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March 2, 2017

Dear Senator Keim, Representative Moonen, Members of the Joint Standing Committee on the Judiciary,

My name is Emily Atkins and I practice law with the firm of Kelly, Remmel & Zimmerman in Portland, Maine. It is my honor to speak before you today on behalf of the Maine Indian Tribal State Commission regarding the amicus brief filed by MITSC in a case now before the First Circuit, *Penobscot Nation v. Mills*. Specifically, I will address the authority for MITSC to file its amicus brief and its entitlement to be represented by private counsel of its own choosing.

MITSC's authority to file an amicus brief in the matter of *Penobscot Nation v. Mills* derives from its statutory charter, powers, and responsibilities as established in the Maine Implementing Act. The Attorney General contends that MITSC is a state agency and therefore must be represented by the Attorney General's Office, or alternatively, private counsel but only predicated upon the Attorney General's permission. However, MITSC is not a state agency for purposes of the Attorney General representation as outlined in, 5 M.R.S.A., Section 191 subsection 3. Rather, MITSC is unique-multilateral tribal state entity comprised of

representatives from four separate sovereign bodies: the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the State of Maine. Despite the State having a presence on the Commission, that presence is no greater than that of the Tribes. As guidance, the Maine Law Court, in a 2000 opinion, stated that it considers the totality of the circumstances when determining whether an entity is a state agency for purposes of Section 191, Subsection 3.

Revealingly, MITSC is not included in the Maine Board and Commissions Statute which contains the “complete inventory and central listing of all boards, commissions, committees, councils, authorities and other similar organizations established by the Legislature” and which are subject to State control. In fact, MITSC is expressly excluded from the definition of a board in that statute. Similarly, MITSC is not included on the statutory list of “Quasi-Independent State Entities.”

And unlike state agencies, MITSC’s purpose does not fulfill any subordinate function of the State. Under the Maine Implementing Act, MITSC is charged with two primary functions. First, it is directed to continuously review “the effectiveness of the Maine Implementing Act and the social, economic and legal relationship between the various Tribes and the State.” In pursuit of this goal, MITSC is authorized to make reports and recommendations to both the Maine legislature as well as the Tribes as it alone deems appropriate. Secondly, MITSC has the exclusive authority to enact fishing rules and regulations over certain waters which are on, within, or adjacent to Indian territory. MITSC is empowered to impose fees and permits, post lands or water, challenge certain actions of the Commissioner of Inland Fisheries and Wildlife, consult with the Tribes and the State, and make recommendations regarding the management of fish and wildlife stocks.

Inherent in the fulfillment of these obligations is the ability for MITSC to undertake legal action to promote, protect, and exercise its statutory authority. Additionally, MITSC’s duly

enacted bylaws allow the commission to go into executive session for “consultations between the Commission and an attorney concerning its legal rights and duties on pending or contemplated litigation.” The contention that MITSC is a state agency whose legal services are subject to the approval and supervision of the Attorney General is wholly inconsistent with the Settlement Acts which recognize the sovereignty of Maine’s tribes.

Notably, there are no records, communications, or other indicia of the Attorney General acting as counsel for MITSC. In support of its position the Attorney General’s Office cites to its review and approval as to form and legality the rules promulgated by MITSC. However, this legal review only occurs after MITSC has submitted its rule and serves not as legal advice to MITSC, but as assurance to the Secretary of State who subsequently receives and codifies the rule.

A number of additional characteristics of MITSC highlight the inconsistencies between its operation and that of state agencies. For instance, MITSC employees are not subject to State personnel laws, as is true with the operation of state agencies. And, additionally, although MITSC receives some funding from the State, it is able to receive funding from any source, be it state, federal, tribal, or private – and the State has no approval or supervisory powers over MITSC’s budget.

In the Maine Implementing Act, MITSC was given complete discretion over whether and when to report to the legislature. However, over the years MITSC has appeared before this committee on its request, and informed the Attorney General’s Office of its involvement in *Penobscot Nation v. Mills* out of a deep desire to maintain comity between the Tribes and the State. MITSC’s hope and goal is to continue to foster a congenial and collaborative relationship between these different sovereigns.

Thank you.



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## **Henry John Bear**

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Testimony to the Joint Standing Committee on the Judiciary  
March 2, 2017 – Supplement to Presentation by the Maine Indian Tribal State Commission

### The Case for Retained Maliseet Nation

#### Aboriginal Rights and Treaty-based Fishing, Hunting and Aboriginal Title Land Rights

Presented by Representative Henry John Bear of the Houlton Band of Maliseet Indians

Senator Keim, Representative Moonen, and honorable members of the Joint Standing Committee on the Judiciary, thank you for the opportunity to present to you as the Tribal Representative of the Houlton Band of Maliseet Indians. It is imperative that we work together to forge a path for our Tribal Members and the State of Maine to move forward, and opportunities like this to share concerns and perspectives are invaluable. To that end, I present the following Tribal perspective regarding the so-called Maine Indian Claims Settlement. This report concludes that neither it, nor the accompanying Maine Implementing Act of 1980 or thereafter, were ever intended to abrogate, annul, extinguish or affect Maliseet Treaty and Aboriginal rights and obligations recognized and memorialized by the 19 July, 1776 Treaty of Alliance and Friendship. This treaty was an agreement between the St. John River Indians or present-day Maliseet Tribe on the one part, and the State of Massachusetts, Bay and all the other united States of America on the other part, including present-day State of Maine by virtue of still unpublished and relatively secret Article Ten and Section 5 of Maine's Constitution.

#### Introduction

The Houlton Band of Maliseet Indians (Band or Maliseet), as it has throughout its history, retains its ancient right to fish, hunt or gather for trade, for both commercial or non-commercial purposes, on and off its Maliseet Tribal Nation homelands comprising the entire, 20 million acre, St. John River watershed and coastal region, most of which exists outside the United States of America, and are immune from U.S. or State laws and regulation regarding these Tribal activities based on a still binding, 1776 Agreement with the United States of America. This is also true whenever Maliseet Indians have occasion to be in the United States of America, that we are exempt from Maine State regulation of both our sustenance and commercial fishing activities, while still self-limiting such activities for purposes of adhering to traditionally practiced and internationally accepted habitat, land and water conservation principles. These legal rights exist and are enforceable internationally and domestically, regardless of any federal or state act to the contrary.

Previously adjudicated and upheld 1725, 1726, 1749 and 1760 Treaties entered into between the Maliseet Nation and Great Britain and also previously hidden Treaties between the Maliseet Nation and the United States of America and the previous State of Massachusetts Bay during the 18<sup>th</sup> century, are now being revealed which clearly reserve and, thereby, preserve the Maliseet Tribe's fishing, hunting and land rights, and these hidden, constitutional provisions contained in Article Ten of Maine's 1820 Constitution and legal rights remain valid and enforceable today. Testimony to this very Committee last session by Janet Mills, Maine's current Attorney General during hearings before the 127<sup>th</sup> Maine Legislature's Joint Standing Committee on the Judiciary confirmed these unpublished Sections of Article Ten of Maine's Constitution remain valid.

This claim is also supported by Maliseet Tribal law and International laws and conventions, including the United Nations Declaration of the Rights of Indigenous Peoples, and by United States Supreme Court precedent, United States practice, the Supreme Court rulings of adjacent, Canadian courts of the same treaties, and recognition of these treaties by the Commonwealth of Massachusetts and, the State of Maine upon its formation in 1820. Again, these specific rights have not been abrogated by any subsequent Treaties, Acts of the State of Massachusetts Bay, State of Maine or by the United States Congress.

### **Historical Context of Treaties Affirm Maliseet Fishing Rights**

The Maliseet treaty history is a long one. Beginning in the 1600's the Maliseet, with other New England and Canadian tribes, entered into agreements with the arriving Europeans. The first comprehensive treaty was with the British. This treaty was negotiated and signed in 1693. The Maliseet and other tribes then met with the British in 1713 to sign a treaty that marked the end of Queen Anne's War. However, it is in the treaty conferences and terms agreed to during 1725-1728 that the Maliseet, along with other tribes and the British "set the standard recognized by all ... [parties] for the treaty relationship through to the American War of Independence." From that point, the parties met on numerous occasions over the next 4 decades to build upon their relationship. This historical perspective is extremely important when analyzing Indian treaties. It is a necessity to understand how the treaty relationship between the British and the New England and Nova Scotia Indian tribes worked in the 18<sup>th</sup> century, when interpreting the treaties today.

There are two significant features of the Tribal-British treaty relationship that are essential to interpreting these 18<sup>th</sup> century treaties and that informed the Tribal-American treaty relationship. First, both the British and the Indian tribes regarded agreements made during the treaty conferences as part of the "treaty relationship." Second, the Indians present at the treaty conferences would have understood each subsequent treaty conference and agreement as building upon earlier conferences and agreements.

### **Peace and Friendship Treaties Did Not Surrender Fishing and Hunting Rights**

Throughout the 17th and 18th centuries, the empires of France and Britain constantly fought for domination of North America's forests, furs, and fishing. When European wars spilled into the colonies, each side called upon its tribal allies to attack the others' settlements and trade

routes. These hostilities stopped temporarily in 1713, after the end of the Seven Years War and the signing of the Treaty of Utrecht when the British won most of Canada from France.

The peace did not last since even after 1713 France continued to use its Tribal allies to harass British colonists and commercial interests. In an effort to protect commerce and create a stable peace, the British negotiated a "Peace and Friendship" treaty with the Maliseet and other Tribes in 1725. Under the terms of the treaty, the Tribes agreed to:

“forbear All Acts of Hostility, Injuries and discords towards all the Subjects of the Crown of Great Britain and not offer the least hurt, violence, or molestation of them or any of them in their persons or Estates.”

In return, the British affirmed and recognized that the Maliseet and other tribes can continue to live, hunt, fish and fowl on their land as they have always done without interference, where they have not sold or traded their rights away:

“Saving unto the Penobscot, Nerridgewock And other Tribes within His Majesties Province aforesaid and their Natural descendants respectively All their Lands liberties & properties not by them Conveyed or sold to, or possessed by any of the English Subjects or aforesaid as also the Privilege of Fishing, Hunting & Fowling as formerly.”

The use of the word “liberties” in the Treaty legally signifies an exemption from the jurisdiction of the King and Parliament.

The "Peace and Friendship" Treaty of Falmouth of 1749 contains similar language as the earlier 1725 treaty: “(s)aving to the Tribes of Indians within His Majesty's Province . . . the privilege of fishery, hunting, and fowling as formerly.” This similar language is due in large part to the fact that the 1749 treaty is essentially a straightforward renewal of the treaty relationship as it had been defined in 1725-28.

The Maliseet sustained the same kind of treaty relationship with the United States. In fact, the very first treaty of any kind entered into by the United States was with the Maliseet or St. John River Indians in July 1776.

Just days after the signing of the Declaration of independence, the Continental Congress directed General George Washington, at his urgent request, to:

“engage in the service of the United States, so many Indians of the St. Johns, Nova Scotia and Penobscot tribes, as he shall judge necessary and that he be desired to write the General Court of the Massachusetts Bay, requesting their assistance in their aid in this business ...”

On July 10, 1776, after travelling from their St. John River homeland or “Wulustook River” in the northeast to Watertown, Massachusetts, the Maliseet Chiefs met with representatives of the newly established United States of America to negotiate a treaty of "Alliance and Friendship." On July 19, 1776, after nine days of conferencing, the parties entered into what is now referred to as the "Watertown treaty" in which the Maliseet promise their support to the

United States in its war for independence from Great Britain and agree to "furnish and supply 600 strong men" to join with and fight under the command of General Washington and with the Continental Army against the British.

In return, the Tribes understood the Treaty to be reaffirmation of our preserved homeland and commercial fishing rights while their Members had occasion to be in the United States of America. The Watertown Treaty contained a provision that revoked only those terms of prior treaties with Great Britain that are "repugnant to any of the Articles contained in this Treaty." The result of that "Article" was to revoke the Tribes' allegiance to the British Crown and confirm all the prior treaties' terms that affirm Maliseet land, hunting and fishing rights.

The Maliseet were party to over half a dozen Peace and Friendship treaties, first with England, then the British and then the United States, between 1713 and 1776 (Treaties). The Peace and Friendship treaties completed in this period all followed a similar pattern. Their terms built on prior treaties and simply re-established peace and commercial relations. In these treaties, the Maliseet Tribe would never and did not surrender rights to any land, natural resources, hunting or fishing.

### **Treaties Remain Valid Post Revolution**

The United States Supreme Court has held that a change in sovereignty between Great Britain and the United States does not terminate property rights. In other words, the Maliseet legally retained all their hunting and fishing rights in their usual haunts within their Maliseet homelands or outside of these lands after the American Revolution that had not been taken from them, or ceded by them, to the British:

"by the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, and remain under their former laws until they shall be changed."

These Treaties are repeatedly upheld as valid and are a testament to the fact that the British did not take, and the Maliseet did not cede, our hunting and fishing rights. Further evidence of this is that the British Crown, the present-day entity that negotiated the Treaties with the Maliseet Nation, still recognizes them as valid in more than 40 countries throughout the world. Also, the Commonwealth of Massachusetts acknowledges the Treaties as still binding. Recognition by Massachusetts is noteworthy for two reasons. The first goes to the foundation of the current enforceable status of the Treaties. The second relates to the impact Massachusetts laws have as the predecessor to those of the State of Maine.

The Constitution of the Commonwealth of Massachusetts plainly provides that laws in effect at the time of the Revolution will remain in effect at the formation of the Commonwealth:

"(a)ll the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practiced on in the courts of law, *shall still remain*

*and be in full force*, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties contained in this constitution.”

Interpreting this constitutional provision in 1847, the Massachusetts Supreme Judicial Court noted:

“We take it to be a well settled principle, acknowledged by all civilized states governed by law, that by means of a political revolution, by which the political organization is changed, the municipal laws, regulating their social relations, duties and rights, are not necessarily abrogated. They remain in force, except so far as they are repealed or modified by the new sovereign authority.”

Since the birth of the Commonwealth, no law or governmental act has repudiated the pre-Revolutionary Treaties with the Maliseet. Actually, Massachusetts has expressly affirmed those Treaties, specifically the hunting and fishing rights contained therein. For example, the Commonwealth recognized the separate and ‘special status’ of Indians and their rights to fishing. Beginning in 1795 and up until 1941, an explicit exemption from fishing regulations for Indians existed in the Massachusetts statutes. In 1795, the Massachusetts legislature authorized towns to issue permits for taking shellfish, “provided that nothing in this act shall extend to deprive any native Indians of the privilege of digging shell fish ....” Similar provisions were re-enacted by the Massachusetts legislature in 1836, 1881, and 1901 and again in 1933.

More recently, all branches of Massachusetts’ government reaffirmed the 1725 and 1749 treaties. In 1976, the Executive branch of the Commonwealth issued an Order stating “for over three centuries, the Commonwealth has molded this relationship by Treaty and Agreement, Legislative Act and Executive Order” and the Commonwealth has “*never ceased to recognize those Tribes with which it has Treaties.*”

On November 9, 1982, the Commonwealth’s House of Representatives (the House) issued a “Resolution Recognizing and Protecting the Ancient and Aboriginal Claim of the Indians of the Commonwealth. In it, the House recognized “this ancient and aboriginal claim (to hunt and fish) has been recognized by Treaties, including the Falmouth Treaty of 1749.”

The highest courts in Massachusetts support the argument that the treaties affirm hunting and fishing rights and are still valid. In *Commonwealth v. Maxim*, the Massachusetts Appeals Court recognized “the protection by the Treaty of Falmouth of 1749 of Native American fishing rights” and concluded, “that the defendants’ right to fish was protected by treaty.” The Massachusetts Supreme Judicial Court (SJC) upheld the lower court’s ruling.

There is no doubt that all branches of the Massachusetts government have shown support for the Treaties’ affirmation of Tribal hunting and fishing rights and that those rights still exist today.

### No Impact on the Treaties When Maine Separated from Massachusetts

When Maine was separated from Massachusetts, the laws of Massachusetts went with it and so the Treaties remain in effect. Maine's 1820 constitution was similar to that of Massachusetts' in that it included: "(a)ll laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation." The Massachusetts legislation that separates Maine from Massachusetts added another layer of protection for the Maliseet and the other tribes by also specifically requiring that:

"all the laws which shall be in force within said District of Maine... shall still remain, and be in force ...until altered or repealed by the government thereof, such parts only excepted as may be inconsistent with the situation and condition of said new State, or repugnant to the Constitution thereof."

Interpreting these constitutional and statutory provisions, the Supreme Judicial Court of Maine in 1986 stated

"the Colonial Ordinance was a rule of Massachusetts common law at the time of the separation of Maine from Massachusetts. By force of Article X, § 3 of the Maine Constitution and of section 6 of the Act of Separation between Maine and Massachusetts, it must be regarded as incorporated into the common law of Maine.

Based on the history of the Treaties in Massachusetts discussed above, there can be no doubt that when Maine separated from Massachusetts in 1820, all of the Treaties were part of the "laws" of the Commonwealth and therefore also part of the laws of Maine."

### 1980 Land Claim Settlement Act Did Not Abrogate Treaties

The 1980 Settlement Act resolved a land claim by the two southern tribes in Maine that have, incorrectly been construed by some as to also abrogate certain other rights of all tribes in Maine. However by its terms, it does not apply to the Maliseet Tribe nor does the Maine Implementing Act, itself ratified by Congress despite changes contrary to Section 31, abrogate the Maliseet's ancient rights to their tribal lands or to hunt, or to fish commercially while in their own lands or while in the United States of America. **While the Act purports to abrogate the Tribe's natural resources (including hunting and fishing rights), it expressly excludes any rights retained and were not transferred by the Tribe or not transferred by way of state statute. Maliseets never entered into any Treaties transferring lands to either the State of Massachusetts Bay or present-day State of Maine. That is not the case, however, for the two southern Tribes:**

Section 1723 of MICSA provides that,

"(a)ny *transfer* of land or *natural resources* located anywhere in the United States, by or on behalf of [Maine Indian Tribes and Indians], including... any transfer pursuant to any treaty,

compact or statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States....”

