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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
AUGUSTA, MAINE 04333

July 21, 1980

The Honorable Cecil D. Andrus  
Secretary of Interior  
United States Department of Interior  
Washington, D. C. 20240

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

Dear Secretary Andrus:

Since the hearings before the Senate Select Committee on Indian Affairs concerning S. 2829, the various parties affected by S. 2829 have met to discuss in detail the concerns you mentioned in your testimony. Representatives of the Department of Interior ("Interior") and Department of Justice ("Justice") have proposed clarifying language to address those concerns. The State of Maine ("State") in turn has evaluated those proposals and has responded in writing to them. The purpose of this letter is to confirm the State's position on each of the various issues and proposals that have been discussed with representatives of Interior and Justice.

The revisions proposed by or agreed upon by the State are intended only to be a clarification of the original mutual intent of the State and the Passamaquoddy Tribe and Penobscot Nation. We believe that substantive changes to S. 2829 are inappropriate because the substance of S. 2829 represents the results of extensive arms-length negotiations between the State and the Passamaquoddy Tribe and Penobscot Nation. Any substantive alteration in S. 2829 by the United States could upset the balance of interests that the parties established through negotiations and upon which the Legislature of the State relied in enacting the Maine Implementing Act.

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Two

Congressional Findings - Section 2

The State agrees with the Interior's proposal that Section 2(a)(2) be redrafted to read:

"(2) Indians, Indian nations and tribes and bands of Indians, other than the Passamaquoddy Tribe, Penobscot Nation and Houlton Band of Maliseet Indians, that once may have held aboriginal title to lands within the State of Maine long ago abandoned their aboriginal holdings."

The State proposes that Section 2(a)(8) be deleted since the "Settlement Agreement" referred to in that section was never executed by the parties.

The State also proposes that Section 2(a)(9) be amended to delete the reference to the Houlton Band of Maliseet Indians.

Definitions - Section 3

The State agrees with Interior's proposal that subsections (a) (h) and (k) be redrafted to provide:

"(a) 'Houlton Band of Maliseet Indians' means the sole successor to the Maliseet Tribe of Indians as constituted in aboriginal times in what is now the State of Maine, and all its predecessors and successors in interest. The Houlton Band of Maliseet Indians is represented, as of the date of enactment of this Act, as to lands within the United States, by the Houlton Band Council of the Houlton Band of Maliseet Indians.

"(h) 'Passamaquoddy Tribe' means the Passamaquoddy Indian Tribe as constituted in aboriginal

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Three

times, and all its predecessors and successors in interest. The Passamaquoddy Tribe is represented, as of the date of the enactment of this Act, by the Joint Tribal Council of the Passamaquoddy Tribe, with separate councils at the Indian Township and Pleasant Point Reservations.

"(k) 'Penobscot Nation' means the Penobscot Indian Nation as constituted in aboriginal times, and all its predecessors and successors in interest. The Penobscot Nation is represented, as of the date of the enactment of this Act, by the Penobscot Nation Governor and Council."

The State agrees that the term "lands or other natural resources" in Section 3(b) should be redrafted to read "land or natural resources". The use of this term throughout S. 2829 should be similarly amended.

Subsection (e) should be redrafted to provide:

"(e) 'Maine Implementing Act' means Section 1 of the 'Act to Implement the Maine Indian Claims Settlement' enacted by the State of Maine in Chapter 732 of the Public Laws of 1979."

The remaining definitional changes proposed by Interior are neither necessary nor appropriate. In particular the terms Passamaquoddy Indian Territory, Passamaquoddy Indian Reservation, Penobscot Indian Territory and Penobscot Indian Reservation should be defined by reference to the Maine Implementing Act. This definition by reference is particularly necessary because the Passamaquoddy Tribe and Penobscot Nation and State could later vary the boundaries of these areas by mutual agreement without further approval by the United States.

The Maine Implementing Act defines the Passamaquoddy and Penobscot Indian Territories as land in specified areas

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Four

to the extent acquired by the Secretary of Interior on or before January 1, 1983. Because it is possible that the contemplated Congressional appropriation for the purchase of these lands may be delayed, Interior proposed that S. 2829 be redrafted to extend the date for acquisition of land. This proposed extension cannot be accomplished without amendment of the Maine Implementing Act and the Legislature of the State would be unwilling to so amend the Maine Implementing Act at this time. Speaking for myself, however, if the appropriation is in fact delayed so that land acquisition for the Passamaquoddy and Penobscot Indian Territories cannot be effected by 1983, I would be willing to recommend to the Legislature of the State that it agree to amend the Maine Implementing Act to extend the date for acquisition.

