

= Joint Tribal Council of the Passamaquoddy Tribe v. Morton =

Joint a Tribal Council , of the Passamaquoddy Tribe v. Morton , 528 F.2d 370 ( 1st Cir . 1975 ) , was a landmark decision regarding aboriginal title in the United States . The United States Court of Appeals for the First Circuit held that the Nonintercourse Act applied to the Passamaquoddy and Penobscot , non @-@ federally @-@ recognized Indian tribes , and established a trust relationship between those tribes and the federal government that the state of Maine could not terminate .

By upholding a declaratory judgement of the United States District Court for the District of Maine , the First Circuit cleared the way for the Passamaquoddy and Penobscot to oblige the federal government to bring a land claim on their behalf for approximately 60 % of Maine , an area populated by 350 @,@ 000 non @-@ Indians . According to the Department of Justice , the suit was " 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 . " The decision led to the passage of the Maine Indian Claims Settlement Act in 1980 , allocating \$ 81 @.@ 5 million for the benefit of the tribes , in part to allow them to purchase lands in Maine , and extinguishing all aboriginal title in Maine . The settlement was reached " after more than a decade of enormously complex litigation and negotiation . "

The Passamaquoddy claim was " one of the first of a series of eastern Indian land claims to be prosecuted " and " the first successful suit for the return of any significant amount of land . " Compared to the \$ 81 @.@ 5 million compensation in the Passamaquoddy case , the financial compensation of other Indian Land Claims Settlements has been " inconsequential . "

= = Background = =

= = = The transactions = = =

Indigenous populations have been present in modern @-@ day Maine for 11 @,@ 000 years , with year @-@ round occupation for 6 @,@ 000 years . Burial sites associated with an Algonquian @-@ speaking culture date back 5 @,@ 000 years . The Wabanaki Confederacy , which included the Passamaquoddy and Penobscot tribes , also pre @-@ dates European contact in the region . The Passamaquoddy may have had contact with Giovanni da Verrazzano in 1524 , but their first extended contact with Europeans would have been with a short @-@ lived settlement built on Dochet Island by Samuel de Champlain and Pierre Dugua , Sieur de Mons in 1604 ? 1605 . Research by Emerson Baker in 1989 uncovered over 70 extant deeds documenting private purchases of land from indigenous peoples by English @-@ speaking settlers , the earliest dating to 1639 . But , most Passamaquoddy lands " remained beyond the reach of English settlers " until the mid @-@ 18th century .

A few years prior to the end of the French and Indian Wars in 1763 , the Province of Massachusetts Bay had taken possession of all Penobscot land " below the head of the tide " of the Penobscot River ( near present @-@ day Bangor ) . During the Revolutionary War , both the Penobscot and Passamaquoddy , having been solicited by Superintendent John Allan , were allied with the colonies and fought against the British . After the war , Allan urged the Continental Congress to follow through on various promises made to the tribes ; Congress took no action and revoked Allan 's appointment .

In 1794 , Allan ? now as Commissioner for the Commonwealth of Massachusetts ? negotiated a treaty with the Passamaquoddy that alienated most of the aboriginal lands at issue in the later litigation . The treaty reserved 23 @,@ 000 acres ( 93 km<sup>2</sup> ) for the tribe . In 1796 , the Penobscot ceded 200 @,@ 000 acres ( 810 km<sup>2</sup> ) in the Penobscot River basin . In 1818 , the Penobscot ceded all their remaining land , save some islands in the Penobscot River and four six @-@ mile @-@ square townships . Maine gained statehood in 1820 and assumed Massachusetts ' obligations under these treaties . The " final big grab " happened in 1833 , when Maine purchased the four townships , relegating the Penobscot to Indian Island . None of the land cessions occurred pursuant

to a federally ratified treaty . According to Kempers :

Since the beginning of this country 's history , most American Indian tribes have been subject to federal authority and jurisdiction . In Maine , however , indigenous populations lived on reservations that were exclusively and completely administered by the state . This unique arrangement shaped tribal life in Maine , and proved to be a crucial issue in the development and resolution of the tribe 's land claim .

In the late 19th century , the Maine Supreme Court had held that the Passamaquoddy were not a tribe and had no aboriginal rights .

