1st - Final

ANALYSIS OF SECTION 6211 OF MAINE IMPLEMENTATION ACT IN RELATION TO FEDERAL PROGRAM DELIVERY TO MAINE INDIANS

Sec. 6211. Eligibility of Indian tribes and State funding.

This section is broken into four subsections. Subsections one and three provide that the Passamaquoddy Tribe and the Penobscot Nation shall be eligible for participation in State programs which provide financial assistance to State municipalities, including discretionary grants or loans, to the same extent and subject to the same conditions as any other State municipality. To the extent local matching funds are required, the tribes may use funds from any source available, including Federal funds. Subsection four provides further that individuals residing within the Indian territories are eligible for and entitled to receive state grants, loans, or other social service entitlements on the same basis as all other citizens of the State.

Subsections two and four provide limitations on eligibility of the Passamaquoddy Tribe or Penobscot Nation or their members for State funds based on receipt of Federal benefits. Subsection two provides:

> "Any moneys received by the respective tribe or nation from the United States within substantially the same period for which state funds are provided, for a program or purpose substantially similar to that funded by the State, and in excess of any local share ordinarily required by state law as a condition of state funding, shall be deducted in computing any payment to be made to the respective tribe or nation by the State."

Subsection four provides:

> "In computing the extent to which any person is entitled to receive any such funds, any moneys received by such person from the United States within substantially the same period of time for which state funds are provided and for a program or purpose substantially similar to that funded by the State, shall be deducted in computing any payment to be made by the State."

If these provisions of State law were to be broadly construed they could have an adverse impact on the ability of the United States to provide assistance to the tribes or their members under programs designed to aid Indian tribes or persons. The supplanting provisions could result in a dollar for dollar reduction of State aid for every dollar of special assistance offered the Indian tribes or members by the United States because of their status as Indians.

At the Select Committee hearing July 1, 1980, Secretary Andrus, pointing specifically to Indian Health Service programs, testified that such a supplanting provision, if applied to Indian programs throughout the United States, could result in costs of hundreds of millions of dollars to the United States. The State Attorney General's office has stated the supplanting provisions are to be narrowly construed and need not result in massive State reductions or increased costs to the United States because of delivery of special Indian programs. The application of Section 6211 to Federal program delivery has been the subject of correspondence between the State and the Interior Department.

On July 21, 1980, James St. Clair, retained counsel for the State of Maine, wrote as follows:

> Interior expressed concern over the interplay between the provisions of Section 8 of S. 2829 and Sections 6211(2) and (4) of the Maine Implementing Act. In particular, Interior expressed concern that Sections 6211(2) and (4) of the Maine Implementing Act might be inconsistent with the policy underlying many federal laws. To that end, Interior initially requested amendments of the Maine Implementing Act or specific language in S. 2829. After much discussion, we believe the parties have eliminated much of Interior's understandable concern. Rather than amending S. 2829 to state the parties' mutual understanding, however, it would be preferable to embody this understanding in the Committee Report. Accordingly, the State proposes the following language for inclusion in the Committee Report:
>
>> "The Committee was advised by the Secretary of his concern that the set-off provisions in § 6211(2) and (4) of the Maine Implementing Act may work to defeat the intent of federal financial assistance to Indian tribes, since it would appear on its face to permit the State to use federal monies to supplant State monies. However, after further inquiry, the Committee believes the Implementing Act is not inconsistent with general federal policy. Specifically, the Committee understands the Maine Implementing Act to work in the following manner:
>>
>> "To the extent the United States provides funds for a program which are intended to be supplemental to a State program, then the set-off provisions of 6211(2) and (4) do not apply. The term 'substantially similar purpose' as used in the Implementing Act was not intended to include federal funds intended to enhance, enrich or supplement programs provided for under State law. Thus, for example, where the BIA funds a remedial reading program for the Tribes, such programs would not be 'substantially similar' to a basic State educational grant and would not supplant State funding."

This proposed language is stated in general terms rather than by reference to either specific State or federal programs, because a detailed review of myriad State and federal statutes and regulations would unduly delay the parties' goal of prompt enactment of S. 2829.

The Department of the Interior responded by requesting that Attorney General Cohen include the following language in his letter of understanding to Interior and Congress:

"Fourth, in drafting § 6211 it was understood among all the parties that to the extent the United States provides funds for a program which are intended to be supplemental to a State program, then the set-off provisions of 6211(2) and (4) do not apply. The term "substantially similar purpose" as used in the Implementing Act was not intended to include federal funds intended to enhance, enrich or supplement programs provided for under State law. Thus, for example, where the BIA funds a remedial reading program for the Tribes, such program would not be "substantially similar" to a basic State educational grant and would not supplant State funding. So also, it was not the intention of the parties to alter the effect of existing federal law. Thus, the usual State participation in State/federal cost sharing of social service programs such as AFDC, Medicate and Food Stamps will be unaffected by § 6211(2) and (4)."

