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August 19, 1980

Honorable John Melcher
Chairman, Select Committee on Indian Affairs
United States Senate
Washington, D.C.

Re: S. 2829 "The Maine Indian Claims Settlement Act."

Dear Chairman Melcher:

I received late last week from the Secretary of Interior a copy of his letter to you dated August 8, 1980, forwarding a proposed redraft of this bill and offering certain comments to the Committee on its effect. As the letter of the Secretary reflects, the proposed redraft was prepared after discussion with the State of Maine and the Tribal representatives and represents the Administration's effort to clarify the Federal responsibility in the settlement and the long-term relationship of the State and Tribes. We are gratified by the work of the Secretary and his staff and believe that in large measure the proposed redraft is consistent with the original intent of the parties. However, since the redraft does depart in some respects from that original intent, I think it necessary to bring to the attention of the Committee a few brief comments of the State. These comments have been reviewed by the Governor and leadership of the Joint Select Committee on the Indian Land Claims and they concur with them.

The statement of Congressional intent in Section 2(b)(3) states as one of the purposes of the bill that it ratifies the Maine Implementing Act "except to the extent that it is inconsistent with the provisions of this Act." By its terms, however, the Maine Implementing Act takes effect only if ratified by Congress "without amendment." While we do not think that this bill effects any amendments to the Maine Implementing Act, the exception in § 2(b)(3) unnecessarily raises the question of inconsistency between this bill and the Maine Act. Therefore, we urge that this exception be deleted.

Section 4 of the bill is designed to effect the extinguishment of the claim and the proposed redraft to clarify language is acceptable to the State. In his covering letter the Secretary indicates that the Tribes have requested an amendment to the original bill to condition extinguishment on Congressional appropriation of $81.5 million. As the Secretary also correctly notes, the State opposes such modification. I think it is important to reiterate the State's position on this issue. The proposal in the original bill was specifically discussed and agreed to by the parties and its implications clearly understood by both sides. This provision is one of the most important sections in the bill and was critical to the State's agreement to the settlement. Alteration of the bill at this stage at the unilateral request of the Tribes would work a substantive change inconsistent with the original understanding of the agreement by myself, the Governor and the Maine Legislature, and would compel reconsideration of the State's support of this bill. To the extent that the Committee might have concern with the provision, there is recent Congressional precedent for this approach, including the Alaska Native Claims Settlement Act and the Rhode Island Land Claim Settlement. As you are aware, in the Alaska Settlement, the claim was extinguished immediately and final payment to the Tribes required subsequent appropriations over ten years. We are confident that Congress would similarly honor its obligation to appropriate the funds authorized by this Act. The Secretary's letter states the Administration's intention to seek the necessary appropriation in FY 1981 and we are fully prepared to support that request for appropriation. We think, therefore, that the Tribes' request is unnecessary and that Section 4 should be adopted as proposed by the Secretary. Should, however, the Committee believe that some additional language is necessary to protect the Tribal interests, a possible alternative would be to provide the Tribes with a remedy against the United States in the U.S. Court of Claims. Such an approach would give the Tribe a claim for damages should the anticipated Congressional appropriation not be provided within a time certain.

Section 5(d)(3) of the bill authorizes the Secretary to acquire land in trust for the Houlton Band of Maliseet Indians provided that such acquisition does not occur without the prior concurrence of "authorized officials of the State of Maine." We have no objection to the substance of that provision, but we are concerned that the quoted phrase may be ambiguous and create problems in the future regarding the identity of such "authorized officials." Accordingly, and consistent with the procedure employed in adopting the Maine Implementing Act, we suggest that the proviso be rephrased as follows:

"Provided, that no land or natural resources shall be so acquired without the prior enactment of appropriate legislation by the State of Maine approving such acquisition."

The sentence following this proviso and the reference to the Houlton Band of Maliseet Indians in subsections 5(f), 5(h) and 5(i) are also of concern to us and we believe they may be the source of future confusion. Since matters such as payments for governmental services by the Houlton Band and the status of any lands to be acquired for them will have to be negotiated in detail with the State before any future land acquisition for them, the referenced provisions are unnecessary and confusing. Moreover, the notion embodied in § 5(d)(3) that the Houlton Band would contract for services is inconsistent with the entire concept of the Maine Implementing Act. Under that Act the Passamaquoddy Tribe and Penobscot Nation will pay fees in lieu of taxes, such fees determined by using usual taxing formulas. The concept of the Maine Implementing Act is that the Tribes and their members are ordinary citizens of Maine eligible for all services without the necessity for contracts, and accordingly must bear their fair share of the cost of such services.

Section 6(e)(2) of the redraft authorizes the State and Houlton Band to negotiate and adopt agreements on the status of their lands in the future, and this subsection is more than sufficient to authorize the Houlton Band to negotiate on subjects such as this with the State when they have located land for proposed acquisition. Specific provisions regarding the status of such lands in sections 5(f), 5(h) and 5(i) may inhibit the search for creative approaches to the State/Band jurisdictional relationship in the future. Therefore, we strongly urge that the sentence immediately following the first proviso in § 5(d)(3) and reference to the Houlton Band in subsections 5(f), 5(h) and 5(i) be deleted.

