

OFFICE OF POLICY AND LEGAL ANALYSIS

Date: March 10, 2022 (corrected 3/11/22)
To: Judiciary Committee
From: Janet Stocco, Legislative Analyst
LD 906 **An Act to Provide Passamaquoddy Tribal Members Access to Clean Water** (Rep. Newell)
Re: Information Requested During First Work Session

This memorandum provides responses to requests from committee members for further information or for clarification made during the March 3, 2022 work session on the sponsor's proposed amendment to LD 906.

1. *Clarification regarding the tax liabilities of the Passamaquoddy Water District and whether changing the corporate structure would entitle the water district to tax-exempt status under state law.*

Under the [charter of the Passamaquoddy Water District](#), which was established by the enactment of Private and Special Law 1983, chapter 25, the water district is a "nonprofit public municipal corporation." Under state tax law, the following property of "public municipal corporations" is exempt from property taxation:

D. The property of any public municipal corporation of this State appropriated to public uses, if located within the corporate limits and confines of such public municipal corporation;

E. The pipes, fixtures, hydrants, conduits, gatehouses, pumping stations, reservoirs and dams, used only for reservoir purposes, of public municipal corporations engaged in supplying water, power or light, if located outside of the limits of such public municipal corporation; . . .

36 M.R.S. §651(1)(D-E). *See* Attachment A. Accordingly, the Passamaquoddy Water District's current corporate structure is sufficient to afford tax-exempt status under generally applicable state law.

Yet, §15 of the water district's charter provides:

Sec. 15. Property not tax exempt. The property of the district shall not be exempt from all taxation in the City of Eastport and the Town of Perry or in any other city or town where any part of its plant may be located.

In reviewing this provision, the Law Court observed: "To give effect to section 15, we must conclude that it excepts the Water District from a tax exemption to which it is otherwise entitled." *Passamaquoddy Water District v. City of Eastport*, 710 A.2d 897 (Me. 1998). By implication, the Law Court's decision suggests that, if it chooses to do so, the Legislature may grant the Passamaquoddy Water District the benefit of the exemptions in 36 M.R.S. §651(1) by repealing §15 of the water district's charter.

2. *Has the Legislature considered legislation to repeal the tax provision of the Passamaquoddy Water District's charter in the past?*

In the 116th Legislature, [LD 661](#), *An Act To Amend the Charter of the Passamaquoddy Water District*, would have amended Section 15 of the water district's charter to provide: "**Sec. 15. Property tax exemption.** The property of the district is exempt from taxation." The bill was carried over, in part because the Utilities Committee was examining issues surrounding the constitutionality of the Passamaquoddy Water District's non-tax-exempt status that were ultimately resolved by the Law Court in 1998. During the Second Regular Session, the Legislature ultimately adopted the Utilities Committee's [majority Ought Not to Pass report](#).

3. *Would the repeal of Section 15 of the Passamaquoddy Water District's Charter constitute a State Mandate?*

Article IX, Section 21 of the Maine Constitution provides:

Section 21. State mandates. For the purpose of more fairly apportioning the cost of government and providing local property tax relief, *the State may not require a local unit of government to expand or modify that unit's activities so as to necessitate additional expenditures from local revenues unless* the State provides annually 90% of the funding for these expenditures from State funds not previously appropriated to that local unit of government. Legislation implementing this section or requiring a specific expenditure as an exception to this requirement may be enacted upon the vote of 2/3 of all members elected to each House. This section must be liberally construed.

LD 906, §1: Water district tax exemption

When LD 661 was pending before the 116th Legislature, then-Attorney General Michael Carpenter issued an opinion letter dated March 7, 1994 on several potential constitutional issues. That letter has been uploaded to the [Electronic Committee File](#) for LD 906 for your review. In that letter, he concluded that LD 661 would not constitute a mandate under Art. IX, Section 21 of the Maine Constitution. *See* Letter p.3. A subsequent Law Court decision lends support to this conclusion.

