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## Indian Lands: Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975)

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## SPECIAL RECENT DEVELOPMENT

### **INDIAN LANDS: *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975)\***

#### *Progress of Settlement Negotiations*

President Carter, in an effort to reach an out-of-court settlement of these claims, appointed a former Georgia judge, William B. Gunter, to study the issues and make a recommendation for a possible solution acceptable to all. The following is the full text of Judge Gunter's original proposal.

RECOMMENDATION TO: PRESIDENT CARTER

FROM: WILLIAM B. GUNTER

RE: PASSAMAQUODDY AND PENOBSCOT TRIBAL COURT—MAINE

#### A. MY ASSIGNMENT

My assignment was to examine the problem created by these claims for approximately ninety days and then make a recommendation to you as to what action, if any, you should take in an attempt to bring about a resolution of the problem.

I have not acted as a mediator in this matter; my role has been more that of a judge; I have read the law and examined the facts; I have met and conferred with affected parties and their representatives; I have attempted to be objective, realizing that no one person can ever attain total objectivity; I have tried to come forth with a recommendation that, in my own mind, is just and practical; and I now proceed with a brief statement of the problem and my recommendations.

#### B. THE PROBLEM

The pending court actions based on these tribal claims have the unfortunate effect of causing economic stagnation within the claims area. They create a cloud on the validity of real property titles; and the result is a slow-down or cessation of economic activity because property cannot be sold, mortgages cannot be acquired, title insurance becomes unavailable, and bond issues are placed in jeopardy. Were it not for this adverse economic result, these cases could take their normal course through the courts, and

there would be no reason or necessity for you to take any action with regard to this matter. However, I have concluded that this problem cannot await judicial determination, and it is proper and necessary for you to recommend some action to the Congress that will eliminate the adverse economic consequences that have developed to date and that will increase with intensity in the near future.

I have concluded that the Federal Government is primarily responsible for the creation of this problem. Prior to 1975 the Federal Government did not acknowledge any responsibility for these two tribes. Interior and Justice took the position that these two tribes were not entitled to federal recognition but were "State Indians." In 1975 two federal court decisions, one at the trial level and another at the appellate level, declared that the Constitution adopted in 1789 and a Congressional enactment of 1790 created a trust relationship between the Federal Government and these two tribes. In short, the Federal Government is the guardian, and the two tribes are its wards. After the appellate decision, Interior and Justice concluded that the tribal claims would be prosecuted against private property owners owning property within the claims area and against the State of Maine for the properties owned by it within the claims area. Therefore, we have the unusual situation of the Federal Government being, in my mind, primarily responsible for the creation of the problem, and it is now placed in a position by court decisions of having to compound the problem by court actions that seek to divest private property owners and Maine of title to land that has heretofore been considered valid title. The prosecution of these cases by the Federal Government brings about the adverse economic consequences already mentioned.

I have concluded that the states of Maine and Massachusetts, out of which Maine was created in 1820, bear some responsibility for the creation of this problem. The states procured the land in the claims area, whether legally or illegally I do not now decide, and sold much of it. The State of Maine now owns, I am informed, somewhere between 400,000 and 500,000 acres of land in the claims area.

I have concluded that the two tribes do not bear any responsibility for the creation of the problem, and I have concluded that private property owners owning property within the claims area do not bear any responsibility for the creation of the problem.

The problem is complex and does not lend itself to a simple solution because it is old and large. The factual situation giving

birth to the problem goes back to colonial times and the early years of our life as a nation under the Constitution. Adding to the complexity is the fact that the problem is social, economic, political and legal.

Enough about the problem—I move on to my recommended solution.

### C. THE SOLUTION

I have given consideration to the legal merits and demerits of these pending claims. However, my recommendation is not based entirely on my personal assessment in that area. History, economics, social science, justness and practicality are additional elements that have had some weight in the formulation of my recommendation.

My recommendation to you is that you recommend to the Congress that it resolve the problem as follows:

(1) Appropriate 25 million dollars for the use and benefit of the two tribes, this appropriated amount to be administered by Interior. One half of this amount shall be appropriated in each of the next two fiscal years.

(2) Require the State of Maine to put together and convey to the United States, as trustee for the two tribes, a tract of land consisting of 100,000 acres within the claims area. As stated before, the State reportedly has in its public ownership in the claims area in excess of 400,000 acres.

(3) Assure the two tribes that normal Bureau of Indian Affairs benefits will be accorded to them by the United States in the future.

(4) Request the State of Maine to continue to appropriate in the future on an annual basis state benefits for the tribes at the equivalent level of the average annual appropriation over the current and preceding four years.

(5) Require the Secretary of Interior to use his best efforts to acquire long-term options on an additional 400,000 acres of land in the claims area. These options would be exercised at the election of the tribes, the option price paid would be fair market value per acre, and tribal funds would be paid for the exercise of each option.

