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Native American Sovereignty in Maine

by Stephen Brimley



The nationally unique, 1980 Maine Indian land claims settlement brought benefits to three of Maine's tribes—the Penobscot Nation, Passamaquoddy Tribe, and Houlton Band of Maliseets. However, serious problems remain with the economic, health, and educational status of tribal members. Moreover, another group, the Aroostook Band of Micmacs, was not included in the original settlement. Brimley's analysis of Native American sovereignty in Maine reviews the foundation of the land claims settlement, how it came to be enacted, its terms, and its impact on Maine's tribes. He notes how the recent failure of tribal efforts to build a casino in the southern part of the state has exacerbated already-strained state-tribal relations. Commentaries by Donna Loring of the Penobscot Nation, anthropologist Lisa Neuman, and anthropologist-attorney Lawrence Rosen provide additional, varying perspectives on Native American sovereignty in Maine and elsewhere in the United States. 🐾

INTRODUCTION

Although there are several other notable Indian land claims and settlements throughout the country, the 1980 Maine Indian land claim is unique both in its sheer size and complexity, and because it was very specific in defining the rights of the tribes that are party to the settlement. From a policy perspective, the Maine settlement represents a clear example of the direct impact that limiting tribal sovereignty can have on the health and well-being of Native American nations.¹

This article will frame the discussion about the impacts of the Maine Indian land claim settlement around the basic elements of the initial claim made by the Penobscot Indian Nation and Passamaquoddy Tribe (and later the Houlton Band of Maliseet Indians), as well as the ensuing settlement made between these tribes and the state. Since the settlement initially was perceived by some as a means for improving tribal-state relations, the article will end with some recommendations for reestablishing working relations that have stalled recently due to several contentious issues, such as the 2003 Indian gaming referendum and the differing interpretation of the settlement act itself.

NATIVE NATIONS AS SOVEREIGN NATIONS

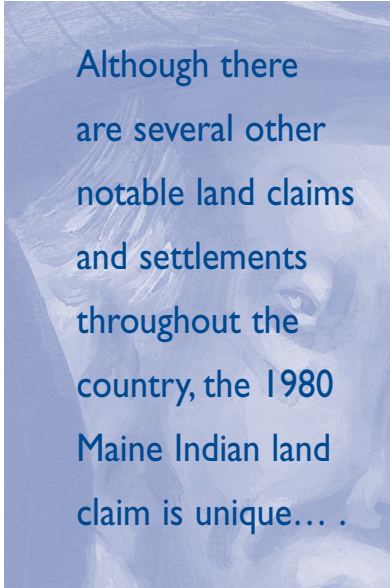
To fully understand the impact of the settlement, it is important to first place Native American sovereignty in Maine in the national context. Although their respective histories, languages and cultures make them unique, the 560 federally recognized tribes in the United States share some basic rights in common. All federally recognized tribes have the right to:

- Define their own form of government;
- Determine the conditions for membership;
- Administer justice and enforce laws;²
- Tax;
- Regulate domestic relations of their members; and,
- Regulate property use.

Though native concepts prior to European contact were somewhat different from those listed here, tribes formerly exercised many, if not all, of these powers. Since contact, the nature and scope of many of these rights have been defined in non-native terms and limited in practice.

Recognition of tribes by the U.S. federal government implicitly defines the government-to-government relationship that exists between the United States and the tribes by recognizing the tribes' inherent sovereign status. In 1831, Chief Justice Marshall described the tribal-federal relationship in the ruling of the U.S. Supreme Court case *Cherokee Nation v. Georgia* as resembling "that of a ward to his guardian," and further described tribes as "domestic dependent nations."³ As explained in an earlier issue of *Maine Policy Review* (Brimley 2004), this important, but contradictory, phrase implies that Native American tribes are sovereign nations that retain rights possessed prior to the formation of the United States. At the same time, the decision suggests that tribes are incapable of exerting those rights and, therefore, are dependent upon the U.S. federal government. The ruling more importantly defined a trust responsibility that the federal government has to native nations—to oversee and protect tribes and their resources from destructive actions or potential harm.

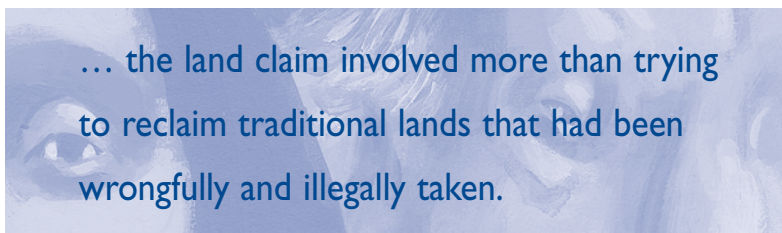
One year later, in 1832, Chief Justice Marshall wrote in the *Worcester v. Georgia* Supreme Court decision that tribes do not lose their sovereign powers by becoming subject to the power of the United States.⁴ This ruling also was important because it defined the nature of relations between tribes and states by ruling that state laws do not apply to tribes or on tribal lands unless Congress specifically grants those powers to the respective states. As a result, tribes have the unique status of nations within a state as well as nations within a nation, with the implication that the relationships



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between the three “sovereigns” are meant to be conducted on a government-to-government basis.

Despite recent threats to Native American sovereignty from Congress and the U.S. Supreme Court, particularly in the area of criminal jurisdiction, this current era is generally viewed as one of the greatest periods of Native American self-determination and sovereignty post “discovery.” Numerous congressional actions and court cases have inadvertently downplayed Marshall’s historical notion of “domestic dependent” by emphasizing the importance and rights of Native American self-rule and self-governance.⁵



... the land claim involved more than trying to reclaim traditional lands that had been wrongfully and illegally taken.