= = = The dispute = = =

In the 1950s , the Penobscot Nation had hired a lawyer to research the possibility of a land claim . In light of the Eisenhower administration 's Indian termination policy , counsel opined that " obtaining a fair hearing of their claim would be virtually impossible . " Up until the 1960s , Maine continued to fulfill certain provisions of the 1794 treaty , including the periodic provision of 150 yards of blue cloth , 400 pounds of powder , 100 bushels of salt , 36 hats , and a barrel of rum . By 1964 , of the 23 @, @ 000 acres ( 93 km<sup>2</sup> ) reservation , 6 @, @ 000 acres ( 24 km<sup>2</sup> ) had been diverted to other purposes and only 17 @, @ 000 acres ( 69 km<sup>2</sup> ) remained under tribal control .

In February 1964 , the tribal council of the Passamaquoddy Indian Township Reservation requested a meeting with Maine 's governor and attorney general to discuss a land dispute related to construction by non @-@ Indians on lands claimed by the tribe . The Passamaquoddy representatives were kept waiting for 5 hours after their scheduled meeting time with the governor , and the attorney general " smiled and wished them well if they ever took their claim to court . " Soon after the meeting , pursuant to a vote of the Passamaquoddy tribal council , 75 members protested against the construction project along Route 1 , resulting in 10 arrests . Charged with disorderly conduct and trespassing , they hired attorney Don Gellers to defend them . While these charges were still pending , Gellers began to prepare a land claim on behalf of the tribe .

= = = Attorneys = = =

Gellers ' theory was that Maine had violated the 1794 treaty by selling 6 @, @ 000 acres ( 24 km<sup>2</sup> ) of land . Because Maine had made no provision for a waiver of its sovereign immunity ( for example , in a state claims court ) , Gellers ' strategy was to sue Massachusetts , hoping that Massachusetts would in turn sue Maine . On March 8 , 1968 , Gellers ? affiliating with Massachusetts attorney John Bottomly ? filed a suit in Suffolk Superior Court in Boston , seeking \$ 150 million in damages . This initial claim involved land in and around the Indian Township Reservation . Three days later , Maine narcotics officers raided Gellers ' home and arrested him for possession of marijuana . Gellers was eventually convicted and , on bail , fled to Israel ; the lawsuit that he started was never prosecuted .

Gellers was representing the Passamaquoddy pursuant to a 10 % contingency fee agreement . Gellers , in turn , had assigned 40 % of his fee to Bottomly . As the negotiations of the Maine Indian Claims Settlement Act were reaching a close in May 1978 , even though neither Gellers nor Bottomly had performed any further work for the tribes , Bottomly filed suit in the District of Maine claiming he was entitled to a portion of any eventual settlement . On October 10 , Judge Gignoux dismissed Bottomly 's suit on the grounds of tribal sovereign immunity . When Bottomly 's appeal came before the First Circuit in 1979 , Maine filed an amicus brief arguing that the tribe was entitled to no such immunity . The First Circuit rejected this argument . A similar suit by Gellers ? who had since been disbarred and changed his name to Tuvia Ben Shmuel Yosef ? was thrown out in 1989 .

Tom Tureen ? who had worked as a summer law clerk for Gellers in the summer of 1967 ? joined the Indian Legal Services Unit of Pine Tree Legal Services ( funded by the Office of Economic Opportunity to provide legal services to indigent clients ) after his graduation in June 1969 . For the remainder of the year , Tureen assisted Passamaquoddy members in " petty disputes " such as divorce and bill collection . In early 1970 , Tureen began assisting the tribe in an effort to receive federal grants . In 1971 , Tureen co @-@ wrote an article with Francis J. O 'Toole , the editor @-@

in @-@ chief of the Maine Law Review , arguing that Maine 's tribes should fall under federal , not state , jurisdiction . O 'Toole and Tureen noted that : " There is no evidence that the treaty was 1794 was made in compliance with the Non @-@ Intercourse Act . "

The Passamaquoddy tribal council fired Gellers and asked Tureen to take over . Fearing that his federally funded legal aid employer could not withstand the political pressure that the suit would inevitably provoke , in 1971 , Tureen asked the Native American Rights Fund ( NARF ) to act as co @-@ counsel . Tureen himself would eventually move to NARF during the course of the litigation . Tureen attempted to persuade a large law firm to join the case pro bono . Among those who turned him down were Arthur Lazarus , Jr. of Frank , Harris , Shriver & Kampelman , who had litigated many claims in front of the Indian Claims Commission . Based on the acreage involved , Lazarus pointed out that the claim would net only \$ 300 @,@ 000 before the Commission , which would be less than the cost of litigation . When Tureen said , " Mr. Lazarus , this is not an Indian Claims Commission case , this is a Nonintercourse Act claim , " Lazarus shook his head and told Tureen he was dreaming . Tureen was able to recruit Barry Margolin , David Crosby , and Stuart Ross of Hogan & Hartson . The other members of the team were Robert Pelcyger of NARF and Robert Mittel of Pine Tree Legal Assistance .