Although one might argue that legislation rendering the property of the Passamaquoddy Water District tax-exempt constitutes a state mandate—because the Town of Perry and the City of Eastport may need to generate additional local tax revenue to replace the taxes they currently receive from the water district—a similar argument was raised and rejected in *Town of Wells v. Town of Ogunquit*, 2001 ME 122. In that case, the Legislature passed legislation amending a particular school district's funding formula. As a result, the Town of Wells was required to pay approximately \$340,000 more to fund the school district in the following year than it would have paid under the prior funding formula. Wells sought a court declaration that the legislation violated the prohibition on unfunded state mandates. The Law Court observed, however, that “[u]nless the State has done something to *require* Wells to expand or modify its activities so that Wells has to spend more local money for that expansion or modification,” the constitutional provision was not implicated. *Id.* ¶7. Although Wells argued that “increasing its tax rate [was] a modification of its activities,” the Law Court disagreed. The Law Court explained that legislation requiring the town to build a transportation system or to hire more teachers would constitute an expansion or modification of the town's activities requiring additional expenditures of local revenue. By contrast, while it was a “harsh reality” that “Wells will have to spend more money if the school budget remains as it is,” the town, but not the State, had input on the school district's budget and any attendant decisions whether to raise taxes.

It is therefore unlikely that a court would conclude that legislation repealing Section 15 of the Passamaquoddy Water District's Charter constitutes a state mandate under Article IX, Section 21. While the Town of Perry and City of Eastport will lose a portion of their tax revenue due to the water district's new tax-exempt status, the town and city will not be *required* to modify or expand their activities as a result of the legislation.

LD 906 Section 2: Authorizing the placement of 2 parcels of land into trust status

Section 2 of the proposed amendment to LD 906 authorizes the U.S. Secretary of the Interior to acquire and place into trust for the benefit of the Passamaquoddy Tribe two parcels of land within the Town of Perry. If those parcels are eventually placed in trust status, the Town of Perry will no longer be able to collect real property taxes on those lands. *See* 36 M.R.S. §651(1) (exempting from property tax “[t]he property of the United States so far as the taxation of such property is prohibited under the Constitution and laws of the United States.”). Although the Passamaquoddy Tribe must make payments in lieu of taxes for its trust lands under §6208(2) of the Maine

Implementing Act, it is my understanding that these payments are paid to Washington County and not to the Town of Perry.

For the reasons explained above with respect to the water district tax exemption, it is unlikely that legislation exempting specific property from taxation by the Town of Perry would be considered a state mandate. Perhaps more importantly, section 2 of the proposed amendment to LD 906 does not itself render the two parcels of land exempt from local property taxes. Instead, it is the federal government's subsequent action of taking the land into trust that triggers the property tax exemption. Nothing in the pending legislation requires or may require the federal government to take this subsequent step.

Related question not raised by the committee:

In his opinion letter dated March 7, 1994, Attorney General Carpenter also addressed whether amending the Passamaquoddy Water District's charter to render its property exempt from property taxation under 36 M.R.S. §651(1)(D-E) would trigger the property-tax reimbursement requirement in Article 3, Part 3, Section 23 of the Maine Constitution:

Section 23. The Legislature shall annually reimburse each municipality from state tax sources for not less than 50% of the property tax revenue loss suffered by that municipality during the previous calendar year because of the statutory property tax exemptions or credits enacted after April 1, 1978. The Legislature shall enact appropriate legislation to carry out the intent of this section.

Attorney General Carpenter concluded that reimbursement would not be required, however, because the property tax exemptions in 36 M.R.S. §651(1) "preexist the April 1, 1978 date set forth in section 23." *See* Letter p.3.

4. *What are the restrictions on a landowner's removal of water from underneath their property?*

As the committee heard during the work session, the laws governing water rights are complex. In 2005, then-Attorney General Dennis J. Harnish sent a memorandum outlining the State's laws governing groundwater extraction to the Legislature's Joint Standing Committee on Natural Resources. That letter has been uploaded to the [Electronic Committee File for LD 906](#) for your review. As that letter and the Law Court's decision in *Maddocks v. Giles*, 1999 ME 63, explain:

