United States Senate

MEMORANDUM

SENATOR:

This is the analysis the White House provided two weeks ago.

Jim

THE WHITE HOUSE

WASHINGTON

June 13, 1980

Dear Jim:

Enclosed is a document prepared within the Administration which addresses the principal features of the proposed Maine Indian legislation. Please note that this document neither endorses nor rejects the bill generally or any of its provisions; rather it is an attempt to identify issues which must be addressed as the bill is considered.

Sincerely,

DOUGLAS B. HURON
Senior Associate Counsel
to the President

Mr. James W. Case
Legislative Director for
The Honorable George J. Mitchell
United States Senate
Washington, D.C. 20510

June 9, 1980

Issues Involving the Proposed "Maine Indian Claims Settlement Act of 1980"

I. Level of Federal Funding

II. Status of the Houlton Band of the Maliseet Indians

III. Changes in Existing Federal Indian Policy Proposed by the Settlement

I. Level of Federal Funding

--The $81.5 million in new budget authority authorized by the settlement far exceeds the $37 million in new Federal funding approved by the Administration for settling Maine land claims.

--Funding difference stems from differing amounts of land contained in the settlement and the average per-acre valuation of the land:

Tribes/State:	300,000 acres x $181.66/acre	$54.5 M
Administration:	100,000 acres x $100/acre	-$10.0 M
		$44.5 M

--Major uncertainty exists concerning effect on Federal programs of the settlement provisions that (1) treat the tribes in Indian Territory as municipalities under State law -- a rare status for tribes within the United States;1/ (2) require the Federal Government to disregard settlement payments to the tribes, or any State payments to them, when determining individual or tribal eligibility for Federal financial assistance, and (3) provide general tribal and individual eligibility for State financial assistance programs on the same basis as other municipalities and persons, but Federal payments to the tribes or individual Indians for substantially similar purposes shall be deducted from the amount of State funding provided.

. Could the tribes as municipalities receive more Federal funding than would be the case today where they are treated only as tribes?

. If the State could withdraw all health care funding for its Indian citizens in anticipation of Indian Health Service (IHS) aid, the incremental cost for the IHS is estimated at about $1 million per year in Maine, and $285 million per year if this provision establishes a nationwide precedent.

. Federal funding would supplant State funds in other programs as well, although no estimates of cost are available. The legislative history for some programs like employment and training under CETA or public school assistance under the Johnson - O'Malley Act indicates a clear Congressional intent to prevent States from supplanting their own funds with Federal dollars.

. Effect of the settlement on general revenue sharing is uncertain. Clarification is needed concerning whether the tribes should be regarded as tribal entities, local governments, or both, for revenue sharing purposes.

--The settlement would expand Federal tax law to treat as "involuntary conversions", and therefore subject to capital gains deferral, the sale of private land to the Maine Indians pursuant to the settlement, if the proceeds from the sale are used to buy similar land within two years after the year of sale (3 years for business property). The estimated Federal tax loss would be $15 million. Existing Federal tax law allows involuntary conversions if the sales stem from Federal or State condemnation -- not private lawsuits or out-of-court settlements. Enactment of this provision would set a precedent for other Indian claim settlements as well as for a general expansion of tax deferrals for real estate.

1/ The settlement defines "Indian Territory" in Maine as the current Passamaquoddy and Penobscot reservations plus the first 300,000 acres of land acquired by the U.S. for the tribes in designated, unincorporated areas of the State.

II. Status of the Houlton Band of Maliseet Indians

Various settlement provisions raise major questions:

--Does the Band meet the standard criteria for a Federally recognized tribe?

--What is the number and location of Band members? (The present estimate is that the Band numbers about 350 persons.)

--Does the Band have a credible land claim pending? (Very little historical or anthropological data is currently available to the Federal Government on this issue.)