In a modern world, where political and economic systems are inextricably linked to one another, it is impossible to find a completely sovereign nation in practice. The comparatively limited level of tribal sovereignty in the United States today is due to tribes relinquishing certain rights through treaties or agreements, or because rights were taken from them without their consent through specific acts of Congress. Despite these limitations, the Supreme Court has continuously supported the notion that the sovereign rights of tribes remain fully intact unless those rights are specifically and clearly taken away from or given away by the tribes. As a result, each tribe has retained varying degrees of the sovereignty it possessed prior to European contact. Again, it is the *de facto* rights (rights in practice) of tribes that enable them to exert their sovereignty, which have been given away. These *de facto* rights often differ, sometimes dramatically, from one tribe to the next, even within the same state. For example, only three out of the four tribes in Maine are affected by the 1980 Maine Indian Claims Settlement Act.⁶ The Aroostook Band of Micmacs, which did not sign the initial settle-

ment act, has clearly defined sovereign rights that are different from those of the Houlton Band of Maliseet Indians, the Penobscot Indian Nation and the Passamaquoddy Tribe.⁷ This issue will be discussed further later in the article, as it is one of the most contentious issues defining relations between the Micmac Indians in Maine and the state today.

THE FOUNDATION OF THE MAINE INDIAN LAND CLAIM

In order to fully understand why the affected tribes would agree to have their *de facto* sovereignty limited, it is important first to understand the circumstances under which the claim was made and the dire living conditions that plagued the majority of native peoples within the state. In conjunction with that, it is also important to view the final settlement in its entirety to further highlight the dubious task that tribes had in weighing the short-term benefits that would come with the settlement against the long-term costs with which the tribes continue to cope today. It also is necessary to understand the national political environment under which the agreement was negotiated, as that had a direct influence on the behavior of the parties involved.

The foundation for the Maine Indian land claim was started in the late 18th century, when the U.S. Congress realized the potential for costly land disputes with native tribes as an increasing number of settlers moved farther west. In an effort to preempt any potential conflict, Congress passed the trade and intercourse act in 1790. The act placed the management of trade, diplomatic relations and land cessions involving Native Americans exclusively in the hands of the U.S. Congress. From 1790 on, regardless of whether land was transferred from a single Native American or an entire tribe, Congress was responsible for ratifying the transaction or the transaction would not be valid.

The land claim brought forward by the Penobscot Indian Nation and Passamaquoddy Tribe of Maine argued that the treaties signed between the respective tribes and the state of Massachusetts just after 1790 (the state of Maine did not exist until 1820) were never ratified by the U.S. Congress. According to the 1790

trade and intercourse act, the treaties were, therefore, null and void, and the tribes were owed—or at least due fair compensation for—the land lost due to the treaties (in addition to thousands of acres subsequently lost). The state argued vigorously that the original trade and intercourse act was intended only to apply to land transactions involving tribes west of the Mississippi and not to tribes in the east that had already been “settled.”⁸ The Court eventually ruled in favor of the tribes’ basic argument, paving the way for the largest and most complex land claim ever brought forth in the United States.⁹ In total, the land claim amounted to more than two-thirds of the present-day state of Maine.

Understanding the conditions on most tribal lands prior to the claim is perhaps one of the best ways to understand why the tribes took on such a task. In retrospect, it is difficult to think from a legal standpoint that two relatively small and poor tribes would take on such a monumental claim. That is, until you realize that the tribes had nothing, literally, to lose. Although it had no ties to the land claim, a report was published in 1974 by the Maine Advisory Committee to the United States Commission on Civil Rights, which provides one of the best insights into Maine at the time and what it was like for most native peoples in the state. Based on hearings held throughout the state during 1973, the committee found the living conditions of most Native Americans in the state to be dire at best. In the final report to the commission, the committee wrote:

Both State and Federal services have been withheld from a people whose need for assistance is tragically evident: unemployment among Maine Indians as of 1973 was reliably estimated at 65 percent; a 1971 survey of off-reservation housing for Indians found 45 percent substandard and poor; health studies of the Maine Indians reveal chronic and severe problems of alcoholism, malnutrition, and disease; bicultural education, which is central to the preservation of tribal values and traditions, is largely non-existent; the ratio of Indian children in foster care homes is 16

times that of the general population, yet only 4 of the 136 Indian children under foster care in Maine have been placed in Indian homes—homes which in some cases were built by the State but are now considered physically inadequate to meet state licensing standards; and while Indians are held responsible for law enforcement on reservations, they are unable to set safe speed limits on State highways crossing their lands.

The advisory committee went on to conclude:

...that these facts are not isolated quirks of circumstance: they are the result of long-standing assumptions, policies, and practices of discrimination against Maine’s Native American population.

It becomes readily apparent upon reading the final report that the land claim involved more than trying to reclaim traditional tribal lands that had been wrongfully and illegally taken. The land claim was, in fact, more about reclaiming a culture and a way of life that had existed for thousands of years.

THE MAINE INDIAN LAND CLAIM¹⁰

The modern genesis of the land claim was begun in 1964, when a non-native trespassed onto Passamaquoddy land that he wrongfully claimed as his (he claimed to have won the deed to the land in question in a poker game from the previous owner). Investigations by the tribe and its lawyer into the disputed property revealed that land totaling more than 6,000 of the original 23,000 acres granted to the Passamaquoddy in their treaty with Massachusetts in 1794 had been lost or wrongfully taken, including the piece in question. After four years of research the original claim was filed in a Boston court. However, it was not until Tom Tureen, who had been a student intern working on the original case, took the lead in the case that the claim took on the magnitude that the settlement is characterized with today. Tureen began by investigating whether the 1790 act was applicable to

the tribes in Maine. Exhaustive research supported the belief that the act did in fact apply. Tureen now had established the basis for the argument that led to the tribes laying claim to two-thirds of the state.