Again, such transfers of Maliseet land or Maliseet natural resources never occurred. Not only do the Treaties represent a preservation of those rights by the Tribe (discussed above), but also there is no event since 1725 which can be characterized as a transfer or ceding of the Tribe’s reserved lands, or their hunting and fishing rights.

**Section 1731 of the Maine Indian Claims Settlement Act purports to extinguish any treaty obligations, but it does not apply to the Treaties, generally, and especially not to the Maliseet Treaty of 1776..**

Section 1731 provides:

“Except as expressly provided herein, this Act shall constitute a general discharge and release of all *obligations* of the State of Maine and all of its political subdivisions, agencies, departments, and all of the officers or employees thereof arising from any treaty or agreement with, or on behalf of any Indian nation, or tribe or band of Indians...”

The Peace and Friendship Treaties plainly address the Maliseet Nation’s hunting and fishing rights, *rights we already possessed and retained*. This fact speaks directly to whether the Treaties impose any obligations on the State of Maine in regards to the Maliseet Tribe’s lands, or hunting or fishing rights within or outside the United States or State of Maine. Since the Maliseet Tribe merely retained rights we already possessed when entering into the Treaties, including all of its St. John River watershed homeland and it’s right to fish within the United States of America, no corresponding obligation was imposed on the State of Massachusetts, and subsequently none was imposed on the State of Maine. There are other treaties with the Penobscot and Passamaquoddy, not involving the Maliseet, that did create monetary obligations on the State of Massachusetts and later State of Maine and those treaties may have been specifically abrogated by the 1980 Act. But, the Treaty of Alliance and Friendship with the Maliseet Nation, however, poses no such obligations and therefore Section 1731 of the 1980 Maine Indian Claims Settlement Act can not and does not apply to the Maliseet Treaty and it still applies in the United States and State of Maine.

**Treaty Abrogation By Maine Implementing or Settlement Acts Do Not Meet United States Supreme Court Standard**

If Congress wants to abrogate the 1776 Watertown Treaty with the Maliseet Nation it must do so explicitly and unambiguously, and not “generally”. The Supreme Court has created a standard whereby Congress can abrogate Indian treaty rights **only** if the abrogation is clear and explicit and **only** “within” the United States. The Court noted in *Menominee Tribe of Indians v. United States* “(w)hile the power to abrogate those rights exists ‘the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.’” (The Supreme Court recently affirmed this standard in *Minnesota v. Mille Lacs Band of Chippewa Indians*.)

The *Menominee Tribe* case is a perfect example of how strict the Indian treaty rights abrogation standard is. In *Menominee Tribe*, not only did the Indian tribe have a treaty which did not explicitly mention hunting and fishing rights, but the tribe itself had been terminated under the Termination Act of 1954. The Supreme Court still found the tribe's hunting and fishing rights intact. As to the absence of hunting and fishing rights in the treaty, the Supreme Court held that "the language 'to be held as Indian lands are held' includes the right to fish and to hunt." Addressing the fact that the Menominee Tribe of Indians had been terminated, the Supreme Court responded, "(w)e decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians."

Neither the Treaties, nor any other agreements or laws, expressly *transfer* the Maliseet's land, hunting or fishing rights to another sovereign government nor to any individuals. The preservation of the Band's lands, hunting and fishing rights is paramount, and any tampering with those rights can only occur within the United States of America, in accordance with the Treaty and will not be "lightly imputed." To suggest that the Maliseet tribe lost Treaty protected lands, hunting and fishing rights under the 1980 Maine Indian Claims Settlement or Maine Implementing Acts mocks the United States' Supreme Court's own standard.

### **Conclusion**

Maliseet land, hunting and fishing rights are critical to the economic self-sufficiency, self-determination and culture of the Maliseet Nation. As the Supreme Court recognized in *United States v. Winans*, 198 U.S. 371, 382 (1905),

"(t)he right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and *which were not much less necessary to the existence of the Indians than the atmosphere they breathed.*"

This statement is true for the Maliseet. The argument that the Tribe, to this day, retains its homelands, and ancient hunting and fishing rights is based solidly on United States law. Additionally, it is in line with United States policy toward respecting Maliseet lands outside the United States, and retained hunting and fishing treaty-based rights within it. Notwithstanding any provisions in the U.S. Federal Maine Indian Claims Settlement Act of 1980, or the accompanying Maine Implementing Act, Maliseets are exempt from the application of State fishing and select other regulations. This applies to Tribal Members when they are engaged in commercial fishing activities in their un-conquered, un-surrendered, un-ceded, never purchased, and still-possessed since time immemorial Tribal homelands both in and beyond the United States of America. This applies, too, in our usual hunting, fishing, gathering and trading haunts within the United States, in accordance with that 1776 Treaty agreement. This agreement is expressly contained in the Articles and trade terms of the "still honored" 1776 Treaty of Watertown. This Treaty retains our jurisdiction, and preserves Maliseet Nation land, fishing, hunting, and gathering rights as the highest law of the land in all affected historical and modern-day jurisdictions. This includes, as I stated above, the previous colony of Massachusetts Bay and present-day State of Maine.

Again, thank you for the opportunity to share this research, analysis, and perspective regarding our shared interests and concerns. I am happy to answer any questions, or discuss in further depth, the points raised above. I look forward to working with you all this legislative session.



*Susan Collins*

January 21, 2009

Mr. Henry Bear  
41 Elm Street  
Houlton, ME 04730

Dear Mr. Bear:

Thank you for providing me with a copy of the Watertown Treaty of 1776 during your recent trip to Washington, D.C. for President Obama's swearing-in ceremony. I was pleased to be able to offer you tickets to the event, and I hope that both you and Violet enjoyed the inauguration.

Again, thank you for the copy of our nation's first foreign treaty, and please do not hesitate to contact me if I can be of future assistance.

Sincerely,

Susan M. Collins  
United States Senator

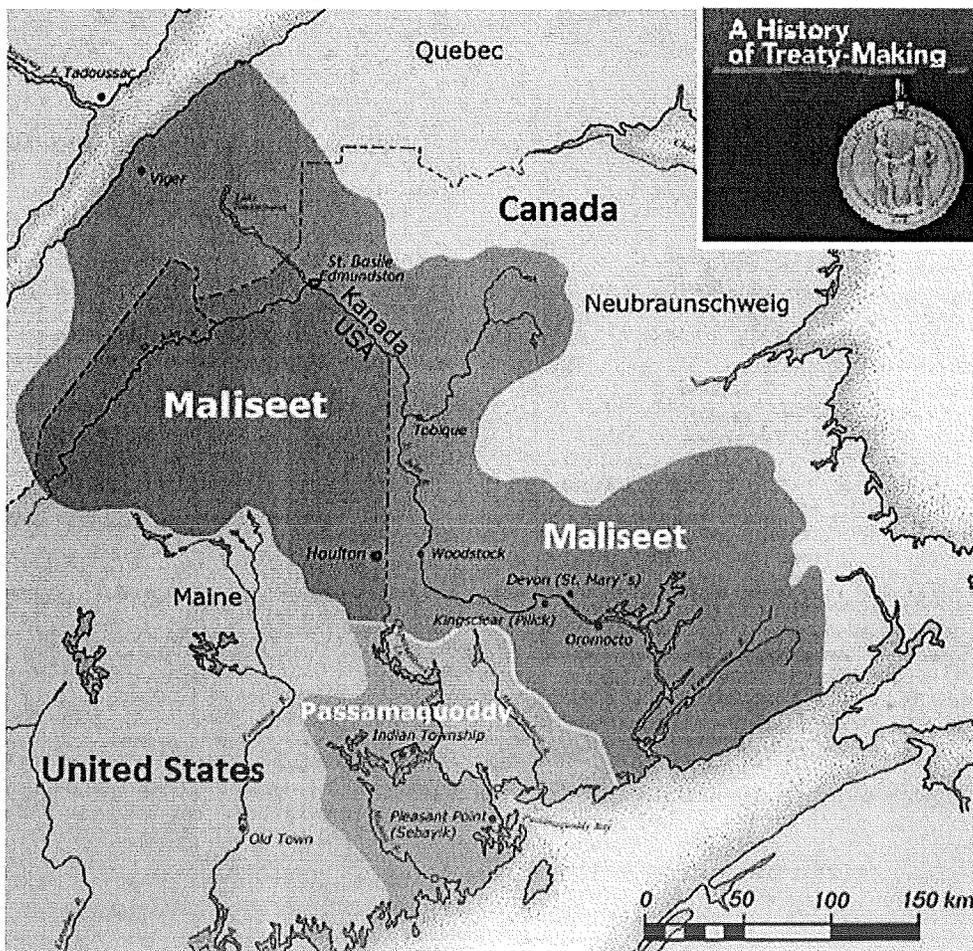
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*United States Senate  
Washington, DC 20540*



# Maliseet Tribal Homelands

## The eight Maliseet Bands



# **The Drafting and Enactment of the Maine Indian Claims Settlement Act**

## **Report on Research Findings and Initial Observations**

**February 2017**

**Nicole Friederichs  
Amy Van Zyl-Chavarro  
Kate Bertino**



**Commissioned by the  
Maine Indian Tribal-State Commission**

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## Acknowledgement

The Maine Indian Tribal-State Commission (MITSC) is honored to offer this thorough review of the crafting of the Federal Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735.

In June of 2014, the MITSC completed the *Assessment of the Intergovernmental Saltwater Fisheries Conflict between Passamaquoddy and the State of Maine* where the MITSC offered the following framework:

The Maine Indian Claims Settlement Act, (MICSA), was passed in October of the same year [1980]. The MICSA gave federal permission for the [state Maine Implementing Act] (MIA) to take effect while retaining intact the federal trust relationship between the federally recognized tribes of Maine and the US Congress; and placed constraints on the implementation of the MIA. Of particular interest to the inquiry into the saltwater fishery conflict between the Passamaquoddy Tribe and the State of Maine are the following provisions of the federal act:

1. MICSA (25 U.S.C. § 1735 (a)) provides that “In the event a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this Act shall govern.” The provisions of the federal MICSA thus override the MIA provisions when there is a conflict between the two.
2. MICSA (25 U.S.C. § 1725 (e)(1)) provides that tribal approval is required for any amendments to the MIA that relate to “the enforcement or application of civil, criminal or regulatory laws” of the tribes and the state within their respective jurisdiction or the allocation of responsibility or jurisdiction over governmental matters between the tribes and the state.

After the release of this report, members of the Joint Standing Committee on the Judiciary requested the MITSC to complete an assessment of the MICSA. The MITSC decided that, given the complexity of both 25 U.S.C. § 1725 and the Cannons of Construction of Federal Indian Common Law which contextualize the interpretation of the MICSA, it would be important to have a qualified, objective third party do the review.

To that end, the MITSC, published a Request for Proposals (RFP). We received 5 responses to this request. After a rubric-based decision making process the contract was awarded to Suffolk University Law School’s Indigenous Peoples Rights Clinic.

The Clinic has completed a thorough review and, in this report, offers all of those in the State of Maine who are interested in resolving long-standing conflicts between the Tribes and the State a working foundation. We are grateful for the dedication, analysis and integrity that the Indigenous Peoples Rights Clinic brought to this task.

Jamie Bissonette Lewey, Chair MITSC

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## Appendix

1. List of Participants in Drafting, Negotiations, and Meetings
2. Analysis of the Drafting of Section 1723

## Attachment

1. Timeline chronicling the progression of the bills proposed to settle the land claim and the relevant meetings.

## Executive Summary

This report presents archival research on and analysis of the drafting of the Maine Indian Claims Settlement Act (MICSA), a federal law enacted in October 1980 to settle land claims brought by the Passamaquoddy Tribe and Penobscot Indian Nation (collectively the “Tribes”). That federal law is one part of a settlement, which also includes the Maine Implementing Act (MIA), a Maine state law, and an agreement to purchase land. The research was sponsored by the Maine Indian Tribal-State Commission (MITSC) and is part of its strategy to develop mutually beneficial solutions to the conflicts arising from the interpretation of the MIA and MICSA.

The research focused on the following topics and MICSA sections:

1. Section 1723 focusing on the force and reservation of rights under the implicated treaties,
2. Definition of sustenance and protected sustenance practices,
3. Definition of internal tribal matters, and
4. Sections 1735(b) and 1725(h) addressing the application of federal law.

Over 200 documents were collected from primarily congressional archival records. These documents were subsequently reviewed and analyzed, yielding approximately 97 documents which specifically address these sections and topics. Documents referencing the Houlton Band of Maliseet Indians (which entered into the settlement negotiations later) and the Aroostook Band of Micmacs (which settled its land claim in 1991) are also included, as are several documents which fall outside the April–October 1980 drafting period but provide necessary context and raise early and relevant negotiations issues.

The number and substantive value of documents identified for each research topic varied. However, even the absence of archival documents on a particular topic still provided useful insights. Limited materials were found, for instance, on the force and reservation of treaty rights as part of the drafting and adoption of section 1723 of MICSA. (Section 1723 extinguishes the land claim brought by the Tribes.) The strongest statement was found in the Senate Report on MICSA: “[t]he settlement also provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations *those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them.*” Although this topic was not discussed at length by Congress, its use of the phrase “reserved to them in their treaties” is a clear invocation of the Reserved Rights Doctrine, a significant principle of federal Indian law.

The related topic of sustenance and protected sustenance practices similarly yielded few materials. The sustenance rights of the tribes are addressed in the state settlement act, the MIA. Congress briefly discussed the “subsistence” rights of the Tribes, noting in the Senate Report that “[s]ubsistence hunting and fishing rights will [not] be lost,” however, does not further define sustenance, or subsistence for that matter, beyond what was discussed during the drafting of the MIA. Again, the language used by Congress, though minimal, is significant. When referring to the limited authority of the State to regulate hunting and fishing, Congress does so by comparing that authority to that of other states in “connection with *federal Indian treaty hunting and fishing rights.*” The interchangeable use of sustenance and subsistence by Congress and the State also raises questions over whether a shared understanding between the Tribes and the State existed when negotiating the terms of the MIA. This is especially relevant given that both terms have different meanings within native languages.

The next two topics and sections yielded more materials. The “internal tribal matters” concept is a feature of the jurisdictional arrangement between the Tribes and the State outlined in the MIA and was addressed by Congress during the drafting of MICSA. The Department of the Interior noted the Tribes’

“exclusive authority over their internal tribal affairs [such as] certain misdemeanor jurisdiction over tribal members, small claims jurisdiction, and a significant residuum of regulatory authority over their lands.” Several other witnesses at the Senate hearing also discussed internal tribal matters, and the Senate made a link between tribal sovereignty and “internal affairs” in its report on the bill.

Finally, sections 1735(b) and 1725(h) of MICSA create a framework for determining when federal law applies to the Tribes and when it will not. Section 1725(h) provides that any federal law which accords special status to the Tribes and affects or preempts Maine state laws does not apply to the Tribes. Using very similar preemption language, section 1735(b) prevents the application of federal laws adopted after MICSA to apply to the Tribes. The most significant finding on section 1725(h) is that the initial impetus for its inclusion was to prevent the application of certain federal environmental laws to the Tribes. Instead of using the broad approach ultimately adopted by Congress, the Department of the Interior suggested enumerating which laws would be excluded from applying. That list included primarily federal environmental laws and Indian trader statutes.

As for section 1735(b), no documents were found explaining why it was included, but it was added to the bill just days before the full House and Senate voted. As a result, there was no discussion by Congress on that particular section. It is worth noting that this broad limitation of federal law to the Tribes, and the Houston Band, is uncommon. Federal authority, specifically congressional authority, is plenary in governing the relationships between the three sovereigns: the United States, the states and the tribes. The absence of materials explaining how, why and by whom section 1735(b) was included, and the unanswered question of why the DOI’s suggestion of enumeration of applicable federal laws was rejected calls for a re-visitation of these sections.

Beyond these sections and topics, reviewing over two thousand pages of documents related to the land claim negotiations and the drafting of the settlement acts revealed other noteworthy issues which the authors of this report thought important to share and comment on. Different aspects of the municipality status of the Tribes’ were addressed throughout the drafting process. For example, there was much discussion on how federal funding would operate under what was called a “unique” jurisdictional framework. The funding issue was ultimately resolved by DOI and the parties, however, what was striking was how the municipality concept seemed to supplant the language of federal Indian law principles related to jurisdiction, namely inherent tribal sovereignty.

References to tribal sovereignty made during the drafting period are minimal, despite Congress’s recognition of all the tribes and their “sovereign rights.” Reviewing the materials broadly, how the State and Congress thought and talked about the rights of the Tribes is noteworthy. There was, more often than not, a language of municipalities, as arms of state government and the application of state law, not the foundational federal Indian law principle of inherent tribal sovereignty. Future research and discussion might explore the question of whether the two concepts (municipality and inherent tribal sovereignty) are reconcilable, and/or whether the framework, as a cornerstone of the MIA, has worked and whether it is working today? As Maine Attorney General Cohen explained during the Senate hearing, the jurisdictional model in the MIA was a means to “avoid [] the types of divisive [sic] controversy that has so marked tribal/State relations in the Western States and has resulted in so much litigation and ill-will.”

## I. Introduction

This report represents eight months of research and analysis of the drafting and passage of the Maine Indian Claims Settlement Act (MICSA), a federal law enacted in October 1980 to settle land claims brought by the Passamaquoddy Tribe and the Penobscot Indian Nation (collectively the “Tribes”), but which also covers the Houlton Band of Maliseet Indians. That federal law is one part of the settlement, which also includes the Maine Implementing Act (MIA), a Maine state law, and an agreement to purchase land. The research was sponsored by the Maine Indian Tribal-State Commission (MITSC) and is part of its strategy to develop mutually beneficial solutions to the conflicts arising from the interpretation of the MIA and MICSA.

