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THE MAINE INDIAN LAND CLAIM SETTLEMENT: A PERSONAL RECOLLECTION

By John M.R. Paterson

From 1971 to 1980, the state of Maine grappled with one of the greatest legal challenges ever before it. That challenge had its origin in a suit brought by the Penobscot and Passamaquoddy tribes against the U.S. Department of the Interior seeking the seemingly simple declaration that the department owed a fiduciary duty to the tribes based on a federal law adopted in 1790. That suit was eventually to lead to a suit by the U.S. Department of Justice against the state of Maine, and potentially 350,000 residents in the eastern two-thirds of the state, seeking return of land taken from the tribes in the latter part of the eighteenth century and first part of the nineteenth century. The outcome was the passage of two laws, one enacted by the state of Maine and one enacted by Congress, the combined effect of which was to extinguish the claims, pay the tribes $81.5 million, redefine the legal relationship between the tribes and the state, and make available to the tribes for purchase 300,000 acres of land to reestablish a tribal land base. This article recounts the author's personal involvement in those remarkable events. The author is a graduate of Bowdoin College and New York University Law School. He served in the Office of the Maine Attorney General from 1969-1981, initially as Chief of the Environmental Protection Division and then as Deputy Attorney General in Charge of Civil Litigation. From 1975-1980 he was the state's lead attorney in charge of managing the state's defense of the Maine Indian land claim case. He was a member of the state's negotiating team that ultimately produced the settlement. At present he is an attorney with the firm of Bernstein Shur in Portland, Maine. His practice focuses on civil litigation, with particular emphasis on media, antitrust, securities, and complex corporate and commercial disputes.

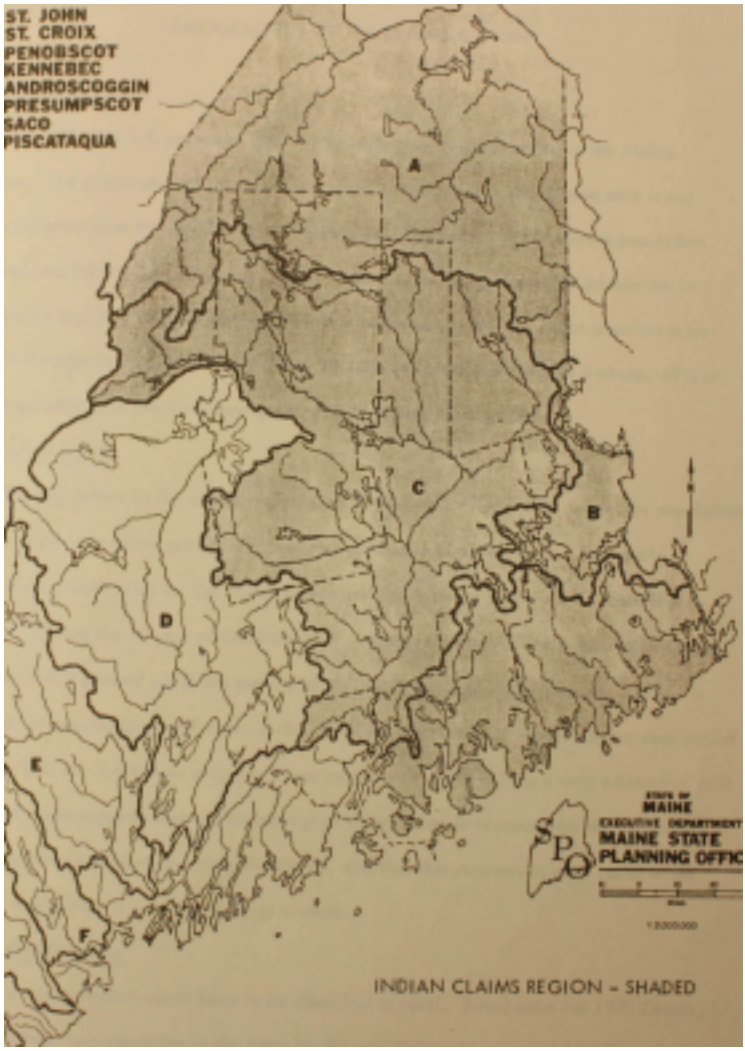
IN THE early 1970s, with the help of the United States government, the Penobscot and Passamaquoddy tribes brought suit against the state of Maine. At issue was ownership of two-thirds of the land area of Maine; the tribes argued that their lands in Maine were seized nearly two hundred years prior by the state of Massachusetts, and later by the state of Maine, without proper constitutional authority. After more than

eight years of litigation, in April 1980, the Maine legislature enacted the Maine Implementing Act as the first step in bringing to an end the land claim issue in Maine.[1] Shortly thereafter, in October 1980, President Jimmy Carter signed into law the Maine Indian Claims Settlement Act thereby taking the final step to resolve the lawsuits and the attendant disruptive public controversy and removing a potential cloud on land titles in more than half of Maine.[2] The combined effect of the two acts was the extinguishment of the tribal land claims, the award of $81.5 million to the two tribes to be used in part to purchase additional lands, and the creation of a unique jurisdictional arrangement under which the state would regain substantial legal authority over all tribal lands and members that the state had lost as a result of a Maine Law Court decision in 1979.[3] Subsequent litigation has tested both the fundamental premise of the acts and has sought to apply the acts to a variety of circumstances.[4] However, despite numerous lawsuits and attempts to erode the scope of their application, the acts have withstood legal challenges and remain as a unique framework for state-tribal legal relations. As a result, Maine stands alone among the states in that it has substantial legal jurisdiction over Indian tribal lands and members.[5]

As the thirtieth anniversary of the 1980 Maine Indian land claim settlement has passed, memories have faded and some of the participants are no longer on the scene. Thus, this article was written to preserve part of that history, and to reflect and comment upon a case without parallel in the state's legal history. The following is intended as a brief history of the case covering the time period from 1971 to late 1980 from the perspective of one who was closely involved as an attorney for the state of Maine at the time. It is based largely on the author's personal knowledge of events in which he participated as the state's lead attorney and from his personal management of all aspects of the state's case from January 1976 through the settlement in October 1980. Of necessity, this article omits the countless details of each event, the detailed legal and political strategizing, the countless conversations among the many players, and the many interesting and sometimes colorful anecdotes. Rather, this article attempts merely to summarize the essential history of this entire matter and the basic principles underlying the settlement.

The Legal and Factual Basis for the Land Claim

The Maine Indian land claim had its origin in a federal law, entitled the Trade & Intercourse Act, more commonly referred to as the Nonin-



With help from the federal government, the Penobscot and Passamaquoddy tribes brought suit against the state of Maine in the 1970s. The two Maine tribes laid claim to roughly two-thirds of the state's land, based upon a 1790 federal law that prohibited treaties between states and tribes without federal consent. Courtesy Maine Legislature and Law Library.

tercourse Act, which was passed by Congress in 1790. The Nonintercourse Act was one of the first pieces of legislation adopted by the First Congress and was largely a continuation of a policy adopted by the British in 1763 and subsequently enacted by the Continental Congress under the Articles of Confederation. The act had a number of provisions regulating relationships between Indians and non-Indians, some of which have been changed from time to time since its original enactment. In particular, the Nonintercourse Act prohibited any person from acquiring land from an Indian, or a band or tribe of Indians, without the approval of the federal government.[6]

The land claim issue in the 1970s arose because of four agreements made between the Maine tribes and the states of Massachusetts and Maine in the early national period. Although these agreements have been commonly referred to as "treaties," their form and content is substantially different from treaties between the United States and western tribes entered into throughout the nineteenth century. Typical federal treaties were executed for the purpose of ending hostilities between a tribe and the U.S. government, and defined the terms of the tribal surrender. Such treaties also usually set aside a land reserve for the tribe. In contrast, the Massachusetts and Maine "treaties" are in form more in the nature of releases or deeds. None of the four treaties was generated as a result of the cessation of any period of armed hostility between any of the tribes and either state. Indeed the agreement of 1794 between Massachusetts and the Passamaquoddy Tribe was executed in response to a petition made on behalf of that tribe to the Massachusetts General Court (the Legislature) in 1793 requesting that Massachusetts provide that tribe with a land reserve in the District of Maine, then part of Massachusetts.