- **General Rule:** Maine adheres to the "absolute dominion rule" under which "groundwater is the absolute property of the owner of the land." Accordingly, a landowner who "dig[s] a well or make[s] other excavations within" the landowner's own property "will be subject to no claim for damages although the effect may be to cut off and divert the water which finds its way through hidden veins which feed the well or spring of his neighbor." 1999 ME 63, ¶5 (citations omitted).
- **Common law exceptions:** a landowner may not (1) "stop or divert the flow of a *watercourse*" to the detriment of a neighbor; or (2) maliciously waste water to the detriment of a neighbor. *Id.* ¶6.
- **Statutory exceptions:** (1) Under 38 M.R.S. §404, "a person is liable for the withdrawal of ground water . . . when the withdrawal is in excess of beneficial domestic use for a single-family home and when the withdrawal causes interference with the preexisting beneficial domestic use of groundwater by a landowner or lawful land occupant." *See* Attachment B. (2) Under 22 M.R.S. §2660-A, unless a statutory exception is met, a person commits a Class D crime if that person "transport[s] water for commercial purposes by pipeline or . . . in a container, greater in size than 10 gallons, beyond the boundaries of the municipality or township in which water is naturally located or any bordering municipality or township." The statutory exceptions to this criminal offense authorize, for example, the transportation of water by a water utility or the transportation of water withdrawn pursuant to a permit from the Department of Environmental Protection. *See* Attachment C.

- Exceptions in DEP Rules: Under the Site Location of Development Law, 38 M.R.S. §483-A(1), a “development of state or regional significance that may substantially affect the environment” may not be constructed without approval from the Department of Environmental Protection. *See* Attachment D. As part of its review, the department evaluates whether the proposed development “will have an unreasonable adverse effect on ground water quantity”—that is, if the quantity of ground water to be taken by the development will “substantially lower the found water table, cause salt water intrusion, cause undesirable changes in ground water flow patterns, or cause unacceptable ground subsidence.” *See* [06-096 Code of Maine Rules Ch. 375 §8](#).

5. *May a local government provide input during the trust land acquisition process?*

Because trust land acquisition under the federal Settlement Act is mandatory and not subject to the discretion of the U.S. Secretary of the Interior, there is no requirement that the secretary solicit input from local governments during the trust land acquisition process. State and local governments must be notified of a decision to take the land into trust status and given 30 days in which to submit an appeal. For more information on the steps in the process and the public notices required, see Bureau of Indian Affairs, Understanding the Fee-to-Trust Process for Mandatory Acquisitions (a brochure), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Fee-to-Trust_Process_for_Mandatory_Acquisitions.pdf; and Bureau of Indian Affairs, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (6/28/16), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf.

§651. Public property

The following public property is exempt from taxation:

1. Public property.

- A. The property of the United States so far as the taxation of such property is prohibited under the Constitution and laws of the United States; [RR 2013, c. 1, §51 (COR).]
- B. The property of the State of Maine; [RR 2013, c. 1, §51 (COR).]
- B-1. Real estate owned by the Water Resources Board of the State of New Hampshire and used for the preservation of recreational facilities in this State; [RR 2013, c. 1, §51 (COR).]
- C. All property which by the Articles of Separation is exempt from taxation; [RR 2013, c. 1, §51 (COR).]
- D. The property of any public municipal corporation of this State appropriated to public uses, if located within the corporate limits and confines of such public municipal corporation; [RR 2013, c. 1, §51 (COR).]
- E. The pipes, fixtures, hydrants, conduits, gatehouses, pumping stations, reservoirs and dams, used only for reservoir purposes, of public municipal corporations engaged in supplying water, power or light, if located outside of the limits of such public municipal corporation; [RR 2013, c. 1, §51 (COR).]
- F. All airports and landing fields and the structures erected thereon or contained therein of public municipal corporations whether located within or without the limits of such public municipal corporations. Any structures or land contained within such airport not used for airport or aeronautical purposes shall not be entitled to this exemption. Any public municipal corporation which is required to pay taxes to another such corporation under this paragraph with respect to any airport or landing field shall be reimbursed by the county wherein the airport is situated; and [RR 2013, c. 1, §51 (COR).]
- G. The pipes, fixtures, conduits, buildings, pumping stations and other facilities of a public municipal corporation used for sewage disposal, if located outside the limits of such public municipal corporation. [PL 1967, c. 115 (NEW).]