= = = Prelude and petition = = =

Tureen was critical of Gellers ' strategy because it required suing in state court ( which he believed would be biased against any such claim ) , because it limited the claim to the 6 @,@ 000 acres ( 24 km<sup>2</sup> ) promised by the 1794 treaty , and because it would leave the tribes under state jurisdiction and ineligible for federal benefits . One theory that Tureen considered in order to overcome Maine 's sovereign immunity was to rely on United States v. Lee ( 1882 ) , which had permitted a land claim by the heirs of Robert E. Lee against the federal government . Tureen also feared that a federal court would find that it lacked subject @-@ matter jurisdiction for an ejectment action due to the well @-@ pleaded complaint rule , although the Supreme Court held otherwise in Oneida Indian Nation of New York v. County of Oneida ( 1974 ) ? decided three years after the Passamaquoddy complaint was filed . Tureen also worried about the delay @-@ related defenses of laches , adverse possession , and statute of limitations .

Tureen 's team discovered the six @-@ year federal statute of limitations for actions by the federal government for money damages related to Indian lands , 28 U.S.C. § 2415 ( b ) ? which treated prior claims as arising on the date of its passage , July 18 , 1966 ? a mere eighteen months before the it was due to expire on July 18 , 1972 . Although Tureen 's team had come up with alternate theories to overcome Maine 's sovereign immunity , the well @-@ pleaded complaint rule , and delay @-@ based defenses , it was " clearly established " that none of those weaknesses would apply to a Nonintercourse Act suit by the federal government .

Tureen recommended that the tribe argue that the entire treaty was void and ask the federal government to seek possession of the entire 1 @,@ 000 @,@ 000 acres ( 4 @,@ 000 km<sup>2</sup> ) on their behalf . The Passamaquoddy tribal council unanimously approved Tureen 's strategy . The Passamaquoddy also had grievances about the management of the tribal trust fund , tribal hunting and fishing rights , and the disfranchisement of tribal members from 1924 to 1967 . Later , in April , Tureen was approached by the Penobscot whose land claim concerned 5 @,@ 000 @,@ 000 acres ( 20 @,@ 000 km<sup>2</sup> ) .

On February 22 , 1972 , the governors of the Passamaquoddy tribes at Indian Township and Pleasant Point wrote a letter to Louis R. Bruce , the Commissioner of the Bureau of Indian Affairs , asking him to initiate such a lawsuit before the July 18th deadline . In early March , Bruce sent a letter to the Department of the Interior recommending that the tribes ' request be granted . No reply was forthcoming before April 1 . Tureen met with William Gershuny , the Associate Solicitor for Indian Affairs , who said more time was needed . On mid @-@ May , Tureen persuaded Governor Kenneth Curtis to issue a public statement saying that the Passamaquoddy deserved their date in court . Senators Margaret Chase Smith ( R @-@ ME ) and Edmund S. Muskie ( D @-@ ME ) and Representatives William Hathaway ( D @-@ ME ) and Peter Kyros ( D @-@ ME ) also issued

similar statements of support .

Gershuny advised Interior to take no action , noting that " no court had ever ordered the federal government to file a lawsuit on behalf of anyone , much less a multi @-@ million dollar lawsuit on behalf of a powerless and virtually penniless Indian tribe . " While Tureen and his colleagues agreed that a court would be hesitant to order such litigation due to the doctrine of prosecutorial discretion , they believed that , in light of the impending statute of limitations , a court might order the federal government to simply file the lawsuit as an exercise of the court 's common law power to preserve its jurisdiction .

