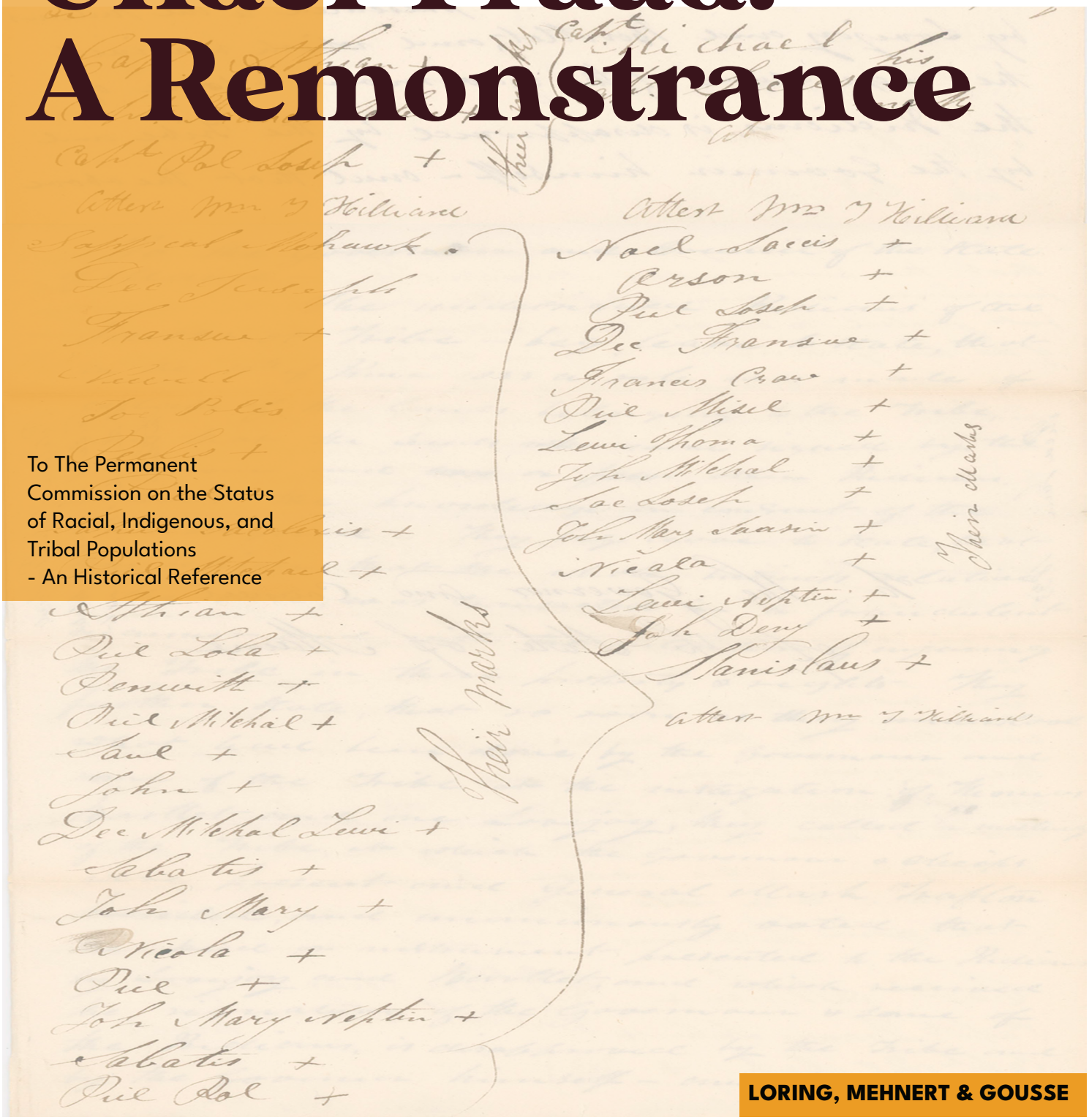
One Nation, Under Fraud: A Remonstrance

To The Permanent Commission on the Status of Racial, Indigenous, and Tribal Populations
- An Historical Reference



LORING, MEHNERT & GOUSSE

Permanent Commission
RACIAL, INDIGENOUS & TRIBAL POPULATIONS

One Nation, Under Fraud: A Remonstrance

Hon. Donna M. Loring
Hon. Eric M. Mehnert
Joseph G.E. Gousse, Esq.

Published by the Permanent Commission on the Status of Racial, Indigenous, and Tribal Populations
March 2022

A version of this document will be forthcoming in Volume 75.2 of the Maine Law Review in 2023

Table of Contents

Part IV: The Indian Papers: Maine's Own 'Nixon Tapes'

Part V: Coda

Appendix

Publisher's Note

The Permanent Commission on the Status of Racial, Indigenous, and Tribal Populations (hereinafter referred to as "Permanent Commission") was established by the Maine State Legislature in 2019 as a non-partisan, independent entity with a mission to improve the status and outcomes for historically disadvantaged racial, indigenous, and tribal populations in the state. To help achieve this, the Permanent Commission conducts public hearings; advises and consults with all three branches of state government; and sponsors legislation. It is comprised of 17 members who represent the broad racial and socio-economic diversity of the state, including a member of each of the four federally recognized tribal nations.

It is through this lens - along with a commitment to fully realizing the human and civil rights of all Mainers, and in honoring the inherent rights, privileges, powers, duties, and immunities of the Wabanaki tribal nations - that the Permanent Commission publishes this document, *One Nation Under Fraud: A Remonstrance*, at the request of the authors. A version of it will be forthcoming in Volume 75.2 of the Maine Law Review in 2023.

The original Remonstrance of the Penobscot Nation contained in these pages was considered by the Maine House of Representatives during the 23rd Legislature. At that time, a vote was taken on the question of printing 300 copies for the full consideration of the legislature, but the motion failed by one vote, and it was not printed.[1]

Now, 188 years later, the Permanent Commission will print exactly 300 copies of this document to distribute to the executive branch, judiciary branch, all members of the 130th Legislature, constitutional officers, and the governmental offices of the Wabanaki Nations. Electronic copies will also be made available by request of the Permanent Commission at **permanentcommission.ritp@maine.gov**.

The opportunity to help educate Mainers on the historical truth of our state's relationship with the Wabanaki Confederacy and the generational impact of this history on all Mainers is one that the Permanent Commission holds in high regard. We are forever grateful to the Hon. Donna Loring, Hon. Eric Mehnert, and Joseph Gousse, Esq. for their historical knowledge, brilliant writing skills, and their unwavering courage to challenge the origins story of statehood and Maine's sense of exceptionalism. This strengthens our belief in the sovereignty of the Wabanaki, the People of the Dawn, the first peoples of this territory to whom this land belongs since time immemorial.

In Solidarity,

Ambassador Maulian Dana, Penobscot Nation
Co-Chair

Representative Rachel Talbot Ross
Co-Chair

1 Report of legislative proceedings, *Kennebec Journal (Augusta, ME)*, February 7, 1834.

ONE NATION, UNDER FRAUD: A REMONSTRANCE

Hon. Donna M. Loring[*]
Hon. Eric M. Mehnert [†]
Joseph G.E. Gousse, Esq. [‡]

---

[*] Hon. Donna M. Loring is an elder and former council member of the Penobscot Indian Nation. She served as the Penobscot Nation's Representative to the Maine State Legislature for 12 years during which time her many accomplishments included authoring and sponsoring of LD 291—"An Act to Require Teaching Maine Native American History and Culture in Maine's Schools"— passed in 2001, and HP 1681—"Joint Resolution in the Support of the United Nations Declarations on the Rights of Indigenous Peoples"—passed in 2008 and marking Maine as the first state in the nation to legislatively support the U.N. Declaration. Ms. Loring held the position of Senior Advisor on Women's Veterans Issues to Governor Angus King and Senior Advisor on Tribal Affairs to Governor Janet Mills. In the past, Ms. Loring—who is a Vietnam War veteran—has served as Chief of Police for the Penobscot Nation and Director of Bowdoin College Security. She is also a published author, playwright, and radio host of the monthly "Wabanaki Windows" program that airs on WERU-FM in Blue Hill and WMPG Portland, Maine. In 2021, Ms. Loring was presented with the *Courage is Contagious Award* by the University of Maine School of Law in recognition of her leadership in bringing awareness to issues of women's rights and equity.

[†] Hon. Eric M. Mehnert is the Chief Judge of the Penobscot Nation Tribal Court—a position he has held since 2008. Judge Mehnert presides over the Nation's Criminal and Civil Courts as well as the Nation's Healing to Wellness Court. He is a member of the bars of the State of Maine, the State of Massachusetts, and has been admitted to practice before the Federal District Courts of Maine and Massachusetts, the First Circuit U.S. Court of Appeals, and the United States Supreme Court. Prior to his appointment to the Penobscot Nation Tribal Court, Judge Mehnert served as the Chief of Enforcement of the Commonwealth of Massachusetts' Commission against Discrimination. In his private capacity, Mr. Mehnert is a principal partner and attorney for the Bangor-based firm Hawkes & Mehnert, LLP.

[‡] Joseph G.E. Gousse, Esq., is an attorney and legal research and writing specialist. In addition to his work in private practice, Mr. Gousse has served as Professor of Legal Research & Writing and Professor of Business Law in the Maine Community College System. Prior to practicing law, he worked as a Legislative Researcher for the Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission, a legal writing teaching assistant at the University of Maine School of Law, and was an Executive Board editor of the *Maine Law Review*—in which he published a critical analysis of the Law Court's interpretation of the Maine Indian Claims Settlement Act of 1980.

The authors are grateful for the following individuals who generously contributed their time and expertise to critique this work:

Stephanie Cotsirilos, Esq.
Nicole Friederichs, Esq.—Practitioner in Residence, Human Rights and Indigenous Peoples Clinic, Suffolk University Law School
Bunny McBride, M.A.
Harald E. L. Prins, Ph.D.
Janice Thompson, RN, Ph.D., Professor Emerita, University of Southern Maine

Disclaimer: Unless otherwise attributed, the views and opinions represented in this work are personal and belong solely to the co-authors. Any such views and opinions do not represent any other people, institutions, organizations, governmental bodies, or other groups with whom the co-authors are or may be affiliated.

PART I: PREFACE

"To the living we owe respect, but to the dead we owe only the truth."

—Voltaire (1694-1778 A.D.)

"All truths are easy to understand once they are discovered; the point is to discover them."

—Galileo Galilei (1564-1642 A.D.)

I. AUTHOR'S NOTE

Maine became a state on March 15th, 1820.

Five months after Maine became a state it would sign a treaty with the Penobscot Nation on August 17th, 1820, in Bangor. The Treaty was nearly the same treaty that was signed between the Penobscot Nation and the Commonwealth of Massachusetts in 1818, with the exception that the 1820 Treaty did not provide for the transfer of two acres on the Brewer waterfront to the Penobscot Tribe. My ancestors viewed the signing of the Treaty in 1820 as a last effort to survive as a tribe and keep their sovereignty in the face of overwhelming odds. Signing meant that they would secure a small bit of land consisting of four townships, the islands in the Penobscot River, as well as their home island—known today as Indian Island. The Treaty would preserve future generations.

Maine saw the signing of the Treaty as the creation of a document not of sovereignty, but of surrender. The ink was not even dry on the Treaty before Maine asserted guardianship over the tribes and treated the Wabanaki people as wards of the State. The State considered the tribes as "paupers" and "imbeciles" and proceeded to institutionalize the control it exercised over the tribes through the appointment of "Indian Agents"—government officers purposed as the gatekeepers for all land transactions with the lumber barons, and the treasurers for all funds dispersed to the tribes for their everyday needs. It was in this manner that the Agents and State were able to control the tribes and keep them in a state of perpetual poverty—a population of manufactured "paupers." Today—two hundred years after the signing of the Treaty—no tribal community in Maine has infrastructure comparable to that of the closest towns, nor do all tribal communities even have access to clean water.

Over the years, it has been my observation that at the highest levels of both tribal and State government, the tribes have never been able to become economically self-sustaining. We grew up in poverty, and the only "way out" was to leave the community to find work or to join the military. The question that has long lingered in my mind is: "Why is it that Wabanaki tribes in this State have never gained any sort of economic foothold?" Growing up in this environment of

pauperism and excoriation took a mental toll on all of us. Tribal leaders made every effort to move ahead and improve the lives of their people but always ran up against roadblocks. We all knew there was a reason we could not move forward in a progressive way—we just couldn't prove our suspicions. The tribes fought for their sovereign rights in the court systems and in the Legislature, all to no avail.

It was in this atmosphere of two hundred years of utter frustration and despair that I finally found what I have begun to call the "Indian Papers" buried in special transcripts of the 1942 Legislative Research Committee. *There it was*. Finally, the facts were in plain view, and in the words of the Committee members and State officials. The pieces of this puzzle finally fell into place. It was a picture of deceit, greed, theft, neglect, isolation, and genocide. It was the answer to my question.

The takeaway for me in all of this is that the Wabanaki people are proud, honorable, and brave survivors of attempted genocide. In the spirit of my ancestors who, in 1833, solemnly affixed their marks to a remonstrance protesting the "Theft of the Four Townships" and the illegal dispossession of my people, this Remonstrance will show it to be a miracle that we are still here.

And that there is restitution to be made.

—Donna Loring, November 2021

II. Introduction

"It does not require many words to speak the truth."
—Hinmatóowyalahtq̓it (or, "Chief Joseph") (1840-1904 A.D.)

Maine's is a history of fraud.

Modern empowerment of the once-subaltern narratives of colonized peoples has given rise to common acceptance of an undeniable truth: the history of America is one of brutality, fraud, and conquest. That the United States of America has committed innumerable crimes against the Native Americans upon whose land we live will come as no surprise to anyone with access to a history book or the internet. But what of the sleepy, seemingly homogenous State of Maine? The depth of the depravity with which Maine—often heralded as a "progressive" and sometimes even "milquetoast" state where little happens, and little offends—has persecuted the Wabanaki people is largely expunged from public consciousness. It is the aim of the authors to contribute to a counter-

cultural narrative in which critical analysis of the historico-legal and economic discourse of Maine's abuse of the Wabanaki people can be accurately portrayed and in good faith discussed.

The purpose of this Remonstrance is not to point out the obvious. Nor have the authors set out to retrace the broadly familiar history of American genocide of indigenous cultures. To do so would contribute little new intellectual capital to the prevailing discourse. Although we would be remiss not to acknowledge that modern cultural narratives and understanding have been attained at great personal cost to the indigenous people of this continent, the reality is that the "story" of cultural genocide perpetuated by white European and early American colonists is, broadly speaking, well-defined.

Excepting the work of tribal scholars and historians, much of the taxonomy of the power relations between Maine and the Wabanaki tribes has been anecdotal. Maine's history of predation upon and mistreatment of the tribes has remained poorly-defined. Indeed, while some oral and written histories of Maine's indigenous people have survived to challenge prevailing Euromerican narratives, modern discourse still lacks a cohesive history tracing the origins, development, and maintenance of the politico-economic power structures weaponized by the State of Maine against the Wabanaki people. Despite the oral and written traditions of a resilient and advanced culture, the preservation remains largely anecdotal.

It is the authors' purpose to move beyond the anecdotal and instead engage in a critical analysis that traces the ontogeny of control exerted by the State of Maine over the Wabanaki tribes. Grounding our historical analysis in a recently rediscovered and remarkable written protest by the Penobscot Tribe in 1833 ("the Remonstrance") this Comment—which the authors have styled as a "modern remonstrance"—seeks to amplify Wabanaki voices beyond the Remonstrance of 1833 and give these ancestors a modern platform for their unresolved grievances.

By engaging in a historico-legal forensic analysis, this Remonstrance endeavors to excavate the hidden historical narrative of the calculated politico-legal regime that has for two-hundred years driven the State's coercive policies. In so doing, this Remonstrance examines the economic imperatives of the early American and Maine governments and the outgrowth of policies aimed at generating wealth from the stolen resources of Wabanaki tribal lands and through in-depth analysis of "Indian Papers" that led to the commissioning of *the Proctor Report* of 1942. These "Indian Papers"—which came to light during the writing of this article—are undeniable primary evidence memorializing the strategy the State undertook to effect a regime of isolation, control, and elimination of the tribes. The authors believe that the "Indian Papers" and other documents analyzed

herein has been heretofore neglected as competent evidence of Maine's conscious orchestration of coercive policies carried out and retroactively "legitimized" through fraudulent jurisprudence. Through critical analysis, we arrive at the conclusion that not only did the state of Maine have actual knowledge and intent to thrust an illegitimate politico-legal regime of suppression upon the tribes, but—despite acknowledging its past bad acts—it consciously chose to adopt many of these same tactics more than one-hundred years later. Indeed, readers will discover that the recommendations of the *Proctor Report* are hauntingly reminiscent of the State's earlier implementation of John G. Deane's "Coercive System" of 1830—purposed to isolate, control, and eliminate the tribes living on coveted Maine timberlands.

Through novel contextualization of Law Court decisions like *Murch* and *Newell*, this Remonstrance evidences the depth of politico-legal capital expended as Maine developed an illegal system of predatory colonialist economics which it "legitimized" through the courts, but which has no valid precedential basis. Serving as a centerpiece of this historico-legal analysis, analysis of *Murch* and *Newell*—the "Twin Pillars" of Maine Indian jurisprudence—reveals how immediately and for centuries this body of law has fortified themes of non-recognition of tribal sovereignty and a determination to treat the tribes as wards, imbeciles, and paupers. Ultimately arriving at the unavoidable realization that Maine's political and economic mistreatment of the tribes was done to intentionally dispossess the Wabanaki of their land and resources, this Remonstrance will examine the lineage of governmental policies and legal precedent which, layered atop this historical context, offer a stunning reframing of contemporary assumptions of Tribal-State relations. Ultimately, this examination arrives at its overarching conclusions:

> 1.) That the State of Maine, acting as a renegade state sovereign in contravention of Congress and for the purpose of financing its fledgling statehood, illegally usurped control of intercourse with the Wabanaki tribes and instituted a system of predatory economics masquerading as law; and
>
> 2.) Once tribal resources were depleted, the State of Maine sought to exterminate the Wabanaki in dereliction of its duties pursuant to the Articles of Separation of 1820 because it was economically advantageous to do so.

Set against Maine's forgotten history as a world economic power during the height of the lumber boom of the mid-nineteenth century, this Remonstrance examines the economic imperatives that fueled Maine's campaigns to divest the tribes of their land, their ancestral claim to the old-growth forests upon which North American expansion was built, and, ultimately, tribal sovereignty.

Maine developed an illegal system of predatory colonialist economics which it "legitimized" through the courts, but which has no valid precedential basis.

This Remonstrance concludes with a discussion of the ongoing ramifications of Maine's predatory politico-legal regime which continues to limit tribal sovereignty and socio-economic autonomy to this day. Offering ameliorative and restorative alternatives to the current system, this Remonstrance suggests ways in which the State of Maine, through executive and legislative action, can make reparations for the cultural and economic losses suffered by the tribes under its despotic control.

Ultimately, it is the authors' intent that the reader come away with a new perspective on Tribal-State relations as framed by the historical discourse and politico-legal analysis presented herein. The authors hope their audience will analyze previously held assumptions and beliefs about Maine's history and its discourse with the tribes—and challenge established narratives that have been assigned to all parties involved.

Nearly two centuries ago, it was said of Maine (once heralded as a political bellwether) "as she goes, so goes the nation." Indeed, through the history revealed in this Remonstrance, the reader will recognize that many of the same policies, tactics, and conflicts that plagued American Indian relations during the expansion of the United States were, in fact, first tested in Maine. It is no coincidence, then, that Andrew Jackson, in his First Annual Message to Congress in 1829 —in which he professed that there could be no tribal sovereigns within a sovereign American nation—expressly referenced Maine's efforts to exercise control over the Penobscot:

Nearly two centuries ago, it was said of Maine, "as she goes, so goes the nation."

> There is no constitutional, conventional, or legal provision which allows them less power over the Indians within their borders than is possessed by Maine or New York. Would the people of Maine

> permit the Penobscot [T]ribe to erect an independent government within their state? And unless they did would it not be the duty of the general government to support them in resisting such a measure?[4]

In Maine, where the seeds of systematic control were first sown, their poisonous legacy flourished for decades. More than one-hundred years later, during the height of the Maine Indian Land Claims in 1980, Governor James Longley would invoke the ghost of Jackson when he fired a shot across the tribes' bow, declaring in fiery rhetoric that there could be "no nation within a nation" in Maine.

Governor James Longley would invoke the ghost of Jackson when he fired a shot across the tribes' bow, declaring in fiery rhetoric that there could be "no nation within a nation" in Maine.

Now, some two hundred years after Maine entered the Union as a Free State, it maintains a stranglehold on tribal sovereignty. While the Jacksons and Longleys of the world may have won their goal of an "ultimate sovereign," they were only able to achieve their "one nation" by inhumane and brutal policies aimed at effecting the mass removal of indigenous peoples and theft of native lands.

PART II: AN HISTORICAL CONTEXTUAL ANALYSIS OF TRIBAL-EUROMERICAN RELATIONS

II. A RIVER RUNS THROUGH IT: STATEHOOD, FEEDING THE LUMBER BOOM, AND THE THEFT OF THE FOUR TOWNSHIPS (1820-1842)

"So we will tell our own story with our voice. So you can hear us. So we can shine a light on those dark deeds that were done to us."

