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United States Senate

SELECT COMMITTEE ON INDIAN AFFAIRS

WASHINGTON, D.C. 20510

September 15, 1980

TO: John Melcher, Chairman, and Committee Members

FROM: Peter Taylor, Special Counsel
Timothy Woodcock, Minority Counsel

SUBJECT: Briefing memo for mark-up of S. 2829, a bill to settle the Maine Indian Land Claims.

PURPOSE:

S. 2829 is intended to extinguish claims raised by three Maine tribes, the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians pursuant to allegations that certain land transfers embodied in treaties between the States of Massachusetts and Maine in which the tribes surrendered their aboriginal title to land are invalid for having been made in violation of the Federal Trade and Intercourse Act of 1790, also known as the Non-Intercourse Act, and its successor legislation. The applicable provision of this Act is now codified in Section 177, Title 25 United States Code and reads as follows:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The Maine claims are the largest of several claims that have been raised in states on the East coast. At issue are land transfers involving as much as 12.5 millions, or more than 60% of the State, on which more than 350,000 people now reside.

If these claims were fully litigated it would doubtless cause

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Indians. These lands will be held by the United States in trust for the three tribes subject to restraint on alienation except as specified in Section 5.

Section 6 provides for the general application of the civil, criminal and regulatory laws of the State of Maine to persons and property within the Indian territories except as specified in subsections (d) and (e). Subsection (e) adopts the Maine Implementing Act and provides that the State may amend the provisions of that Act only with the prior consent of the Passamaquoddy Tribe and Penobscot Nation. The Maine Implementing Act sets forth the terms of agreement between the Tribe and Nation with the State of Maine with respect to the jurisdiction of the Tribe, the Nation and the State and the legal status of the tribes under State law.

Essentially the Maine Implementing Act accords the Passamaquoddy Tribe and Penobscot Nation the status of a municipality under State law; it provides for the application of State law to persons and property within the Indian territory; it provides for the tribes to make payments in lieu of taxes on real and personal property within the Indian territory; it provides that the Tribe and Nation will adopt certain laws of the State as their own but the independent legal status of the tribes under Federal law is recognized; it establishes the authority of the Tribe and Nation to enact ordinances applicable to all persons within the Indian territory, provides that the State shall enforce tribal ordinances as to offenses by non-members or offenses by members committed within their respective reservations where the potential penalty exceeds imprisonment for six

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months or a fine of \$500.00; it reserves to the Tribe or Nation exclusive authority over internal tribal matters, jurisdiction over minor offenses and juvenile offenses committed by members within their respective reservations, and reserves to the tribes small claims civil jurisdiction, and matters of domestic relations including support and child welfare involving their own members.

To facilitate implementation of the Maine Act, Sec. 6 (d) provides that the Passamaquoddy Tribe, Penobscot Nation and the Houlton Band of Maliseet Indians and their members may sue and be sued in State and Federal courts the same as any other person or entity, provided that principles of immunity applicable to municipalities in the State of Maine are applicable to the Tribe and the Nation when acting in their governmental capacity. Since the trust lands and trust fund of the tribe and nation are exempt from levy or attachment or from alienation, provision is made for payment by the Secretary of income from the Trust Settlement Fund in satisfaction of valid, final orders of the courts.

Section 6(h) provides that the general laws of the United States which are applicable to Indians because of their status as Indians are applicable to the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians, except that no such law which affects or preempts the civil, criminal or regulatory jurisdiction of the State of Maine shall be applicable. The Tribe, Nation and Band are specifically recognized as eligible to receive benefits provided by the United States to Indians because of their status as Indians.

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Section 11 provides for the transfer of tribal trust funds from the State of Maine to the Secretary of the Interior. Section 12 provides for the general discharge of the State of Maine from existing or further claims. Section 13 provides that this Act shall not be construed as conferring jurisdiction upon any Indian, Indian tribe or band, to sue the United States except as provided in this Act.

