-9/2/80 See Back for further suggestion from John Paterson

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 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:

> 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.

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 millions 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, believes the odds are a little better. Counsel for the tribes, needless to say, would reverse the odds.~~

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

Should the case be litigated all parties agree that the mere pendency of the lawsuit may cause substantial economic harm to the people of the State. The filing of a suit claiming title to millions of acres of Maine land ~~could~~ would in all probability prevent scores of municipalities from selling bonds and would cast a cloud on thousands of land titles. Already some titles and bonds have been adversely affected. Even if the State were to ultimately prevail the interim economic damage would still be severe. In addition, all parties agree that the cost of litigation of a suit, described by the Justice Dept. in 1977 as potentially the most complex civil litigation in the history of the United States, would be enormous. ~~[illegible]~~ Finally, litigation, regardless of its outcome, would create long term ill-will between Indian and non-Indian people in Maine. For all those reasons the Congress believes

BACKGROUND AND NEED

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 not apply to non-recognized tribes and on the grounds that there was, thus, no trust relationship between 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 tribes 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 reaffirmed 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 whan 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-

maquoddy 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, in early 1977, 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 proposal was not accepted by the parties.) The White House then appointed, in the fall of 1977, 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 produces 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.

This Federal-Tribal agreement was not accepted by the St

This Federal-State agreement was not accepted by the Tribes.

This agreement was negotia directly between State and Tribal representatives.

The process of negotiating this settlement involved more than a year of direct ~~negotiat~~ discussions between the parties. ~~In early 1977 As noted it late 1978 the Department of Interior made approval Administration proposed settlement the~~ The jurisdictional agreement was negotiated at the direction of the United States. Although by ~~1978~~ late 1978 the Administration had agreed in principle with the United States accepting responsibility for cost of the settlement, the Administration and Maine Congressional delegation were of the view that settlement of jurisdictional issue was the responsibility of the parties directly involved. Attorneys for the Tribes negotiated for more than nine months ~~with~~ the A.G and governor ~~and~~ ~~signed~~ ~~new~~ a settlement embodying

The process of negotiating this settlement involved more than a year of direct discussions between the parties. The jurisdictional agreement was negotiated at the direction of the United States. Although late in 1978 the ~~United States~~ Administration had agreed in principle with the United States' accepting responsibility for the cost of the settlement, the Administration and the Maine Congressional Delegation were of the view that settlement of jurisdictional issues was the responsibility of the parties directly involved. Attorneys for the Tribes neogotiated for more than nine months with the A.G. and governor of Maine agreed upon a settlement embodying both a State jurisdictional act and the original form of this Act. In April of 1980, the Maine Legislature considered the jurisdictional bill. A special Committee on the Indian Land Claims was ppointed by theMaine Legislature to evaluate the proposed settlement. That Committee held public hearings and heard testimony from public opponents and proponents. The Committee voted to report the settlement act with a favorable report. After public debate both Houses of the Maine Legislature enacted the Maine Implementing Act and it was signed into law by Governor Brennan on April 2.

After the Maine Implementing Act became law, the Federal settlement Act negotiated by the Tribes and the State was submitted to the Maine Congressional Delegation. ON June 13, Senator William Cohen and Senator George Mitchell introduced the proposal in Congress. The original bill differs from this Act since, subsequent to its introduction, the bill was clarified and technical changes were made to avoid ambiguities in the original bill.

John Paterson 9/7/80

Suggested Additions to the Committee Report: John Paterson; 9/7/80

State Contribution to the Settlement:

The Committee believes that the cost of the settlement is appropriately placed on the United States. The Administration indicated its support of national responsibility in settlement proposals made in October 1978 and in the testimony of Secretary of the Interior before this Committee. Although the State has not been compelled to do so, it has sinse 1820 probided approximately $20 million in financial benefits to the Passamaquoddy Tribe and Penobscot Nation. These benefits were in addition to those provided to the Maine Indians by virtue of their being citizens of Maine. These benefits were also provided at a time when the United States refused to recognize these tribes or provide for their welfare.

In addition, the historical record demonstrates that to a great extent the problem created by this land claim was the direct result of the failure of the United States to supervise affairs of the Maine Tribes. For year, the officials and agencies of the United States affirmatively disclaimed responsibility for these tribes. As early as 1792, President Washington wrote that the Maine Tribes were a state, not federal wards. When Maine was admitted to the Union in 1820, the Act of Admission referred to the Maine Constitution. That very Constitution specifically referred to the very treaties which are now claimed to be illegal. Correspondence and reports throughout the Nineteenth and Twentieth Centuries are consitent with Washington's position. In hearings before the Committee the Attorney General of Maine provided copies of ~~hundreds~~ several hundred such documents which include correspondence from the U.S. Bureau of Indian Affairs

~~disclaiming~~ as late as 1940 disclaiming any authority or jurisdiction over the Maine Tribes.

It is clear that the current residents of the claim area in Maine did not participate in the original transactions that gave rise to the claim. Moreover, it is equally clear that the U.S. has through a variety of programs participated in the development of the claims area. Fderal loans and grants have helped individuals to build homes and businesses on this land. The U.S. itself has built federal facilities including roads, bases, ~~and~~ post offices, courthouses, and has aided the construction of State and municipal and other public facilities. In view of all this, it can be fairly said that the citizens of Maine acted in good faith for 160 years reliance on the United States that the land legally belonged to ~~them~~ the current non-Indian occupants. Because of these factors, Congress believes that the responsibilty now lies with the United States to bear the financial burdern of this settlement.

Capital Gains Provision for Selling Landowners:

The Settlement provides that individuals and corporations selling land to facilitate the settlement are entitled to ~~have~~ treat the tranactions as forced sales under the Internal Revenue Code. If the proceeds of the sale are reinvested in like property in three years, no capital gains tax has to be paid on the sale. The Committee believes this provision is fair and appropriate.

Those selling land are doing so in part to help facilitate the settlement. The acquisition of a land base by the tribe was an

essential requirement by the tribes. Without the ability to acquire land, the tribes were not willing to settle. Many of those individuals selling alnd are doing so only to assist in the settlement. Thus it is expected that those landowners will likely reinvest in land. Were they to be taxed on this sale, it is entirely likely that such landowners would not sell at all, and an essential element of settlement would not be acheived. Thus, it is ~~expressedxthat~~ in the interest of Congress not to tax those landowners who sell land and reinvest in land within three years. In contrast, those individuals and corporations who do not reinvest ~~theix~~ in land, and that likely to include a substantial portion of the land will be subject to capital gains taxation.