— *Donna M. Loring*[5]

[4] President Andrew Jackson, First Annual Message to Congress (Dec. 8, 1829). In his congressional address, Jackson made an appeal to legislators in favor of what would later become the Indian Removal Act of 1830, under which the Cherokee and other southeastern tribes were forcibly removed from their lands and sent west of the Mississippi.

[5] Donna M. Loring, *It Is Up to Us*, *in* ENOUGH! POEMS OF RESISTANCE AND PROTEST 88 (Claire Milliken & Agnes Bushell eds., Littoral Books 2021).

A. *The Theft of the Four Townships: Fraudulent Dispossession of the Penobscot People*

It's a familiar yet disturbing history. By 1833, the once boundless, verdant acres of pine forests and riverine valleys in which the Wabanaki people made their home had been relentlessly hewn, transacted, and concentrated down into a handful of diminutive land holdings amongst the several tribes. The "Four Townships" belonging to the Penobscot Tribe by 1833 were reserved to them in accordance with an 1818 Treaty with Massachusetts.[6] The "first two lower" townships—located around the area of Mattawamkeag Point—were home to a cultural center seated in a village at the confluence of the Penobscot and Mattawamkeag Rivers.[7] The remaining two northern townships, located near present-day Millinocket, afforded the Penobscot easy lake access to their ancestral hunting grounds located in the interior of the River Valley.[8] Considering the immense difficulty that the Wabanaki, by 1833, were experiencing with hunting and trapping in British North America at the hands of the Hudson Bay Company, access to these ancestral hunting grounds had by this time become vital to their survival.[9] The Penobscot Tribe had little, if any, interest in selling or otherwise dispossessing itself of the Four Townships. But that did not deter Maine, which was hellbent on acquiring quiet title to as many acres of old growth forests as could be had in an effort to fund a "land lottery" designed to lift the impoverished fledgling state out of near-bankruptcy.

To fully understand Maine's history as an economic dependent of the tribes, it is first necessary to acknowledge that it is a legacy inherited from its progenitor, Massachusetts. In the wake of the American Revolution, the colonies struggled mightily in their infancy as independent territories. Massachusetts, for

---

[6] For a visual representation of the land holdings incident to the 1818 Treaty, see Micah Pawling's and Donald Soctomah's "1818 Penobscot Treaty with Massachusetts: A Map of the Four Townships" under Appendix A. Although perhaps assumed by many, it bears specific mention that all of the "negotiations" and treaty writings thereto were conducted and recorded in the English language, with interpreters "serving" to communicate information to tribal delegates. The issue of language is, of course, of critical importance when considering whether language barriers may have led to disparate understandings between parties. In fact, federal Indian law has evolved to take historical language barriers into account when construing the intent of parties and the impact of intercultural treaties between Euromericans and indigenous peoples. As part of federal Indian jurisprudence, a core tenet holds that—stemming from these historical inequities—any ambiguities of the written English terms are construed in favor of the tribe. This, of course, follows a fundamental principle of contract law which holds that any ambiguities in contractual language are construed against the drafting party.

[7] *See* C.B. O'Hara, Jr., *A Brief History of Mattawamkeag up to 1900*, http://www.wit-maine.com/a-brief-history-of-mattawamkeag-up-to-1900.html.

[8] *See* Micah Pawling, Wabanaki Windows, *Unpacking Sovereignty (6th in a series)*, at 43:34 (July 21, 2021), https://archives.weru.org/wabanaki-windows/2021/07/wabanaki-windows-7-27-21-unpacking-sovereignty-6th-in-a-series/.

[9] *See id.*

example, was financially destitute. As one 1829 history reflected upon Massachusetts's financial straits following the Revolution:

> [H]er people borne down with the weight of taxes—her treasury empty—her credit that of a bankrupt—her paper currency worth, in the market, scarcely 10 per cent of its normal value—her commerce next to nothing—her utmost exertions barely able to discharge the ordinary expenses of government, in time of peace.[10]

Facing a premature demise, Massachusetts weighed its options. Further taxation—a sore subject amongst the Americans—was "out of the question."[11] In a stunning mimicry of the very imperial regime it had just fought so mightily to overthrow, Massachusetts turned to exploitation of the District of Maine's "exhaustless merchandise" of timber for salvation.[12] In the eyes of Massachusetts's first governor, John Hancock, the millions of acres of unsettled real estate in the District were "just waiting to be turned into desperately needed funds for the new Commonwealth."[13] Like the cuckoo bird come to roost and deposit its imposter offspring, so too would Massachusetts leech from the lifeblood of its host to survive.

Like the cuckoo bird come to roost and deposit its imposter offspring, so too would Massachusetts leech from the lifeblood of its host to survive.

When Maine became a state in 1820, it picked up exactly where Massachusetts had "left off"—commissioning land surveys and engaging in countless transactions and grants for the purpose of converting its timber resources into economic gain. By 1859, Maine retained a paltry 2,000,000 of the 8,000,000 acres of wilderness lands it had once possessed at its zenith.[14] These holdings were further depleted when, in 1868, the State granted nearly 700,000 acres to the European & North American Railroad Company—leaving it with a mere 213,880 acres of wild lands left in its control.[15]

---

[10] THOMAS URQUHART, UP FOR GRABS: TIMBER PIRATES, LUMBER BARONS, AND THE BATTLES OVER MAINE'S PUBLIC LANDS 6 (2021).
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] JAMES ELLIOTT DEFEBAUGH, HISTORY OF THE LUMBER INDUSTRY OF AMERICA, VOL. 2, 29 (1907).
[15] *Id.*

Concurrent with the dizzying expansion of Maine's lumber industry, the tribes not only had to contend with an increased lumberman presence[16] in their territory, but also suffered lumber pirates, trappers, and hunters as they began encroaching on reservation lands. When, in 1829, Penobscot Lieutenant Governor John Neptune appealed to the Legislature to intervene in the encroachment upon tribal lands, lawmakers brazenly responded by "authorizing" Maine's Governor to "negotiate" for the sale of two of the Penobscot Nation's Four Townships. It was a stunning and open display of hostility—shocking even by the State's standards at the time. Rather than addressing the Penobscots' concerns, the State greedily hijacked Neptune's appeal as an opportunity to secure territories the State had long coveted given their claimed military significance as artillery access roads leading to the British frontier.[17]

On the heels of its gambit, Maine commissioned one of the most infamous figures in State-Tribal history, John G. Deane, to negotiate the purchase of the two lower townships in question.[18] Deane's mandate was to acquire those two townships with access to an eastern road that had been built from present-day Milford to Greenbush and across the county towards Houlton, Maine—this belonging to those territories long claimed to have military significance in securing the international border.[19] More specifically, Maine believed that the Houlton area was of critical importance in Maine's ongoing efforts to stave off the advancement of British forces in present-day Canada who, despite the Treaty of Ghent, continued to dispute the international boundary—which was readily supplied by the eastern road.[20] These tensions would eventually precipitate the political conflict referred to as the "Aroostook War"—a misleading moniker given the fact that no active military confrontation took place.[21] It was a "War of Words" in the truest sense, and the perceived military importance of the two lower townships was never legitimized.

Having been authorized by the Legislature to pay *any* amount necessary to secure the purchase of the two townships,[22] Deane departed to treat with

---

[16] As an example, by the mid-1800s, members of the Penobscot Tribe were outnumbered 1,000 to 1 by non-indigenous lumbermen patrolling their ancestral forests. *See* BUNNY MCBRIDE & HARALD E.L. PRINS, INDIANS IN EDEN: WABANAKIS AND RUSTICATORS ON MAINE'S MOUNT DESERT ISLAND, 1840S-1920S 12-13 (2009).

[17] *See* URQUHART, *supra* note 10, at 45; *see also* Harald Prins, Wabanaki Windows, *Unpacking Sovereignty (6th in a series)*, at 10:41 (July 21, 2021), https://archives.weru.org/wabanaki-windows/2021/07/wabanaki-windows-7-27-21-unpacking-sovereignty-6th-in-a-series/.

[18] *See* Prins, *supra* note 17.

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] In a letter dated July 20, 1830, Deane confirmed that his authority for purchase was unlimited: "A recurrence to the Resolve and my instruction, will shew, there was no limitation in price." Letter from John G. Deane (July 20, 1830)(*a copy of which was transcribed and a copy of which is on file with historians Harald Prins and Bunny McBride*).

Penobscot Governor John Attean at Indian Island.[23] Upon arrival, Deane was frustrated to discover that Governor Attean would not negotiate or assent to terms until the Tribe had formed a general assembly.[24] That Deane was surprised and/or dismayed by this was, of course, the product of his own ignorance. It had been common knowledge since the Wabanaki's first dealings with the Europeans that tribal leaders were not traditionally imbued with absolute decision-making authority on behalf of their people.[25] Rather, "[t]hey exerted authority only so far as their followers were willing to comply with their advice . . . ."[26]

In any event, once the Tribe had gathered, Deane set about negotiating for the purchase of the two townships. In 1830, he writes: "A long conversation ensued between us in which I endeavored to discover their price, and when I was satisfied they had fixed no price among themselves, I named ten thousand dollars and requested their answer."[27]

Governor Attean wisely advised his people not to assent to these paltry terms. Instead, the Tribe issued a counteroffer amounting to $69,120.00, based on acreage.

Despite his unlimited purchasing authority, Deane declined on behalf of the State. He departed Indian Island having failed—perhaps purposely, given his *carte blanche* mandate—in his directive to acquire the two townships. Having the benefit of historical hindsight, one must now wonder whether Deane's refusal to exercise his unlimited purchasing authority *was*, in fact, purposeful. His letter of July 1830 confirms, at a minimum, that he had actual knowledge that a simple majority of the Tribe was "disposed to sell, and some of them at fifty cents the acre and less."[28] At the very least, the consequences of his decision (intentional or no) set into motion a cascade of events that would eventually precipitate the fracturing and division of the Penobscot people.

While Deane's precise motivations for choosing not to exercise his purchase power are likely forever lost to history, the certainty of the words he penned in July 1830 are indisputable. Venturing well beyond the mandate of his commission for a land purchase, Deane seemingly *sua sponte* set about recommending a "Coercive System" targeted at subjugating the tribes to State control. Deane's System advocated for programs designed to keep the tribes stationary throughout the year (i.e. no more migratory hunting), establishment of

---

[23] Earlier that year, the Legislature voted to "authorize" the Penobscot to sell two of their four townships with funds to be "invested for the benefit" of the tribes, but "no part" paid to them directly. *See* URQUHART, *supra* note 10, at 45.
[24] *See* Letter from Deane, *supra* note 22.
[25] *See* DAWNLAND ENCOUNTERS: INDIANS AND EUROPEANS IN NORTHERN NEW ENGLAND 6 (Colin G. Calloway ed., 1991).
[26] *Id.*
[27] Letter from Deane, *supra* note 22.
[28] *Id.*

State control of tribal affairs, the sale of tribal landholdings to fund State "support" for the tribes, a conversion from subsistence hunting and gathering to euroagrarian practices, and the division of communally held tribal lands into lots held by individual tribal families.

It seems clear from these proposed measures—and Occam's Razor supports the conclusion—that Deane's and the State's ultimate purpose was to divest the tribes of their communally-held sovereign lands. By alienating tribal landholdings from the sovereign and putting title into individual hands, the State saw a means of eventually facilitating transfer into the hands of white society through transactional assimilation. From a legal perspective, once the lands were under individual ownership, they were held in fee simple and therefore subject to transfer. This is, of course, in diametric opposition to tribal practices in which individual ownership of land was either rare or unpracticed. It is worth noting that, ultimately, Maine pioneered a system eerily similar to that later adopted and expanded by the federal government under the Dawes Act during its dispossession of the tribes living in Oklahoma.

Critical contextual analysis of Deane's "Coercive System" lays bare his intent to impose a regime of political, social, and economic control aimed at dispossessing the tribes and, eventually, assimilating them to the point of extinction. Deane was a well-educated man and a graduate of Brown University.[29] Ostensibly equipped with the intellectual acumen to conceive of the disparity between his *knowledge* and his *recommendations*, there can be little dispute as to Deane's purpose. For, on the eve of dispossessing the tribes of the two townships, Deane had a conversation with a priest who lived amongst the Penobscot. In that conversation, Deane acknowledged that Penobscot were distinct from the mighty Cherokee because, unlike the Cherokee, the Penobscot were still living on their own land.[30] In Deane's own words:

> The situation of the [Penobscot] Indians is peculiar not merely as it relates to the mode in which they have been treated by the government since the settlement of New England, but as it relates to themselves.[31]

The "peculiarity" to which Deane was referring was that, dissimilar to the lion's share of the eastern tribes that failed in their resistance to dispossession, the Penobscot retained genuine, ancestral title to their lands.[32]

---

[29] *See* Prins, *supra* note 17, at 08:58.
[30] *See* Pawling, *supra* note 8, at 07:24.
[31] Letter from Deane, *supra* note 22.
[32] *See* Pawling, *supra* note 8, at 07:24.

In the years that followed Deane's failed attempt to acquire the townships, illegal cutting gangs began to fell timber located on Penobscot islands in the River.[33] The Penobscot faced an equal threat to their lands from the increasing encroachments of sawmills installed along the length of the Penobscot River as territories were acquired for lumbering activity via sales commissioned by the State's Indian Agents—often without the knowledge or consent of the tribes.[34] The hunt for "Indian Gold"—or, land—was on and in full force. While the State persisted in coveting the four townships under the likely guise of their militaristic importance but surely for their proximity to valuable timberlands, private individuals with criminal designs tried to swindle the tribes out of their timber rights—sometimes even going so far as to impersonate Native American dress and to draft clearly fraudulent "documentation" of their timber rights.[35]

By 1833, the State of Maine was tired of waiting. It wanted the issue of the Four Townships "settled" once for all.[36] The State commissioned yet another envoy to attempt to negotiate a purchase from the Penobscot Tribe and sent lumber baron Amos Roberts—one of eighteen original members of the first commercial lumbering franchise, the Penobscot Boom[37]—and his associate Judge Thomas Bartlett, to acquire "such of the lands belonging to the Penobscot Tribe as they might be disposed to sell."[38] Of course, Roberts and Bartlett likely carried with them instructions to see to it that the reluctant Penobscot were "disposed to sell" all four townships.

What happened next is the subject of much historical conjecture, debate, and disagreement. According to the State, Roberts and Bartlett negotiated the purchase of the Four Townships for $50,000—a sum paid to the Tribe by bond of

---

[33] *See* Prins, *supra* note 17, at 30:13.

[34] *See id.*; DONALD SOCTOMAH, SAVE THE LAND FOR THE CHILDREN 1800-1850: PASSAMAQUODDY TRIBAL LIFE AND TIMES IN MAINE AND NEW BRUNSWICK 98-99 (2009)(*citing Eastport Sentinel February 7, 1834*).

[35] *See id.*

[36] *See* URQUHART, *supra* note 10, at 45.

[37] As a matter of necessity, lumbering required lumberjacks to float logs down the river so that they could be processed, surveyed, purchased, and shipped at a central point of processing. Because each log bore a "blaze" or owner's mark to identify the company who had felled it, lumbermen needed a system for sorting the timber at various checkpoints. ALFRED GEER HEMPSTEAD, THE PENOBSCOT BOOM AND THE DEVELOPMENT OF THE WEST BRANCH OF THE PENOBSCOT RIVER FOR LOG DRIVING 1825-1931 15 (1975). The checkpoints—referred to in the industry as "booms"—were strategically placed along waterways at points where large quantities of timber would accumulate before being passed through—like a riverine highway of sorts. In the Penobscot River, the most logical sorting location was a point just above the final destination of the logs at the Old Town sawmill. It was here that the Penobscot Boom was erected. *Id.* at 15 [*citing* H.K. BARROWS & C.C. BABB, WATER RESOURCES OF THE PENOBSCOT RIVER BASIN, MAINE 8, 13 (1912)].

[38] NEIL ROLDE, UNSETTLED PAST, UNSETTLED FUTURE: THE STORY OF MAINE INDIANS 191 (2004).

the Legislature on June 10, 1833.[39] No one, including the State or the commissioners, would later claim that this price was fair market value for the land in question—the shared perception on both sides was that it was not.

The Penobscot bemoaned the sale as fraudulent. Historians today have pieced together the general narrative of what transpired between Roberts, Bartlett, and the Tribe. Rather than taking Deane's more "diplomatic" approach and negotiating terms, Roberts and Bartlett are believed to have engaged in backroom "politicking," interfering with tribal leadership to fraudulently obtain the signatures of fifteen Penobscot members, including Governor John Attean and Lieutenant Governor John Neptune. Having acquired the marks, Roberts and Bartlett returned to Augusta believing and/or professing that they had obtained a legal release of the land, but as this Remonstrance has discussed, Wabanaki cultural practices did not imbue tribal leaders with absolute authority to agree to any such transaction without the consent of a majority of tribal members in a General Meeting.[40]

The "Theft of the Four Townships," as the Penobscot later referred to it, ignited a firestorm of protest from the Tribe, forcing John Neptune to travel to Augusta in the winter of 1833-1834 to lead a delegation for the purposes of delivering unto the Legislature a Remonstrance of the fraudulent transaction.[41] Neptune and the Penobscot Delegation appealed to the Legislature, arguing that a "certain deed fraudulently obtained in June last from a few individuals without the knowledge or consent of the tribe" should be nullified.[42] When the State Senate convened in January to hear the matter, it considered several documents as evidence of the parties' claims, including: a brief report by Roberts and Bartlett addressed to the State, a motion from the Governor's Council approving the commissioners' work, a deed to the land in question bearing the alleged signatures of fifteen Penobscot members, and the Tribe's Remonstrance which, importantly, was signed by some of the very same names appearing on the deed in question.[43]

---

[39] The Proctor Report on Maine Indians, Final Report to the Maine Legislative Research Committee of the 90th Legislature 18 (Sept. 1942)(*hereinafter* "the Proctor Report").

[40] To date, no tribal law can be enacted unless a general assembly of all tribal members of the tribe have given their assent. This cultural mandate has existed for millennia and certainly predated euromerican intercourse with the tribes.

[41] A transcript of the original Remonstrance of June 1833 is included under Appendix B, along with a photograph of the marks of the original signatories thereto.

[42] Trafton, Mark and Penobscot Nation, "1833-06-18 Two petitions from the Penobscot Tribe against the illegal sale of their land" (1833). *Documents*. 50. https://digitalmaine.com/native_tribal_docs/50

[43] *Id.*

The Penobscot Remonstrance—bearing the signatures of forty-two tribal members—alleged that the commissioners (specifically naming Bartlett and one "Lovejoy"—a party of interest known to have previously attempted to purchase the townships as Deane had) had never explained the true nature of the transaction; had forced the Penobscot signatories to sign the deed under duress; and that the land had been acquired for far less than fair market value.[44] Despite openly acknowledging how "ably written" the Tribe's Remonstrance was, lawmakers refused to question the integrity of Roberts and Bartlett—even when held against these commissioners' meager statement of facts. Incensed at a perceived attempt to defame the "good name" of the commissioners, the Legislature rejected the Penobscot's' plea to withdraw from the "sale agreement" brokered by Roberts and Bartlett.

B. *The Lumber Boom and Maine's Rise to Economic Dominance*

Indian land was the gold of the 19th Century. Reflecting thereupon, U.S. Secretary of the Treasury Hugh McCulloch once remarked that "the wildest speculation that has ever prevailed in any part of the United States was in the Timberlands of Maine." Indeed, there is considerable truth to Secretary McCulloch's observations given that lumber was at times regarded as legal tender and "would buy any goods and pay any debts." [45] In the earlier days of its history, Maine—known even to this day as the most heavily forested state in the United States—was overflowing with timber.

The earliest indicator of significant efforts to export timber *en masse* was in 1816—"the year without a summer"—during which lumber yields reached approximately 1,000,000 feet of timber processed through Bangor.[46] Yields slowly continued to increase per annum through 1822, at which time Massachusetts lumbermen began to enter the Penobscot River Basin to partake in the "wood rush." By 1831, lumber mills in present-day Penobscot County yielded approximately 30,000,000 feet.[47] As stunning indicator of just how *abundant* Maine's pine forests were, despite these increases in lumbering, by 1832 there

---

[44] *Id.* It is worth noting, as further supporting evidence of this widely-accepted fact, that the land in question continued to have immense value throughout Maine's history due to the natural resources located thereupon. One of the townships—Township 3—would later act as a keystone to the success of establishing the Great Northern Paper Company in the late 19th century as it sat atop a major hydroelectric power source sufficient to power the paper manufacturer. NEIL ROLDE, THE INTERRUPTED FOREST: A HISTORY OF MAINE'S WILDLANDS 279 (2002).

[45] ROLDE, *supra* note 44, at 232.

[46] DEFEBAUGH, *supra* note 14, at 52.

