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AUGUSTA, MAINE 04333

August 12, 1980

Senator John Melcher
Select Committee on Indian Affairs
U.S. Senate
Washington, D.C.

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

Dear Sir:

During the Committee's hearing on this bill on July 1 and 2, 1980, the Committee requested that Governor Brennan, Senator Collins, Representative Post and me to respond in writing to certain questions posed by the Bangor Daily News and former Governor James B. Longley concerning the bill and the State Implementing legislation. This letter constitutes a joint response to that request.

It is important to note that many of the questions posed by both the Bangor Daily News and former Governor Longley contain inaccurate assumptions about this bill and the State legislation which should be corrected to assure a clear understanding of the issues.

The following are questions from Bangor Daily News editorial of March 28, 1980, with our joint response:

1. "What are the implications for Maine if the State legislature ratifies the proposal and the U.S. Congress refuses to go along with the revised and extravagent price tag?"

This question is premised on the initial assumption that the appropriation provided for in the S. 2829 is excessive. Much of the testimony before the Senate Committee addresses this point and there is no need to repeat those points in this letter.

However, several items are worthy of restatement. As my written testimony noted, the payment to the Maine Tribes under S. 2829 is proportionally less than that provided for in the Rhode Island Settlement enacted by Congress in 1978 and is far less than the total cost of the Alaska Settlement. Moreover, the size of the trust fund and the land base provided in S. 2829 first appeared in settlement proposals made several years ago by the Administration. For all these reasons, I have recommended a settlement at the figures contained in S. 2829. The position of Governor Brennan and the Maine Legislative leadership appears in their testimony in the record. Of course, it is ultimately and appropriately the responsibility of Congress to determine the amount of money that should be spent to extinguish these claims.

The possible implications of Congressional failure to enact S. 2829 were presented in detail by several persons who testified before the Committee. That testimony, which details the likely social and economic hardship if the case went to trial, does not need repetition here. If the settlement failed because of the defeat of S. 2829, the fact that the State has enacted the State Implementing Act would have no effect, either legally or otherwise, on the State's position in possible future litigation. The fact that the State and Indian Tribes had attempted to reach a negotiated settlement could not be used as evidence in any future litigation. If any further litigation results from failure to enact S. 2829, the State would have made no concessions and would not have impaired its litigation position by enacting the State Implementing Act. In addition, if S. 2829 were defeated, the State Implementing Act, by its own terms, would not take effect, and current Maine and federal law would remain in place.

2. <u>"Why did the state attorney general agree to let the attorney for the timberland owners and the Indians establish the price tag for the settlement without his participation as spokesman for the state?"</u>

This issue was discussed in my testimony to the Committee. Briefly restated, it was my view, consistent with earlier statements of former Governor Longley, that any land acquired by the Tribes under any settlement should come from willing sellers at fair market value. Since State participation in those sales negotiations could be perceived as pressuring parties to sell, the State officials responsible for negotiations thought it inappropriate to participate in that aspect of the settlement discussions.

3. "If one of the major landsellers, Dead River Co., is prepared to sell much of its timber acreage to the Indians, isn't that highly suggestive of a government giveaway?"

Apparently the assumption here is that the only reason one seller is willing to sell most of its land is that the price is greater than its worth and cannot be refused. Thus, the questions suggest that at least this seller, and perhaps others, would be unfairly enriched. To state the assumption seems sufficient to refute it. However, the Committee also received testimony that explained why the Dead River Co. had decided to sell off most of its timber acreage. Those reasons do not reflect any suggestion of taking advantage of a "government giveaway."

Perhaps the intent of this question was to raise the issue of land values under the settlement. As the Committee heard, the experts retained by various parties agreed that the prices for the acreage involved were fair and in line with current market values for similar acreage in Maine. The Department of Interior's experts also independently reviewed the acreage and prices and agreed that they reflected fair market value.

4. "There are reportedly 9,500 Indian cases yet to be resolved by Congress. When the state Legislature ratifies this settlement offer, it is unwittingly establishing a precedent for the entire country?"

When the Maine Legislature considered the State Implementing Act, it believed that it was following precedent rather than establishing it, in that it was seeking to resolve the claims by negotiated settlement rather than by litigation. The concept of settlement as a precedent was established by the Rhode Island and Alaskan settlements and has consistently been encouraged by the federal government.

Apart from that consideration, the question assumes that all 9,500 Indian claims are the same and that this settlement would be model applicable to all. In fact this is not so. Only a handful of all claims identified thus far are similar in concept to Maine's and none is so large. Most of the western claims have nothing in common with this case other than the fact that the claimants are Indian. It is a mistake, therefore, to assume that this settlement will be a pattern for resolution of all others.