As outlined in MITSC’s request for proposal, the focus of the research was to collect background information relating to the development of the MICSA’s provisions from April 1980 to September 1980, paying particular attention to gathering information regarding the formulation of the following sections and topics:

1. Section 1723 focusing on the force and reservation of rights under the implicated treaties,
2. Sustenance and protected sustenance practices,
3. Definition of internal tribal matters, and
4. Sections 1735(b) and 1725(h) addressing the application of federal law.

This report presents the findings of this research and offers initial observations on those findings. More specifically, the findings sections of this report identify and describe relevant documents found during the research. The observations comment on those findings offering some initial thoughts and ideas on what the materials may mean within the larger context of the drafting of MICSA and the settlement as a whole. Unfortunately, very little was found on some of the topics and sections, limiting the ability of the authors to comment. Additionally, the report provides an overview of the legislative process, a description of the larger context prior to and during the drafting of MICSA, and finally offers suggestions for areas of future research.

Although not the focus of this research, the authors also identified and collected several documents related to the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs. The Houlton Band of Maliseet Indians received a slightly different treatment under the MIA and MICSA, compared to that of the Penobscot Indian Nation and the Passamaquoddy Tribes. The Aroostook Band of Micmacs settled their land claim a decade later. A review of those documents, mostly from prior to 1980, reveals that one of the discussion points with regards to these two tribes, as well as any other tribes in Maine, was what would happen if other tribes were not included in the 1980 settlement.<sup>1</sup>

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<sup>1</sup> See, e.g., *Letter from Maynard Polchies (President of the Association of Aroostook Indians) to Forrest Gerard (Department of Interior) referencing the Micmacs and the Maliseets (05/10/1979)*, The Edmund S. Muskie Papers, Box 2150, Folder 10, The Edmund S. Muskie Archives and Special Collections Library, Bates College, Lewiston, ME (BATES001), available at <http://maineindianclaims.omeka.net/items/show/2> [hereinafter BATES001]; *Internal memo from Muskie staffers Estelle Lavoie to James Case regarding a meeting with the Micmac and Maliseet Tribes (09/05/1979)*, The Edmund S. Muskie Papers, Box 2150, Folder 10, The Edmund S. Muskie Archives and Special Collections Library, Bates College, Lewiston, ME (BATES004), available at <http://maineindianclaims.omeka.net/items/show/4>; *Memo to Senator Edmund Muskie from James Case (Muskie’s Chief Legislative Assistant) with draft legislation that the White House intends to submit to Congress encompassing Part A of the Task Force proposal for settlement of Maine Indian Land Claims (06/21/1978)*, The Edmund S. Muskie Papers, Box 2151, Folder 1, The Edmund S. Muskie Archives and

Although the report provides an overview of the findings and offers observations on the primary materials, readers are encouraged to review and study the materials themselves. There are a couple of reasons why solely relying on the report may limit the potential that these materials have to contributing to a new dialogue on the settlement and on the relationship between the State of Maine and the Tribes located in Maine. First, readers, especially those familiar with the history and those living in the current context, will be able to perceive nuances and appreciate different interpretations of the primary materials that the authors of this report may not. Second, the RFP and, thus the report, are limited to specific topics. However, many of the materials address other topics and issues that may be of interest or importance to others.

Given this greater promise of the materials, the authors have attempted to make accessing those materials easy. Citations in this report include hyperlinks to a website which houses all the relevant documents recovered from this research project. The website is also searchable, allowing for interested individuals to search specific words or topics amongst all the documents. It is the authors' hope that this research and report mark only a first step in creating a productive dialogue towards creating a positive and workable government-to-government relationship between the Tribes and the State of Maine.

## **II. Research Process and Sources**

The process of selecting sources of potential materials began with the drafting of the proposal. An initial round of research during the drafting of the proposal revealed several potential sources, almost all of which yielded a substantial amount of materials. The actual research of which began in June 2016. The authors focused on relevant federal government sources, such as congressional committees, federal departments and individual senators, all of which are outlined in detail below. One background law review article on the settlement also led to archives of the National Congress of American Indians and Attorney Suzan Harjo stored at the archives of the National Museum of the American Indian. Ms. Harjo was present at several meetings during the relevant time period in her capacity as the White House's Congressional Liaison for Indian Affairs and later lawyer for the National Congress of American Indians. Tribal government sources were not researched, as MITSC sought to focus on available federal sources.

During the period from June – October 2016, five locations were visited to gather source documents. Before arriving at each location, archivists and librarians assisted the authors with identifying which files to examine.

First, at the **National Archives** in Washington, D.C., approximately eight boxes of documents were reviewed. The National Archives included primarily official legislative materials. Some examples are transcripts of hearings, drafts of the bill for both the Senate and House of Representatives, and official correspondence between federal agencies all relating to the Maine Indian Claims Settlement Act. The archives at the **National Museum of the American Indian** yielded approximately five boxes of documents from Suzan Harjo and the National Congress of American Indians. Files from this location include correspondence between tribal interests and both the state and federal government agencies.

The archives of **Senators Cohen and Hathaway** at the University of Maine were studied, and these turned up many helpful documents. There were approximately fourteen boxes of documents examined, primarily of Representative and then later Senator William Cohen. This search turned up some duplicates of the official legislative documents already gathered in D.C., but also correspondence and

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Special Collections Library, Bates College, Lewiston, ME (BATES005), *available at* <http://maineindianclaims.omeka.net/items/show/5>.

inter-office memos which were illuminating. The archives of **Senator Edmond Muskie** are held at Bates College in Lewiston, Maine. Approximately nineteen boxes of documents related to land claims and the Maine Indian Claims Settlement Act were reviewed. Most of these documents were considered unnecessary as the time period was outside the scope of this project, but they provided relevant background to the research, and documents from this period are included for those purposes. Lastly, the archives of **Senator George Mitchell** were examined at Bowdoin College in Brunswick, Maine. These documents were mostly official legislative material that had already been collected.

There were other archives and catalogues searched that did not yield any relevant or additional documents. These were Cecil Andrus' (Secretary of Interior) archives at Boise State University; Lloyd Cutler's biographical oral history housed at the University of Virginia; the Jimmy Carter Presidential Library and Museum; and the National Archives Online Database and Microfilm Collection. The authors also were told that materials related to the Department of the Interior's involvement in MICSA did not exist. Both Eliot Cutler (member of the White House negotiating team) and Jim Case (aid to Senator Muskie) were also contacted but did not reveal any additional sources.

Approximately 1,800 pages of photocopies were collected and some documents were accessed through ProQuest Congressional. Once the documents were collected, they were catalogued by date and subject heading. Except for early drafts of the bill and documents which provided context to the entire settlement process, documents deemed outside the parameters of the research were eliminated. The documents were then scanned and uploaded onto the website.

### **III. History and Context**

#### **A. The Land Claim and the Settlement**

The history of the Tribes' land claim is long and complex and beyond the scope of this report. Many of the materials found during the research recount the history leading up to the drafting of MICSA. Because MICSA is the final chapter of settling the land claim, it is necessary to put that Act into that historical context. In 1972 the Passamaquoddy Tribe initiated its land claim by bringing suit against the U.S. Government, arguing that the U.S. Government had a trust responsibility to the tribe and must bring suit on their behalf. The Court of Appeals for the First Circuit subsequently affirmed that a trust relationship existed.

The basis of the land claim was the Non-Intercourse Act, a federal law which provides that any transfer of lands by an Indian tribe must have approval of the U.S. Government for it to be valid. The Treaty of 1794 between the Commonwealth of Massachusetts (which governed the then District of Maine) and the Passamaquoddy tribe those connected with them, transferred lands from the several tribes in Maine to the Commonwealth. This was done without any federal involvement or approval.

Although continuing the claim in court was one option, the White House intervened and encouraged that Tribes and the State of Maine to negotiate a settlement. President Carter appointed former Judge William Gunter to facilitate the negotiations. Judge Gunter's recommendation was rejected by all parties in July, 1977, after which the White House formed a three-member Task Force (or Work Group) to assist the parties in coming to an agreement. In 1978, the White House Task Force and the Passamaquoddy and Penobscot tribes entered into a Joint Memorandum of Understanding. Negotiations continued for more than two years until finally, in April 1980, the MIA was passed.

As everyone understood during the negotiations and as it remains today, it is Congress which has plenary power of Indian affairs. Because of this authority, any action taken by the State of Maine was not legitimate unless approved by Congress. The following section explains what Congress sought to accomplish with the adoption of MICSA.

### **B. How the U.S. Congress Saw its Role in the Settlement of the Maine Indian Lands Claims**

On July 1, 1980, U.S. Senator William Cohen of Maine stated on the first day of the Senate's hearing on MICSA,

“The bill before us is a counterpart to legislation which has already been passed and signed into law in the State of Maine. The effectiveness of each piece of legislation is contingent upon the enactment of the other. Taken together, the MIA and the federal legislation constitute a complex and unique resolution of this most difficult problem.”<sup>2</sup>

As introduced above, Maine's congressional delegation was well aware and at times intimately involved in the Maine Indian land claims settlement process prior to the drafting and adoption of the MICSA in 1980. Although the research was limited to April – October 1980, many of the archives reviewed revealed a wealth of materials related to the months and years prior to April 1980. Over the long process of negotiations, Congress, and ultimately the federal government, came to see its role as building upon the negotiated settlement memorialized in the state law in April of 1980. The research revealed the following primary tasks that Congress had in drafting the federal counterpart to the state act:

1. To extinguish title that was the subject of the land claims;
2. To provide funds for the settlement;
3. To ratify the MIA; and
4. To outline the relationship between the tribes and the federal government, and the applicability of federal law.

Taking each task in turn, extinguishing the land claims was seen as the most important provision of the federal bill. The Department of the Interior, which was heavily involved in the drafting of MICSA stated in a letter to Senator Melcher that, “[t]he most important provision in S. 2829 is clearly Section 4 . . . . The effect of this provision . . . would be that all Indian land claims in Maine arising under Federal law will be extinguished on the date of the enactment of the Act.”<sup>3</sup> The significance of this role is illustrated in the earlier drafts of the federal settlement act: even though some of the earlier bills drafted fluctuated between including a funding provision or a provision creating a mechanism for Indians to file a claim for damages in federal court, as early as March, 1977, every version of the bill contained an extinguishment provision.

Second, providing federal funds for settlement was another key component. Who would pay the settlement was a key part of negotiations prior to the drafting of MICSA and ultimately it was agreed

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<sup>2</sup> Proposed Settlement of Maine Indian Land Claims: Hearings Before the Senate Select Committee on Indian Affairs, 96th Cong., 2nd sess., S. 2829, Vol. 1, Washington, DC: U.S. Government Printing Office (1980): 28, available at <http://hdl.handle.net/2027/umn.31951p00324196j> [hereinafter S. 2829 Hearings Before the Senate Select Committee].

<sup>3</sup> Letter from Cecil Andrus (Secretary of the Interior) to Senator John Melcher, with proposed amendment to Bill S. 2829 in the nature of a substitute (amendment not attached to letter) (08/08/1980), p. 3, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 12 (UMAINE032), available at <http://maineindianclaims.omeka.net/items/show/85> [hereinafter UMAINE032].

that the federal government bore the sole responsibility. At the Senate hearing, the Maine Attorney General stated that the fundamental premise of MICSA is that the “cost of settling the Maine land claim is a national responsibility and should be funded by the Federal Government.”<sup>4</sup> Third, ratifying the MIA was also a primary task for Congress given that the state act would not have any effect without federal involvement. Maine pressed Congress to ratify the agreement without modification, which it ultimately did.<sup>5</sup>

Finally, clarifying the relationship between tribes and federal government and addressing the applicability of federal law was an issue on which that Congress and the Department of Interior (DOI) focused. In his remarks to the Senate during the two-day hearing, Secretary of the Interior Andrus stated that one of DOI’s “foremost concerns [with regards to the novel jurisdictional relationship created by the settlement] is the lack of clarity in defining the role of the Federal Government as trustee to the tribes.”<sup>6</sup> As noted below in section V, the materials revealed that one of the main areas discussed was federal vs. state funding.

### **C. The Role (and Absence) of the U.S. Department of the Interior during the Negotiations and Drafting**

Attorneys with the Department of the Interior were involved throughout much of the negotiations and drafting of the federal law.<sup>7</sup> And the Department’s involvement centered on legal issues such as

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<sup>4</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 161 (Cohen statement).

<sup>5</sup> In the Senate Report, it states that “Under the circumstances, the Committee believes that the Maine Implementing Act should be ratified without modification.” S. Report No. 96-957, *Authorizing Funds for the Settlement of Indian Claims in the State of Maine*, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., on S. 2829, September 17, 1980, Washington, DC: Government Printing Office, p. 44, *available at* [http://congressional.proquest.com:80/congressional/docview/t49.d48.13330\\_srp.957?accountid=1131](http://congressional.proquest.com:80/congressional/docview/t49.d48.13330_srp.957?accountid=1131) [hereinafter S. Report No. 96-957]; *see also*, *Memo from Timothy Woodcock to Senator William S. Cohen, containing notes regarding 07/17/1980 meeting in Portland for revisions to the federal Maine Indian Claims Settlement bill (07/21/1980)*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine, 3.3.13.2 Box 5, Folder 11 (UMAINE040), *available at* <http://maineindianclaims.omeka.net/items/show/93>; *Letter from Maine Attorney General Richard Cohen to Cecil Andrus, Secretary of Interior, after the hearings before the Senate Select Committee on Indian Affairs (Re: Bill S. 2829) (07/21/1980)*, National Congress of American Indians records, Box 532, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “Maine Land Settlement Legislation [2 of 2]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI005), *available at* <http://maineindianclaims.omeka.net/items/show/30> [hereinafter NMAI005].

<sup>6</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 37 (Andrus).

<sup>7</sup> *See, e.g.*, BATES001, *supra* note 1; *Memo from Bob Lipschutz (White House Counsel) to Leo Krulitz (Solicitor), Providing an update on the status of the Maine Indian Claim Settlement Negotiations (07/11/1979)*, National Congress of American Indians records, Box 530, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “Maine”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI009), *available at* <http://maineindianclaims.omeka.net/items/show/33>; *Memo to Eliot Cutler (White House, OMB), Douglas Huron (Associate Counsel to the President), Edwin Kneedler (Department of Justice) and Tim Vollmann (Department of Interior) from Kay Oberly (Department of Justice, Land and Natural Resources Division), with draft of Maine Indian Claims Settlement legislation attached (07/18/1978)*, National Congress of American Indians records, Box 530, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “Maine Indian Claims Settlement Act”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI011), *available at*

extinguishment, funding and jurisdiction.<sup>8</sup> Following the agreement between the Tribes and the White House which was embodied in the February 10, 1978 Joint Memorandum of Understanding, “the Tribes were asked by the Maine Congressional Delegation to reach an agreement with the State of Maine concerning jurisdictional matters.”<sup>9</sup> Of interest, however, is DOI’s absence from the process from November 1979 to March 1980, which is when the MIA was finalized and adopted. Following a statement by Secretary Andrus during the Senate hearing about DOI’s concerns and questions over the

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<http://maineindianclaims.omeka.net/items/show/35>; *Letter from Diane Greenberg (Department of Interior) to Senator Edmund Muskie, with draft bill attached of Maine Indian Claims Settlement Act (MICSA) (09/07/1979)*, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indians - Land Claims - General, I] [2 of 3]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI014), available at <http://maineindianclaims.omeka.net/items/show/38>; *Memo from Tim Vollmann (Department of Interior) to Leo Krulitz (Solicitor), with draft bill attached of Maine Indian Claims Settlement Act (MICSA) (07/31/1979)*, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indians - Land Claims - General, I] [2 of 3]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI015), available at <http://maineindianclaims.omeka.net/items/show/39>; *Handwritten note from Tim Vollmann (Department of Interior) to Thomas Tureen (NARF Attorney for the Passamaquoddy Tribe and the Penobscot Nation), with a portion of a draft bill attached (07/16/1979)*, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indian Land Claims - General, IV]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI020), available at <http://maineindianclaims.omeka.net/items/show/44>; *Letter from Andrew Akins (Penobscot-Passamaquoddy Tribal Planning Board) to Forrest Gerard (BIA, Department of Interior) (04/11/1978)*, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indian Land Claims - General, IV]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI023), available at <http://maineindianclaims.omeka.net/items/show/47>; *Draft Maine Indian Claims Settlement Bill sent to Suzan Harjo (Congressional Liaison for Indian Affairs) from Tim Vollmann (Department of Interior), with his handwritten notes (07/07/1977)*, National Congress of American Indians records, Box 532, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indian Land Claims - General V]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI024), available at <http://maineindianclaims.omeka.net/items/show/48> (this is the earliest); *Memo to Eliot Cutler (White House, OMB), Douglas Huron (Associate Counsel to the President), Edwin Kneedler (Department of Justice) and Tim Vollmann (Department of Interior) from Kay Oberly (Department of Justice, Land and Natural Resources Division), with draft of Maine Indian Claims Settlement legislation attached (07/11/1978)*, National Congress of American Indians records, Box 532, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indian Land Claims - General V]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI025), available at <http://maineindianclaims.omeka.net/items/show/49>.

<sup>8</sup> See *id.*

<sup>9</sup> *Letter to Senator John Melcher from Thomas Tureen (NARF Attorney for the Passamaquoddy Tribe and the Penobscot Nation), explaining to Senator John Melcher some of the background on where the concept of tribes being treated as municipalities came from (09/06/1980)*, p. 2, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indian Land Claims - General, II]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI018), available at <http://maineindianclaims.omeka.net/items/show/42> [hereinafter NMAI018].

