

To: Bill
From: Tim
Re: Maine Indian Legislation
Date: 9/5/80

As events proved yesterday, some areas of disagreement over the federal legislation remain unresolved.

The reservations voiced by the State come as a surprise because the State's representatives were told that, if they had any problems with the bill, they should bring them to the attention of the Committee at once. John Paterson mentioned two and, so I called him on Friday and we agreed on solutions to them.

I believe that, once the supplemental funding issue was resolved on Wednesday, the State turned its attention to other portions of the bill which then grew in importance. Much of the agitation in this regard seems to be coming from the State Legislators. In any event, the State has highlighted several areas of concern which they would like to see addressed. All are capable of solution.

1. The State would like to see the introductory clause in section 6(b)(1) reworded. The clause reads: "To the extent not inconsistent with this Act..." I spoke with Interior today and they agreed to accept the wording: "In the event a conflict in the interpretation of...." the two acts arises, the federal act will control.
2. The State objects to inclusion of a proviso in 6(a) which prohibits the Indian Territory from being made subject to taxation, encumbrance, or alienation. The provision is redundant when taken with other parts of the Act and may well be safely removed.
3. The State objects to the provision that all condemnation proceedings be conducted in federal district court. This problem will have to be worked out by the State and Justice Department.
4. The State objects to the inclusion of the Maliseets in several salient provisions. We have worked out this disagreement in part.
5. Interior has raised a couple of minor problems dealing with its trust relationship with the tribes which we will have leave to them to work out.

Representatives from the State, the tribes, Interior, and the Committee will meet here in the Indian Committee today. The meeting will present the parties to overcome logistical problems which arise when they try to run language by one another over the telephone. It will also present us with an opportunity to jawbone them into agreement.

Problem 1. The State objects to the phrase in Sec. 6(b)(1) "To the extent not inconsistent with this Act..." The State agrees that in the event of a conflict between the State Act and the Federal Act, the language of the Federal Act will control.

Solution: Delete the objectionable language in this subsection and add a new Section 16 "Construction" as follows:

"In the event a conflict in interpretation of the provisions of the Maine Implementation Act and this Act should emerge, the provisions of this Act shall govern and shall supersede the conflicting provision of the State Act."

This new section will be accompanied by Committee report language to make clear that the Congress does not believe there is any conflict in the two Acts as presently understood by the parties.

Problem 2, The State objects to the proviso in Sec. 6(a) which reads as follows;

"Provided, that nothing in this section shall be construed as subjecting land or natural resources held by the United States in trust to taxation, encumbrance, or alienation."

Exemption from taxation, encumbrance or alienation is a customary incident of property held by the United States in trust for an Indian tribe or individual. Exemption from taxation, financial encumbrance which would cloud title, or from alienation through a forced sale is indeed a necessary incident of the trust. The term "encumbrance" standing alone has been construed to include any regulatory law of a state or county which controls the use of property. Clearly the agreement of the parties as evidenced in the Maine Implementation Act shows that the trust lands of the tribes shall be subject to State law.

The exemption of the trust lands from State taxation, financial encumbrance, or forced alienation is, however, already embodied in the provisions of Sec. 5(g)(2) and (3) and 5(i) restricting alienation generally and providing a comprehensive scheme for condemnations for public purposes, and Sec. 6(d)(2) providing a means by which judgments against the tribes may be paid without invasion of the principle of the tribal trust funds or attachment or levy against the tribes trust property. In addition, the tribal trust property is specifically provided for in Section 6208(2) of the Maine Implementation Act which provides for payments by the tribes "in lieu of taxes on all real and personal property within their respective Indian territory...". Thus it is clear that the parties have agreed that the trust property shall not be subject to taxation by the State, but the tribes have agreed to make payments "in lieu" of such taxes and, through Sec. 6(d)(2) of the Federal Act, they authorize the Secretary of the Interior to make such payments from the dividends or earnings of the tribal trust funds.

Solution: (a) Leave the proviso in place and add committee report language as above.

(b) Move the proviso to Sec. 5(g)(2) where it appears more appropriate and add committee report language as above.

(c) Delete language entirely and add to committee report in explanation of Sec. 5(g)(2) to explain that the restrictions on alienation in that Section mean that the trust property of the tribes is not subject to taxation, financial encumbrance, forced or alienation in any other

alienation (such as adverse possession) except as provided in Sec. 5(g)(3).

Problem 3. The State objects to the provisions of Section 5(h)(3) which provides that the U. S. District Court for the District of Maine will have exclusive jurisdiction over condemnation actions. They contend and the attorney for the tribes agrees that the parties contemplated that the State courts would have jurisdiction over condemnation proceedings and this was the intent embodied in the Maine Implementation Act. The relevant provision of the Maine Act (Sec. 6205(3) provides a statutory scheme for condemnation proceedings but does not specify the court in which judicial proceedings are to be brought. It seems apparent the State and the tribes did contemplate state court jurisdiction.

The jurisdictional issue was raised in one of the last negotiating sessions by the Dept of Interior and Justice. In view of the fact legal title will repose in the United States and the United States must be a party to any condemnation proceeding, and because condemnation proceedings against tribal trust property throughout the rest of the United States must be brought in Federal court, committee staff opted for Federal court jurisdiction rather than State.

Solution: This is a problem to be resolved between the State and Interior and Justice. The tribes have no position on the issue.