The particular land transactions at issue were: (1) an agreement of 1794 between Massachusetts and the Passamaquoddy Tribe, (2) agreements of 1796 and 1818 between Massachusetts and the Penobscot Tribe and (3) an agreement of 1833 between Maine and the Penobscot Tribe. It was the theory of the land claim lawsuits that each of those transactions was illegal and void, since they had been consummated without the approval of the federal government as required by the Nonintercourse Act. It was also the theory of the claim that equitable defenses such as laches, estoppel, and adverse possession were not applicable, since the claim had its origin in federal statutory law and not the common law of trespass.[7]

The geographic limits of the area claimed were never defined with

precision, since the four agreements did not describe the lands with the specificity of a traditional deed. However, it was the contention of the Maine tribes that the combined effect of the agreements had resulted in the unlawful tribal relinquishment of their right to aboriginal possession of the entire watersheds of the St. Croix and Penobscot rivers (approximately twelve million acres or two-thirds of Maine's land area). Under the principle of "aboriginal possession," Indian tribes, lacking deeds, royal grants, or other instruments of title under Anglo-American law, are deemed to hold title to their lands by virtue of traditional usage such as for hunting, gathering, and general seasonal movement.[8] The right of aboriginal possession is a right superior to all others except the sovereign, which was either the English Crown or later the federal government. The sovereign alone has the right to extinguish aboriginal title.

It was against this basic principle that the First Congress enacted the Nonintercourse Act, largely as a continuation of British Indian policy. To this day, however, the exact scope of the Nonintercourse Act remains an open question. Based on extensive historical research, the state concluded that the Nonintercourse Act was never intended to govern tribal-state dealings or to apply to land transactions within any state at the time. Rather, and again based on historical research, the state concluded that the Nonintercourse Act was only intended to govern land transactions with tribes in what was then the western frontier, sometimes referred to at the time as "Indian Country," and to grant the federal government the exclusive authority to deal with such tribes.[9] The tribes, of course, disagreed with that analysis.

In addition to the question of the meaning, intent, and scope of the Nonintercourse Act, there remain unresolved historical questions regarding the events that gave rise to the four agreements. As stated above, it was the tribes' contention that the agreements constituted an affirmative relinquishment of aboriginal possession to lands held by the tribes at the date of each agreement. The state disagreed with that characterization of the events. Rather, it was the state's position that, at least with respect to the agreements of 1794 and 1796, they simply constituted a reaffirmation by the tribes of the fact that they had previously lost their aboriginal possession as a result of events (including hostilities) before the time of the American Revolution and well prior to the enactment of the Nonintercourse Act. The state concluded that the purpose of the 1794 and 1796 agreements was simply to put to rest any lingering doubt on that point. It was the state's contention that, in effect, the agreements of 1794 and 1796 were nothing more than unilateral grants of land and

Democrat Kenneth Curtis served as Maine's governor in the late 1960s and early 1970s. In 1971, members of the Penobscot and Passamaquoddy tribes met with his staff to ask for concessions from the state. At that time, however, state officials did not appear to take the claims seriously. Maine Historical Society Collections.

ongoing support to the two tribes with corresponding releases by the tribes acknowledging their prior loss of land.[10]

As a corollary to that issue, there was also the unresolved question of exactly how much territory the tribes used and what they might legitimately claim as aboriginal possession, as of 1790 when the Nonintercourse Act was adopted. That is, what was the scope of their aboriginal territory as of the late-eighteenth century? Since all the New England tribes, including the Penobscots and Paassamaquoddies, had been decimated by European disease and nearly 200 years of conflict with the colonists, the actual territorial scope of the lands used by the Maine tribes in 1790 had undoubtedly been substantially diminished.

Although the tribes publicly insisted in the 1970s that their aboriginal lands as of 1790 comprised all the Penobscot and St. Croix river watersheds, such a claim was not grounded in any kind of evidence normally relied on by courts.[11] The anthropological evidence consisted of

imprecise tribal tales nearly 200 years removed from modern-day events. From that data alone the tribes asserted that a few hundred members had, in 1790, used the estimated 12,000,000 acres in the area of the two watersheds. Whether that was the case would never be known, since there were no documentary records and in the end no trial to determine the facts, since the entire claim was ultimately settled through state and federal legislation. Even today it remains unclear as to exactly how these events came to pass, why it was that Massachusetts and Maine officials simply ignored the Nonintercourse Act, whether the act even applied to these transactions, exactly what lands the tribes held at the time they executed the various agreements and what they relinquished in the agreements of 1794 and 1796.

The *Passamaquoddy v. Morton* Litigation

The origin of the land claim case itself is also something of a mystery. The story circulated at the time was that sometime in the late 1960s a tribal elder found a copy of one or more of the treaties in a trunk.[12] She allegedly brought it to the attention of tribal leaders where it ultimately found its way to a lawyer. Whether that story is true or apocryphal we do not know. Certainly the agreements had never been a secret; they were included in an appendix to the government publication of the laws of Maine in 1843. Furthermore, the agreements with the two tribes are specifically referenced in the 1820 Articles of Separation between Maine and Massachusetts, and the Articles of Separation have been regularly printed along with the Maine Constitution in the various versions of the *Maine Revised Statutes* throughout the twentieth century.

In 1968 attorney Donald Gellers of Pine Tree Legal Assistance filed suit on behalf of the Passamaquoddy Tribe in Suffolk County Superior Court in Boston against the state of Massachusetts alleging that the state had breached the terms of the 1794 treaty. Gellers sought the return to the tribe of 6,000 acres and an award of $150,000,000. Within days of filing suit, Gellers left the state, however. There the matter seemed to die.

Then, in 1971, representatives of the Passamaquoddy Tribe met with the office of Governor Kenneth Curtis and presented a series of demands on behalf of the tribe, including a demand that the state pay to the tribe the current value of the past due food stuffs and goods that Massachusetts had agreed to annually provide to the tribes under the 1794 and 1796 agreements.[13] Those demands were transmitted to Attorney General James Erwin, where they eventually found their way to my desk. Inquiries to various historians produced a rough estimate of the

Tom Tureen, an attorney for Pine Tree Legal Assistance who focused on Native rights advocacy, represented the Penobscot and Passamaquoddy tribes throughout most of the land claim dispute. He is pictured here (second row, middle) in 1980, with Jim Sappier and Tim Love (second row) and Carl Nicholas, George Stevens, and Albert Dana (first row). Maine Historical Society Collections and Maine Today Media.

cumulative total of what might have been owed.[14] Those numbers were provided to the governor's office, but nothing apparently became of the matter. From all appearances at the time, no one in state government took any kind of tribal claim very seriously.