MIA's jurisdictional arrangement, Senator Cohen asked Andrus about the extent of DOI's involvement during the Senate hearing:

Has not the Department of the Interior, or some of its attorneys, been working in conjunction with either counsel for the tribes or in connection with the State in developing this settlement, or have you been totally excluded? Have you had no role of participating so that we come on this first day of hearings saying these issues have not been dealt with, and that there is a problem as far as treating tribes as municipalities, and it is a problem as far as CETA funds or general revenue sharing which has not been contemplated? What has been the role of the [DOI] in this particular settlement?<sup>10</sup>

Secretary Andrus responded that DOI's role "has been very active all the way through except from about late November 1979 till March 1980. There was kind of a little void in communication there." He added that he learned about the \$81.5 million settlement in the "newspaper." He suggested that the lack of DOI involvement "probably caused some of these questions to be raised at a later date" but there were "open lines of communication now" and that "these apparent flaws [were not] fatal."<sup>11</sup> Senator Cohen responded by noting that the "brief hiatus . . . introduced an entirely new relationship between the State and tribes as not recognized in any other State in the country."<sup>12</sup>

Senator Cohen initiated a similar line of questioning to Maine Attorney General Cohen later in the day during the hearing. The Senator asked "why was not the [DOI] involved in negotiating those particular sections that established this unique relationship as a municipality?"<sup>13</sup> AG Cohen responded that when he assumed the office of attorney general of Maine, he was told that,

it was up to the State and the Department of the Interior, and the administration had indicated that it was up to the State before Congress got involved and before Washington got involved, that is, the State should go back and do their negotiations and work out all the jurisdictional aspects, and then come back.<sup>14</sup>

AG Cohen added that he met with Secretary Andrus, and DOI "certainly knew the negotiations were going on." He added that he "never heard anything about Interior wanting to be involved in the development of any particular provisions until this morning."<sup>15</sup> Senator Cohen ended the exchange by stating that it would have been helpful if DOI had been involved with regards to the tax code, to which AG Cohen agreed.

These brief exchanges seem to offer conflicting recollections as to why DOI was absent for a period of several months. In the end, it is unknown whether DOI's participation would have made a difference in avoiding the funding issue or creating a different jurisdiction arrangement, as articulated in the MIA. Ultimately, the funding issue was resolved and the jurisdictional arrangement left unchanged. However, the DOI's absence during such a pivotal time may be seen as striking given the plenary role that the federal government plays in Indian matters. But as referenced in section IV.C.2., the absence of the federal government during that process may alternatively be understood as a reflection of the interest

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<sup>10</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 38 (Sen. Cohen).

<sup>11</sup> *Id.*, at 38 (Andrus).

<sup>12</sup> *Id.*, at 38 (Sen. Cohen).

<sup>13</sup> *Id.*, at 171 (Sen. Cohen).

<sup>14</sup> *Id.*, at 171-2 (A.G. Cohen).

<sup>15</sup> *Id.*

of both sides/parties in keeping the federal government at bay to varying degrees and for different purposes.

#### **D. The Legislative Process and Significance of Congressional Reports**

Given that this research is intended as a review of the drafting and adoption of MICSA, an overview of the federal legislative process is useful. The first step toward passing a new law is for a member (or members) of Congress to introduce a bill.<sup>16</sup> Once a bill has been submitted to the Clerk of the House or Senate, the bill is then assigned a number. House bill numbers are preceded by “H.R.” Senate bill numbers are preceded by “S.” Some bills are presented in both the House and the Senate at approximately the same time.<sup>17</sup> This was true with MICSA. **The Senate bill, introduced by Senator William S. Cohen on June 13, 1980, was identified as S. 2829.<sup>18</sup> The companion House bill, introduced by Representative David Emery on August 1, 1980, was identified as H.R. 7919.<sup>19</sup>**

Once a bill has been introduced, it is referred to the committee that is in charge of dealing with the particular subject matter that will potentially be affected by the bill.<sup>20</sup> In the case of MICSA, Senate Bill S. 2829 was referred to the Senate Select Committee on Indian Affairs, chaired by Senator John Melcher. House Bill H.R. 7919 was referred to the House Committee on Interior and Insular Affairs, chaired by Representative Morris K. Udall. The committee in charge of considering the bill usually seeks the input of other government agencies affected by or involved with the bill’s particular subject matter.<sup>21</sup> **In the case of MICSA, significant communication occurred between the congressional committees and the Department of the Interior (DOI), as well as some correspondence with the parties to the settlement.**

The committee may also hold a public hearing, where witnesses may be heard and questioned by the committee members.<sup>22</sup> **During the drafting of MICSA, the Senate Select Committee on Indian Affairs held a public hearing in early July, 1980 and the House Committee on Interior and Insular Affairs held a hearing on August 25, 1980.<sup>23</sup>** The transcripts of both these hearings are a valuable resource in

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<sup>16</sup> See The U.S. House of Representatives: The House Explained, The Legislative Process, [http://www.house.gov/content/learn/legislative\\_process/](http://www.house.gov/content/learn/legislative_process/) (follow “Learn More: Introduction & Referral” link on Site) [hereinafter The House Explained].

<sup>17</sup> See “How Our Laws Are Made” (House Document 110-49); revised and updated by John V. Sullivan, Parliamentarian, United States House of Representatives, July 2007, *web-friendly version available at* <https://www.congress.gov/resources/display/content/How+Our+Laws+Are+Made+-+Learn+About+the+Legislative+Process#HowOurLawsAreMade-LearnAbouttheLegislativeProcess-SourcesofLegislation> (follow “III. Sources of Legislation” link on Site) [hereinafter How Our Laws Are Made].

<sup>18</sup> See S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 3-25.

<sup>19</sup> See Settlement of Indian Land Claims in the State of Maine: Hearing Before the Committee on Interior and Insular Affairs, House of Representatives, 96th Cong., 2nd sess., H.R. 7919 (Serial No. 9641), Washington, DC: U.S. Government Printing Office (1980): 2-24, *available at* <http://hdl.handle.net/2027/mdp.39015082320907> [hereinafter H.R. 7919 Hearing Before the House Committee on Interior and Insular Affairs].

<sup>20</sup> See The House Explained, *supra* note 16 (follow “Learn More: Introduction & Referral” link on Site).

<sup>21</sup> See How Our Laws Are Made, *supra* note 17 (follow “VI. Consideration by Committee” link on Site).

<sup>22</sup> See *Id.*

<sup>23</sup> See H.R. 7919 Hearing Before the House Committee on Interior and Insular Affairs, *supra* note 19.

learning what information was available to the two committees for consideration regarding the MICSA bills.<sup>24</sup>

After the hearings have been completed, each congressional committee then holds a “mark-up” session. During the mark-up session, each committee deliberates, then votes on whether to “report” the bill to the rest of its corresponding chamber of Congress. The bill may be reported favorably or unfavorably, with or without amendment, or “tabled” rather than reported.<sup>25</sup> **The Senate Select Committee on Indian Affairs reported bill S. 2829 favorably, with amendment, to the full Senate on September 17, 1980.<sup>26</sup> The House Committee on Interior and Insular Affairs did the same in the House two days later, amending bill H.R. 7919 so that it was identical to the Senate bill.<sup>27</sup>**

When a congressional committee votes to report a bill, the committee usually prepares a written report to accompany the bill.<sup>28</sup> A committee report usually includes the text of the bill, and describes the purpose of the bill, its legislative history, and a section-by-section analysis that explains some of the choices in wording.<sup>29</sup> Congressional committee reports “are perhaps the most valuable single element of the legislative history of a law. They are used [later on] by the courts, executive departments, and the public as a source of information regarding the purpose and meaning of the law.”<sup>30</sup>

**Correspondence between the different parties involved in drafting MICSA provides evidence that all the parties had an expectation that the Senate and House committee reports would subsequently play an important role in the interpretation of MICSA.** For example, representatives of both the State of Maine and the Tribes proposed redrafts not only of the language of the bill itself, but also of portions of the committee reports:

July 18, 1980 letter from Reid Peyton Chambers, Attorney for the Houlton Band of Maliseet Indians: “If we adopt the ‘trust-on-a-trust concept’, the pertinent committee reports should state something like the following. . .”<sup>31</sup>

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<sup>24</sup> See S. 2829 Hearings Before the Senate Select Committee, *supra* note 2; H.R. 7919 Hearing Before the House Committee on Interior and Insular Affairs, *supra* note 19.

<sup>25</sup> See The House Explained, *supra* note 16 (follow “Learn More: In Committee” link on Site).

<sup>26</sup> See All Actions: S. 2829—96<sup>th</sup> Congress (1979-1980), at <https://www.congress.gov/bill/96th-congress/senate-bill/2829/all-actions>. Three earlier mark-up sessions were apparently called off either because of disagreement between the State of Maine and the federal government, or because of “failure to gain complete agreement among the parties.” See *Partial List of Meetings to Resolve Disagreements about the Operation of the Legislation to Settle the Maine Indian Land Claims (Undated)*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 3 (UMAINE026), available at <http://maineindianclaims.omeka.net/items/show/79> [hereinafter UMAINE026].

<sup>27</sup> See Actions Overview: H.R. 7919—96<sup>th</sup> Congress (1979-1980), at <https://www.congress.gov/bill/96th-congress/house-bill/7919/actions>.

<sup>28</sup> See The House Explained, *supra* note 16 (follow “Learn More: In Committee” link on Site).

<sup>29</sup> See Georgetown Law Library Legislative History Research Guide, Committee Reports, <http://guides.ll.georgetown.edu/c.php?g=278869&p=1862825>.

<sup>30</sup> How Our Laws Are Made, *supra* note 17 (follow “VII. Reported Bills” link on Site).

<sup>31</sup> *Letter from Reid Peyton Chambers (Attorney for the Houlton Band of Maliseet Indians) to Thomas Tureen (NARF Attorney for the Passamaquoddy Tribe and the Penobscot Nation), proposing a draft of some of the provisions for the Maine Indian Claims Settlement Bill (07/18/1980)*, National Congress of American Indians records, Box 532, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “Maine

July 21, 1980 letter from Maine Attorney General Richard Cohen: “Rather than amending S. 2829 to state the parties’ mutual understanding, however, it would be preferable to embody this understanding in the Committee Report.”<sup>32</sup>

Undated Tentative Response of the Passamaquoddy Tribe and the Penobscot Nation to State Proposals for Amendments to S. 2829: “The tribes are generally in agreement with the proposed Committee report language, but would suggest a redraft as follows . . .”<sup>33</sup>

Copy of MICSA after it was signed into law, annotated by someone in Senator William S. Cohen’s staff: A note in the margin states that Section 6(h) (now 25 U.S.C. 1725(h)) “was the subject of a much discussion [sic] and correspondence i\_ the Committee report is intended to clarify it.”<sup>34</sup>

In addition to including a section-by-section analysis of the bill, the Senate Report (S. Report No. 96-957) also includes a section-by-section analysis of the Maine Implementing Act (MIA), which governs the implementation of the settlement as it pertains to state law.<sup>35</sup> In its own report, the House Committee accepted the Senate Report as its own.<sup>36</sup> **The House of Representatives passed the bill first on Sept 22, 1980.<sup>37</sup> The Senate passed the bill the next day, and President Carter signed the bill into law on October 10, 1980.**

#### IV. The Topics: Findings and Observations

##### A. Section 1723 and the Force and Reservation of Rights under the Implicated Treaties

###### 1. Text of Section 1723

**(a) Ratification by Congress; personal claims unaffected; United States barred from asserting claims on ground of noncompliance of transfers with State laws or occurring prior to December 1, 1873. (1)** Any transfer of land or natural resources located anywhere within the United States from, by, or on behalf of

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Land Settlement Legislation [2 of 2]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI004), available at <http://maineindianclaims.omeka.net/items/show/29>.

<sup>32</sup> NMAI005, available at <http://maineindianclaims.omeka.net/items/show/30>.

<sup>33</sup> *Tentative Response of the Passamaquoddy Tribe and the Penobscot Nation to State Proposals for Amendments to S. 2829 (Undated)*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 9 (UMAINE012), available at <http://maineindianclaims.omeka.net/items/show/65>.

<sup>34</sup> *Public Law 96-420 (H.R. 7919), with notes in the margins*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 9, Folder 3 (UMAINE035), available at <http://maineindianclaims.omeka.net/items/show/88> [hereinafter UMAINE035].

<sup>35</sup> See S. Report No. 96-957, *supra* note 5.

<sup>36</sup> See H.R. Report No. 96-1353, *Providing for the Settlement of Land Claims of Indians in the State of Maine*, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., on H.R. 7919, September 19, 1980, Washington, DC: Government Printing Office, available at

[http://congressional.proquest.com:80/congressional/docview/t49.d48.13377\\_h.rp.1353?accountid=11311](http://congressional.proquest.com:80/congressional/docview/t49.d48.13377_h.rp.1353?accountid=11311) [hereinafter H.R. Report No. 96-1353].

<sup>37</sup> See Actions Overview: H.R. 7919—96<sup>th</sup> Congress (1979-1980), at <https://www.congress.gov/bill/96th-congress/house-bill/7919/actions>.

the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, and any transfer of land or natural resources located anywhere within the State of Maine, from, by, or on behalf of any Indian, Indian nation, or tribe or band of Indians, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, shall be deemed to have been made in accordance with the Constitution and all laws of the United States, including but without limitation the Trade and Intercourse Act of 1790, Act of July 22, 1790 (ch. 33, Sec. 4, 1 Stat. 137, 138), and all amendments thereto and all subsequent reenactments and versions thereof, and Congress hereby does approve and ratify any such transfer effective as of the date of said transfer: *Provided however*, That nothing in this section shall be construed to affect or eliminate the personal claim of any individual Indian (except for any Federal common law fraud claim) which is pursued under any law of general applicability that protects non-Indians as well as Indians.

**(2)** The United States is barred from asserting on behalf of any Indian, Indian nation, or tribe or band of Indians any claim under the laws of the State of Maine arising before October 10, 1980, and arising from any transfer of land or natural resources by any Indian, Indian nation, or tribe or band of Indians, located anywhere within the State of Maine, including but without limitation any transfer pursuant to any treaty, compact, or statute of any State, on the grounds that such transfer was not made in accordance with the laws of the State of Maine.

**(3)** The United States is barred from asserting by or on behalf of any individual Indian any claim under the laws of the State of Maine arising from any transfer of land or natural resources located anywhere within the State of Maine 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, compact, or statute of any State.

**(b) Aboriginal title extinguished as of date of transfer.** To the extent that any transfer of land or natural resources described in subsection (a)(1) of this section may involve land or natural resources to which the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians, or any of their members, or any other Indian, Indian nation, or tribe or band of Indians had aboriginal title, such subsection (a)(1) shall be regarded as an extinguishment of said aboriginal title as of the date of such transfer.

**(c) Claims extinguished as of date of transfer.** By virtue of the approval and ratification of a transfer of land or natural resources effected by this section, or the extinguishment of aboriginal title effected thereby, all claims against the United States, any State or subdivision thereof, or any other person or entity, by the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians or any of their members or by any other Indian, Indian nation, tribe or band of Indians, or any predecessors or successors in interest thereof, arising at the time of or subsequent to the transfer and based on any interest in or right involving such land or natural resources, including but without limitation claims for trespass damages or claims for use and occupancy, shall be deemed extinguished as of the date of the transfer.

**(d) Effective date; authorization of appropriations; publication in Federal Register.** The provisions of this section shall take effect immediately upon appropriation of the funds authorized to be appropriated to implement the provisions of section 1724 of this title. The Secretary shall publish notice of such appropriation in the Federal Register when such funds are appropriated.

## 2. Findings

As described by Secretary Andrus, in a letter to Senator John Melcher, Chair of the Senate Select Committee on Indian Affairs, 25 U.S.C. §1723 “[is clearly t]he most important provision in [the MICSA,]” given that “[t]he effect of this provision . . . [is] that all Indian land claims in Maine arising under Federal law [are] extinguished [as of] the date of the enactment of the Act.”<sup>38</sup> This provision also ratifies prior conveyances of land or natural resources, including those made by way of a treaty.

As outlined in the RFP, in regards to section 1723, MITSC was specifically concerned with obtaining information on: (1) the extent to which the treaties with Massachusetts still have the force and effect of law after the passing of the MICSA; (2) what was conveyed and what was reserved under the treaties that gave rise to the MICSA; and (3) the scope of rights that were retained when the treaties were entered into.

The research revealed very little insight into what portion of the treaties survived the passing of the MICSA. In fact, the only reference to rights still reserved under the treaties was in the Summary of Major Provisions contained in the Senate Report, which states that

The settlement also provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them.<sup>39</sup>

No additional record was found of any discussion regarding the extent of force, nor the effect of the treaties underlying the tribal land claims, nor any discussion regarding any reserved treaty rights of the tribes. In other words, apart from the above excerpt from the Senate Report, the research did not uncover any detailed discussion as to tribal rights that might survive extinguishment of the land claims in question. Instead, the discussion at the congressional level was heavily focused on ensuring that the language of Section 4 (now 25 U.S.C. §1723) was sufficient to “fully and finally” extinguish all tribal land claims in Maine and “put an end to this dispute.”<sup>40</sup> A DOI legal opinion confirmed that,

the comprehensive nature of the extinguishment of Indian land claims provided for in Section [1723] (which is very similar to the language used in the Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §1705), especially as supplemented by Section [1724(e)], would completely eliminate the clouds from land titles in Maine caused by the pendency of such Indian claims.<sup>41</sup>

**Observations on this section are found in section IV.B.4 “Reserved Rights and the Canons of Construction” below.**

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<sup>38</sup> UMAINE032, *supra* note 3, at 3.

<sup>39</sup> S. Report No. 96-957, *supra* note 5, at 18.

<sup>40</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 88, 39.

<sup>41</sup> *Letter from Clyde O. Martz (Solicitor, Department of Interior) to Senator John Melcher, in response to request from Senator George J. Mitchell at the Senate Select Committee Hearing regarding the Maine Indian Claims Settlement Bill (08/20/1980)*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 6, Folder 1 (UMAINE048), available at <http://maineindianclaims.omeka.net/items/show/101>.

