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THE WHITE HOUSE

WASHINGTON

Passamaquoddy Issue

1. Interior finish up work on its Litigation Report to Justice.
2. In this process, invite State and Indians' input. (State has asked for this; so have Indians).
3. Interior send final Litigation Report to Justice.
4. Justice release this to the interested parties.
5. White House send letters to the parties inviting written input to a "settlement concept" option paper.
6. White House host one or more informal conferences of the parties to compare the inputs and clarify the issues and gather the pieces of such an option paper.
7. White House, together with Justice, Interior and Indians and in consultation with State, Congressional Delegation etc draw up option paper for President Carter.
8. Justice report the completion of this staff work to Judge Gignoux on his deadline of January 15, 1977, and then, and in the light of this, request a 30-day extension of the Judge's deadline so that President Carter can make up his mind.
9. Outcome of the option paper might be the draft of legislation which Carter could promptly send to Congress -- so that early Congressional action can minimize economic disruption in Maine.



I INTRODUCTION

The following is a summary of research relative to the Penobscot Tribe.

II TRIBAL EXISTENCE

The Penobscot Nation is part of the Abenaki linguistic group, a collection of tribes which once occupied land as far west as Vermont.^{1/} Because of their geographic location, the Penobscots were drawn into contact with non-Indians at an early date, and the record evidence of the tribal existence of the Penobscots is extensive. The tribe entered into treaties with the Colony of Massachusetts in 1693,^{2/} 1699,^{3/} 1713,^{4/} 1717,^{5/}

^{1/} Ernest S. Dodge, "Ethnology of Northern New England and the Maritime Provinces," Massachusetts Archaeological Society, *Bulletin*, CVIII (1957), 68.

^{2/} Truce between Indian and English, July 21, 1693, *The Barter Manuscripts: The Documentary History of the State of Maine* [hereafter *Bar. Mss.*] (24 vols.; Portland: Maine Historical Society, 1869-1916), XXIII, 4-5. The Submission and Agreements of the Eastern Indians, Aug. 11, 1693, *ibid.*, X, 9-11.

^{3/} Indian Treaty, Jan. 7, 1698/99, *ibid.*, XXIII, 19-21.

^{4/} Treaty of Eastern Indians, July 11-- , 1713, *ibid.*, 37-50. *Calendar of State Papers, Colonial Series, 1574-1733* [CSP] (40 vols.; NCR Microcard Editions, 1965), XXVII, 225.

^{5/} Indian Treaties in Maine Historical Society, *Collections*, 1st Ser. (Portland: The Society, 1853), III, 373-74.

1725, ^{6/} 1726, ^{7/} 1727, ^{8/} 1749, ^{9/} and 1752. ^{10/} John Allan, the Superintendent of the federal Eastern Indian Agency during the Revolution dealt with the Penobscots as a tribe, ^{11/} as did the

6/
The Submission and Agreement of the Delegates of the Eastern Indians, Dec. 15, 1725, in Peter Cummings and Neil Mickenberg, eds., *Native Rights in Canada*, 2nd ed. (Toronto: General Publishing Company, 1972), 300.

7/
Conference with the Eastern Indians, Maine Historical Society, *Collections*, 1st ser., III, 392-93.

8/
Conference with the Eastern Indians at the Further Ratification of the Peace, Held at Falmouth in Casco-Bay, in July, 1727, *ibid.*, 407-47; and *Traite de Paix Entre les Anglois et les Abenakis*, Aoust, 1727, *Collection de Manuscrits contenant lettres, Memoires, et autre documents historiques relatif a la Nouvelle France* (4 vols.; Quebec: Legislature de Quebec, 1883-85), III, 407-47.

9/
Treaty with the Eastern Indians at Falmouth, 1749, Maine Historical Society, *Collections*, 1st ser., IV, 145-67; and Nathaniel Boulton, ed., *New Hampshire Provincial Papers....* (7 vols.; Concord: George E. Jenks, 1867-73), V, 131-33.

10/
Treaty with the Eastern Indians at St. Georges Fort, 1752, Maine Historical Society, *Collections*, 1st ser., IV, 168-84. For colonial treaties see Henry F. Depuy, comp., *A Bibliography of the English Colonial Treaties with the American Indians* (New York, 1917).

11/
See Allan's Commissions and Instructions from the Continental Congress and the Government of Massachusetts, *Papers of the Continental Congress* [PCC] (Jan. 15, 1777), Roll 8, Vol. 7, 65-68; May 24, 1783, PCC, Roll 163, Vol. 149, II, 561-62; June 3, 1783, PCC, Roll 26, Vol. 19, 53; *Baxter Bax. Mss.*, XV, 212, 215-16. For additional evidence of Allan's federal relationship with the tribe see: Return of Indians and their Families that are and have Been in the Service of the United States by order of Col^o Allen, Superintendent and Commandr in Chief of Indians, Eastern Department, at Machias, July 28, 1780, Frederic Kidder, *Military Operations in Eastern Maine and Nova Scotia during the Revolution Chiefly Compiled from the Journals and Letters of Colonel John Allan, with Notes and a Memoir of Col. John Allan* (Albany: Joel Munsell, 1867), 52-54.

Commonwealth of Massachusetts which concluded treaties with the tribe in 1796 and 1818.^{12/} Since its separation from Massachusetts in 1820, the State of Maine has continuously treated the Penobscots as a tribe of Indians,^{13/} and the Penobscots have continuously occupied the lands which they reserved in their treaties.

The history of the governmental structure of the Penobscot Nation is roughly similar to that of the Passamaquoddy Tribe. Until the nineteenth century the tribe was governed by Sagamores who were selected for life.^{14/} These Sagamores were responsible for allocation of the family hunting territories, and hence became increasingly more important as the fur trade rose in importance.^{15/} The Sagamores also played a critical role

12/

The 1796 treaty is recorded in the Hancock County Registry of Deeds, Ellsworth, Maine, at Book 27, Page 6; for 1818 Treaty, see Mary F. Farnham, ed., *Documentary History of the State of Maine*, Vol. III (Lefavor-Tower Company, Portland: 1902), 127.

13/

The State of Maine has enacted a comprehensive set of statutes which purport to regulate many facets of Penobscot tribal life. See generally 22 M.R.S.A. § 4761 *et seq.*

14/

Alfred Goldsworthy Baily, *The Conflict of European and Eastern Algonkian Cultures, 1504-1700* (Toronto: University of Toronto Press, 1969), 91-92, and Morrison, *The People of the Dawn*, (Unpub. Ph'd. Diss. Orono: University of Maine, 1975), p. 25, 38-40.

15/

Dean R. Snow, *Wabenaki "Family Hunting Territories,"* *American Anthropologist*, 70 (1968), 1143-51.

in the Penobscots' rather extensive diplomatic encounters with other governmental entities, both Indian and non-Indian.^{16/}

In the early part of the nineteenth century a political split developed within the Penobscot Nation, and the Sachems, who had traditionally been chosen for life, became elective.^{17/} Two political parties were formed, and leaders were chosen alternately every two years from each party.^{18/} This situation persisted until the present century, when the party system became less evident. Today the governing body of the Tribe consists of a Governor and Lieutenant Governor who are elected every two years, and a 12 member tribal council consisting of members elected for two year staggered terms.^{19/}

16/

Frank G. Speck, *The Eastern Algonkian Wabanaki Confederacy*, *American Anthropologist*, XVII (1915), 492-508, outlined the eighteenth-century alliance system which united the Abenaki peoples. A few short biographies of Penobscot and Maliseet leaders are also suggestive about these developments. See Frank T. Siebert, "Wenemouett," in George W. Brown, *et al.*, eds. *Dictionary of Canadian Biography* (Toronto: University of Toronto Press, 1966--), II, 664-66; Kenneth M. Morrison, "Loron Sauguararam," *ibid.*, III, 584-85 for Penobscot biographies and Richard I. Hunt, "Ambrose St. Auban," and "Pierre Tomah," *ibid.*, IV, for Maliseet leaders.

17/

Eugene Vetromile, *The Abenakis and their History: or Historical Notices of the Aborigenes of Acadia* (New York: James B. Kirker, 1866),

18/

Ibid.

19/

22 M.R.S.A. § 4793.

III ABORIGINAL TERRITORY

A. *Nature of Use.*

Penobscot aboriginal territory probably reached its maximum extent by the middle of the eighteenth century.^{20/} Penobscot land usage patterns were similar to those of the Passamaquoddy.^{21/} Both tribes were riverine in orientation, and both hunted inland areas during the fall and winter, and spent the summer by the sea shore. Frank G. Speck, who has conducted extensive anthropological research among the Penobscots, describes the pattern as follows:

Within this stretch of country the Penobscot used to divide their time somewhat regularly, spending the summer months (June, July, August) in the lower coast or salt-water region, then ascending the river to the family hunting territories for the fall hunting (October, November, December), and finally returning to the tribal rendezvous at the main headquarters at Oldtown for the dead of winter (January, February, March).

20/

See discussion of the corresponding summary of the Passamaquoddy claim.