Section 14 authorizes the appropriation of \$81.5 million to implement the provisions of Section 5. Section 15 provides that if the extinguishment provisions of Section 4 are held invalid then the entire Act shall be invalidated.

Section by Section Analysis
S. 2829, the Maine Indian Claims
Settlement Act of 1980

Section 1. Short Title.

Sec. 1 provides that the Act may be cited as the "Maine Indian Claims Settlement Act of 1980."

Section 2. Congressional Findings and Declaration of Policy.

Sec. 2(a)(1) describes the basis of the claim the Maine Indian tribes have raised against the State of Maine and private landowners owning land in certain areas of the State of Maine. Subsections 2(a)(3) through (6) establish that the Houlton Band of Maliseet Indians, the Penobscot Nation, and the Passamaquoddy Tribe are the sole successors of those aboriginal entities from which the land was taken, allegedly in violation of federal law.

Subsection 2(a)(7) finds that other tribes, nations, or bands which may once have held aboriginal title within the State of Maine have long ago abandoned their holdings.

Subsection 2(a)(8) refers to the Maine Implementing Act which was passed by the Maine State Legislature on April 3, 1980 and which embodies various jurisdictional agreements between the parties.

Subsection 2(a)(9) recounts the contributions the State of Maine has made to welfare of Maine Indians. According to recent court decisions, Maine was never required to make these contributions and, in light of them, the State of Maine has not been required to make further direct contributions to this settlement.

Subsection 3. Definitions.

Section 3 contains definitions of terms used throughout the

Claims Settlement Act. Of particular importance, among these definitions are:

Subsections (1); (9), and (12) which establish that the tribes participating in the settlement are the sole successors to the aboriginal tribes and that they are represented by their respective governing bodies.

Subsection (2) refers to "Indian Territory." This land is given a special jurisdictional status under the Maine Implementing Act.

Subsection (3) refers to "land or natural resources." This term is to be interpreted consistently with the term "land and other natural resources" in the Maine Implementing Act.

Subsections (8) and (10) defines the Indian territory of the Passamaquoddy Tribe and Penobscot Nation by reference to the Maine Implementing Act. The Maine Act specifically describes approximately 400,000 acres of land within the state from which the Secretary of the Interior may acquire 150,000 acres on behalf of the Tribe and the Nation respectively. Upon selection and acquisition such land becomes in addition to their "Reservations", the "Territory" of the Tribe or Nation respectively.

Subsection (15) defines the word "transfer." It is intended to have a comprehensive meaning and to cover all conceivable events and circumstances under which control of land can pass from one person or group of persons to the control of another person or group of persons.

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Subsection 4(d) provides that the extinguishing and barring provision shall take effect immediately upon the appropriation of the funds necessary to implement Section 5 of the Act.

Section 5. Establishment of Funds

Section 5 consists of 10 subsections.

Subsection 5(a) establishes a trust fund for the benefit of the Penobscot Nation and Passamaquoddy Tribe in the amount of \$27 million.

Subsection 5(b) describes the manner in which the fund shall be allocated and how it shall be managed. The principal of the fund shall in no event be distributed to the Passamaquoddy Tribe or Penobscot Nation or any individual members of those tribes. The Secretary of the Interior is protected from unwarranted liability in administering the settlement trust fund in subsections 5(b)(1) and (3).

Subsection 5(c) establishes a land acquisition fund in the amount of \$54.5 million.

Subsection 5(d) provides that the funds shall be used to acquire land or natural resources for the tribes and describes the manner in which it shall be apportioned. The subsection also authorizes the Secretary of the Interior to take land in trust for the Houlton Band of Maliseet Indians but that in no event shall land be taken in trust for that Band without the approval of the Maine State Legislature. The provision of this subsection regarding acquisition of land for the Houlton Band is designed to allow good faith negotiations by the parties to secure acceptable land subject to conditions initially satisfactory to the Band and the State.