Shortly after Gellers' departure, Tom Tureen became the tribes' attorney. Tureen had prior experience working for the U.S. Bureau of Indian Affairs and had concentrated on Indian law issues while in law school. He started his work in Maine as an attorney with Pine Tree Legal Assistance, but by 1973 was working for the Native American Rights Fund while assisting the Maine tribes. Tureen was well versed in Indian law and recognized early on the potential for a claim against the state and landowners based on the Nonintercourse Act. Understanding that the tribes were barred by the Eleventh Amendment from suing the state in federal court and were also barred by sovereign immunity from suing the state in state court, Tureen devised a strategy to get the U.S. government involved as a plaintiff on behalf of the tribes. In early 1972, the Passamaquoddy Tribe wrote to the Bureau of Indian Affairs, within the Department of the Interior, asking it to file suit against the state of Maine under the Nonintercourse Act. At that time the statute of limita-

Throughout the 1970s and early 1980s, Maine's politicians played a decisive role in the Indian land claim issue. Pictured here in 1984 are Edmund Muskie, William Cohen, Margaret Chase Smith, George Mitchell, and Joseph Brennan. Muskie and Smith both served in the U.S. Senate, while Cohen was elected to the Senate in 1978 thanks, in part, to his stance on the land claim issue. Brennan was state attorney general from 1975-1978 and served as governor from 1979-1987. Courtesy of the Margaret Chase Smith Library.

tions on all Indian claims was set to expire on July 18, 1972, since Congress had previously established a general statute of limitations applicable to all Nonintercourse Act claims, not just the Maine claims. And in one of the most remarkable events of the entire dispute, Tureen persuaded Governor Kenneth Curtis, Senators Edmund Muskie and Margaret Chase Smith, and Representatives Peter Kyros and William Hathaway to join in his request to the Bureau of Indian Affairs that the federal government sue the state of Maine. One can only assume that none of them had any idea of the chain of events that would follow. In any event, the Department of Justice (DOJ) responded on behalf of the Department of the Interior stating that the U.S. government owed no fiduciary duty to the Passamaquoddy Tribe and, therefore, declined to file suit on its behalf.

Upon receipt of the DOJ denial, the Passamaquoddy filed suit against the Secretary of the Interior alleging that the government had breached its fiduciary duty to the tribe under the terms of the Nonintercourse Act. Virtually simultaneous with that filing, the tribe requested

and obtained a preliminary injunction requiring the Department of the Interior to file a protective lawsuit on behalf of the tribe in order to toll, that is to "stop the running of," the statute of limitations.[15] In response, the U.S. district court ordered the Department of Justice to file a lawsuit, and in July 1972 the Department of Justice simultaneously filed two virtually identical protective lawsuits on behalf of the Passamaquoddy and Penobscot tribes. This action alone was extraordinary, since federal courts customarily decline to issue orders to the executive branch to file lawsuits. Indeed, as far as can be determined, that may have been the only time when a federal court had taken such an action. In its initial status report to the U.S. district court in Maine, reporting on developments in the case, the Department of Justice described these suits as "potentially the most complex litigation ever brought in the federal courts with social and economic impacts without precedent and incredible potential litigation costs to all parties."[16] Both lawsuits, each of which was entitled *United States of America v. State of Maine*, were immediately stayed pending the outcome of the Passamaquoddy's suit against the Secretary of the Interior. Ironically, Congress acted shortly thereafter to extend the statute of limitations to 1977.

Although the Passamaquoddy suit was originally filed only against the Secretary of the Interior, the state of Maine moved to intervene. In retrospect, the decision to intervene came to be seen as a poor tactical decision, since the resulting decision in favor of the tribe had a binding impact on the state as an intervenor. That would not have been the case had the state sat on the sidelines or participated only as an *amicus,* since if the state had not been a participant in the lawsuit the decision would have had less of a binding effect on it. That tactical decision was made before I was involved in the lawsuit.

At the time few outside the Attorney General's Office and the Office of the Governor paid any attention to the Passamaquoddy lawsuit or had any understanding of its possible implications. The existence of the case was barely reported in the press. Early on in the case Attorney General Jon Lund requested a special appropriation from the legislature so that his department could hire outside counsel and experts to help with defense of the case. The legislature denied the request, since no one in the legislature could be convinced that the case posed any risk to the state.

In January 1975, the district court issued a decision finding that the Passamaquoddy Tribe was a "tribe" within the plain meaning of the Nonintercourse Act and holding that the U.S. government owed a fidu-

ciary duty to the tribe to investigate the alleged breach of that law by Maine and Massachusetts and, if warranted, bring suit to vindicate the tribe's rights.[17] Both the Secretary of the Interior and the state appealed. In a decision rendered in December 1975, the court of appeals affirmed the district court decision.[18] In rendering its decision, however, the court of appeals was far more insightful than the district court in understanding the possible ramifications of its decision on the potential underlying land claim itself. Thus, the court of appeals said:

> Before turning to the District Court's ruling, we must acknowledge a certain awkwardness in deciding whether the Act encompasses the tribe without considering at the same time whether the Act encompasses the controverted land transactions with Maine. Whether the tribe is a tribe within the Act would best be decided, under ordinary circumstances, along with the tribe's specific land claims, for the Act only speaks of tribes in the context of their land dealings. If that approach were adopted here, however, the tribe would be deprived of a decision in time to do any good on those matters cited by the Department of Interior as reasons for withholding assistance in litigation against Maine. And without United States participation, the tribe may find it difficult or impossible ever to secure a judicial determination of the claims. Given, in addition, the federal government's protective role under the Nonintercourse Act, ... below, it is appropriate that plaintiffs and the federal government learn how they stand on these course matters before adjudication of the tribe's dispute with Maine.
>
> Yet the resulting bifurcation of decision necessarily restricts the reach of the present rulings. In reviewing the district court's decision that the tribe is a tribe within the Nonintercourse Act, we are not to be deemed as settling, by implication or otherwise, whether the Act affords relief from, or even extends to, the tribe's land transactions with Maine. When and if the specific transactions are litigated, new facts and legal and equitable considerations may well appear, and Maine should be free in any such future litigation to defend broadly, even to the extent of arguing positions and theories which overlap considerably those treated here.[19]

At the conclusion of its decision the circuit court said: "we accordingly affirm the District Court's ruling that the United States never sufficiently manifested withdrawal of its protection so as to sever any trust relationship. In so ruling, we do not foreclose later consideration of whether Congress or the tribe should be deemed in some manner to have acquiesced in, or Congress to have ratified, the tribe's land transactions with Maine."[20]

In light of that qualifying language, and concluding that an appeal was not likely to result in a better opinion than that of the circuit court, both the state and the DOJ decided not to file a petition for *writ of certiorari* in the Supreme Court.

The Events Following the Circuit Court Decision in *Passamaquoddy v. Morton*

For a month or two after the Court of Appeals opinion, relatively little attention was paid to it. It was reported in the papers without fanfare. However, shortly after the decision, the Departments of the Interior and Justice announced their intentions to pursue the claims against the state as set forth in the original 1972 "protective lawsuits" filed by the DOJ on behalf of the tribes. It was at that moment that I had the good fortune to be named as lead counsel for the state. Although the suit only named the state as a defendant, since virtually all of the claim area was in private hands, the next logical extension of the suit would have been for the DOJ to have commenced a defendant's class action lawsuit naming as defendants the roughly 350,000 residents within the claim area. Fortunately, subsequent political events prevented that from happening.

Nevertheless, immediately after the court of appeals decision, the existence of the suit exploded into public attention and, among other things, derailed two state bond issues, which cast a cloud on land titles in roughly two-thirds of the state and called into doubt the solvency of banks holding mortgages on land in the claim area. In early 1976, both the state and the Maine Municipal Bond Bank were scheduled to issue bonds to raise, in total, approximately $25,000,000 for various public projects. As a routine part of any bond issue, the bond underwriter must provide an opinion of counsel. Among other things, the bond opinion for a public entity must contain a statement affirming the legal ability of the issuing authority to impose taxes to pay the bond purchasers. Although styled as "opinions," such statements of counsel are more akin to a certification to the potential bond purchasers.