21/

The Jesuit Relations, June 20, 1677, Vol. 60, 263-64, refers to the riverine orientation of the Penobscots. On the nature of Penobscot aboriginal title within their own sense of law see: Lt Governor Dunbar to Mr. Popple, Nov. 17, 1730, CSP, XXXVII, 345-46. The secondary literature is extensive. See: James Phinney Baxter, *The Abnakis and their Ethnic Relations*, Maine Historical Society, *Collections*, 2nd ser., III, 13-40; Fannie H. Eckstorm, "The Indians of Maine," in L.C. Hatch, ed., *Maine: A History* (New York: The American Historical Society, 1919), I, 43-64; Dodge, "Ethnology of Northern New England and the Maritime Provinces," 68-71; Frank G. Speck, *Penobscot Man: The Life History of a Forest Tribe in Maine* (Philadelphia: University of Pennsylvania, 1940), 7ff.; and Dean R. Snow, "Wabanaki 'Family Hunting Territories,'" *American Anthropologist*, 70 (1968), 1143-51.

The early spring months (April, May) were spent drifting down toward the ocean and hunting through the neighboring streams and in the main river for eels. This, it should be understood, is only a general outline of the movements of the people; many of them would spend longer periods in the interior, while some "lazy" families would remain most of the time at salt water, gaining an easy though monotonous living from the sea.^{22/}

Dr. Speck also notes that the Penobscots hunted seals during the summer from the islands adjacent to their territory,^{23/} and that the members of the tribe were strict conservationists.^{24/}

The Tribe's conservation practices were described in 1764 as follows:

They said it was their custom to divide the hunting grounds and streams among the different Indian families; that they hunted every third year and killed two-thirds of the beaver, leaving the other third to breed; beavers were to them what cattle were to the Englishmen, but the English were killing off the beavers without any regard for the owners of the lands.^{25/}

B. *Evidence of territorial location and extent.*

Much of the extent of the aboriginal territory of the Penobscot Nation is indicated in the many negotiations which

^{22/} Frank G. Speck, *Penobscot Man*, 26.

^{23/} *Ibid.*, 35.

^{24/} *Ibid.*, 207.

^{25/} Joseph Chadwick, "An Account of a Journey from Fort Pownal -- Now Fort Point -- Up the Penobscot River to Quebec, in 1764," *Bangor Historical Magazine*, IV (1889), 143.



accompanied the various treaties and agreements by which the bulk of the Tribe's territory was ceded. Since these negotiations will be discussed in some detail in the following section, those events will not be separately discussed here. This section, rather, will highlight the anthropological research which has been completed on Penobscot aboriginal hunting territories.

As was indicated above, the Penobscot Nation, like the other tribes in the area, was riverine in orientation, and divided its overall territory into smaller family hunting territories. The Tribe's aboriginal territory consisted primarily of the drainage basin of the river which bears its name.^{26/} The principal villages of the tribe were all located on the Penobscot River. The following villages were occupied until well into the present century: Indian Island, opposite Old Town, Maine; Olemon, some twelve miles up-river; Long Island, opposite Lincoln, Maine. Other large camps, possibly towns, were situated on the Penobscot River at the Mattawamkeag River and the Passadumkeag River, and at Castine on the eastern shore of Penobscot Bay.^{27/} These villages served as staging grounds from which the family hunting groups would move to their respective territories in the fall.^{28/}

^{26/} Frank G. Speck, *Penobscot Man*, 7.

^{27/} *Ibid.*, 25-26.

^{28/} *Ibid.*, 22.

Practically the entire Penobscot watershed, an area encompassing 5,303,511 acres, was divided into family hunting territories. Several Penobscot family hunting territories covered the area above the Penobscot watershed.^{29/} The northernmost of these, which Speck describes as "perhaps the largest and most active family of hunters in the tribe," occupied land in the St. John watershed reaching to Maine's northern border with Canada.^{30/}

IV LOSS OF ABORIGINAL TERRITORY

The Penobscots' aboriginal lands were protected in the Tribe's colonial treaties. The Treaty of Portsmouth in 1713, for example, guaranteed the Penobscot "their own Grounds" and defined that territory as lands held as of 1693.^{31/} In all her dealings with the Abenaki peoples in general, and with the Penobscots in particular, Massachusetts held to the practice of purchase or cession to establish English title.^{32/} Indeed,

^{29/} For map see *ibid.*, p. 6.

^{30/} *Ibid.*, 229.

^{31/} Frederic Kidder, ed., "The Abenaki Indians; their Treaties of 1713 and 1717," *Maine Historical Society, Collections*, 1st ser., VI, 251 and 260.

^{32/} An Act to Prevent and make void clandestine and illegal purchase of lands from the Indians, June 26, 1702, *Acts and Resolves, Public and Private of the Province of the Massachusetts Bay* (21 vols.; Boston: Wright and Potter, 1869-1922), I, Chap. 11. See also text of the Treaty of 1717, *ibid.*, 260, as examples.

throughout the early colonial period, land conflicts between the Penobscots and Massachusetts revolved only around the issue of the legality of several seventeenth-century land deeds covering but a tiny fraction of the Tribe's aboriginal territory.

Land conflicts between Massachusetts and the Kennebecs, on the other hand, were more severe and resulted in war in 1722. Though the Penobscots abandoned the Kennebecs' cause in 1725, they realized that peace was impossible without some basic agreement about land. In a preliminary meeting in 1725, the Penobscot negotiator, Loron Sauguaaram, urged the English to abandon their forts at St. Georges River (in Penobscot territory) and at Richmond on the Kennebec River. (outside Penobscot territory). Massachusetts replied: "We shall neither build or settle any where but within our own Bounds so settled, without your Consent."^{33/} A year later Sauguaaram insisted that the two forts be removed. As before, the English defended the validity of their original deeds from the Indians.^{34/} On July 18, 1726, the Committee on Lands presented twenty-nine deeds to the Penobscots for their inspection. Only two concerned

^{33/}

At a conference with the Delegates of the Indian Tribes, Nov. 15--Dec. 1, 1725, Baxter, *Bax. Mss.*, XXIII, 189.

^{34/}

Conference with the Eastern Indians, Maine Historical Society, *Collections*, 1st ser., III, 389.

Penobscot land; both were signed by Penobscot sachem Madockawando in 1694 and conveyed land on Penobscot Bay at Muscongus north of Pemaquid point and on both sides of the St. Georges River.^{35/} Realizing that Massachusetts would not compromise, the Penobscots signed a treaty in 1726.^{36/} A year later the Kennebecs and several Canadian Indians joined the Penobscots in ratifying this treaty, which is known as Dummer's Treaty^{37/} and which defined legal relations between the Penobscots and Massachusetts until 1755. Dummer's Treaty confirmed Massachusetts' "Rights of Lands and former Settlements." At the same time, however, the treaty reserved to the Penobscots "...all their lands, Liberties and Properties, not by them conveyed or Sold to or Possessed by any of the English subjects as aforesaid, as also the Privilege of Fishing, Hunting, and Fowling as formerly."^{38/}

During the post-war years the Penobscots held Massachusetts to these terms, and Governor Johnathan Belcher repeatedly assured the Nation of Crown protection. The Penobscots opposed,

^{35/} At Falmouth in Casco Bay, July 18, 1726, Baxter, *Bax. Mss.*, XXIII, 204-08.

^{36/} Conference with the Eastern Indians, Maine Historical Society, (July, August-1726), *Collections*, 1st ser., III, 377-405.

^{37/} These negotiations are discussed in Morrison, *"The People of the Dawn,"* 388.

^{38/} Maine Historical Society, *Collections*, 1st ser., III, 418.

and halted, the eastward expansion of the Crown settlement called Georgia on Pemaquid peninsula,^{39/} and they asserted that Samuel Waldo illegally took their lands on the St. Georges River.^{40/} Governor Belcher assured them that the Crown protected their title. In February, 1735, he declared that he would treat them "with Reason and Justice and in the same Manner with the rest of King George's Subjects."^{41/} When the Penobscots complained, he promised that the land article of Dummer's Treaty would be "punctually observ'd on the part of this Government, who will not push on the settlement of those Lands, 'till they are satisfy'd, that those, who at present pretend to be the Proprietors, have obtain'd the native right from the true Owners."^{42/}

It is not necessary to detail the precise nature of these conflicting claims, for the Penobscots and Massachusetts reached a compromise. The Penobscots accepted the *de facto* legality of the 1694 Madockawando deed and, in 1736, ran a boundary northeast of St. Georges between their own and English lands. Further settlements, the Indians declared, would not be tolerated.^{43/} In Feb-

^{39/} Penobscots to Dunbar, Nov. 14, 1729, Baxter, *Bax. Mss.*, X, 44546 and CSP, XXXVI, 574; Dunbar to Gov. Phillips, Sept. 16, 1730, *ibid.*, XXXVII, 369, Dunbar to Lt. Gov. Tailor, Nov. 12, 1730, *ibid.*, 348.

^{40/} Mass. Council, May 17, 1736; Indian Conference, June 25, 1736, Baxter, *Bax. Mss.*, XXIII, 23641.

^{41/} J. Belcher to J. Gyles, Feb. 28, 1734/35 Belcher Letterbooks, Mass. Historical Society, Film IV, 50506.

