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Testimony Neither For Nor Against L.D. 1835, An Act to Require the State to Notify Indian Tribes and Indian Nations When New Laws Are Enacted That Need to Be Certified

Senator Carney, Representative Moonan, and distinguished members of the Joint Standing Committee on Judiciary, I am Aaron Frey, and I have the privilege of serving as Maine's Attorney General. Thank you for allowing me this opportunity to provide comments on L.D. 1835, *An Act to Require the State to Notify Indian Tribes and Indian Nations When New Laws Are Enacted That Need to Be Certified*.

Pursuant to federal law, amendments to the state settlement acts relating to the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, and the Mi'kmaq Nation do not take effect unless approved by the relevant tribe or tribes. Current state law sets forth the process by which Indian tribes certify their approval of amendments to Maine Implementing Act, 30 M.R.S. §§ 6201-14, and the Mi'kmaq Nation Restoration Act, 30 M.R.S. §§ 7201-10 (collectively, "Settlement Acts"). See 3 M.R.S. §§ 601-603.

LD 1835 would expand the tribal approval requirement to all legislation that "expressly references or applies to the Penobscot Nation, the Passamaquoddy Tribe, the Houlton Band of Maliseet Indians, the Mi'kmaq Nation or one or more federally recognized Indian tribes within the State or members of those Indian tribes." Such legislation would not take effect without the approval of the affected tribe's (or tribes') tribal government.

I have several concerns. First, outside of the context of the Settlement Acts, amendments to which Congress has expressly stated require the consent of the affected tribe or tribes, it is not clear to me that the Legislature can essentially delegate to a tribal government the determination of whether duly enacted legislation will take effect. Second, the language "expressly references or applies" is vague. While "expressly references" presumably means that tribes are explicitly mentioned in the legislation, it is not clear what it means for legislation to "apply" or "expressly . . . apply" to tribes and their members. For example, many bills broadly apply to persons throughout the state, including tribal members. Arguably, such legislation could not take effect unless approved by the tribal governments.

Third, even with bills that expressly reference tribes or their members, there could be unforeseen consequences. For example, suppose the Legislature enacts a bill relating broadly to hunting or fishing but also has provisions specifically relating to tribal members. It may be that

no part of the legislation takes effect unless all tribal governments approve it. This would essentially allow tribes to control the effectiveness of bills relating to non-tribal members.

Finally, the bill would apply to emergency legislation (expressly referencing or applying to tribes or their members), and tribes would have 45 days to certify their approval or else the legislation would not take effect. This could interfere with the Legislature's ability to immediately respond to an emergency situation.

Based on its title, it appears that a primary purpose of the bill is to ensure that tribes are properly notified when tribal certification for an amendment to the Settlement Acts is necessary for that amendment to take effect. The bill also contemplates tribal-state consultation when a tribe disapproves such legislation so that the State can understand the reasons for the disapproval and the parties can discuss alternate legislation. I agree that these are important procedural safeguards to put in place for amendments to the Settlement Acts, and I have no objection to this as a matter of policy.

But the tribal approval requirement should not be expanded to all laws expressly referencing or applying to tribes. Such an expansion will interfere with the Legislature's exercise of its responsibilities, create uncertainties about the effectiveness of legislation, and likely result in litigation.

I hope these comments are helpful and aid in your consideration of this bill.