The Attorney General, by letter of August 22, 1980, responded with the following proposed language:

"Fourth, in drafting § 6211 it was not the intention of the parties to alter the effect of Federal law. It was understood among all the parties that to the extent the United States provides funds for a program which are required by Federal law to be supplemental to and not to supplant State and local funds, then the set-off provisions in § 6211(2) and (4) would not apply to such Federal funds. The term "substantially similar purpose" as used in § 6211 of the Maine Implementing Act [was not intended to] refer to

such Federal funds that enhance, enrich or supplement programs provided for under Maine law. Such Federal funds received by the Tribes would be outside the scope of § 6211 entirely and would neither be deemed to be eligible to initiate a State match under § 6211(1) not would they offset or supplant any State march or State funds under § 6211 (2) or (4). Consistent with the foregoing, the usual State participation in the State/ Federal cost sharing of social services such as AFDC, Medicare and Food Stamps would be unaffected by § 6211(2) or (4)."

In comparing the draft Interior proposal and the response of Attorney General Cohen it is clear that the point of conflict revolves around the alternative phrases:

> "Federal programs which are required by Federal law to be supplemental to and not to supplant State and local funds..." (State)

and

> "Federal programs intended to be supplemental to a State program..."(Interior)

The exchanges of correspondence are in agreement that Federal funds for programs that "enhance, enrich or supplement" State programs would not trigger the supplanting provisions of Section 6211 of the Maine Implementing Act.

At the Committee mark-up on S. 2829 Interior proposed the following language for inclusion in Sec. 6(b). The State objected to inclusion of the bracketed language as being inconsistent with Sect. 6211:

> The Maine Implementation Act is hereby approved, ratified, and confirmed [to the extent that it is not inconsistent with the provisions of this Act.] Nothing in this section shall be construed to supercede any

> federal laws or regulations governing the provision or funding of services or benefits to any person or entity in the State of Maine unless expressly provided by this Act.
>
> [Nor shall anything in this Act be construed to allow the State of Maine to treat the Passamaquoddy Tribe or the Penobscot Nation different from any other municipality in the State for provisions of funding of municipal programs or services nor to allow the State of Maine to treat the members of the two tribes any different from any other citizen in the State for purposes of their eligibility or entitlement for state services or programs.]

The State objects to the language "to the extent not inconsistent on the ground that this suggests that S. 2829 is in fact in conflict with the Maine Implementing Act, that ~~This~~ this suggestion or implication generates unnecessary concern and hostility at the State level. They argue that ~~The~~ the Federal statute has supremacy over the State statute in the event of any conflict. Interior argues the the language is needed because S. 2829 is ratifying the Maine Implementing Act, thus creating a need for some standard for resolution of conflicts within the Federal Act itself.

The State objects to the "equal treatment" paragraph on conflicting ~~the~~ grounds, ~~that are somewhat difficult to understand~~. The Maine State constitution requires that all municipalities be treated equally and the State courts have been vigorous in enforcement of that provision. In addition, the Maine Implementing Act is premised on the concept that members of the two tribes are full citizens of the State and are entitled to all the benefits of any citizen. To this extent, then, the "equal treatment" paragraph would appear consistent with State law and the only objection would be that inclusion of such language is in the nature of a gratuitous

insult. However, an additional objection was raised on the grounds that the Maine Implementing Act does in fact treat the tribes and the individual members differently. This objection seemed to relate to the supplanting provisions of Sec. 6211 rather than other sections of the Maine Act; that the "equlaity of treatment" provision effectively nullifies the supplanting provision.

The Department of the Interior objects to the supplanting features of Sec. 6211 of the Maine Implementing Act as being counter to the policies persued by that Department, and indeed all Federal agencies, over the past 20 years of requiring States to provide services to their Indian citizens on the same basis as they provide services to all other citizens of the State.

The supplanting provisions of Sec. 6211, however, do not appear to result in any difference in treatment of individual members of the tribes from other citizens of the State or difference in treatment of the tribes from other municipalities for State funding purposes. The supplanting provisions of Sec. 6211 are triggered only when the Federal funds provided the tribes for the same or substantially similar program exceed the local or municipal share ordinarily required by State law as a condition of State funding. The funds in question are those which the tribes or members may receive from Federal sources because of their status as Indians; funds which would not be available to other muncipalities or other State citizens. (See Cohen letter, 8/22/80, p. 3, para. 2 and 3). The objection of Interior that the supplanting provision may deny the tribes or their members equality of treatment with outher State municipalities or citizens would not appear well founded since no other municipality or citizen would have access to such funds. It would appear the real objection to the supplanting provision is that it may lock the tribes and their members into a

position of equality unless the Federal government is willing, through Indian monies, to totally supplant the State funding. Federal policy to upgrade the conditions of the American Indian through special programs may thus be thwarted.