^{42/} J. Belcher to J. Gyles, Apr. 14, 1735, *ibid.*, Film 4, 565.

^{43/} Conference with the Penobscot & Norridgewalk Indians in July, 1738, Baxter, *Bax. Mss.*, XXIII, 252.

ruary, 1737, Belcher ordered his agent, John Gyles, to encourage new settlement provided that the settlers conformed to this agreement.^{44/}

The land article of Dummer's Treaty was reinacted in the 1749 treaty which ended King George's War. Land was not an issue in that conflict and was not discussed during the conference.^{45/} Although land was discussed during the 1752 treaty negotiations, the 1749 treaty was ratified unaltered.^{46/} Wishing to prevent a Penobscot - French alliance, Massachusetts carefully recognized Penobscot title. In the early 1750's, for example, the Penobscots complained about, and Massachusetts

^{44/} J. Belcher to J. Gyles, Feb. 25, 1736/37, Belcher Letterbooks, Film V, 157-58.

^{45/} Treaty with the Eastern Indians at Falmouth, 1749, Maine Historical Society, *Collections*, 1st ser., IV, 162.

^{46/} Louis, a Penobscot speaking on behalf of his own tribe and the Norridgewocks and Maliseets said: "...we are for proceeding upon Governour Dummer's Treaty, by which it was concluded, that the English should inhabit the lands as far as the salt water flowed, and no further; and that the Indians should possess the rest." These boundaries are not at all clear. Perhaps Louis referred to the Kennebec River, and it is likely that he was describing the agreed upon boundary at St. Georges. It is certain that he was not referring to the Penobscot, as English settlement was far from that river in 1752. The English assured the Abenaki that their lands would be protected: "Upon the third article in the aforesaid Treaty, the Commissioners said, if there be any encroachments made upon your lands by the English, let us know it; we will inform the Government of it, so that justice may be done you." See Treaty with the Eastern Indians at St. George's Fort, 1752, *ibid.*, quotes at 174 and 177.

ordered removed, an English trespasser on Matinicus, an island south of Penobscot Bay.^{47/}

Before the outbreak of the Seven Years' War between France and Great Britain, the Penobscots worked carefully to preserve peace with Massachusetts. When Massachusetts declared war against the Abenaki tribes on June 10, 1755, the Penobscots were excepted on condition that they join the English against hostile Abenaki as Dummer's Treaty required.^{48/} The Penobscots accepted this condition but refused to move their families near the English settlements for the duration of the war as Governor William Shirley requested.^{49/} Massachusetts persisted in the de-

^{47/}

In Aug. 1751 Governor Phips appointed Commissioners to confer with the Abenaki. He instructed them to "Avoid controversy about Lands." See Instructions in re Treaty with Indians, Aug. 15, 1751, Baxter, *Bax. Mss.*, XXIII, 412. During the meeting Loron Sauguaaram, the Penobscot negotiator, complained about a squatter on Matinicus. The commissioners replied: "Our Governour knows nothing of this matter, but we will inform him of it. Govr Dummer's Treaty shall be complied with." Report of Conference, August, 1751, *ibid.*, 416. After repeated complaints from the Penobscots, Massachusetts ordered the Matinicus squatters removed. In Council, June 12, 1753, Baxter, *Bax. Mss.* XXIII, 448-49; S. Phips to Jabez Bradbury, *ibid.*, 449.

^{48/}

Declaration of war, June 10, 1755, Baxter, *Bax. Mss.*, XII, 408-11; also *ibid.*, XXIV, 30-32.

^{49/}

Reply of Penobscot Indians, June 27, 1755, *ibid.*, XXIV, 34.

mand that the Penobscots settle among the English^{50/} and, after claiming without evidence that the Penobscots participated in an attack on Fort St. Georges, declared war against them on November 3, 1755.^{51/} The war involved no real military engagements with the Penobscots, and the Penobscots occupied the same land after the war as they had before.

After the war, Governor Bernard saw the need for a treaty with the Penobscots, but was thwarted in his efforts to obtain one. In September, 1762, the Massachusetts House and Council opposed Bernard's proposal to travel to Maine to conclude a peace on the grounds that the Indians had not formally asked for a treaty.^{52/} On July 23, 1763, Bernard instructed Captain Sanders to invite the Penobscots to send two or three of their chiefs to Boston to discuss scheduling for a treaty conference.^{53/} Three Penobscots arrived a month later and discussed

^{50/} Action of House, August 8, 1755, *ibid.*, 46-47; In Council, August 8, 1755, *ibid.*, XII, 454; Final Vote, August 14-15, *ibid.*, XXIV, 48-49; Governor to Penobscots, August 18, 1755, *ibid.*, 51-53.

^{51/} In Council, Oct. 3, 1755, *ibid.*, 58; Phips to Bradbury, Oct. 3, 1755, *ibid.*, 59; Bradbury to Phips, Oct. 24, 1755, *ibid.*, 61; Proclamation S. Phips, Nov. 3, 1755, *ibid.*, 62-64.

^{52/} Message, Sept. 14, 1762, *ibid.*, XIII, 294.

^{53/} Instructions to Capt. Sanders, July 23, 1763, Baxter, *Bax. Mss.*, XXIV, 116.

renewing the Tribe's former treaties with Massachusetts; however, no agreement was reached, and no date for a conference was set.^{54/} In a message delivered on June 5, 1764, Bernard stressed the strength of the Penobscots and again urged that a treaty be concluded with the Tribe.^{55/} Still no action was taken.

This, then, was the state of affairs in the closing years of the colonial era. The Indians continued to occupy their principal hunting grounds. Governor Bernard continually agitated for a treaty with the Tribe. At a conference held in 1769, three delegates from the Tribe sought to retain aboriginal title to their hunting grounds and to have fee title to a tract for planting:

We should be glad of a sufficiency at present for our hunting but as hunting is daily decreasing we would be glad of a tract of land assigned us for a Township settled upon us and our posterity for the purposes of husbandry.^{56/}

Although no townships were ever set off to the Tribe in fee, indeed no further colonial treaties were concluded with the Tribe,

^{54/}

Indian Conference, August 22, 1763, *ibid.*, 116-23. In his reply to the Indians the following day, Bernard said that he would not permit the soldiers at Fort Pownall to hunt beaver or other furs, and that he would only permit them to hunt deer or moose in the vicinity of the fort. *Id.*, 121-122.

^{55/}

Message, June 5, 1764, *ibid.*, XIII, 341-45.

^{56/}

Ibid., 157-158.

the townships which were proposed by Bernard at the conference were to be on either side of the Penobscot village of Old Town, just above the head of the tide.^{57/}

At the opening of the American Revolution, the Massachusetts Provincial Congress quickly recognized the military importance of the Penobscots. On June 21, 1775, a delegation of Penobscots (who had been brought to Watertown for the purpose) addressed the Provincial Congress. Land problems were clearly the Indians' primary concern. Their comments, as reported by the Committee which was appointed to confer with the Tribe, were as follows:

They have a large Tract of Land, which they have a right to call their own, and have possess'd accordingly for many Years.

These Lands have been encroached upon by the English, who have for Miles on end cut much of their good Timber.

They ask that the English would interpose, and prevent such Encroachments for the future; and they will assist us with all their Power in the common defense of our Country; and they hope if the Almighty be on our side the Enemy will not be able to deprive us of our Lands.^{58/}

^{57/} *Ibid.*, 158.

^{58/} L. Kinvin Wroth, *Province in Rebellion: A Documentary History of the Founding of the Commonwealth of Massachusetts 1773-1775* (Harvard Univ. Press, 1975), 2294.

Thus, as of the time of the Revolution, the Penobscots still occupied and claimed their lands. More importantly, the Provincial Congress recognized their claims also. On the same day that the above report was read, the Provincial Congress passed a resolution which:

...strictly forbid any person or persons whatsoever from trespassing or making waste upon any of the lands and territories or possessions beginning at the head of the tide on Penobscot River, extending six miles on each side of said river now claimed by our brethren the Indians of the Penobscot tribe, as they would avoid the highest displeasure of this Congress.^{59/}

The records of the Provincial Congress do not explain why the resolution was limited to the head of the tide. Nor is the reason for the six-mile corridor clear. The riverine orientation of the Penobscots clearly did not limit them to an arbitrary European measure such as the mile. Their territory was delineated by the heights of land which defined their hunting streams. The Provincial Congress obviously recognized that the Tribe claimed land on both sides of the Penobscot River. Not knowing the precise outer limits of the claim, the Congress may have adopted the twelve-mile wide corridor simply as a matter of convenience. In all events, it is important to note that in adopting its resolution the Provincial Congress did not say that the Penobscots did not own any land outside of the twelve-mile corridor; it only forbade trespass within the corridor.

^{59/}
Kidder, *Military Operations*, 53.