Subsection 5(e) empowers the Secretary to perfect title to the

land acquired through normal condemnation procedures provided the owner of the land has agreed upon the purchase price or valuation. The Secretary is limited in his ability to acquire land or natural resources for any Indians or Indian Tribes in Maine to the authorities provided in this Act.

Subsection 5(f) would prohibit the Secretary from expending any sums for the benefit of the Penobscot Nation, the Houlton Band of Maliseet Indians, or the Passamaquoddy Tribe either under the Maine Claims Settlement Fund or the Maine Indian Claims Land Acquisition Fund until he determines that the tribes have relinquished all claims of the tribes against the State of Maine or individual citizens of the State of Maine.

Subsection 5(g)(1) provides that the Nonintercourse Act (R.S. 2116, 25 USC 177) shall not apply to the Maine Indians.

Subsection 5(g)(2) which provides that all land acquired for the Maine tribes which either falls within the bounds of their reservations or is included within "Indian Territory" shall be subject to a restraint against alienation.

Subsection 5(g)(3) permits the lands and natural resources within Indian Territory to be used in certain ways pursuant to established federal law governing Indian trust lands. Subclause (E) of that section establishes the right to exchange parcels of land within Indian Territory for land of near equal value. This provision closely tracks the language of the Federal Land Policy and Management Act (43 USC 1716). Subclause (F) of subsection 5(g)(3) requires that the Secretary locate a willing seller of land and effect a contract or option with him before selling any land within Indian

Territory,

Subsection 5(h) permits the Secretary and the Penobscot and Passamaquoddy Tribes to set the terms under which the land acquired under this Act shall be administered.

Subsection 5(i)(1) provides that trust land held for the benefits of the Passamaquoddy Tribe and Penobscot Nation may be taken for public uses under State law as provided in the Maine Implementing Act. Section 6205 of the Maine Act provides a procedure of acre for acre compensation for taking of reservation lands. It also provides that monetary compensation for a taking of lands in Indian Territory and provides such funds shall be reinvested in land through the Maine Indian Claims Land Acquisition Fund.

Subsection 5(i)(2) provides generally that the State of Maine is able to condemn land held by the tribes in Indian Territory. Subsection 5(i)(3) places condemnation proceedings in United States District Court but provides that courts of the State of Maine are empowered to review condemnation proceedings of the Maine Public Utilities Commission as set forth in the Maine Implementing Act.

Subsection (j) provides that, in the event land held for the benefit of any of the three tribes is condemned under federal law, the compensation received for the land taken shall be reinvested through the Maine Indian Claims Land Acquisition Fund.

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Section 6. Application of State Laws.

Section 6 has eight subsections.

Subsection 6(a) provides generally that the three tribes participating in the settlement shall be subject to the criminal and civil laws of the State of Maine. The only exceptions are set forth in Subsection (d) and (e) of this section which will be discussed further below.

Subsection 6(b). The Executive is to submit recommended language based on current consultation with State authorities.

Subsection 6(c) provides that the federal government is barred from asserting criminal jurisdiction in the State of Maine. This avoids problems of concurrent State and Federal jurisdiction.

Subsection 6(d) establishes that the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians may sue and be sued in the State of Maine and in the courts of the United States just as any person or entity within the State might sue or be sued. The Penobscot Nation and Passamaquoddy Tribe are acknowledged to be immune from suit when they or their officers are acting in their governmental capacity to the same extent that municipalities and their officers are immune from suit within the State of Maine.

Subsection 6(d)(2) provides that, notwithstanding any provision of the Anti-Assignment Act, the Secretary of the Interior is empowered to take notice of valid judgments against the Penobscot Nation and Passamaquoddy Tribe and to satisfy the creditors with

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the income received from the Maine Indian Claim Settlement Fund.

Subsection 6(e)(1) permits the State of Maine and the Penobscot Nation and the Passamaquoddy Tribe to enter into agreements which will be enacted by the Maine State Legislature and included in the Maine Implementing Act. A proviso in this subsection limits the subject matter of those agreements to three specific areas. Subsection 6(e)(2) extends the authority to enter into agreements with the State of Maine to the Houlton Band of Maliseet Indians over jurisdictional issues.