#### Extinguishment of Claims - Section 4

The State cannot agree with Interior's proposed amendment to Section 4(a)(1). The adoption of the proposed redraft of Section 4(a)(1) would result in a major substantive change in the agreed upon settlement.

The State cannot agree with the request by the Passamaquoddy Tribe and the Penobscot Nation that extinguishment be conditioned upon actual appropriation of monies. Any such change would result in a major substantive change in the agreed upon settlement. Moreover, we are confident that Congress will honor its undertaking to appropriate the monies authorized by S. 2829. We also think there is ample precedent for the approach embodied in S. 2829 including the Alaska Native Claims Settlement Act, and the recent Rhode Island Indian Claims Settlement Act.

Similarly, the State cannot agree with Interior's proposal to condition extinguishment of claims upon the execution of releases by the Tribes. Conditioning extinguishment of claims upon execution of releases would provide the Passamaquoddy Tribe and Penobscot Nation an opportunity to

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Five

delay the extinguishment of claims agreed upon by the parties.

Although the present language of Sections 4(a)(2) and 4(a)(3) is sufficient, the State proposes the following to the extent redrafting is essential:

"(2) The United States is barred from asserting by or on behalf of any Indian, Indian nation or tribe or band of Indians any claim under the laws of the State arising from any transfer of land or natural resources located anywhere within the State of Maine, from, by or on behalf of any Indian nation or tribe or band of Indians including but without limitation any transfer pursuant to any treaty or compact with or any statute of any state.

"(3) The United States is barred from asserting by or on behalf of any individual Indian any claim under the laws of the State arising from any transfer of land or natural resources located anywhere within the State from, by, or on behalf of any individual Indian, which occurred prior to December 1, 1873, including but without limitation any transfer pursuant to any treaty or compact with or any statute of any state."

Settlement Fund and Land Acquisition Fund - Section 5

While the language in S. 2829 is sufficient and appropriate, we would agree to the following clarifications to Sections (d), (e) and (g) if clarification is deemed essential:

"(d) The principal of the Land Acquisition Fund shall be apportioned as follows:

- (1) \$900,000 to be held in trust for the Houlton Band of Maliseet Indians;

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Six

- (2) \$26,800,000 to be held in trust for the Passamaquoddy Tribe; and
- (3) \$26,800,000 to be held in trust for the Penobscot Nation.

The secretary is authorized and directed to expend, with the consent of the affected Tribe, Nation, or Band, the principal and any income accruing to the respective portions of the Land Acquisition Fund for the purpose of acquiring at least 147,500 acres of land for the Penobscot Nation, at least 147,500 acres of land for the Passamaquoddy Tribe, and at least 5,000 acres of land for the Houlton Band of Maliseet Indians. Land within Passamaquoddy and Penobscot Indian Territories shall be held in trust by the United States for the benefit of the respective Tribe or Nation. Land outside the boundaries of Passamaquoddy and Penobscot Indian Territories shall be held in fee simple by the respective Tribe, Nation or Band, and the United States shall have no further trust responsibility with respect thereto. Except as provided in this section, or as otherwise provided in the Maine Implementing Act, the United States shall have no other authority to acquire lands in trust for the benefit of Indians, Indian nations or tribes or bands of Indians in the State of Maine. Notwithstanding the provisions of Section 257 of Title 40 of the United States Code, the Secretary may acquire land under this Act only if the Secretary and the owner of record of the land have agreed upon the identity and price of such land.

"(e)(2) Except as provided in paragraph (3) of this subsection, any transfer of land or natural resources within Passamaquoddy Indian Territory or Penobscot Indian Territory, except (i) takings for public uses pursuant to the Maine Implementing Act, (ii) takings for public uses pursuant to the laws of the United States, or (iii) transfers of individual Indian use assignments from one member of the Passamaquoddy

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Seven

Tribe or Penobscot Nation, to another member of the same Tribe or Nation, shall be void ab initio and without any validity in law or equity.

"(3) Land or natural resources within Passamaquoddy Indian Territory or the Penobscot Indian Territory, may be--

(i) leased in accordance with the Act of August 9, 1955 (69 Stat. 539), as amended,

(ii) leased in accordance with the Act of May 11, 1938 (52 Stat. 347), as amended,

(iii) sold in accordance with section 7 of the Act of June 25, 1910 (36 Stat. 857), as amended,

(iv) subject to rights-of-way in accordance with the Act of February 6, 1948 (62 Stat. 17),

(v) exchanged for other land or natural resources of equal value, and

(vi) sold, only if the proceeds of the sale are deposited in the Land Acquisition Fund established pursuant to subsection (c).