[47] *Id.* The reader may be interested to note that by the mid-nineteenth century there were already approximately 250 lumber mills along the shores of the Penobscot River alone. AMERICAN FRIENDS SERVICE COMMITTEE, A RESOURCE BOOK ABOUT PENOBSCOT, PASSAMAQUODDY, MALISEET, MICMAC AND ABENAKI INDIANS A-10 (1989).

was *still* merchantable pine standing on the Penobscot River within the present limits of the city of Bangor.[48]

Describing the rapidly changing landscape surrounding Bangor and Old Town at this time, historian Micah Pawling paints a vivid picture of the Penobscot River Valley during this period and the deleterious effects that increased lumbering was having on the environment:

> By the 1830s this waterscape, altered by various wing dams, had emerged as the hub of lumbering activities on the largest watershed within the borders of Maine. At the falls, several sawmills hummed with activity as flowing water powered the saws that cut logs into boards, shingles, laths, clapboards, and other wood products for market. Dams and sawmills also impeded canoe travel and deterred anadromous fish from spawning upriver. Moreover, the tons of sawdust discharged into the Penobscot River caused a decline of oxygen levels in the water, further degrading the rich fishery upon which the Penobscots depended for their livelihood. From April to September numerous log booms just north of Old Town Island changed the riverscape into a sea of floating logs as far as the eye could see, forever changing the Penobscot River. Boom piers or cribwork in the river that directed or sorted logs changed the flow of the river, emphasizing one channel over another. The river current, carrying an extra weight that increased its force, beached floating timber on the reservation islands, transforming the shorelines and threatening to separate the Indigenous inhabitants from the river.[49]

To the tribes who, for thousands of years had been faithful stewards of the land and its renewable resources, the explosion of industrial activity and the insatiable appetite of the lumber companies for the consumption of land was apocalyptic. Such fears are powerfully captured by the accounts of tribal officials during the early 1830's, published in newspapers of the time. As one example, a Passamaquoddy Indian attempted to alert the public of the State's attempts to satisfy its increasing lust for land through the vigilante actions of its Indian Agents:

---

[48] *Id.*

[49] Micah A. Pawling, *A 'Labyrinth of Uncertainties' - Penobscot River Islands, Land Assignments, and Indigenous Women*, 42:4 AMER. INDIAN Q. 454, 458-59 (2018).

> Why should an agent of the government totally disregard his instructions and assume the responsibility of managing the property of the Natives as he may choose? When the present agent came into power . . . [h]e found an account from the former agent and the trespassers for the value of fifteen hundred dollars . . . . [and evidence that] each year the agent wrote more permits than the law allowed.[50]

A similar account from yet another member of the Tribe around the same period bemoans the State's breach of its fiduciary duty to the tribes through its failure to protect and subsequent regulations of the sale of Native lumber through the Indian Agents:

> If the Maine Governor intended that the agent shall permit timber to be cut off the Township at will, why is he not instructed to obtain the fair rate for timber on Indian land? Had the timber cut off the present winter been fairly put into the market, there would have been $2 to $3 might have been obtained for pine. As few townships possess greater advantages for logging than this, it being ease of access at all times, with abundance of hay in the area and having only a short distance to drive. Had the right course been followed $6,000 might have been raised. The agent may say that the nine oxen teams and cutters are nearly all trespassers without permits. If the agent had visited the area early in the year he could have stopped the trespass. If all the transactions of ther [sic] agent be laid before the State Governor and his council, it is believed that a different exhibition would be presented than now it appears. It is hoped that the property may be secured for the native Passamaquoddy Tribe.[51]

[50] SOCTOMAH, *supra* note 34, at 98-99 (*citing Eastport Sentinel February 7, 1834*).
[51] *Id.*

It is worth pointing out that, once again, the failure of the State to honor its fiduciary duty to the Passamaquoddy Tribe was a precursor of the federal government's failure to honor its fiduciary duties to the tribes.[52]

There seemed to be no corner of Indian land that the State either hadn't claimed, stolen, purchased, or leased away against the tribes' protests. Indeed, not even the grass atop the increasingly barren islands was safe, as Indian Agents began leasing rights to lumbermen for conversion to hay to feed their draft animals during winter operations.[53]

Maine's liquidation of its public land holdings—many of which had originally been reserved under the State Constitution for the benefit of education and religious organizations—was proof positive that if the lumber industry were to continue to grow (and Maine to continue to be an economic force) access to more land was necessary. At a time when Bangor was being touted as a "jewel in the North," the State had no plans to allow the barons—and therefore Maine's economy—to fail.

So, in 1842, Maine began its campaign to push and facilitate the privatization and commodification of its public lands. By act of the Legislature, control was taken from the Land Agents and handed over to county commissioners who were, three years later, authorized to grant permits to cut timber on the reserved lots and in unincorporated townships. [54]

Maine was precariously balancing many spinning plates in the air. It was desperate to sustain the lumber boom which had been a boon to settlement of the northern counties, the barons thirsted for legal channels to consume as much land as possible, and the Penobscot Tribe—divided since the "Theft of the Four Townships"—continued to see their lands alienated under predatory economic policies and gambits. Maine felt an increasing panic and need not only to "open up" channels for further dispossession of what little tribal lands remained, but more importantly to lend legitimacy to its past bad acts. As Maine struggled to

---

[52] Maine's willful breach of its fiduciary duty to the tribes was later emulated by the federal government when the Bureau of Indian affairs mismanaged and failed to properly provide an accounting of land allotments and interests held in trust for the benefit of the tribes and members thereof (leasing tracts with valuable timber and mineral mining rights for far less than market value). The tribes were successful in levying a class action lawsuit in which the federal government ended up having to remit approximately $1.5 billion for breach of fiduciary duty. Class Action Settlement Agreement, Cobell *et al* v. Salazar *et al*, (D.C. Cir. 2010)(1:96CV01285-JR).

[53] *See* RICHARD G. WOOD, A HISTORY OF LUMBERING IN MAINE 1820-1861 17 (1961).

[54] *See id.*, at 54 (*citing* Maine House Doc., 1847, #20. Com. On State Lands and Roads, p. 2).

keep the boom alive, the powers at hand embarked upon a quest to sow the seeds of an illegitimate lineage of legal precedent to support their illegitimate empire.

It marked the beginning to a system of predatory economics masquerading as law.

PART III:
A CRITICAL LEGAL ANALYSIS OF MAINE INDIAN JURISPRUDENCE

III. PREDATORY ECONOMICS MASQUERADING AS LAW: THE TOXIC PRECEDENT SET BY *MURCH V. TOMER* (1842)

"You whites make all the ammunition."

*— **Mahpíya-lúta** (or, "Chief Red Cloud") (1822-1909 A.D.)*

Under its push to privatize, Maine had a serious problem when it came to the tribes: they did not want to sell their land. Despite the seemingly indomitable will of the tribes to retain possession of what little lands they retained, private land owners in Maine—particularly those living in riverine townships in the vicinity of the islands—". . .repeatedly expressed a desire that [the Penobscots' Islands] may be purchased."[55] Despite efforts by the 4th Legislature to fund the purchase of said islands by passing a Resolve to fund the tribes' dispossession, the tribes held strong and the Resolve remained unexecuted.

It is against this historical background that a Penobscot man named Peol Tomer would set into motion events that would ripple throughout time as the foundation for Maine's toxic Indian jurisprudence.

The Law Court's 1842 decision in *Murch v. Tomer*[56] is, perhaps, facially innocuous. Indeed, even as recently as 2015, some legal scholars have heralded *Murch* as a protectorate of Maine's supposed guarantee of Lockean natural rights.[57] In truth, however, *Murch* is a case that when critically examined quickly reveals itself to be one in which the Court grossly abuses its discretion by traveling well beyond the justiciable controversy before it and, in so doing, relies upon a judicial fiction to create precedent deleterious to tribal sovereignty. At the

---

[55] The Proctor Report on Maine Indians, *supra* note 39 (*citing* "Maine Governor's Annual Message" 1826).

[56] *Murch v. Tomer*, 21 Me. 535 (1842).

[57] *See* Steven G. Calabresi & SofÍa M. Vickery, *On Liberty and the Fourteenth Amendment: The Original Understanding of Lockean Natural Rights*, 93 TEX. L. REV. 1299, 1359 (2015)(*internal citations omitted*).

same time *Murch* supposedly conveys Lockean rights upon tribal members, it minimizes Native Americans' ability to exercise those rights, claiming that they suffer from "imbecility."[58]

Murch is problematic not simply because it is of the ilk of *Korematsu* or *Plessy*, but because it serves as toxic progenitor to the later-described and highly injurious *Newell* case. Serving as the foundation of all future Maine Indian jurisprudence, *Murch* is the bad seed from which would forever grow fruit of the poisonous tree.

A. *Facts and Background*

Murch is strange in that there is very little surviving contextual detail to describe exactly *why* and *how* the parties ended up before Chief Justice Ezekiel Whitman and the Law Court. What *is* apparent is that the case is based upon a dispute over a promissory note executed by Peol Tomer and tendered to Charles Murch.[59] No description of Murch is given, nor does the opinion specify the terms of the note. Only by reviewing the handwritten case file were the authors able to determine that Tomer's note was executed on April 13, 1837, to one Charles Murch of Passadumkeag, in the amount of $32.50.[60] It is strange that a legal action would be taken against Peol Tomer both in light of his status as a Tribal Representative (all of whose costs were expensed to the State) and since all debts incurred by tribal members for necessary expenses were paid by the State via a voucher system.

Although this history lends some confidence to the correct identity of Tomer, little is known about Charles Murch. That Murch sought enforcement of Tomer's note is never explicitly stated or confirmed, and must be inferred by the legal status of the parties. Further, the authors were able to discern little to nothing about Murch personally, other than the unverifiable anecdote that he may have been a physician.

Despite the gaps inherent in *Murch*, the little-known information is largely irrelevant. Given the grave departure from the subject matter of the case endeavored by the Court, whether *Murch* was about a promissory note against land or a contract for the purchase of a mere peppercorn makes little difference.

B. *Procedural Posture*

From the opinion, we similarly derive precious little information about the procedural posture of *Murch*. We learn that Tomer (defined as "an Indian of the

---

[58] *Murch*, 21 Me. at 538.
[59] *Id.* at 535.
[60] Promissory Note Executed by Peol Tomer, *Murch v. Tomer*, 21 Me. 535 (1842).

Penobscot [T]ribe") was represented by "Cony & Sewall"—ostensibly a law firm or two co-counselors.[61] Murch was represented by "J. Appleton and Randall."[62] Apparently, upon Murch's complaint to Tomer, Tomer's attorneys furnished no defense.[63] Pre-suit, the parties agreed to stipulated facts stating that the action was upon a note signed by Tomer and "that [Tomer] was at the time of signing it, and still is, an Indian of the Penobscot Tribe."[64] Last, the parties stipulated as to an application of law, agreeing that "if action could be maintained against the defendant, he being an Indian as aforesaid, he was to be defaulted; and if not, the plaintiff was to become nonsuit."[65] By consent of counsel, *Murch* was originally continued *nisi* under an agreement that it should be decided upon the submission of briefs to the Court.[66] Neither counsel, however, submitted briefs, and the matter was brought before the Court with written arguments never having been made.[67]

C. *Holding and Analysis*

At issue in *Murch*—by stipulation of the parties—was whether Tomer "by his reason of being [an] Indian" could enter into legal contracts under the law and therefore be held liable for breach upon the same.

At the outset, Justice Whitman dives headlong into a discourse on natural rights and whether Native Americans are endowed with the absolute title to their ancestral lands. In so doing, he concludes that although the Native Americans were legally dispossessed by European colonization, the Constitution contemplates that they might be voters if taxed and, therefore, should not differ from American citizens:

> The aborigines of this country were its ancient proprietors. But, emigrants from Europe having obtained a foothold here, and having increased in numbers, till their power had greatly transcended that of the natives, they at length assumed entire control over them: till it has become settled law, that even the territory and soil of the small districts, to which

[61] *Murch*, 21 Me. at 535.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*

> they are now reduced, in their occupation, is not absolutely theirs in fee. They are prohibited from alienating: and even the use and improvement is not left to their entire control . . . Our constitution seems to contemplate that, under certain circumstances, they may become voters at our elections. It only excludes such from voting, as are not taxed: thereby implying, if taxed, that they may be voters. Our constitution moreover says that 'all men shall be born equally free and independent'…why then, should an Indian differ from that of other individuals born and reared upon our own soils?[68]

Relying on the State's establishment of Indian Agents for the management of Indian "property," Whitman infers that control thereof was only intended to be exerted over *real estate* and not *personal* property of tribal members. Without citing precedent to support his conclusions, Justice Whitman declares that although Indians might be considered citizens with rights incident to ownership and contracting of personal property, they are "imbecilic" and incapable of possessing natural rights to own and govern their land as a collective sovereign:

> Although endowed with the attributes belonging to our species, and in fact, a portion of the human race, and born within our borders, and by the terms of our constitution having seemingly an inalienable right to the acquisition and control of property; yet, as a people, and as it were nationally and collectively, they are treated, and perhaps necessarily so to a certain extent at least, as having none of those attributes. Imbecility on their part, and the dictates of humanity on ours, have necessarily prescribed to them their subjection to our paternal control; in disregard of some, at least, of abstract principles of the rights of man. To the extent to which our laws go in abridging them of their supposed natural right, ordinarily incident to the ownership of property, we must consider them individually and collectively as under our tutelage. As the regulations before stated are in derogation of personal rights, however, we

[68] *Murch*, 21 Me. at 535, 537.

> must not ex-tend them beyond what is obviously prescribed.[69]

Essentially, Justice Whitman concludes that tribal lands are "individually and collectively . . . under the tutelage" of the State of Maine. A clear abruption of then-contemporary federal precedent, this runs contrary to the Supreme Court's opinions expressed in what has become known as the *Marshall Trilogy*.[70]

Whitman's opinion is problematic for several reasons. First, he several times refers to the State Constitution but makes no mention of Maine's obligations incident the 1820 Treaty just 21 years earlier. Acknowledgement of such would show, as would the Maine Indian Land Claims Settlement nearly 140 years later, that *entertaining the Articles of Separation and the 1820 Treaty in the first place* was, at a bare minimum, a tacit recognition of tribal sovereignty. But the analysis goes deeper. Prior to his career as Chief Justice, Whitman was a Representative to Congress for the Commonwealth. A federalist, legal scholar, *and a member of the very framers who drafted the Maine Constitution*, Whitman was doubtless aware of Maine's obligations incident the Articles of Separation as they pertained to the tribes. Indeed, even if it could genuinely be contended that Whitman *was* somehow ignorant of this fact based on personal experience alone, he would have had no excuse for overlooking the treaty obligations included in the pre-text of the Maine Constitution as published just one year prior in 1841.

That* Murch *appears to have been predicated upon a legal fiction for the purposes of manipulating the judicial system for the establishment of pre-determined precedents serving State interests supports the theory that this was nothing more than predatory economics masquerading as law.

In basing his largely contradictory analysis on pseudo-citizenship rights (inclusive of the right to own private property and enter into contracts) held against a distinct class of rights incident to tribal sovereignty, Whitman leaves exposed the house of cards atop which the Court's "logic" rests. Put plainly, the issue in *Murch*—whether Tomer could be held liable on the promissory note—did not require an analysis of his status as a tribal member any more than it would if Tomer was a foreign national.

---

[69] *Murch*, 21 Me. at 538.

[70] *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).

Whitman created a legal fiction by making this the central issue of the case and failing to correct the bizarre stipulation of the parties.

Similarly irregular were the actions of Tomer's counsel. Why, if it was common knowledge that the Tribe has been a party to a *treaty* just 21 years earlier and, therefore, was cloaked with the recognition of sovereignty, would Tomer's attorneys argue that his status as an Indian somehow bore on his ability to make a valid contract? Would not they have agreed that a Frenchman or Canadian had the ability to enter into transactions of foreign commerce? Furthermore, what of the fact that the State of Maine—incident to its treaty obligations assumed from the Commonwealth of Massachusetts—paid for tribal members' food and living expenses? Given this, it makes little sense why Peol Tomer—both a Penobscot Indian and a Tribal Representative—would enter litigation over a promissory note when, in fact, the State voucher system providing for necessary expenses of tribal members would have paid the amount in controversy.

It begs the question of whether *Murch* was "set up" with a question that didn't need to be answered for the purpose of engaging in a pre-determined discourse serving the instrumental ends of the State and its political elite. This, of course, is further supported by the fact that the *Murch* Court fails even to provide an enumerated remedy to Murch after finding in his favor. It's as if once the precedent was set, nothing else mattered.

That *Murch* appears to have been predicated upon a legal fiction for the purposes of manipulating the judicial system for the establishment of a concocted precedent to serve State interests supports the theory that this was nothing more than predatory economics masquerading as law. In hindsight, *Murch* almost serves the State's dual imperatives *too* perfectly to be pure coincidence.

By 1842 Maine lusted to acquire as much land as possible to feed the Lumber Boom. Despite significant interest by the State and local municipalities in acquiring the Penobscot's islands in the river, the Tribe had been uninterested in selling. It would be a shocking coincidence if *Murch* and its mandate for legitimizing the alienation and subsequent liquidation of tribal lands held by tribal members just so happened to coincide with the State's push for privatization of lands. The far more likely reality is that *Murch* represents a conscious attempt by Maine to "have its cake and eat it too" with regard to engorging itself with tribal land resources while simultaneously derogating the rights of indigenous people. It is through this dichotomy that the fallacy of *Murch* is laid bare.

Not only is *Murch* based upon a legal fiction, but it is an irrational decision that confuses the legal capacity thrust upon the tribes by the State. At the signing of the 1820 Treaty, Maine endeavored to establish a guardianship relationship with the tribes, with the State serving as guardian and the tribes as wards. Seeming to acknowledge this, Whitman's "although endowed" soliloquy recognizes tribal members as individuals with natural rights incident to owning

property while, in the same breath, designating tribal nations—those sovereign bodies *comprised of* these same tribal members to which he just prescribed property rights—as incompetent. The illogical conclusion of *Murch* is so stated: when tribal members own land and property as individuals, they inherently have capacity, but tribal nations—being collective "children" and wards—lack the same. In so holding, *Murch* impermissibly creates a "floating standard" for capacity that is at odds with the State's then-perceived relationship with the tribes. According to *Murch*, tribal members had sufficient capacity to contract, but their body politic, being wards of the State, collectively lacked the same. These determinations of capacity are logically at odds.

In sum, *Murch* is fairly characterized as a color of law case in which Justice Whitman "traveled outside of his case" similar to that lamented of Chief Justice John Marshall by former President Thomas Jefferson following the Supreme Court's decision in *Johnson v. M'Intosh*.[71] Stretching the fabric of credulity past its breaking point when he made a simple contract claim an investigation of the nature of Indian's Lockean Natural Rights, Whitman and the *Murch* Court were "legislating from the bench" in a decision that both promoted the State's interest in divesting individual tribal members of their land *and* eroding sovereignty by putting the rights of the individual above the community, all the while outright disregarding federal Indian law, ignoring the sovereign status accorded to tribal governments, laying the foundation for the further erosion of federal Indian law, and creating their own Indian jurisprudence culminating in MICSA in 1980—a devastating piece of legislation designed to further isolate, control and eliminate the tribes by, *inter alia*, making them the legal equivalent of a municipality.[72]

---

[71] In a letter bemoaning the opinion, Thomas Jefferson complained bitterly that the "practice of John Marshall, of travelling out of his case to prescribe what the law would be in a moot case not before the court, is very irregular and censurable." Jefferson to William Johnson, June 12, 1823. *Cf.* A Virginian's 'Amphictyon' Essays in Gerald Gunther, ed., John Marshall's Defense of McCulloch v. Maryland 55 (Stanford U. Press, 1969); *see generally M'Intosh*, 21 U.S. 543 (1823).

[72] MICSA is a pariah in the world of American Indian Law, as it imposes a quasi-municipal status upon the tribes, rather than adopting/implementing the standard "nation-to-nation" acknowledgements between the sovereign federal government, states, and tribes located elsewhere in the United States. For example, the Supreme Court, in *Cherokee Nation v. Georgia*, characterized indigenous tribes as "domestic dependent nations." 31 U.S. at 2; *see also Worcester*, 31 U.S. at 519 ("The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians as we have applied them to the other nations of the earth. They are applied to all in the same sense").

As damaging as *Murch* was for the tribes, its true destructive force would not be felt until 50 years hence, when it would serve as foundational precedent for *Newell*—the most hostile case in Maine Indian jurisprudence.[73]

D. *Stranger Than (Legal) Fiction: The Curious Case of* Johnson v. M'Intosh—*Analogue of Fraud or Stunning Coincidence?*

As a matter of both fact and finding, comparisons between *Murch* and the infamous Supreme Court decision in *M'Intosh* are warranted given the similarities shared by these two cases. From a factual standpoint, both *Murch* and *M'Intosh* are "Indian law" cases that adjudicate the rights of Native Americans having transacted with non-tribal citizens. In reaching this issue, however, both *M'Intosh* and *Murch* had to widely "travel outside of the case," as Jefferson put it. Neither the Court in *M'Intosh* nor in *Murch* were presented with the legal question of whether Native Americans have a right to transact, but both courts nevertheless hacked out a rough path to reach this analysis, as discussed *infra*. In the case of *M'Intosh*, modern legal scholars have identified several facts tending to prove that the case was a sham—consciously and purposely staged to facilitate a contrived holding.

Far less discussed than the Supreme Court precedent set in *M'Intosh*, forensic legal analysis of *Murch* is nevertheless indicative of similar fraudulent roots. As discussed *infra,* modern critical analysis of the Supreme Court's decision in *M'Intosh* offers a potentially eye-opening cause for comparison to *Murch* and, startlingly, anecdotal evidence suggesting that, like *M'Intosh*, *Murch* was a fraudulent case.

