STATEMENT OF SEN. WILLIAM S. COHEN
AT THE MARK-UP OF S. 2829, THE MAINE
INDIANS CLAIMS SETTLEMENT ACT, BY THE
SENATE SELECT COMMITTEE ON INDIAN
AFFAIRS: AUGUST 26,]980.

Mr. Chairman and my colleagues on the Senate Indian Committee, the legislation before the Committee today is of the utmost importance to the people and the State of Maine as well as the entire nation. In view of its importance, I would like to take a moment to describe the events which have produced this proposed legislation and to describe its salient provisions.

Nearly ten years ago, the Passamaquoddy Tribe asserted a claim that land which it held by aboriginal title had been taken from it illegally by the State of Massachusetts of which Maine was once a part in a treaty signed in 1794. The gravamen of the tribe's case was that the treaty had never been approved by the federal government and that such approval was required by the Nonintercourse Statute.

The Nonintercourse statute was first enacted as part of the Trade and Intercourse Act of 1790 and was re-enacted with some modifications several times in the years which immediately followed. It is, in essence, a restraint on the alienation of Indian land operates to prohibit the transfer of Indian-held land without the approval of the federal government. It is currently codified at 25 USC 177 and is widely acknowledged to be the legal cornerstone of federal Indian policy.

When the Passamaquoddy Tribe initially raised its claim it asked the United States to press the suit in its behalf. The request was rejected, however, because the United States denied both that the Nonintercourse statute applied to the Passamaquoddy Tribe

and that it had any trust duties toward the tribe. In so doing, the federal government was acting on the same assumption as the representatives of the States of Maine and Massachusetts who had effected treaties with the Passamaquoddy and Penobscot tribes in the good faith belief that they were not constrained by the Nonintercourse Statute.

In January of 1975, the United States District Court for the District of Maine held that the Nonintercourse did in fact apply to the Passamaquoddy Tribe and that the statute created a trust relationship between the tribe and the federal government. Later in that same year, the First Circuit Court of Appeals affirmed the decision. In upholding the District Court, however, the Court of Appeals expressly refused to decide whether the Nonintercourse statute applied to the land transactions which were embodied in the several treaties which had been made with Maine Indians.

Among the most troubling aspects of this case, a point which was noted by the federal District Court in its decision, is the lack of legislative history of the Nonintercourse statute. The problems caused by the absence of legislative history is compounded by the jurisdictional history of the statute in Maine. Although the statute was inspired by a native of Maine and Massachusetts, Henry Knox, and was enacted and re-enacted several times by a Congress in which Massachusetts and later Maine, too, was represented, no attempt was made to apply it to the treaties which have only so recently come into doubt. This experience contrasts sharply with the definite attempts of the federal government to apply the Nonintercourse

course statute in states such as New York.

In their allegations before the federal district court, the Passamaquoddy Tribe and the Penobscot Nation contended that, because the treaties signed by their ancestors lacked federal approval, they still held aboriginal title to 12.5 million acres, or 60 per cent, of the State of Maine. In the more than 180 years that had passed since the first treaty was signed, more than 350,000 persons had moved onto the now-disputed land and, consequently, the potential the suit posed for economic dislocation and sheer human misery was enormous. Accordingly, negotiations between the State, the Indians, and other interested parties began. In pursuing this route, the negotiators were actively encouraged by the present Administration which endorsed the process as being that most likely to lead to a fair and equitable resolution.

The first effort at solving the problem was made by retired Supreme Court Justice William Gunter who had been personally chosen for his task by President Carter. Justice Gunter's proposal for a settlement was ultimately rejected but his conclusion that the federal government was primarily responsible for the problem has remained a hallmark of all subsequent proposals to resolve the Indian claim.

Despite the failure of several suggested resolutions to the dispute, negotiations continued until the present proposed settlement was reached in March of this year. This settlement, then, represents the product of a process of negotiation which has taken nearly four years to complete. It is a process that has had the

blessing and encouragement of the present Administration from the start and the Administration has testified to its support of the arrangement we are considering before this Committee just last month.

I would like to turn briefly to provisions of the bill.

In exchange for the tribes' extinguishing their claims based on the Nonintercourse statute, the federal government will provide $27 million to be held in trust for the benefit of the Penobscot and Passamaquoddy Tribes. A land acquisition fund is also established by the bill in the amount of $54.5 million and it is to be used to acquire 300,000 acres of Maine timberland. I should note that the Houlton Band of Maliseet Indians will also participate in the apportionment of the land acquisition fund but to a lesser degree than other two tribes. This reflects a judgment by the State of Maine that the Maliseet claim is much weaker than those raised by the Passmaquoddy and Penobscot Tribes.

S. 2829 incorporates by reference the Maine Implementing Act which was passed by the Maine Legislature in April of this year. That Act contains many of the jurisidictional arrangements which will bind the parties. The Maine Implementing Act provides for, among other things, the establishment of tribal courts of specific jurisdiction and describes the various ways in which the Indian tribes will hold their lands.

Last month, this Committee held hearings on S. 2829 during which reservations were expressed about the possible effect of some of the provisions in the settlement legislation. At that time, the parties to the settlement pledged to work to rectify

those provisions of the bill which held troublesome implications for Congress and the Adminisration. For example, the apprehension voiced by the Secretary of the Interior that the bill as then drafted would leave the Interior Department susceptible to undue liability as trustee of the trust fund established for the Penobscot and Passamaquoddy tribes has been adequately addressed in section 5(b)(1) and (3) which now contain express limitations on its liability. Likewise, a potentially burdensome procedure by which the Secretary would satisfy judgment creditors has been simplified by the process embodied in section 6(d)(2) of the Act.

Section 6(e)(1) now authorizes the State of Maine and the Indian tribes to enter into agreements covering certain areas of concern rather than calling for a prospective Congressional ratification of any and all amendments to the Maine Act.

Additionally, language in the definition section, section 3, has been improved to make absolutely certain of the identity of the Indian tribes which are participating in this legislation.

Finally, before closing, I would like to note that the most troublesome provision, section 6211(2) and (4) of the Maine Implementing Act has been addressed in this bill. In his testimony, Secretary Andrus expressed his concern that this provision might be susceptible to an interpretation which would, if the provision were enacted throughout the country, cost the federal government $300 million in Indian Health Service expenditures alone. This problem has been addressed by section 6(b) of the federal bill and will addressed still further in the Report of this Committee on S. 2829 so that no doubt about the effect of this

provision remains.

I would like to thank the Committee for affording me the opportunity to speak to this bill and I yield to the Chairman.