In early 1976, the state and the Bond Bank had engaged Ropes & Gray, a law firm in Boston that had been long-standing bond counsel for the state and the Bond Bank. When Ropes & Gray learned of the decision in *Passamaquoddy v. Morton* it undertook an inquiry to determine the scope of the potential land claim area and the substance of the allegations in the two still-pending protective lawsuits that had been filed by the United States against Maine in 1972. Based on their inquiry and reading of the *Passamaquoddy v. Morton* decision, Ropes & Gray advised

the state and Bond Bank that they could not issue an opinion as to the taxing authority of the state or municipalities within the boundary of the land claims.

The attorneys at Ropes & Gray understood that (1) the factual and legal allegations in *United States of America v. State of Maine* could apply to any person or entity in the claim area, (2) the claim area encompassed roughly the eastern two-thirds of the state, and (3) the U.S. Department of Justice had expressed its view that there was merit to the suit and that it intended to pursue it. Therefore, they reasoned, if the tribal claims were valid, title to all land in the entire claim could eventually vest in the tribes. Since under general principles of federal law Indian tribal lands are exempt from state and local taxes, Ropes & Gray concluded that it could not issue an "opinion" stating that the issuing towns could tax the land in those towns in order to pay the bonds. Ropes & Gray also advised the state that, since the Department of Justice had stated its intention to actively pursue the suits, it could not discount the suits as frivolous. As a result of their inquiry, Ropes & Gray also advised the state treasurer and the Bond Bank that, although they did not have an opinion as to the ultimate outcome of the claim, they could not determine the claim to be frivolous and hence could not issue the needed bond opinion.

The refusal of Ropes & Gray to issue a bond opinion in early 1976 resulted in the state government withdrawing from the market the previously announced bond issues. The turmoil in state government resulting from this event, plus the general publicity about the size and potential consequences of the claim, was enormous. For a period of time that late winter or early spring, there were also rumors that the federal bank-regulatory agencies might declare banks in the claim area to be insolvent, since so much of their assets consisted of mortgages on land in the claim area, land which potentially belonged to the tribes. Although the tribes stated publicly that they did not intend to dispossess any present individual landowners, throughout much of 1976, land sales in eastern Maine were substantially impaired, since Maine attorneys became reluctant to issue title opinions to lending banks. This interference with normal lending caused some considerable public and business concern and in some cases harm to those seeking to buy or sell property in northern and eastern Maine. The press coverage and public debate over what to do and how to "fix the problem" was seemingly never ending. To say that the state of affairs in state government was close to crisis is to state matters too lightly.

In response to this situation, and because no other litigation or political solution was then on the horizon, Governor James Longley called on the Maine congressional delegation to solve the problem. Publicly he insisted that the tribal claim should be simply extinguished by Congress on the grounds that it was unfair to permit such a claim to be asserted after the passage of almost 180 years. State Attorney General Joseph Brennan supported Longley's position. In response, in late 1976, the Maine congressional delegation introduced legislation providing for the unilateral termination of the tribal land claims.

The position of the tribes was masterfully managed by Tureen. He presented a calm, determined, but reasonable image, expressing the tribes' desire not to harm innocent people in the claim area, but insisting on fair compensation for the tribes.[21] In response to the legislation providing for extinguishment of the claim, Tureen enlisted the assistance of Harvard professor Archibald Cox, who publicly characterized the legislation as unconstitutional.

Concurrently with developing a public response to the claim, the Maine attorney general's office undertook to develop a legal and factual defense against the claim. That effort was lead by me, assisted by other attorneys and staff. In addition to legal research, we engaged several experts to assist with the development of the historical facts necessary to defend against the claim. The principal expert in that task was Professor Ronald Banks of the Department of History at the University of Maine at Orono. Banks conducted an astonishingly creative and comprehensive research project to examine the origins of the Nonintercourse Act and its application to eastern tribes in general, and the Maine tribes, in particular. His work involved examining archival records in London, Washington, D.C., Philadelphia, Boston, and New York. His remarkable work was to form the underpinnings of Maine's arguments regarding the meaning of the act. Tragically, he was murdered in 1978 while on a professional trip to New Orleans, the victim of a senseless street crime in front of his hotel.

The initial state of chaos within state government, the state and municipal bond markets, and in the real estate market lasted for about a year. Fortunately, in March 1977, President Jimmy Carter, presumably acting in response to behind-the-scenes discussions involving the Maine congressional delegation and the White House staff, appointed Justice William Gunter, a former Georgia Supreme Court justice, as a "special representative" to inquire into and recommend a resolution of the land claim dispute. The appointment of Gunter was sufficient to calm the chaos with title attorneys, banks, and bank regulators, and shortly thereafter the real estate and bond sales market returned to normal.

President Carter signed the Maine Indian Land Claim Settlement Act on October 10, 1980, with members of the state and tribal negotiating teams in attendance. Here, Carter is pictured shaking hands with Tom Tureen, the tribes' attorney. Courtesy of the Jimmy Carter Library.

Justice Gunter met with the parties directly throughout the spring and summer of 1977, and invited each side to make presentations as to the claim on its merits. He also requested the parties to offer possible solutions and consulted with the Departments of Justice and Interior and the congressional delegation about ways to resolve the problem. As part of the state's presentation to him, the attorney general's office submitted lengthy memoranda addressing the merits of the claim and detailing Maine's historic economic support for the Maine tribes. The purpose of the memoranda was to cast doubt on the merits of the claim and make the case for a settlement fully funded by the federal government. With regard to the issue of possible settlement, the memoranda argued that, since for 200 years the federal government had ignored the Maine tribes, neither recognizing them nor providing any programs to them, and since, in contrast, the state of Maine had been solely responsible for the supervision and economic support (albeit not generously) of the Maine tribes, that, therefore, the federal government should assume responsibility for compensating the tribes without cost to the state of Maine.

In August 1977, Judge Gunter publicly announced his recommendation for the general framework for a settlement. The essential elements of his proposal provided that (1) Maine convey 100,000 acres of state-

owned land to the federal government, to be held by the federal government in trust as a land reserve for the tribes, (2) the state agree to indefinitely continue its appropriation of $1.7 million per year for tribal education and social welfare programs, (3) the federal government appropriate $25 million, a portion of which would go directly to the tribes and a portion to be used for support for federal Indian programs that benefitted the tribes, and (4) the Maine tribal land claims be extinguished. Both the state and the tribes rejected the proposal.

There followed during the next two-year period a complex, behind-the-scenes series of negotiations among senior members of the federal administration, the Department of the Interior, members of Maine's congressional delegation, the state and the tribes seeking an economic solution to the lawsuit. The state's principal goal in these negotiations was to force the federal government to assume the total cost of the settlement. To that end, in 1978, Governor Longley retained well-known Washington attorney Edward Bennett Williams to assist in lobbying the White House. Over time, relations between Governor Longley and some of the delegation became strained, largely because of Longley's repeated public demands that the delegation do whatever was necessary to extinguish the claim at no cost to the state, coupled with his public criticism of the delegation for failing to solve the problem as he demanded.

Concurrently, both sides also engaged in a public relations battle, with each side using every opportunity to attempt to sway public opinion to its side. In general the tribes' message to the public was: (1) the claim had merit, (2) it was too risky for the state to litigate, (3) it was fair for the state to contribute to a settlement, (4) the tribes did not want to hurt individuals and businesses by taking land, but rather that they only wanted fair monetary compensation, and (5) it was unjust, dishonorable, and unconstitutional for Congress to unilaterally extinguish the claims without fair compensation.