A cornerstone of American property law, *M'Intosh* was founded upon a dispute between two American landowners who had been deeded what the parties alleged was the same plot of land.[74] The "controversy" at hand arose when one party obtained title as conveyed to him by the British Crown prior to the American Revolution. The other obtained title as sold to him in a direct transaction with the Piankeshaw Tribe living in Virginia. Despite what appears, facially, to be a competent controversy between two landowners, contemporary analysis of history of the legal proceedings in *M'Intosh* supports the conclusion

---

[73] It is, perhaps, also interesting to note that the United States would also follow suit to *Murch*. By Act of March 3, 1875, the Homestead act was amended so that "Indians abandoning tribal relations were given right of homestead, though not permitted to dispose of the land until after five years from issuance of the patent, retaining, however, a tribal interest in annuities and other funds." JAMES ELLIOTT DEFEBAUGH, HISTORY OF THE LUMBER INDUSTRY OF AMERICA, VOL. 1, 385 (1906).

[74] *See generally M'Intosh*, 21 U.S. 543 (1823).

that the supposed dispute between the two parties was "collusive and manufactured."[75]

There is a growing body of legal scholarship that supports the *M'Intosh* fraud theory. One such scholar, professor Eric Kades, claims that even without diving into a complex analysis of the case, it is clear that it has fraudulent roots. According to Kades, it was quite literally impossible that the two landowners in *M'Intosh* could have had a dispute over a single contested parcel of land when, in fact, the two deeds at issue were for two distinct tracts of land more than 50 miles apart from one another.[76] Fellow legal scholar Lindsay G. Robertson also contends that "*Johnson v. M'Intosh* was the result of the two sides committing a fraud upon the Court."[77]

Ultimately, Robertson's thesis that *M'Intosh* was a fabrication is borne out by historical procedural fact. Attorney Robert Goodloe Harper—hired to represent the interests of the land companies—*did* contrive an agreed statement of fact to direct and constrain the justiciable controversies before the Court; Harper *did* employ fellow attorney Daniel Webster as co-counsel in this matter and, together, they "hired" the defense attorneys; and arguing before the Court, Harper and Webster *did* employ a beneficent façade recognizing indigenous land rights as a means of shuffling the Court along to their desired controversy. But for Chief Justice Marshall's other plans, Harper's fraudulent case clearly would have succeeded, given his success in "setting up" the issue before the Court. His downfall was in failing to anticipate the ways in which a rogue Chief Justice might use the contrived case to meet his *own* instrumental ends.

This was a valuable lesson for Harper. And for Webster, who would later "pop up" at a most curious time in Maine jurisprudence.

Having drawn upon the forensic analysis of Robertson, the comparative analysis with *Murch* yields stark similarities between the two cases that are eerily reflective of one another. First and foremost, like *M'Intosh*, the parties in *Murch* agreed to a stipulated statement of fact that had direct bearing on the justiciable controversy before the Court for its decision.

---

[75] STEVEN T. NEWCOMB, PAGANS IN THE PROMISED LAND: DECODING THE DOCTRINE OF CHRISTIAN DISCOVERY, 75-76 (2008)(*internal citations omitted*).
[76] *See id.* (*internal citations omitted*).
[77] *See id.* (*internal citations omitted*).

Dated "Jan. of the year 1841," the Stipulated Statement of Fact reads:

> Charles Murch vs. Peol Tomer
> Dist Court-_Eastern Dis
>
> Jan. of the year 1841
>
> In the above action the parties agree to the following statement of facts—the action is on a note of hand by the defendant and payable to the plaintiff. The defendant is an Indian of the Penobscot Tribe—If the defendant is not liable to the action in consequence of him being an Indian, and if he can take the objection at this time in any form of pleading, then the plaintiff agrees to become nonsuit, the endorser of the writ out of the holding, otherwise the defendant agrees to be defaulted.[78]

Here, we see that counsel for both parties—including those for Tomer, who are under a fiduciary duty to protect his legal interests—establishing the factual and legal parameters around which the case will be decided: the defendant is an Indian, and whether or not he is defaulted on his promissory note is dependent thereupon. In a shocking concession of their client's legal rights reminiscent of the contrived stipulations in *M'Intosh*, counsel for Tomer constrains itself to arguing and defending on one issue, forgoing the entire universe of potential alternative defenses that might prevail.

It is worth noting that, at the same time the attorneys for the parties in *Murch* were coming to their agreement, Daniel Webster was prominent and active in the Maine Bar. Around this same time period, Webster was not only licensed to practice law in Maine, but he partook in high-profile land rights cases bearing on tracts coveted by the lumber barons and once under the protection of the tribes. As an example, around this time, Webster represented General Samuel Veazie in a claim prosecuted by the law firm Wadleigh and Purinton and even conducted direct examination of John Neptune.[79] Perhaps more notably, however, was Daniel Webster's presence in Maine during 1842—the same year *Murch* was decided.

During the period of time that the Aroostook War was being waged on paper against the English in British-occupied Canada (it being a "war of words"), Webster was called upon to represent the United States in settling the international boundary in northern Maine. Together with Alexander Baring of

[78] Stipulated Statement of Facts, *Murch v. Tomer*, 21 Me. 535 (1842).
[79] *See* ROLDE, *supra* note 38, at 219.

England, Webster negotiated what later became known as the Webster-Ashburton Treaty.[80] Of course, Webster's involvement in this, as in *M'Intosh*, is not immune from speculation that his dealings were less than transparent. During negotiations and at a time when Webster was having immense difficulty getting Americans to support a compromise with Britain, there was a "fortuitous discovery . . . of a map that purported to show a boundary line drawn by Benjamin Franklin during the Paris peace talks in 1783 that helped assuage American feelings."[81] Following this miraculous discovery, the Webster-Ashburton Treaty was signed in August 1842.[82] Just two months prior, in June of 1842, counsel for the parties in *Murch* agreed to continue proceedings *nisi* so that the case could "be argued in writing."[83]

It is here that the confluence of Maine lumbering history, counsel's reliance upon stipulated facts, and Daniel Webster's prominence in the Maine Bar during 1842 forms a compelling nexus of incentive and resulting policy: in the face of an expanding industry and demand for timber, Maine needed to "open" up any lands it could, including those held by the tribes or individuals thereof. Indeed, by 1842 ". . . pine was still the lumberman's prize, and Maine was the last place in the Northeast where it grew commercially viable stands. They were long gone from the state's southern forests, but up north woodsmen could find the immense trunks of old and in wonderful quantity. Only the disputed border had prevented them from being exploited with confidence [by Maine]."[84] *Murch*, having been decided during this fateful year, falls directly in tandem with the signing of the Webster-Ashburton Treaty—the certainty gained therefrom which "uncorked a flood of optimism" in speculation and began to reverse a declining trend in land sales, which had reached a nadir the prior year.[85] Indeed, the same summer the Treaty was signed, Maine saw a flurry of "advertisements for saws, axes, and other woods-related stuff [fill] the pages of Bangor's broadsheets."[86]

It is not the position of the authors that the similarities between *M'Intosh* and *Murch* offer proof beyond a reasonable doubt that *Murch* was a fraudulent case. It is, however, the belief of the authors that *Murch*, like *M'Intosh*, bears several of the hallmarks of a manufactured case designed to set the stage for a contrived precedent. Especially in light of the intimate connections with Webster, Maine's land situation, and the timing of the Webster-Ashburton Treaty, the

---

[80] *See* URQUHART, *supra* note 10, at 69.
[81] *Id.*
[82] *See id.*
[83] *Murch*, 21 Me. at 535.
[84] URQUHART, *supra* note 10, at 72.
[85] *Id.* at 73.
[86] *Id.*

authors certainly suggest that, like *M'Intosh*, *Murch* is deserving of an analysis so thorough as Robertson's.

IV. INTERVENING YEARS: SHIFTING ECONOMICS, BREACH OF FIDUCIARY DUTY, AND THE PAUPER MYTH (1843-1892)

"Poverty is the worst form of violence."

*— **Mahatma Gandhi** (1869-1948 A.D.)*

The *Murch* decision punctuates a period of tribal history in which the Native American population in Maine was facing two converging threats to their continued existence: environmental destruction and dispossession. Together, these interrelated forces had a crippling effect on the tribes' ability to continue practicing sustenance hunting and gathering and sustainable living. The tribes were forced to conform to a euroagrarian construct of farming and industrialization or else face starvation. It was a false choice: assimilate or die.

A. *Dispossession and Economic Assimilation by Force*

When Maine became a state in 1820, it was agreed that the millions of acres of "untamed" wilderness lands that covered the region should become the "joint property of both" Maine and Massachusetts. By this division, Maine came into possession of as many as 7,000,000 acres of wild woodlands.[87] As the need for expansion onto public lands was fueled by unchecked lumbering, Maine desperately wanted to acquire additional lands within its borders. So, in 1853, the State purchased all remaining land within its borders from the Commonwealth of Massachusetts for a sum of $362,500.[88]

Though Maine had a history of having immediately liquidated some public lands to secure funding for its young government during the earliest stages of statehood, it began to truly accelerate divestment efforts in the mid-19th century. Previously, lands had been used as an analogue to a bank loan, with the State financing political and infrastructural projects with land grants and sales:

> Indeed, lacking money, the State was led in its early days to secure the things it desired by the grant and sale of its lands, the income from which, for many years, constituted its largest source of revenue. As an example of this policy, which later generations have

[87] *See* DEFEBAUGH, *supra* note 14, at 28.
[88] *See id.*

> not hesitated to characterize as wasteful, it is interesting to know that the construction of the State House was largely paid for with State lands, the Legislature providing for the sale of twelve townships, the proceeds of which were to be devoted to this purpose.[89]

Such efforts were so lucrative that not only was the State able to fund governmental infrastructure projects, but funds were also channeled into promoting the settlement and industrialization of socio-economic centers like Bangor. Almost overnight, it seemed, lumbering towns exploded in population size, according to contemporaries such as Henry David Thoreau. Undoubtedly regarded as a bastion of wealth and industry at this time, Bangor drew frequent comparisons to "sister cities" like New York and Boston in regard to its "majesty."

The State—once heralded as home to "exhaustless" timber resources—had either sold into private hands or permitted the clearcutting of nearly all of its public lands. Having unwisely parted with nearly all of this land, Maine was largely held by private owners in immense tracts, often comprising one or more townships.[90]

The effect of dispossession was two-fold. First, dispossession and industrialization of ancestral lands led to a drastic and accelerated shift in tribal cultural practices. People who were historically sustainable sustenance hunters and gatherers were no longer able to live a traditional life. This, in turn forced the tribes to participate in the colonizer's foreign economics, in which they were afforded little opportunity to succeed. Second, having taken nearly every acre of the tribes' ancestral lands, and not able to further dispossess them, the State set about implementing a regime of socio-legal policies aimed at keeping the tribes financially dependent while at the same time executing an attack on tribal sovereignty in an attempt to skirt treaty obligations and get the tribes "off the State's payroll."

B. *Environmental Crises and the Hypocrisy of Pauperism*

Dispossessed of nearly all of their ancestral land holdings, the tribes began expanding into white settlements across the state.[91] In so doing, the tribes were less "following" white expansion than they were attempting to maintain ties to advantageous ecological sites discovered and stewarded by their ancestors for

---

[89] *Id.*
[90] *See* DEFEBAUGH, *supra* note 14, at 25 (*citing Abbott and Elwell's 'History of Maine' 1892).*
[91] *See* MCBRIDE & PRINS, *supra* note 16, at 21.

centuries.[92] There was, however, some imperative to intersperse amongst the white settlements as a means of survival. In the face of unduly restrictive State hunting, fishing, and trapping laws, the Wabanaki people were unable to practice traditional means of sustenance.[93] By force, the tribal populations became increasingly dependent on currency and commercial foodstuffs consumed by the Americans.[94] In an effort to earn a living in this alien economy, tribal members worked as hunting and fishing guides, laborers, lumberjacks and log drivers, seasonal farmers, basket makers and craftsmen, canoe builders, and even traveling "Indian doctors" practiced in naturopathy and herbal remedies.[95]

Further limiting the tribes' ability to practice their traditional, sustainable lifestyle was the proliferation of lumber booms during the second quarter of the 19th century, which destroyed ancestral fisheries at Old Town and below the islands. Species that once swam in abundant numbers such as salmon, shad, and alewives no longer engaged in migratory spawning in the Penobscot River.[96] Concurrently, deforestation and the increasing presence of humans encroaching ancestral hunting grounds precipitated a decline in moose and deer populations.[97]

The tribes made some efforts to incorporate agrarian methods into their traditional means of survival, but met challenges in this, as well. Following John Attean's example of planting a corn field at Mattawamkeag Point, many Penobscots tried their hand at farming on the islands, but spring flooding and invasive species—like the roaming cattle of the lumber teams—made the riverine environment hostile to their efforts.[98]

In the face of the environmental crises befalling them, many indigenous families were likely ". . . anxious to leave the crowds of laborers and the log jams, human filth, and thick sawdust polluting their river, not to mention the screaming saws that destroyed the serenity of their island home."[99] It was around this same time that many tribal communities began making increased voyages to ancestral coastal holdings in the Mount Desert Island region which, by this time, was beginning to take hold as a destination among the Americans. Here, the Indians would sell baskets or medicines.[100] Perhaps most importantly, here they would be free from the constant pressures of the "industrialization surrounding them at Indian Island and, to a lesser extent, Pleasant Point."[101]

Struggling to integrate into the white economy due to the paucity of opportunities and institutional and societal pressures of racism opposing them, the

---

[92] *See id.*
[93] *See id.*
[94] *See id.*, at 21, 30-31.
[95] *See id.*
[96] *See* Pawling, *supra* note 8, at 33:55.
[97] *See id.*
[98] *See id.*
[99] MCBRIDE & PRINS, *supra* note 16, at 13-14.
[100] *See id.*
[101] *Id.*

tribes fell into deep poverty—inflicted, as it was, by the State's dispossession of their lands and interference with their sustenance.

By 1852, the cascade of events that had bankrupted the tribes began to take on a new narrative. No longer was it the "inferiority" of the "savage" way of life that white Americans blamed for the impoverished state of the Native Americans, but instead it was "native slothfulness" that was to blame.[102] According to a 1852 Governor's Report on Indian Affairs, the tribes were destined to remain "in a condition bordering on pauperism. . . until their habits have been changed."[103] Though the State (and its progenitor, Massachusetts)—and *not* the tribes—had been paupers from their inception, the proliferation of the "pauper myth" of the Native American had begun to spread like wildfire. No one seemed to notice that, in fact, it was the State leeching from tribal resources, and not the tribes leeching from the State.

No one seemed to notice that, in fact, it was the State leeching from tribal resources, and not the tribes leeching from the State.

By 1878, the lumber business—as a whole, regardless of species felled—began to die down, resulting in yields in 1906 of just 16,000,000 feet per annum.[104] It was this—the death of Maine's golden economic years—that precipitated attempts to extinguish the tribes altogether.

Through fabrication of the pauper narrative, the State attempted to legitimize its efforts to dump the tribes from its payrolls by dissolving tribal sovereignty and subsequent assimilation. Maine's campaign was one of misinformation and unjust characterization of the tribes as "paupers" when, quite oppositely, it was Maine who had always been the pauper—dipping into tribal funds and stealing to further engorge itself and expand.

[I]t was Maine who had always been the pauper—dipping into tribal funds and stealing to further engorge itself and expand.

[102] ROLDE, *supra* note 38, at 283.
[103] *Id.*
[104] DEFEBAUGH, *supra* note 14, at 83.

In an astoundingly hypocritical and shameless perversion of the public narrative, the duality of tribal versus state self-sufficiency was turned on its head. In retrospect, this miscarriage of truth is brazen in its unabashed falseness. Somehow, the State succeeded in portraying itself as a beneficent guardian of the "poor, slothful" Indians when, in fact, the tribes were and always had been the economic donor class that carried the endless waves of Euromerican paupers. Without having stolen tribal lands, Massachusetts and Maine would never have survived the economic hardships that retarded their growth in infancy.

In retrospect, this miscarriage of truth is brazen in its unabashed falseness. Somehow, the State succeeded in portraying itself as a beneficent guardian of the "poor, slothful" Indians when, in fact, the tribes were and always had been the economic donor class that carried the endless waves of Euromerican paupers.

V. GENOCIDE IN THE COURTROOM: *STATE V. NEWELL* AND THE LAW COURT'S ASSAULT UPON TRIBAL SOVEREIGNTY (1892)

"And I can see that something else died there in the bloody mud, and was buried in the blizzard. A people's dream died there. It was a beautiful dream."

— Heȟáka Sápa (or, "Black Elk") (1823-1950 A.D.)

In this time of economic decline of the lumber industry, the Maine Law Court found before it a perfect opportunity to end its Treaty obligations to the Wabanaki Tribes thus eliminating thousands of dollars in annual payments.

Exactly 50 years after the Law Court's decision in *Murch*, a seemingly innocuous hunting trip shared between two Passamaquoddy tribal members would precipitate the most caustic jurisprudence ever authored by the Maine judiciary. An attempted death blow to the recognition of tribal sovereignty in Maine, the Law Court's 1892 ruling in *State v. Newell*[105] set into motion a cascade of case law that, over the years, would erode indigenous rights. Belonging to the same class of infamous decisions as *Korematsu* (internment of Japanese Americans), *Dredd Scott* ("people are property"), and *Plessy v. Ferguson* ("separate but

[105] *State v. Newell*, 84 Me. 465, 24 A. 943 (1892).

equal"), *Newell* is an unapologetic assault upon the sovereignty of the tribes in Maine and an attempt to illegally cancel the treaty obligations of the State thereto.

Despite *Newell's* genocidal and racist intentions, perhaps the most incredulous legacy it leaves is that it *is still lawful precedent*. A shameful miscarriage of justice, *Newell* is an embarrassment to Maine jurisprudence that not only mars the legacy of the Law Court so long as it remains "good law," but continues to have deleterious effects on tribal sovereignty.

A. *Facts and Background*

On what was very likely a bitterly cold and snowy morning in the winter of 1891, Peter Newell and Joseph Gabriel—both members of the Passamaquoddy Tribe at Peter Dana Point ("Indian Township")—readied their gear and set out to go hunting.

They shot two deer that fateful day—January 14, 1891. Unbeknownst to either of the hunters, the killing of these two deer would soon turn out to be perhaps the most consequential event in the history of Wabanaki Tribes in Maine.

Whether known to the two hunters or not, Newell's and Gabriel's deer were, in fact, taken during what is referred to as "closed season"—a period of time in which certain game may not be legally hunted, as regulated by State fisheries and wildlife laws.

Following the hunt, Newell was issued a summons while on reservation land. He was indicted and arraigned for "with force and arms kill[ing] and destroy[ing] two deer, against the peace, & contrary to the statute in such case made and provided." At his arraignment, Newell's attorney entered a guilty plea and offered the affirmative defense that, by way of Newell's status as a member of the Passamaquoddy Tribe, "he had a lawful right" to do so by reason of the treaties of 1713, 1717, 1725, 1727, 1749, 1752, 1780, and 1794 between the Passamaquoddy Tribe and the English Crown or the Commonwealth of Massachusetts, and the hunting "privileges" reserved to the tribes thereunder. In other words, Newell acknowledged that he had taken the two animals, but argued that he had a lawful right to do so by reason of the treaties between his tribe and Massachusetts.[106] At Newell's arraignment, the parties agreed to petition the Law Court for review of the matter.

[106] ROLDE, *supra* note 38, at 253.

A bit of historical context on the parties involved in the *Newell* case bears discussion. Just eight months after being indicted, Peter Newell was elected Chief of the Passamaquoddy Tribe at Indian Township on September 30, 1891.

The presiding Chief Justice of the Maine Supreme Judicial Court (this being the official title of Maine's highest court—known as the "Law Court" when sitting in its appellate capacity) at this time was John A. Peters. The son of a lumber merchant from Ellsworth, Maine, Peters was a Yale educated attorney and member of the secretive Skull and Bones society. Upon his return to Maine, Peters initially served as a State Senator from 1862-1863 before holding office as Attorney General from 1863-1866. In 1867, Peters was elected to serve in the U.S. Congress, where he was a member until 1873, thereafter returning to Maine to serve as a judge. A decade later, Peters's jurisprudential career reached its peak when he was appointed as Chief Justice of the Court—a position he held from 1883 until his resignation in 1900.

Given the focus of this Comment and the depth into which its authors have examined the political and socio-economic repercussions of Maine's lumber industry, it will be of great interest to note that Chief Justice Peters's second wife, Fannie E. Roberts, was the daughter of infamous Maine lumber baron Amos Roberts—he of the Theft of the Four Townships. To state that Chief Justice Peters's immediate family had a vested interest in the vitality of the Maine lumber industry is perhaps an overly modest characterization. That *Newell* quickly devolved from a criminal matter bearing upon the killing of two deer in a "closed season" into a full-on assault of tribal sovereignty by means of treaty rights recognition is concerning, if not entirely unexpected. As was the case in *Murch*, it very much felt as though the "deck was stacked" against the tribes from the very beginning.

B. *Holding and Analysis*

Writing on behalf of a unanimous Court (with one justice abstained), Justice Lucillius Emery (who would later succeed Justice Peters as the Court's Chief Justice) spared precious little time departing from the criminal matter at hand in favor of a more expansive discourse regarding tribal sovereignty. Although the justiciable controversy before the Court might readily have been resolved by a facial reading of the hunting statute or the treaties in question, the Court instead endeavored to cloak itself with the authority to determine, *de novo*, what constituted an Indian Tribe.