Tureen's next challenge was to find a way to get the case heard in court. Historically, tribes had not fared well in state court so he decided that the case would best be fought in federal court. By law, a private party cannot sue a state. Getting the case heard in federal court would therefore require the federal government to file suit against the state of Maine on behalf of the tribes—something that to that point had rarely been done, especially for a non-federally recognized tribe. The legal problems for the tribes, however, had only begun. Because of a recently implemented congressional statute of limitation on Indian land claims, Tureen and the tribes had only six months to get their case into court. Tureen began in earnest by lobbying Governor Kenneth Curtis for help; Curtis had been seen by the tribes as sympathetic to the cause. Governor Curtis did make a public statement on behalf of the tribes, saying that a case of this merit should not end on a statute of limitation. With the deadline for filing rapidly approaching, Tureen continued his lobbying efforts by contacting the Maine congressional delegation, including Senators Edmund Muskie and Margaret Chase Smith, and Representatives Peter Kyros and William Hathaway. Seeing the merits of the case for themselves prompted each member to write letters of support on behalf of Tureen and the tribes to the Department of Justice, encouraging them to file suit against the state of Maine. The Justice Department eventually responded by filing a \$150 million dollar suit against the state—one day before the statute was to expire.

In 1974, the tribes received another major boost to their case. The U.S. Supreme Court reversed two lower court decisions in a New York Indian land claim case by ruling that the 1790 trade and intercourse act *did* apply not only to tribes west of the Mississippi but also within the original 13 colonies. Consequently, the federal judge appointed to the Maine case had no choice but to apply the ruling here. The celebrations by Tureen and the tribes were short-lived, however, as Governor Curtis (who had already served his two terms

in office) was replaced in 1975 by the then relatively unknown Independent James B. Longley. Longley quickly made his mark on the case by adamantly refusing to address the merits of the Indian land claim. It was not long, however, before the economic and political situation forced Longley to get involved. He, in turn, would become a strong opponent to the national model of tribes as nation within a state, arguing that a new model for tribal-state relations had to be developed not only for Maine but for the country altogether.

Lobbying and legal wrangling, complete with a surprising turnaround by the Maine congressional delegation, who had unsuccessfully proposed legislation to extinguish the claim, continued in earnest for another two years before the tribes got another surprising and unexpected boost in 1976. When the Boston law firm of Ropes and Gray, which provided legal advice to the issuers of New England municipal bonds, discovered that the tribes would have civil jurisdiction over disputed lands if they won the claim, the firm was forced to announce that clean bond ratings could not be given to any municipality in the disputed territory. In addition, tax liens were no longer enforceable. When Millinocket, Ellsworth, Calais and Hampden, among several other municipalities, were not able to secure loans or to continue municipal construction projects, Governor Longley and the rest of the state and federal government were forced to take notice.

In an effort to quell the political and economic turmoil that was quickly spiraling out of control, and thanks in part to a strong showing in Maine in the recent election, President Carter became involved in the Maine land claim case in 1977. President Carter asked a long-time friend and a former Georgia Superior Court judge to investigate the merits of the claim. After four months of research, Judge Gunter recommended to President Carter that the claim should not be pursued due to the potential impact on the economy of Maine. Despite the recommendation, Carter felt obligated to help the tribes. Carter appointed a task force to work with the respective parties to develop a settlement. The three-person task force met eight times with an 11-person Passamaquoddy-Penobscot negoti-

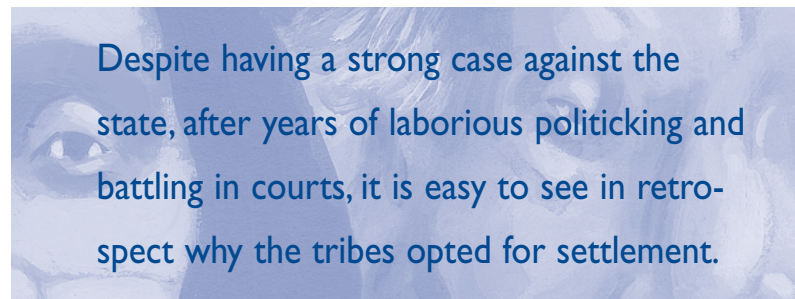
ating committee, which included the tribal governors from the three reservations (Penobscot and the two Passamaquoddy reservations), and eight other elected members from the tribes. The state of Maine chose to boycott the meetings. In February 1978, the tribes and the federal government signed a memorandum of agreement that would pave the way for a final settlement that would eventually include the state.

Two more years of legal wrangling and court cases, lobbying, political turnover and congressional hearings ensued. Both the state and the tribes were feeling the strain of the multi-year negotiations and were eager to settle the claim once and for all. By 1980, it was clear that Carter was likely to be replaced by Ronald Reagan, who had already announced that he would not sign any Maine settlement. The tribes were once again under a time constraint to get the settlement done in time for President Carter to sign. In the spring of 1980 Senator Muskie was made Secretary of State by President Carter. George Mitchell was, in turn, appointed by Governor Brennan (who had been attorney general under Longley) to replace Muskie. This was fortuitous and timely for the tribes, as Mitchell was well-liked and had served as counsel of record in the claim while he served as U.S. Attorney for the District of Maine. He had also served as a federal judge in Maine district court (Brodeur 1985; Rolde 2004: 117-18). In realizing the growing bipartisan support developing in Maine to find a settlement, the other senator from Maine reversed his long-standing opinions about extinguishing the settlement, and with the help of Mitchell presented the previously drafted Maine settlement act for congressional hearings. With little fanfare the settlement act was sent to the House of Representatives on September 19, 1980. Three days later it was approved by the Senate and passed into law.

