tribes were considered by the State of Maine, the United States, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed laws governing the internal affairs of the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to change these laws or even terminate these tribes. In 1979, however, it was held in Bottomly v. Passamaquoddy Tribe, 599 F.2d

1061 (1st Cir. 1979), that the Maine Tribes still possess inherent sovereignty to the same extent as other tribes in the United States. The Maine Supreme Judicial Court reversed its earlier decisions and adopted the same view in State v. Dana, 404 A.2d 551 (Me. 1979), cert. denied, 100 S.Ct. 1064 (Feb. 19, *Cite?* 1980). While the settlement represents a compromise in which state authority is extended over Indian territory to the extent provided in the Maine Implementing Act, in keeping with these decisions the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs. Thus, rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs and by withdrawing the power which Maine previously claimed to interfere in such matters, the settlement strengthens the sovereignty of the Maine Tribes.

The settlement also protects the sovereignty of the Passamaquoddy Tribe and the Penobscot Nation in other ways. For example, Secs. 6206(1) and 6214, and 4733 of the Maine Implementing Act provide that these Tribes, as Indian tribes under the United States Constitution, may exclude non-Indians from tribal decision-making processes, even though non-Indians live within the jurisdiction of the tribes. Other examples of expressly retained sovereign activities include the hunting and fishing provisions discussed in paragraph 7 below, and the provisions contained in Title 30, Sec. 6209 as established by the Maine Implementing Act and Sec. 6 in S. 2829 which provide for the continuation (and/or) establishment of tribal courts by the

the Passamaquoddy Tribe and the Penobscot Nation with powers similar to those exercised by Indian courts in other parts of the country. Finally, Sec. 7(a) of S. 2829 provides that all three Tribes may organize for their common welfare and adopt an appropriate instrument to govern its affairs when acting in a governmental capacity. In addition, the Maine Implementing Act grants to the Passamaquoddy Tribe and Penobscot Nation the state constitutional status of municipalities under Maine law. In view of the "home rule" powers of municipalities in Maine, this also constitutes a significant grant of power to the Tribes.

*Add description
of Maliseet - State
negotiations*

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

4. Individual Indian property and claims by Indians who hold individual use assignments will be taken in the settlement. The settlement envisions four categories of Indian land in Maine: individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian

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

note where the fee is the reservation and lies.

The settlement will also have no effect on claims by individual Indian land owners or individual Indian assignment owners. Section 4 of S. 2829 and Title 30, Sec. 6213 as established by the Maine Implementing Act specifically protect claims which individual Indians have for causes of action arising after December 1, 1873. For these reasons, trespass actions brought by individual Indians will not be affected *by this Act.*

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

Nation or subject to a restriction against alienation, shall be considered "Federal Indian reservations for purposes of federal taxation."

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

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

6. That the provision for eminent domain takings will lead to a rapid loss of Indian land. While Sec. 6205(3), (4), and (5) of the Maine Implementing Act and Sec. 5(h) and (i) of S. 2829 provide a mechanism for takings for public uses, these provisions impose preconditions on such takings which are more stringent than any other known to the Committee. Before a taking could ever be effectuated within the reservations, an entity proposing such a taking must demonstrate that there is no reasonably feasible

6

alternative to the taking. No taking, whether within or without the reservation, can lead to a diminution of Indian lands, and any taken land must be replaced. The settlement provides machinery for adding such substitute lands to the reservation or Indian territory from which they are taken.

7. ^{*Sustenance?*} Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement. Prior to the settlement, Maine law recognized the Passamaquoddy Tribe's and the Penobscot Nation's right to control Indian ^{*sustenance*} subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time. Under Title 30, Sec. 6207 as established by the Maine Implementing Act, the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting and fishing in certain ponds is concerned, in the newly-acquired Indian territory as well. The power of the State of Maine to alter such rights without the consent of the affected tribe or nation is ended by Sec. 6(e)(1) of S. 2829. The State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse affect on stocks in or on adjacent lands or waters. This residual power is not ^{*comparable to*} unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in Title 30, Sec. 6207(6) as established by the Maine Implementing Act, the State will only be able to make use of this residual power where it can be demonstrated by

Evidence

substantial that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal land.

8. The lands and trust funds provided in the Settlement will not benefit the Indians because of the lack of adequate controls. In testimony before the Committee, one of the Indian opponents to the bill stated his belief that the Indians would receive no benefits from the trust fund established under the settlement, and that all income would be used by the Secretary of the Interior. This fear is unfounded. Section 6(b) of S. 2829 requires the Secretary to make all trust fund income available to the respective Tribe and Nation quarterly⁶ and provides that he may make no deduction for the United States' expense in the administration of the fund.