(6) Upon receiving the consent of the State of Maine that it will accomplish what is set forth in numbered paragraphs (2) and (4) above, the Congress should then, upon obtaining tribal consent to accept the benefits herein prescribed, by statutory enactment extinguish all aboriginal title, if any, to lands in Maine and also ex-

tinguish all other claims that these two tribes may now have against any party arising out of an alleged violation of the Indian Nonintercourse Act of 1790 as amended.

(7) If tribal consent cannot be obtained to what is herein proposed, then the Congress should immediately extinguish all aboriginal title, if any, to all lands within the claims area except that held in the public ownership by the State of Maine. The tribes' cases could then proceed through the courts to a conclusion against the state-owned land. If the tribes win their cases, they recover nothing. However in the meantime, the adverse economic consequences will have been eliminated and Interior and Justice will have been relieved from pursuing causes of action against private property owners to divest them of title to land that has heretofore been considered valid title.

(8) If the consent of the State of Maine cannot be obtained for what is herein proposed, then the Congress should appropriate 25 million dollars for the use and benefit of the tribes (see paragraph numbered (1)), should then immediately extinguish all aboriginal title, if any, and all claims arising under an alleged violation of the 1790 Act as amended, to all lands within the claims area except those lands within the public ownership of the State. The tribes' cases could then proceed through the courts against the state-owned land. If the tribes win their cases they recover the land; but if they lose their cases they recover nothing against the State of Maine. However, in the meantime, they will have received 25 million dollars from the United States for their consent to eliminate economic stagnation in the claims area and their consent to relieve Interior and Justice from pursuing causes of action against private property owners to divest them of land titles that have heretofore been considered valid.

It is my hope that the Congress can resolve this problem through the implementation of numbered paragraphs (1) through (6) above. Paragraphs (7) and (8) are mere alternatives to be utilized in the event consensual agreement cannot be obtained.

Respectfully submitted,  
William B. Gunter

\* A reprint.— *Ed.*

TELEGRAM\*

ORIGINAL TO PRESIDENT JIMMY CARTER

July 26, 1977

Dear Mr. President: We the undersigned urge you not to adopt the approach to the Maine Indian Land Dispute recommended by your special representative. While we applaud Judge Gunter's understanding that the Indian Claims warrant an out of court settlement, and agree that the Federal Government has a duty to provide relief for the small defendants in these actions, we deplore his failure to consider the rights of the Indians and particularly his suggestion that the United States wipe out 90 percent of their claims to land without any compensation if they do not accept his offer.

The Passamaquaddy and Penobscot people have won every round in their long battle to obtain justice within the American Legal System. While they have consistently indicated their willingness to discuss a negotiated settlement, they have never asked that the matter be removed from normal legal channels. Your representative has neither attempted to mediate between the parties nor negotiate the Federal Government's contribution toward a settlement. The figures in his proposed settlement were "pulled out of a hat," according to all accounts of his 7/15/77 press conference. The size of the proposed settlement amply demonstrates that one whose primary responsibility is to guard the treasury cannot hope to fulfill the function of an independent judiciary. It is unfortunate enough that Judge Gunter did not serve as a mediator. But to say that the Indians must accept his proposal or face extinguishment of their claims by the political branches is to make a mockery of this nation's legal and moral trust obligations to Indians and to tell the World that the United States is unwilling to abide by the dictates of its own legally constituted courts.

At the heart of the recommendation is an assumption that this nation, because it is powerful, has the right to take land or claims to land from Indian nations because they are small. This attitude, all too prevalent at various times during our history, has been rejected by every humane and thoughtful American President since George Washington. To return to it now can only reopen the wounds of a dishonorable past, bring shame to this country and produce fundamental disrespect for the rule of law not only among Indians but among all constitutionally minded people.

We urge you to resist the temptation to follow what must seem an expedient solution, and instead, immediately appoint a mediator to seek a truly voluntary settlement of this dispute.— *Signed*