THE SETTLEMENT¹¹

Despite having a strong case against the state, after years of laborious politicking and battling in courts, it is easy to see in retrospect why the tribes opted for a settlement. The tribes never publicly acknowledged that they had a strong case, as they were

more aware than anyone that things could have been dramatically different. Historically, after all, things had not always worked in the tribes' favor. The final settlement was a mixture of hard work and a fair amount of luck for the tribes. As is the nature of most settlements, however, no party can declare an outright victory.



The major components of the negotiated settlement can be summarized as follows:

Further Claims

The settlement signed in 1980 put an end to any further land claims by any individual Native American, tribe, nation or band in Maine. It legally ratified all past Native American land transactions as if they were legal, and removed any obligations of the state with regard to any previous land transactions.

Recognition

Federal recognition was granted to the Penobscot, the Passamaquoddy and the Houlton Band of Maliseet Indians. Federal recognition provided each tribe access to and eligibility for much needed federally funded Indian programs and services in areas such as housing, health and environmental management. The Aroostook Band of Micmacs, which was state-recognized, did not obtain federal recognition until 1991.

Land

In addition to their existing tribal lands, the Penobscot and Passamaquoddy were each provided with \$26.8 million to purchase land. The first 150,000 acres of land respectively purchased by each tribe was

eligible to be held in trust by the federal government. Any additional land above and beyond the 150,000 acres would then be considered fee-land and would have the same status as any other privately held land in the state. For any land purchased beyond the 150,000 acres, the tribes could go through the process that other tribes went through to place land in trust. The Houlton Band of Maliseet Indians was provided with \$900,000 for the purchase of additional lands, subject to approval from the Maine legislature.

Trust Fund

In addition to money for land purchases, both the Penobscot and Passamaquoddy tribes were provided with trust funds that totaled \$12.5 million each. The funds would be held in trust by the U.S. federal government and would be invested in consultation with the tribes. The interest made from an additional \$1 million provided to each tribe was specifically earmarked for tribal members over 60 years of age.

Municipal Status

One of the most contested aspects of the settlement act centers on the municipal status granted to the Penobscot and Passamaquoddy. The tribes argue they would never relinquish their sovereign status and that the municipal status was meant to be in addition to their sovereignty—granting them access to municipal

funding sources for the development and repair of infrastructure on the reservation, for example. The state argues that the municipal status replaces their sovereign status with the status equivalent to that of a municipality. The settlement act clearly states, except as otherwise provided, that the Penobscot and Passamaquoddy, within their respective territories, “shall have, exercise, and enjoy the rights, privileges, powers and immunities of a municipality (including the power to enact ordinances and collect taxes); Be subject to all the duties, obligations, liabilities, and limitations of a municipality; and be subject to the laws of the State” (Scully 1995). Internal tribal matters, such as forming a government and elections, were strictly left to the respective tribes. Without further clarification the tribes are relegated to having federal recognition with clearly defined limitations in exerting their sovereign rights, making them subject to some state oversight.

Jurisdiction

The Penobscot and Passamaquoddy are subject to the same federal laws that cover other federally recognized tribes unless otherwise mentioned in the settlement act. The settlement also states that no federal laws passed after 1980 apply to the Penobscot and Passamaquoddy, unless these tribes are clearly mentioned in the law. Other important areas of jurisdiction that are specifically defined in the settlement include:

- The application of the Indian Child Welfare Act of 1978—a federal law to protect Indian families from having their children placed in non-Indian homes during extenuating circumstances;
- The ability of the tribes to form their own courts to oversee minor civil and criminal crimes committed by Native Americans. This mirrors the federal Major Crimes Act that defines the types of crimes that other federally recognized tribes have jurisdiction over;
- Sovereign immunity that is equal to that granted to other municipalities—not to other federally recognized tribes;

TABLE 1: **Summary of Settlement Funds Transferred to Tribes**

Trust funds: Passamaquoddy tribes	\$ 12,500,000
Trust funds: Passamaquoddy elderly	\$ 1,000,000
Trust funds: Penobscot Indian Nation	\$ 12,500,000
Trust funds: Penobscot elderly	\$ 1,000,000
Land acquisition: Passamaquoddy tribes	\$ 26,800,000
Land acquisition: Penobscot Indian Nation	\$ 26,800,000
Land acquisition: Houlton Band of Maliseet Indians	\$ 900,000
Total	\$81,500,000

Source: Scully 1995

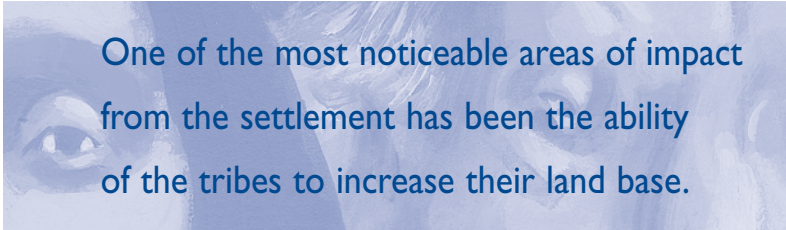
- The right of the tribes to develop rules for hunting and trapping on their lands and for fishing, provided the water is completely within their territory and is less than 10 acres; and,
- The two tribes must make payments to the state in lieu of taxes. Federally recognized tribes, as sovereign nations, are not subject to the same taxation as non-natives. This component of the settlement enables the state to still receive revenue that would otherwise be lost but does not allow the state to take native lands under its tax laws.