The Court dedicates two sentences to discussing the underlying criminal matter:

> The defendant admittedly killed two deer in this State contrary to the form, letter and spirit of the statute for the preservation of deer and other game animals. The only matter of fact he interposes in defense is, that he is an Indian, one of the Passamaquoddy tribe, a tribe living on and near Lewey's Island in the eastern part of the State.[107]

Having so stated the most basic of facts and Newell's affirmative defense, the Court immediately dives headlong into a dialectic analysis of the status of Native American tribes in general, comparing those in the "east" with the "west":

> Whatever the status of the Indian tribes in the west may be, all the Indians of whatever tribe, remaining in Massachusetts and Me. have always been regarded by those States and by the United States as bound by the laws of the State in which they live.[108]

The fallacy of this statement is exposed by an examination of the U.S. Constitution. The Constitution was drafted in May of 1787 and ratified in July of 1789. At the time of ratification, Art. I, sec. VIII gave the U.S. Congress sole authority to regulate affairs among the tribes in the United States. Western tribes were not contemplated by Art. I, sec. VIII because they were not even *in* the United States until the Louisiana Purchase of 1803 and annexation of Mexican lands in 1848. Contrary to Justice Emery's assertion, the U.S. Constitution always considered the eastern tribes as falling under federal—not state—jurisdiction, because they were the *only* tribes living within the geographic boundaries of the United States at the time the Constitution was written.

Citing *Murch* as direct authority, the Court disingenuously expands the holding thereof as an access point for reaching a question not before the Court: 'how then *are* the Indian tribes regarded in Maine?' Although the Court then embarks upon analyses of the treaties, the exercise is entirely illusory given its ultimate determination:

---

[107] *Newell*, 84 Me. at 466, 24 A. at 943.

[108] *Id.* at 466. This statement, of course, is complete fallacy. There were, in fact, no "western tribes" under the jurisdiction of the United States of America at the time that the federal government established its relationships with indigenous populations pursuant to Article I, Section VIII of the Constitution—establishing sole authority to treat with the tribes—and the Non-Intercourse Act of 1790, vesting in Congress the sole authority to transact with the tribes.

> Whatever may have been the original force and obligation of these treaties, they are now *functus officio*. One party to them, the Indians, have wholly lost their political organization and their political existence. There has been no continuity or succession of political life and power. There is no mention in the treaties of a tribe called "Passamaquoddy," and we cannot say that these present Indians are the successors in territory, or power, of any tribe named in the treaties, or are their natural descendants.[109]

It would seem, after all, that the Court found little purpose in its own academic dissection, given its determination that the treaties did not, in fact, apply to *any* Maine tribes still in existence. Justifying this finding, the Court writes:

> Though these Indians are still spoken of as the "Passamaquoddy Tribe," and perhaps consider themselves a tribe, they have for many years been without a tribal organization in any political sense. They cannot make war or peace, cannot make treaties; cannot make laws; cannot punish crime; cannot administer even civil justice among themselves. Their political and civil rights can be enforced only in the courts of the State; what tribal organization they may have is for tenure of property and the holding of privileges under the laws of the State. They are as completely subject to the State as any other inhabitants can be. They cannot now invoke treaties made centuries ago with Indians whose political organization was in full and acknowledged vigor.[110]

The Court delivers its final blow to tribal identity (and thus sovereignty) in its interpretation of the applicability of the most recent treaty—the Treaty of 1794 and that which, importantly, was the last to reserve the then-present-day holdings to the Passamaquoddy Tribe:

> What the report calls "the treaty of 1794," was simply a grant by the commonwealth to the Passamaquoddy tribe of Indians of certain lands and the privilege of fishing in the Schoodiac river, in consideration of

[109] *Id.* at 468.
[110] *Id.* at 466.

> their releasing all claims to other lands in the commonwealth. Clearly the defendant gains no right to hunt under that grant.[111]

In an unabashed miscarriage of judicial restraint and respect for the separation of powers of government, the 1892 Law Court attempted to deliver a death blow to the tribes, invalidating nearly two centuries' worth of treaty agreements and laying waste to the agency of the tribes to articulate meaningful defenses to attacks on their sovereignty over the greater part of the next century.

Newell is highly problematic for a multitude of reasons. First, it is a direct and grave violation of the terms of the Articles of Separation[112] in which Maine expressly recognized and adopted several of the treaties discussed in *Newell*. As such, *Newell* is not only a toxic miscarriage of justice, it is also an *illegal* decision properly characterized as a contravention of the highest law of the land.

Also of great concern is the Court's lack of judicial integrity in following the spirit and letter of the law. Not only did the *Newell* Court violate the Maine Constitution with its decision, but it abandoned established principles regarding

---

[111] *Id.*

[112] With Congress's blessing, the Articles of Separation provided for the establishment of an independent Maine. Under the Articles, Massachusetts bequeathed unto Maine some 11 million acres of public lands to which it had previously held title in the District. *See* URQUHART, *supra* note 10, at 42.; *see* ROLDE, *supra* note 37, at 227. The reader should understand that beginning at Maine's inception in 1820 through 1871, the Articles of Separation and the treaty agreements thereto were published as a pretext to the Maine State Constitution. Although contemporary publications of Maine's Constitution no longer contain the printed text of these treaty agreements, they remain in full effect per the original Articles. Me. Const. art. X, § 5. The original language of the Articles relating to the Commonwealth's treaty obligations to the tribes read: "The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise; and for this purpose shall obtain the assent of said Indians, and their release to this Commonwealth of claims and stipulations arising under the treaty at present existing between the said Commonwealth and said Indians; and as an indemnification to such new State, therefor, this Commonwealth, when such arrangements shall be completed, and the said duties and obligations assumed, shall pay to said new State, the value of thirty thousand dollars, in manner following, viz.: The said Commissioners shall set off by metes and bounds, so much of any part of the land, within the said District, falling to this Commonwealth, in the division of the public lands, hereinafter provided for, as in their estimation shall be of the value of thirty thousand dollars; and this Commonwealth shall, thereupon, assign the same to the said new State, or in lieu thereof, may pay the sum of thirty thousand dollars at its election; which election of the said Commonwealth, shall be made within one year from the time that notice of the doings of the Commissioners, on this subject, shall be made known to the Governor and Council; and if not made within that time, the election shall be with the new State." Me. Const. art. X, § 5.

veracious application of *stare decisis* and faithful adherence to good-faith principles of logic and reason. Put plainly, it is as if the *Newell* Court was content with its thinly-veiled attempts to "make it up" as it "went along." For example, the interpolation that the tribes had enjoyed "no continuity or succession of political life and power" is both false and an absurdity. Not only had recognition of the tribes and tribal membership served as *the literal basis* for the Court's logic in *Murch*, but even the most cursory review of contemporary legislative reports would have revealed otherwise. One such report—the 1860 Report from Indian Agent James A. Purington of Old Town—dated December 15, 1860, documents that Maine was still paying *treaty obligations* to the tribes.[113]

Another article—this from the wife of Passamaquoddy Indian Agent W. Wallace Brown, recounts that despite the discontinuation of some traditional cultural and political practices within the Tribe, not all long-practiced rites and procedures had been replaced:

> The government is a tribal assembly, composed of chief, subordinate chief, (po-too-us-win), captains, and councilors. The latter are appointed by the chief from among the old men of the tribe. They do not make the law for the law is usage transmitted by tradition. They settle all manner of dispute by the decision of the majority, receiving the chief's sanction.[114]

Although the learned Court might not have had the benefit of electronic databases or the internet at the time it decided *Newell*, it certainly had access to contemporary publications and, more importantly, legislative materials. Given that the sole objective of the Law Court is to apply the Maine Constitution and the laws of the State in resolving appellate cases, one would hazard to guess that said justices had a fast and loose relationship with legal research. A more discerning perspective, however—and that held by the authors—is that this judicial "activism" was purposeful.

The finality of the Law Court's decree being what it was at the time, *Newell* entered the world as a piece of shameful revisionist judicial activism aimed at eradicating the very existence of the ancient Wabanaki civilization. Importantly, it is a decision which amounts to a one-sided argument by a governmental body purposed to be an impartial arbiter of objective justice. It is,

---

[113] *See* Purinton, James A., "1860-12-15 Annual report of James A. Purinton, Agent for the Penobscot Tribe" (1860). *Documents*. 96. https://digitalmaine.com/native_tribal_docs/96.
[114] Brown, Mrs W Wallace, *Chief-making among the Passamaquoddy Indians,* 37, No. 3 Maine History 132 (1998).

though, the toxic legacy of *Newell* that is perhaps its most poisonous attribute. Stacked atop the fraudulent *Murch* decision, *Newell* is the crown jewel of the house of cards that is Maine Indian Law. *Newell* stands on nothing, yet stands for everything when it comes to the subsequent lineage of cases that have vitiated tribal sovereignty throughout the ensuing decades. In the words of Passamaquoddy Tribal Historian and former Tribal Representative to the Maine Legislature Donald Soctomah, the precedent set by *Newell* would set off a cascade effect that propelled the tribes into what he called "the Invisible Years" between 1890-1920.[115]

The finality of the Law Court's decree being what it was at the time,* Newell *entered the world as a piece of shameful revisionist judicial activism aimed at censoring the very existence of the ancient Wabanaki civilization.

The deplorable living conditions suffered by the residents of the Penobscot and Passamaquoddy Reservations in the mid-20th Century provide a stark case study illustrative of Soctomah's "Invisible Years." In 1934, Dr. Gladys Tantaquidgeon—then a young Mohegan woman working at the Bureau of Indian Affairs—visited the reservations in Maine, recording her observations of the unsanitary and inhumane conditions.[116] Sent by Commissioner John Collier to report on the general state of the Penobscots and Passamaquoddy, Tantaquidgeon visited Indian Island and found the residents to be in a state of utter despair.[117] Tantaquidgeon was horrified to discover that the State had condemned the Tribe's wells and subsequently was derelict in any attempt to restore or provide a source of potable drinking water. Tantaquidgeon learned that the Tribe had only managed to survive by retrieving ice during the winter months, storing it, and melting it down. Compounding the health threats posed by a lack of clean drinking water was the fact that the Tribe was without a working sewage system.

[115] *See* SOCTOMAH, *supra* note 34.
[116] ROLDE, *supra* note 38, at 269.
[117] *See id.* at 270.

Traveling east, Tantaquidgeon found conditions equally deplorable at the Passamaquoddy reservations. Living amongst ramshackle shelters and failing structures was a malnourished and diseased population plagued by childhood malnutrition, tuberculosis, and venereal disease. Tantaquidgeon learned that as much as 95% of the Passamaquoddy relied on "relief notes" to survive, and it was a near universal practice for families to sleep on floors covered with threadbare coats, for want of proper beds.[118]

Stacked atop the fraudulent* Murch *decision,* Newell *is the crown jewel of the house of cards that is Maine Indian law.* Newell *stands on nothing, yet stands for everything when it comes to the subsequent lineage of cases that have vitiated tribal sovereignty throughout the ensuing decades.

The "Invisible Years" were long and difficult. It would be another eight years after Tantaquidgeon's visit to Maine before the State's greed and desire to stop paying meager aid to the tribes would set into motion publication of *the Proctor Report*, thus bringing the tribes back into the spotlight.

C. Considerations

That *Newell* remains "valid" precedent is an embarrassment to Maine jurisprudence. That it has not yet gone the route of similarly abhorrent decisions like *Korematsu, Plessy v. Ferguson*, and *Dredd Scott* is an embarrassment for the Court. But, this does not have to be the case. In fact, there are plenty of considerations which, if applied by an informed Court seeking to restitute the grave harms effected by *Newell*, could provide fertile grounds for a reversal of course.

For example, the Law Court lacked jurisdictional authority to issue rulings interpreting treaties with Native American nations.[119] It had no authority to determine what constituted and how to legally define a tribe (typically the

---

[118] *See id.* at 271.

[119] Premised upon the constitutional authority vested in Congress pursuant to the Supremacy Clause of the Constitution (Art. VI) and federal jurisdiction over treaties (Art. III, Sec. II), the Supreme Court's decision in *Worcester v. Georgia* is illustrative of this point: "The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among the powers who are capable of making treaties. . . . The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . . *The whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the Government of the United States*." *Worcester*, 31 U.S. at 519 (emphasis added).

province of the federal government). Neither did it have authority to determine tribal membership. Nor was it imbued with the power to assess whether a tribe may invoke treaty obligations. In truth, the Law Court had no more authority to interpret or enforce tribal treaties than it would the Paris Accord.

It would be an understatement to suggest that the Law Court, sitting in 1892, was merely 'ill-equipped' to decide these questions even if it somehow could manufacture judicial authority. It outright lacked the authority to do so. For example, in interpreting the 1794 Treaty, the *Newell* Court concluded that the Passamaquoddy Tribe—setting aside for a moment its belief that the tribe "didn't exist"—could not hunt on its own land because hunting was not expressly mentioned in the land grants thereunder. This begs the question: *what is a land treaty if not the grant of land for something in return?*

In addition to questions of jurisdiction, authority, and competence, there are of course also considerations borne out by contemporary historico-legal analysis. As anthropologist Darren Ranco, Ph.D., has opined, the Maine Constitution contemplates a dichotomy of tribal-state relations that is far afield of that put into practice. Referencing the "Indians not taxed" language included in the Constitution of the State of Maine, Dr. Ranco theorizes that it "recognizes . . . they are not a part of the public and the republic of the U.S. and State of Maine in that context. . . ."[120] The importance of harnessing the insight afforded by contemporary social, economic, and political study cannot be understated and, by example of Dr. Ranco's analysis, may even be revelatory in presenting modern courts with the necessary perspective to revisit foundational legal documents and principles that have been misconstrued for centuries.

Of course, context always matters and only through thoughtful application of these analyses can our society function in a just and equitable manner. For, as Dr. Ranco acknowledges, even though the "Indians not taxed" language is properly interpreted as a recognition of tribal sovereignty, it is in many ways a "double-edged sword."[121] According to Dr. Ranco, while "a great recognition [of sovereignty] … [i]t allows for a category of 'racialized otherness' for the State to really treat Indians as second-class citizens, as a racialized group not deserving of a full set of rights and also therefore ignoring any kind of promises that are embedded, for example, in the Articles of Separation and treaties."[122]

---

[120] Darren Ranco, Ph.D., Wabanaki Windows, *Unpacking Sovereignty (6th in a series)*, at 02:45 (July 21, 2021), https://archives.weru.org/wabanaki-windows/2021/07/wabanaki-windows-7-27-21-unpacking-sovereignty-6th-in-a-series/.
[121] *Id.* at 05:11.
[122] *Id.*

PART IV: THE INDIAN PAPERS: MAINE'S OWN 'NIXON TAPES'

VI. A LEGISLATIVE DISCOURSE OF 'SQUAWS,' 'FREAKS OF NATURE,' AND 'PAUPERS,'

"But when the President does it, that means that it is not illegal."
*— **Richard M. Nixon** (1913-1994 A.D.)*

A. *LD 694: An Act Relating to Loss of Membership in Indian Tribes by Marriage*

On the afternoon of July 28, 1942, members of the Joint Legislative Research Committee gathered at the State House in Augusta, Maine. On the docket for consideration that day was L.D. 694—"An Act Relating to Loss of Membership in Indian Tribes by Marriage."[123] Sponsored by Senator George W. Chamberlain and touted as "an attempt backed up by the Indians in general to try and limit membership in the tribes," L.D. 694 stripped tribal membership from Penobscot and Passamaquoddy women who married non-tribal partners:

> If any woman who is a member of the tribe marries a man who is neither a member of the tribe nor eligible for membership therein she shall forfeit her membership in the tribe and shall not be eligible for adoption into the tribe during the period of such marriage. All provisions of this section shall apply to the Passamaquoddy tribe of Indians as well as to the Penobscot tribe, and such persons shall be subject to removal from the tribal reservations as provided in sections 261 and 291 of this chapter.[124]

It is incomprehensible that the Maine Legislature thought itself empowered to determine who is and who is not a tribal member. Even the federal government, which has a constitutional mandate to regulate relations with the tribes, has never claimed the authority to determine tribal membership. Indeed, as

---

[123] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony of Norman W. MacDonald, Director of Social Welfare) (*hereinafter* "MacDonald Testimony").
[124] L.D. 694 (90th Legis. 1942).

the Indian Child Welfare Act would subsequently acknowledge, the ability to determine tribal membership is the ability to eradicate the tribe.[125]

Earlier that year, when L.D. 694 was initially presented to the 90th Legislature, lawmakers were flummoxed to discover that tribal laws already provided a system limiting title transfers of reservation land between tribal members. Although these tribal laws were distinct from L.D. 694's express purpose of vitiating membership on the basis of marriage, the revelation apparently generated confusion amongst legislators about the nature of the State's relationship with the tribes, the laws applicable thereto, and the history behind Tribal-State relations.

The Legislature referred the matter to the Research Committee for clarification. In response, the Research Committee appointed Maine Attorney Donald W. Webber as Special Counsel. Special Counsel Webber—who eleven years later, in 1953, would take a seat as a justice on the Maine Supreme Judicial Court—had previously served the Legislature as a legal advisor to the Joint Special Session Investigative Committee. Upon assessing the bill in question and the uncertainty of legislators as to Maine's entire "Indian situation," Special Counsel Webber concluded that it be a waste of legislative resources to "spend too much time just on [L.D. 694] unless we might be considering at the same time some of the broader aspects of the whole Indian situation in Maine . . . ."[126]

Special Counsel Webber proposed that the Research Committee convene to discuss both the bill and Maine's "Indian Situation."

Special Counsel Webber proposed that the Research Committee convene to discuss both the bill and Maine's "Indian situation." A panel was commissioned and scheduled to meet on July 28, 1942, at which time it would

---

[125] This maxim finds its genesis in the testimony of Chief Calvin Isaac, Mississippi Band of Choctaw. In Chief Isaac's testimony before the United States Senate's Select Committee on Indian Affairs, considering the Indian Child Welfare Act of 1977, he said ". . . [C]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their people. . . . Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." *The Indian Child Welfare Act of 1977*: Hearing on S. 1214 before the U.S. Senate Select Committee on Indian Affairs, 95th Congress, First Session. (August 4, 1977).

[126] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony of Donald W. Webber, Special Counsel to the Legislative Research Committee)(*hereinafter* "Webber Testimony").

call upon officials from the Attorney General's office and the Department of Health and Welfare.

B. *MacDonald and Cowen Testimony before the Legislative Research Committee (1942)*

Special Counsel Webber convened the Legislative Research Committee panel on July 28, 1942, at two o'clock in the afternoon. After welcoming those in attendance—an audience of which consisted of members of both the State House and Senate— Special Counsel Webber again explained the nature of business to be discussed. He disclosed that he had ordered a contemporaneous record of the proceedings ". . . simply because in considering so many different problems none of us can retain this stuff in our minds . . . ."[127] Despite this, however, Special Counsel Webber reminded lawmakers and officials that he had no intention "to confine [them] to the record at all," and offered free reign to discuss matters off the record as requested.[128]

First to testify was Norman W. MacDonald, Director of Social Welfare for the State of Maine.[129] Special Counsel Webber invited Mr. MacDonald to educate the Committee as to the background of L.D. 694, and to offer the Department of Health and Welfare's official position on its soundness. MacDonald began his testimony by explaining that L.D. 694 arose out of an attempt to limit tribal membership, which he claimed was "backed up by the Indians in general . . . ."[130] MacDonald recounted the Legislature's inability to reconcile the proposed law with existing tribal and state regulations on title transfers of reservation lands. He added that there was resistance from "certain members" of the tribal communities who "d[id] not want to be deprived of their property right through marriage. . ."[131] Ultimately, MacDonald expressed his belief that the bill's marriage mandate would ". . . limit membership in the tribe to persons who are actual Indians . . ." as opposed to "our present laws which could result in the end in having no full-blooded Indians or even half-blooded Indians even."[132]

---

[127] *Id.* In hindsight, this administrative directive by Special Counsel Webber had the effect of essentially creating a time capsule, for which the authors are supremely grateful. Without Special Counsel Webber's record of the proceedings of the Legislative Research Committee on L.D. 694, much of the critically important context of the *Proctor Report* and its place in Maine history would be lost.

[128] *Id.*

[129] In 1933, the Maine Department of Health and Welfare was given general supervisory authority of the tribes. P.L. 1933, ch. 1, §241.

[130] MacDonald Testimony, *supra* note 123.

[131] *Id.*

[132] *Id.*

State Representative and Republican Floor Leader Walter Mayo Payson of Portland interjected, focusing on what he referred to as the "fundamental proposition" of ". . . what [was] the situation with relation to these tribes? Are they practically people on the State payroll, state-supported and state-sponsored?"[133]

MacDonald's response was to point to the original obligations of the State of Massachusetts which were absorbed and assented to by the State of Maine in the Articles of Separation concurrent with its admission to statehood in 1820.

MacDonald's response was to point to the original treaty obligations of the State of Massachusetts which were absorbed and assented to by the State of Maine in the Articles of Separation concurrent with its admission to statehood in 1820.

Payson rebuffed MacDonald; he explained that he was not interested in what the treaties provided for but what the practical effect was. In his words, what was the "actual situation" with regard to State expenditures for supporting the tribes?

