

Statement of Wayne P. Libhart, Esquire, of Ellsworth, Maine and  
James S. Erwin, Esquire, of York, Maine,  
on the subject of Chapter 732 of the Public  
Laws of Maine entitled The Maine Indian Claims Settlement:

This statement assumes that this Committee has as a part of its permanent record and has read the following:

(a) "Summary of Massachusetts/Penobscot Relations-UPDATE," August 20, 1977 by the late Professor Ronald F. Banks of the University of Maine at Orono, Maine.

(b) "State Power and the Passamaquoddy Tribe: A Gross National Hypocrisy," Francis J. O'Toule and Thomas N. Tureen, Maine Law Review, Volume 23, November 1, 1971.

(c) Symposium on Indian Land-Eastern Land Claims-The Entire Volume, Volume 31, November 1, 1979.

The differing viewpoints of the issues here involved are thoroughly discussed in those writings, and the applicable history and documents are presented therein. We will not attempt to summarize the salient points in these writings except to comment on what we perceive to be errors. If any member of this Committee has a basic familiarity with the issues involved, it will be because he has carefully read these above-listed writings. There are, of course, many others, but we feel that these stated above cover both sides of the issue quite well. Our position on the passage of this Act of the Maine Legislature is basically outlined as follows:

(a) The Congress of the United States has the power to extinguish the claims of all Maine Indians to Maine lands. (To our knowledge no serious scholar contests this.)

(b) Because the claims of Maine Indians now pending in the United States District Court for Maine pose a serious threat to innocent Maine property owners, those claims should be extinguished (see, for example, American Land Title Association Memorandum, March, 1978).

(c) If, in fact, Maine Indians have had lands they owned (ownership in this context meaning, we believe, to be title as opposed to possession or presence on the land) taken from them without adequate compensation, or if they have been cheated out of

The Passamaquoddies were seafaring Indians and never ventured far from the sea. They were also Micmacs and Malacites mostly, but there were many intermarriages with the Indians from Old Town. Old Town, by the way, has been an Indian village for some 5,000 years and was originally inhabited by Indians called "the Red Paint People."

It may be that the stipulation of tribal status in the Passamaquoddy Tribe v. Morton takes that issue away as well as the use of a trust relationship, but the extent of the Passamaquoddy claims remains open. We feel that the issues of tribes and of damage are still open, however, because the Supreme Court may yet rule on these issues; the First Circuit Court of the United States left unanswered the ultimate questions upon which the pending suits will depend if the cases reach trial.

There is an additional, very important question to be answered before a satisfactory solution to this problem can be reached. The present claims by the tribes or bands of Indians in Maine are for a large proportion of the land mass of the State. Whether or not these Indians were tribes in the legal sense becomes important in determining whether or not they ever held aboriginal possession of such a large portion of Maine. If the claims ever do come to trial, such issues remain for the court to decide and also as to the matter of damages.

The summary of Professor Banks listed at the opening part of this statement is dated in August of 1977, and it provides documented proof that the Congress has on prior occasions acknowledged, at least by implication if not directly, that the Indian claims to Maine lands have been extinguished. Certainly, Massachusetts, during the time that the Province of Maine was part of Massachusetts, believed that the claims had been extinguished and that the Indians themselves had admitted that they had been conquered and their claims to their lands had been extinguished. We said at the beginning of this statement that the issues involved should not be determined in haste because of the thought that two thirds of the land in Maine may be taken away from its present white ownership and returned to the Indians. If the Indian claims have any merit at all, and if the merit can be established in court, then the Indians should be compensated as Indians in the past have been with money damages; but, as a prerequisite to that, it should be incumbent upon them to prove the merit of their claims in the proper courts.

We would like to comment on one other aspect of this entire problem that it appears others have not addressed and which we believe can become a serious problem for Maine's sportsmen if the act becomes law. Presently Maine sportsmen have access to the great ponds and can hunt game and wildfowl on Maine wildlands by virtue of common law rights derived from the Colonial Ordinances of 1641-47.

Although the proponents of the Maine Indian Claims Settlement Act may state to the contrary, we believe the grants of authority to Maine Indians under the Maine Indian Claims Settlement Act will abrogate those Ordinances on the lands which the Indians intend to acquire. We think that result would be regretted by the people of Maine forever. If Congress approves the Maine Implementation Act as written, it will be almost impossible to alter the Act in future years and Maine sportsmen will lose what we consider a very valuable right in 300,000 acres of Maine land.

Finally, as to the law, we would like to call to the attention of the Committee again the important case decided by the Supreme Court of the United States just recently: Wilson v. Omaha Indian Tribe, \_\_\_\_\_ U.S. \_\_\_\_\_, 61 L.Ed.2d 153. In that case the Court said "but in terms of the purpose of the provisions--that of preventing and providing remedies against non-Indian squatters on Indian lands-- it is doubtful that Congress anticipated such threats from the states themselves or intended to handicap the states so as to offset the likelihood of unfair advantage." Indeed, this 1834 Act, which included Section 22, the provision identical to the present Section 194 was "intended to apply to the whole Indian country as defined in the first section." HR Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi and not within the states of Missouri and Louisiana, or the Territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished... ." Although this definition was discarded in the Revised Statutes, see R.S. 5596, it is apparent that in adopting Section 22, Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the states.

We are most distressed that the Maine Implementation Act, although a long time being negotiated, was rushed through the Maine Legislature without time for close examination of all aspects of the issues. This Committee, therefore, we submit, should do the work which the select committee of the Maine Legislature failed to do. We feel very sure that if this Committee does investigate the historic and legal background of this matter, it will agree that, whatever the solution may be to the Maine Indian lands problem, the present proposed solution is not, in fact, the right one.