Tribal-State Commission

With the advent of federal funding for many of the native programs that were previously covered by the state, the Maine Department of Indian Affairs was closed after the passage of the settlement. It was widely recognized that in lieu of the state department of Indian affairs there had to be a new formal and institutionalized means for communication between the state and the Passamaquoddy and Penobscot. The Maine Indian Tribal-State Commission was formed with four distinct responsibilities (Scully 1995):

- “...to review and make reports concerning the effectiveness of the settlement act and the social, economic, and legal relationship between the state and the Passamaquoddy Tribe and the Penobscot Indian Nation”;
- The commission can recommend the addition of lands, other than those already described in the settlement, to Passamaquoddy tribal or Penobscot territory (upon local approval);
- The commission can act to “promulgate fishing rules on certain ponds, rivers, and streams adjacent to or within Passamaquoddy or Penobscot Indian territory”; and,
- The commission is required to review fish and wildlife management practices on non-native

lands in order to make recommendations on how to further protect fish and wildlife within native territory.



One of the most noticeable areas of impact from the settlement has been the ability of the tribes to increase their land base.

THE IMPACT OF THE SETTLEMENT

In 1974, the Advisory Committee to the United States Commission on Civil Rights recognized and acknowledged the potential effect that federal recognition would have on bringing much-needed funding and services to native peoples in Maine. Although the funding and access to federal services has often been inadequate, the tribes of Maine have benefited from funding and program support from the Bureau of Indian Affairs, Indian Health Services, Department of Justice, Administration of Native Americans, Fish and Wildlife Service, Environmental Protection Agency and Housing and Urban Development to name a few. Program support from federal agencies has enabled the tribes to establish and maintain their own health, police, environmental and education departments.

One of the most noticeable areas of impact from the settlement has been the ability of the tribes to increase their land base. As previously mentioned, the Penobscot and Passamaquoddy were each given \$26.8 million to purchase lands, and the Houlton Band of Maliseet Indians was given \$900,000. Although their land holding will never match their traditional territories, each of the settlement tribes has managed to purchase some substantial amounts of land within Maine. The Houlton Band, for example, has purchased and placed into trust more than 800 acres in and around Houlton, Maine. In a state where the price of land on the whole is rapidly increasing, and where

large tracts of land are rarely available, both of the two remaining tribes have struggled to obtain the 150,000 acres set aside for trust by the settlement. They have managed, however, to add several thousand acres to their land holdings across the state. The Passamaquoddy tribe is one of the state’s largest landholders, with more than 100,000 acres.

TABLE 2: Maine Population Comparison

	Maine Overall	Maine Native Americans
Total Population	1,274,923	7,098
Education (age 25 and over)		
Less than high school	19.6%	24.0%
H.S. diploma or GED	36.2%	32.9%
Some college	19.0%	23.8%
Associate’s degree	7.4%	7.2%
Bachelor’s or higher	22.9%	12.1%
Income and Poverty		
Per capita income	\$19,533	\$12,700
Median household income	\$37,240	\$25,470
Median family income	\$45,179	\$28,475
Families below poverty	11.5%	26.0%
Population below poverty	10.9%	31.5%
Employment (age 16 and over)		
In labor force	65.3%	60.1%
Unemployed	4.7%	12.4%
Life Expectancy	77	63

Sources: Figures on life expectancy are from Kuehnert (2000). The other figures are from Census 2000. Total population is from the full census (dataset SF-1) and the remainder from the sample (dataset SF-3); both datasets are available online at http://factfinder.census.gov/servlet/DatasetMainPageServlet?_program=DEC&_lang=en

Note: Census data are based on the responses of those who identified themselves as just “American Indian or Alaska Native,” a population of 7,098 in 2000. In 2000, for the first time, people could self-report as belonging to more than one “race”/ethnic group. However, census breakdowns are not available for those who identified themselves to be “American Indian or Alaska Native” and some other group (an additional population of 6,058).

Although none of the tribes in Maine has had overwhelming long-term success with economic development ventures, there have been some notable short-term exceptions. Perhaps the most successful economic initiative ventured into by a Maine tribe was the purchase of the Dragon Cement plant in Thomaston, Maine by the Passamaquoddy Tribe. With very little competition and with a construction boom throughout the region (most notably the “Big Dig” in Boston), the tribe managed to make a \$60 million profit when they sold the plant in 1988. The tribe kept the most important asset of the Dragon Cement venture—a patent for a sulfur-dioxide-emissions scrubber that is so efficient and cost-effective that it may single-handedly reduce smokestack-industry contributions to acid rain. The U.S. Department of Energy gave \$5 million to the tribe to develop the scrubber while they owned Dragon Cement to help the plant meet newer and stricter emission standards. Now, with the patent, the tribe stands to make millions of dollars by selling the scrubber worldwide. Other notable successes include a blueberry farm owned by the Passamaquoddy, and Olamon Industries, a factory on the Penobscot’s Indian Island Reservation, which produced high-quality tape cassettes (White 1990). Unfortunately, long-term economic success on Native American reservations in Maine has been the exception rather than the rule.

Despite the benefits of federal recognition and their relative success with securing federal funding and services, purchases of land and economic development, tribes in Maine continue to face proportionally higher rates of unemployment, greater rates of cancer, obesity, alcoholism and diabetes, and tribal members continue to have lower rates of education attainment and adequate housing than the overall population in Maine (see Table 2 for some selected population comparisons).