It is in the nature of negotiated settlements that particular provisions meet the requirements of the interested parties. Each settlement must have unique characteristics that reflect the nature and implications of the underlying claim, the relative risks to the parties, traditions of the area involved and the desires of the parties. In this sense, the settlement provisions in the Maine Act and S. 2829 are not precedents. Every future settlement will have to reflect the unique considerations in each case to meet the parties' requirements.

5. "Have all of the intricacies of the jurisdictional language been examined by an expert without vested interest? Does the jurisdictional language bestow a preferential treatment upon the tribes which will foster an unrelenting chain of legal disputes in the years ahead?"

This question incorrectly assumes that the Governor and Attorney General, and their staffs, in accepting the settlement agreement and the Maine Implementing Act, have not carefully reviewed the jurisdictional language in that Act. The question further suggests that the Governor, Attorney General and members of the Maine Legislature somehow had a "vested interest" or personal stake in the matter and were not acting out of concern for the general welfare of Maine citizens. This suggestion is false.

Not only did we carefully review the language of the bill, we brought in outside counsel to do so as well and have encouraged any other experts to review and make corrective suggestions. At the time of enactment of the Maine Implementing Act the intricacies of the State and Indian jurisdictional relationship had been carefully scrutinized by several independent experts, by the Legislature and by many public speakers. It has been knowledgeably and thoroughly assessed and accepted.

The second part of the question contains the assumption that the Indians receive "preferential" treatment. Under the State Implementing Act, the Penobscot Nation and Passamaquoddy Tribe are given certain rights and authority within the 300,000 acres of "Indian Territory." To the extent that these rights and authority exceed that given any Maine municipality, they do so only to a limited extent and in recognition of traditional Indian activities. (The Houlton Band of Maliseets are not granted this "municipal" status). The most significant aspect of this limited expansion of authority is in the area of hunting and trapping and, to a limited extent, fishing in Indian Territory. Even in this area, the Indian Tribes must treat Indians and non-Indians alike, except for subsistence provisions, and Tribal authority can be overriden by the State if it begins to affect

hunting, trapping or fishing outside the Indian Territory. Generally the Act does not provide Indians with preferential treatment. To the contrary, we believe the Implementing Act establishes a measure of equality between Indian and non-Indian citizens normally not existing in other States. Indeed, the Act recovers back for the State almost all of the jurisdiction over existing reservations that had been lost as a result of recent Court decisions.

Obviously no one can guarantee that there will be no litigation in the future over the meaning of certain provisions in the Maine Implementing Act or S. 2829. However, the provisions of S. 2829 and the Implementing Act have been carefully drafted and reviewed to eliminate insofar as possible any future legal disputes. Particular care was taken to insure that S. 2829 is adequate to finally extinguish the land claims, and as to those provisions we are satisfied that they have been drafted as carefully as possible. Nevertheless, litigation over this and other provisions is always possible and we cannot prevent the filing of future suits. Any contract, agreement or legislation always contains unanticipated ambiguities that sometimes can only be resolved through the courts. In our judgment, however, should questions arise in the future over the legal status of Indians and Indian lands in Maine, those questions can be answered in the context of the Maine Implementing Act and S. 2829 rather than using general principles of Indian law.

6. "If the Indians get their money and land in Maine, will the Native American Rights Fund and other foundations that have bankrolled the Indians in their legal quest dispatch an army of well-financed lawyers to Maine to chase down other historic injustices heaped upon the Native Americans by our forefathers?"

Though we cannot say what the plans of the Native American Rights Fund or similar organizations may be, the Maine Implementing Act and S. 2829 clearly and absolutely extinguish all Indian land claims in Maine. These two Acts will finally and completely settle those issues and remove any legal ground for attempting to resurrect the historical incidents that gave rise to the present claims. As to any other disputes that may arise in the future, we assume the Tribes will use available legal resources and rights just as any other citizen would.

7. "What about the so-called "Tribal Commission," which constitutes the critical intermediary body in potential jurisdictional disputes between Indians and non-Indians? Is its membership makeup realistic or evan workable?"

The Tribal Commission's functions are to regulate fishing in Great Ponds and rivers in Indian Territory and to make recommendations on the "social, economic and legal relationship" between the State and tribes. Its balanced composition, with a retired State or Federal Judge as chairman, seems appropriate for its tasks. We believe the composition of the Commission is reasonable and workable and had we not we would not have agreed to its inclusion in the settlement.