Fears that the Tribes will not have adequate control over the management of the trust funds are equally unfounded. The legislation specifically provides that the funds shall be managed in accordance with terms put forth by the Tribes. As is explained elsewhere in this report, the Secretary must agree to reasonable terms put forth by the tribes⁶ and, through the Administrative Procedure Act, the Tribes may obtain judicial review of any refusal by the Secretary to agree to reasonable terms. While the Investments which are outside of the scope of the Department of the Interior's existing authority can only be made at the request of the Tribe or Nation seeking the investment. In that event, the United States will bear no liability from any losses which may result from the investment the Tribe or Nation has requested. States will be liable for mismanagement under the doctrine of

United States v. Mitchell. Cite.

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

United States v. Mitchell. US (1980)

9. The Settlement will lead to acculturation of the Maine Indians. Nothing in this settlement provides for acculturation of Indians in Maine. Nor is it the intent of Congress, through this Act, to in any way disturb the cultural integrity of the Indian people of Maine. On the contrary, those provisions of the settlement which establish tribal governments which are separate and apart from towns and cities of the State of Maine offer positive protection against any attempt by any entity outside of the tribal structure to impose policies of acculturation on the tribes. In addition, the settlement expressly provides that the Tribes in Maine will continue to be eligible for all federal Indian cultural programs.

JP annotations + TWT

Final

SPECIAL ISSUES

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

1. That the settlement will terminate the three Maine Tribes.

In ~~his~~ July 1, 1980 testimony, Interior Secretary Cecil Andrus stated that the settlement does not terminate the three ~~Maine Tribes~~ ^{in MAINE}. The Committee agrees with the Secretary. Numerous provisions of S. 2829 and the Maine Implementing Act ~~make~~ refer ~~ence~~ to the Maine Tribes as tribes, and Sec. 6 (h) specifically provides "That as Federally recognized Indian tribes the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations or tribes or bands of Indians, to the same extent and subject to the same eligibility criteria ^{as well} generally applicable to other Indians, Indian nations or tribes or bands of Indians."

Consolidate

2. That the settlement amounts to a "total destruction" of

the sovereign rights and jurisdiction of the Passamaquoddy Tribe and the Penobscot Nation. ~~date~~ ^{Until recently,} ~~Prior to 1879,~~ the Maine Tribes were ^{the United States} considered by the State of Maine, and by the Maine courts, to have no inherent sovereignty. Prior to the settlement, the State passed laws governing the internal affairs of ~~these~~ the Passamaquoddy Tribe and the Penobscot Nation, and claimed the power to

HHA

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

VS cite?

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

For example, ~~Sec. 1, which enacts~~ ~~Secs. 6206 (1), 6214, and 4733~~ of the Maine Implementing Act provide that these tribes, as Indian tribes

under the ^{United States} ~~Federal~~ Constitution, may exclude non-Indians from ^{processes,} ~~a voice in tribal~~ (decision-making) even though non-Indians

live within the jurisdiction of the tribes. Other examples of ^{(activities) → use better word.} ~~retained sovereignty~~ include the hunting and fishing provisions

discussed in paragraph 7 below, and the provisions contained in ^{Title 30, as established by} ~~Sec. 6209~~ of the Maine Implementing Act and Sec. 6 ⁱⁿ ~~and~~ S.2829 which provide for the continuation and/or establishment of

?
unusual phrase

as established by

expressly

power of home rule "embodied" in the state constitution "home rule" powers of municipalities in Maine the also constitutes a significant grant of power to the tribes.

tribal courts by the Passamaquoddy Tribe and the Penobscot Nation with powers similar to those exercised by Indian courts in other parts of the country. ↑

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

4. Individual Indian property and claims by Indians who hold individual use assignments will be taken in the settlement. The settlement envisions four categories of Indian land in Maine: individually-assigned existing reservation land, existing reservation land held in common, newly-acquired tribal land within "Indian territory," and newly-acquired tribal land outside "Indian territory." Only newly acquired land within Indian ^{and newly acquired tribal land to be acquired for the HSMI} territory will be taken in trust by the United States. Existing land within the reservations, whether held by individuals pursuant to a use assignment or in common by the tribe as a whole, will not be taken by the United States in trust. These land will simply be subject to a federal restriction against alienation

property for non-payment of the tax. Section 6208 does not provide for such a tax, and Sec.6(a) of S.2829 forbids such a tax. The actual workings of this provision are explained in detail in the section by section analysis of the Maine Implementing Act elsewhere in this report. That analysis explains, among other things, that these payments in lieu of taxes will most likely be paid with funds provided to the tribes by the federal government.