Section 5(h) of the redraft is an elaborate provision restating in large measure provisions already contained in the Maine Implementing Act which Act will itself be ratified by Congress. To the extent the Committee or Administration thinks that specific restatement of the State's authority to exercise eminent domain in Indian Territory is required in this bill, we think that end could have been accomplished more simply by a sentence authorizing the exercise of eminent domain as provided in the Maine Implementing Act. Nevertheless, we do not object to the contents of paragraphs 5(h)(1) or 5(h)(2) as proposed.

However, paragraph 5(h)(3) is of concern to us and unfortunately was not previously discussed with the parties before it was included in the Administration's redraft. This new paragraph requires that eminent domain under the Maine Implementing Act occur in the U.S. District Court and that the Federal government be a party to such proceedings. The eminent domain provisions of the Maine Implementing Act, §§ 6205(3) and 6205(4), were, like other sections, negotiated at great length, drafted with care and agreed to by both sides. Among other things it was the clear contemplation of the parties that all eminent domain proceedings involving Indian Territory would involve State statutory procedures in State forums. A proposal to conduct such proceedings in Federal Court was specifically discussed and rejected by the parties. The new proposal in § 5(h)(3) is inconsistent with the parties' agreement. We do not see any need for the provision and respectfully suggest that no sufficient justification for it is found in the Secretary's letter of August 8, 1980. We urge that paragraph 5(h)(3) be deleted.

Section 6(a) contains a proviso not in the original bill and which could, as phrased, be the source of future confusion. That proviso limits the exercise of State jurisdiction by, in effect, prohibiting the taxation, encumbrance or alienation of Indian trust lands in Maine. While the proviso is largely a restatement of limitations otherwise appearing in this bill and the Maine Implementing Act, and to that extent we have no objection to it, we think that it raises the possibility that the fees assessed under § 6208(2) of the Implementing Act might be prohibited. We think, therefore, that the clarity of the bill would be greatly enhanced if the Committee report confirmed that the proviso was not intended to be inconsistent with §§ 6208(2) and (3) of the Maine Implementing Act. Thus, the fees in lieu of taxation on land within Indian Territory could not later be argued to be inconsistent with the proviso.

Section 6(h) contains several provisos, the second of which relates to the status of the Tribes and Tribal lands for Federal tax purposes. This same proviso appears in the original bill negotiated by the parties in Section 6(g). At the time of negotiation of the original bill, it was the clear understanding of the parties that this proviso would result in the Passamaquoddy Tribe, Penobscot Nation and Houlton Band being exempt from payment of Federal income taxes (see Revenue Ruling 67-284, C.B. 1967-2, pp. 55-58) and might result in them being exempt from other Federal taxes. However, the parties also contemplated that by virtue of § 6208(3) of the Maine Implementing Act, all Indians, Indian Tribes, Nations or Bands of Indians would be required to pay all Maine taxes like any other person or entity in Maine. When the Maine Legislature

enacted the Maine Implementing Act they were clearly lead to believe that, whatever the Federal tax status, the Passamaquoddy Tribe, Penobscot Nation or Houlton Band would be required to pay Maine income taxes and would not be exempt from such Maine taxes by virtue of any exemption from Federal taxes. During the course of discussions with the parties, the Administration proposed the addition of a new section which now appears in the redraft as Section 7. The new Section 7 as first proposed to the parties would have included a subsection (b) which would have provided, in part, that any Tribal corporations would be subject to Maine tax laws regardless of any exemption from Federal taxes. That proposed subsection was deleted in the redraft submitted to the Committee for reasons unknown to us. In order to avoid future misunderstandings, and because the Governor of Maine and the Legislative leadership are particularly concerned that their earlier understanding be reflected in this bill, I think it is essential that the State's understanding of the obligation of the Tribe, Nation and Band to pay State taxes as stated herein either appear in this proviso or the accompanying Congressional report. We suggest that the provision be amended by the addition of a sentence to read:

> "This provision shall not affect taxation of such Tribe, Nation or Band under the laws of the State of Maine or the Maine Implementing Act."

With these limited comments we think the redraft of the Secretary is consistent with out original intent. We have tried to keep our comments to a minimum and have avoided commenting on every detail of the redraft even if we felt its language could be improved. It should be understood, however, that we consider these changes to be essential in order that the final bill be consistent with the understanding that the Governor and Legislature had with respect to the original bill and the representations made by all concerned regarding the effect of the settlement.

Please feel free to contact us if we can be of further assistance.

Sincerely,

RICHARD S. COHEN
Attorney General

RSC:mfe

cc: Honorable Cecil D. Andrus
Honorable William S. Cohen
Honorable George J. Mitchell
Thomas N. Tureen
Reid P. Chambers