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Re: United States of America v. The State of Maine.

Gentlemen:

In the course of our review of the Joint Memorandum of Understanding developed by the White House Work Group and representatives of the Penobscot and Passamaquoddy Tribes, a number of questions have been raised. We believe that, prior to development of any final State position on the proposed settlement, answers to these questions are necessary. It is unfortunate that we did not have an opportunity to pose these questions to the Work Group prior to the preparation of the Joint Memorandum.

1. Past State Payments.

In the past 15 years, the Maine taxpayers have contributed approximately \$15,000,000 to provide social services, housing and other support to the Indian Tribes. The federal government now recognizes that it is obligated to provide support for the Indian

Tribes and that it has been obligated to provide support services for many years past because of the trust relationship it now asserts to exist. In light of the present federal position regarding its responsibilities for financial support of the Indian Tribes, is the federal government prepared to reimburse the State of Maine for the support provided by the State in lieu of the federal support which should have been available to the Indian Tribes?

Assuming that the federal government is correct in demanding State participation in a settlement as a quid pro quo for federal involvement (a principle with which we take exception), why were Maine's past payments to the Tribes insufficient to satisfy this principle? Has consideration been given to the fact that none of the other states involved in Trade and Intercourse Act claims, Massachusetts, Rhode Island, Connecticut or South Carolina, ever made similar payments to the Tribes located in those states? In view of Maine's extraordinary efforts (approximately \$10 - \$15 million in the last 19 years alone), why is more expected by the federal government from Maine citizens and taxpayers? Why is it fair to Maine to expect more of Maine taxpayers who acted in good faith all these years in taking care of what are now asserted to be federal Tribes?

2. Integrity of State Laws.

The Joint Memorandum indicates that any lands acquired by the Indians be within the State's criminal and civil jurisdiction subject to "retrocession" which would terminate state authority over the lands. The question of the status of enforcement of state laws on acquired Indian lands would appear to require resolution prior to any settlement because of the many implications involved. For example, in developing new businesses, as is proposed with the \$25 million federal contribution, would the Tribes take advantage of exemption from state consumer protection, environmental, work place safety or minimum wage laws to compete unfairly with other Maine business who must remain subject to these laws? What protections, if any, will exist for wild animals and fish which live in or cross the acquired Indian lands? What protections will there be for abutting landowners from such problems as stream siltation, air pollution or noise which may result from uncontrolled industrial and commercial activity, such as clearcutting timber, on Indian-acquired land?

3. Tax Losses.

At current rates of taxation (\$0.75 - \$0.80 per acre) the State will lose at least \$400,000 a year in taxes on the 500,000 acres which it is proposed that the Indians would acquire. Assuming an increase in this tax rate over the course of time, this tax loss will surely increase. Will this be the limit of tax losses or will there be other tax losses? For example, will all improvements on

this property be exempt from State taxation? Will business transactions on this property be exempt from State sales and income taxes? Would the exemption from State sales and income taxes be limited to transactions between Indians or would the exemption, if there is to be one, also extend to transactions between Indians and non-Indians? We understand that there is litigation in process in Washington State to determine whether an Indian Tribe can sell tax free cigarettes to non-Indians. The sale of such cigarettes has cost the State of Washington an estimated \$8 - 14 million in lost revenues already. Is there likely to be a similar problem in Maine with lost taxes?

4. Easement Uses and Fish and Game Laws.

The proposed settlement requests the Indians be given easements to hunt and fish and collect brown and yellow ash on approximately 3 million acres. How intensive a use is contemplated under these easements? Will the uses under these easements be subject to State criminal laws, fish and game laws, and other necessary State controls designed to prevent abuse of land and resources?

5. Other Indians in Maine.

The Joint Memorandum makes no provision for claims of or federal support for other Indians in Maine, i.e., the Micmac and Maliseet (Malicite). It is entirely possible, however, that either or both of these tribes may assert against the State the same kind of claims asserted by the Penobscot and Passamaquoddy. Indeed, it has curiously been ignored that the 1794 agreement that forms the basis of the Passamaquoddy claim was executed by Massachusetts, not only with the Passamaquoddy, but other eastern tribes, which appears to include the Micmac and Maliseet. What precedential value will the proposals in the Joint Memorandum have on these other latent claims? Is the federal government prepared to extinguish these other claims? Will the federal government take the same posture toward settlement in those cases as it does in this?