= = District of Maine decision = =

The tribes ' complaint was filed in the United States District Court for the District of Maine on June 2 , 1972 . The tribes asked for a declaratory judgment and a preliminary injunction requiring the Interior Department to file suit for \$ 25 billion in damages and 12 @.@ 5 acres ( 51 @,@ 000 m2 ) of land . Tureen 's appearance before Judge Edward Thaxter Gignoux ? two weeks after filing the complaint , at the first of two hearings ? was his first ever appearance in court . Tureen relied on a provision of the Administrative Procedure Act , 5 U.S.C. § 706 ( 1 ) , which permits a review court to " compel agency action unlawfully withheld or unreasonably delayed . " Justice Department lawyer Dennis Wittman represented the Secretary . Judge Gignoux gave the Secretary one week to either voluntarily file the suit or report its reasons for not doing so to him .

At the second hearing , on June 23 , the Secretary took the position that the Nonintercourse Act did apply to the Maine ( and the original states ) , but that it only applied to federally recognized tribes . The Secretary also argued that filing a lawsuit would damage relations between the federal government and the state of Maine . When Judge Gignoux pointed out that Maine 's governor and entire Congressional delegation had called on the Secretary to bring suit , U.S. Attorney for Maine Peter Mills ( who was with Wittman at the counsel 's table ) declared that " he , too , wanted the government to bring suit " ? causing laughter in the courtroom . After a recess , Judge Gignoux issued a preliminary order requiring the Secretary to file the lawsuit .

The Secretary filed a suit ? United States v. Maine ? for \$ 150 @,@ 000 @,@ 000 in damages on behalf of the Passamaquoddy on July 1 , 1972 . The Penobscot Tribe voted to join the lawsuit late June , and the Secretary filed a second lawsuit , for the same amount , on behalf of the Penobscot on July 17 ? one day before the statute of limitations would have expired . A few hours before the statutory period was due to expire the next day , Congress extended it for 90 days ? the first of a series of such extensions . United States v. Maine was stayed , pending the resolution of Passamaquoddy v. Morton . Further , proceedings in the district court were put on hold until the First Circuit dismissed the Secretary 's interlocutory appeal from Judge Gignoux 's preliminary order in 1973 .

The tribe amended their complaint , abandoning their request for injunctive relief and instead asking only for a declaratory judgment . Judge Gignoux allowed the state of Maine to intervene .

Judge Gignoux 's ruling was issued on January 20 , 1975 , eighteen months after the oral arguments concluded . Judge Gignoux ruled in the tribe 's favor on the first two questions , and thus did not reach the third :

- whether the Nonintercourse Act applies to the Passamaquoddy Tribe ;
- whether the Act establishes a trust relationship between the United States and the Tribe ;
- whether the United States may deny plaintiffs ' request for litigation on the sole ground that there is no trust relationship

= = First Circuit opinion = =

The defendants appealed to the United States Court of Appeals for the First Circuit . On December 23 , 1973 , Judge Levin H. Campbell , for the unanimous panel , affirmed . Because the trust relationship was found , the First Circuit did not reach the third issue .

= = = Applicability of Nonintercourse Act = = =

The First Circuit held that the plain meaning of the Act applied to " any tribe , " whether federally recognized or not :

Congress is not prevented from legislating as to tribes generally ; and this appears to be what it has done in successive versions of the Nonintercourse Act . There is nothing in the Act to suggest that ? tribe ? is to be read to exclude a bona fide tribe not otherwise federally recognized . Nor , as the district court found , is there evidence of congressional intent or legislative history squaring with appellants ' interpretation . Rather we find an inclusive reading consonant with the policy and purpose of the Act .

The Circuit acknowledged that its holding had great relevance to the tribe 's ultimate land claim :

Before turning to the district court 's rulings , 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 .

However , the Circuit did not wish to foreclose the result of that potential future lawsuit :

[ W ] e 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 .

= = = Existence of trust relationship = = =

Campbell acknowledged that federal dealings with the Passamaquoddy had been sparse :

[ T ] he federal government 's dealings with the Tribe have been few . It has never , since 1789 , entered into a treaty with the Tribe , nor has Congress ever enacted any legislation mentioning the Tribe .

However , the Circuit held that the Nonintercourse Act alone was sufficient to create the trust relationship , even in the absence of federal recognition or a treaty :

[ T ] he Nonintercourse Act imposes upon the federal government a fiduciary 's role with respect to protection of the lands of a tribe covered by the Act seems to us beyond question , both from the history , wording and structure of the Act and from the cases cited above and in the district court 's opinion . The purpose of the Act has been held to acknowledge and guarantee the Indian tribes ' right of occupancy . . . and clearly there can be no meaningful guarantee without a corresponding federal duty to investigate and take such action as may be warranted in the circumstances .