## **B. The Definition of Sustenance and Protected Sustenance Practices**

### **1. References to Sustenance in MIA, 30 M.R.S. § 6207**

- (1). Adoption of ordinances by tribe.** Subject to the limitations of subsection 6, the Passamaquoddy Tribe and the Penobscot Nation each shall have exclusive authority within their respective Indian territories to promulgate and enact ordinances regulating: A. Hunting, trapping or other taking of wildlife; and B. Taking of fish on any pond in which all the shoreline and all submerged lands are wholly within Indian territory and which is less than 10 acres in surface area. Such ordinances shall be equally applicable, on a nondiscriminatory basis, to all persons regardless of whether such person is a member of the respective tribe or nation provided, however, that subject to the limitations of subsection 6, such ordinances may include special provisions for the sustenance of the individual members of the Passamaquoddy Tribe or the Penobscot Nation.
- (3). Adoption of regulations by the commission.** Subject to the limitations of subsection 6, the commission shall have exclusive authority to promulgate fishing rules or regulations on: A. Any pond other than those specified in subsection 1, paragraph B, 50% or more of the linear shoreline of which is within Indian territory; B. Any section of a river or stream both sides of which are within Indian territory; and C. Any section of a river or stream one side of which is within Indian territory for a continuous length of 1/2 mile or more.

In promulgating such rules or regulations the commission shall consider and balance the need to preserve and protect existing and future sport and commercial fisheries, the historical non-Indian fishing interests, the needs or desires of the tribes to establish fishery practices for the sustenance of the tribes or to contribute to the economic independence of the tribes, the traditional fishing techniques employed by and ceremonial practices of Indians in Maine and the ecological interrelationship between the fishery regulated by the commission and other fisheries throughout the State. Such regulation may include without limitation provisions on the method, manner, bag and size limits and season for fishing....

- (4). Sustenance fishing within the Indian reservations.** Notwithstanding any rule or regulation promulgated by the commission or any other law of the State, the members of the Passamaquoddy Tribe and the Penobscot Nation may take fish, within the boundaries of their respective Indian reservations, for their individual sustenance subject to the limitations of subsection 6.

### **2. Findings**

The research revealed no specific references to a definition of sustenance and/or protected sustenance practices as part of the drafting and adoption of the federal MICA. When these topics were discussed by Congress, it was almost always in relation to the MIA. The one instance where Congress seemingly referenced subsistence hunting and fishing outside of the context of the MIA is in the House and Senate Reports. In those reports, subsistence hunting and fishing is regarded as falling within the “expressly retained sovereign activities” of the Tribes.<sup>42</sup> This reference, along with any reserved treaty rights, is briefly discussed below in section IV.B.4.

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<sup>42</sup> See H.R. Report No. 96-1353, *supra* note 36, at 15; S. Report No. 96-957, *supra* note 5, at 15.

With regards to the MIA and sustenance practices, responding to the concern that “[s]ubsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement...” the Senate in its report noted that under the MIA,

the Passamaquoddy Tribe and the Penobscot Nation have the permanent right to control hunting and fishing not only within their reservations, . . . in the newly-acquired Indian territory as well. The power of the State . . . to alter such rights without the consent of [tribes] is ended by Sec. 6(e)(1).<sup>43</sup>

Congress refers to this “power of the State” as a “residual power,” one that is like the power other states have in connection with federal Indian treaty hunting and fishing rights:

This residual power is not unlike that which other states have been found to have in connection with federal Indian treaty hunting and fishing rights. . . . The State will only be able to make use of this residual power where it can be demonstrated by substantial [evidence] that the tribal hunting and fishing practices will or are likely to adversely affect wildlife stock outside tribal land.<sup>44</sup>

In a letter to Senator Melcher and in response to a concern that tribes were getting preferential treatment, Maine AG Cohen explained the MIA as follows:

“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 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 overridden 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.<sup>45</sup>

Senator Cohen’s archives also included copies of several letters written by State of Maine Attorney General Richard Cohen to Maine’s Joint Select Committee on Indian Land Claims. One letter dated April 1, 1980 answered a request by the committee for additional information on a variety of topics including the definition of sustenance: “‘Sustenance’ means personal or family consumption and does not include

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<sup>43</sup> S. Report No. 96-957, *supra* note 5, at 16-17. See also H.R. Report No. 96-1353, *supra* note 36, at 17. In an internal memo summarizing the then proposed (state) legislative solution to the Indian Land Claim, Tim Woodcock wrote to Senator Cohen that “the Indians are given the right to pass hunting and fishing ordinances.... Tribal members may hunt and fish for sustenance if the tribe so decides.” *Memo to Senator William S. Cohen from Timothy Woodcock summarizing proposed legislative solution to Indian land claim (03/20/1980)*, p. 1, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 5, Folder 11 (UMAINE020), available at <http://maineindianclaims.omeka.net/items/show/73>.

<sup>44</sup> H.R. Report No. 96-1353, *supra* note 36, at 17.

<sup>45</sup> *Letter from Maine Attorney General Richard Cohen (also on behalf of Maine Governor Joseph Brennan) to Senator John Melcher (dated 08/12/1980) responding to questions posed by Bangor Daily News and former Gov. Longley at the Select Committee on Indian Affairs Hearing on July 1-2, 1980*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 6, Folder 1 (UMAINE018), available at <http://maineindianclaims.omeka.net/items/show/71> [hereinafter UMAINE018].

commercial disposition for maintaining a livelihood.”<sup>46</sup> An April 2, 1980 letter answered questions from state legislators some of which addressed the jurisdiction of hunting and fishing regulation, but did not delve into the meaning of sustenance.<sup>47</sup>

Finally, Congress also received a statement from two Maine attorneys, Wayne Libhart and James Erwin, outlining their concerns over regulation of hunting and fishing in the MIA. The bulk of this statement dealt with the underlying basis of the lands claims, but the two attorneys did express “distress[]” with the MIA:

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.<sup>48</sup>

In addition to the specific language of the MIA’s sections 6207(1)(a) and 6207(6) as a source of conflict between the State of Maine and the tribes over the regulation of hunting and fishing,<sup>49</sup> Libhart and Erwin also referenced the importance of hunting and fishing in Maine culture: “the rights to hunt and fish and trap are widely considered to be inalienable rights by a large proportion of the Maine citizens.”<sup>50</sup> According to these two Maine citizens, “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.”<sup>51</sup> The authors called on Congress to “make its own in-depth evaluation” of the MIA.<sup>52</sup>

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<sup>46</sup> *Letter to Maine Legislature's Joint Select Committee on Indian Land Claims from Maine Attorney General Richard Cohen regarding amendments to the Maine Implementing Bill, discussing fishing and hunting rights (04/01/1980)*, p. 2, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 6 (UMAINE021), available at <http://maineindianclaims.omeka.net/items/show/74>.

<sup>47</sup> *See Letter to Maine Legislature's Joint Select Committee on Indian Land Claims from Maine Attorney General Richard Cohen explaining certain aspects of the jurisdictional arrangement on Tribal lands (04/02/1980)*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 8, Folder 6; William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 7 (UMAINE016), available at <http://maineindianclaims.omeka.net/items/show/69>.

<sup>48</sup> *Statement of Attorneys Wayne Libhart and James Erwin of Maine, submitted to the House Committee on Interior and Insular Affairs and included as part of the hearing record for Bill H.R. 7919 (Maine Indian Claims Settlement Bill) (08/25/1980)*, p. 7, Committee on Interior & Insular Affairs, Legislative Files: House Bills, Box 139, Folder “Hearing on HR 7919 Full Committee”, 96th Congress, Records of the U.S. House of Representatives, RG 233, National Archives, Washington, DC (NARA014), available at <http://maineindianclaims.omeka.net/items/show/18>.

<sup>49</sup> *See id.* at 8.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

### 3. Observations

It is a little surprising that more documents were not found on this topic, given that both the House and Senate Reports discuss a “concern” that these rights be lost under the MIA. Given this concern, it might have been expected to have found more discussion or materials on the topic possible raised by tribal members, Indian or DOI lawyers. However, no materials were found raising this concern or arguing that “[s]ubsistence hunting and fishing rights will be lost since they will be controlled by the State of Maine under the Settlement.”

Additionally, the inconsistent and interchangeable use of “subsistence” and “sustenance” is also of note. The word “sustenance” is used in the MIA, and in some of the materials authored by the State of Maine, the word sustenance is used. However in an August 12, 1980 letter reprinting the Bangor Daily News Editorial, the State of Maine used the word “subsistence.”<sup>53</sup> Both the Senate and House reports use the term “subsistence.” On a draft portion of the Senate Report, there are handwritten notes, probably from Tim Woodcock, suggesting changing “subsistence” to “sustenance.”<sup>54</sup> That change was never made. The interchangeable and inconsistent use of these terms also raise questions, such as, given that subsistence and sustenance are two different concepts for native peoples, were State and Tribal negotiators talking about the same thing? Did tribal negotiators hold a different concept of natural resources reflected in native languages which was different from how State negotiators used the words sustenance, and then sometimes subsistence? Do the English words accurately reflect those native concepts and relationships? And, finally, how might Congress’s use of the word “subsistence” impact the use of the term “sustenance” in the MIA?

The topic of sustenance hunting and fishing rights are related to treaty rights discussed in the previous section. Given this association, the following section discusses these rights within the field of federal Indian law and offers additional observations.

### 4. Reserved Rights and the Canons of Construction

Given Congress’s, albeit brief, mention of reserved and retained rights, it is worthwhile to discuss its two statements on those rights. That said, this is not intended as a thorough analysis of the Tribes’ reserved treaty rights but rather an introduction to some applicable principles of federal Indian law which may inform the discussion of these rights. Found in the congressional committee reports, Congress stated that subsistence hunting and fishing is regarded as falling within the “expressly retained sovereign activities” of the Tribes.<sup>55</sup> Later, it noted that “[t]he settlement also provides that the Passamaquoddy Tribe and the Penobscot Nation will retain as reservations those lands and natural resources which were reserved to them in their treaties with Massachusetts and not subsequently transferred by them.”<sup>56</sup>

Two principles of federal Indian law are applicable to these statements by Congress. First is the reserved rights doctrine which provides that “[t]reaties reserving hunting, fishing, and gathering rights over previously owned tribal lands do not constitute a ‘grant of rights to the Indians, but a grant of rights

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<sup>53</sup> See UMAINE018, *supra* note 45.

<sup>54</sup> See *Draft of a Portion of the Senate Report for the Maine Indian Claims Settlement Act: Sections titled “Purpose”, “Background and Need” and “Special Issues” (09/10/1980)*, p. 14, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 1 (UMAINE047), available at <http://maineindianclaims.omeka.net/items/show/100>.

<sup>55</sup> H.R. Report No. 96-1353, *supra* note 36, at 15; S. Report No. 96-957, *supra* note 5, at 15.

<sup>56</sup> S. Report No. 96-957, *supra* note 5, at 18.

from them – a reservation of those not granted.”<sup>57</sup> Second are the Indian law canons of construction which are to be used when interpreting treaties, agreements, statutes, and executive orders. As outlined by the U.S. Supreme Court, the canons provide the following rules of interpretation:

1. Treaties, agreements, statutes, and executive orders are to be liberally construed in favor of the Indians;
2. All ambiguities are to be resolved in favor of the Indians, and
3. Are to be construed as the Indians would have understood them.<sup>58</sup>

These principles are important to the conversation of not only sustenance rights but also the related topic of reserved rights under the treaties which formed the basis of the land claim. It is almost unimaginable to think that Congress’s use of the words “retained” and “reserved” are by chance. Such words hold such an important position in the body of federal Indian law and Congress must have used them to ensure the applicability of federal Indian law to this settlement, especially as it related to the Tribes’ hunting and fishing rights. The limited discussion of a reservation of rights under the treaties and sustenance hunting and fishing practices generally should not be interpreted as an extinguishment of any such rights; under federal Indian law, extinguishment of treaty rights requires a clear and unambiguous statement by Congress.<sup>59</sup>

### **C. Application of Federal Laws: 25 U.S.C. §1725(h)**

#### **1. Text of Section 1725(h)**

Except as otherwise provided in this subchapter, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) 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 also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

#### **2. Findings**

Section 1725(h) first appears as section 6(g) of the bill (later 6(h)) and was discussed by Congress.<sup>60</sup> Initially, the federal government thought that the section was too broad as drafted but ultimately the

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<sup>57</sup> Cohen’s Handbook of Federal Indian Law, sec. 18.02 (2005 edition), citing *U.S. v. Winans*, 198 U.S. 371, 381 (1905).

<sup>58</sup> *Id.* at sec. 2.02[1], citing *Choctaw Nation v. U.S.*, 318 U.S. 423, 431-432 (1943). In 1999, the U.S. Supreme Court affirmed these canons in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The canons are not only applicable to the interpretation of treaty rights, but also federal statutes, such as MICA.

<sup>59</sup> See Cohen’s Handbook of Federal Indian Law, sec. 18.07[1] (2005 edition), citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).

<sup>60</sup> See *Transcript of Markup Session for Maine Indian Claims Settlement Bill H.R. 7919, House of Representatives, Committee of Interior and Insular Affairs (09/17/1980)*, Section 6(h) of the attached bill and p. 6 (sec. 6(g)) of the attached Section-by-Section Analysis, Committee on Interior & Insular Affairs, Legislative Files: House Bills, HR 7919, Box 139, Folder “Full Committee mark-up 9/17/1980”, 96th

“special status or rights” language stayed. In June 1980, the White House noted “major uncertainty [of] which [federal] laws . . . apply to Maine” and about whether tribes would be able to administer federal programs if the Indian Self-Determination Act didn’t apply.<sup>61</sup> In July at the Senate hearing, Secretary Andrus noted that the original provision “would have made inapplicable every provision of federal law codified in title 25, except financial benefits.”<sup>62</sup> And again in August, referring back to an earlier version of the section, DOI noted, “[w]e found this provision troublesome and confusing in that Federal financial benefits to Indian tribes would be divorced from general Federal statutes applicable to Indians.”<sup>63</sup>

In an attempt to clarify the section, DOI suggested enumerating which laws would be excluded from applying.<sup>64</sup> In an undated document entitled “Proposed Changes to S.2829”, a draft of the bill included a list of federal laws that would be excluded from application to the Tribes of Maine. Among the federal laws to be excluded were:

- (1) Section 5 of the Act of August 15, 1876 (19 Stat. 200) [25 U.S.C. § 261 Power to appoint traders with Indians];
- (2) Section 1 of the Act of March 3, 1901 (31 Stat. 1066), as amended [25 U.S.C. § 262 Persons permitted to trade with Indians];
- (3) Section 2132 and Section 2133 of the Revised Statutes, as amended;
- (4) Sections 405(k) and 710 of the Act of August 3, 1977 (91 Stat. 459, 523 [30 U.S.C. §§ 1235(k) (State reclamation program) and 1300 (Indian lands)]);
- (5) Section 164(c) and (e) of the Clean Air Act, as amended by section 127(a) of the Act of August 7, 1977 (91 Stat. 735);
- (6) Act of October 31, 1979 (93 Stat. 721) [formerly 16 U.S.C. § 470, now 54 U.S.C. § 300101 Historic Preservation, Policy];

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Congress, Records of the U.S. House of Representatives, RG 233, National Archives, Washington, DC (NARA020), available at <http://maineindianclaims.omeka.net/items/show/24> [hereinafter NARA020].

<sup>61</sup> See *Memo from James Case (staffer to Senator Muskie, and then to Senator Mitchell), probably addressed to Senator George J. Mitchell, and with a White House analysis of Bill S. 2829 attached (06/13/1980)*, George J. Mitchell Papers, Box M202.6.2.2.2, George J. Mitchell Dept. of Special Collections & Archives, Bowdoin College Library, Brunswick, ME (BOW001), available at <http://maineindianclaims.omeka.net/items/show/6> [hereinafter BOW001].

<sup>62</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 133.

<sup>63</sup> NARA020, *supra* note 60, at 8 of the attached letter from DOI to Chairman Udall.

<sup>64</sup> The Houlton Band of Maliseet Indians “strongly” preferred the DOI approach that specific federal provisions be excluded, rather than have a blanket exclusion. See *Letter from Reid Peyton Chambers (Attorney for Houlton Band of Maliseet Indians) to Cecil Andrus (Secretary of the Interior) (dated 07/15/1980), Attention to Tim Vollmann (Department of Interior) providing comments to “Proposed Changes in S. 2829,” supplied to Houlton Band by Tim Vollmann at a meeting on 07/10/1980*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 9 (UMAINE011), available at <http://maineindianclaims.omeka.net/items/show/64>.

(7) Section 8(d) of the Act of November 16, 1977 (91 Stat. 1397) [42 U.S.C. § 300j–6 Safe Drinking Water Act not altering Indian water rights]

(8) Section 23 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by section 21 of the Act of September 30, 1978 (92 Stat. 834), insofar as this section authorizes the Administrator to enter into cooperative agreements with Indian tribes.<sup>65</sup>

Most of these laws are federal environmental laws which is in line with how this section was discussed in the Senate Hearing. Senator Cohen asked DOI Attorney Tim Vollmann about this section and whether it “provides the tribes with sufficient protection?”<sup>66</sup> Mr. Vollmann responded that DOI had discussed the section with the State and the Tribes, and that DOI was “troubled by the language.”<sup>67</sup> He went on to identify the purpose of the section to “which all parties agree:” to prevent the application of “certain environmental statutes . . . ; for example those that would give tribes enforcement authority that would affect non-Indians in Maine.”<sup>68</sup> Mr. Vollmann ended by stating that he was “sure that [DOI could] work with the State and the tribes to work out language that would be satisfactorily clear and not give rise to future litigation.”<sup>69</sup>

The Tribes’ attorney, Tom Tureen was also questioned about this section, and more broadly about the “general body of Federal Indian law” by Senator Cohen.<sup>70</sup> Mr. Tureen did not address section 6(g) directly, and instead commented on the “general body of Federal Indian law.” He stated that,

[t]he general body of Federal Indian law is excluded in part because that was the position that the State held to in the negotiations. It was the State’s view that the destiny of the Maine tribes as much as possible in the future should be worked out between the State and the tribes. The tribes were concerned about basic Federal protections which they had not had before the recent round of court cases. So it is also true that the tribes are concerned about the problems that existed in the West because of the pervasive interference and involvement of the Federal Government in the internal tribal matters.<sup>71</sup>

Based on an August 25, 1980 letter from DOI to Chairman Udall, the DOI and the State and Tribes reached an agreement on the language which ended up as almost the final iteration of section 1725(h). In that letter explaining the section to Congress, DOI noted that “[t]his limitation would include such Federal laws, among others, as the Indian trader statutes [] and the provision of the Clean Air Act Amendments of 1977 which permits Indian tribes to designate air quality standards [].”<sup>72</sup>

Finally, the Senate Report gives guidance on how to read section 1725(h) including those federal laws which accord special status or rights to Indians or Indian Tribes. As an example, the Report cites to the

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<sup>65</sup> *Proposed changes in S. 2829 (Undated)*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 8, Folder 12 (UMAINE045), available at <http://maineindianclaims.omeka.net/items/show/98>.