Addressing directly the act of the Maine State Legislature entitled "Maine Indian Claims Settlement Chapter 732 Public Laws of the State of Maine 1980," we wish to make the following comment:

1. Notwithstanding the fact that in the Mashpee Indian case in Massachusetts above-cited, the case of the Indian claims was lost because of the plaintiff's failure to prove its existence as a tribe, the Maine Indian Claims Settlement Act, in its definitions and in a fashion of "bootstrapping,"

finds and declares that the claimants are, in fact, tribes; all of them, the Malacites, Passamaquoddies, and Penobscots are declared to be tribes as they were constituted on March 4, 1789, thus ignoring the express historical data compiled by the late Professor Ronald Banks in the update summary quoted at the beginning of this statement. The submitted work of Professor Banks (who was cruelly murdered in New Orleans before he was able to finish his research on this matter) is required reading for any intelligent understanding of the chronological and factual events which negate the claims presently before this Committee. The Legislature of the State of Maine has, as did the Attorney General's Office in the above-stated case of the Passamaquoddy Tribe v. Morton stipulated an essential element of the Indians' claim. The stipulation is unfounded in history and amounts to a logically inexplicable acceptance of a major portion of a claim adverse to the State of Maine.

2. In creating 300,000 acres of new "Indian territory," the advocates of acceptance of the Maine Indian Claims Settlement deny that there is any possibility of creating a sovereign within a sovereign. This would only be true if, in fact, the lands enumerated in the Settlement Act were made available to the Indians for purchase in fee simple and were held by Indians either as individuals or by the tribe as some form of legal entity with exactly the same rights, privileges and obligations that all other landowners in the unoccupied territory of Maine possess and are subject to. Instead, these new Indian territories are conceived of as "municipalities," but they are, in fact, special municipalities that do not exist in exactly the same form anywhere else in Maine. A reading of the provisions concerning law enforcement within these Indian territories shows how the persons who drafted the Settlement Act labored to define and explain the relationship between the Indian tribes and the State of Maine. The result is a hybrid of law enforcement relationships which cannot help for years to come to create severe problems as to where and when state jurisdiction obtains and as to what may happen as the expectations and understandings of whites and Indians within the Indian territories come into conflict, as inevitably they will. The prospects for peaceful and orderly law enforcement in the area of fish and game regulations alone are dubious, to say the least. Any attempt, in later years, in the face of depleted fish and game stocks by the Commissioner to change fish and game laws as to bag limits or species which may be taken can only be regarded by Indians as another instance of the white man taking away from them something which they considered to be theirs of right. We respectfully request this Committee to make a careful analysis of the law enforcement responsibilities and the possible problems which could arise as the matter is covered in the Settlement Act. Note particularly that under Section 6206 of Section 1 General Powers, the Passamaquoddy Tribe and the Penobscot Nation shall designate such officers and officials as are necessary to implement and

administer those laws of the State of Maine that are applicable to the Indian territories. And note, also, under Section 6207 that by Subsection 1(a) the Passamaquoddy Tribe and the Penobscot Nation shall have exclusive authority within their respective Indian territories to promulgate and enact ordinances regulating hunting, trapping, and other taking of wild life. Yet, note by Subsection 6 of the same section in the Act, the Commissioner's powers of supervision may well be in conflict with the tribes' choice of ordinances for hunting, fishing and trapping. This area alone could easily become a nightmare and lead to considerable administrative difficulty and, perhaps, dangerous problems for law enforcement.

The undersigned feel that calling attention to a few points as above will indicate to this Committee that there are some very serious problems with respect to tribal and state relationships which have been unrealistically and perhaps ineffectively dealt with by the Settlement Act. Law enforcement is not an exercise which occurs in a vacuum. It is often and perhaps almost always fraught with emotion and some danger for the law enforcement officers themselves. In Maine, at least, the rights to hunt and fish and trap are widely considered to be inalienable rights by a large proportion of Maine citizens. Clearly, if Maine's Indians are given special, exclusive rights to hunt without limitation for sustenance purposes and non-Indians may not have the same rights, conflicts will begin to crop up. We respectfully request this Committee to make its own in-depth evaluation of the Settlement Act of the Maine Legislature. We think it raises more questions than it answers.

The undersigned--both of whom are active practitioners of law in the State of Maine of many years' standing, are avid hunters and fishermen and, for what it is worth, former members of the Maine State Legislature--believe that even though the so-called settlement was negotiated for many years, the Legislature was given little or no opportunity for in-depth study or review of the negotiations and their decisions and the reasons for them. We believe that most of the legislators voted on the basis of statements made to them as to the chaotic problems that would arise with respect to land titles, future mortgage commitments by banks, and the near impossibility of selling future municipal bonds. We believe that such tactics while presented perhaps by spokesmen who believe they were implicit in continued negotiations or the advent of active lawsuit, the statements themselves foreclosed the individual legislators from asking for the necessary time to think about the proposition and to review it at leisure.

Finally, we do not believe the scare stories because we believe as lawyers that there are court procedures to prevent such untoward freezing of land titles. As we stated above, the simplest way in which the matter could be handled to the satisfaction of nearly everyone except those members of the tribes who literally believe

that they may have returned to them one half of the land in the State of Maine, is for Congress forthwith to extinguish all claims to land of all Indians in the State of Maine and to authorize suits to be brought in the United States courts of proper jurisdiction for the proof of and the award of money damages, if any be deemed appropriate by the courts, which said damages would be paid by the United States of America.

We earnestly submit these thoughts to your consideration, and we are grateful for the opportunity to be heard. We most earnestly request that you will read the documents listed above, and we feel very sure that if you do, you will become convinced as we are that history and the law will make it impossible for the Maine Indians to sustain these claims in any courts of this land.

Respectfully submitted,

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