--What status for the Band does the settlement envisage? (The State act does not give "municipal" status to the Band nor recognize any power or authority of the Band; however, the proposed Federal act "recognizes" the band, and does not specifically revoke concomitant tribal power.) Further, what is the relationship between the Band and the Federal Government under the settlement? The Band would be eligible for financial benefits to which other tribes may be entitled, but their lands would not be subject to any restrictions on alienation. The nature of the Federal "trust responsibility" over such lands is unclear, since the U.S. might not have any authority with respect to their disposition.

--Although Congress has the authority to recognize the Band as a tribe, it would be contrary to positions taken by the U.S. in Federal court for the Executive Branch to take a position on the Band's status as a tribe without the Band proceeding through the recently initiated Federal Acknowledgement Project administered by Interior. This project was implemented to enable Indian groups to establish their entitlement to a government to government relationship with the U.S.

III. Changes in Existing Federal Indian Policy Proposed by the Settlement

1. State civil and criminal jurisdiction over Indians and Indian Land -- Sec. 6(a)

Assumption by the State of Maine of jurisdiction over civil and criminal actions by or against Indians in Indian country is similar to the existing situation in certain other States as authorized by Federal law, but the provision

--although containing some protections, lacks the same protections for trust land and federally guaranteed water, hunting, trapping or fishing rights as contained in existing Federal law -- 25 USC 1321(b) and 1322(b),

--covers lands and other natural resources owned by the United States, for its own use and not held in trust.

--leaves in doubt whether the Houlton Band retains any civil or criminal jurisdiction.

2. Waiver of sovereign immunity -- Sec. 6(c)

This provision would waive sovereign immunity for the Houlton Band and the corresponding waiver for the Passamaquoddy and Penobscot tribes when they act in a proprietary function.

-- Although Congress has the authority to waive a tribe's sovereign immunity, it has done it only occasionally and then usually in a limited fashion, and

-- the provision needs clarification to determine what types of tribal business are covered for the Passamaquoddy and Penobscots.

3. Payment of money judgments from tribal trust fund income -- Sec. 6(c)

This provision allows persons with unpaid final, money judgments against the Passamaquoddy or Penobscot tribes to obtain payment from the Secretary of the Interior, using income from the proposed tribal trust funds. The provision

--is unique in regard to Federal Indian law,

--imposes an administrative burden on Interior to assess money judgment claims and defend litigation, and

--creates ambiguity because the Secretary is required by an earlier provision to make available to the tribes their trust fund income "without any deductions".

4. Congressional consent to amendments made to the State law implementing the settlement -- Sec. 6(d)

This provision is an apparent attempt to authorize unilateral State changes to the State and Federal laws implementing the settlement.

--The provision is unique because it would allow the Federal act and United States interests regarding the settlement to be amended by subsequent State amendments.

--In addition, should a Federal act ratify an ambiguous State act in a blanket manner?

5. Full faith and credit for tribal judicial proceedings--Sec. 6 (f)

Pursuant to this provision, the United States, every State, every U.S. territory, and every Indian tribe shall give full faith and credit to the judicial proceedings of the Passamaquoddy and Penobscot tribes, but,

--under recent Federal case law, full faith and credit is not given to tribal court proceedings by Federal courts, although "comity" plays a role,

--the United States would be treating the judicial proceedings of the two Maine tribes differently from those of all other tribes, and

--the provision would require Federal courts to recognize tribal adjudications even if they violate the Indian Bill of Rights, since Federal courts do not have jurisdiction to review tribal government actions as a result of the 1978 Supreme Court decision in Santa Clara Pueblo v. Martinez.

6. General non-applicability of Federal laws affording special status to Indians--Sec. 6 (g)

This provision requires that Federal laws providing benefits, programs, or services to Maine Indians or tribes because of their status as Indians not apply in Maine, except to the extent Federal funds were provided the tribes. The provision

--is unique, because in no other instance does the Federal Government provide funding to tribes without statutory guidance as to the nature of the trust responsibility,

--is unclear as to tribal and State intent,

--would cause major uncertainty over which laws in Title 25 of the U.S. Code apply to Maine, and

--raises questions whether individual tribal members could receive Federal scholarship, employment, welfare, or health care assistance directly from the United States because only the tribes are eligible for such funding. However, the tribes might be prohibited from administering certain Federal programs due to the non-applicability of the Indian Self-Determination Act which authorizes tribes to run these programs themselves.