It was not until after the War ^{60/} that Massachusetts again set its sights on Penobscot land. Following the lead of the Provincial Congress, the Massachusetts "Committee on Lands" operated on the assumption that the Penobscots had title to land above the head of the tide on the Penobscot River. On July 7, 1784, for example, the Committee recommended the establishment of three additional townships "between the lands claimed by the Indians & the uppermost of the twelve townships...." ^{61/} To facilitate settlement beyond the three townships, Massachusetts appointed Commissioners to ascertain the limits of the Penobscot territory and investigate the possibility of a cession by the tribe of some of the land which it was found to own. ^{62/}

The Commissioners presented their case to the Penobscots on September 4, 1784. They learned, they said, that the Penob-

^{60/} The Penobscots aided the Americans in the Revolution, and were under the care of John Allan, the Superintendent of the federal Eastern Indian Department. See Kidder, *Military Operations*, 126.

^{61/} July 7, 1784, Report of Committee on Lands in the County of Lincoln, Baxter, *Bax. Mss.* XX, 354.

^{62/} This committee was aware of the twelve-mile corridor in the Watertown Resolve but apparently took the position that the corridor was not intended to limit the Tribe's territory since it recommended appointment of suitable persons to ascertain the boundaries of the lands claimed by the Tribe. June 30, 1784 Report of Committee Appointed by Resolve of Oct. 20, 1783, filed with 1784 Res. C. 57, Mass. Arch.

scots possessed, "more lands than were necessary for their purpose....," and that they had sold "considerable tracts for trifling considerations." The Commissioners noted that these sales were void without approval from the Commonwealth. The Commissioners then stated, however, that if the tribe "...really possessed more Lands than were necessary or were desirous to change their present bounds for others so that all their land should be on one side of the River or on both Sides higher up, a due consideration should be allowed them therefore."^{63/}

The Penobscots rejected the suggestion that they wanted to sell or trade any part of their territory. They asserted their right of ownership on the basis of immemorial possession and referring to the Watertown Resolve (without mentioning a twelve-mile corridor), maintained that the General Court had fixed their bounds from the head of the "tides up to the head of the River." They also denied that they had sold any land.^{64/} On the other hand, the Tribe welcomed the opportunity to establish a mutually recognized boundary. "All that we desire," they declared, "is that you will fix the bounds, that we may know what we possess."^{65/}

^{63/} Sept. 4, 1784, the Substance of the Commissioners' speech...., in Papers filed with 1796 Jan. Sess. Res. C. 86, Mass. Arch.

^{64/} *Ibid.*

^{65/} Sept. 4, 1784, The Answer of the Indian Chiefs to the Commissioners...., *ibid.*

According to the Commissioners, the most that the Tribe would consider was a new boundary four miles above the head of the tide. When the Commissioners suggested instead "that the Indians should occupy the Lands on both sides of the River, half the distance from the Canada lines to the head of the Tide," the Penobscots became insulted and "the Principal of them very abruptly left the Conference."^{66/}

In August, 1786, the State sent new commissioners (Benjamin Lincoln, Thomas Rice and Rufus Putnam) "to treat with the Penobscot Tribe of Indians respecting their claims to Lands on Penobscot River...."^{67/} The Rev. Daniel Little, an observer at the conference, described the Commissioners' purpose as being "to purchase the Indians' Lands on Penobscot River, or settle more certain & advantageous boundaries...."^{68/} During the conference the Penobscots maintained their claims to their lands. The Commissioners acknowledged, according to Rev. Little, that the Watertown Resolve confirmed Penobscot title to six miles on each side of the river from the head of the tide.⁶⁹

^{66/} Oct. 25, 1784, The Report of the Commissioners appointed to confer with the Indians of the Penobscot Tribe, *ibid.*

^{67/} A resolve of March 18, 1785, appointed Commissioners "to treat with the Penobscot Tribe of Indians, respecting their claims to lands on Penobscot River....," but a meeting never took place. See July 4, 1786 letter, Benjamin Lincoln Papers, Mass. His. Soc., Reel 7, 471-474.

^{68/} Reverend Daniel Little, Journal, 109, Manuscript Copy, Maine Historical Society, Portland, Maine.

^{69/} *Ibid.*

This concession, however, was not enough for the Penobscots. The statement about their lands "much hurt and disappointed" them as "...they supposed before they had the whole width of land as far as the waters of this river extended East and West."^{70/} The Commissioners also added that the Watertown Resolve did not give the Penobscots much advantage, since the Tribe would be prevented from hunting as soon as Massachusetts settled the area beyond the six miles.^{71/}

The Commissioners offered the Penobscots the following set of terms. The Penobscots would cede

... all their claims & Interest to all the lands on the west side of Penobscot river, from the head of the tide up to the River Pisquataquiss being about Forty three miles, And all their claims & Interest on the east side of the river from the head of the tide aforesaid up to the river Mantanonkeektook being about 85 Miles....

The Tribe, for its part, would reserve to itself

...the Island on which the Old Town stands, About 10 Miles above the head of the tide, and those Islands on which they now have actual Improvements in the said river, lying from Sunkhaze river, about 3 Miles above the said old town to Passadunkee Island, inclusively, on which Island their new Town so called, now stands, and

^{70/}

Aug. 30, 1786, Letter of Committee to Governor in re Indians. Bax. Mss. XXI, 248.

^{71/}

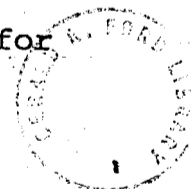
Ibid.

fee title to two islands in Penobscot Bay, known as Black Island and White Island near Naskeeg point.

Perhaps most significantly of all, the proposed treaty also contained the following pledge:

And we further agreed that the lands on the west side of the river Penobscot, to the head of all the waters thereof, above the said river, Pisquataquiss & the lands on the east side of the river to the head of all the waters thereof, above the said river Mantanomkeektook, should ly as hunting ground for the Indians and should not be laid out or settled by the state or engrossed by Individuals thereof....^{72/}

After deliberation, the Penobscots proposed a boundary at Passadumkeag but the Commissioners refused to consider that compromise. The Penobscots responded that the land Massachusetts desired could be theirs but "they expected to be paid for it." A few moments more of negotiations passed and the Commissioners promised "350 Blankets, 200 lbs Powder, & Shot & Flints in proportion, at the time when you sign the papers for the ratification of this agreement."^{73/}



The verbal agreement between the Penobscots and the Commissioners rested on shaky ground at best. The Commissioners advised the Governor and Council that they "discovered a total aversion in the Indians to surrender all their claims," as Massachusetts wished. "The Indians were so far from doing this,

^{72/}
Ibid. 241. The details of the proposed treaty were set forth in a subsequent draft document. See footnote 93, *infra*.

^{73/}
Little, Journal, 110.

that when they were urged to relinquish as far North on the west side of the river as on the east side they absolutely refused on any terms whatsoever, to comply with the proposition."^{74/}

Happy with even a partial cession, on October 4, 1786, Governor Hancock recommended that the Commission's promises of goods be granted to the Penobscots in return for "a proper deed of the ceded lands."^{75/} Accordingly, the legislature

^{74/} August 30, 1786, Report of Committee on Penobscot Indians, Baxter, *Bax. Mss.*, XXI, 241.

^{75/} October 11, 1786, Act Confirming Treaty with Penobscot Tribe, *ibid.*, VIII, 80-82.

passed an act confirming the Commissioners' verbal agreement with the Penobscots. The act empowered the Governor to appoint a person "to carry into execution the said agreement" by receiving from the Penobscots "a deed of relinquishment in due form." It further provided that "when the said deed of relinquishment shall be executed as aforesaid, this act shall be considered as a compleat and full confirmation of the agreement before recited...."^{76/} Both the Commissioners and the Legislature understood, then, that the verbal agreement of August, 1786, required the signature of a formal deed and the delivery and acceptance of the goods provided in payment.

Early in November, 1786, Benjamin Lincoln, on behalf of Governor Bowdoin, traveled to the Penobscot to complete the verbal agreement of August. He met Chief Orono who informed him "... the Tribe was in general out on their winters' hunt, & that they would not be collected untill the Spring." On the chance that the Penobscots might return "sooner than was expected," Lincoln placed the treaty goods and the unsigned deed in the care of John Lee of Majorbagaduce [Castine].^{77/} Lee also

^{76/} Nov. 9, 1786, Benjamin Lincoln to Gov. J. Bowdoin, Benjamin Lincoln Papers, Mass. His. Soc. Reel 7, 547-48. And *see also* Nov. 6, 1786, B. Lincoln to John Lee, and Nov. 10, 1786, B. Lincoln to Gov. Bowdoin, both letters filed with 1796 Jan. Sess., Res. C. 86, in Mass. Arch.

^{77/} Dec. 5, 1786, John Lee to Benjamin Lincoln, Benjamin Lincoln Papers, Mass. His. Soc., Reel 7, 564.

soon concluded an agreement would not be reached until spring.^{78/}

A full year passed in futile efforts to induce the Penobscots to accept the goods and to formally cede their lands. John Lee repeatedly conversed with the Penobscot chiefs. He learned "a Majority of the tribe wish to be off from their engagements." He warned the Penobscots that if they refused to ratify the agreement "that the Governor would chastize them severely." Lee added:

that their refusing to sign the Deed & receive the Blanketts &c would by no means prevent Government from surveying, Disposing ^{of} & settling the Lands upon Penobscot River.^{79/}

Governor Hancock, however, favored continued negotiations:

for though perhaps a small force may subdue or extirpate the Tribe of Native if they should commence hostilities, yet the effecting it would be more expensive & troublesome than the completing a Treaty respecting their Lands can be.^{80/}

On May 29, 1788, Governor Hancock appointed Reverend

^{78/} December 28, 1787, John Lee to Gov. Hancock, filed with 1796 Jan. Sess., Res., C. 86 in Mass. Arch.