Although it is difficult to develop accurate statistics with a small sample population such as this, examining health status offers a good representation of the overall current state of Native Americans in Maine. With little to no support from the state, a major hurdle for Maine’s tribes is that the amount of federal funding available for native programs, including health, is divided between all the federally recognized tribes according to the number of members enrolled in each tribe. The tribes in Maine

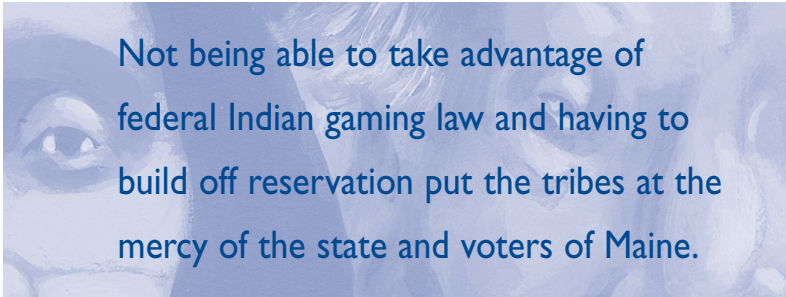
have very few members compared to the larger tribes of the West, so the amount of funding received often does not meet their needs. Past surveys of tribal health directors around the state consistently have listed the top three health problems among tribal members as diabetes and its complications, addictions (tobacco, alcohol and other substances) and obesity (Kuehnert 2000). Although many of the health problems faced by tribes in Maine are treatable and preventable, as previously mentioned, tribes are almost entirely reliant on federal funding that often is erratic in nature and consistently inadequate—particularly when tribes are also forced to confront an increasing number of more difficult to treat socio-economic health problems such as suicide, automobile accidents and cancer. These facts are particularly disturbing since the Native American population is proportionally younger than the general Maine population. Therefore, these same life-threatening problems affect not just individual tribal members but the viable existence of the entire tribe.

The Casino Effort

Due to the often inadequate amount of federal funding for health programs, as well as for programs such as law enforcement and environmental management, tribes are forced to find economic development strategies to fill the gaps and to meet the needs of their members. Across the country, a common and relatively successful strategy has been the development of tribally run casinos. The casino industry has expanded across the nation in the last decade, with more than 600 casinos in 26 different states, most of which are tribally run. In 2003 the Passamaquoddy and Penobscot attempted to add to those numbers by proposing a tribally run casino in southern Maine.

As previously mentioned, the settlement act clearly states that federal Indian law does not apply to the tribes in Maine after 1980 unless the federal law specifically and clearly mentions Maine. Specific and targeted concessions are rare in federal laws. As a result, tribes in Maine have not been able to benefit from the many protections, services and economic advantages that other federally recognized tribes have realized in the past 24 years. The Indian Gaming Regulatory Act (IGRA) of 1988 is one such federal law.¹² The act

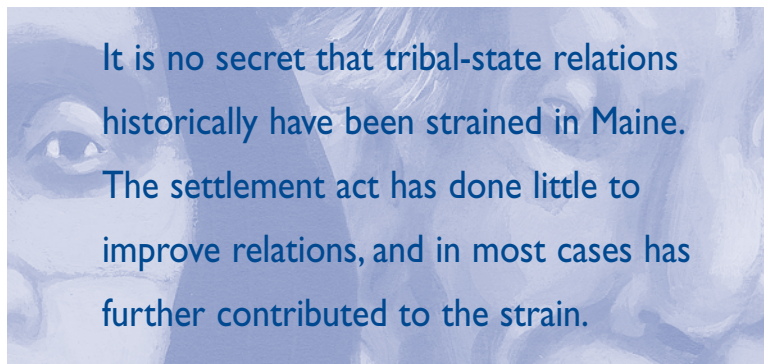
specifically articulates that Indian tribes, as sovereign nations, possess the right to establish and operate gaming facilities to promote tribal economic development and self-sufficiency, but the Penobscot and Passamaquoddy are not able to take advantage of IGRA because it was passed after 1980. In addition, no reservation land in Maine is located in areas that could strategically take advantage of larger urban populations that are needed to make gambling facilities economically viable. As a result, the Maine tribes were forced to look in the southern part of the state to take advantage of the larger population centers in Maine and even further south toward Massachusetts. Not being able to take advantage of a federal Indian gaming law and having to build off reservation put the tribes at the mercy of the state and the voters of Maine. The issue became one of the most contentious debates in Maine's history.



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In November 2003, the gaming referendum was soundly beaten by nearly a two-to-one margin. Numerous reasons for the defeat have been voiced publicly, including claims by the tribes of widespread racism. Although there is a long history of well-documented, institutionalized racism towards Native Americans in Maine, as described in the 1974 advisory committee report, it is more likely that the tribes of Maine were just plainly beaten by a well-organized opposition that was able to convince the majority of Mainers that a casino was a bad idea. However, the claims of racism linger, because another referendum question on the same ballot, proposing non-tribally owned slot machine gambling at racetracks (so-called "racinos"), passed despite offering fewer jobs and less

financial benefit to the state and surrounding communities. (At the time of the referendum, a racino had been locally approved only by the citizens of Bangor, while Scarborough's citizens had already vigorously defeated such efforts. The racino referendum, in essence, only affected Bangor.) Nonetheless, the tribes felt that the defeat of the casino referendum was yet another unfair rejection of an opportunity for them to prosper.



It is no secret that tribal-state relations historically have been strained in Maine. The settlement act has done little to improve relations, and in most cases has further contributed to the strain.

The defeat of the tribal gaming referendum and the contentious debates that went along with the campaign were the final straw that broke the state-tribal relation's back. The November 2003 meeting of the Maine Indian Tribal-State Commission began with a statement by the Passamaquoddy representatives that, in light of the negative nature of the campaign and the resounding defeat of the referendum, the Passamaquoddy Tribe decided to leave the commission and to reexamine their relationship with the state. As a sign of support, the Penobscot representatives also removed themselves. The commission is currently at a standstill. There are ongoing discussions about the future and nature of tribal-state relations in Maine, but the near future is far from clear.