Having found that the trust relationship existed , the Circuit rejected the remainder of Maine 's arguments on the grounds that " Congress alone has the right to determine when its guardianship shall cease . " However , the Circuit noted that " 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 . "

= = Settlement negotiations = =

= = = During the Ford Administration = = =

The defendants did not appeal to the U.S. Supreme Court , and the time for filing such an appeal lapsed on March 22 , 1976 . After Judge Gignoux 's decision became final , the Passamaquoddy and Penobscot gained federal recognition in 1976 , thus becoming eligible for \$ 5 million / year in housing , education , health care , and other social services from the Bureau of Indian Affairs . Further , the Interior Department 's Solicitors Office began looking into whether and how it should

proceed in United States v. Maine .

Afterward , Tom Tureen ( the tribes ' lawyer ) tried to negotiate a cash settlement . At first Maine 's governor , James B. Longley , Maine 's attorney general , Joseph Brennan , and the Great Northern Nekoosa Corporation , the largest landowner in the state , were unwilling to discuss a settlement . With no one to negotiate with , Tureen devoted his energy to assisting the Solicitors Office in researching the legal and historical basis of the claim .

In September 1976 , Boston law firm Ropes & Gray opined that the state 's \$ 27 million municipal bond issue could not go forward using property within the claim area as collateral . On September 29 , Governor Longley flew to Washington , and Maine 's delegation introduced legislation directing the federal courts not to hear the tribe 's claim ; Congress adjourned before the bills could be considered .

Bradley H. Patterson , Jr . , a member of the Ford administration , evaluated the tribe 's claim and concluded that " Maine 's tribes stood to gain a sizeable portion of that state " if the federal government went forward and litigated the dispute on behalf of the tribe , to which the court had declared the tribe was entitled . Patterson evaluated various other options , and recommended a land and cash settlement ; however , in December 1976 , Ford decided to pass this issue to the next administration : that of President Jimmy Carter .

= = = Interior memo = = =

On January 11 , 1977 , prior to Carter 's inauguration , the Interior Department sent the Justice Department a litigation report on the merits of the claim , recommending that ejectment be sought against the landowners in the 1 @, @ 250 @, @ 000 acres ( 5 @, @ 100 km<sup>2</sup> ) claim area populated by 350 @, @ 000 people . In response , Governor Longley called on the tribes to limit their claim to the value of the land as of 1796 , without interest ( the valuation method used in Indian Claims Commission cases ) , and called on Congress to pass legislation forcing the tribes to so limit their claim . Interior 's memo reached Peter Taft ? the grandson of President Taft , and the head of the Justice Department 's Land and Natural Resources Division ? who wrote to Judge Gignoux , declaring his intention to litigate test cases concerning 5 @, @ 000 @, @ 000 ? 8 @, @ 000 @, @ 000 acres ( 20 @, @ 000 ? 32 @, @ 000 km<sup>2</sup> ) of forests ( mostly owned by large forestry companies ) within the claim area on June 1 , unless a settlement was reached .

On March 1 , 1977 , the Maine delegation introduced bills to extinguish all aboriginal title in Maine without compensation . Senator James Abourezk ( D @-@ SD ) , the Chairman of the Senate 's Indian Affairs Committee , denounced the legislation as " one @-@ sided " and declined to hold hearings .

= = = First task force = = =

Soon after , Carter created a special White House task force to investigate the claims . Carter named retiring judge William B. Gunter , of the state Supreme Court of Georgia , to mediate the dispute . Archibald Cox ? a professor at Harvard and the former Watergate special prosecutor ? joined the tribes ' legal team pro bono . In response , Governor Longley hired Edward Bennett Williams , the named partner of Williams & Connolly , to represent the state . Three months of presentations to Judge Gunter ensued .

On July 15 , 1977 , in a four @-@ page memorandum to President Carter , Gunter announced his proposed solution : \$ 25 million from the federal treasury , 100 @, @ 000 acres ( 400 km<sup>2</sup> ) from the disputed area to be assembled by the state and conveyed to the federal government in trust ( 20 % of the state 's holdings within the claim area ) , and the option to purchase 400 @, @ 000 acres ( 1 @, @ 600 km<sup>2</sup> ) at fair market value as negotiated by the Interior Secretary . If the tribes rejected the settlement , Gunter proposed that Congress extinguish all aboriginal title to privately held lands ( more than 95 % of the claim area ) , and allow the tribes to litigate their claims only to 5 @, @ 000 acres ( 20 km<sup>2</sup> ) owned by the state of Maine .

