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Director
Thomas W. Fredericks

August 28, 1980

Honorable John Melcher
Chairman, Select Committee
on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing with regard to Interior Secretary Cecil Andrus' August 8, 1980 letter to you concerning S. 2829. As the Secretary indicates, the parties to the settlement have made great progress in resolving the problems raised at the July 1, 1980 hearing before your Committee. My clients are very grateful for the assistance which the Administration has provided in this regard. The Tribes do have various concerns, however, which require attention.

The Secretary's draft bill omits a sentence in Section 5(d) of S. 2829 which provided that, "If the Houlton Band of Maliseet Indians should cease to exist, any lands acquired for the Maliseet Tribe pursuant to Section 5 shall be divided equally and held in trust, one-half for the benefit of the Passamaquoddy Tribe and one-half for the benefit of the Penobscot Nation." The funds for the Houlton Band were provided in S. 2829 as a result of an agreement with the Passamaquoddy Tribe and the Penobscot Nation. The Tribes were prepared to have $900,000 from their land acquisition fund used to purchase land for the Houlton Band, but only if lands purchased with such funds were to revert to the Passamaquoddy Tribe and the Penobscot Nation in the event the Houlton Band ceased for any reason to be able to continue to hold beneficial title thereto. We therefore feel it essential that this provision appear in the final version of the bill.

Section 3(2) of the Secretary's draft bill defines Indian territory in a manner which might suggest that the lands within the existing Passamaquoddy and Penobscot Reservations are to be counted in calculating the 300,000 acres specified in that section. The problem arises because of potential confusion over the meaning of the term "subparagraph" as used

in the proviso at the end of Section 3(2). We understand the term "subparagraph" in this context to relate only to language contained in 3(2)(c). If this is the case, land within the existing reservations would clearly be excluded in calculating the 300,000 acre Indian territory. As this was the intent of the parties, we ask the Committee to take appropriate action to ensure that there is no confusion on this issue.

Section 4 of the Secretary's draft deals with approvals of prior transfer and extinguishment of Indian title. As originally drafted, Section 4(a)(3) only purported to approve transfers of individual Indian land pursuant to state law which occurred prior to December 1, 1873. The notion that only those individual Indian claims which arose prior to 1873 would be affected by the settlement was an integral part of the negotiations. In the process of revising Section 4, the Secretary has deleted this concept. We feel it essential that this aspect of the original settlement be included in the final bill. To accomplish this end we would recommend that the parenthetical expression at the end of Section 4(a)(1) be altered to read as follows: "(except for any Federal common law fraud claim which arose after December 1, 1873"). We would also recommend that Section 4(a)(2) be amended by inserting the words "by any Indian tribe, band or nation" after the word "resources" and before the word "located" in the fourth line of the subsection, and by including a new subparagraph 4(a)(3) to read as follows: "the United States is barred from asserting by or on behalf of any individual Indian any claim under the laws of the State arising from any transfer of land or natural resources located anywhere within the State from, by, or on behalf of any individual Indian, which occurred prior to December 1, 1873, including but without limitation any transfer pursuant to any treaty or compact with or any statute of any state."

We note that the bill as drafted by the Secretary does not provide the same kind of flexibility in management for the Land Acquisition Fund as it provided for the Maine Indian Claims Settlement Fund. We believe that it would be appropriate to provide the same degree of flexibility for both funds.

Section 5(g) of the Secretary's draft provides in part that the lands shall be administered in accordance with the Indian Self Determintion Act. We believe that it is unnecessary

to make specific reference to this Act, as that Act is, and will be, clearly applicable to the Maine Tribes without specific reference.

The first and second sentences of Section 5(h)(1) and the first sentence of Section 5 (h)(2) of the Secretary's draft make reference to "the laws of the State of Maine relating to such lands," or "the laws of the State of Maine." To avoid possible confusion with the general condemnation laws of the State of Maine, which are not applicable, we would recommend that the words "the Maine Implementing Act" be substituted in the quoted phrases.