\*A reprint.— *Ed.*

The following individuals signed this telegram: Hank Adams, National Director, Survival of American Indians Assn. (Tacoma, Wash.); Rev. John Adams, Director, Department of Law, Justice and Community Relations, Board of Church and Society, United Methodist Church (Washington, D.C.); Richard Arens, Professor of Law, Temple University, and Member, Board of Directors, International League for Human Rights (Philadelphia, Pa.); Peggy Barta, Assistant Director, Office of Governmental Relations, Board of Baptist Churches, USA (Washington, D.C.); Julia Belafonte (New York, N.Y.); Robert L. Bennett, Former Commissioner, Bureau of Indian Affairs (Albuquerque, N.M.); Severin Beliveau, Democratic National Committeeman Augusta, Me.) Marjorie Boehm, President, U.S. Section, Women's International League for Peace & Freedom (San Jose, Cal.); John Borbridge, President, Sealaska Corp., and Commissioner, American Indian Policy Review Commission (Juneau, Alas.); Carl O. Bradford, Attorney (Freeport, Me.); Francis Brown, Trustee, University of Maine (Calais, Me.); Louis R. Bruce, Former Commissioner, Bureau of Indian Affairs, and Commissioner, American Indian Policy Review Commission (Washington, D.C.); Edgar S. and Gean Cahn, Co-Deans, Antioch Law School (Washington, D.C.); Hugh Calkins, Past President, Maine Civil Liberties Union (Portland, Me.); Marilyn Clement, Executive Director, Center for Constitutional Rights (New York, N.Y.); David Cohen, President, Common Cause (Washington, D.C.); Audrey Rowe Colom, President, National Women's Political Caucus (Washington, D.C.); Eugene Crawford, Secretary, Indian Service, Lutheran Council in the U.S.A. (Chicago, Ill.); Ada Deer, Office of Native American Programs, University of Wisconsin, and Commissioner, American Indian Policy Review Commission (Oregon, Wis.); Joe Delacruz, President, National Tribal Chairmen's Assn. (Taholah, Wash.); P.S. Deloria, Director, American Indian Law Center, University of New Mexico School of Law (Albuquerque, N.M.); Vine Deloria, Jr., Attorney and Author (Golden, Colo.); The Venerable Vine Deloria, Sr., (Pierre, S.D.); Adolph Deal, Chairman, American Indian Studies Department, Pembroke State University, and Commissioner, American Indian Policy Review Commission (Pembroke, N.C.); Cathleen H. Douglas,

Washington Counsel, Hisqually Indian Tribe (Washington, D.C.); Wayne Ducheneaux, Chairman, National Indian Litigation Committee, and Chairman, Cheyenne River Sioux Tribe (Eagle Butte, S.D.); Charlie Edwardson, Director, Arctic Slope Regional Corporation (Barrow, Alas.); Pablo Eisenberg, Executive Director, Center for Community Change (Washington, D.C.); John Foster, President, Washington County Bar Assn. (Eastport, Me.); Billy Frank, Chairman, Northwest Indian Fish Commission (Olympia, Wash.); Dick Gregory (Plymouth, Mass.); Fred Harris, Professor, Political Science, University of New Mexico (Albuquerque, N.M.); Rev. Raymond Helmick, S.J., American Director, Center of Concern, London, England (Boston, Mass.); Theodore Hetzel, General Secretary, Indian Rights Assn. (Philadelphia, Pa.); Alvin Josephy, Editor, American Heritage (Greenwich, Conn.); Kirke Kickingbird, Director, Institute for the Development of Indian Law (Washington, D.C.); Susan Kominsky, Trustee, University of Maine (Bangor, Me.); Louis Larose, Chairman, Winnebago Tribe (Winnebago, Neb.); Rodney B. Lewis, Chairman, American Bar Assn. Committee on the Problems of the American Indian (Sacaton, Ariz.); Jim Lorenz, President, Council for Public Interest Law (Sacramento, Cal.); Oren Lyons, Onondaga Nation (Nedrow, N.Y.); Peter MacDonald, Chairman, Navajo Nation (Window Rock, Ariz.); Jane Pierson McMichael, Executive Director, National Women's Political Caucus (Washington, D.C.); D'Arcy McNickle, Director, Center for the History of the American Indian Newberry Library, Chicago (Albuquerque, N.M.); Byron Mallott, President, Alaska Federation of Natives (Juneau, Alas.); Mexican-American Legal Defense & Educational Fund (Washington, D.C.); Bette Crouse Mele, President, Indian Rights Assn. (Philadelphia, Pa.); Maya Miller, Women's Lobby (Washington, D.C.); Bob Monks, Attorney (Portland, Me.); Art Naparstek, Director, University of Southern California's Washington Public Affairs Center (Washington, D.C.); Philleo Nash, Former Commissioner, Bureau of Indian Affairs (Wisconsin Rapids, Wis.); Aryeh Neier, Executive Director, American Civil Liberties Union (New York, N.Y.); Hal Pachios, Chairman, State Democratic Party (Portland, Me.); Alan R. Parker, Chief Counsel, Senate Select Committee on Indian Affairs (Washington, D.C.); Purcell Powless, Chairman, Oneida Indian National Business Council (Oneida, Wis.); Don Reeves, Legislative Secretary, Friends Committee on National Legislation (Washington, D.C.); Rudy Ryser, Executive Director, Small Tribes of Western Washington (Sumner, Wash.); Samuel Stanley,



Research Anthropologist, Smithsonian Institute (Washington, D.C.); Gloria Steinhem, MS Magazine (New York, N.Y.); Ernest L. Stevens, Staff Director, Senate Select Committee on Indian Affairs (Washington, D.C.); Morris Thompson, Former Commissioner, Bureau of Indian Affairs (Juneau, Alas.); Mel Tonasket, President, National Congress of American Indians (Omak, Wash.).