In response, the state, principally the governor and attorney general, publicly argued that: (1) the claim had no legal or factual merit, (2) it was fundamentally unjust for the federal government to bring a lawsuit almost 200 years after the events, and (3) if a settlement was to occur, it was unjust for the federal government to require the state to make a contribution, given that the federal government had provided no assistance or programs at all to the tribes for 200 years. The federal government had repeatedly denied any recognition of or responsibility for the Maine tribes for 200 years and the entire burden of financial support for the tribes had fallen on the state of Maine.[22]

The public debate about the issue had become so polarizing that in 1978 it was a significant issue in the Senatorial campaign between Representative William Cohen and incumbent Senator William Hathaway. It was accepted wisdom at the time that Cohen's outspoken opposition to the claim was a significant factor in his defeat of Hathaway, who had been active in seeking a settlement acceptable to both sides and whose public statements about the claim had been moderate and balanced.[23]

In the meantime, the lawsuit in the U.S. district court remained stayed. Although the court required periodic status reports and conferences with the parties, neither party engaged in discovery and the court took no action to treat the case as an actively-litigated matter.[24] From the outset the parties and the court had acknowledged that the case required a political settlement. Among other things, it was recognized that, although the pending lawsuits were directed at the state of Maine, the state owned a relatively small amount of land in the claim area (although it did include Baxter State Park). It was understood by the parties and the court that a suit directed at the full geographic claim area would entail naming as defendants hundreds of thousands of landowners in the claim area, probably in the form of a defendants' class action. It was also understood that the complexity of the factual and legal issues, the problems of actual management of a case of that size, and the possible social and economic consequences, were such that as a practical matter the case would never actually be tried. However, in order to keep pressure on the parties, the court scheduled regular status conferences in which it threatened to move forward with the case if the parties failed to find a political solution.

The Settlement Process

Following the rejection of Gunter's proposal in August 1977, President Carter appointed a three person "Working Group" to attempt to develop a workable settlement plan. Over the next two years, there followed a series of proposals building on the conceptual framework first laid out by Justice Gunter. Throughout 1978 and 1979, a series of proposals by Senator Hathaway and the White House were put forward only to be rejected by one or both of the parties. Nonetheless, despite the lack of a specific settlement, by the fall of 1979 it had become apparent that some form of agreement was likely. Intense pressure on the state congressional delegation from the public and state political leaders caused them to pressure the Carter administration to support ever more generous settlement packages which would exclude, most importantly to the

Members of both the state and tribal negotiating teams posed for this picture outside the West Wing of the White House on October 10, 1980, immediately after President Carter signed the Maine Indian Land Claim Settlement Act. The author is standing in the third row, far left. Courtesy of the author.

state, a demand for state financial participation in any settlement. The assessment of all parties was that the financial terms of a wholly federally-funded settlement were within political reach.

While all this was happening, two important legal decisions were rendered. First, in July 1978, the Maine Law Court rendered a decision in the case of *State v. Dana and Sockabasin.*[25] The origin of the case was entirely unrelated to the tribal land claim but was to have an enormous impact. Unbeknownst to the Maine attorney general's office, the Washington County District Attorney had commenced a criminal action in 1978 against two members of the Passamaquoddy Tribe, accusing them of having committed arson against a tribal school on the reservation in Indian Township adjacent to Princeton, Maine. The defendants had moved to dismiss the prosecution in the superior court on the grounds that the state had no criminal jurisdiction over the reservation by virtue of the federal Indian Major Crimes Act of 1885.[26] That act provided that the federal government had exclusive jurisdiction over certain crimes,

including arson, committed "within the Indian country." The Superior Court denied the motion and the defendants were convicted. Unfortunately for the state, the defendants appealed, arguing that the Passamaquoddy Indian reservation was "Indian country" (even though the Passamaquoddy reservation in Washington County was a state, not a federal, reservation) and that, therefore, the state of Maine had no legal jurisdiction over that reservation. What started out as a garden variety arson prosecution ended up with a complex appeal involving issues that were potential surrogates for some of the unresolved issues in *Passamaquoddy v. Morton* and the entire land claim suit.[27] The Maine attorney general's office took the case from the district attorney and briefed the case on appeal. The Department of Justice also noticed the importance of the case and intervened on the side of the defendants. In its decision the Law Court reversed the conviction and sent the matter back for a rehearing on the jurisdictional issue. However, the Law Court's opinion made it relatively clear that the court believed that the state did not have jurisdiction over crimes committed on the Passamaquoddy reservation. Because of the potentially serious legal and political impact of the case, a decision was made by the state to take the risk of filing a petition for *writ of certiorari* to the Supreme Court. That petition was denied in early 1980, leaving the state in the awkward situation of dealing with a Law Court decision that potentially undercut the state's defense in the land claim case.

Although the Law Court's decision in *Dana* avoided deciding that issue, the state's historical and legal analysis was to find support in 1979 in the U.S. Supreme Court's decision in *Wilson v. Omaha.*[28] In that case the Court said that the Nonintercourse Act only applied within "Indian Country" which did not include land "within any state."[29] Needless to say, the decision gave us increased confidence that our argument had real substance. And we would later learn that the *Wilson* decision was a source of great concern to the tribes' lawyers.

But by then political events had accelerated and the legal implication of the decisions in *Dana* and *Wilson* began to be secondary to a political solution. By the fall of 1979, the broad financial terms of a workable settlement proposal, a proposal that required no money or land from the state, were on the table and had been generally accepted by the tribes. It was at that point that the state signaled its willingness to consider settlement. However, the state had made it clear that it was not prepared to sign any deal, even one entirely funded by the federal government, unless the settlement included restoration of full state legal

authority and jurisdiction over tribal lands and tribal members. Governor Joseph Brennan and Attorney General Richard Cohen publicly stated that any federal/state/tribal agreement had to entail the restoration of full state civil and criminal jurisdiction over all tribal lands and members of both tribes. The White House responded by stating that it would not move forward with any settlement legislation unless and until the state and the tribes had reached complete agreement on all aspects of the settlement and that the federal government would not impose a jurisdictional solution.

With an economic settlement in sight, the time seemed right for the state and tribes to discuss these other essential issues. To that end, in the fall of 1979, Attorney General Cohen made contact with the tribes' attorney Tom Tureen for the purpose of exploring the possibility of a negotiated jurisdictional arrangement. Formal meetings started soon thereafter. Cohen and I represented the state at each session. The tribes were represented by attorneys Tom Tureen and Barry Margolin, along with five members of each tribe.[30] Also participating as an occasional observer was attorney Don Perkins, representing many of the large land owning interests at the time. Since the settlement had to include a mechanism for the tribes to acquire a land base which they would purchase with settlement funds, it was necessary to include some representative of the large landowners. Perkins was largely an observer and occasional commentator on jurisdictional issues, and participated only to ensure that arrangements for the purchase of land were made in conjunction with the overall settlement.

In addition to the state/tribal negotiations, Perkins and the tribes engaged in separate negotiations for the purpose of identifying and agreeing on parcels of land to be sold to the tribes using settlement monies. The tribes had made it clear that they would not finally agree to any settlement unless they had in hand written options to purchase land at agreed upon prices, lest they be left with money to buy land but no willing sellers. Fortunately, a number of land owners appeared to be ready to sell land to the tribes if the parcels to be purchased fit with the landowners' business plans. The state was not a participant in the negotiations over the location, price, or other terms of those land acquisition agreements.[31]

During the course of negotiations, it was my responsibility to prepare regular memoranda to the attorney general and governor summarizing each negotiating session, reviewing the parties' respective demands and proposed language, and analyzing the state's negotiating

strategy and possible language to resolve disputes and deadlocks. The attorney general and I regularly consulted with Governor Brennan to ensure that he was informed about and concurred with our negotiating positions. Between negotiating sessions, draft language was exchanged between the parties. In the end, I was the principal drafter of the final language of what was later to be known as the State Implementing Act.

