

July 1, 1980

To: Senator John Melcher, Chairman, and Members of the Select Committee on Indian Affairs

From: Timothy Woodcock, minority staff attorney

Re: S. 2829, A bill to provide for the settlement of land claims of Indians, Indian Nations, and tribes and bands of Indians in the State of Maine.

PURPOSE:

S. 2829 is designed 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 treaties between the States of Massachusetts and Maine in which the tribes surrendered their aboriginal title to the land are invalid for having been made in violation of the Non-intercourse statute.

BACKGROUND:

The Maine claims are the largest of several claims that have been raised in states on the East Coast. At issue are land transfers involving as much as 12.5 million acres, or more than 60 per cent of the State, on which more than 350,000 people now reside.

In its first session, 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.

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, it was rarely applied within the boundaries of the thirteen original states. New York State remains a notable exception in that federal agents made repeated, and ultimately fruitless, attempts to force the State to comply with the Nonintercourse in making treaties with Indian tribes on its western frontier. There is no 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.

Accordingly, the States of Massachusetts and Maine, as its successor in interest after 1820, made several treaties with the Penobscot and Passamaquoddy tribes between 1794 and 1833 under which the tribes relinquished their aboriginal claim more than 60 per cent of the State in exchange for small reservations in northern and eastern portions of Maine. Until recently, the validity of these treaties was not questioned.

In 1972, the Passamaquoddy Tribe wrote to the Secretary of the Interior requesting that the Interior Department bring suit on the tribe's behalf alleging, inter alia, that the State of Maine had wrongfully deprived it of its original title to land by failing to gain federal approval for the treaty made in 1794. Although the Interior Department agreed, the Department of Justice refused to bring the suit because it maintained that the Passamaquoddy was not a federally recognized tribe and that no trust relationship existed between it and the federal government. The Passamaquoddy then filed suit against the Interior Department for a declaratory judgment that the Nonintercourse statute applied to the tribe. In 1975, the federal district court for the District of Maine held that the Nonintercourse statute did apply to the Passamaquoddy tribe and that the statute created a trust relationship between the tribe and the federal government. The court did not decide, however, whether the Nonintercourse statute applied to the land transactions which occurred between the State and the tribe from 1794 on. That issue remains unresolved.

Given the magnitude of the claim and the potential for economic disruption throughout the State should the suit be pursued, the present Administration counseled the State of Maine, the tribes, and the private landowners to negotiate their differences and to submit a settlement package to Congress. Negotiations have been on-going since 1977 and have resulted in several proposals all of which have failed for lack of agreement among the parties.

The legislation which will be the subject of hearings today is the product of the negotiating process. It consists of two bills. One is the Maine Implementing Act which contains the parties' agreements over questions of jurisdiction. It was passed by the Maine State Legislature and signed into law on April 3, 1980. Its effectiveness is contingent on the enactment of the second piece of legislation, the federal bill. A brief description of each measure follows:

THE MAINE IMPLEMENTING ACT:

oThe Maine Act creates a broad category of Indian held land called "Indian territory." (Sec. 6205) Within this territory is "reservation" land which has special jurisdictional features which will be set forth below.

\*oThe Passamaquoddy and Penobscot tribes lands within the Indian territory are given the status of a municipality of the State of Maine. (Sec. 6206). They may collect taxes within these areas and enjoy sovereign immunity from suit to the extent any other Maine municipality does.

oTribal government of affairs within the Indian territory is not subject to regulation by the State. (Sec. 6206)

oA Tribal-State Commission of nine members, (including two from each tribe) is established to oversee the provisions of the Act. (Sec. 6212). The Commission will issue regulations covering fishing within certain designated areas of the Indian Territory. (Sec. 6207(2)).

oThe tribes have authority to enact ordinances regulating hunting and, in some instances, fishing. These ordinances are subject only to findings by the Maine Commissioner of Inland Fisheries and Wildlife that they are harming the wildlife outside the Indian Territory. (Sec. 6207(1) and 6207(6)).

oThe tribes must make "payments in lieu of taxes" to the State on all real and personal property within the Indian Territory. (Sec. 6208(2)).

oIncome from the Indian trust fund established under the settlement is exempt from State and federal taxation. (Sec. 6208(1) and Sec. 6(g) of the Federal Act).

oThe Penobscot and Passamaquoddy have exclusive jurisdiction on the reservation (not the whole territory) over minor criminal offenses, juvenile crimes, and minor civil actions if the action concerns members of either tribe alone. (Sec. 6209(1)(A)-(C)).

oChild custody proceedings are made contingent on federal law (The Indian Child Welfare Act 25 USC 1901 et seq.)

oTribal courts are established in the Maine Act pursuant to 25 USC 1301-1303.

oThe Penobscot and the Passamaquoddy tribes have the exclusive authority to enforce those offenses over which their courts have exclusive jurisdiction.

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oThe bill extinguishes the aboriginal title of the Penobscots, the Passamaquoddy, and the Houlton Band of Maliseets and approves land transfers occurring after the enactment of the first Nonintercourse statute as of the date of transfer. (Sec. 4(a)(1). The parties expect that this language will also extinguish claims to trespass and lost rent which have accrued in the interim. (Sec. 4(c)).

oA trust fund of \$27 million is established for the benefit of the Penobscot and Passamaquoddy tribes by the federal government. (Sec. 5(a)).

oThe federal government is also to place \$54.5 million in a fund called the "Maine Indian Land Claims Land Acquisition Fund." (Sec. 5(c)) The money from this fund will be used to acquire 300,000 acres of land three tribes in the following amounts:

\*\$900,000 to purchase 5,000 acres of land for the Houlton Band of Maliseets

\*\$53.6 million to purchase an undesignated amount of land for the Penobscots and Passamaquoddy. (It assumed that the money will purchase 295,000 acres of land but the acreage is not set forth in the bill).

oThe availability of funds forthcoming under the trust funds or through the land acquisition fund may not be considered by the federal government in awarding assistance or other benefits. (Sec. 7(c)).

oThose landowners selling land to the tribes under this agreement are allowed to treat the sale as section 1033 events under the Internal Revenue Code. This provision, which covers "Involuntary Conversions," permits the landowner to defer the realization of capital gains made on the sale for three years. During that time, if he invests in like or similar property, the capital gain will not be realized and the basis of the newly-acquired property will be that of the property he sold.

SUMMARY:

The federal bill would authorize the expenditure of \$81.5 million for the settlement of the Maine Indian Claim. (\$27 million trust fund + \$54.5 million for the acquisition of land).

The tribes would acquire 300,000 acres of Maine land.

The State of Maine would retain broad powers of civil and criminal jurisdiction within the Indian territory and the reservations.

The State of Maine is not making a direct contribution to the settlement in either land or money.

\*NOTE: The Houlton Band of Maliseet Indians do not share in the settlement to the same degree as the Penobscot and Passamaquoddy tribes. Although the Band is given 5,000 acres of land it may, unlike the Penobscot and Passamaquoddy land, be taken by a judgment creditor or for failure to pay taxes on it. The difference in treatment lies in the State's judgment that the Band's case is very weak and that, should the Band proceed to court alone, it would lose.