6. Changes from the Gunter Plan.

The Joint Memorandum contains an agreement by the White House to extinguish the Tribal claims to 9,200,000 acres in return for a payment of \$25,000,000. This is in contrast to Judge Gunter's proposal to extinguish claims to 12,000,000 in return for the same amount of money. Why did the White House decide to still pay \$25,000,000 to the Tribes but extinguish a smaller amount of the claim? Since we understand the original proposal of Judge Gunter to have been characterized generally by President Carter as fair and equitable, why did the White House retreat from the position of Judge Gunter that no private landowners be held responsible? Does the White House now take the position that indeed some landowners are, because of the size of their holdings, more guilty than others and less deserving of the protection originally fashioned by Judge Gunter? If so, why?

7. Land Acquisition Costs.

The federal government proposes to assist the Indians in acquiring approximately 300,000 acres of land from private landowners for a payment of approximately \$1.5 million, or \$5 an acre. At the same time, we understand that a tentative settlement has been reached in a similar suit in Rhode Island, that involves a proposal under which the federal government will acquire land for the Narragansett Tribe at fair market value. Assuming that the federal government agrees to assist in that settlement by acquiring land at fair market value, why should Maine lands purchased to resolve a similar dispute be acquired for far less than fair market value? Is the federal government prepared to reconsider its position and pay prices at or near fair market value for land acquired in Maine?

8. Payments to Interior Department.

The proposed settlement contemplates that any payments by the State to the Indians be paid through the Interior Department. If the settlement is to be between Maine and Maine's Indians, why should the Interior Department play a middleman role in payments? Would it be preferable to keep the money in Maine by making any payments from Maine direct to Maine's Indians without channeling the funds through a Washington bureaucracy which might mandate uses of the funds in a way desired by neither the State nor its Indians?

9. Baxter Park Easement.

The Indians have requested, as part of the settlement, a religious easement in Baxter State Park. Precisely what uses are contemplated under this easement? By this request for an easement, do the Indians seek special privileges not accorded to other citizens, or are they merely requesting permission to do something which they could now do with approval of proper authorities?

10. Responsibility for Services.

It has been suggested that the Indians would undertake a number of economic development projects with funds received as part of the settlement. Such projects will necessarily increase demand for certain services traditionally provided by the State, such as highway maintenance and highway improvement and forest fire protection. Will the State continue to be called upon to supply such services, or will such services all be provided with the \$3 to \$5 million a year which the federal government contemplates giving to the Indians?

11. Changes in Federal Assistance Patterns.


If the Indians acquire the land they are seeking, will the federal government provide a greater level of assistance to Maine to acquire more park lands for use by all Maine citizens? Similarly, if the Indians acquire the lands they are seeking, will those lands be deemed federal public lands so that the State will receive an increase in the funds the State is paid under the Federal Highway Trust Fund? Are there other areas in which federal aid patterns to the State would change - for better or worse - as a result of the Indian settlement?

12. Contribution from Massachusetts.

The agreements ("treaties") of 1794, 1796 and 1818 which form the bulk of the claim against Maine and its citizens were in fact executed by Massachusetts. Assuming arguendo that these agreements were made in violation of the Trade and Intercourse Act, it must be concluded that the State of Massachusetts perpetrated these "wrongs." Inasmuch as Maine was only assigned the treaties when it became a State, an assignment imposed upon it by Massachusetts as a condition of its statehood, why was no consideration given to, in fairness, demanding a contribution from the State of Massachusetts? Are citizens of present day Maine any more responsible for the events of 200 years ago than the citizens of present day Massachusetts?

I look forward to your answers since they will affect our response to the proposals in the Joint Memorandum.

Sincerely,


JOSEPH E. BRENNAN
Attorney General

JEB/ec

cc: Honorable James B. Longley
Honorable Robert Lipshutz
Honorable Edmund S. Muskie
Honorable William D. Hathaway
Honorable William S. Cohen
Honorable David F. Emery
Members of the Maine Legislature