^{79/} *Ibid.*

^{80/} March 17, 1788, Governor Hancock's Message, Baxter, *Bax. Mss.*, XXI, 462-63.

Daniel Little to settle the issue.^{81/} Little did not intend to negotiate a new treaty with the Penobscots, but simply "to bring forward & complete the Treaty made at Condukeag by General Lincoln &c, 26 Aug. 1786."^{82/} Despite Little's reiteration of all the arguments of the past few years, the Penobscots refused to sign any document divesting them of their lands.

Orsong Neptune argued the Penobscots'

right to the soil from the general peace among French Indians, Americans & King George from the gift of God, who put them here to serve him from the promise of Gen^l Washington & the Gen^l Court from the long possession of five hundred years, from their being of the Religion of the King of France & meaning to remain so.^{83/}

Daniel Little responded "...You may expect Gov^t. will abide by it & expect the same for you."^{84/}

Despite Little's bluff, Massachusetts continued to recognize Penobscot title. In 1791 Henry Jackson, agent for Henry Knox who was seeking to purchase 2,000,000 acres of Maine land, told his principal that the committee charged with the sale of Maine land "...will not permit us to come within six miles of

81/

May 29, 1788, Govr's Message respecting a conference with the Penobscot Indians, Baxter, *Bax. Mss.*, XXII, 30-31.

82/

Little, Journal, 126.

83/

June 23, 1788, Witnesses Deposition, filed with 1796 Jan. Sess. Res. C. 86 in Mass. Arch.

84/

Little, Journal, 128. And see June 25, 1788, Little to Hancock, filed with 1796 Jan. Sess. Res. C. 86 in Mass. Arch.

Penobscot River." Indeed, the land committee informed Jackson that "the six miles on the east side of Penobscot is the property of the Indians."^{85/}

The 1786 treaty was never ratified, and the question of Penobscot lands was not raised again until 1796 when the State again appointed commissioners who this time were successful in obtaining a treaty. The 1796 treaty was similar to the 1786 treaty, except the ceded territory extended only thirty miles up stream from the head of the tide on each side of the river, and the consideration was larger.^{86/} The treaty called for the delivery of "...one hundred and forty nine and a half yards of blue cloth for blankets, four hundred pounds of shot, one hundred pounds of Powder, thirty six hats, thirteen bushels of Salt being one large Hogshead, one barrel of New-England Rum, and one hundred bushels of Corn..." upon signing the treaty.

The treaty also called for an "annual annuity consisting of three hundred Bushels of good Indian Corn, fifty pounds of powder, two hundred pounds of shot, and seventy five yards of

^{85/} June 19, 1791, Henry Jackson to Henry Knox, Knox Papers, Mass. His. Soc.

^{86/} The deed which encompasses the terms of the treaty was recorded in the Hancock County Registry of Deeds, Ellsworth, Maine on May 3, 1809, at Book 27, Page 6. See affidavit of Jacob Kuhn, March 8, 1809, and Order of Council dated March 20, 1809 filed with Papers relating to Massachusetts Resolves of 1796, Jan. Sess., C. 86, Massachusetts Archives, Boston, Mass., for explanation of the late registration.

good blue cloth for Blankets...." In return, the Penobscot Tribe was to cede all its "right, Interest and claim to all the lands on both sides of the River Penobscot, beginning near Colonel Jonathan Eddy's dwelling house, at Nichel's rick, so called, and extending up the said River Thirty miles on a direct line, according to the General Course of said River, on each side thereof...." Excepted from the transaction and reserved to the Tribe were "...all the Island in said River, above old town, including said Old-town Island, within the limits of the said thirty miles." A deed encompassing the terms of the treaty was signed by the Penobscot Nation on August 8, 1796.^{87/}

Neither the proposed 1786 treaty nor the actual 1796 treaty made mention of a twelve-mile corridor. The proposed 1786 treaty specifically reserved to the Tribe as a hunting ground all of the lands above the ceded area on both side of the Penobscot River "to the head of all the waters" thereof.^{88/} While the 1796 treaty did not specifically reserve a hunting territory, it did not purport to extinguish title to anything other than the thirty-mile tract. Indeed at the end of negotiations in which they indicated their willingness to enter the treaty, the Penobscots said, "Further-

^{87/}
Ibid.

^{88/}
Little, Journal, 110.

more Brothers - as we have come to a settlement about the Lands, what we now say is exactly Right - Now all the land above thirty miles above Col^o Eddys, we do not sell.^{89/}

In 1818 the Penobscots, who had fallen on hard times, sent word to the State that they wished to sell an additional ten townships.^{90/} The Commonwealth responded by appointing three commissioners to treat with the Tribe for the release of all its remaining lands.^{91/} The result was a treaty in which the Tribe relinquished its claim to "all the lands they claim, occupy and possess by any means whatever on both sides of the Penobscot river, and the branches thereof, above the tract of thirty miles in length on both sides of said river, which said tribe conveyed and released to said commonwealth by their deed of the eighth of August, one thousand seven hundred and ninety six."^{92/} The Tribe reserved from the said conveyance four townships near the point where the east and west branches of the Penobscot River converge. The Tribe also reserved the islands in the river which had previously been reserved. Massachusetts

^{89/} Answer of Indians, August 6, 1796, filed with Massachusetts Resolves of 1796, Jan. Sess. C. 86, Massachusetts Archives, Boston, Mass.

^{90/} Williamson, *History of the State of Maine*, II, 669.

^{91/} *Ibid.*

^{92/} Mary Frances Farnham, ed., *The Farnham Papers: Documentary History of the State of Maine* (Portland: Lefavor - Tower Company: 1902) vol. VIII, 127-132.

promised to purchase two acres of land in the town of Brewer for the use of the Tribe, and to provide them with a man who could instruct them in agriculture. Four hundred dollars and certain specified goods were to be delivered immediately, while other supplies were to be delivered annually thereafter.

The four townships which were reserved by the Penobscot Nation in the 1818 treaty were purchased by the State of Maine in an agreement concluded on June 10, 1833.^{93/} The Indians were to be paid \$50,000, the principal amount of which was to be placed in the state treasury, with the interest paid to them annually if the state thought they needed it. Unappropriated interest was to be added to the principal.

Today the Penobscot Tribe has only the islands in the Penobscot River between Old Town and Mattawamkeag. In fact, the Tribe doesn't even have all of the islands, since the land area of the islands has been reduced by flooding caused by hydro-electric dams.^{94/}

^{93/} *Ibid.*, 303.

^{94/} See *Taylor v. Bangor Hydro-Electric Company*, Civil No. 1970 (D. Me., Filed July 17, 1972).

CONCLUSION

This research has been conducted by experts who are prepared to testify as expert witnesses that the Penobscot Nation constitutes (and has constituted since time immemorial) a tribe of Indians, that the Penobscot Nation used and occupied an aboriginal territory which included the entire Penobscot watershed in the present State of Maine, together with a major portion of the St. John watershed in the present State of Maine, and that the Penobscot Nation ceded the vast bulk of these aboriginal lands in treaties with the Commonwealth of Massachusetts in 1796 and 1818, and in a purchase by the State of Maine in 1833, none of which has ever been approved by the United States.

THE WHITE HOUSE

WASHINGTON

October 18, 1976

NOTE TO RON NESSEN

Subject: Possible Sensitive Press Subject:
the Passamaquoddy Case in Maine

You may have noticed in the papers a word or two about the Indian claims case on behalf of the Passamaquoddy Tribe of Indians in Maine. A dogged young lawyer has won a court victory where the Federal courts (District, and Court of Appeals) have said that a 1790 Non-Intercourse Act may have been violated and 2/3 of the State of Maine (when it belonged to Massachusetts) may be found to be still in Indian ownership. The next step is that the Federal Government must file a suit in the Court which will help the Court determine just how much of the State is in fact still in Indian ownership.

This filing will not have to be made until after November 2.

Bond lawyers however have told the State that the case erects a cloud over the bonds, so they can't be sold and Maine has practically spent

THE WHITE HOUSE

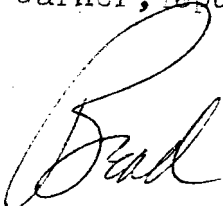
WASHINGTON

the affected bond money, so the Governor is hopping mad. The Congressional delegation there apparently, according to Interior, is silent so far.

It is important that if the issue should come up in the White House vicinity, that no one here answer without checking carefully first with me or with Interior. The Government must, as a duty, defend Indian trust rights and both Indians and non-Indians are watching us on this one.

(In the far future, no one may have to leave his property; but we might have to ask Congress to enact a "Maine Native Claims Settlement Act" to clear up the whole matter.)

I'll be in Salt Lake City this week, back next Tuesday; if the question should arise in the interim, check with Hugh Garner, Deputy Solicitor of Interior (343-6115).