MacDonald's answer—that Maine was spending approximately $48,000 per annum to "support" the Penobscot Tribe—prompted a deluge of questions about whether and how tribal members worked to support themselves.[134] The discussion then moved to whether the treaties had memorialized land transfer agreements between the tribes and Maine or Massachusetts. Committee Chair and State Senator Robert B. Dow addressed the question directly, asking of the tribes' assent to treaty terms: "Do they agree to give us the rest of Maine if we will give them some reservations?"[135]

The Research Committee had now strayed from discussion of the bill, and MacDonald began explaining Maine's history of land transactions with the tribes, including the "purchase" of the four townships from the Penobscot Tribe in the 1833.

---

[133] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony of W. Mayo Payson, State Representative)(*hereinafter* "Payson Testimony").

[134] MacDonald Testimony, *supra* note 123.

[135] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony of Robert B. Dow, Committee Chair and State Senator)(*hereinafter* "Dow Testimony"). This a tacit admission that the State occupied land still belonging to the tribes, which would come to bear in the Maine Indian Land Claims litigation.

Special Counsel Webber refocused the Committee, asking MacDonald whether the Department favored L.D. 694.[136] To this, MacDonald responded by noting his concerns that the bill might unfairly deprive tribal members of their lawful property without consideration.[137] When asked, however, if the Department favored the bill "insofar as [it] prevent[ed] the addition of further white blood into the picture . . ." MacDonald replied "yes."[138]

Having come to a consensus on the propriety of the underlying aims of L.D. 694, the Committee began discussing how to amend the bill so as to ameliorate any "unjust" deprivation of tribal property rights. To this end, MacDonald suggested a provisional period—perhaps ten years—in which tribal members could liquidate their holdings or, alternatively, a system to allow the State to purchase and hold title to the land.[139]

After much debate about what a state acquisition program might look like, Representative Payson again interjected; how did any of this get the tribes off of state support programs?[140] It didn't, confessed MacDonald; who agreed that the bill was "not a means of solving the problem of supporting the Indians."[141]

From there, the "discussion" devolved into a cacophony of uninformed conjecture and confusion. The real impetus for L.D. 694 was laid bare:

There was considerable concern that "[s]ome degraded white men . . . would marry Indian women and live on the reservation"[142] at the expense of and "[o]n the bounty of the State."[143]

Chairman Dow inquired which was more prevalent: ". . . white men marrying squaws, or vice versa."[144]

Indian Agent Flagg Cummings's contribution was an anecdote of a "quite ugly" and "bossy" white man who had "married an Indian girl," had eleven children, and "liv[ed] on the reservation [while] the State support[ed] his family."[145]

With this, MacDonald concurred that "[o]f course, they are not very high class white men that marry in there." Though, ultimately, it was the uncontrolled

---

[136] Webber Testimony, *supra* note 126.
[137] MacDonald Testimony, *supra* note 123.
[138] *Id.*
[139] *Id.*
[140] Payson Testimony, *supra* note 133.
[141] MacDonald Testimony, *supra* note 123.
[142] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony Roy S. Libby, State Representative).
[143] Dow Testimony, *supra* note 123.
[144] *Id.*
[145] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony Cadwallader Flagg Cummings, Indian Agent)(*hereinafter* "Cummings Testimony").

expansion of "pauper support,"[146,147] that MacDonald stated ". . . [was] a real problem."[148]

What followed in the Committee's discourse was a disturbing dialogue in which the members laid bare their aspirations to dissolve the tribes in Maine.

At one point, Representative Payson inquired about ". . . segregating these people and keeping them intact as a separate people"[149] to which MacDonald replied such a plan was not feasible because ". . . those people are citizens of the United States."[150]

Instead, MacDonald opined that a law "to prohibit white men living on the reservation" might work, offering ". . . if they married a squaw they have got to leave there."[151] This was met with approval from State Senator Jean Charles Boucher, who declared "[i]f a white man has a squaw, get them off the reservation and keep them off the rest of their life, and their children can't go back."[152] The discussion showed an astounding ignorance of U.S. Supreme Court precedent, as Chief Justice Marshall had held in *Worcester v. Georgia*[153] that states have no right to dictate who may go onto tribal lands. That authority rests with the sovereign tribe.

After a brief yet disturbing tangent endorsing Native American children crossing frozen areas of Penobscot River during spring and fall thaw to attend school,[154] it was agreed that the State should endeavor to dissolve the tribes. MacDonald opined that the State might absorb the reservations into adjacent townships[155] to which one legislator replied such a plan would serve the goals of assimilating the tribes.[156]

[I]t was agreed that the State should endeavor to dissolve the tribes.

The Committee wanted a way to move forward, both on L.D. 694 and on the larger "Indian situation." It was Representative Payson who compared the

[146] Dow Testimony, *supra* note 123.
[147] Payson Testimony, *supra* note 133.
[148] MacDonald Testimony, *supra* note 123.
[149] Payson Testimony, *supra* note 133.
[150] MacDonald Testimony, *supra* note 123.
[151] *Id.*
[152] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony of Jean Charles Boucher, Stare Senator).
[153] 31 U.S. 515 (1832).
[154] MacDonald Testimony, *supra* note 123.
[155] *Id.*
[156] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony of Lorenzo J. Pelletier, Stare Representative).

situation to a "miniature slave problem," offering that any attempts to dissolve the tribes and integrate the members into society would be reminiscent of the Reconstruction Era South:

> You gave the slaves in the south emancipation, made them all free men, but you didn't solve anything so far as the economic problem was concerned. We have got a minature [sic] slave problem here, and it seems to me we need to be careful in working it out, not by the Legislature but by people who know how to work people out of a bad proposition as a social proposition.[157]

Properly concluding that the Committee was woefully uninformed and therefore ill-equipped to make *any* substantive policy recommendations, MacDonald suggested that the Committee commission an investigation ". . . to make a real study of the Indian situation from 1820 on . . ."[158] "Wouldn't you like to know," MacDonald asked the Committee, "why we made the treaty with the Indians in the first place, and . . . why we have utterly ignored and set up a new group of laws to govern Indian affairs, and since we did, what has been the effect?"[159]

[T]he Committee apparently not only sought an investigation into the 'Indian Situation' for the purposes of moving forward with its plans to disband State financial support for the tribes, but also to "get enough facts from any source to destroy the myth that the Indians own the State and we are paying them interest on that ownership . . . ."

The Committee did. As evidenced by Representative Payson's testimony, the Committee apparently not only sought an investigation into the 'Indian situation' for the purposes of moving

"If we can get rid of that whole phase by reporting this whole thing as a deal between the Indians and the State of Maine and they have been doing pretty well . . . we might be able to lay a little background for a long-range plan that wouldn't have so much maudlin sympathy."

—W. Mayo Payson, State Representative

[157] Payson Testimony, *supra* note 133.
[158] MacDonald Testimony, *supra* note 123.
[159] *Id.*

forward with its plans to disband State financial support for the tribes, but also to "get enough facts from any source to destroy the myth the Indians own the State and we are paying them interest on that ownership. . ."[160] The plan was clear: ". . . if we can get rid of that whole phase by reporting this whole thing as a deal between the Indians and the State of Maine and they have been doing pretty well . . . we might be able to lay a little background for a long-range plan that wouldn't have so much maudlin sympathy."[161]

With the die cast on the plan to commission an investigative report of Tribal-State relations, the Committee broke for a recess. Later that same day, Maine Attorney General Frank I. Cowen was called to testify before the Legislative Research Committee to "share any pearls of wisdom" about the legality of L.D. 694. Addressing the panel before him, Attorney General Cowen advised that he could "not remember the exact bill" but was intimately familiar with ". . . quite a few individuals come into the tribe who have been adopted under that quarter blood law that have been trouble makers. . ."[162]

When asked about his opinion as to long-term solutions to Maine's "Indian situation," Cowen expressed the opinion that the tribal members were "just children" and would "never develop" unless Maine undertook coordinated efforts to "[get] any of them that show any ambition at all off the island and away from the reservation."[163]

Special Counsel Webber then immediately jumped to the Committee's concerns about Maine's historical intercourse with the tribes, asking: "Do you think we owe them any money?"[164]

Cowen expressed the opinion that the tribal members were "just children" and would "never develop" unless Maine undertook coordinated efforts to "[get] any of them that show any ambition at all off the island and away from the reservation."

Cowen was unequivocal. "Oh yes," he replied. "No doubt about that. . . I think we owe them some millions probably."[165]

[160] Payson Testimony, *supra* note 133.
[161] *Id.*
[162] *An Act Relating to Loss of Membership in Indian Tribes by Marriage*: Hearing on L.D. 694 before the Legislative Research Committee, 90th Legis. (July 28, 1942) (testimony of Frank I. Cowen, Maine Attorney General)(*hereinafter* "Cowen Testimony").
[163] *Id.*
[164] Webber Testimony, *supra* note 126.
[165] Cowen Testimony, *supra* note 162.

Having perhaps unwittingly opened Pandora's Box, Cowen continued on, seemingly unaware of the tensions discussed by the Committee during the earlier session that day. Although Cowen acknowledged that he felt Maine had "paid [the tribes] very well" in recent history, he added: "You go back into earlier history of the State and it would seem fairly apparent that [the tribes] were robbed left and right."[166]

"Do you think we owe [the Indians] any money," asked Special Counsel Webber.

Cowen was unequivocal. "Oh yes," he replied. "No doubt about that . . . I think we owe them some millions probably."

Chairman Dow punctuated Cowen's testimony, asking the Attorney General if he supported a program that would "wipe them out."[167] When Cowen said that he did not, Dow asked "what is an Indian anyhow?"[168]

Chairman Dow punctuated Cowen's testimony, asking the Attorney General if he supported a program that would "wipe them out."

Cowen's response amounted to the belief that interracial relationships between tribal members and non-members quickly dissolved "Indian characteristics."[169] He then proffered an example of two brothers with Native American descent, one of whom had "quite a lot of Indian blood in him" while his brother did "not seem to show any Indian characteristics."[170] To this, Special Counsel Webber proclaimed "[t]hat is a freak of nature."[171]

---

[166] *Id.*
[167] Dow Testimony, *supra* note 135.
[168] *Id.* It is significant and worth mentioning that although Attorney General Cowen and the Research Committee displayed a very clear disdain for Native Americans—referring to them as slow, imbecilic, and wards rather than citizens—the Legislature, just one year earlier, had petitioned the Law Court for a determination of Native American voting rights. Here, in the span of just two years, Maine's vacillating stance on indigenous citizenship is laid bare for what it was, and always has been: fluid and subservient to whatever political whims are prevailing at the time. When it benefitted the State to argue that there could be "no nation within a nation," they argued that the tribes were comprised of citizens. Elsewhere, when it fit the narrative of disparaging the tribal members as imbeciles and paupers, citizens they were considered no longer.
[169] Cowen Testimony, *supra* note 162.
[170] *Id.*
[171] Webber Testimony, *supra* note 126.

Having sufficiently demonstrated a shared perspective of the societal caste of these "freaks of nature," the Committee pressed Cowen on whether he had ever investigated "the whole Indian thing" in his official capacity and made a report.[172]

> ***"Well, I had a feeling it would be more than we wanted to see in that closet, so I closed the door."***
> ***— Frank I. Cowen, Maine Attorney General***

Cowen's response was striking: "On the Indians, no, sir. I was scared of it when I got into it and closed the door." He further explained his previous efforts to investigate the "Indian situation" in Maine—an exercise which led him into the archives of the State House and Land Office:

> I was digging into things down there and I kept running into this stuff, and I was checking up on the Indian Trust Fund, trying to find the origin of it and find out why it was a certain amount of course, and as I went back through the Land Office records I began to get more and more dubious. I finally said 'the Indian Trust Fund amounts to $138,000—period,' and stopped right there.[173]

To this, Representative Payson offered perhaps the most developed thought shared between Committee members that June afternoon: "This is a skeleton in our closet."[174]

"Well," Cowan responded. "I had a feeling it would be more than we wanted to see in that closet, so I closed the door."[175]

C. *'A State of Utter Confusion': Commissioning* the Proctor Report *to address Maine's 'Indian Problem'*

Having arrived at a "state of utter confusion" at the conclusion of testimony,[176] the Committee members agreed to commission an investigation of Maine State-Tribal affairs and history. At the end of August that same year, Special Counsel Webber obtained funds from the Committee for the purposes of

---

[172] *Id.*
[173] Cowen Testimony, *supra* note 162.
[174] Payson Testimony, *supra* note 133.
[175] Cowen Testimony, *supra* note 162.
[176] Payson Testimony, *supra* note 133.

commissioning Ralph W. Proctor—a local school administrator[177]—to investigate the matter and draft a report.

Proctor's work—which took approximately five weeks to finish[178]—was not foundational. When the Maine Legislature transferred "general supervision" of the Penobscot and Passamaquoddy Tribes to the Maine Department of Health and Welfare in March 1933, the Department commissioned a research study of Tribal-State relations referred to simply as the "Indian Project."[179] Margaret Snow of Rockland, Maine, was hired to lead the research project.[180] In a letter from Ms. Snow to the Department of Health and Welfare, she summarized what she understood to be the aim of the project:

> During the 114 years of her jurisdiction over these two tribes, the State has built up in the performance of her obligations acquired in the separation of Maine from Massachusetts in 1820, certain policies, practices, and customs. Yet, the evidence of these policies, of these practices, and of these customs through the years, lie buried in a mass of legislative, executive, and judicial state documentary records, both published, and in manuscript form. To unearth, to compile, and finally, to reduce this knowledge to a concise, workable medium for both historical fact, present development, and future possibility with regard to Indian Affairs, is the aim, or hope of the present project.[181]

Following her commission, Ms. Snow and her cousin, Dorothy Snow, conducted extensive research in the archives of the Governor's Council "with great thoroughness and investigated various departments in the State House for

---

[177] *Hearing on Ralph W. Proctor's 'Report on Maine Indians,'* 90th Legis. (October 6, 1942) (testimony of Donald W. Webber, Special Counsel to the Legislative Research Committee)(*hereinafter* "Dow Testimony"). At the time he conducted his investigation and drafted *the Proctor Report*, Proctor was acting principal of Edward Little High School—a public school located and still operating today in Auburn, Maine.

[178] Final Report of the Legislative Research Committee for 1941-1942 to the 91st Legislature 4 (Dec. 1, 1942)(*hereinafter* "Final Report of the Legislative Research Committee").

[179] Report of Margaret Snow to the Director for Women's Relief under the Federal Civil Works Program 1 (Feb. 20, 1934)(*available at*: https://digitalmaine.com/cgi/viewcontent.cgi?article=1000&context=arc_finding_aids).

[180] Untitled Internal Memorandum of the Department of Health and Welfare Regarding Margaret Snow's work on the "Indian Project" (May 17, 1934)(*available at*: https://digitalmaine.com/cgi/viewcontent.cgi?article=1000&context=arc_finding_aids).

[181] *Id.*

original source material on the Penobscot and Passamaquoddy Indians."[182] Unfortunately, it appears as though the Department of Health and Welfare deemed the Snows research of little importance and destroyed some of it:

> It is evident on examination of this manuscript that a great deal of the material used and compiled by Miss Snow in the early stages of the work was discarded. The intent of the project was to discover exactly what the state's policy in Indian affairs had been when by Act of the Legislature, March 28, 1933, the conduct of Indian affairs was turned over to the Bureau of Health and Welfare. Much of the information gathered by Miss Margaret Snow could not be of very great value to the Bureau who employed her. It was, however, of great value to the Indian historian and should have been preserved.[183]

Several years later, on January 5, 1942—approximately eight months before the commissioning of *the Proctor Report*—Margaret and Dorothy Snow were killed when they were struck while changing a tire on a roadway in Rockland, Maine.[184] Reflecting on this sudden and unexpected tragedy, Maine historian Elizabeth Ring—who later came into possession of the surviving Snow research materials—lamented that "[t]he accidental death in 1942 of the two young women who worked on the project leaves doubt as to what actually became the typed material from which the followed report was made."[185]

After Snow's death, Ms. Ring shepherded the surviving research materials from the Department of Health and Welfare archives to the Maine State Library in June 1942. Given the speed with which Mr. Proctor subsequently conducted his five-week investigation, one wonders whether and just how much of the Snows' original research was available to him.

Ultimately, Proctor finished his "Report on Maine Indians"—which came to be known as *the Proctor Report*—in September 1942. Broken into ten sections, *the Proctor Report* contained investigative analyses of subject matter ranging

---

[182] Untitled Cover Letter of Historian Elizabeth Ring Regarding "Indian Material" in the Possession of the Bureau of Health and Welfare Turned Over to the Maine State Library (June 25, 1942)(*available at*: https://digitalmaine.com/cgi/viewcontent.cgi?article=1000&context=arc_finding_aids)(*hereinafter* "Ring Letter").
[183] *Id.*
[184] *Shocking Double Tragedy*, COURIER-GAZETTE (Rockland, ME), Jan. 6, 1942, at 1, 3.
[185] Ring Letter, *supra* note 182.

from "Treaty Rights and Obligations" to histories of tribal funds and appropriations, tribal censuses, and a report on the "Progress of Indians."[186]

Touted by Special Counsel Webber as the new "leading authority on Indian affairs in the State of Maine," Principal Proctor delivered testimony to the Legislative Research Committee on October 6, 1942.[187] Proctor advised the Committee that his research had been guided by six questions:

- What is an Indian;
- Do we owe the Indians any money;
- How many Indians are there;
- What is the condition of the Indians;
- What should we do for them; and
- What are their citizenship rights? [188]

The discussion that followed on October 6, 1942, and the conclusions drawn by *the Proctor Report* are the subject of Section VII of this Remonstrance. The principal conclusions, however, can be summarized here: Proctor offered unconditional support for "the policy of limiting responsibility toward the Indian tribes."[189]

When Chairman Dow responded with the suggestion that "[y]ou could have the State buy [reservation land under tribal title] and tear down the buildings and keep somebody else from living there"[190] Ralph Proctor—"Maine's leading authority on Indian affairs" replied: "[y]ou might gradually buy back the

Two months later, in its Final Report to the 91st Legislature, the Legislative Research Committee would acknowledge more than a century of militant State programs, tactics, and behaviors that worked to injure the tribes. As reparations for these enumerated harms, the Committee would suggest* de minimus *legal relief—without interest.

[186] *See generally* the Proctor Report, *supra* note 39, at 18.
[187] *Hearing on Ralph W. Proctor's 'Report on Maine Indians,'* 90th Legis. (October 6, 1942) (testimony of Donald W. Webber, Special Counsel to the Legislative Research Committee)(*hereinafter* "Webber Testimony").
[188] *Hearing on Ralph W. Proctor's 'Report on Maine Indians,'* 90th Legis. (October 6, 1942) (testimony of Ralph W. Proctor, author of the "Proctor Report" and Principal of Edward Little High School, Auburn, Maine)(*hereinafter* "Proctor Testimony").
[189] *Id.*
[190] Dow Testimony, *supra* note 177.

reservation," before the Committee stopped transcription and went off the record.[191]

Two months later, in its Final Report to the 91st Legislature, the Legislative Research Committee would acknowledge more than a century of militant State programs, tactics, and behaviors that worked to injure the tribes. As reparations for these enumerated harms, the Committee would suggest *de minimus* legal relief—without interest.

VII. THE 1942 PROCTOR REPORT

"You will forgive me if I tell you that my people were Americans for thousands of years before your people were here. The question is not how you can Americanize us, but how we can Americanize you. We have been working at that for a long time."

—Unknown Indigenous Voice (as appearing in Felix S. Cohen's Americanizing the White Man, 1952)

Exactly 50 years after the Law Court's severe hobbling of tribal sovereignty in *Newell* (but still 38 years before the Maine Indian Land Claims Settlement would 'finish the job' of stamping out tribal independence almost entirely), the Research Committee for the 90th Maine Legislature found itself in a bit of a sticky wicket. Having endeavored to legislate on matters affecting a culture and a people of which and whom they had precious little (if any shred of) intelligible understanding, lawmakers exposed themselves as ignorant of the history, relationship, and ongoing obligations and duties existing between the tribes and the State.

Proctor's findings allowed him to support "the policy of limiting responsibility toward the Indian tribes."

When Ralph Proctor delivered his *Proctor Report* in September 1942 after just five weeks of research, the Research Committee convened to hear his testimony in October. During his testimony, Proctor fielded questions about his findings and explained the structure of his inquiry. Proctor defined his mandate as ". . . to record general trends and practices through a careful study of basic treaties, legislation, handling of funds, and present responsibilities, in

[191] Proctor Testimony, *supra* note 188.

order to furnish a basis for consideration of future policy in regard to Indian affairs."[192]

Having established his objectives, he set out to answer the six primary questions previously identified to help "educate" the Research Committee.[193]

Then, in a shocking moment of candor characteristic of the hostile social mores of 1940's America, Proctor put into words the objective of the 90th Legislature: his findings allowed him to support "the policy of limiting responsibility toward the Indian tribes."[194]

Through *the Proctor Report*, we regain a window fixed upon a moment in time; an almost fleeting moment when the State—evoking the taped confessions of disgraced future president Richard Nixon—let down its guard and admitted to genocidal acts and intentions. Laying naked for all the world to bear its goals of "assimilation," "buy[ing] back the reservation," "limiting responsibility towards the Indian[s]," and even undertaking measures such as controlling the intermarriage and interbreeding of mixed-race couples, the State apparently forgot that "the tape was running." Now, unveiled and dragged into the light, *the Proctor Report* serves as a self-audit and accounting of the conscious purpose of Maine's persecution of the tribes.