THE AROOSTOOK BAND OF MICMACS

Since the Aroostook Band of Micmacs did not have the appropriate historical documentation showing that their historical territory included parts of Maine, they were not included in the 1980 settlement. They

were, however, greatly affected by it. With the federal recognition of the three other tribes and the subsequent provision of federal aid, the state no longer saw the need for the Maine Department of Indian Affairs. With the closing of the department, and without federal recognition, the Micmac were left without any means of formal communication with the state and without any provision for receiving the aid or services to which they had become accustomed.

Although the 1980 settlement act clearly states that it covers all Indian peoples, tribes, nations, etc. in the state, it is unrealistic and incomprehensible to think that the Penobscot, Passamaquoddy and Maliseet could speak on behalf of all native peoples, tribes, or bands in Maine. It would be inconceivable to ask a sovereign nation such as England to sign a treaty for all the sovereign states of Europe. Regardless, the state of Maine continues to argue to this day that the 1980 settlement directly affects the Aroostook Band of Micmacs.

By 1986, the Aroostook Band had compiled the necessary documentation for them to pursue federal recognition. In response, the state enacted an act to "Implement the Aroostook Band of Micmacs Settlement Act."¹³ The act recognized the Band's aboriginal claim to land in Maine, but similar to the 1980 act, tried to limit the Band's sovereign authority in response. In order to make the act law, the state required the Band to agree in writing to the act. The Band never provided that statement.

In 1991, the U.S. Congress sought to rectify the inequities caused by the 1980 settlement. On November 26, 1991 Congress passed the Aroostook Band of Micmacs Settlement Act (PL 102-171), which granted the Band \$900,000 compensation for aboriginal land lost and 5,000 acres. Although the 1991 act also ratified the state's 1989 Micmac implementing act, a thorough review of both the legislative history and the language within the 1991 law clearly show that Congress had no intention of abrogating the sovereign authority of the Aroostook Micmac.¹⁴ The best indication of this is that the 1980 settlement only tangentially refers to the Aroostook Band, while the 1991 law clearly defines the relationship between the Band and the state of Maine.¹⁵ If Congress had fully intended to apply the same limitations to the Band's sovereignty, as

they had done with the other tribes in Maine in 1980, they could have easily amended the 1980 settlement act. Instead, they chose to make their actions clear by passing a new law that established a new relationship between a tribe in Maine and the state. By all indications, the Micmac in Maine are a fully recognized sovereign group.

DOES LIMITED TRIBAL SOVEREIGNTY REALLY MATTER?

An abundance of research conducted over the last 20 years shows clearly and undeniably that when native nations exert their sovereignty and take matters into their hands to create local solutions to local problems, they not only succeed but prosper. Institutions such as the Harvard Project on American Indian Economic Development have not found a single example of sustained economic development on a Native American reservation where the models for development have been imposed or developed by outside agencies, or where native nations have not exerted their inherent and *de facto* sovereignty.¹⁶ Sovereignty, above all else, determines successful economic development on reservations.

The benefits of economic development on reservations also have been clearly shown to expand well beyond the boundaries of reservations to benefit surrounding communities.¹⁷ With well-documented research findings, policymakers, practitioners and politicians should be revisiting the Maine settlement to determine what, if any, impact the act has had on tribes in pursuing economic development and on the entire state of Maine.


Due to their sovereign status, federally recognized tribes are not subject to the same tax structures as non-reservation lands, thus making them ideal for locating businesses. As the majority of tribal lands are located in the poorest counties of Maine, any economic development on reservations would greatly benefit the surrounding communities, which are in dire need of jobs. Depending on the type and size of business, it is unlikely the tribes would be able to supply all the needed and necessary human capital for any business venture located on reservation lands. Towns in Maine

where tribal lands are located potentially could be faced with the same problem with which Philadelphia, Mississippi is now faced—traffic jams caused by thousands of non-natives commuting to and from the Mississippi Band of Choctaw reservation, where they work in more than a dozen factories and industries, producing everything from food containers for fast food restaurants around the country to airplane parts for the U.S. military.

WAYS FORWARD TO IMPROVING TRIBAL-STATE RELATIONS

It is no secret that tribal-state relations historically have been strained in Maine. The settlement act has done little to improve relations, and in most cases has further contributed to the strain. Maine is not unique in this matter, as tribal-state relations have become increasingly strained around the country as Native American tribes grow more politically and economically savvy and active. The difference, however, is that many of the other states confronted with conflict have been willing and able to overcome the challenges and to dramatically improve relations. For example, on May 22, 1996, the governor of Oregon signed *Executive Order EO-96-30, State of New Mexico State/Tribal Government-To-Government Relations Policy*. The order recognizes the unique legal status of Native American tribes and, as a result, requires state agencies to work with tribes on a government-to-government basis. Implementation and monitoring of the policy is conducted by tribal-state workgroups called “Clusters” (Quigley 2000). In 1998, the governor of New Mexico signed *Executive Order 98-10, State of New Mexico State/Tribal Government Relations Policy*. Similar to EO-96-30 in Oregon, 98-10 recognizes the sovereign status of tribes in the state and confirms the state’s intent in cooperatively working with tribes.¹⁸ The recognition of the unique legal status of Native Americans in New Mexico has been institutionalized with the creation of that state’s highly acclaimed Indian Affairs Department.¹⁹ In Montana, the Legislative Committee on Indian Affairs created a handbook in 1995 for all state legislators that outlines seven basic but important principles of state-tribal relations (Reed and Zelio 1995).

In light of the above examples and many others around the country, the following are offered as potential ways forward to improving tribal-state relations in Maine. (Many of these recommendations, and examples of each, may be found in Reed and Zelio 1995.)

