STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
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Janet T Mills
GOVERNOR

May 31, 2023

Hon Anne Carney, Chair
Hon Matt Moonen, Chair
Joint Standing Committee on Judiciary
Room 438, State House
Augusta, Maine 04330

Re LD 2004, *An Act to Amend the Maine Indian Claims Settlement Implementing Act Regarding the Application of Beneficial Federal Laws to the Wabanaki Nations*

Dear Sen Carney and Rep Moonen

Please accept this testimony on behalf of the Office of the Governor in opposition to LD 2004

Overview

This bill attempts to override a federal statute in the Maine Indian Land Claims Settlement Act (MICSA) that addresses how federal Indian law applies in Maine Specifically, this bill purports to make a subset of federal laws applicable in Maine when a federal statute makes the same laws inapplicable in the State It would do so by a wholesale repeal of an undefined class of state laws, and a permanent release of the Maine Legislature's jurisdiction The bill irrevocably transfers the State's jurisdiction to the federal government It would apply to both pre-existing and future and federal enactments

Federal laws may override – or preempt – inconsistent state laws, but the same is not true in reverse In MICSA, Congress authorized the Tribes and the State to amend the Maine Implementing Act (MIA) by mutual consent to reallocate jurisdictional authority between themselves But nothing in MICSA authorizes the Tribes and the State to reallocate jurisdictional authority between the State and the federal government The manner in which LD 2004 attempts to accomplish this result – by repeal of a set of unspecified state laws contained throughout the Maine Revised Statutes, as well as the permanent release of the jurisdiction the Legislature relied upon to enact those laws – is unprecedented and constitutionally suspect

The bill also suffers from public notice problems, both as a matter of legislative process and in its potential implementation This would be a highly consequential amendment to MIA, yet the bill is being heard on a single day's notice at the end of a long legislative session Substantively, the bill's language does not meaningfully apprise the public of which state laws are being repealed and to what extent As a result, Maine citizens could not know with any certainty what laws are in effect – a basic element of due process

In addition to these legal defects, we oppose this bill because it will lead to extensive litigation and confusion about the state of the law in Maine, and because there is a far more straightforward way to ensure the Wabanaki Nations are appropriately benefitting from federal Indian law The Wabanaki Nations, the Governor, and the Congressional delegation should work together to identify federal statutes that benefit Indians generally, but that do not or may not apply in Maine under MICSA As those statutes are identified, the Wabanaki Nations can determine whether they seek to make them applicable in Maine, and the State can assess any potential impacts In this process we can achieve the goal of this bill, while also providing clarity and certainty for Maine people about which federal laws will become applicable and what consequences that will have

Background on the Maine's Indian Land Claims Settlement Acts

In the 1970s, the Penobscot Nation and the Passamaquoddy Tribe asserted claims to nearly two-thirds of the land in the State of Maine The complexity of the issues and the risk to all parties led a negotiated agreement which was codified in two statutes, one state and one federal The state law, the *Maine Implementing Act*, 30 M R S §§ 6201 *et seq* , puts in place a jurisdictional framework that, with certain exceptions, makes state law applicable to Tribal lands and Tribal members to the same extent as non-tribal lands and citizens The federal statute, the *Maine Indian Claims Settlement Act of 1980*, Pub L No 96-420, ratified the jurisdictional provisions of MIA, extinguished the land claims, created a settlement trust fund of $27,000,000, and a $54,500,000 land acquisition fund to allow the Penobscot Nation and Passamaquoddy Tribe each to acquire up to 150,000 acres of Indian Territory in addition to their existing reservations The Houlton Band of Maliseet Indians was also included in MICSA, and the Aroostook Band of Micmacs (now known as the Mi'kmaq Nation) negotiated a separate Settlement Act with the State in 1991 through Pub L No 102-171

The Settlement Acts authorized the Tribes to purchase from willing sellers multiple parcels that could comprise 150,000 acres for each Tribe, in the aggregate Of necessity, many of these lands are located far from the existing reservations, and had been privately owned by non-tribal parties since Maine first became a state The jurisdictional terms of the settlement – that Maine law would apply uniformly to Tribal and non-tribal lands alike – were essential to avoid the disruptive effects that would otherwise result from numerous Tribal jurisdictional enclaves appearing throughout the State in areas that had long been regarded as non-tribal The Maine settlement afforded the Penobscot Nation and Passamaquoddy Tribe among the greatest Tribal land holdings east of the Mississippi, on the condition that those lands would remain subject to state law as had historically been the case

All four Wabanaki Nations have authority to acquire more Tribal Territory or Trust Lands, so those terms do not carry with them fixed locations The acquisition of future parcels will be controlled by the Wabanaki Nations and the federal government, without state involvement

The Settlement Acts generally guarantee the Wabanaki Nations receive the benefit of federal laws, with a limited exception MICSA provides

> As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians

25 U S C § 1731(i) The impact of this provision has been tremendous According to a federal financial disclosure website maintained under the Digital Accountability and Transparency Act, since FY 2019, the Wabanaki Nations appear to have collectively received $423 6 million in federal grants (775), direct payments (62), contracts (54), and contract IDVs (2) [1] It is therefore clear that the Wabanaki Nations are currently benefitting substantially from federal Indian law

The only federal laws that benefit Indians generally but do not apply in Maine are those that would affect or preempt the State's jurisdiction To ensure that Congress did not inadvertently disrupt the jurisdictional agreement the parties had negotiated, MICSA provides that such laws do not apply in Maine unless specifically made applicable 25 U S C §§ 1725(h) & 1735(b) As to future enactments, this serves "as a warning signal to later Congresses to stop, look, and listen before weakening the foundation on which the settlement between Maine and the Tribe rests " *Passamaquoddy Tribe v Maine*, 75 F 3d 784, 789 (1st Cir 1996)