Without reciting the details of the negotiations, a couple of essential observations must be made. First, at the beginning of the settlement discussions, the state expressly made it clear to the tribes that the jurisdictional agreement had to be governed by one overriding principle: the settlement would have to provide that the tribes, their members, and their lands would be subject to all state statutory and common law and the full civil and criminal jurisdiction of the state. The state was by that time acutely aware of problems in some western states. There were numerous conflicts between those states and their tribal residents, and we made it clear that we would not agree to any settlement that replicated those problems in Maine. By way of specific example, we made it clear that we would not agree to an arrangement in which state environmental, hunting and fishing, gambling, tax, civil law (both statutory and common law) and criminal laws, and the authority of Maine courts did not apply to the tribes, their lands, or their members. While we indicated our willingness to discuss specific exceptions, it was the state's consistent position that full application of state law to the tribes must be the overarching principle of the agreement. The tribal negotiators initially protested, but within a matter of weeks agreed. From that point forward there was never any misunderstanding between the state and tribal negotiators about this essential principle. For their part, the tribes made it clear that it was of paramount importance to them to have control over internal matters such as tribal governance, as well as over regulation of hunting and fishing and land use. The state indicated its willingness to discuss such matters. What was most remarkable was that after years of acrimonious wrangling the tribal and state negotiators began to recognize that it was possible to develop a legal template that honored the legitimate concerns of both sides. Thereafter, the parties spent most of the rest of the time negotiating the details.

Second, with the parties in general agreement that the tribes would be subject to state law, the question remained as to exactly what kind of entities they would be and what kind of powers and rights they would have. Would they be traditional tribes, business corporations, some kind of special statutory entities, or something else? More importantly, how

would their powers be defined? As we discussed that issue, the state proposed that the agreement specify that the tribes would be entitled to exercise the same kind of authority over their lands as municipalities do within their municipal boundaries. As that idea evolved, it was agreed that with certain exceptions set out in the final settlement, the general powers of the tribe would be defined by reference to the powers possessed by municipalities. It was understood by the parties that the tribes would not "be" municipalities. They would be tribes. But their powers, and corresponding duties would be the same as those of municipalities, including all the powers of home rule reserved to municipalities by state law including the right to zone, to establish ordinances to the extent a municipality could, to manage their own schools, to create industrial and commercial parks, to build and maintain roads, and to operate their own police and fire departments. In addition, it was agreed that the tribes would be legally entitled to the same types of financial aid programs that went to any other town or city in the state.

In addition, the parties agreed that the tribes would be entitled to govern their own internal affairs including determining who qualified as members and what their form of government would be. The parties also negotiated a complex mechanism for affording the tribes the right to regulate hunting, fishing, and trapping on their own lands and bodies of water, provided that the tribal regulation did not adversely affect neighboring non-tribal lands. The agreement established a mechanism for the resolution of disputes over those matters. The settlement also permitted the tribes to create tribal courts with limited jurisdiction over certain tribal crimes and civil disputes, including disputes arising under the federal Indian Child Custody Act.

In addition, the parties also agreed to the creation of a unique mechanism which, it was hoped at the time, would provide an institutionalized forum for ongoing discussion of the tribal-state relationship: the Maine Indian Tribal-State Commission. Under the act, the commission had legal authority to enact hunting and fishing regulations on certain tribal lands and ponds that touched on non-tribal areas. It was also anticipated that the commission might serve as an official body to explore possible future changes to the agreement. The commission had no power to force future amendments, but could provide a setting for ongoing dialogue.

By early 1980, the state and tribal negotiators had reached agreement on the exact language of what was to be enacted as the original version of the Maine Implementing Act. The tribes and state had also

reached agreement on the general framework for accompanying federal legislation that was necessary to complete the settlement and ratify the Implementing Act. In addition, and as reflected in the Implementing Act, the tribes had reached written agreements with landowners, principally Dead River Company, under which the tribes would be entitled to buy specific parcels of land using the eventual settlement proceeds.

Concurrent with these negotiations, the tribes had continued their discussion with the Department of the Interior and the White House over the economic elements of the settlement. By early spring 1980 an agreement was reached on federal legislation that included the following basic provisions: (1) the federal government would appropriate $81.5 million for the settlement, (2) of that amount, $54.5 million could be used to buy up to 300,000 acres of land for the benefit of the tribes, (3) the balance of $27 million would be held in trust by the Department of the Interior for the use and benefit of the tribes, (4) the lands acquired by the tribes would be protected against voluntary or involuntary alienation, (5) the selling landowners would have their sales treated as if they were forced sales (i.e., accomplished through eminent domain), thereby avoiding capital gains taxes, (6) the federal enacting legislation would finally extinguish all Indian land claims in Maine, (7) the federal enacting legislation would ratify any jurisdictional arrangement reached between the state of Maine and the Penobscot and Passamaquoddy tribes and permit the tribes and state to amend that jurisdictional arrangement by mutual agreement in the future and without the need to return to Congress for approval, and (8) the Maine tribes would be officially recognized by the federal government and afforded all the same federal economic benefits as other federally-recognized tribes.

With a federal and state legislation agreed to, and with tribal and landowner agreements in hand, the entire settlement was publicly announced in March 1980. However, because of the way the settlement was structured, Maine insisted that it would not support any federal legislation until the jurisdictional agreement was formally adopted by the state and the tribes. The state's concern was that if Congress appropriated money for the settlement and extinguished the claim before the jurisdictional agreement was reached, the state would lose its leverage and the tribes would have no reason to follow through on the agreed upon jurisdictional elements of the deal. In addition, the state was concerned that any jurisdictional agreement reached between the state and tribes would be unenforceable unless authorized by Congress, since in matters of Indian affairs the federal government is paramount.[32] Thus, the agreement

was that the Maine legislature would act first, after which the federal legislation would ratify and approve the Maine jurisdictional act.

As part of its consideration of the settlement, the Maine legislature created a special Joint Select Committee on Indian Land Claims, charged with the responsibility of conducting a public hearing and reporting to the legislature. On March 28, 1980, the committee held a hearing at the Augusta Civic Center. Hundreds of people attended, including the tribal and state negotiating teams. Copies of the entire text of the settlement agreement were available for all to read. A transcript was made of the committee hearing and published in the 1980 *Maine Legislative Record*. During the hearing, Attorney General Cohen was asked to explain the settlement and to state why he believed it should be approved by the legislature. He stated, in part:

> The proposal before you . . . recovers for the State much of the jurisdiction over the existing reservations that it lost in current litigation - - in recent litigation. It would be an overstatement to say that there would be no difference between the Indians' lands and non-Indians' lands under this proposal but I do firmly believe it is fair to say that by and large this proposal is generally consistent with my belief that all people in the State should be subject to the same laws. While there are some exceptions which recognize historical Indian concerns, in all instances the State's essential interest is protected.[33]

Following Cohen's remarks, attorney David Flanagan, counsel to Governor Joseph Brennan, testified. Flanagan stated:

> This proposal offers the potential for building a whole new relationship with our Indian citizens. A relationship unlike that which exists in any other state. By treating the Indian Territories as municipalities, this Settlement provides that our Indian citizens will be on substantially equal footing with their fellow citizens in other towns for the first time in history.[34]

Flanagan then outlined the provisions in the settlement, noting that as a general principle the tribes and their members would be subject to state law and the jurisdiction of state courts, the sole exceptions being: (1) a limitation on the exercise of state eminent domain on tribal lands, (2) the creation of new tribal courts with limited jurisdiction over limited offenses involving Indians and occurring on tribal lands and over Indian family matters, and (3) limited tribal regulatory authority over hunting and trapping on tribal lands and fishing on certain specified waters. Flanagan then stated:

> With these exceptions all State laws will apply in full force and effect. So it is accurate to state that there has been no compromise of the State's sovereignty at all. What we have created is certainly not a nation within a nation but rather two new municipalities within the state.[35]

No members of the tribal negotiating team spoke in opposition to or disagreement with either Cohen's or Flanagan's presentation.