- **Review of the Settlement and Implementation Acts:** A complete and comprehensive review of the settlement must be completed to determine the overall economic, political and cultural impact not only on the tribes but on communities surrounding reservations and on the state as a whole. This would allow policymakers, practitioners, politicians and tribal leaders to identify ways, if needed, of revising the act to improve the conditions of all those affected.
- **Executive Education:** Both state and tribal leadership (including program-level leaders) would benefit greatly from educational opportunities that exposed them to the workings of each other's government agencies and to how the respective governments function in general. These opportunities would increase not only knowledge but also respect that eventually could foster improved relations.
- **Increased Communication:** At present, the majority of communications between tribes in Maine and the state are done in response to crisis situations, such as following the defeat of the 2003 gaming referendum. It is clear that a proactive rather than a reactive liaison would be a huge benefit. Communication between the parties would greatly increase with a formal and permanent body such as Department of Indian Affairs. States such as New Mexico have greatly benefited from such a department. However, the department would have to be vested with the proper authority to make recommendations and changes at all the necessary and appropriate levels of government.
- **Institutionalize Government-to-Government Relations:** Although the Penobscot and Passamaquoddy have representatives at the state legislature, they are non-voting members, which does not always give them the audience they rightly deserve. In addition, all tribes in Maine should be equally represented in Augusta to recognize the sovereign status of each. The formation of a Department Indian Affairs would also greatly contribute to this effort.
- **Find Common Ground:** Not surprisingly, tribes and states share many of the same day-to-day challenges of building healthy and functioning governments. Perhaps the greatest struggle shared by both the tribes and the state is in finding new sources of revenue to cover the increasing costs of providing for their citizens. These shared challenges have been catalysts for numerous tribal-state agreements around the country in the areas of revenue sharing, natural resource management, healthcare and law enforcement. There are ample opportunities for this type of collaboration in Maine, as shown by recent discussion around the development of a pharmaceutical warehouse and distribution center on the Penobscot Indian reservation. This proposed opportunity would create much-needed employment and revenue opportunities for the tribe and make cheaper drugs available for all residents of Maine. 



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ENDNOTES

1. "American Indian," "Native American," "nation," and "tribe" are all used interchangeably throughout the article. My personal experience has shown me that it is acceptable to use them in such a manner. "Nation," although admittedly not a native concept, is used here to imply the sovereign state of Native American nations and how intergovernmental relations should be conducted in a nation-to-nation, government-to-government manner.
2. In 1953, Congress passed Public Law 83-280, which gave five states criminal and partial civil jurisdiction over tribal members. In 1958, the state of Alaska was added. At the same time, states were given the option to assume jurisdictional powers over tribes. Only 10 took advantage of the opportunity. Since 1968, several states and tribes have signed land settlement claims which, in some cases, have conferred jurisdictional powers over tribes to states. For a further explanation of Public Law 83-280, and for a list of states that have taken jurisdiction over tribes, see Brimley (2004).
3. See 30 U.S. (5 Pet.) 1.
4. See 31 U.S. (6 Pet.) 515.
5. See, for example, the Indian Gaming Regulatory Act (25 USCA §§2701-2721), and the Tribal Self-Governance Act of 1994 (PL 103-413).
6. The use of "settlement act" throughout the article also implies the implementation act, which was passed by the U.S. Congress to ratify the settlement act.
7. Although there are two Passamaquoddy Indian reservations in Maine, which are distinct from one another in many ways, both will be collectively referred to as the Passamaquoddy Tribe throughout the article.
8. It is ironic to note that the original act in 1790 has been attributed to then Secretary of War Henry Knox, a Mainer with a substantial amount of landholdings in both the Penobscot Indian Nation and Passamaquoddy Tribe's traditional territories. See Rolde (2004) for more details on Henry Knox.
9. The same argument about the applicability of the intercourse act of 1790 has successfully been used by several other tribes in their land claim cases such as in Connecticut, Rhode Island, Massachusetts, New York and Florida.

Please turn the page for more references.

10. It would be nearly impossible to recreate the entire historical background of the settlement in this paper. This section, therefore, borrows from two much more detailed and thorough explanations of the case (Brodeur 1985; Rolde 2004).
11. The majority of this discussion was indirectly taken from a paper explaining the Maine Indian Claims Settlement Act by Diana Scully, former Executive Director of the Maine Indian Tribal-State Commission (1995).
12. See 25 USCA §§2701-2721.
13. See 30 M.S.R.A. Section 7201 et seq.
14. Such a review can be found on the Aroostook Band of Micmacs Web site: (www.micmacnsn.gov/html/legal_issues.html).
15. See, in particular, sections 2(b) (4), 6(b), and section 11 in the 1991 law.
16. The Harvard Project on American Indian Economic Development is housed at the John F. Kennedy School of Government at Harvard University. Their research findings can be found at: (www.ksg.harvard.edu/hpaied).
17. See the Harvard Project Web site for both casino and non-gaming examples. Specific examples include the Mississippi Band of Choctaw Indians in Philadelphia, Mississippi and the White Mountain Apache tribe and surrounding northern Arizona towns and communities.
18. For more information on tribal-state relations, see *Native Americans in the New Millennium* on the Harvard Project on American Indian Economic Development Web site: (www.harvard.ksg.edu/hpaied).
19. The Indian Affairs Department accomplishes its mission by: (1) recognizing and respecting the sovereign status of tribal governments; (2) enhancing and improving communication and outreach; (3) assisting in developing policies that may result in positive resolution to issues affecting Native American Indian people; (4) utilizing intergovernmental and intra-agency coordination and collaboration; and (5) institutionalizing an implementation process that provides a framework for how the state and tribal governments will exercise agreed upon policy and principles. More information on the New Mexico Indian Affairs Office can be found on the Web at: (www.state.nm.us/oia).

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