"(g) If land or natural resources within the Passamaquoddy Indian Territory or Penobscot Indian Territory is taken for public purposes pursuant to the Maine Implementing Act or the laws of the United States, the proceeds paid in compensation for such taking shall be deposited in the Land Acquisition Fund established by subsection (c)."

Tribal Government - Section Y.

Although the proposed Section Y is not necessary, the

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Eight

State does not object to the following language to the extent clarification is deemed essential:

"Sec. Y. (a) The Passamaquoddy Tribe and the Penobscot Nation shall each organize for their common welfare, and adopt an appropriate instrument in writing to govern the affairs of the Tribe or Nation, when each is acting in its governmental capacity. Such instrument and any amendments thereto, must be consistent with the terms of this Act and the Maine Implementing Act, and must be approved by a majority of the adult members of the Tribe or Nation participating in an election conducted by the Secretary.

"(b) Any business corporation created by the Passamaquoddy Tribe or Penobscot Nation with the approval of a majority of the adult members of such Tribe or Nation participating in an election conducted by the Secretary shall not constitute for purposes of federal taxation a corporation within the meaning of section 11 of the Internal Revenue Code of 1954, as amended, provided, however, that any business corporation created by the Passamaquoddy Tribe, Penobscot Nation or any member of either Tribe or Nation shall be subject to all the laws of the State."

#### Application of State Laws - Section 6

Although the language of S. 2829 is sufficient and appropriate, the State would agree to the following to the extent clarification is necessary:

Redraft Section 6(c) by adding to the end of the first sentence the following clause:



The Honorable Cecil D. Andrus  
July 21, 1980  
Page Nine

"; and 28 U.S.C. § 1362 shall be applicable to civil actions brought by the Passamaquoddy Tribe and Penobscot Nation."

Redraft Section 6(c) by adding in the second sentence the word "valid" before "money judgment".

Redraft Section 6(d) to provide:

"(d) The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or Penobscot Nation, provided that such amendment is made with the agreement of the affected Tribe or Nation, and that such amendment relates to (1) the enforcement or application of civil, criminal or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation and the State within their respective jurisdictions; (2) allocation or determination of governmental responsibility of the State and the Tribe or Nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the Tribe or Nation, or (3) the allocation of jurisdiction between tribal courts and State courts."

Redraft Section 6(f) to provide:

"(f) The Passamaquoddy Tribe, Penobscot Nation and the State of Maine shall give full faith and credit to the judicial proceedings of each other."

The State would have no objection to a provision in S. 2829 to the effect that the United States and other states shall honor judgments of the Passamaquoddy and Penobscot tribal courts.

Redraft Section 6(g) to provide:

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Ten

"(g) No law or regulation of the United States (i) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians and (ii) which affects or preempts the civil, criminal or regulatory jurisdiction of the State of Maine, including but without limitation the Act of June 25, 1948, c. 645, 62 Stat. 757, as amended, and the Act of July 12, 1960, 74 Stat. 469 as amended, shall apply within the State of Maine, provided, however, that the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians and State shall be eligible to receive all the financial benefits which the United States provides to Indians, Indian nations and tribes or bands of Indians or States to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians or states and for the purposes of determining eligibility for such financial benefits, the respective Tribe, Nation and Band shall be deemed to be federally recognized Indian tribes; and provided, further, that the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians shall be considered federally recognized Indian tribes for the purposes of federal taxation and any lands owned by or held in trust for the respective Tribe, Nation or Band shall be considered federal Indian reservations for purposes of federal taxation."

It has been proposed that S. 2829 be amended to authorize that land acquired for the Houlton Band of Maliseet Indians under Section 5 be held in trust subject to restraints on alienation and be exempt from taxation. Any proposal that would exempt the Houlton Band of Maliseet Indians from the laws of the State in any respect would constitute a serious

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Eleven

departure from the agreed upon settlement and would be a major substantive amendment to which the State cannot agree. The State believes, however, that there is ample provision in the bill as drafted to permit the Passamaquoddy Tribe or Penobscot Nation to agree to allow the Houlton Band of Maliseet Indians to occupy up to 5,000 acres of land in either the Passamaquoddy or Penobscot Indian Territory. If specific authorization language is necessary, the State would agree to clarification of S. 2829. This issue, however, is of paramount importance; accordingly, it is essential that the State examine specific language and insure that it is consistent with other provisions of S. 2829 and the Maine Implementing Act.