= = = Second task force = = =

Both the tribes and the state rejected Gunter 's solution . In October 1977 , Carter appointed a new three @-@ member task force ( the " White House Work Group " ) , consisting of Eliot Cutler , a former legislative assistant to Senator Muskie and staffer at OMB , Leo M. Krulitz , the Interior Solicitor , and A. Stevens Clay , a partner at Judge Gunter 's law firm . Over a period of months , the task force facilitated negotiations over a settlement that would include portions of cash , land , and BIA services . A memorandum of understanding was signed in early February 1978 .

The memorandum called for 300 @,@ 000 acres ( 1 @,@ 200 km<sup>2</sup> ) , with the additional land coming from the paper and timber companies , and a \$ 25 million trust fund for the tribes . In return , the tribes would agree to the extinguishment of their aboriginal title as against all titleholders with 50 @,@ 000 acres ( 200 km<sup>2</sup> ) or less ; this would have cleared title to more than 9 @,@ 000 @,@ 000 acres ( 36 @,@ 000 km<sup>2</sup> ) , leaving only the tribe 's claims against the state and fourteen private landowners such as the Great Northern Nekoosa Paper Corporation , the International Paper Company , the Boise Cascade Corporation , the Georgia @-@ Pacific Corporation , the Diamond International Corporation , the Scott Paper Company , and the St. Regis Paper Company . Further , the tribes would agree to dismiss their claims against the state for \$ 1 @.@ 7 million in appropriations per year for 15 years and all claims against the private landowners for 300 @,@ 000 acres ( 1 @,@ 200 km<sup>2</sup> ) and an option to buy 200 @,@ 000 acres ( 810 km<sup>2</sup> ) more at fair market value . Congress was to appropriate \$ 1 @.@ 5 million to compensate the contributing private landowners and \$ 3 @.@ 5 million to assist the tribes in exercising the option .

= = = Final negotiations = = =

On April 26 , Governor Longley and Attorney General Brennan finally sat down with Tureen and the tribal negotiating committee . Negotiations broke down over the issue of state taxation as well as civil and criminal jurisdiction . In response , in June , Attorney General Griffin Bell threatened to commence the first phase of the litigation against the state for 350 @,@ 000 acres ( 1 @,@ 400 km<sup>2</sup> ) and \$ 300 million . In August , however , Bell informed Judge Gignoux that he would not proceed against the fourteen large private landowners . And , in September , Bell asked for a six @-@ month delay before prosecuting the claim against the state . Meanwhile , Representative William Cohen ( R @-@ ME ) was running against Senator William Hathaway ( D @-@ ME ) ? the tribe 's main ally in Congress ? in the 1978 election with TV advertisements criticizing Hathaway 's role in the land claim . After the public announcement of a new plan negotiated by Hathaway , Cohen defeated Hathaway in a landslide , while Brennan replaced Longley in the gubernatorial election .

Although the tribes made progress in implementing the Hathaway plans with the paper and timber companies , Krulitz ceased to support the proposal when the full extent of the required federal appropriations became clear . Krulitz was replaced with Eric Jankel ? assistant for intergovernmental affairs to Interior Secretary Cecil Andrus ? with whom Tureen had previously negotiated the settlement to the Narragansett land claim in Rhode Island . Tureen and Jankel ? along with Donald Perkins , a lawyer for the paper and timber companies ? negotiated a solution whereby \$ 30 million of the settlement funds would come from various programs in the federal budget . That settlement was presented to the Maine congressional delegation in August 1979 , but they refusal to endorse it until the Maine legislature had approved it . Governor Langley , in turn , refused to accept any deal that would limit the state 's jurisdiction over the tribes .