Section 6(d)(2) relates to payments to claimants against the Tribes. We would recommend that the word "final" be inserted before the word "orders" of the second line of the subsection. This amendment, together with appropriate language in the Committee Report, will make it clear that the Secretary is not to make any payment from income of the trust funds until the judicial order in question is truly final, including the running of the time for appeals.

We note that two different formulations are used in Section 6(h) of the Secretary's draft to describe federal statutes relating to Indians. There appears to be no reason for the distinction, and we recommend that the language be harmonized to prevent possible confusion.

The first two provisos to Section 6(h) ensure that the Passamaquoddy Tribe and the Penobscot Nation will continue, as federally recognized tribes, to be eligible for all of the special federal Indian services and federal tax treatment which other federal tribes receive. The section also provides that the Houlton Band of Maliseet Indians will become eligible for such benefits. As drafted, however, the section provides that the Tribes shall be "deemed to be Federally recognized tribes," or "considered Federally recognized" for these purposes. Since the settlement provides that the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians are and will be federally recognized tribes and entitled to the benefit of such status except to the extent of any limitation provided in the settlement, we believe that this section should be stated more positively. For this reason, we recommend that the words "as Federally recognized Indian tribes" be inserted

after the word "That" and before the article "the" in the first line of the first proviso in Section 6(h); that the language beginning with the words "and on the purposes..." and ending with the words"...recognized Indian tribes:" be stricken; that the phrase "treated in the same manner as other Federally recognized" be inserted after the phrase "Maliseet Indians shall be" in the second proviso to Section 6(h); and that the phrase "considered Federally recognized" be deleted from that second proviso.

We would recommend that the word "subsection" be substituted for the word "section" in Section 9(b). This change will ensure that the limitation contained in the proviso to Section 9(b) will only relate to funds provided to the Tribes by the State of Maine.

The last line of Section 9(c)(3) should be amended by adding the words "eligible or" before the word "entitled" at the end of the subsection. Comparatively few Federal services are "entitlements" and this change will make certain that the subsection has the broad application which was intended.

In closing, we also believe it would be most helpful if the Committee Report would provide some guidance to the Secretary, or to the courts, should judicial review ever be necessary, in determining what would constitute a reasonable plan for the management of the trust funds. To this end, we would recommend inclusion of the following language:

> The Settlement Fund will be divided into two equal shares, one to be held, together with income therefrom, in trust by the Secretary for the benefit of the Passamaquoddy Tribe and the other to be held, together with income therefrom, in trust by the Secretary for the benefit of the Penobscot Nation. The Secretary will invest and administer each share in accordance with terms applicable to it as established by the Passamaquoddy Tribe or the Penobscot Nation, as the case may be, and agreed to by the Secretary. The Secretary is obligated to agree to any reasonable terms for investment and administration proposed by such Tribe or Nation. Such terms need not be the same for each. The standard of reasonableness as

applied to the terms of investment and administration should be determined by reference to modern standards by which endowment funds are invested and administered in the United States. Standards such as those found in the Management of Institutional Fund Act, for example, would be considered reasonable. It is not intended that the Secretary or the Department of the Interior would necessarily make the investment decisions or carry them out. It would be reasonable, for example, for the Passamaquoddy Tribe or the Penobscot Nation to establish an investment committee and charge it with responsibility for (A) setting investment policies; (B) selecting one or more professional investment managers to carry out those policies; (C) monitoring both the policies and the managers; and (D) effecting changes in policies and managers from time to time as circumstances and experience may warrant. The committee might include, in addition to tribal members, representatives of the Secretary and persons experienced in the management of endowments, including, in particular, the establishment of policies and the selection of investment managers.

Similar standards will apply to the investment and administration of the Land Acquisition Fund until fully utilized to acquire land.

We also believe that the Committee Report should explain that the term "principal" as used in Section 5 means the return in money or property derived from the use of the assets in the Settlement Fund, including net appreciation, both realized and unrealized.

We thank you for your assistance in this most important matter.

Sincerely,

Thomas N. Tureen

TNT/crm
ccs: Honorable William Cohen
Honorable George Mitchell
Honorable Cecil Andrus
Honorable Richard Cohen
Donald W. Perkins, Esq.