Bradley H. Patterson, Jr.

cc *Sarsady*
Mrs. Kelberg



THE WHITE HOUSE

WASHINGTON

October 28

NOTE TO MRS. KILBERG

Peter Taft called me yesterday and today about Passamaquoddy.

The litigation report he has received from Justice recommends, he says, actions aimed at the land. He agrees with my informal opinion that very possibly a policial, i.e. Congressional settlement may be the proper approach, asper the Alaska Native Claims Act. Peter feels he may need our help in mediating this little controversy and would appreciate ^(if) it you and I would call a session here at the end of next week. I said of course we would.

Today Peter called to say that the deadline of November 15 or whatever had been changed yesterday by the Court to January 15; the Statute of Limitations on our actions runs out next July and by that final date we would have to sue all the individual land-owners, if that is what we intended to do. The US representative mentioned yesterday in Court that a Congressional settlement was a possible option.



Small

THE WHITE HOUSE
WASHINGTON

October 29, 1976

NOTE TO GREG AUSTIN

Would you and an appropriate member of your staff please join Mrs. Kilberg and me on Thursday at 10 AM here to discuss with Peter Taft the matter of where we are headed in the Passamaquoddy case?

An unrelated matter: would you respond to Mr. Boundy's telegram about Squaxin Island? I will acknowledge by phone. Kindly send me a copy of your response.



Austin

Bound

THE WHITE HOUSE

WASHINGTON

November 12, 1976

MEMORANDUM FOR THE PRESIDENT

THROUGH: JAMES M. CANNON

FROM: BRADLEY H. PATTERSON, JR.
GEORGE W. HUMPHREYS

SUBJECT: Governor Longley's Inquiry re the
Passamaquoddy/Penobscot Case

Governor Longley of Maine met with you recently and asked you to look into this matter; you told him you would do so.

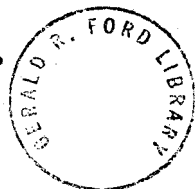
The Passamaquoddy Indian Tribal Council won a Federal Court decision from Judge Gignoux at the beginning of 1975 declaring that the United States has a trust responsibility to the Tribe and declaring that the Tribe is in fact covered by the terms of the 1790 Nonintercourse Act (25 USC 177) which forbids the conveyance of Indian land without the consent of the United States. This decision was affirmed by the First Circuit Court of Appeals on December 23, 1975.

The chain of effects from that decision is:

- The land conveyances in the treaties of 1794 and 1818 between Maine (then Massachusetts) and the Passamaquoddy and Penobscot Indians respectively, wherein the Indians gave up some 2,000,000 and 10,000,000 acres respectively of their aboriginal lands may well be void, since the United States was not a party to these treaties nor were they ever ratified by the Senate.
- This in turn puts a cloud over the ownerships and titles in those 12,000,000 acres -- which amounts to 60% of the State of Maine.



- Because of this cloud, bond attorneys have advised clients not to buy State of Maine construction bonds, and a \$27 million sale of same has been held up.
- Tax anticipation bonds (from real estate taxes) for the operating expenses of Maine towns and counties will probably suffer the same fate as of next January. This will hurt some of those communities.
- The Federal Government, now as Trustee for the Indians, has in the Circuit Court's words "the duty to investigate and take such action as may be warranted in the circumstances." This may well mean pursuing or expanding (to other property-owning defendants) two protective lawsuits filed some time ago against Maine on behalf of the tribes by Justice at the insistence of the Court.
- Judge Gignoux has set back a November 15 deadline to January 15, 1977 for the Federal Government to come into his court and tell him what they are going to do to discharge their trusteeship obligation. Much research must be done to put any expanded suits in final form before a July, 1977 expiration of the Statute of Limitations for all Indian claims for trespass damages.



The State Attorney General continues to call the Indians' claim "preposterous," "frivolous" and "without merit"; the Maine Congressional delegation introduced a bill to repeal the Nonintercourse Act and has more recently washed its hands of the matter claiming that it is a problem for the Courts.

The Indians have long been ready to talk about a comprehensive settlement package but the State has shown little interest.

Actions Now Being Taken:

Solicitor Austin of Interior is sending a letter to the Maine Deputy Attorney General, transmitting documents showing the strength of the case and inviting his input and comment.

Secretary Kleppe is responding to a letter he has received from Governor Longley, will refer to Mr. Austin's invitation to the State Deputy Attorney General, and will also refer to the Governor's visit with you -- by saying that "The President has asked me to look into this matter." We and Mr. Buchen believe that this discharges your obligation to Governor Longley and keeps the matter at the proper arm's length from the White House.

The Future:

After receiving input from both the Indians and the State, Interior will send its Litigation Report to Justice -- i.e., the formal request for definitive or expanded lawsuits.

The Litigation Report will then be made available to the Indians and the State and further comments will be invited.

These comments may point to a possible overall settlement, such as a "Maine Native Claims Settlement Act" by the Congress (as an alternative to months if not years of claims litigation.)

Justice will inform Judge Gignoux of the steps taken so far.

Mr. Carter, then as President, will have to make the final judgment about what kind of lawsuits or a legislative package to support.



THE WHITE HOUSE
WASHINGTON

November 23,

TO: BRAD PATTERSON

FROM: GEORGE W. HUMPHREYS

Memo went to the
President on 11/15.

COPY FOR BRAD PATTERSON

THE WHITE HOUSE
WASHINGTON

November 12, 1976

MEMORANDUM FOR THE PRESIDENT



THROUGH: JAMES M. CANNON
FROM: BRADLEY H. PATTERSON, JR.
GEORGE W. HUMPHREYS
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The Passamaquoddy Indian Tribal Council won a Federal Court decision from Judge Gignoux at the beginning of 1975 declaring that the United States has a trust responsibility to the Tribe and declaring that the Tribe is in fact covered by the terms of the 1790 Nonintercourse Act (25 USC 177) which forbids the conveyance of Indian land without the consent of the United States. This decision was affirmed by the First Circuit Court of Appeals on December 23, 1975.

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- This in turn puts a cloud over the ownerships and titles in those 12,000,000 acres -- which amounts to 60% of the State of Maine.

- Because of this cloud, bond attorneys have advised clients not to buy State of Maine construction bonds, and a \$27 million sale of same has been held up.
- Tax anticipation bonds (from real estate taxes) for the operating expenses of Maine towns and counties will probably suffer the same fate as of next January. This will hurt some of those communities.
- The Federal Government, now as Trustee for the Indians, has in the Circuit Court's words "the duty to investigate and take such action as may be warranted in the circumstances." This may well mean pursuing or expanding (to other property-owning defendants) two protective lawsuits filed some time ago against Maine on behalf of the tribes by Justice at the insistence of the Court.
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The State Attorney General continues to call the Indians' claim "preposterous," "frivolous" and "without merit"; the Maine Congressional delegation introduced a bill to repeal the Nonintercourse Act and has more recently washed its hands of the matter claiming that it is a problem for the Courts.

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THE WHITE HOUSE

WASHINGTON

INFORMATION

November 15, 1976

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THE WHITE HOUSE
WASHINGTON

11/19

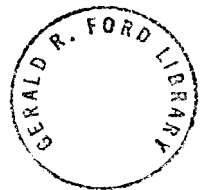
Peter Taft's intentions:

Receive litigation report from Interior
in about a month.

Make it available to the parties.

Tell the Judge on ~~NOVEMBER~~ January 15
that we intend to sue the major parties: the
State and the big companies -- just 5 or 6
defendants perhaps (with resources to pay
competent counsel) -- and also that we will
recommend that the Congress extend the Statute of
Limitations for another 3 years so that later
we can identify and sue the smaller landholders
if necessary.

Let JC determine a settlement option
package and propose it.



PASSAMAQUODDY/PENOBSCOT CASE
OPTIONAL COURSES OF ACTION



I. LITIGATE THE CASE THROUGH

Indians are quite willing and ready to do this.

Interior and Justice would have to come along with it; the Court has told them to behave like trustees and they would.

As for litigating strategy, there are no current differences between Indians, Interior and Justice -- they are doing just what the Court said and are behaving like trustees.

But there are some 200,000 individual defendants.

It is most unlikely that Justice would file a class-action type suit; the law is very unclear here, but most class-action cases are plaintiff suits; there is very little legal precedent for defendant type class-action suits. Also very little precedent for class-action type suits in property cases such as this.

In our Pyramid Lake case, the Supreme Court refused to take original jurisdiction and left us with the only other alternative: filing against 13,000 defendants in Nevada, which we did.

In any case, the litigation option would take perhaps 15 years when all the defendants and all the appeals are totalled up; maybe longer.

Indians are very likely to win all these cases.

But for all the 15 years or more, there would be a cloud over all the land titles -- a "lis pendens" notation made on every deed registered. This is also likely to affect ~~the~~ not only the public debt offerings of the State and counties, etc, but also the private debt offerings of all the companies in Maine; Indians would probably go to the SEC and to stockholders' meetings and insist on full disclosure in every company's Annual Report -- which would put a crimp in any debt offerings.

Also: a big burden on the courts.