Several legal developments occurred on the eve of the settlement . First , the First Circuit held in *Bottomly v. Passamaquoddy Tribe* ( 1979 ) that the Passamaquoddy were entitled to tribal sovereign immunity ( see supra ) . Second , the Maine Supreme Judicial Court held in *State v. Dana* ( 1979 ) that the state had no jurisdiction to punish on @-@ reservation arson because of the federal Major Crimes Act . Third , in *Wilson v. Omaha Indian Tribe* ( 1979 ) , the U.S. Supreme Court held that the provision of the Nonintercourse Act placing the burden of proof in land claims on non @-@ Indians did not apply to U.S. state defendants ( but did apply to corporate defendants ) ; further , language

in Wilson threatened to confine the applicability of the Act to Indian country . The tribes persuaded the U.S. Solicitor General to file a motion asking the Court to delete that language from its opinion . The Court denied the motion . Maine unsuccessfully sought certiorari in Dana on the basis of Wilson .

#### = = = Maine Implementing Act = = =

Maine 's new attorney general , Richard S. Cohen ( no relation to the senator ) took over negotiations for the state ; soon , each side made new concessions . In March 1980 , draft legislation was approved by the tribes ' joint negotiating committee and ratified by an advisory referendum of the tribes ' membership . This vote also permitted the inclusion of the Houlton Band of Maliseet Indians in the settlement . The Maine state legislature passed the Maine Implementing Act ( MIA ) , a statute enabling the settlement , on April 3 , 1980 .

#### = = Maine Indian Claims Settlement Act = =

Several political changes preceded the passage of the settlement act . First , Senator Edmund Muskie ( D @-@ ME ) ? who previously seemed supportive of a settlement , but was gaining national prominence on the issue of fiscal responsibility prior to the 1980 Democratic primary ? gave up his seat as Chairman of the Senate Budget Committee to accept President Carter 's nomination for Secretary of State . Second , Governor Brennan 's choice to replace Muskie ( and thus inherit his predecessor 's committee assignments ) was George Mitchell ( D @-@ ME ) ? who had supported the land claim as U.S. Attorney and possessed legal gravitas due to his tenure as a District Judge . Another factor affecting the final push for the settlement was the fear that , if Ronald Reagan won the 1980 presidential election , he would veto any settlement favorable toward the tribes .

On June 12 , 1980 , Senators Mitchell and William Cohen ( R @-@ ME ) introduced the settlement act in the Senate . The House passed the Maine Indian Claims Settlement Act ( MICSA ) on September 22 , the Senate on September 23 , and President Carter signed it on October 10 . The appropriation bill funding the settlement was approved on December 12 .

MICSA extinguished all aboriginal title in Maine . In return , the Act allocated \$ 81 @.@ 5 million . \$ 27 million was placed in trust for the Passamaquoddy and Penobscot tribes , and the remaining \$ 55 million was allocated towards the tribes ' purchase of up to 300 @,@ 000 acres ( 1 @,@ 200 km<sup>2</sup> ) of land . The land acquisition funds were divided such : \$ 900 @,@ 000 for the Houlton Maliseet ; \$ 26 @.@ 8 million for the Passamaquoddy ; and \$ 26 @.@ 8 million for the Penobscot . Further , the Houlton Maliseet gained federal recognition ( which the Passamaquoddy and Penobscot had possessed since 1976 ) . Altogether , the Passamaquoddy , Penobscot , and Houlton tribes " received the equivalent of \$ 25 @,@ 000 and 275 acres per capita . "

#### = = Aftermath = =

As of August 1982 , the Passamaquoddy had acquired approximately 40 @,@ 000 acres ( 160 km<sup>2</sup> ) and the Penobscots approximately 150 @,@ 000 acres ( 610 km<sup>2</sup> ) . As of January 1987 , the Passamaquoddy had acquired 115 @,@ 000 acres ( 470 km<sup>2</sup> ) ; the Penobscot , 143 @,@ 685 acres ( 581 @.@ 47 km<sup>2</sup> ) ( not including the 4 @,@ 841 acres ( 19 @.@ 59 km<sup>2</sup> ) reservation ) ; and the Houlton had not yet acquired any . MICSA was subsequently amended to provide additional compensation to the Houlton and the Aroostook Band of Micmacs .

The settlement acts created " unique jurisdictional relationships between the State of Maine and the tribes . " MICSA provided that the " Passamaquoddy Tribe , the Penobscot Nation , and their members , and the land and natural resources owned by , or held in trust [ for them ] . . . shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act . . . ? MIA provided that the tribes and their lands " shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person . . . or natural resources therein . " Outside of Maine , the federal



government and tribal governments generally share concurrent civil and criminal jurisdiction in Indian country , and the state governments possess no jurisdiction unless granted by Congress .