<sup>66</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 47.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See Id.*, at 181.

<sup>71</sup> *Id.* at 181-182.

<sup>72</sup> NARA020, *supra* note 60, at 8-9 of the attached letter from DOI to Chairman Udall.

federal Clean Air Act which “will not apply in Maine because otherwise they would interfere with State air quality laws.”<sup>73</sup> The Report also adds that “[t]his would [] be true of police powers on such matters of safety, public health, environmental regulations or land use.”<sup>74</sup>

### **3. Observations**

The research reveals that the main impetus, at least initially, for including section 1725(h) was to ensure that primarily federal environmental laws which would give tribes enforcement authority over non-Indians would not apply. The final version of the law builds on the section’s early emphasis on environmental laws, but then broadens its scope. DOI’s suggestion, supported by the Maliseets, to enumerate the federal laws that would not apply was rejected or abandoned for reasons unknown. It may be that DOI’s concern that the section may cause future litigation did not resonate or the parties believed that the way it was drafted would avoid any problems. This section is arguably tied to section 1735(b) which also addresses the application of federal law. Given this link, additional observations on section 1725(h) are found in the next section following the observations on section 1735(b).

#### **D. Application of Federal Laws: 25 U.S.C. §1735(b)**

##### **1. Text of Section 1735(b)**

The provisions of any Federal law enacted after October 10, 1980, for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this subchapter and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

##### **2. Findings**

The RFP was specifically concerned with obtaining information regarding the origin and meaning of subsection (b) of §1735. The research revealed one document on why and how subsection (a) of §1735 came to be included in the MICSA bill, but no materials discussing the addition of subsection (b).

Focusing on subsection (a) first, a September 5, 1980 memo from Tim Woodcock to Senator Cohen presented the addition of Section 16 (now 25 U.S.C. §1735) as a possible solution to the State’s objection to language in Section 6(b)(1) (now 25 U.S.C. §1725(b)(1)).<sup>75</sup> Section 6(b)(1) grants jurisdiction over the Tribes to the State of Maine. The State of Maine objected to language at the beginning of §6(b)(1) that qualified that grant of jurisdiction, “[t]o the extent not inconsistent with [MICSA.]”<sup>76</sup> The solution that was proposed, and later adopted, was to move that qualifying language from §6(b)(1) to a new §16(a). The Woodcock memo that discussed the possible creation of a new §16 was written in preparation for what would end up being three days of meetings involving the parties to the agreement

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<sup>73</sup> S. Report No. 96-957, *supra* note 5, at 31.

<sup>74</sup> *Id.*

<sup>75</sup> See *Memo to Senator William S. Cohen from Timothy Woodcock concerning issues the State of Maine was having with several provisions (09/05/1980)*, pp. 1-2, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 8, Folder 1 (UMAINE002), available at <http://maineindianclaims.omeka.net/items/show/57> [hereinafter UMAINE002].

<sup>76</sup> See *Id.*, at 1-2.

and the Senate Select Committee on Indian Affairs.<sup>77</sup> At that point in time, three congressional mark-up sessions of the federal bill had apparently already been called off either because of disagreement between the State of Maine and the federal government, or because of “failure to gain complete agreement among the parties.”<sup>78</sup> Consequently, there was significant pressure to get the parties to come to an agreement.<sup>79</sup>

As for subsection (b), again no documents were found discussing its inclusion. A review of the different drafts of the bill, however, reveals that at one time the word “materially” was inserted before “affect or preempt” in reference to the application of Maine state laws. The version of the bill that the Senate Select Committee on Indian Affairs reported to the full Senate on September 17, 1980 contained the final language of §1735(b), except that this version included the word “materially.”<sup>80</sup> In the version of the bill that the House Committee on Interior and Insular Affairs reported to the full House two days later, §1735(b) no longer contained the word “materially.”<sup>81</sup> It was this latter version that ultimately was signed into law.

Interestingly, however, the Section-by-Section analysis in the Senate Report (which the House accepted as its own), as well as the Summary of Major Provisions contained in both the House and Senate Reports use the phrase “*materially* affect or preempt” (emphasis added), rather than just “affect or preempt” when describing §1735(b).<sup>82</sup>

Finally, sections 1735(a) and (b) appeared as part of a dated draft of the MICSA bill for the first time on September 17, 1980, which was close to the final version of the bill.<sup>83</sup> There are also two undated documents titled “Amendment to S. 2829 in the Nature of a Substitute” that include a version of 1735.<sup>84</sup>

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<sup>77</sup> See *id.*; UMAINE026, *supra* note 26.

<sup>78</sup> See *id.*

<sup>79</sup> See UMAINE002, *supra* note 75, at 1.

<sup>80</sup> See *S. 2829 (Maine Indian Claims Settlement Bill, Senate) (09/17/1980)*, §16(b), Senate Select Committee on Indian Affairs, Bill Files- Second Session, S. 2623- S.3222, Box 12, Folder “S.2829”, 96th Congress, Records of the U.S. Senate, RG 46, National Archives, Washington, DC (NARA019), available at <http://maineindianclaims.omeka.net/items/show/23> [hereinafter NARA019].

<sup>81</sup> See *Draft of H.R. 7919 (Maine Indian Claims Settlement Bill, House of Representatives) (09/19/1980)*, §16(b), Committee on Interior & Insular Affairs, Legislative Files: House Bills, HR 7919, Box 138, 96th Congress, Records of the U.S. House of Representatives, RG 233, National Archives, Washington, DC (NARA021), available at <http://maineindianclaims.omeka.net/items/show/25>.

<sup>82</sup> See *S. Report No. 96-957*, *supra* note 5, at 20, 35; *H.R. Report No. 96-1353*, *supra* note 36, at 20.

<sup>83</sup> See NARA019, *supra* note 80.

<sup>84</sup> See *Amendment to Maine Indian Claims Settlement Bill S. 2829 (Senate) in the Nature of a Substitute (Undated)*, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled “[Maine Indian Land Claims - General, II]”, National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI016), available at <http://maineindianclaims.omeka.net/items/show/40> [hereinafter NMAI016]; *Proposed Amendment to S. 2829 in the Nature of a Substitute (S. 2829 is the Senate Bill relating to the Maine Indian Claims Settlement) (Undated)*, Senate Select Committee on Indian Affairs, Bill Files- Second Session, S. 2623- S.3222, Box 12, Folder “S.2829”, 96th Congress, Records of the U.S. Senate, RG 46, National Archives, Washington, DC (NARA017), available at <http://maineindianclaims.omeka.net/items/show/21>.

This amendment is the Senate Bill which was substituted into the House Bill during the mark-up session in the House of Representatives on September 17, 1980.<sup>85</sup>

### 3. Observations

What is most remarkable about §1735 is how very late it appeared in the drafting process of MICSA; just five days before the House and six days before the Senate voted on the bill. The Woodcock memo referred to above suggested that discussions to add §1735 to the bill began less than two weeks before both congressional committees reported the bill to the full House and Senate, and well after both committees held their public hearings on the bill.

Though the exact origin of §1735(b) remains unclear, a few materials do show a progression in the language of this provision. For example, one undated draft of the bill obtained from the Records of Suzan Harjo contains a version of §1735(b) (then referred to as §16(b)) that is worded more simply than the final version:

The provisions of a federal act adopted after this Act shall modify or alter the provisions of this Act, and the Maine Implementing Act only if such later Act contains an express provision making it applicable within the State of Maine.<sup>86</sup>

That approach to limiting the application of future federal laws in Maine was not taken. Instead a decision was made, by whom it's unclear, to prevent the application of future federal laws which "affect or preempt" state laws, unless it is "specifically made applicable in the State of Maine."

### 4. The Non-Application of Federal Laws: Pre- and post-MICSA

Sections 1735(b) and 1725(h) of MICSA create a framework for determining when federal law applies to the Tribes and when it will not. Section 1725(h) provides that any existing federal law which accords special status to the Tribes and affects or preempts Maine state laws does not apply to the Tribes. Using very similar preemption language, section 1735(b) ensures that federal laws adopted after MICSA may also not apply.

The absence of documents discussing the reasoning behind section 1735(b) leaves much room for guesswork. May one attribute the initial motivation for section 1725(h) to prevent the application of federal environmental laws to section 1735(b)? Or did Congress foresee the increase of Indian gaming following the *California v. Cabazon Band of Mission Indians* decision in 1987 and then the Indian Gaming Regulatory Act of 1988?<sup>87</sup> Or are these provisions part of the municipality framework negotiated between the parties and later memorialized in the MIA? And, did Congress see a need to limit federal laws to ensure that the state municipality framework would work?

This limitation of federal law to federal tribes is uncommon. Federal authority, specifically congressional authority, is plenary in governing the relationships between the three sovereigns: the United States, the states and the tribes. Other Indian settlement acts have been interpreted to preclude a federal law, but most, if any, tribes are not subject to the framework established in MICSA. The absence of materials explaining how, why and by whom section 1735(b) was included, and the unanswered question of why the DOI's suggestion of enumeration of applicable federal laws was rejected calls for a re-visitation of

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<sup>85</sup> See NARA020, *supra* note 60, at 7-10.

<sup>86</sup> NMAI016, *supra* note 84.

<sup>87</sup> IGRA was deemed to not apply to in Maine. See *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1996).

these sections. Even if there was a perceived concern during the negotiations of federal “interference,” today the policy underlying federal Indian law is one of tribal self-determination.

## **E. Internal Tribal Matters**

### **1. Reference to Internal Tribal Matters in MIA, 30 M.R.S. § 6209(1)**

The Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the *State, provided however*, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

### **2. Findings**

The RFP identified the phrase “internal tribal matters” as another topic of research. This phrase is not found in the text of the MICSA, but rather in the MIA. The research revealed several references to “internal tribal matters” or “internal tribal affairs” as part of the jurisdictional relationship negotiated by the parties.

One example of a reference made to “internal tribal affairs” was in the context of Section 1725(f), which authorizes the Passamaquoddy Tribe and the Penobscot Nation “to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act [MIA.]” In this example, DOI explained to the Senate Select Committee that the MIA,

leaves the two Tribes with exclusive authority over their own *internal tribal affairs*, certain misdemeanor jurisdiction over tribal members, small claims jurisdiction, and a significant residuum of regulatory authority over their own lands. The two Tribes will also be treated as municipalities under State law for purposes of jurisdiction over their lands in Indian territory, which means that no other municipality, the main unit of local government in Maine, may exercise any authority over *tribal affairs* in those areas. (emphasis added)<sup>88</sup>

In other words, all tribal land in Maine, whether it was owned by the federal government in trust, or directly by Indians, was to be subject to State law and to State civil and criminal jurisdiction, with a few exceptions. One of these exceptions had to do with “internal tribal matters.”<sup>89</sup> At the Senate Hearings in July 1980, Cleve Dorr, Lieutenant Governor of the Passamaquoddy Tribe, described this exception as a gain for the Tribes, where the State of Maine was “relinquish[ing] the power [which it had formerly claimed] to interfere in [the Tribes’] internal affairs[.]”<sup>90</sup> The Senate Report later reiterated this point of view that tribal sovereignty was being strengthened by allowing Tribes to manage their internal affairs independently from other municipalities.<sup>91</sup> As understood by Secretary Andrus, other exceptions to State jurisdiction would include the “use of settlement fund income, certain tribal ordinances

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<sup>88</sup> UMAINE032, *supra* note 3, at 8.

<sup>89</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 132.

<sup>90</sup> *Id.* at 176.

<sup>91</sup> See S. Report No. 96-957, *supra* note 5, at 14, 17.

concerning hunting and fishing, and jurisdiction over minor crimes by Indians, Indian child custody proceedings, and domestic relations matters of tribal members.”<sup>92</sup>

Other references to “internal tribal matters” or “internal tribal affairs” during the Senate Hearing provide some examples as to what areas might have been presented to Congress as encompassed under this terminology. For example, State Representative Bonnie Post quoted a portion of the MIA that indicated that internal tribal matters “includ[e] membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income[.]” In addition, a statement submitted at the hearing by the Maine Legislature’s Joint Select Committee on Indian Land Claims stated that “[t]he selection process and requirements for selecting a tribal school committee are *internal tribal matters* governed solely by tribal law... [but] [t]he standards for operating the school and school committee, including teacher certification, curriculum, hours, records and other operational requirements are governed by State law.” (emphasis added)<sup>93</sup> In yet another statement submitted at the same hearing, Terry Polchies, Representing the Houlton Band of Maliseet Indians, seemed to indicate that the Band authority over “internal tribal affairs” included authority over child welfare, especially in relationship to the Indian Child Welfare Act.<sup>94</sup>

### 3. Observations

Several observations may be made with regards to the treatment of “internal tribal matters.” First, Congress does not offer a lot in the way of gaining a better understanding of what the term “internal tribal matters” means. This is likely attributable in part to the fact that the term is found in the MIA, and not MICSA. Additionally, officials representing the State of Maine may have interpreted the term “internal tribal affairs” within the concept of municipality that existed under Maine state law. Though the “internal tribal affairs” terminology is not explicitly used, an August 1980 letter submitted by the Maine Attorney General to the Senate Committee, drew a parallel between the “powers, duties and rights” of the Tribes and the authority a municipality was to have over its internal affairs. The letter specifically stated that,

In drafting and negotiating the Maine Implementing Act, the Tribes and State agreed that the powers, duties and rights of the Tribes in Maine would be defined by reference to the powers, duties and rights of municipalities in Maine, (See Section 6206(1) of the Maine Implementing Act). Because municipalities are an important and essential unit of government in Maine and, under principles of “home rule” in the Maine Constitution, are accorded significant power of self-government, this approach was believed to be an important element of the MIA.<sup>95</sup>

It remains unclear, however, whether the Tribes, State and federal government all shared a single understanding of what “internal tribal affairs” encompassed.

### V. Possible Areas for Future Research

During an initial presentation of the research to MITSC in September 2016, the authors also shared with the Commission some findings on topics falling outside the RFP, primarily the municipality status of the Tribes. Given MITSC’s interest in “internal tribal matters” and larger questions of jurisdiction, the

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<sup>92</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 132.

<sup>93</sup> *Id.* at 346.

<sup>94</sup> *See id.* at 442.

<sup>95</sup> S. Report No. 96-957, *supra* note 5, at 49.

Penobscot and Passamaquoddy's status as a municipality may be worth exploring further. Additionally, an early proposal made during the White House-led negotiations for an "initial study period" may be of interest. What follows is an overview of research findings on the Tribes' status as municipalities in the MIA and the proposal of an "initial study period."

#### **A. "Initial Study Period"**

Two documents from the Archives of the National Museum of American Indians referenced an "initial study period" within the context of jurisdiction. First, a 1977 memo from the Passamaquoddy and Penobscot Negotiation Committee to the White House Task Force on Indian Claims in Maine outlined the responsibilities of the federal government. Of interest is paragraph five which referred to a jurisdictional arrangement where tribal lands acquired would be "treated as lands of other federally recognized Tribes are treated" and that the Tribes "would hold further talks to determine the appropriate means of accomplishing the Nations' desire . . . to have the State of Maine exercise civil and criminal jurisdiction during an initial study period."<sup>96</sup>

This study period was referenced again a few months later in 1978, again in a memo from the Passamaquoddy/Penobscot Negotiation Committee to the White House Task Force on Indian Claims in Maine. In that memo, the Negotiation Committee explained that lands held by the Tribes would be "considered Indian Country, exempt from state taxation and regulation, including hunting, fishing, and trapping regulations, except civil and criminal jurisdiction." The Committee added that, with regards to the civil and criminal jurisdiction, the federal government shall provide for civil and criminal jurisdiction of the State of Maine during an initial study period, not to exceed two years, during which time the said Nations shall determine whether they wish to have the land considered as Indian country for purposes of civil and criminal jurisdiction. If at any time during said two year period the Nations shall decide to have their lands considered Indian Country for purposes of civil and criminal jurisdiction, then the jurisdiction of the State of Maine shall cease for these purposes.<sup>97</sup>

These references are of interest because they suggest that during the negotiations, the parties contemplated that the State would not necessarily exercise its jurisdiction over the Tribes after a two-year trial period. Instead, each Tribe would have the option, after the trial period, of exercising its own jurisdiction over its lands within the parameters of federal Indian law. Clearly, this approach was not ultimately adopted by the Tribes and the State.

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<sup>96</sup> *Memo from Passamaquoddy and Penobscot Negotiation Committee to the White House Task Force on Indian Claims in Maine (Draft), regarding the settlement package that is being negotiated (01/02/1978)*, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled "[Maine Indians - Land Claims - General, I] [1 of 3]", National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI013), available at <http://maineindianclaims.omeka.net/items/show/37>.

<sup>97</sup> *Memo from Passamaquoddy and Penobscot Negotiation Committee to the White House Task Force on Indian Claims in Maine, describing the terms which the Passamaquoddy and Penobscot Negotiation Committee agrees to in exchange for relinquishment of their land claims. (11/11/1977)*, National Congress of American Indians records, Box 531, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled "[Maine Indians - Land Claims - General, I] [1 of 3]"; National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI027), available at <http://maineindianclaims.omeka.net/items/show/51>.