II. CONGRESS RATIFY THE TREATY AND ESTINGUISH THE LAND CLAIM

Congress could certainly extinguish the land claim in this way, but it is very doubtful whether this measure would also extinguish the trespass claim for the years of trespass between the time of the signing of the treaty and its ratification.

Such pre-ratification trespass claims are, arguably, protected by the Fifth Amendment and a Congressional action purporting to extinguish these claims would be attacked as unconstitutional.

Indians under this option would file for the trespass claims which they allege, and in so doing would attach all the property of all the individual defendants -- tying all property actions up for the 3 years or so that it would take to resolve the question of whether the trespass claims were constitutionally extinguished by the ratification action.

It would be alleged that the government and especially the Congress was taking unilateral action, changing the rules of the game-- playing baseball by moving the bases well into the middle of the game.

These arguments would make ratification doubtful of Congressional passage.



III. CONGRESS EMPOWER THE INDIAN CLAIMS COMMISSION OR CREATE A SPECIAL
NEW COMMISSION TO HEAR AND DECIDE THE CASE

If the Congress, in so doing, ordained rules or settlement criteria for the Commission which would diminish the Indians' Fifth-Amendment-protected rights (e.g. the trespass claims), this would arguably be unconstitutional.

The Indians would probably ignore the new Commission, and would proceed with Option I -- i.e. to litigate the case against every defendant.

It would take perhaps 3 years for the issue to be litigated about the Commission's jurisdiction -- on the Fifth Amendment rights issue-- and during that time the cloud would stay on all the titles and property actions.

Even if ~~xyz~~ the Commission's jurisdiction were eventually established, it would take many more years for the entire case to be heard and settled (look at the record of the Indian Claims Commission on some of its complicated cases...) Such delays would not solve the State's problem.

If a Commission were finally found to have jurisdiction, the Government would then be put into an impossible bind: being a claims case, the Government would be the defendant, but also being trustee, the Government would have to be the plaintiff, arguing for the Indians.

Indians would regard the creation of a Commission as also a changing of the rules halfway in the game, a unilateral move by the government and/or Congress.



IV. WE COULD TRY THE MODEL ESTABLISHED IN THE ALASKA NATIVE CLAIMS SETTLEMENT ACT: ENGAGE IN CONSULTATION WITH INDIANS AND STATE AND THEN PRESENT A BILL TO THE CONGRESS WHICH WOULD ITSELF BE A FINAL SETTLEMENT PACKAGE.

Sub-Option A: Of course we (i.e. the Carter Executive Branch) could send up a bill without any consultation -- as we did in Alaska Claims in 1969 -- but this would break faith with the promise to consult the Indians, and the State would feel likewise.

Sub-Option B: We would engage in careful consultation, but send up a bill which we think is right without necessarily having the complete consent of all the parties. (This is what we did in the Alaska Native bill Nixon sent up in May of 1971).

Sub-Option C: We would try to get a completed agreed bill -- or try to get the parties together to reach an agreement among themselves.

Indians have said:

- a) They will enter into negotiations on a comprehensive settlement
- b) They are not seeking to possess the home of any individual homeowner if a comprehensive settlement package is worked out. (This promise does not apply if the litigation route has to be chosen.)
- c) Indians will insist on some symbolic treatment of the ownership of Baxter State Park and Mt. Katahdin.
- d) Indians will insist on a substantial land settlement plus a reasonable cash award for the extinguishment of the rest of their land and trespass claims.

Indians don't care where the land comes from for them;



it would be in part State land (the State has some 500,000 acres in "Public Lots" plus Baxter Park of 200,000 acres), or the State or the Federal Government could compensate the paper companies for land which the companies would then turn over to the Indians. (That land is worth about \$110-\$125 per acre now). Some of those "Public lots" may not be the best settlement option; the State is trying to secure them for public recreational areas.

- e) Indians consider that the "at fault" parties are the State and the feds -- and most of the money for cash or for the land or both will probably have to come from the federal government. The companies take the position that they will not give up anything for nothing; they must be compensated for any land they give up. (But they have been very silent on the whole case; they did not intervene in the case in its earlier stages; they are following it closely; they have not put any pressure on the State, however.
- f) No out-of-court settlement will, of course, be possible which gives the Indians less than they pre-treaty lands without the consent of Congress; the Non-Intercourse Act is still on the books...

Methods of Handling Sub-Options B or C

1. White House might call a meeting of, first, the Indians and the State and the feds. Companies would come to a later meeting. Such a first meeting would give the State the option of gracefully moving off its present unwise position.
2. President Ford and President-elect Carter might jointly ask former Gov. Kenneth Curtiss to be a Special Intermediary.

V. CONGRESS COULD ORDAIN A PER CAPITA SETTLEMENT IN SETTLEMENT FOR ALL INDIAN CLAIMS

As a matter of settling the land claims, Congress could probably do this, but it could not settle the trespass claims that way, since these are Fifth-Amendment-protected rights.

Furthermore, any such settlement, to meet the trespass claims, would be exorbitant.

The Indians would sue to protect their Fifth-Amendment rights and the untangling of these lawsuits would take a long time.



THE WHITE HOUSE

WASHINGTON

December 3, 1976

MEMORANDUM TO: PHIL BUCHEN
BRADLEY PATTERSON

FROM: JIM CANNON *JC*

SUBJECT: Passamaquoddy and Penobscot
Land Claims

The President would like an option paper for his review on the Maine Indian land claims problem.

I have asked George Humphreys to work with you, or your designate, to present a full discussion of possible Presidential action that may be advisable in order to effect an early settlement. George will be calling you shortly for your advice and guidance.

As a starter, I am attaching five legislative options that have been suggested to us. You may want to review this list for any good ideas it may suggest.

*JC. What back to
II & new answers
was given - - no, an
option paper need and
be prepared. It will be
a problem for the Carter Admin.
BTR*



PASSAMAQUODDY SETTLEMENT LEGISLATION OPTIONS

Option 1: The President could recommend that the Congress ratify the 1794 Treaty conveyance nunc pro tunc, thus probably extinguishing any claim which the tribes may have to the land in question or compensation therefor.

Option 2: The President could recommend to the Congress the enactment of a Maine Native Claims Settlement Act (MNCSA) which would provide that the Indian Claims Commission, or a specially constituted commission, would determine the scope of the aboriginal lands of the tribes as of 1794, and determine the value of the aboriginal lands which were conveyed by the tribes under the 1794 Treaty, and then award to the tribes the 1794 value of the aboriginal lands which were conveyed, which would probably amount to something less than \$15 million. In addition, the Indians could be awarded interest on the value of the lands conveyed. At 5% per annum simple interest, this would increase the award by a factor of approximately 10, to a total of something less than \$150 million. At 5% per annum compound interest, the increase would be by a factor of approximately 700, to a total of something less than \$105 billion.

Option 3: The President could recommend a MNCSA which would provide that the Indian Claims Commission, or a similarly constituted commission, would evaluate the legal claim now being advanced by the Indians, and award to the tribes the present value of any land the title to which the tribes were found to have a valid claim. This award would amount to the present value of up to 16 million acres of Maine land including approximately 100,000 private homes and buildings.

Option 4: The President could recommend a MNCSA which would simply set an arbitrary sum to be paid to the tribes in full settlement of any legal claims they might have by reason of the 1794 Treaty. Such a settlement might amount to a payment of cash in the amount of \$1,000 to \$100,000 for each of the approximately 3,000 members of the tribes.

Option 5: The President could recommend a MNCSA along the lines described in options 2 through 4 and, in addition, recommend that the MNCSA contain provisions requiring that the State of Maine, as its contribution to the settlement, deed certain state-owned lands to the tribes.



DISCUSSION

Option 1: The Congress has legal authority to extinguish Indian land claims, such as are involved in these cases, by statute without compensation. It can be argued that the Maine Indians have no equitable or moral argument in support of their claim, and that any compensation paid to them would amount to a windfall. The tribes have not argued that they were dealt with unjustly, but rather based their entire claim solely upon technical non-compliance with the Nonintercourse Act.

Option 2: Historically, Congress has not taken a hard line on extinguishment of aboriginal title. Under the Indian Claims Act, Congress has provided that tribes who have lost their aboriginal lands unfairly under Federal treaties may sue for the value of the land at the time of loss. Although the Indian Claims Act generally provides for compensation when there is a presence of fraud, unconscionable consideration, etc., an analogy could be made between such situations and the extinguishment of a valid claim under the Nonintercourse Act. No interest is allowed under the Indian Claims Act but if simple reimbursement for the 1794 value of the land (probably less than \$1 per acre) appears unreasonably low, simple interest might be added for these purposes.

Option 3: As a matter of Indian advocacy, this option must be considered. This option would give to the Indians the monetary equivalent of the value of the tribes' Nonintercourse Act Claim. To give the tribes anything less is, arguably, to take from the tribes something granted by act of Congress.

Option 4: This option could be supportable on grounds that, in light of the availability of option 1, only token compensation is justifiable. It would have the further advantages of being fast, simple and predictable in cost.