Similarly the tribes were asked to explain why they supported the settlement and, in particular, why they agreed to the jurisdictional arrangement in the Implementing Act. Tom Tureen spoke for the tribes and said:

> One might ask why the Indians were willing to even discuss the question of jurisdiction with the State but simply the answer is that [they] were obliged to if they wanted to effectuate the settlement of the monetary and land aspects of the claim which they had already worked out with the Carter Administration....
>
> The Tribes opened negotiations with the State concerning the question of jurisdiction not because they wanted to do so but because they were obliged to do so to obtain a Settlement that they had already negotiated with the Federal Government....
>
> As negotiations progressed, feelings of mistrust began to breakdown and a spirit of reconciliation made itself felt . . . both sides began to attempt to understand and to the greatest extent possible, accommodate the needs of the other. For the State this meant among other things, understanding the Tribes' legitimate interest in managing their internal affairs, in exercising tribal powers in certain areas of particular cultural importance such as hunting and fishing, and securing basic federal protection against future [loss] of land to be returned in the settlement. For the Indians it meant, among other things, understanding the legitimate interest of the State in having basic laws such as those dealing with the environment apply uniformly throughout Maine. Increasingly both sides found areas of mutual interest as, for example, in the general body of Federal Indian regulatory law….[we agreed upon] a blueprint for a governmental relationship unlike that which exists anywhere else in the United States. The plan is very much a compromise but both sides see it as a framework within which the spirit of cooperation and mutual understanding which developed during the negotiations can continue in the future. With this Plan it is my clients' belief that we in Maine will be able to avoid the bitterness and rancor which all too often characterized Indian-non-Indian relations in other parts of the Country.[36]

No member of the tribal negotiating team rose to disagree with Tureen.

In April 1980, the committee issued a written report setting forth

the committee's understandings of various provisions in the Implementing Act, and the Maine legislature enacted the bill on April 2, 1980.[37]

Since the Maine Implementing Act expressly provided that it became effective only on enactment by Congress of a law extinguishing the claims, compensating the tribes, and ratifying the Implementing Act, attention then turned to the appropriate congressional committees.[38] Although the tribes and state officials did not draft the federal legislation or committee reports, every word of the federal act and the legislative history was reviewed and, where necessary, renegotiated by the tribes and state in order to arrive at language that was acceptable to all parties. I personally spent days with Senate committee staff and Tureen negotiating the language of the federal bill and the accompanying committee reports.

Importantly, and consistent with the fundamental principle of the negotiated settlement, the state insisted on the addition of a provision to the federal law specifically reaffirming that, except for those specific subject areas set out in the negotiated state law as described above, the tribes and all their lands were to be "subject to the civil and criminal jurisdiction of the state, the laws of the state, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person."[39] The intent of the provision was to avoid the possible pre-emptive effect of any federal legislation that delegated certain kinds of federal regulatory power to Indian tribes.[40] Thus, the federal act provides that, except as otherwise specifically provided in the Maine Implementing Act or the federal settlement act:

> 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 reservation, 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.[41]

The state also insisted on additional language to prevent future federal laws from undoing the agreement reached by Maine and the tribes.[42] The plain intent was to avoid future disputes in which the tribes could claim inherent tribal sovereignty and exemption from state laws by virtue of later enacted federal law.

In July 1980, the Senate Select Committee on Indian Affairs held

two days of hearings on the federal Maine Indian Claims Settlement Act. Representatives of the tribes and the state testified and indicated their agreement with the settlement, including, in particular, the unique jurisdictional arrangement. At this late point in the process, the Houlton Band of Maliseet Indians approached the congressional committees and insisted that they were entitled to participate in the settlement and in particular were entitled to an award of some portion of the funds to be appropriated. The Maliseets argued that, since the federal settlement act proposed to extinguish claims of all Indian tribes in Maine, not just those of the Passamaquoddy and Penobscot, they too were entitled to compensation. The state opposed including the Maliseets in any separate jurisdictional arrangement because it was too late in the process, but more importantly because the Maliseets were believed to have no colorable claim under the Nonintercourse Act. The federal administration also opposed increasing the appropriation to make any payment to the Maliseets. In order to facilitate a resolution of this last-minute dispute, the Penobscot and Passamaquoddy tribes agreed that $900,000 of the land acquisition fund could be used to acquire land for the Maliseet Band. However, no provision was added to provide any degree of separate legal authority to Maliseets, and they remained subject to all laws of the state, without the same exceptions as agreed to with respect to the Penobscots and Passamaquoddies.

In September 1980, the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs issued their respective reports.[43] Thereafter the Maine Indian Land Claims Settlement Act was enacted by Congress in September and signed by President Carter at the White House on October 10, 1980, in a ceremony attended by tribal and state leaders, including me.[44]

The end result of the years of sometimes bitter political and public relations wrangling, legal strategizing, and complex negotiations was the creation of a jurisdictional and legal relationship between the state of Maine and the Penobscot and Passamaquoddy tribes unlike that in any other state. At the time of its completion, most of the participants and observers were optimistic that the settlement augured a new future of cooperation between the state and tribes as predicted by Attorney General Cohen. The prior eight years had been marked by public acrimony and ill-will, and it was hoped that the settlement would mark a new start. Many were also hopeful that the tribal trust funds would enable the tribes to develop a more prosperous tribal economy, which would help them address some of the difficulties experienced by their mem-

bers. Regrettably the settlement has not resulted in the kind of harmonious relationship between the state and the tribes that the drafters contemplated. Nor has it resulted in the kind of economic improvement for the tribes that was hoped for. One can hope that both of those problems will improve in the years to come.

NOTES

1. "An Act to Implement the Maine Indian Claims Settlement," 30 Me.Rev.Stat.Ann. §6201 et seq. (1980).

2. 25 U.S.C. §1721 et seq. (1980).

3. *State v. Dana*, 404 A.2d 551 (1979).

4. *Penobscot Nation v. Fellencer*, 999 F.Supp.120, reversed 164 F.3d 706, *cert. denied* 527 U.S. 1022 (2001); *Francis v. Dana-Cummings*, 868 A.2d 196 (2005); *Penobscot Nation v. Georgia-Pacific Corp*., 254 F.3d 317 (1st Cir. 2001) *cert. denied* 534 U.S. 1127; *Akins v. Penobscot Nation*, 130 F.3d 482 (1st Cir. 1997); *Passamaquoddy Tribe v. State of Maine*, 897 F.Supp. 632 (D.Me. 1995) *affirmed* 75 F.3d 784; *Winifred B. French Corp. v. Pleasant Point Passamaquoddy Reservation*, 896 A.2d 950 (2006); *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574 (Me. 2001) *cert. denied* 534 U.S. 1019; *Kimball v. Land Use Regulation Commission*, 745 A.2d 387 (Me.2001); *Penobscot Nation v. Stilphen*, 461 A.d 478 (Me. 1983) *appeal dismissed* 464 U.S. 923.

5. *Great Northern Paper, Inc. v. Penobscot Nation*, 770 A.2d 574 (2001) cert. denied 534 U.S. 1019. The relationship between the state of Maine and the Indian tribes is not governed by the general federal laws and principles that define such relationships, but is governed by the Maine Implementing Act and the Maine Indian Claims Settlement Act.

6. That operative provision is now codified in Title 22 U.S.C. § 177, which provides in part: "No purchase, grant, lease, or other conveyance of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty of convention entered into pursuant to the Constitution."

7. Laches, estoppels, and adverse possession are common law defenses to legal claims. Stated simply, "laches" is a principle that bars a claim because of unreasonable delay. "Estoppel" bars a claim when the defendant had relied on the plaintiff's action or inaction. "Adverse possession" bars a claim for trespass when the defendant has openly occupied and used the disputed land (in Maine, for twenty years) and has claimed ownership of it.