Now, unveiled and dragged into the light,* the Proctor Report *serves as a self-audit and accounting of the conscious purpose of Maine's persecution of the tribes.

A. *This Land is Your Land, and Now It's My Land: Treaty Abruptions and Fraudulent Transfers of Tribal Land Holdings*

As revelatory as the conclusions of *the Proctor Report* and the subsequent recommendations of the Legislative Research Committee are, the research that forms the substance of *the Proctor Report* is rather paltry. In evaluating some three centuries of historical events and documents, Proctor revealed three instances of land "transactions" that constituted potential violations of Maine's treaty obligations to the tribes. As has been made abundantly clear by this Remonstrance, there have been far more than three instances of uncompensated and/or fraudulent dispossession of the Maine tribes.

[192] The Proctor Report, *supra* note 39, at 1.
[193] Proctor Testimony, *supra* note 188.
[194] *Id.*

Later characterized by the Committee as "certain minor items in connection with the handling of Indian affairs . . ."[195] Proctor described the following three transactions:

1.) On October 11, 1835, the State sold, at auction, three islands in the Penobscot River belonging to the Penobscot Nation for $7,550 ($237,300.79 in 2021 USD). The tribe never received this money.;[196]
2.) The sale of 15 islands in the St. Croix River—having been granted to the Passamaquoddy Tribe in the 1794 Treaty, despite having been sold to a William Bingham in 1793—were assessed by an Indian Agent in 1855 as having been worth $2,000 ($50,288.91 in 2021 USD). The Tribe never obtained the islands or the $2,000 value; [197] and
3.) In October 1834, the State sold to Joseph Granger, at auction for $7,530 ($242,176.18 in 2021 USD), a collection of said islands in Old Town Falls belonging to the Passamaquoddy Tribe under the 1794 Treaty obligations. In 1855, Granger sued the Tribe for trespass thereupon and was awarded damages of $2,486.17 ($79,039.92 in 2021 USD). This was paid out of the Tribe's Trust Fund. The Tribe lost both the islands they believed to be their rightful property and the costs associated with defending the trespass action. [198]

Speaking to the Legislature through his report, Proctor posed the question of whether payment should be made to the Penobscot and Passamaquoddy Tribes for the illegal dispossession of these lands. The Legislative Research Committee issued its response: the land would not be returned to the tribes and the sums outstanding and never obtained would be paid to the tribes' respective Trust Funds—*without interest*.[199]

The sums repaid to the tribes at the direction of the Legislative Research Committee in 1942 were not only grossly less than the then-present day value when adjusting for inflation, but failed to take into account the interest to which the tribes were entitled and would have realized on these sums if timely paid at the time of divestiture. In essence, not only did the State steal from the tribes by failing to remit value duly adjusted for inflation, but it further divested the tribes of their expectant financial interests as well. At a minimum, the State failed to repay the tribes for the fair market value of the interests in question when it chose to tender only the original dollar amounts. It is an unsatisfactory argument that "the State doesn't pay interest as part of its sovereign immunity" because the

---

[195] Final Report of the Legislative Research Committee, *supra* note 178, at 44.
[196] The Proctor Report, *supra* note 39, at 3.
[197] *Id.* at 3a.
[198] *Id.* at 29 (*citing* "Annual Report of Land Agent" 1834).
[199] Final Report of the Legislative Research Committee, *supra* note 178, at 45-46.

tribes, having been left without consideration for decades received an incomplete remedy in 1942. If these transactions could ever be deemed a valid "accord and satisfaction," surely scrutiny would reveal that there was never an accord and the State failed to satisfy.

B. *Breach of Fiduciary Duty and Misappropriation of Trust Funds*

Next, *the Proctor Report* addressed instances of misappropriation of Trust Funds by the State in relation to both the Penobscot and Passamaquoddy Tribes. Despite the voluminous accounting records presented as evidence with the report (giving examples of payments remitted for the acquisition of basic necessities and foodstuffs for the tribes), this section of the report fails in its mandate from Special Counsel Webber to examine the root *causes and problems* that precipitated the mishandling of funds initially. A review of Proctor's reporting reveals that this failing is the result of a lack of historical context—something this Remonstrance has endeavored to remedy.

First focusing on misappropriations of Passamaquoddy Trust Fund monies, Proctor listed the following irregularities:

1.) Impounded bank accounts totaling $1,718.70;[200]
2.) $10,000 loss realized on defaulted bonds purchased from the City of Eastport by the State, on behalf of the Tribe;[201] and
3.) $3,877.12 of funds belonging to the Passamaquoddy Trust Fund, for balances accrued from the sale of timber rights, instead deposited into the State's General Fund from 1938-1940.[202]

As to the Penobscot Fund, Proctor listed a loss of $22,911.04 lost to the impoundment of bank accounts in which the State had invested Fund monies.[203]

Again addressing the Legislature, Proctor's report inquired whether the Penobscot and Passamaquoddy Trust Funds should be credited these amounts. In the alternative, Proctor supposed, the Legislature also had the option to cancel these amounts owed to the tribes "…on basis of the thousands spent . . . in excess of treaty obligations."[204]

---

[200] The Proctor Report, *supra* note 39, at 12.
[201] *Id.*
[202] *Id.* at 5.
[203] *Id.* at 4.
[204] *Id.* at 12.

The Legislative Research Committee recommended that only the $3,877.12 owed to the Passamaquoddy Trust Fund be restored—*without interest*—on the basis of mistake of law.[205]

As to the other outstanding losses, the Legislature stated its belief that

> [T]hese sums were deposited in banks of the State of Maine and in bonds of the City of Eastport in good faith, that the losses which may be incurred are the result of no more than the normal hazards accompanying any investment program, and that no negligence on the part of the State in so investing the Indian funds is apparent, and therefore recommends no restoration of these sums to the funds.[206]

It is disingenuous for the State, having a fiduciary duty to the tribes, to invest the tribes' money with a financially insecure municipality when the municipality cannot pay the bond, and to say it's 'not the State's fault.' Essentially, the State used tribal funds to reduce the amount that the State might have to pay to support a moribund and bankrupt municipality of the State.

C. *Disinterested and Without Interest: Recommendations of the Legislative Research Committee on Maine's 'Indian Problem'*

Expounding upon its rationale for denying the tribes any interest whatsoever—for *any* of the losses noted in *the Proctor Report*—the Committee explained:

> In making these recommendations, the Committee is basing its conclusions not upon any recognized legal obligations but solely upon a sense of the State of its responsibility for the protection of Indian welfare. In recommending that not interest be included, the Committee is mindful of the fact that its contributions and appropriations to the Indians over the period of many years has exceeded by hundreds of thousands of dollars any of its financial

[205] Final Report of the Legislative Research Committee, *supra* note 178, at 45.
[206] *Id.*

> obligations arising from the treaties with the Indians.[207]

In denying interests to the tribes occasioned by "hundreds of thousands of dollars" paid to them over the course of "many years" in excess of treaty obligations, the Commission stripped the tribes of legal relief duly accorded them for deprivation of the enjoyment of their property over a period of years of malfeasance. No consideration was lent or thought given to the separation of legal remedy from ancillary benefits. In short, the State unilaterally decided that its unrelated "overpayments" to the tribes in excess of "treaty obligations"—which, fairly stated amounted to a paltry cache of stipend foodstuffs—were able to be substituted in place of sums deprived and otherwise bearing significant interest. It was another robbery.

In short, the State unilaterally decided that its unrelated "overpayments" to the tribes in excess of "treaty obligations"—which, fairly stated amounted to a paltry cache of stipend foodstuffs—were able to be substituted in place of sums deprived and otherwise bearing significant interest. It was another robbery.

Had Proctor and the Committee ended their escapades there, the tribes would have been left bereft of their rightful property and spared the indignity of a superfluous racist diatribe bearing on the delusions of a group of legislators self-admittedly ignorant of the entirety of the history of Maine Tribal-State relations.

Unfortunately, the Committee had one last blow to deliver the tribes.

Even though the Committee had settled (albeit unfairly) the foregoing unlawful and irregular transactions, it proceeded to launch into a defense of the indefensible—levying gratuitous and racist insults en route to the same:

> It is elementary that people who have no need for self-dependence and self-reliance seldom develop it. That is the status of the Maine Indians today. Whether this attitude is wholly or in part Indian nature, or whether it has been created by the paternalistic attitude of the State in providing for them, is a matter for conjecture—possibly both factors have contributed. The Committee feels that at least the elements of the Indian problem have been cleared, and concurs in the following statement. . . There are those amongst the Indians themselves and

[207] *Id.* at 46.

> in other places who have maintained that the Indians in Maine were robbed. Our conclusion is that it is not so, that they have been amply repaid for whatever they gave up and excessively well-treated on the financial side; that they never owned or occupied the whole of the State of Maine; that the numbers of Indians at the time of the treaties show the impossibility of their having reduced to possession any substantial part of the State; and that as a result of the above conclusions the State is in a position to deal with the Indians fairly but on a realistic basis with a policy looking to the eventual self-dependence and self-reliance of each Indian.[208]

Having thus decreed, and in a haunting evocation of John Deane's 1830 "Coercive System," the Committee recommended the State adopt the following policies:

- Definition of "an Indian" as a person with at least one-quarter "Indian blood";[209]
- Implementation of vocational training for youth "wherever available" and seemingly without discretion;[210]
- State sponsorship of "Indian handicraft business";[211]
- Facilitation of agricultural vocational pursuits;[212] and
- Restricting State assistance programs solely to tribal members physically unable to find and perform a job.[213]

An orchestrated effort for a continuance of the failed policies of agricultural oppression and a condemnation to a future as "handicraft" makers that had for a century been incumbent of a state of poverty occasioned by the State's very own predatory policies, it was, of course, straight out of Maine's tried and true genocidal playbook.

That Maine has committed *genocide* against the tribes is not widely accepted by the general public. In general, the prevailing consensus appears to be that Maine may have unjustly enriched itself during a period of time where so doing was "acceptable" or "common practice," but there is no widespread

---

[208] *Id.* at 47.
[209] *Id.* at 46.
[210] *Id.* at 47.
[211] *Id.*
[212] *Id.*
[213] *Id.*

contemporary discourse advocating that Mainers are descended from a legacy of literal genocide.

The United Nations has defined genocide as any of the following acts committed with an intent to destroy—in whole or in part—a national, ethnical, racial, or religious group:

a. Killing members of the group;
b. Causing serious bodily or mental harm to members of the group;
c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
d. Imposing measures intended to prevent births within the group; and/or
e. Forcibly transferring children of the group to another group.[214]

PART V: CODA

VIII. PRESENT DAY: A PATH FORWARD

"Let understanding and communication through education be the building blocks of a new tribal-state relationship, one that recognizes and honors the struggles and contributions of Native people."

—Donna Loring (2008)

So, what can be done? While it's true that nothing can wash away the sins of the past, perhaps that assumes the wrong conclusion. Maybe, if the toothpaste is out of the proverbial tube, rather than trying (and failing) to do the impossible and putting it all back in, we instead started looking for a new container in which to transfer it.

It's a crude analogy, but it makes the point: contemporary efforts to "rectify," "solve," or "make up for" blood already spent—while noble—aren't

[214] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. It may well be noteworthy that the United States would not ratify this Treaty until November 25, 1988—nearly 40 years after it was drafted.

always *practical*. If, in endeavoring to make amends, our heart is in the right place, let us refocus our efforts on initiatives that can create *real*, *tangible* progress for the living.

As a coda to the foregoing historico-legal remonstrance of Maine's parasitic persecution of the tribes within its borders, the authors would like to offer some limited, practical suggestions for ways in which the State of Maine and the tribes can work together *right now* to make progress towards more humane relations, justice between, and earned respect for one another.

A. *Pulling Back the Curtain: Restoring the Language of the Original Treaties to Maine's Constitution*

A measure easily undertaken that would have the immediate and lasting effect of enlightening Maine's population, lawmakers, and courts would be repatriation of the original text of Article X, Section 5, adapted from the Constitution of the Commonwealth of Massachusetts.[215]

This language—prefixed to the official publication of the laws passed by the First Legislature of the State of Maine—was subsequently published in the prefix of the Revised Statutes of Maine of 1841, 1857, and 1871, after which time an amendment provisioned for the following:

> Section 7. Original sections 1, 2, 5, of Article X not to be printed; section 5 in full force:
>
> Sections 1, 2 and 5, of Article 10 of the Constitution, shall hereafter be omitted in any printed copies thereof prefixed to the laws of the State; but this shall not impair the validity of acts

[215] Me. Const. art. X, § 5. The text read: The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, 'whether the same arise from treaties, or otherwise; and for this purpose shall obtain the assent of said Indians, and their release to this Commonwealth of claims and stipulations arising under the treaty at present existing between the said Commonwealth and said Indians; and as an indemnification to such new State, therefor, this Commonwealth, when such arrangements shall be completed, and the said duties and obligations assumed, shall pay to said new State, the value of thirty thousand dollars, in manner following, viz.: The said Commissioners shall set off by metes and bounds, so much of any part of the land, within the said District, falling to this Commonwealth, in the division of the public lands, hereinafter provided for, as in their estimation shall be of the value of thirty thousand dollars; and this Commonwealth shall, thereupon, assign the same to the said new State, or in lieu thereof, may pay the sum of thirty thousand dollars at its election; which election of the said Commonwealth, shall be made within one year from the time that notice of the doings of the Commissioners, on this subject, shall be made known to the Governor and Council; and if not made within that time, the election shall be with the new State.

> under those sections; and said section 5 shall remain in full force, as part of the Constitution, according to the stipulations of said section, with the same effect as if contained in said printed copies.[216]

Given the already substantial length of the Maine Constitution, Section 7's purpose is dubious, at best. Restoration of this language to the Maine Constitution is both a symbolic gesture of Maine's recognition of its legal obligations to the tribes, as well as a corrective measure aimed at restoring this critical historic information to the public domain in a manner that is practically accessible.

B. *Amending the Maine Constitution: Establishing a Constitutional Officer on Tribal Relations*

The tribes have always had sovereignty. The question is not whether the tribes are sovereign, but what it would *mean* to Maine tribes if they were free from molestation to practice their sovereign status. Paternalistic views on the matter have bred fears of "unintended consequences" if the tribes' sovereignty were recognized by the State. The unfortunate reality, however, is that the tribes have been suffering from the damaging *intended* consequences occasioned by restrictive State control for centuries.

Forced political subjugation of the sovereign tribes in Maine is predicated upon a system designed both to siphon resources away from the tribes and keep said tribes dependent. Paradoxically, Maine's apparent desire to eliminate the tribes altogether, while not vitiated, is certainly prolonged by such measures. Inexcusable and entirely preventable hardship continues to befall Maine's indigenous populations. The Passamaquoddy Reservation at Pleasant Point has not had potable drinking water in their community—*ever*. Attempts by neighboring townships and municipalities to block tribal efforts to access clean water were explained away as posing a threat to the water supply of these larger population centers. The current system allowing for towns and municipalities to have any influence over tribal issues is unproductive and produces inhumane results.

---

[216] *Id.* art. X, § 7.

Recognition of the tribes' inherent sovereignty will afford a certain freedom from Maine towns and municipalities that would act (and in the past have acted) to harm the tribes. Through the channels created incident to the recognition of their sovereignty, the tribes would be empowered to deal directly with the federal government for access to clean water, emergency services, and technical assistance needed in areas such as law enforcement, tribal courts, housing, healthcare, and business—all areas the State of Maine has historically neglected. Indeed, following the passage of the Maine Indian Claims Act of 1980, after which Maine dissolved its Department of Indian Affairs, the tribes would have no direct discourse with either State or federal governments. This is, of course, highly problematic because it deprives the tribes of any conduit for addressing grievances and accessing governmental programs and assistance (similar to how the rest of the general population and states access said resources).

Maine seems to want a 'hybrid relationship' with the tribes—seeking complete control of matters like jurisdiction over felonies committed on reservation lands, control of sovereign status, and a stranglehold over any political or economic efforts that bear even remotely on 'extra-tribal interests,' all the while denying the tribes any conduit for channeling their concerns to a governmental body equipped to address these systemic inequities.

Instead, Maine seems to want a 'hybrid relationship' with the tribes—seeking complete control of matters like jurisdiction over felonies committed on reservation lands, control of sovereign status, and a stranglehold over any political or economic efforts that bear even remotely on 'extra-tribal interests,' all the while denying the tribes any conduit for channeling their concerns to a governmental body equipped to address these systemic inequities. Emulating the models of intergovernmental discourse between the western tribes, states, and federal government would be an appropriate starting place for remedying Maine's broken system of managing tribal affairs.

Recognition of tribal sovereignty would engender State-Tribal cooperation on equal footing and, in so doing, require both powers to make mutually beneficial decisions. It would foster a new environment of respect and productivity the likes of which has yet to even be attempted in Maine history.

Maine can effect this change by taking permanent action to amend its State Constitution. Constitutional change is neither drastic, nor unprecedented. It is, however, entirely necessary. For decades, incoming Maine governors have vacillated between executive orders recognizing tribal sovereignty or treating the

tribes in a paternalistic manner. This is not conducive to a building trust between the State and the tribes.

Amending the Constitution to create a fifth Constitutional Officer, the Secretary of Tribal Relations, would be a show of good faith by the State in recognition of the extent of damage it has heretofore inflicted. As a constitutional office, this would be a permanent position appointed by the Legislature to serve as the official liaison between the State and the tribal governments. This singular action—this one appointment—would recognize tribal sovereignty and demonstrate Maine's resolve to cultivate a new and honest relationship with the Tribes.

This is something Maine can do *now*. It is entirely within the power of the Legislature to create this Constitutional Office and the People of the State of Maine have power to approve it.

C. *A New Beginning: Implementing a Bicentennial Accord between the Federally Recognized Indian Tribes in Maine and the State of Maine*

Yet another proposition—advanced by co-author of this Comment and former Penobscot Tribal Representative to the Maine Legislature Donna Loring—is the execution of an Executive Order to establish, and subsequent adoption of, an Accord with the Tribes.[217] A successful and well-written example is the *Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington*.[218] A 1989 treaty between the State of Washington and 26 federally recognized tribes located therein, the *Centennial Accord* seeks to memorialize the tribes' and state's reciprocal recognition of one another's sovereignty. It lays the framework for arms-length government-to-government exchanges, dispute resolutions, and cooperative efforts between the tribes and the state. Furthermore, it explicitly recognizes that it does not constitute a derogation or abandonment of any previously-recognized rights or benefits afforded to the tribes by the state.

Although State-Tribal relations remain imperfect, Washington is perceived as the national leader when it comes to enlightened, intelligent, and humane intercourse with the tribes living within its borders. In fact, where some states (like Maine) are entirely lacking in having signed any such Accord with the tribes living within their own borders, Washington has even adopted an "Out of State Accord" recognizing the sovereignty of federally recognized tribes residing outside its jurisdiction, so long as said tribal entities have treaty reserved rights in

---

[217] A copy of proposed language to be implemented as the Bicentennial Accord is included in Appendix C.

[218] Centennial Accord between the Federally Recognized Indian Tribes in Washington State and the State of Washington, Aug. 4, 1989.

Washington.[219] These "above and beyond" efforts demonstrate a basic level of institutional integrity and human decency.

Maine's signatory to a "Bicentennial Accord"—aptly named given the recent two-hundred-year anniversary of its statehood—would be not only a showing of good faith, but a revelatory and historic step towards repairing its relationship with the tribes. An Accord and formal recognition of sovereignty would establish the proper governmental structure for arms-length interactions between two cultures sharing one state. Moreover, such a document would serve as competent evidence that the State of Maine recognizes the humanity of *all* its citizens and endeavors to treat them with dignity and respect. It would, in effect, be Maine's political passport into legitimate, humane, and respected 21st Century politics—an arena from which it will continue to be excluded until it makes an effort to address the grievous miscarriages of justice that persist within its borders.

IX. CONCLUSION

"In the end, we will remember not the words of our enemies,
but the silence of our friends."

—Martin Luther King, Jr. (1929-1968 A.D.)

This Remonstrance has offered a critical historico-legal analysis of the State of Maine's policies and intercourse with the Native American people living within its borders. By providing a detailed historical accounting of Euromerican discourse with tribal sovereigns from first contact with the Europeans in 1604 through the period of 1892, the authors sought to establish the context in which Maine political structures and systems were formed.

From Massachusetts's initial imperative to expand and lift itself from pauperism to the commercialization of the timber industry as a means of converting Maine's natural resources into a source of immense wealth, the land and forests of present-day Maine have been commodified to serve the colonialist agenda. The ontogeny of Maine's political intercourse with the tribes is particularly reflective of these parasitic practices. From the outset of statehood in

[219] Accord between Federally Recognized Indian Tribes with Treaty Reserved Rights in Washington State and the State of Washington, Dec. 9, 2004. The practical effect of this "Out of State Accord" was to recognize the Confederated Tribes of the Umatilla Indian Reservation and the Nez Perce, both of whom have ancestral ties to the Pacific Northwest and present-day Washington.

1820, Maine sought to usurp tribal ancestral resources to grow its fledgling government.