8. "In view of the congressional mood to balance the budget, how can Maine's Congressional delegation possibly get behind a settlement proposal whose price tag is two and a half times what was originally agreed to?"

First, the question incorrectly refers to an earlier, less costly settlement as having been "agreed to." While the State did agree in 1978 to a $37 million settlement proposal, the Tribes did not. We know of no settlement proposal that was agreed to by all parties and that involved less money than that called for in S. 2829.

In addition, and as my prepared testimony reflects, the total value to the Tribes of S. 2829 is roughly similar to several earlier settlement proposals sponsored by the Federal government and is less than the value of the proposal of the White House in February, 1978. To the extent that there has been any increase in the estimate of settlement costs, it is largely because of the changing value of land and the fact that land values were understated in earlier proposals. In any event, we would not presume to speak for Maine's Congressional Delegation, the members of the Delegation can adequately respond for themselves. As indicated in our answer to question 1, Congress will have to decide on the appropriateness of the legislation and proposed appropriation, after considering all the factors addressed in testimony given the Committee.

9. "Are Maine citizens prepared to submit, to embrace the expedient lifting of the lawsuit cloud and render to history an irrevocable record of a citizenry intimidated by specters bereft of principle and conviction?"

This is a polemical statement in the form of a question and does nothing to advance reasoned debate of these issues.

The question would have been more fairly phrased if it asked: "Does the Settlement reasonably reflect a fair assessment of risks involved in litigation and is the negotiated jurisdictional arrangement a fairly balanced distribution of governmental authority over tribal lands?" We think that the answer to the question thus phrased is "yes."

The Governor, Attorney General and members of the Joint Select Committee of Maine Legislature have examined the basis for the claim, the risks of litigation and implications of this settlement in detail. All agreed that the settlement now pending was a principled and prudent way to bring this complex legal and social problem to a fair and final conclusion. This is a resolution consistent with our belief that all Maine people ought to be treated equally and fairly and that we should not expose the people of Maine to unnecessary legal and economic risks resulting from a lawsuit if it can be avoided. We believe that the majority of Maine citizens share the view that the settlement represents a reasonable and rational alternative to lengthy, costly and divisive litigation.

The following questions were posed by former Governor Longley in his statement of March 23, 1980.

1. <u>"Why would $81 million dollars plus special tax breaks be negotiated by pulp and paper companies and private landowners, with Indian Legal Counsel, without any state involvement?"</u>

The answer to this question is essentially the same as that in response to Question #2 of the <u>Bangor Daily News</u>. In addition, I would note again that former Governor Longley, when in office, repeatedly stated his belief that the State should not participate in those land negotiations.

2. <u>"Why has the price of land been substantially increased from the time I was Governor, when private landowners quoted prices ranging from $100 to $112 per acre, vis a vis the present price quoted under this settlement agreement of $181 per acre. This is a difference of over $20 million dollars. Who is to receive this money?"</u>

The price of $100-$112 per acre to which Governor Longley refers was a value per acre proposed by the White House in 1978. Inquiries by the State and statements of landowners at the time revealed that figure to be unrealistically low even then. It is therefore inappropriate to use it as the basis for criticizing

the values now proposed. In addition, the price of land, like other things, has risen in the two and one-half years since the value cited by Governor Longley was used by the Administration. Moreover, the value of $181 per acre is an average and includes parcels, some of which are valued at far less and some at more. The identity of the selling, private landowners has already been made public.

3. "To the extent both federal and state taxes are involved, why shouldn't citizens and the news media of Maine have an actual list of:

(a) Land to be purchased and where and from whom?

(b) The price to be paid per acre to individual landowners?"

That information in response to part (a) was presented to the public and the Joint Select Committee of the Maine Legislature at the public hearing on the Maine Implementing Act. It is part of the public record. Values of particular parcels have, we understand, been provided to the Department of Interior in order that it might evaluate the proposed prices. Additional information relative to part (b) has been solicited by this Committee from the landowners involved.

We support full public disclosure of all the details of the transactions between the tribes, the U.S. Department of the Interior and the private landowners as a part of the ongoing public discussion of this issue.

4. "Why wouldn't it be appropriate for the Legislature to ask the Indian Tribes to submit this claim to the United States Court of Claims without any economic sanctions during the trial, if the Indians refuse whatever Congress recommends?"

This proposal is one that was repeatedly suggested by former Governor Longley, but which the Tribe and the Federal government consistently rejected. Asking the Indians to voluntarily abandon their claim to land, as the question suggests, was futile. Continued pursuit of this proposal would have been fruitless.