7. Land Alienation--Sec. 5 (e)

The settlement provision involving trust land status authorizes substantial changes from existing Federal law:

--The general restriction on non-alienation of tribal land except pursuant to Federal law is removed.

--Land owned by the Houlton Band, whether in trust or not, is not subject to any restrictions on alienation.

--Land in Indian Territory held in trust for the Passamaquoddy or Penobscot tribes retains restrictions on alienation, and, pursuant to the settlement, the Secretary of the Interior's authority to approve conveyances is somewhat more limited than for other tribes.

--Passamaquoddy or Penobscot land outside Indian Territory and in "organized and incorporated" areas of the State would be subject to no alienation restrictions--whether or not the land is held in trust. (Apparently, a substantial portion of the land to be purchased for the tribes will be outside of Indian Territory.)

--The removal of the traditional non-alienation provisions for trust land affects the U.S. ability to protect its title to the land, is a major change from Federal policy protecting tribal trust lands from alienation, and renders the U.S. trust responsibility ambiguous at best.

--Tribal land would be subject to State eminent domain proceedings.

8. Taxation--Sec. 6208 of the State act

The State act provides for State tax exemption for the settlement trust fund and income derived therefrom--this is similar to the State action taken in the Rhode Island Indian claims settlement. However, other tax provisions in the State act differ substantially from Federal law:

--The Passamaquoddy and Penobscot tribes agree to make payments in lieu of State real estate and personal property taxes on land in Indian Territory--currently, all trust property is exempt from such taxation, and tribes do not make alternative payments.

--Other trust property (i.e., all land held for the Houlton Band and all land held for the other two tribes outside of Indian Territory) is subject to levy and collection of taxes by all State taxing authorities--this, apparently would mean tax payment by the United States as trustee, or by the beneficiary tribes, and could allow trust property to be sold for non-payment of taxes. The Federal Government could be placed in the position of investing millions of its dollars in a legislative scheme for tribal development, only to see the resources dissipated in a short period of time.

--Taxation of trust land has two important implications: (1) it is contrary to current Federal law and policy whereby Indian lands are held by the U.S. in trust in order to prevent their loss from Indian ownership; and (2) it would, in an unprecedented manner, allow the State to tax interests of the Federal Government contrary to basic constitutional law.

--Under existing Federal case law, States cannot tax Indian income earned on reservations or income directly derived from trust property. Similarly, income from tribal activities is not taxed by the State, unless the tribal business is incorporated pursuant to State law. The State act eliminates these tax exemptions for the tribes and individual Indians.

9. Municipality Status of the Tribes--Sec. 6206 of the State act

The State act would provide the Passamaquoddy and Penobscot tribes with the powers and liabilities of a municipality under Maine law. However, other sections of the State act would largely repeal current State law provisions on tribal organization. The Maine tribes have no constitution, charter, or organic act defining their structure and powers (as have many tribes nationwide and all other Maine municipalities).

--By granting the two tribes municipality status, the State act would seem to limit tribal authority and subject it to State control (a unique situation for the U.S.). What authority will be delegated is not specified.

--Can the tribes exercise municipality powers without a charter? How will the future stability of tribal government be assured without some type of organic act for each tribe? Should the Federal legislation provide for such a constitution, charter, or organic document? Any entity, whether private or public, would seem to need such a charter to conduct business and manage valuable resources in an efficient manner.

10. Extinguishment of claims under State law--Secs. 4 (a) (ii) and 11

These provisions would extinguish Indian claims existing under State, not Federal, law.

--Is this appropriate in Federal legislation? Is it not purely a State matter?

--Is the Federal Government being unnecessarily exposed to potential, unnecessary liability?