Due Process

LD 2004 suffers from a basic due process problem The core of the legislation is the following

> The purpose of the amendments to this Act enacted in 2023 is *to modify and withdraw the jurisdiction of and the application of the laws of this State to the limited extent that such laws otherwise would be affected or preempted* by the application of the statutes and regulations of the United States which are generally applicable to, enacted for the benefit of Indians, or relate to a special status or right of Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians

LD 2004, Sec 1 (emphasis added) This language – "to modify and withdraw the jurisdiction of and application of the laws of this State to the limited extent that such laws otherwise would be

[1] *See* www usaspending gov Searches can be performed by inserting the name of the recipient, limited by date and other filters

affected or preempted" – is too vague to inform Maine citizens what state laws apply It is simply not possible for ordinary people to rely upon this language to make informed decisions about which state laws have been effectively repealed, and to what extent they may remain in effect "A statute may be void for vagueness when people of common intelligence must guess at its meaning " *State v Witham,* 2005 ME 79, ¶ 7, 876 A 2d 40 That would be the case here Providing clarity and certainty are always important legislative goals, but they are of paramount importance in any proposed amendment to the Maine Implementing Act

Amending MIA

It is important to note that this bill would amend MIA As part of a settlement agreement, MIA operates like a legislative contract When the Legislature amends MIA, and the Wabanaki Nations ratify that amendment, the Legislature cannot unilaterally repeal or make changes to the amendment in the future without the consent of the Wabanaki Nations It is the only context in which a sitting legislature can bind its successors It is therefore critically important that the Legislature understand clearly and thoroughly the nature of the amendment and its potential consequences, and ensure that Maine citizens are equally well apprised

State Nullification of Federal law

LD 2004 would declare that all federal statutes and regulations that provide rights or benefits unique to Indian tribes or their members apply in Maine This conflicts with 25 U S C §§ 1725(h) & 1735(b), which explicitly state that a limited subset of those federal laws do not apply in Maine – if they affect or preempt the State's jurisdiction As noted above, there are serious questions whether the Legislature has the authority to make federal statutes applicable in Maine when federal law makes currently makes those same statutes inapplicable Congressional action is the only way to ensure that result

In MICSA, Congress gave its advance consent to the State and the Tribes to amend MIA in a manner that adjusts the jurisdictional boundary between the Tribes and the State That provision reads in its entirety as follows

> **(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band lands**
>
> **(1)** The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation *Provided,* That such amendment is made with the agreement of the affected tribe or nation, and that such amendment relates to (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions, (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation, or (C) the allocation of jurisdiction between tribal courts and State courts

25 U S C § 1725(e)(1) Nothing in this provision, or elsewhere in MICSA, authorizes the Tribes and the State to redraw broad jurisdictional boundaries between the State and federal government Nor could it, because any such change would require Congressional action If enacted, LD 2004's attempt to nullify a conflicting federal statute would certainly be challenged in court on this basis

151 Federal Statutes That Accord Unique Rights, Benefits or Status to Indians

In 2019, researchers at Suffolk University prepared a report that identifies 151 federal laws enacted since 1980 that accord special rights, benefits, or status to Indian Tribes or their members [2] It is important to note that this is not a list of laws that MICSA bars from applying in Maine, it is a list of all beneficial federal Indian statutes enacted since 1980, many of which are already fully applicable to the Wabanaki Nations For example, numerous statutes that provide funding to support healthcare, education, infrastructure, natural resource management, etc , and have no jurisdictional impact, apply to the Wabanaki Nations just as they do other tribes

Many of the 151 laws would seem to have little or no impact to the Wabanaki Nations if they were applicable here (e g the Nuclear Waste Policy Act of 1982, the Abandoned Shipwreck Act of 1987, the Indian Dams Safety Act of 1994) Some, like the Stafford Act and the Indian Healthcare Improvement Act, contain provisions that are not now applicable in Maine due to jurisdictional impacts, but the Governor would support making them applicable through amendments to federal law A few, like the Water Quality Act of 1987, should not be made applicable in Maine due to potentially serious impacts on non-tribal communities

Still others could inadvertently cause significant confusion if they were suddenly made applicable in Maine For example, Maine's Probate Code has always applied to members of the Wabanaki Nations, just as it does all Maine citizens What would it mean to declare that the American Indian Probate Reform Act of 2004 applies in Maine? Has anyone examined the practical and legal consequences of making this one, seemingly mundane, change in the law?

The point here is that each federal statute is different and needs to be evaluated individually to understand its potential consequences for tribal and non-tribal members and communities It would be a serious mistake for the Legislature to agree that a large swath of federal statutes, together with their implementing regulations, are now applicable in Maine without first undertaking that assessment

A Path Forward

Ensuring that the Wabanaki Nations are appropriately benefiting from federal Indian statutes can and should be resolved collaboratively The Wabanaki Nations, the Governor's Office, and the Congressional delegation should work together to identify those statutes that the Wabanaki Nations believe would provide significant rights or benefits, and that are not or may not currently be applicable in Maine With the agreement and support of all parties, it is realistic to expect that legislation could be introduced and enacted that makes the necessary changes,

[2] https //legislature maine gov/doc/3815 at pp 260-64

without creating confusion, triggering litigation, or risking unintended consequences We would be pleased to be part of that process

For all of these reasons, the Office of the Governor urges you to oppose LD 2004 Thank you for your consideration

Sincerely,

Gerald D Reid
Chief Legal Counsel