The basic premise of any settlement is that both parties voluntarily agree to it. The Maine Legislature has no power to erase the Indians' Claims without their consent, and in recent years Congress has indicated that it will not act to resolve Indian claims without Tribal consent. The Indians have continually asserted that they will not settle the claim without some land as well as money. Moreover, in 1976 legislation was introduced in Congress at Governor Longley's request which would have largely accomplished the suggestion contained in this question. The proposal was rejected by Congressional leadership as inconsistent with longstanding Congressional Indian policy.

5. ". . . is it fair to say there is not going to be additional tax imposed on the taxpayers of Maine (as they also pay federal taxes)?"

Presumably the federal appropriation will be paid out of present federal revenues. Thus, it seems fair to say that there will be no additional taxes imposed.

6. "I feel that unless each Maine lawmaker thinks $81 million dollars is fair, they should search their conscience as to whether it is fair to pass the buck to the Maine Delegation and the United States Congress."

The Maine Legislature did not "pass the buck" to anyone. It studied the provisions of the Maine Implementing Act and the proposed federal bill, S. 2829. The Maine Legislature carried out its responsibilities of reviewing and designating the 300,000 acres of Indian Territory and resolving the jurisdictional relationship between the State and the Indian Tribes. The Legislature did not have the responsibility or authority to appropriate the federal money. Thus, it could not make a decision on the appropriateness or fairness of that figure.

7. "Should the federal government or the Indian Tribes reimburse the State of Maine from any settlement they might receive for the millions of dollars the taxpayers of Maine have paid our Indian citizens due to the fact the federal government in the past refused to recognize our Maine Indians as eligible for federal assistance while still pouring millions of dollars into the Western Indian reservations(?)"

This suggestion, like many other options, was in fact considered by the State but rejected by us. In our judgment it would have been futile to ask Congress to reimburse the State

for its past expenditures as well as asking Congress to pay the Tribes for extinguishment of the claim. The State has, however, taken the position that the millions of dollars that it has spent on Maine Indians is its contribution to the settlement agreement. It is for this reason that we expect the Federal Government to meet the expense of purchasing land and creating a trust fund. To ask the Indians or federal government to reimburse the State would only increase the federal cost of the settlement, thus making it more difficult to have the settlement implemented by Congress. Thus, the State has simply proposed that Congress consider the State's past payments as its share of the settlement.

8. "Does the Maine Implementing Act establish 'separate and preferential laws for Indian Citizens,' or has it thus rendered favored treatment to one class of citizen, or in effect, endorsed the concept of a second class of citizen at the expense of the rest of the citizens of Maine?"

The implication in the term "preferential treatment" for Indians has already been discussed in the response to the Bangor Daily News question # 5.

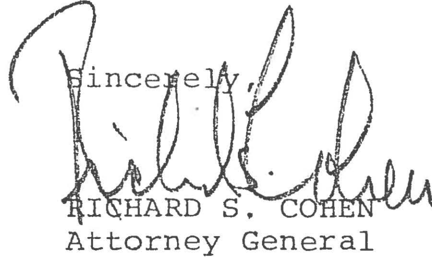
There are certain provisions in the Maine Implementing Act that permit in Indian Territory different laws than apply elsewhere in the State. These provisions embody a recognition of traditional Indian ways. They are minor changes and are far less intrusive on general state jurisdiction than the generally applicable laws that govern federal "Indian Country" generally.

As was stated in testimony, the Maine Tribes now have certain rights on their reservations that other citizens do not. The State is now powerless to change that fact. Should the Tribes be successful in recovering land in a lawsuit they would enjoy these same additional rights on these other lands also. Under current general law, their rights are far more extensive than those accorded under either the Maine Implementing Act or S. 2829. As we stated above, we think the Maine Implementing Act restores equality of treatment of Indians and non-Indians which was lost under recent Court decisions. Rather than creating and continuing "preferential treatment" the Implementing Act and S. 2829 insure equality of treatment. To the extent there are some minor distinctions in the application of State law in Indian Territory and elsewhere in Maine, those differences are in our judgment minor and represent a fair compromise and balancing of Tribal, State and Federal interests.

We wish to thank the State Committee for the opportunity to respond for the record on the series of questions raised by the Bangor Daily News and former Governor Longley. We believe that the record of your hearings on S. 2829 and the Maine Implementing Act clearly show that these questions have been adequately answered.

We hope that the Committee will shortly act favorably on this bill.

Sincerely,



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cc: Honorable William S. Cohen
Honorable George J. Mitchell