Problem 4. The State accepts the reality that the extinguishment provisions of Sec. 4 will be made contingent upon appropriation of the funds to implement Section 5. They

ask what will be done in the event the Congress fails to appropriate the entire \$81.5 million in one lump sum but rather strings it out over a multi-year appropriation. In such event the State wishes immediate extinguishment upon appropriation of the initial sum. They point out, among other things, that the Maine Implementing Act does not take effect until the claims are extinguished. However, that same section of the Maine Act (Sec. 31) also conditions the effective date of the Maine Act upon appropriation of funds to compensate the tribes.

Solution: The Administration has committed itself to seek an immediate appropriation of the full \$81.5 million upon enactment of this Act. Certainly the tribes are entitled to begin earning income from the trust fund to be established upon the date their claims to land are extinguished. More importantly, appropriation of funds for acquisition of trust lands cannot be delayed because the numerous purchase options are due to expire. It can only be assumed that the Congress and the Administration will follow through on the commitments encompassed in the passage of this legislation.

Problem 5. The State objects to sections 5(d)(3), (g), (f), (h) and (i) which provides for acquisition of land to be held by the United States in trust for the Houlton Band of Maliseet Indians subject to the same terms and conditions as those lands to be acquired for the Passamaquoddy Tribe and Penobscot Nation. The gravamen of the States complaint is that the Houlton Band did not participate in negotiations prior to introduction of this Federal legislation; that the Maine Implementing Act contains no provisions respecting trust ownership of land for the Houlton Band; and that the proposed language presupposes a jurisdictional relationship between the State and the Band with respect to such lands which should be resolved through negotiations.

Specifically the State objects to inclusion of the Maliseet lands within the framework of the Federal-State Act relating to condemnation of tribal trust lands and they object to the concept that lands held by the United States for the Maliseets should be immune from levy or attachment and forced sale by judgment creditors. Their contention is that this arrangement was satisfactory as the Passamaquoddy and Penobscot lands because of the provisions in Sec. 6(d)(2) which authorizes payment of judgment creditors from income earned from the trust funds of those two tribes. There is no similar trust fund for the Maliseets.

Immunity from taxation, financial encum~~berance~~, or alienation without the consent of the United States and the tribe or band is the very essence of the trust character. The Houlton Band is impoverished, it is small in numbers and has a dubious capacity for financial management, it has no trust fund to look to, and it is doubtful if the land to be acquired will be utilized in an income

producing fashion at least in the foreseeable future. Given the position of the State, it is difficult to see how any arrangements can be negotiated with the Band which will not contradict the trust status of the asset. And yet it is clear that in the absence of such a trust status the lands will quickly pass out of the Band's ownership.

The State is willing to enter into negotiations with the Band with the end in mind that the United States will acquire land on behalf of the Band which will be held in trust with restrictions against alienation no less protective than that provided in this Act for lands acquired in trust for the Passamaquoddy Tribe and Penobscot Nation. Such negotiations should address the concerns of the State regarding application of State condemnation laws and provision for satisfaction of judgment creditors. Resolution of this issue must be subject to enactment of appropriate enabling legislation by the Maine State legislature.

By the terms of this Act the land claims of the Houlton Band of Maliseet Indians are extinguished and the Band and its members and any lands which they now own or may acquire are placed under the jurisdiction of the State. There is no monetary compensation to the Band from either State or Federal sources. The \$900,000 allotted for the acquisition of property for the Band was set aside for them out of the portion of the funds agreed to be allocated to the Passamaquoddy Tribe and Penobscot Nation. The monetary contribution to the Band is thus derived from the Tribe and Nation. The Maine Implementing Act does not accord the Band any governmental status. The Federal Act does extend to the Band Federal recognition, thus making the Band and

The only thing the Band acquires by virtue of this settlement and the extinguishment of their claims is Federal recognition as an Indian tribe, thus making the Band and its members eligible for Federal benefits extended to Indians. From the State they get nothing. From the United States they get recognition. This is not adequate compensation for the extinguishment of their claims. It is the intent of this section to provide ^{the} Band and the State an opportunity to resolve this land acquisition matter in a manner acceptable to both sides with full participation of the Maine State legislature. It is also the intent of this section that land shall be acquired for the Houlton Band of Maliseet Indians as promised in this Act. To be sure that this promise is fulfilled, this section provides that the Secretary shall file a report ^{on the status of negotiations} with the Congress within six months.

Solution to Problem 5.

Sec. 5(k). The Secretary is authorized and directed to enter into negotiations with the State of Maine and the Houlton Band of Maliseet Indians for purposes of identifying and acquiring lands or natural resources which shall be held by the United States on behalf of the Houlton Band of Maliseet Indians in trust with restrictions against taxation, encumbrance or alienation no less protective than that provided by this Act for land to be acquired in trust for the Passamaquoddy Tribe and the Penobscot Nation, provided, the provisions in subsection (i) of this section relating to condemnation for public purposes shall not be applicable to any such lands unless otherwise agreed by the parties, provided further, that the Passamaquoddy Tribe and the Penobscot Nation shall ^{each} have a one-half undivided reversionary interest in any such property in the event the Houlton Band of Maliseet Indians should terminate their interest in the land, and, provided further, that no land or natural resources shall be so acquired for or on behalf of the Houlton Band of Maliseet Indians without the prior enactment of appropriate legislation by the State of Maine approving such acquisition. The Secretary is directed to submit to the appropriate committees of the House of Representatives and the Senate having jurisdiction over Indian affairs a report on the status of these negotiations within 180 days from the date of enactment of this Act.