These are the only two references to an “initial study period” that were found. However, that may be in part because it falls outside the scope of this research and the authors were not searching for references to an “initial study period.” It may be that additional references to a study period are made in other materials during that time, which explain the meaning and rationale behind such a proposal and why it was eventually dropped from the final settlement.

### **B. The Adoption of the Municipality Model and Its Impact on Tribal Sovereignty**

As introduced above, the MIA treats the Penobscot and Passamaquoddy tribes as municipalities. During the congressional hearings and in the reports and correspondences, the Tribes status as municipalities and the implicated principle of home rule were referred to as “unique, novel and unusual.” During his statement at the Senate hearing, Secretary Andrus used the word “novel” to describe the arrangement, but also noted that “the respective authority of the State and tribes would not be radically different from the jurisdictional relationship which exists among other States and tribes.”<sup>98</sup>

The status as municipalities and the principle of home rule were characterized as a significant grant of power to the tribes, one of self-government: “In view of the ‘home rule’ powers of municipalities in Maine, this also constitutes a significant grant of power to the Tribes.” The Senate Report lists as an example of the tribes’ sovereignty, the municipality status.<sup>99</sup> Neither this status, nor the other aspects of the jurisdictional arrangement appeared to be of great concern to the parties. Instead it was portrayed as a positive development, one that may “avoid in Maine the types of devisive [sic] controversy that has so marked tribal/State relations in the Western States and has resulted in so much litigation and ill-will.”<sup>100</sup>

The Department of the Interior also did not express concern over the jurisdictional arrangement but instead focused on the municipality status’ implication for federal vs. state funding. The bulk of discussion around this relationship focused on potential funding problems. Given that as municipalities, the Tribes may be eligible for state funds, DOI and Congress were concerned on how that may impact federal funding which the Tribes would be eligible for as federally recognized tribes. This problem was addressed in numerous letters, meetings and hearings, and was one that the parties and DOI addressed during the drafting process, and devoted a lot of time to finding a solution for.<sup>101</sup> In August 1980, memos from House Indian Affairs staff and Tim Woodcock noted that “[t]he jurisdictional provisions of the MIA and the bill are still in disagreement” referring to the characterization of the Tribes as municipalities but only as it relates to funding.<sup>102</sup> The DOI worked with the parties to resolve this issue.

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<sup>98</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 134.

<sup>99</sup> *See Id.* at 15.

<sup>100</sup> *Id.* at 160 (AG Cohen).

<sup>101</sup> *See, e.g.,* NMAI018, *supra* note 9; *Memo to Senator William S. Cohen from Timothy Woodcock summarizing disagreement between the U.S. Department of Interior and State of Maine regarding the status of Tribes as municipalities under the Maine Implementing Act (MIA) (08/28/1980)*, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine, 3.3.13.1 Box 8, Folder 6 (or 3.3.13.2 Box 5, Folder 11) (UMAINE003), available at <http://maineindianclaims.omeka.net/items/show/58> [hereinafter UMAINE003]; S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 132-3; BOW001, *supra* note 61, at 4.

<sup>102</sup> *Memo to the House Committee on Interior and Insular Affairs from Frank Ducheneaux (Special Counsel for Indian Affairs) and Michael Jackson (Minority Consultant for Indian Affairs), summarizing the history behind the Maine Indian Claims Settlement Bill (H.R. 7919), the bill's provisions, and the problems that remain unresolved between the parties to the settlement (08/22/1980)*, Committee on Interior &

Beyond the funding issue and novelty of the municipality framework, one of the most striking revelations of the research is the limited use of the language of tribal sovereignty by Congress and the State in favor of the language of municipality when describing the rights of the Tribes. In that same August 1980 memo to Senator Cohen, Woodcock offers an insight to this absence::

The municipality concept was adopted because it was believed to be the best device to ensure that the tribes remained under Maine law and did not take on the substantial attributes of sovereignty which characterize many of the tribes in the West. . . . the state believed it was avoiding the creation of a ‘nation within a nation’ which Governor Longley had so vigorously decried.<sup>103</sup>

What is remarkable about the statement, is the comment that the municipality status was adopted as a means to avoid the “substantial attributes of sovereignty.” Despite being a cornerstone of federal Indian law, inherent tribal sovereignty is rarely discussed by the State and Congress.

The State of Maine relied almost solely on the language of municipality and home rule to describe the rights of tribes, and rarely, if ever, the language of sovereignty. The “nation within a nation” concept is well-known to those involved in and familiar with the history of this settlement. The State of Maine rejected creating (or more accurately recognizing) a nation (a tribe) within a nation (Maine). The term “sovereignty” was also rarely used by Congress. The Senate and House reports included a section on how the settlement would not destroy the sovereign rights of the tribes, but beyond that there are not many more references.<sup>104</sup> It is important to note, however, that the use of the term sovereignty by Congress is significant: just as the use of the term “reserved” is purposeful within the context of treaty rights, the use of the term sovereignty by Congress is a recognition of the Tribes as sovereigns.

So, how does one reconcile the municipality/home rule model, which Congress supported, with the federal Indian law principle of inherent tribal sovereignty, which Congress also recognized? The reasons for adopting the municipality model in the MIA seem to include avoid creating a nation within nation and ensure that the relationship between the State and the Tribes was governed, at least in the first instance, under state law, not federal. It is also worth noting again here that the DOI was not involved in the MIA negotiations (from November 1979 to March 1980), which in turn raises the question of whether DOI’s presence would have impacted the adoption of the municipality framework. More research on that question may be worth engaging in.

Part of exploring that question of whether the two concepts (municipality and inherent tribal sovereignty) are reconcilable might also include a discussion on whether the municipality framework, as a cornerstone of the MIA, has worked and whether it is working today? Remember, Maine Attorney General Cohen explained that the jurisdictional model in the MIA was a means to “avoid [] the types of divisive [sic] controversy that has so marked tribal/State relations in the Western States and has resulted in so much litigation and ill-will.”<sup>105</sup>

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Insular Affairs, Legislative Files: House Bills, HR 7919, Box 138; 96th Congress; Records of the U.S. House of Representatives, RG 233; National Archives, Washington, DC (NARA004), *available at* <http://maineindianclaims.omeka.net/items/show/10>. See also UMAINE003, *supra* note 101.

<sup>103</sup> UMAINE003, *supra* note 101, at 1.

<sup>104</sup> S. Report No. 96-957, *supra* note 5, at 14.

<sup>105</sup> S. 2829 Hearings Before the Senate Select Committee, *supra* note 2, at 160 (AG Cohen).

## **VI. Conclusion**

This report offers the primary findings of the research of the drafting and passage of the Maine Indian Claims Settlement Act during the period of April 1980 through October 1980. It also offers initial observations on those findings, providing at times, some legal context. However, to iterate the suggestion made in the introduction, the authors recommend that readers take the opportunity to review the materials themselves in an effort to glean additional insights.

A reasonable assumption underlying this research is that the relationship between the State of Maine and the Tribes is strained. Conflicts between the two sovereigns are common, as highlighted by the several lengthy and costly court cases, which have centered on the interpretation of MICSA and the MIA. This research sought to uncover additional materials to presumably assist in the interpretations of the settlement acts, and the research does offer a few insights. For example, the materials on section 1725(h) suggest that the main impetus for that provision centered on federal environmental laws. However, a broader view of the materials raises a different and possibly larger question beyond the legal interpretation of the settlement acts. Namely, is the “unique” framework adopted by the MIA and MICSA working?

That question arises in part from how the relationship between the State and the Tribes and the authority of the Tribes are discussed. Reviewing the materials in 2017, the prominence of the municipality framework seemingly over the principle of tribal sovereignty is noticeable. As Tim Woodcock explained in his memo to Senator Cohen, “[t]he municipality concept was adopted because it was believed to be the best device to ensure that the tribes remained under Maine law and did not take on the substantial attributes of sovereignty . . .” However, the Tribes do retain inherent sovereign rights and powers; the municipality concept could not and did not prevent that. The authors are not intending to present a legal argument as to whether inherent tribal sovereignty and the jurisdictional arrangement outlined in the MIA are compatible. Instead, what the authors seek to highlight is how the State and Congress thought and talked about the rights of the Tribes. Theirs was, more often than not, a language of municipalities, as arms of state government and the application of state law, not the foundational federal Indian law principle of inherent tribal sovereignty.

That principle of tribal sovereignty has not changed significantly in the almost 40 years since the settlement acts. In fact, the continued federal policy of self-determination, the adoption of the United Nations Declaration on the Rights of Indigenous Peoples affirming the right to self-determination, and the native nation building movement have strengthened it. It is these concepts, norms and principles which should be discussed with a goal of reaching a shared understanding of them. And, it is these concepts, norms and principles which should underlie any future negotiations between the State and the tribes in Maine to find mutually beneficial solutions to the conflicts arising from the interpretation of the MIA and MICSA.

## Appendix 1

### List of Participants in the Negotiating, Drafting, and Passing MICSA (in alphabetically order)

- Akins, Andrew; Chairman, Passamaquoddy-Penobscot Negotiation Committee
- Andrus, Cecil D.; Secretary of Interior: worked out language in the bill, gave suggestions
- Boylan, Ginny; staff of Senate Select Committee on Indian Affairs
- Brown, Andrew; staff of U.S. Representative Olympia Snowe
- Carr, Bob; U.S. House of Representatives, Committee on Interior and Insular Affairs, helped Representatives Snowe and Emery in his capacity as a Committee member
- Case, James; Staffer to Senator Muskie, and then to Senator Mitchell
- Chambers, Reid Peyton; Sonosky, Chambers & Sachse, Attorney for the Houlton Band of Maliseet Indians
- Clay, A. Stephens; White House Work Group
- Coen, Barbara; Department of Justice
- Cohen, Richard; Attorney General of Maine
- Cohen, William; U.S. Senate, Maine, Senate Select Committee on Indian Affairs: submitted Bill S. 2829
- Collins, Jr., Samuel W.; Maine State Representative, Chairman of the Maine Legislature's Joint Select Committee on Indian Land Claims
- Cox, Michael; Minority Counsel, Senate Select Committee on Indian Affairs
- Cutler, Eliot; Associate Director, Office of Management and Budget and member of White House Work Group
- Ducheneaux, Frank; Majority Special Counsel for Indian Affairs, in charge of Indian affairs for the House Committee on Interior and Insular Affairs, did the basic staff work on the bill, staff expert; first Native American to serve as legal counsel for the Interior Committee
- Emery, David; U.S. House of Representatives, Maine: submitted H.R. 7919
- Erwin, Esq., James; Attorney from York, Maine: submitted statements to both congressional hearings
- Flanagan, David; Legal Counsel, Governor's Office, State of Maine
- Frinsko, F. Paul; Bernstein, Shur, Sawyer & Nelson, Special Counsel to Maine
- Gomez, Sharon
- Greenberg, Diane; Assistant Legislative Counsel, Department of Interior: sent Muskie a draft of the bill in 1979 on behalf of Cecil Andrus
- Gunter, William; Judge asked by President Carter to make a recommendation on the settlement in 1977
- Hull, Johnathan C.; Legislative Counsel to the Joint Committee of the Maine State Legislature
- Hunt, JoJo; staff of Senate Select Committee on Indian Affairs
- Jackson, Michael; Minority Consultant for Indian Affairs
- Jankel, Eric; Aide to Secretary Andrus
- Khanna, Carolyn; staff of U.S. Representative David Emery
- Krulitz, Leo; Solicitor, White House Work Group
- Larrabee, Don; Office of the Governor of Maine in Washington, DC
- Lee, Bill; Hale and Dorr, Special Counsel to the State of Maine
- Lewey, Harold; Governor, Passamaquoddy Tribe

- Libhart, Esq., Wayne; Attorney from Ellsworth, Maine: joined James Erwin in statements to both congressional hearings
- Lipschutz, Bob; White House Counsel
- Martz, Clyde; Solicitor, Department of Interior
- Melcher, John; U.S. Senate, Chairman of Senate Select Committee on Indian Affairs
- Mitchell, George; U.S. Senate, Maine: submitted S. 2829
- Newell, Robert; Governor Passamaquoddy Tribe
- Paterson, John M. R.; Deputy Attorney General, Maine
- Pehrson, Wilfred; Governor, Penobscot Nation
- Perkins, Donald W.; Pierce, Atwood, Scribner, Allen, Smith and Lancaster, Counsel for Landowners in Maine
- Phillips, Butch; Penobscot Nation, Passamaquoddy-Penobscot Negotiation Committee
- Post, Bonnie; Maine State Representative on Joint Select Committee in Maine (dealt with MICSA and MIA)
- Richtman, Max; Staff Director of the Senate Select Committee on Indian Affairs
- Sappier, James; Penobscot Indian Nation, Passamaquoddy-Penobscot Negotiation Committee
- Saxon, John; staff attorney of the Senate Select Committee on Indian Affairs
- Snowe, Olympia; U.S. House of Representatives, Maine: submitted H.R. 7919
- St. Claire, James D.: Hale and Dorr, Special Counsel to the State of Maine
- Streeter, Jean; staff of Senator Cohen
- Taylor, Peter; Special Counsel to Senate Select Committee on Indian Affairs
- Tureen, Thomas; Native American Rights Fund Attorney for the Passamaquoddy Tribe and the Penobscot Nation
- Udall, Morris; Charman of the House Committee on Interior and Insular Affairs
- Vollmann, Tim; Assistant Solicitor for Indian Affairs, Department of the Interior
- Walker, Willard; Professor of Anthropology at Wesleyan University: gave his opinion on whether the Houlton Band of Maliseets should be included
- Woodcock, Timothy; Minority Counsel to Senate Select Committee on Indian Affairs, Senator Cohen's Office

### Meetings for which a list of participants was available

#### **Meeting to discuss the desire of the Micmac and the Maliseet Tribes to obtain federal recognition and seek Senator Edmund Muskie's guidance (June 27, 1979)**

- Lavoie, Estelle; Staff of Senator Muskie
- Polchies, Maynard; President of the Association of Aroostok Indians, Inc.
- Joseph, John
- Tomah, James
- Wherry, Jim
- Stevens, John; former Passamaquoddy tribal governor hired to assist the Micmac and Maliseets
- Buesing, Gregory; Federal Regional Council in Boston

*(Internal memo from Muskie staffer Estelle Lavoie to James Case regarding a meeting with the Micmac and Maliseet Tribes (09/05/1979), The Edmund S. Muskie Papers, Box 2150, Folder 10; Muskie Archives and Special Collections Library, Bates College, Lewiston, ME (BATES004).)*

#### **Meeting, July 11, 1979**

- Andrus, Cecil D.; Secretary, U.S. Department of the Interior
- "representatives of the Maine Indians"
- Perkins, Donald W.; Pierce, Atwood, Scribner, Allen, Smith and Lancaster, Counsel for Landowners in Maine

*(Memo from Bob Lipschutz (White House Counsel) to Leo Krulitz (Solicitor), Providing an update on the status of the Maine Indian Claim Settlement Negotiations (07/11/1979), National Congress of American Indians records, Box 530, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled "Maine"; National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI009).)*

#### **Meeting with parties to the Indian settlement (May 29, 1980)**

- Cohen, Richard; Attorney General of Maine
- Cohen, William S.; U.S. Senate, Maine, Senate Select Committee on Indian Affairs
- Emery, David; U.S. House of Representatives, Maine
- "Indian negotiators"
- Tureen, Thomas; Native American Rights Fund Attorney for the Passamaquoddy Tribe and the Penobscot Nation
- "Tim" (probably Woodcock, Timothy; Minority Counsel to Senate Select Committee on Indian Affairs, Senator Cohen's Office)

*(Memo from Timothy Woodcock to Tom D. (?) containing a summary of meeting between delegation and parties to settlement on 5/29/1980, as well as an overview of what the legislative process would most likely look like (05/30/1980), William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 5, Folder 11 (UMAINE023), available at <http://maineindianclaims.omeka.net/items/show/76>.)*

- Akins, Andrew; Chairman, Passamaquoddy-Penobscot Negotiation Committee ----- 174
- Andrus, Cecil D.; Secretary, U.S. Department of the Interior ----- 34
- Ayoob, William; Town Manager, Millinockett Maine ----- 364
- Beaupain, Dean A.; Chairman, Millinockett Town Council ----- 365
- Bouchard, Henry G.; President, Maine Municipal Bond Bank ----- 360
- Brennan, Joseph E.; Governor, State of Maine ----- 136
- Cohen, Richard S.; Attorney General, State of Maine ----- 156
- Collins, Samuel; State Senator, Rockland, Maine ----- 334
- Coti, Julia; Penobscot Tribe ----- 373
- Coulter, Robert; Indian Law Resource Center, Washington, D.C. ----- 373
- Crowley, Eunice; Penobscot Tribe ----- 373
- Dorr, Cleve; Lieutenant Governor, Passamaquoddy Tribe ----- 174
- Flanagan, David; Legal Counsel, Governor's Office, State of Maine ----- 136
- Francis, Joseph; Member, Penobscot Nation Tribal Council ----- 178
- Gilford, Gene; Committee for an Indian Referendum ----- 303
- Hull, Jonathan; Counsel, Joint Select Committee on Indian Land Claims,  
Maine State Legislature ----- 334
- McDougall, Renee; Penobscot Tribe ----- 373
- Mitchell, Dana; Penobscot Tribe (referred to as "Traditionalists") ----- 373
- Nelson, Lorraine; Penobscot Tribe ----- 373
- Nicholas, Carl; Lieutenant Governor, Indian Township, Passamaquoddy Reservation 176
- Paterson, John; Deputy Attorney General, State of Maine ----- 156
- Pehrson, Wilfred; Governor, Penobscot Nation ----- 177
- Perkins, Donald W.; Pierce, Atwood, Scribner, Allen, Smith and Lancaster, Counsel for  
Landowners in Maine ----- 187
- Phillips, Neil; Penobscot Tribe ----- 373
- Pierce, Leonard; Land Appraiser, James Sewall Co., Old Town, Maine ----- 351
- Post, Bonnie; Maine State Representative, Owls Head Maine ----- 334
- Redmond, Andrew; Maine State Senator, Madison, Maine ----- 298
- Redmond, Pierre; Committee for an Indian Referendum ----- 303
- Reeser, Ralph; Acting Deputy Assistant Secretary for Indian Affairs, DOI----- 34
- Sapiel, John; Penobscot Tribe ----- 373
- Sappier, Francis; Negotiating Committee Member, Penobscot Nation Tribal Council - 177
- Tureen, Thomas; Counsel for Native American Rights Fund ----- 174
- Vollmann, Tim; Assistant Solicitor for Indian Affairs, Department of the Interior ----- 34

(Proposed Settlement of Maine Indian Land Claims: Hearings Before the Senate Select Committee on Indian Affairs, 96th Cong., 2nd sess., S. 2829, Vol. 1, Washington, DC: U.S. Government Printing Office (1980): 3-25, available at <http://hdl.handle.net/2027/umn.31951p00324196j>.)