Passamaquoddy and Penobscot

Sec. 6 (h) of S.2829, which ^{treats} ~~considers these as the~~ ~~Maine~~ Indian Territories, ^{as} federal reservations for purposes of federal taxes is designed to ensure that activities within these ~~Passamaquoddy and Penobscot~~ Indian Territories are entitled ^{Federal, but not State,} to the same tax exemptions which apply on reservations of other Federally-recognized tribes. The provision is intended only to benefit the tribes.



6. That the provision for eminent domain takings will lead to a rapid loss of Indian land. While Sec. 6205(3), (4), and (5) of the Maine Implementing Act and Sec. 5 (h) and (i) of S.2829 provide a mechanism for takings for public uses, these provisions impose preconditions on such takings which are more stringent than any other known to the Committee. ^{Under this attempt} Before a taking ~~can~~ be effectuated within the reservations, an entity proposing such a taking must demonstrate that there is no reasonably feasible alternative to the taking. No taking, whether within or without the reservation, can lead to a diminuation of Indian lands, and

any taken land must be replaced. The settlement provides machinery for adding such substitute lands to the reservation or Indian territory from which they are taken.

7. Subsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement. Prior to the settlement, ^{Maine Law Recognized} the Passamaquoddy Tribes and the Penobscot Nation ~~had the right under Maine law~~ to control Indian subsistence hunting and fishing within their reservations, but the State of Maine claimed the right to alter or terminate these rights at any time. Under ^{Title 30, 7} Sec. 6207 ~~of~~ ^{as established by} the Maine Implementing

Act the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, but insofar as hunting ^{and fishing in} ~~any~~ ^{certain} ponds ^{is} concerned, in the newly acquired Indian territory as well. The power of the State of Maine to alter such rights without the consent of the affected tribe or nation is ended by Sec. 6(e)(1) of S.2829. The State has only a residual right to prevent the two tribes from exercising their hunting and fishing rights in a manner which has a substantially adverse affect on stocks in or on adjacent lands or waters. This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. The Committee notes that because of the burden of proof and evidence requirements in ^{Title 30,} Sec. 6207(6) ^{as established by} ~~of~~ the Maine Implementing Act, the State will ^{only} be able to make use of this residual power only (in the most extreme circumstances)

8. The lands and trust funds provided in the settlement will not benefit the Indians because of the lack of adequate

OK
where we can monitor rare or
Scarce. in that the Tribal hunting and
fishing practices will or are likely to adversely affect
wildlife stocks outside Tribal land.

which will prevent their loss or transfer to a non-tribal member. Sec. 5(f)(2)(C) of S.2829 provides that the Department of the Interior will have no role in transfers of individual tribal property from one tribal member to another, and Sec. 18 of the *M.I.A.* ~~4733 (18)~~ ends the power of the Maine Commissioner of Indian Affairs to interfere with such internal transfers.

The settlement will also have no effect on claims by individual Indian land owners or individual Indian assignment ~~under Maine law.~~ *T. He 30, as established by* owners; Section 4 of S.2829 and ~~Sec. 6213 of the Maine Implementing Act specifically protect~~ *under Maine statutes or common law* claims, which individual Indians have for causes of action arising after December 1, 1873. ~~For these reasons, the trespass action to which one member of the Penobscot Nation referred in her testimony, will not be affected by this settlement.~~ *For these reasons, it appears that trespass actions brought by individuals will not be affected, ↓ indians*

check the AG's must parallel 2(a) provision

5. The Settlement will subject tribal lands to taxation.

The settlement does not subject any tribal land ^{property} to taxation.

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

T. He 30, as established by Section 6208 of the Maine Implementing Act does not impose

any taxes on any land within Indian territory. A tax is a charge against ~~a piece of~~ property which can result in a taking of that

controls. In testimony before the Committee, one of the Indian opponents to the bill stated his belief that the Indians would receive no benefits from the trust fund established under the settlement, and that all income would be used by the Secretary of the Interior. This fear is unfounded. Section 5(b) of S.2829 requires the Secretary to make all trust fund income available to the respective Tribe and Nation quarterly, and provides that he may make no deduction for the ~~government's~~ ^{United States} expense in the administration of the fund.

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

9. The settlement will lead to acculturation of the Maine

Indians. Nothing in the settlement provides for acculturation, ^{nor is} the intent of Congress to disturb the cultural integrity of the Indian people of Maine. To the contrary, the settlement provides for tribal governments

offers protections against this result being imposed
by outside entities by providing

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which are separate and apart from the towns and cities of the
State of Maine ^{and which control all such internal matters.} The settlement also clearly establishes that
the ~~Maine~~ ^{in Maine} tribes will continue to be eligible for all federal
Indian cultural programs.