Subsection 6(f) recognizes the jurisdictional authority of the Penobscot Nation and Passamaquoddy Tribe as embodied in the the Maine Implementing Act.

Subsection 6(g) provides that the courts of the State of Maine and the courts of the Penobscot Nation and Passamaquoddy Tribe shall accord full faith and credit to the judgements of the court's of each.

Subsection 6(h) provides that, unless otherwise provided in this Act or the Maine Implementing Act, the general body of federal Indian law applies to the Passamaquoddy Tribe, Penobscot Nation and Houlton Band of Maliseets within the State of Maine, except that laws which accord special status or rights to Indians or tribes shall not apply within the State of Maine if they would affect the civil and criminal jurisdiction of the State of Maine. Subsection 6(h) also provides that the Penobscot Nation, the Passamaquoddy Tribe, and the Houlton Band of Maliseet Indians are federally recognized tribes and that they are subject to same

eligibility criteria as other Indians in securing financial benefits and assistance from the United States. Subsection 6(h) provides further that for purposes of federal taxation the Houlton Band of Maliseets, the Penobscot Nation, and the Passamaquoddy Tribe shall be treated as other federally recognized tribes and that their lands which are held in trust for them shall be considered reservation land for federal tax purposes.

Section 7. Tribal Organization.

Subsection 7(a) empowers the Penobscot Nation, the Passamaquoddy Tribe, and the Houton Band of Maliseets to adopt an appropriate instrument to govern affairs of the tribe. This is not required.

Subsection 7(b) limits participation in the Maine Indian Claims Settlement Act by the Houlton Band of Maliseet Indians to those Maliseet Indians who are citizens of the United States or who, as of the date of this Act, are enrolled members of the Band. The limitation also applies to benefits available from the United States by virtue of federal recognition of the Band. The Band is empowered to redefine its membership rolls with the approval of the Secretary.

Section 8. Implementation of the Indian Child Welfare Act.

Subsection 8(a) authorizes the Penobscot Nation and the Passamaquoddy Tribe to assume exclusive jurisdiction over Indian child custody proceedings under the Indian Child Welfare Act of 1978. (25 U.S.C. § 1901).

Subsection 8(b) establishes that the Secretary shall review petitions for the assumption of jurisdiction over Indian child

custody proceedings which are made by the Penobscot Nation or the Passamaquoddy Tribe. The Secretary shall consider the petitions as provided in sections 108(b) and (c) of the Indian Child Welfare Act.

Subsection (c) provides that where a court already has jurisdiction over Indian child custody proceedings, it shall not be affected by an assumption of jurisdiction pursuant to this section.

Subsection (d) of section 8 provides that, for purposes of this section, the reservations of the Passamaquoddy Tribe and Penobscot Nation shall be considered reservation under section 4(10) of the Indian Child Welfare Act. Indian territory lying outside the reservation is not considered part of the tribes' reservations.

Subsection 8(e) provides that, should there be an interim period within which the Passamaquoddy Tribe or the Penobscot Nation has not assumed jurisdiction Indian child custody proceedings, jurisdiction will lie with the courts of the State of Maine.

Section 9. Effect of Payments to Passamaquoddy Tribe, Penobscot Nation, and Houlton Band of Maliseet Indians.

Section 9 has three subsections.

Subsection 9(a) provides that the receipt of income by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall not be considered by any agency of the federal government in determining the eligibility of the State of Maine for federal financial assistance.

Subsection 9(b) provides that, the receipt of payments from the State of Maine or the simple eligibility for payments by the State of Maine by the Passamaquoddy Tribe and the Penobscot Nation shall not be computed by the federal government in determining the eligibility of the Penobscot Nation and Passamaquoddy Tribe or any of their members for federal assistance. A proviso to this subsection permits the federal agency to consider the actual need of the applicant if the financial assistance is dependent on a showing of need.