**Meeting on revisions in Portland, Maine (July 10, 1980)**

- Akins, Andrew; Passamaquoddy-Penobscot Negotiation Committee
- Case, James; Staffer to Senator Mitchell
- Chambers, Reid Peyton; Sonosky, Chambers & Sachse, Attorney for the Houlton Band of Maliseet Indians
- Coen, Barbara; Department of Justice
- Cohen, Richard; Attorney General of Maine
- Flanagan, David; Legal Counsel, Governor's Office, State of Maine
- Frinsko, F. Paul; Bernstein, Shur, Sawyer & Nelson, Special Counsel to Maine
- Hull, Johnathan C.; Legislative Counsel to the Joint Committee of the Maine State Legislature
- Lee, Bill; Hale and Dorr, Special Counsel to the State of Maine
- Paterson, John; Deputy Attorney General, Maine
- Perkins, Donald W.; Pierce, Atwood, Scribner, Allen, Smith and Lancaster, Counsel for Landowners in Maine
- St. Claire, James D.; Hale and Dorr, Special Counsel to the State of Maine
- Taylor, Peter; Special Counsel to Senate Select Committee on Indian Affairs
- Tureen, Thomas; Native American Rights Fund Attorney for the Passamaquoddy Tribe and the Penobscot Nation
- Vollmann, Tim; Assistant Solicitor for Indian Affairs, Department of the Interior
- Woodcock, Timothy; Minority Counsel to Senate Select Committee on Indian Affairs, Senator Cohen's office

*(Maine Settlement Legislation: Meeting for Revisions; Porland, ME: July 10, 1980 (List of Participants) (07/10/1980), William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 8, Folder 6 (UMAINE004), available at <http://maineindianclaims.omeka.net/items/show/59>.)*

**Witnesses at the House Hearing on August 25, 1980:**

*(page of House Hearing Transcript)*

- Akins, Andrew; Chairman, Penobscot Nation ----- 79
- Bullock, Jr., William C.; President, Merrill Bankshares Co. of Bangor, Maine ----- 87
- Cohen, Richard; Attorney General of Maine ----- 58
- Coulter, Robert T.; Indian Law Resource Center ----- 99
- Dorr, Cleve (also spelled Cliv Dore); Lieutenant Governor,  
Pleasant Point Passamaquoddy Tribe ----- 79
- Flanagan, David T.; Legal Counsel, Office of the Governor  
(on behalf of Joseph Brennan, Governor of Maine) ----- 44
- Fredericks, Tom; Deputy Assistant Secretary, Indian Affairs ----- 29
- Joseph, James; Under Secretary, Department of the Interior ----- 29
- Mitchell, Dana; Member of the Penobscot Nation ----- 99
- Perkins, Donald W.; Pierce, Atwood, Scribner, Allen, Smith and Lancaster,  
Counsel to Maine Landowners ----- 90
- Phillips, Neil; Member of the Penobscot Indian Nation (seems to have appeared  
with R. Coulter and Dana Mitchell, in place of Lorraine Nelson) ----- 99
- Pierce, Leonard; Land Appraiser, James Sewall Company ----- 94

- Post, Bonnie; Maine State Representative, District 56 ----- 71
- Redmond, Pierre; Former Chairman of Committee for an Indian Referendum ----- 112
- Tureen, Thomas; Native American Rights Fund ----- 79
- Vollmann, Tim; Office of the Solicitor ----- 29

*(The above list of witnesses has been checked against the List of witnesses to the Hearing held by the House of Representatives Committee on Interior and Insular Affairs regarding the Maine Indian Claims Settlement Bill H.R. 7919 (08/25/1980), Committee on Interior & Insular Affairs, Legislative Files: House Bills, HR 7919, Box 138; 96th Congress; Records of the U.S. House of Representatives, RG 233; National Archives, Washington, DC (NARA003).)*

**Names from a handwritten attendance sheet corresponding to a meeting with the staff of the Indian Affairs Committee (Undated)**

- Boylan, Ginny; staff of Senate Select Committee on Indian Affairs
- Brown, Andrew; staff of U.S. Representative Olympia Snowe
- Gomez, Sharon
- Hunt, JoJo; staff of Senate Select Committee on Indian Affairs
- Khanna, Carolyn; staff of U.S. Representative David Emery
- Paterson, John; Deputy Attorney General, Maine
- Phillips, Butch; Penobscot Nation, Passamaquoddy-Penobscot Negotiation Committee
- Richtman, Max; Staff Director of the Senate Select Committee on Indian Affairs
- Sappier, James; Penobscot Indian Nation, Passamaquoddy-Penobscot Negotiation Committee
- Streeter, Jean; staff of Senator Cohen
- Taylor, Peter; Special Counsel to Senate Select Committee on Indian Affairs
- Tureen, Thomas; Native American Rights Fund Attorney for the Passamaquoddy Tribe and the Penobscot Nation
- Woodcock, Timothy; staff of Senator Cohen

*(Handwritten attendance sheet corresponding to a meeting with the staff of the Indian Affairs Committee (Undated), William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 1 (UMAINE005).)*

## Appendix 2

### Analysis of the Drafting of Section 1723

Section 1723 was designed to extinguish land claims from several different fronts. (a.) It validated all prior conveyances of Indian-owned land and natural resources under federal law; (b.) it prevented the federal government from asserting claims on behalf of the Tribes under state law and regarding past transfers; (c.) it extinguished the Tribes' aboriginal title to previously conveyed land and natural resources; (d.) it extinguished all other claims relating to transfers of land and natural resources, such as claims for damages or claims for use and occupancy; and (e.) it made extinguishment contingent upon appropriation of federal funds for the benefit of the Tribes.

### Transfers of Land and Natural Resources under Federal Law

Section 1723(a)(1) deems all prior transfers of land and natural resources valid under federal law. This includes all transfers made "pursuant to any treaty, a compact, or statute of any State," and these transfers are deemed valid as of the date of the original transfer.<sup>1</sup> "Transfers" here are defined as "includ[ing but] not limited to any voluntary or involuntary sale, grant, lease, allotment, partition, or other conveyance; any transaction the purpose of which was to effect a sale, grant, lease, allotment, partition, or conveyance; and any act, event, or circumstance that resulted in a change in title to, possession of, dominion over, or control of land or natural resources."

The one exception under Section 1723(a)(1) is that the MICSA did not extinguish most personal land title claims of *individual* Indians in Maine.<sup>2</sup> In a letter requesting that this proviso be reinstated, Thomas Tureen, NARF attorney for the Passamaquoddy Tribe and the Penobscot Nation, stated that "[t]he notion that only those individual Indian claims which arose prior to 1873 would be affected by the settlement was an integral part of the negotiations."<sup>3</sup> The only type of individual claim that this proviso does not apply to is a fraud claim under federal common law.<sup>4</sup> The State of Maine requested that this type of claim be left out of the proviso because it was concerned that claims under the Nonintercourse Act might be recast as federal common law fraud claims.<sup>5</sup> As DOI explained it, "[w]ithout the proviso the

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<sup>1</sup> See 25 U.S.C. 1723.

<sup>2</sup> See *Public Law 96-420 (H.R. 7919)*, with notes in the margins, p. 3, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 9, Folder 3 (UMAINE035), available at <http://maineindianclaims.omeka.net/items/show/88> [hereinafter UMAINE035].

<sup>3</sup> *Letter to Senator John Melcher from Thomas Tureen (NARF Attorney for the Passamaquoddy Tribe and the Penobscot Nation) (08/28/1980)*, p. 2, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 8, Folder 1 (UMAINE033), available at <http://maineindianclaims.omeka.net/items/show/86>.

<sup>4</sup> See 25 U.S.C. 1723(a)(1).

<sup>5</sup> See UMAINE035, *supra* App. 2, note 2, at 3. See also *Letter from Maine Attorney General Richard Cohen to Cecil Andrus, Secretary of Interior, after the hearings before the Senate Select Committee on Indian Affairs (Re: Bill S. 2829) (07/21/1980)*, National Congress of American Indians records, Box 532, Misc. Rec. of S. Harjo, Eastern Land Claims, Folder Titled "Maine Land Settlement Legislation [2 of 2]", National Museum of the American Indian Archive Center, Smithsonian Institution (NMAI005), available at <http://maineindianclaims.omeka.net/items/show/30> [hereinafter NMAI005] (objecting to amendment to 1723(a)(1)).

section, read literally, would extinguish the title claim of an Indian homeowner in the State whose claim is based on a Federal law generally designed to protect non-Indians as well as Indians, such as laws governing Federal home loans.”<sup>6</sup>

The language of 1723(a)(1), without the proviso regarding individual claims, dates back at least as far as June 21, 1978, when the extinguishment language was expanded from concentrating solely on validating transfers of aboriginal title from the Tribes specifically to the State of Maine or Massachusetts (see discussion of 1723(b), below) to validating all transfers of title to land or natural resources generally, from, by or on behalf of the Tribes.<sup>7</sup>

### **Transfers of Land and Natural Resources under State Law**

As initially introduced to the Senate Committee, Sections 1723(a)(2) and 1723(a)(3) would have deemed all prior transfers of land and natural resources valid under the laws of the State of Maine.<sup>8</sup> DOI felt this was inappropriate for federal legislation, however, insisting that state law claims should be extinguished by the legislature of the state.<sup>9</sup> Instead, on August 20, 1980, DOI proposed changing the language to bar the federal government, in its role as trustee for the Tribes’ interests, to assert claims under state law regarding past transfers.<sup>10</sup> The bar would apply to both group claims and individual claims. However, when it came to individual claims, 1723(a)(3) mirrored 1723(a)(1) in only barring the federal government from asserting individual claims regarding transfers that occurred prior to December 1, 1873.

### **Aboriginal Title**

As DOI defined it at the time,

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<sup>6</sup> *Letter from Cecil Andrus (Secretary of the Interior) to Senator John Melcher, with proposed amendment to Bill S. 2829 in the nature of a substitute (amendment not attached to letter) (08/08/1980)*, p. 3, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 12 (UMAINE032), available at <http://maineindianclaims.omeka.net/items/show/85> [hereinafter UMAINE032].

<sup>7</sup> *See Memo to Senator Edmund Muskie from James Case (Muskie’s Chief Legislative Assistant) with draft legislation that the White House intends to submit to Congress encompassing Part A of the Task Force proposal for settlement of Maine Indian Land Claims (06/21/1978)*, p. 6, Sec. 4, The Edmund S. Muskie Papers, Box 2151, Folder 1, The Edmund S. Muskie Archives and Special Collections Library, Bates College, Lewiston, ME (BATES005), available at <http://maineindianclaims.omeka.net/items/show/5>.

<sup>8</sup> *See Proposed Settlement of Maine Indian Land Claims: Hearings Before the Senate Select Committee on Indian Affairs, 96th Cong., 2nd sess., S. 2829, Vol. 1, Washington, DC: U.S. Government Printing Office (1980): 167*, available at <http://hdl.handle.net/2027/umn.31951p00324196j>.

<sup>9</sup> *See, e.g., Id.* at 135-36.

<sup>10</sup> *See Letter from Clyde O. Martz (Solicitor, Department of Interior) to Senator John Melcher, in response to request from Senator George J. Mitchell at the Senate Select Committee Hearing regarding the Maine Indian Claims Settlement Bill (08/20/1980)*, p. 5, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 6, Folder 1 (UMAINE048), available at <http://maineindianclaims.omeka.net/items/show/101> [hereinafter UMAINE048]. We also see this approach of limiting the federal government’s authority, as trustee, “to institute an action on behalf of” one of the Tribes earlier, in some proposed changes dated 07/14/1980, but it is unclear who the author of these changes was. *See Proposed Changes to §§ 4, 5, 6 of Bill S. 2829 (what ultimately became 25 U.S.C. 1723, 1724 and 1725) (07/14/1980)*, p. 1, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 9 (UMAINE013), available at <http://maineindianclaims.omeka.net/items/show/66>.

aboriginal title is the Indian title to land based upon lengthy and exclusive use and occupancy as opposed to titles arising out of formal action, such as the transfer of a deed or the issuance of a patent. It is a right of exclusive use and occupancy, but it does not include the right to sell the land to whomever one pleases.<sup>11</sup>

Section 1723(b) had the effect of validating all transfers of land and natural resources regardless of whether they had once been owned under aboriginal title. Since the transfers were deemed valid, any aboriginal title preceding the transfers was extinguished.

The 1723(b) language that concentrates on “recogniz[ing as valid] all prior conveyances of [aboriginal] title and interests” and extinguishing aboriginal title as of the date of the conveyances was present in drafts of the MICSA bill as early as March 1, 1977.<sup>12</sup> In that early draft, however, this language was limited to apply only to conveyances of lands or waters by the Tribes to the State of Maine or the State of Massachusetts (as Maine’s predecessor in interest), rather than to conveyances of lands or natural resources generally.<sup>13</sup>

### **Extinguishment of All Other Claims Relating to Transfers of Land and Natural Resources**

In addition to validating transfers of land and natural resources and extinguishing claims to title, Section 1723 also includes language designed to extinguish “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.”<sup>14</sup> This includes claims for trespass damages or claims for use and occupancy.<sup>15</sup>

### **Extinguishment Contingent upon Appropriation of Federal Funds**

One caveat that was important to the Tribes was that extinguishment of the Tribes’ claims be contingent upon the appropriation of the \$81.5 million that the federal government was to contribute toward acquisition of tribal lands under the negotiated settlement.<sup>16</sup> The State of Maine did not want to make

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<sup>11</sup> UMAINE048, *supra* App. 2, note 10, at 1.

<sup>12</sup> “DECLARATION OF TITLE EXTINGUISHMENT. Sec. 3(a) To the extent, if any, that the Passamaquoddy or Penobscot Indian Tribes held aboriginal title or interests in lands or waters, or both, in the area now comprising the State of Maine, the Congress hereby recognizes all prior conveyances of such title and interests from such Indian tribes to the State of Maine and its predecessor in interest, the Commonwealth of Massachusetts, and deems all such title and interests to have been extinguished as of the date of such conveyances.” *H.R. 4169, State of Maine Aboriginal Claims Bill of 1977 (03/01/1977)*, Sec. 3(a), William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.2 Box 4, Folder 10 (UMAINE044), available at <http://maineindianclaims.omeka.net/items/show/97>.

<sup>13</sup> *See Id.*

<sup>14</sup> S. Report No. 96-957, *Authorizing Funds for the Settlement of Indian Claims in the State of Maine*, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., on S. 2829, September 17, 1980, Washington, DC: Government Printing Office, p. 22, available at [http://congressional.proquest.com:80/congressional/docview/t49.d48.13330\\_s rp.957?accountid=1131](http://congressional.proquest.com:80/congressional/docview/t49.d48.13330_s rp.957?accountid=1131)

<sup>15</sup> *See* 25 U.S.C. 1723(c).

<sup>16</sup> *See Transcript of Markup Session for Maine Indian Claims Settlement Bill H.R. 7919, House of Representatives, Committee of Interior and Insular Affairs (09/17/1980)*, p. 13, Committee on Interior & Insular Affairs, Legislative Files: House Bills, HR 7919, Box 139, Folder “Full Committee mark-up 9/17/1980”, 96th Congress, Records of the U.S. House of Representatives, RG 233, National Archives, Washington, DC (NARA020), available at <http://maineindianclaims.omeka.net/items/show/24>.

extinguishment contingent upon the appropriation of funds.<sup>17</sup> DOI did not feel that the federal government was obligated to condition extinguishment in that way, but appreciative of the Tribes' concern, DOI was not opposed to making an amendment to include such language.<sup>18</sup> Ultimately, sometime after August 8, 1980, the amendment was made in the form of Section 1723(d). This was one of the last issues to be resolved prior to the MICSA legislation being passed.<sup>19</sup>

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<sup>17</sup> See NMAI005, *supra* App. 2, note 5, at 4; *Letter to Senator John Melcher from Maine Attorney General Richard Cohen (08/19/1980)*, p. 2, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 9, Folder 12 (UMAINE014), available at <http://maineindianclaims.omeka.net/items/show/67>.

<sup>18</sup> See UMAINE032, *supra* App. 2, note 6, at 3.

<sup>19</sup> See *Settlement of Indian Land Claims in the State of Maine: Hearing Before the Committee on Interior and Insular Affairs, House of Representatives, 96th Cong., 2nd sess., H.R. 7919 (Serial No. 9641)*, Washington, DC: U.S. Government Printing Office (1980): 68, available at <http://hdl.handle.net/2027/mdp.39015082320907>; *Memo to Senator William S. Cohen from Timothy Woodcock concerning issues the State of Maine was having with several provisions (09/05/1980)*, pp. 4-5, William S. Cohen Papers (MS 106), Special Collections, Raymond H. Fogler Library, University of Maine, Orono, Maine. 3.3.13.1 Box 8, Folder 1 (UMAINE002), available at <http://maineindianclaims.omeka.net/items/show/57>.