In addition, the State would be willing to clarify that the State and Houlton Band of Maliseet Indians can negotiate jurisdictional agreements in the future and to that end proposes the following new subsection:

"(h) Notwithstanding the provisions of subsection 6(a), the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the Band or its members. Unless and until such agreement is made, the Houlton Band of Maliseet Indians, its members and any land owned by the Houlton Band of Maliseet Indians or any of its members shall be subject to the laws of the State of Maine to the extent provided in subsection 6(a)."

The other amendments to this section proposed by Interior are unnecessary and inconsistent with the agreement of the parties.

#### Indian Child Welfare Act - Section 7

The amendment proposed by Interior is unnecessary and inconsistent with the Indian Child Welfare Act.

The Honorable Cecil D. Andrus  
July 21, 1980  
Page Twelve

Although Interior has made no proposal concerning the application of the Indian Child Welfare Act to the Houlton Band of Maliseet Indians, in response to the legitimate concerns of the Houlton Band, the State agrees that S. 2829 may be clarified by the addition of a new Section 7(f) to provide:

"(f) Except as may otherwise be subsequently agreed to by the Houlton Band of Maliseet Indians and the State of Maine pursuant to Section 6(h), Section 1912 of Title 25 of the United States Code shall apply to the Houlton Band of Maliseet Indians to the same extent that that section applies to Indian tribes as defined in Section 1903 of Title 25 of the United States Code."

#### State and Federal Funding to the Tribes - Section 8

Although the State believes no redrafting of Section 8 is necessary, the State would agree to language similar to that used in the second sentence of 25 U.S.C. §459e, to the extent clarification is essential.

Interior expressed concern over the interplay between the provisions of Section 8 of S. 2829 and Sections 6211(2) and (4) of the Maine Implementing Act. In particular, Interior expressed concern that Sections 6211(2) and (4) of the Maine Implementing Act might be inconsistent with the policy underlying many federal laws. To that end, Interior initially requested amendment of the Maine Implementing Act or specific language in S. 2829. After much discussion, we believe the parties have eliminated much of Interior's understandable concern. Rather than amending S. 2829 to state the parties' mutual understanding, however, it would be preferable to embody this understanding in the Committee Report. Accordingly, the State proposes the following language for inclusion in the Committee Report:

The Honorable Cecil D. Andrus  
July 22, 1980  
Page Thirteen

"The Committee was advised by the Secretary of his concern that the set-off provisions in § 6211(2) and (4) of the Maine Implementing Act may work to defeat the intent of federal financial assistance to Indian tribes, since it would appear on its face to permit the State to use federal monies to supplant State monies. However, after further inquiry, the Committee believes the Implementing Act is not inconsistent with general federal policy. Specifically, the Committee understands the Maine Implementing Act to work in the following manner:

"To the extent the United States provides funds for a program which are intended to be supplemental to a State program, then the set-off provisions of 6211(2) and (4) do not apply. The term 'substantially similar purpose' as used in the Implementing Act was not intended to include federal funds intended to enhance, enrich or supplement programs provided for under State law. Thus, for example, where the BIA funds a remedial reading program for the Tribes, such program would not be 'substantially similar' to a basic State educational grant and would not supplant State funding."

This proposed language is stated in general terms rather than by reference to either specific State or federal programs, because a detailed review of myriad State and federal statutes and regulations would unduly delay the parties' goal of prompt enactment of S. 2829.

#### State Held Tribal Trust Funds - Section 10

Section 10 is essential and any change would work a major substantive alteration of the negotiated agreement. Section 10 is particularly necessary because there are now claims of mismanagement of tribal trust funds pending against the State by the United States. Because these tribal trust

The Honorable Cecil D. Andrus  
July 22, 1980  
Page Fourteen

funds were created out of proceeds of the land transactions in dispute, final resolution of claims arising from State management of these funds is essential. In recognition of Interior's concern, however, the State proposes substituting the term "shall constitute" for "shall be accepted" in the first sentence of Section 10. Any other change cannot be agreed to.

General Discharge of State Treaty Obligations - Section 11

For the reasons stated above, any change in Section 11 would constitute a major substantive alteration. It would not be inconsistent with the intent of the parties, however, to delete the words "any Indian" in the first sentence of Section 11.

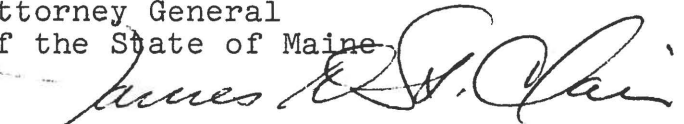
Limitations of Actions - Section 12

The State believes Interior's proposed subsection.(b) may be unconstitutional.

We look forward to discussing these matters further with your representatives in the hope that we can promptly resolve all the remaining issues.

Sincerely,

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of the State of Maine



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