Subsection 9(c) funds which are forthcoming to the tribes and their members under the terms of this Act are not to be used to deny or reduce benefits to any Indian household or member of that household under any federally assisted housing program. Funds available to the tribes under this Act are also not to be used to deny or reduce federal assistance or benefits to either tribe.

Section 10. Deferral of Capital Gains.

Section 10 permits landowners who are selling their land under this Act to treat the sales as events occurring under Section 1033 of the Internal Revenue Code. This provision of the Code covers involuntary conversions of property.

Section 11. Transfer of Tribal Trust Funds Held By the State of Maine.

Section 11 provides for the transfer of funds currently held in trust for the Penobscot Nation and Passamaquoddy Tribe to the Secretary. The receipt of these funds by the Secretary shall

constitute a discharge of any claims which may be raised on the basis of their having been wrongfully managed. The Secretary shall execute releases of the State and its officers to that effect upon receiving the funds.

Section 12. Other Claims Discharged By this Act.

Section 12 releases the State of Maine from any obligations it may have pursuant to any treaty or agreement with an Indian Tribe. The court cases which the Penobscot Nation and Passamaquoddy Tribe have pending against the State of Maine in United States District Court for the District of Maine are specifically included herein.

Section 13. Limitation of Actions.

Section 13 provides that this Act shall in no way be construed to grant jurisdiction to sue the United States regarding the claims extinguished by the operation in this Act.

Section 14. Authorization.

Section 14 authorizes the allocation of \$81.5 million to fulfill the purposes expressed in this Act.

Section 15. Inseparability.

Section 15 provides that if any portion of Section 4, the extinguishment section, is found to be invalid, it is the intent of Congress that the whole Act fail. Should any other portion of the bill be held invalid, however, it is the intent of the Congress that the rest of the Act remain in force.

Section 4. Approval of Prior Transfers and Extinguishment of Indian Title and Claims of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, and any other Indians, or Tribe or Band of Indians within the State of Maine.

Section 4 consists of three subsections.

Subsection 4(a) extinguishes any claim which Penobscot Nation, the Houlton Band of Maliseet Indians, the Passamaquoddy Tribe, or any other Indian or groups of Indians might raise on the assertion of a violation of the Nonintercourse Act or other federal law with a limited exception noted here in this subsection. The language is intentionally broad and is designed to extinguish all claims based on land transfers arising before the enactment of this Act. It is the opinion of the Department of the Interior that the language will effectively extinguish the claim.

Subsection 4(a)(2) bars the United States from asserting any claims based on the transfer of land or natural resources by treaty, compact or other device or event which may have occurred in violation of Maine State law.

Subsection 4(a)(3) bars the United States from asserting any individual claims arising from violation of state law prior to December 1, 1873.

Subsection 4(b) states for further emphasis that any claim based on aboriginal title is hereby extinguished.

Subsection 4(c) extinguishes all claims for damages by the Maine tribes or their members arising from the allegedly illegal use and occupancy of the land since the transfers were effected.

Subsection 4(d) provides that the extinguishing and barring provision shall take effect immediately upon the appropriation of the funds necessary to implement Section 5 of the Act.

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Subsection 5(d) provides that the funds shall be used to acquire land or natural resources for the tribes and describes the manner in which it shall be apportioned. The subsection also authorizes the Secretary of the Interior to take land in trust for the Houlton Band of Maliseet Indians but that in no event shall land be taken in trust for that Band without the approval of the Maine State Legislature. The provision of this subsection regarding acquisition of land for the Houlton Band is designed to allow good faith negotiations by the parties to secure acceptable land subject to conditions initially satisfactory to the Band and the State.

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Subsection 6(d)(2) provides that, notwithstanding any provision of the Anti-Assignment Act, the Secretary of the Interior is empowered to take notice of valid judgments against the Penobscot Nation and Passamaquoddy Tribe and to satisfy the creditors with

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