Option 5: Since fault, if any, lies with the State of Maine (or its predecessor, the State of Massachusetts), and since the entire burden of the Indian claim will fall on the residents of the State of Maine in the absence of congressional action, there is good justification for requiring a contribution from the State of Maine to the settlement. The State of Maine does own undeveloped lands which could be made available to the tribes. Since the tribes claim close attachment to the land, providing land as a part of the compensation might make a settlement more palatable to the tribes.

THE WHITE HOUSE

WASHINGTON

December 3, 1976

MEMORANDUM TO: JIM CANNON

FROM: GEORGE W. HUMPHREYS *GWH*

SUBJECT: Passamaquoddy and Penobscot
Indian Land Claims

Attached are two memos drafted for your signature:

1. A status report from you to the President
2. A memo from you to Buchen and Patterson (Baroddy's guy for Indians) asking their help in preparing an option paper for the President.



THE WHITE HOUSE

WASHINGTON

December 3, 1976

MEMORANDUM TO: THE PRESIDENT

FROM: JAMES M. CANNON

SUBJECT: Passamaquoddy and Penobscot
Indian Land Claims

You asked for a report on the status of the land claims of the Maine Indian Tribes.

On October 27, 1976 U.S. District Judge Edward T. Gignoux ordered the counsel for the United States to advise the court by January 15, 1977 as to whether the Government intends to continue prosecution of the two pending protective actions filed on behalf of the Maine Tribes. He also ordered that the actions be assigned for a preliminary pretrial conference as soon thereafter as practicable. In so ruling, the judge amended his October 6 order which had given the Government only until November 15, 1976 to respond.

Meanwhile, since last spring, Interior's Office of the Solicitor has been engaged in investigating the Tribes' land claims and preparing litigation reports to the Justice Department. On November 11, 1976 detailed summaries of the factual bases for the claims were sent to Maine's Deputy Attorney General. He has indicated that his office intends to submit to Interior by December 7, 1976, a memorandum attempting to rebut the Tribes' claims. Interior's litigation reports must be finalized as shortly thereafter as possible in order to permit the Justice Department to evaluate them in advance of the January court date.

It is intended to make those litigation reports available to the attorneys for both the State and the Tribes so that the legal and factual bases for the Indian claims may be evaluated by the real parties in interest prior to the



initiation of any settlement negotiations. The State Attorney General has continued to characterize the claims in public as "frivolous," thus thwarting any talk of settlement for the time being. The Tribes' attorneys have indicated a willingness to discuss settlement. Of course, any negotiated settlement would ultimately have to be ratified by Congress.

OTHER KNOWN CLAIMS

Interior is also pursuing the Nonintercourse Act claims of the Oneida, Cayuga, and St. Regis Mohawk Tribes in New York State, and will soon begin to evaluate a similar claim of the Catawba Tribe in South Carolina.

Nonintercourse Act suits have also been filed by the Narragansett Tribe in Rhode Island, the Mashpee Wampanoag and Gay Head Wampanoag Tribes in Massachusetts, and the Schaghticoke Tribe in Connecticut. Their claims range from 1,300 to 17,000 acres. The Federal Government is not, as yet, a party to the Rhode Island, Massachusetts or Connecticut litigation.

ALTERNATIVES

I have asked Phil Buchen and Bradley Patterson to review a range of alternative actions suggested by George Humphreys of the Domestic Council Staff. I expect to submit to you a full discussion of these options by December 10.



THE WHITE HOUSE

WASHINGTON

December 3, 1976

MEMORANDUM TO: PHIL BUCHEN
BRADLEY PATTERSON

FROM: JIM CANNON

SUBJECT: Passamaquoddy and Penobscot
Land Claims

The President would like an option paper for his review on the Maine Indian land claims problem.

I have asked George Humphreys to work with you, or your designate, to present a full discussion of possible Presidential action that may be advisable in order to effect an early settlement. George will be calling you shortly for your advice and guidance.

As a starter, I am attaching five legislative options that have been suggested to us. You may want to review this list for any good ideas it may suggest.



THE WHITE HOUSE
WASHINGTON

November 29, 1976

NOTE FOR

Phil Buchen
George Humphreys

Attached for your information are copies of the two letters which Interior has sent to Maine officials, i.e. Governor Longley and Deputy Attorney General Paterson respectively.

As agreed, the letter to the Governor mentions the President's interest in this matter.

Interior will send me a copy of the material received from Mr. Paterson when it arrives.





United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Honorable James B. Longley
State of Maine
Office of the Governor
Augusta, Maine 04333

NOV 22 1976

Dear Governor Longley:

Thank you for your letters of October 8 and October 26, 1976, regarding the land claims of the Maine Indian Tribes. As I indicated to you when we met some weeks ago, I understand and appreciate the very real concerns of the people of your State. The President has also expressed interest in this matter, and has asked me to give it my personal attention.

As you know, shortly after our meeting Mr. Brennan, your Attorney General, met with Mr. Austin, my chief legal officer. Subsequent to that meeting, attorneys in the Solicitor's Office, including Mr. Austin himself, undertook a very careful analysis of a proposed litigation report to the Justice Department with regard to the claims of the Passamaquoddy Tribe. A similar report on the claims of the Penobscot Nation is in the preliminary stages.

That analysis is not yet completed. It involves, among many other things, a complete historical and legal review of over 200 years of transactions. It is not proper to suggest that our ultimate decision in this matter is controlled by a threat of a suit by the Tribe. This Department was sued by one of the tribes and this Department defended that suit jointly with the State of Maine. The Court has now rendered its decision and we are required to comply with that judgment.

I am understandably concerned with the implications contained in your stated desire that you receive "fair treatment or fairer treatment" than you perceive you have received to date. I was unaware of any unevenness of treatment in this respect but I will restate the position I enunciated at the time of our conversation



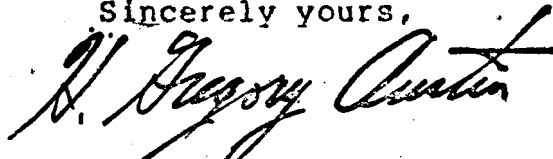
in my office: the posture of the Government today vis-a-vis the State of Maine is different from the relationship that existed when the Government and the State defended the suit of the tribe in the Joint Tribal Council of the Passamaquoddy Tribe v. Morton.

Nothing in the foregoing is to be taken as meaning that we are not keenly aware of the ramifications of the situation. You were particularly effective in bringing home to me the seriousness of the State's position and the distress some persons in your State have already experienced. We are not unconcerned.

For example, Mr. Austin has indicated to me that he appreciates your Deputy Attorney General's letter of October 21, 1978 in which he offers to submit a memorandum on his view of the Indian claims. Mr. Austin also informs me that he is amenable to the idea of sharing with your Attorney General certain of the materials which support the Passamaquoddy and Penobscot land claims so that the Department's litigation reports will reflect a thoroughly considered decision in these matters. This is but one indication of our desire to try to assist the State all we can subject to the legal limitations placed on us by our trust relationship with the Tribes.

Please be assured that we are giving high priority to the evaluation of the tribal claims and that that evaluation will be the result of very careful study.

Sincerely yours,



Acting Secretary of the Interior





United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

NOV 11 1976

John M. R. Paterson, Esquire
Deputy Attorney General
Department of the Attorney General
State of Maine
Augusta, Maine 04333

Dear Mr. Paterson:

This will acknowledge your letter of October 21, 1976, with respect to United States v. Maine, in which you stated your understanding of the status of the preparation of our litigation report to the Department of Justice, requested that the United States make available to you certain factual and historical materials which we now have in hand, and described your reservations concerning the disclosure to the United States of factual and legal aspects of the position of the State of Maine in opposition to the anticipated claims of the Passamaquoddy and Penobscot Tribes.

While your description of our present posture is accurate, the matter is of sufficient importance that I would like to restate one point in order to avoid even a remote possibility of misunderstanding.

The draft litigation report submitted by us to the Department of Justice does take the form of a firm recommendation; however, you are correct in stating that we have not yet made a firm recommendation to the Department, since our report is still in draft form.

We are thoroughly sympathetic with the concerns expressed by you with respect to revealing, at this time, the factual or legal basis of your position in opposition to the anticipated claims of the Passamaquoddy and Penobscot Tribes. I would like to repeat that we have neither requested nor urged that the State make such a disclosure to us. However, I did state that we are still in the process of formulating the position which this Department will take on behalf of



the Tribes, and that any factual or legal information supplied to us by the State of Maine might be helpful to us in establishing our position and deciding upon the course which we will pursue on behalf of the Indian Tribes.

In response to your request that we make factual and historical materials available to you, we are submitting herewith summaries of the factual bases for the Passamaquoddy and Penobscot land claims. If you wish to attempt to rebut any or all of the conclusions found therein, please do so in the memorandum which you intend to prepare for us. Again, however, please understand that you are not obliged to do so.

I think we agree that it is in everyone's interest to resolve the questions posed by the Tribes' claims as soon as possible. Therefore, if you expect to offer your arguments to us, please submit them no later than November 30, 1976.* As you know, the Justice Department is now required to inform the court of the government's final decision by January 15, 1977.

Sincerely yours,

H. Gregory Austin
Solicitor

* Extended to Dec-7 at Paterson's request.