In so doing, Maine became a pariah. Rather than abiding the typical form and manner of state-tribal relations under the purview of the Congress, Maine consciously manufactured a system of complete control in which it isolated the Maine tribes and alienated them from their land for profit. When the land's valuable timber began to wane in supply, the State set about a regime of genocidal practices designed to permanently disband the tribes in an effort to relieve itself of the "burdens" of treaty obligations previously secured in dealings with Massachusetts.

When compared against this historical context, the "twin pillars" of toxic Indian law precedent in Maine—*Murch* and *Newell*—take on new meaning revelatory of Maine's clear intention to defraud and eliminate the tribes and in the severity of the harm these decisions carry as standing precedent. Contemporary evidence now strongly suggests that Maine's political elite may have had a hand in manipulating the *Murch and Newell* cases, weaponizing legal fictions to set off a cascade effect that paved the way for the Law Court's attempted death blow to tribal sovereignty in *Newell*.

But for the Legislature's commissioning of *the "Indian Papers" and Proctor Report* in 1942, the now undeniable evidence and confirmation of Maine's bad acts—and the elucidation of the insidious nature of the political construct against which *Murch* and *Newell* arose—might have been lost to the mists of time. Fortunately, Special Counsel Webber provisioned for what might be fairly referred to as "Maine's Nixon Tapes" in having the proceedings of the Legislative Research Committee recorded.

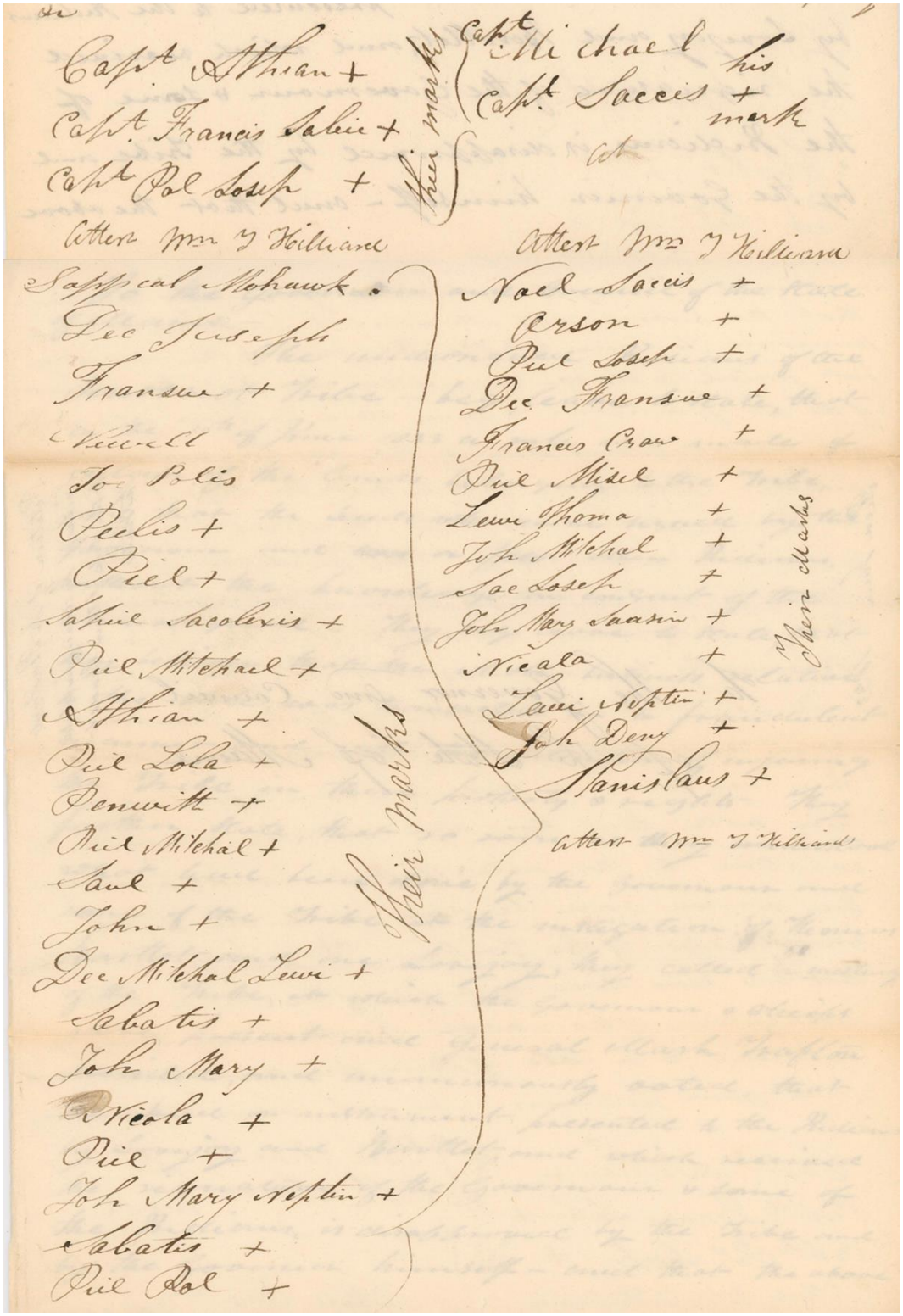
From "The Indian Papers" and *Proctor* we get the State's recognition of the historical economic disenfranchisement and the related genocidal initiatives designed to eliminate the tribes. Perhaps more shockingly, the Committee actually moves past historical recognition and in real time and on record admits to this as an ongoing objective of the State.

By engaging in this Remonstrance, this critical analysis arrives at the conclusion that Maine's historic predation of the tribes for economic benefit and its subsequent persecution of the same continues to change form. Even today, Maine's reluctance or failure to engage in arm's-length government-to-government recognition of the tribes as sovereign entities (rather than the powerless and, frankly, inconsequential "quasi-municipal" entities forced upon the tribes under the Maine Indian Claims Settlement Act of 1980) is a form of ongoing colonization. And, uncomfortable though it may be for some to hear, Maine's continued dereliction of its treaty obligations to the tribes—especially in light of the harm it has proactively caused them—fits entirely within the United Nations' definition of genocide.

Despite all that has transpired—the bloodshed, the land stolen, the dignity stripped, and justice deprived—there is hope. There is hope that Maine will join with states like Washington in taking relatively simple, practical, and immediately viable steps to recognize the sovereignty of the tribes. Although Maine cannot "go back in time" and undo what has been done, it can adapt and it can change for the better.

The Remonstrance—first penned in 1833—continues to the present. We are still waiting for justice. Maine can still consider our voices, own its responsibilities, and do the right thing.

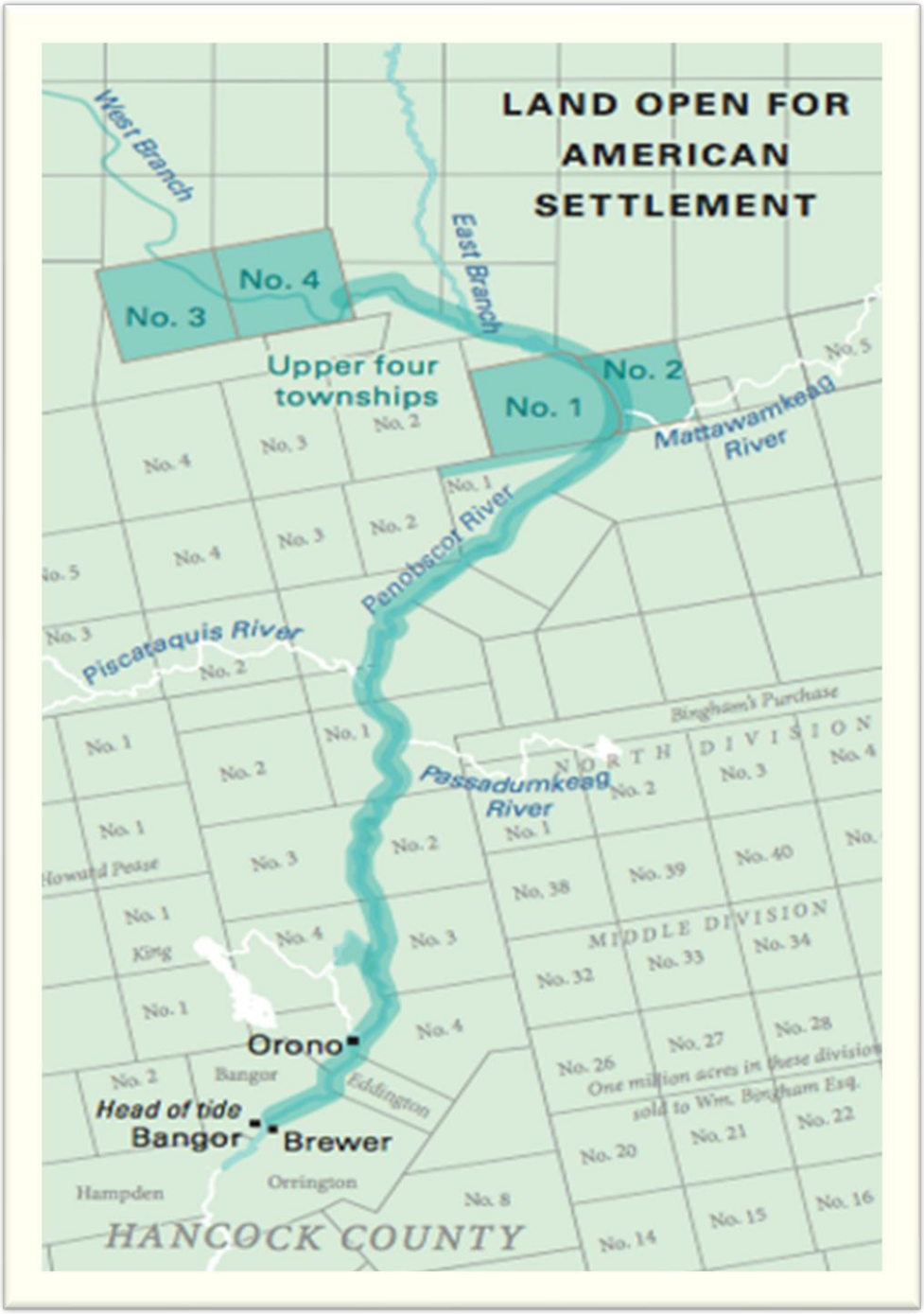
Photograph of the original marks of the signatories to the Remonstrance of 1833.



APPENDIX A

1818 PENOBSCOT TREATY WITH MASSACHUSETTS: A MAP OF THE FOUR TOWNSHIPS

Credit: Micah Pawling & Donald Soctomah



APPENDIX B

REMONSTRANCE OF THE PENOBSCOT TRIBE (JUNE 1833)

To the Governour and Council of the State of Maine

The undersigned Indians of the Penobscot Tribe beg leave to state, that on the 10th of June 1833 a sale was made of certain of the lands belonging to the Tribe, and that the deeds were signed by the Governour and a few other Indians, without the knowledge or consent of the undersigned. They beg leave to state, that they believe that the whole business relative to the sale, was transacted in a fraudulent manner and with the intention of injuring the Tribe in their property & rights. They further state, that as soon as they understood what had been done by the Governour and some of the Tribe at the instigation of Thomas Bartlet and one Lovejoy, they called a meeting of the Tribe, at which the Governour & chiefs were present and General Mark Trafton presided, and unanimously voted, that the deed or instrument presented to the Indians by Lovejoy and Bartlet, and which received the signature of the Governour & some of the Indians, is disapproved by the Tribe and by the Governor himself and that the above mentioned writing was obtained by fraud & deception—that the persons who attempted to purchase the land, promised to come & settle the business the next day but failed to do so—and voted, also, that the names of the Lt. Governour & some other Indians who were not present, were put to the above named deed without authority—voted, that the Agent notify the Commissioners that the Indians are ready to receive proposals for the purchase by the State, of one or all of their Townships. The undersigned conceive it to be their duty solemnly to protest against all the proceedings had relative to the sale of their lands as above expressed by their unanimous vote. They beg leave to state, as above expressed in their vote, that they are willing to negotiate relative to the sale of their lands, provided the same can be done with the full knowledge of the Tribe. They pray that all that has been done by a few of the Tribe at the instigation of the above Bartlet and Lovejoy relative to a sale of their lands, may be void. And your petitioners as in duty bound will pray.

Capt. Athian
Capt. Francis Sabeir
Capt. Pol Joseph
Capt. Michael
Capt. Saccis
Sappeal Mohawk
Dec. Joseph
Fransue
Newell
Joe Polis
Peelis
Piel
Sapiel Sacolexis
Piel Mitchael

Athian
Piel Lola
Penwith
Piel Mitchal
Saul
John
Dec Mitchal Lewis
Sabatis
John Mary
Nicola
Piel
John Mary Neptin
Sabatis
Piel Pol

Noel Saccis
Orson
Piel Joseph
Dec Fransue
Francis Crane
Piel Misel
Lewis Thoma
John Mitchal
Sac Joseph
Joh Mary Swassian
Nicala
Lewis Neptin
Joh Deny
Stanislaus

APPENDIX C

PROPOSED FORM LANGUAGE OF BICENTENNIAL ACCORD

BICENTENNIAL ACCORD between the Federally Recognized Indian Tribes in Maine and the State of Maine

I. PREAMBLE AND GUIDING PRINCIPLES

This Accord dated _____, is executed between the federally recognized Indian Tribes of Maine signatory to this Accord and the State of Maine through its governor, in order to better achieve mutual goals through an improved relationship between their sovereign governments. This Accord provides a framework for government-to-government relationship and implementation procedures to assure execution of that relationship.

Each party to this Accord respects the sovereignty of the other. The respective sovereignty of the state and each federally recognized tribe provide paramount authority for that party to exist and to govern. The parties share in their relationship particular respect for the values and culture represented by tribal governments. Further, the parties share a desire for complete Accord between the State of Maine and the federally recognized tribes in Maine reflecting a full government-to-government relationship and will work with all elements of state and tribal governments to achieve such an accord.

II. PARTIES

There are four federally recognized Indian tribes in the State of Maine. Each sovereign tribe has an independent relationship with each other and the state. This Accord, provides the framework for that relationship with each other and the state. This Accord provides the framework for the state of Maine, through its governor, and signatory tribes.

The parties recognize that the state of Maine is governed in part by independent state officials. Therefore, although, this Accord has been initiated by the signatory tribes and the governor, it welcomes the participation of, inclusion in and execution by chief representatives of all elements of state government so that the government-to-government relationship described herein is completely and broadly implemented between the state and the tribes.

III. PURPOSES AND OBJECTIVES

This Accord illustrates the commitment by the parties to implementation of the government-to-government relationship, a relationship reaffirmed as state policy

by gubernatorial proclamation dated _____. This relationship respects the sovereign status of the parties, enhances and improves communications between them, and facilitates resolutions of issues.

This Accord is intended to build confidence among the parties in the government-to-government relationship by outlining the process for implementing the policy. Not only is this process intended to implement the relationship, but also it is intended to institutionalize it with the organizations represented by the parties. The parties will continue to strive for complete institutionalization of the government-to-government relationship by seeking accord among all the tribes and the elements of state government.

This Accord also commits the parties to the initial tasks that will translate the government-to-government relationship into more efficient, improved and beneficial services to the Indian and non-Indian people of Maine. This Accord encourages and provides the foundation and framework for specific agreements among the parties outlining specific tasks to address or resolve specific issues.

The parties recognize that implementation of this Accord will require a comprehensive education effort to promote understanding of the government-to-government relationship within their own governmental organizations and with the public.

IV. IMPLEMENTATION PROCESS AND RESPONSIBILITIES

While this Accord addresses the relationship between the parties, its ultimate purpose is to improve the services delivered to people and parties.

Immediately and periodically, the parties shall establish goals for improved services and identify the obstacles to the achievement of those goals. At an annual meeting, the parties will develop joint strategies and specific agreements to outline tasks, overcome obstacles and achieve specific goals.

The parties recognize that a key principle of their relationship is a requirement that individuals working to resolve issues of mutual concern are accountable to act in a manner consistent with this Accord.

The state of Maine is organized into a variety of large and separate departments under its governor, other independently elected officials and a variety of boards and commissions. Each tribe on the other hand, is a unique government organization with different management and decision-making structures.

The Chief of Staff of the governor of the state of Maine is accountable to the governor for the implementation of this Accord. State agency directors are accountable to the governor through the chief of staff for the related activities of

their agencies. Each director will initiate a procedure within her/his agency by which the government-to-government policy will be implemented. Among other things these procedures will require persons responsible for dealing with issues of mutual concern to respect the government-to-government relationship within which the issue must be addressed. Each agency will establish a documented plan of accountability and may establish more detailed procedures in subsequent agreements between tribes and the particular agency.

The parties recognize that their relationship will successfully address issues of mutual concern when communication is clear, direct and between persons responsible for addressing the concern. The parties recognize that in state government, accountability is best achieved when this responsibility rests solely within each state agency. Therefore, it is the objective of the state that each particular agency be directly accountable for implementation of the government-to-government relationship in dealing with issues of concern to the parties. Each agency will facilitate this objective by identifying individuals directly responsible for issues of mutual concern.

Each tribe also recognizes that a system of accountability within its organization is critical to successful implementation of the relationship. Therefore, tribal officials will direct their staff to communicate within the spirit of this Accord with the particular agency, which under the organization of state government, the authority and responsibility to deal with the particular issue of concern to the tribe.

In order to accomplish these objectives, each tribe must ensure that its current tribal organization, decision-making process and relevant tribal personnel is known to each state agency with which the tribe is addressing an issue of mutual concern. Further, each tribe may establish a more detailed organizational structure, decision making process, system of accountability and other procedures for implementing the government-to-government relationship in subsequent agreements with various state agencies. Finally, each tribe will establish a document system of accountability.

As a component of the system of accountability within state and tribal governments, the parties will review and evaluate at the annual meeting the implementation of the government-to-government relationship. A management report will be issued summarizing this evaluation and will include joint strategies and specific agreements to outline tasks, overcome obstacles, and achieve specific goals.

The Chief of Staff will also use his/her organizational discretion to help implement the government-to-government relationship. The Senior Advisor on Tribal Affairs will assist the chief of staff in implementing the government-to-government relationship by providing state agency directors information with which to educate

employees and constituent groups as defined in the accountability plan about the requirement of the government-to-government relationship.

V. SOVEREIGNTY AND DISCLAIMERS

Each of the parties respects the sovereignty of each other party. In executing this Accord, no party waives any rights, including treaty rights, immunities, including sovereign immunities, or jurisdiction. Neither does this Accord diminish any rights or protections afforded other Indian persons or entities under state or federal law. Through this Accord parties strengthen their collective ability to successfully resolve issues of mutual concern.

While the relationship described by this Accord provides increased ability to solve problems, it likely will not result in a resolution of all issues. Therefore, inherent in their relationship is the right of each of the parties to elevate an issue of importance to any decision-making authority of another party, including, where appropriate, that party's executive office.

Signatory parties have executed this Accord on the date of ____and agreed to be duly bound by its commitments.

Remonstrance of the Penobscot Tribe

JUNE 1833

To the Governour and Council of the State of Maine

The undersigned Indians of the Penobscot Tribe beg leave to state, that on the 10th of June 1833 a sale was made of certain of the lands belonging to the Tribe, and that the deeds were signed by the Governour and a few other Indians, without the knowledge or consent of the undersigned. They beg leave to state, that they believe that the whole business relative to the sale, was transacted in a fraudulent manner and with the intention of injuring the Tribe in their property & rights. They further state, that as soon as they understood what had been done by the Governour and some of the Tribe at the instigation of Thomas Bartlet and one Lovejoy, they called a meeting of the Tribe, at which the Governour & chiefs were present and General Mark Trafton presided, and unanimously voted, that the deed or instrument presented to the Indians by Lovejoy and Bartlet, and which received the signature of the Governour & some of the Indians, is disapproved by the Tribe and by the Governor himself and that the above mentioned writing was obtained by fraud & deception—that the persons who attempted to purchase the land, promised to come & settle the business the next day but failed to do so—and voted, also, that the names of the Lt. Governour & some other Indians who were not present, were put to the above named deed without authority—voted, that the Agent notify the Commissioners that the Indians are ready to receive proposals for the purchase by the State, of one or all of their Townships. The undersigned conceive it to be their duty solemnly to protest against all the proceedings had relative to the sale of their lands as above expressed by their unanimous vote. They beg leave to state, as above expressed in their vote, that they are willing to negotiate relative to the sale of their lands, provided the same can be done with the full knowledge of the Tribe. They pray that all that has been done by a few of the Tribe at the instigation of the above Bartlet and Lovejoy relative to a sale of their lands, may be

Capt. Athian
Capt. Francis Sabeir
Capt. Pol Joseph
Capt. Michael
Capt. Saccis
Sappeal Mohawk
Dec. Joseph
Fransue
Newell
Joe Polis
Peelis
Piel
Sapiel Sacolexis
Piel Mitchael

Athian
Piel Lola
Penwith
Piel Mitchal
Saul
John
Dec Mitchal Lewis
Sabatis
John Mary
Nicola
Piel
John Mary Neptin
Sabatis
Piel Pol

Noel Saccis
Orson
Piel Joseph
Dec Fransue
Francis Crane
Piel Misel
Lewis Thoma
John Mitchal
Sac Joseph
Joh Mary Swassian
Nicala
Lewis Neptin
Joh Deny
Stanislaus