8. *Johnson v. M'Intosh*, 21 U.S. (8 (Wheat.) 543 (1823).

9. For a more complete and detailed discussion of this issue see John Paterson and David Roseman "A Reexamination of Passamaquoddy v. Morton," 31 *Me. L. Rev*. 115 (1979).

10. In addition to making land grants to the two tribes, the 1794 and 1796 agreements also contained a promise by the state of Massachusetts to annually supply the tribes with stated quantities of goods and foodstuffs including black powder, blankets, and molasses. The agreements of 1818 and 1833 were in form much more like outright land purchases, since in both cases the state simply purchased from the respective tribe a portion of the land that had been reserved to it by the earlier agreement with that tribe. As

to these later agreements, there could obviously have been no argument that the tribes had "lost" their lands prior to 1790.

11. See, for example, Frank G. Speck, *Penobscot Man: The Life History of a Forest Tribe in Maine* (Philadelphia: University of Pennsylvania Press, 1940), pp. 7-12. Despite the tribes' claims that they had historically used and occupied the entire watersheds of the Penobscot and St. Croix rivers, roughly some twelve million acres, the historical evidence for that was unclear.

12. See an unpublished report by Diana Scully, "Maine Indian Settlement Claim: Concepts, Context and Perspective," *Maine Indian Tribal-State Commission* (1995); Neil Rolde, *Unsettled Past, Unsettled Future: The Story of Maine Indians* (Gardiner, ME: Tilbury House, 2004), p. 13.

13. The 1794 and 1796 agreements contained a promise by the state of Massachusetts to annually supply the tribes with stated quantities of goods and foodstuffs. Presumably, that contractual obligation of Massachusetts was assumed by Maine under the Articles of Separation when Maine became a state in 1820. It was unclear how long Maine continued to honor that obligation and why it ceased.

14. At the time that this inquiry was posed to the attorney general's office, I was a young assistant attorney general, and as a junior member of the office was asked to attempt to answer the question. We attempted to make a rough and ready estimate of the accumulated value of those commodities from 1794 forward to 1970, and then converting those unpaid benefits to a rough "present value." Little did I know at the time that this early assignment would later lead to a far more complex and demanding role in what was to become an enormous land claim case.

15. Interior initially appealed the order of the district court to the court of appeals, arguing that the federal courts did not have the authority under the separation of powers clause to supersede the prosecutorial discretion, which is vested exclusively in the executive branch. The appeal was ultimately dismissed by the United States when the solicitor general of the United States, for reasons that were not disclosed, refused to authorize a continuation of the appeal.

16. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975). Since the suit by the Department of Justice named only the state of Maine as a defendant, that suit could not have achieved the full result potentially sought by the tribes, the return of their original aboriginal lands, since the state owned only a fraction of the lands in the claim area.

17. *Passamaaquoddy v. Morton*, 388 F.Supp. 649 (D.Me. 1975). For whatever reason, the U.S. government and the state of Maine both chose to stipulate that the Passamaquoddy Tribe was a tribe "in the racial and cultural sense." Since the Nonintercourse Act by its terms protects "tribes" it was only a small logical leap for the court to hold that the act applied to them. With the advantage of hindsight, it is apparent that the decision to make that stipulation was probably a mistake. Fortunately for me, that decision was made at a stage in the case before I had been assigned to manage the lawsuit for the state.

18. *Passamaquoddy v. Morton*, 528 F.2d 370 (1st Cir. 1975).

19. *Passamaquoddy v. Morton*, 528 F.2d 376 (1st Cir. 1975).

20. *Passamaquoddy v. Morton*, 528 F.2d 380-381 (1st Cir. 1975).

21. The tribes' disclaimer was never entirely clear, since so much of the land in the claim

area was owned by large timber and paper companies or other corporations and businesses.

22. This fact was ultimately acknowledged by the Congress in the "Congressional findings and declaration of policy" that prefaces the Maine Indian Claims Settlement Act. 25 U.S.C. § 1721(9).

23. For a more comprehensive recitation of the events in the political and public relations battle, see Rolde, *Unsettled Past, Unsettled Future*, pp. 28-44 and Paul Brodeur, "Annals of Law: Restitution," *The New Yorker*, October 11, 1982. Neither author ever interviewed me.

24. Although there was no discovery by either side, in 1977 the Department of Justice agreed to permit the state to conduct an unrecorded interview of its principal anthropology expert, a professor at the University of California at Los Angeles.

25. *State v. Dana and Sockabasin*, 404 A.2d 551 (1979).

26. 18 U.S.C. §1153.

27. The meaning of the term "Indian Country" in *Dana* had a potentially enormous impact on the land claim case, since it affected whether the Nonintercourse Act at issue in the land claim case applied to Maine. It was the state's contention that the 1790 Nonintercourse Act was originally intended to apply only to "Indian Country," a term we argued was historically used to designate unsettled areas west of the Appalachian ridge line. Based on extensive historical research, we argued that neither the English Crown nor the U.S. Congress had intended to exercise control over Indians within the original thirteen colonies/states and the lands east of the Appalachian Mountains because those areas were not "Indian Country." Thus, by pure accident, the state found itself drawn into litigating that issue, and testing its theory of "Indian Country" in the context of what appeared to be a routine arson prosecution.

28. *Wilson v. Omaha*, 442 U.S. 653 (1979).

29. *Wilson v. Omaha*, 442 U.S. 668 (1979).

30. In what was one of the great ironies of the land claim case, Allen Sockabasin, one of the two defendants in *State v. Dana*, was later appointed by the Passamaquoddy Tribe as a member of its negotiating team.

31. The final settlement agreed to by the tribes and state specifically identified the parcels of land that would be sold to the tribes and specified that they were to be included in what was to be defined in the settlement legislation as "Indian Territory" and over which the tribes were granted limited legal authority. 30 M.R.S.A. § 6205.

32. *Great Northern Paper v. Penobscot Nation*, 2001 ME 68 ¶ 19, 770 A2d 574, 581 (Me. 2001).

33. "Report, Hearing Transcript and Related Memoranda of the Joint Select Committee on Indian Land Claims," *Maine Legislative Record*, 109th Legislature, 2d. Sess. (1980), pp. 6-7. The committee report, hearing transcript, and memoranda are attached as an unnumbered appendix to the *Legislative Record*. The transcript and report are separately paginated.

34. *Maine Legislative Record* (1980), p. 14.

35. *Maine Legislative Record* (1980), p. 15.

36. *Maine Legislative Record* (1980), pp. 23-25.

37. *Maine Legislative Record* (1980), report, p. 1.

38. In addition, as a matter of constitutional law, the federal government has plenary power over Indian tribes. Thus, in order to be legally effective the Maine Implementing Act had to be ratified by Congress. *Worcester v.Georgia*, 31 U.S. (6 Pet.) 515 (1832).

39. 25 U.S.C. § 1725(a).

40. For example, the Clean Air Act regulations contain an entire part entitled, "Tribal Clean Air Act Authority." 40 C.F.R. Part 49. Among other things the regulations provide that qualifying tribes may, within tribal lands, be treated as and accorded the same regulatory authority as a state with respect to control of air emissions. 40 C.F.R. §49.3. The state of Maine was unwilling to accept a circumstance in which air emissions inside tribal lands would not be subject to state regulation and control.

41. 25 U.S.C. § 1725(h).

42. 25 U.S.C. § 1735(b).

43. H.R. Rep. 96-1353, 96th Cong., 2nd Sess. (1980) and S.Rep. 96-957, 96th Cong., 2nd Sess. (1980).

44. For a summary recapitulation of the history of the entire claim and settlement process which summary tracks this article, albeit in an abbreviated form, see *Great Northern Paper, supra* at ¶18-42.