The First Circuit has interpreted the settlement acts to limit the authority of the Maine tribes relative to other federally recognized tribes . Under the settlement acts , federal law governs only " internal tribal matters . " Lawyer Nicole Friederichs argues that the " narrow interpretation of those statutes makes it difficult for tribal governments to serve and protect their peoples , lands , and culture " and that the result is incompatible with the United Nations Declaration on the Rights of Indigenous Peoples .

= = As a precedent = =

The Passamaquoddy decision is binding only in the First Circuit , which includes the U.S. states of Maine , New Hampshire , Massachusetts , and Rhode Island , and the settlement act extinguished any further aboriginal title litigation in Maine . The Narragansett were an early beneficiary of the Passamaquoddy precedent . In an opinion striking all the defendants ' affirmative defenses against the Narragansett land claim , the Rhode Island district court noted that " [ our ] task has been greatly simplified by the First Circuit 's analysis of the [ Nonintercourse ] Act in " Passamaquoddy . Citing Passamaquoddy , that court held that neither Rhode Island 's unilateral attempt to disband the Narragansett tribe nor its provision of services to the tribe " could operate to terminate the trust relationship . " Instead , the court held that the Narragansett need only establish that they were a tribe " racially and culturally " to come within the protection of the Act . The Narragansett claim was settled by legislation in 1978 .

In Mashpee Tribe v. New Seabury Corp. ( 1979 ) , the First Circuit confronted a land claim by a non @-@ federally recognized tribe in Massachusetts . This time , because the tribe sought damages rather than a declaratory judgment , the question of tribal status went to a jury . And , the First Circuit affirmed the jury 's finding that the Mashpee had ceased to be a tribe . Mashpee cited Passamaquoddy for the principle that " courts will accord substantial weight to federal recognition of a tribe . " Although Passamaquoddy held that only Congress could terminate the trust relationship , Mashpee noted that " [ t ] he establishment of a trust relationship with tribes generally , however , did not guarantee the perpetual existence of any particular tribe . Plaintiff here must still prove that it was a tribe at the relevant times before it can claim the benefit of a trust relationship . " And , the First Circuit has held that only tribes , and not individual Indians , may bring Nonintercourse Act claims .

In Mashpee , the First Circuit rejected the Mashpee 's attempt to stay the litigation until the Bureau of Indian Affairs ( BIA ) could adjudicate the tribe 's petition for federal recognition . The court noted : " The Department has never formally passed on the tribal status of the Mashpees or , so far as the record shows , any other group whose status was disputed . Therefore , the Department does not yet have prescribed procedures and has not been called on to develop special expertise in distinguishing tribes from other groups of Indians . " Yet , in 1978 , the BIA had promulgated regulations establishing the criteria for federal recognition of tribes . In light of these new regulations , and their later use , the Second Circuit has held that the BIA retains " primary jurisdiction " over tribal recognition . In other words , Nonintercourse Act claims by unrecognized tribes must be stayed until the BIA is given a timely opportunity to adjudicate the tribe 's petition for recognition . If the BIA rejects a tribe 's petition , the tribe 's Nonintercourse Act claim may be barred by collateral estoppel .

= = Commentary = =

In 1979 , John M.R. Paterson and David Roseman ? who , as Deputy and Assistant Attorneys General for the State of Maine , respectively , were involved in the litigation ? published a law review article criticizing the First Circuit 's Passamaquoddy decision . Paterson and Roseman argued that the Nonintercourse Act 's restriction on land purchases from tribes was not meant to apply to land within the territory of a U.S. state . According to Paterson and Roseman , " [ n ] either the district nor

circuit courts in *Passamaquoddy v. Morton* had all the available legislative history , administrative rulings , legal analysis or case law necessary to make a fully informed decision . "

Kempers ' 1989 study of the settlement is based on 35 interviews conducted with members of the Passamaquoddy and Penobscot tribes ( 24 Penobscot members and 11 Passamaquoddy members ) conducted between September and December 1985 . According to Kempers , " [ t ] here is no clear consensus on how much the tribes gained or lost in the final negotiations . " But , in Kempers ' view , " [ i ] n the final analysis , however , the settlement negotiations appear to have compromised the very basis of the claim " by bringing the tribes under " much closer state supervision . " " In a very real way , the deterioration of culture that the tribes ' sought to reverse by going to court was aggravated by the litigation and the political negotiation of their claim . "