[RR 2013, c. 1, §51 (COR).]

SECTION HISTORY

PL 1965, c. 125 (AMD). PL 1967, c. 115 (AMD). PL 1981, c. 492, §D6 (AMD). PL 1981, c. 595, §4 (AMD). RR 2013, c. 1, §51 (COR).

§404. Ground water rights

1. Definitions. As used in this section, unless the context indicates otherwise, the following terms have the following meanings.

A. "Beneficial domestic use" means any ground water used for household purposes essential to health and safety, whether provided by individual wells or through public supply systems. [PL 1987, c. 491, §4 (NEW).]

B. "Ground water" means all the waters found beneath the surface of the earth. [PL 1987, c. 491, §4 (NEW).]

C. "Preexisting use" means any use which was undertaken by a public water supplier, a landowner or lawful land occupant or a predecessor in interest of either of them, at any time during the period of 3 years prior to the commencement of the use which resulted in the interference. [PL 1987, c. 491, §4 (NEW).]

2. Cause of action created. Subject to the limitations of subsection 3 and except as provided by Title 23, section 652, a person is liable for the withdrawal of ground water, including use of ground water in heat pump systems, when the withdrawal is in excess of beneficial domestic use for a single-family home and when the withdrawal causes interference with the preexisting beneficial domestic use of ground water by a landowner or lawful land occupant. [PL 1987, c. 491, §4 (NEW).]

3. Limitations. The liability imposed under subsection 2 shall be in compensatory damages only, to be recovered in an action brought by the landowner or other lawful land occupant whose ground water use has been interfered with, against the person whose subsequent use has caused the interference.

A. The damages shall be limited to the following:

(1) All costs necessary to restore the landowner or lawful land occupant to a status which is reasonably equivalent in terms of quantity and quality of ground water, made available on a similarly accessible and economic basis;

(2) Compensatory damages for loss or damage to property, including, without limitation, the loss of habitability of residence, caused to the landowner or lawful land occupant by reason of the interference, prior to restoration of the status provided for in subparagraph (1); and

(3) Reasonable costs, including expert witness and attorney fees, incurred in initiating and prosecuting an action when necessary to secure a judgment granting the relief provided for under this chapter. [PL 1987, c. 491, §4 (NEW).]

B. The rights afforded by this chapter shall be in addition to, and not in derogation of, any other rights, whether arising under statute or common law, which any person may have to seek redress against any other person for ground water interference or contamination. [PL 1987, c. 491, §4 (NEW).]

SECTION HISTORY

PL 1987, c. 491, §4 (NEW).

§2660-A. Restrictions on transport of water

1. Prohibition. Except as otherwise provided in this section, a person may not transport water for commercial purposes by pipeline or other conduit or by tank vehicle or in a container, greater in size than 10 gallons, beyond the boundaries of the municipality or township in which water is naturally located or any bordering municipality or township. [PL 2013, c. 381, Pt. B, §2 (AMD).]

2. Exceptions. The prohibition in this section does not apply to:

A. Any water utility as defined in Title 35-A; [PL 1987, c. 745, §1 (NEW); PL 1987, c. 816, Pt. KK, §20 (NEW).]

B. Water transported for use in well drilling, construction activities, concrete mixing, swimming pool filling, servicing portable toilets, firefighting, hospital operations, aquaculture, agricultural applications or civil emergencies; [PL 1987, c. 745, §1 (NEW); PL 1987, c. 816, Pt. KK, §20 (NEW).]

C. Water distilled as a by-product of a manufacturing process; [PL 2007, c. 399, §4 (AMD).]

D. Water transported from a water source that, before July 1, 1987, was used to supply water for bottling and sale and that is used exclusively for bottling and is sold in its pure form or as a carbonated or flavored beverage product; and [PL 2007, c. 399, §4 (AMD).]

E. Water withdrawn pursuant to a permit issued by the Department of Environmental Protection or the Maine Land Use Planning Commission. [PL 2007, c. 399, §4 (NEW); PL 2011, c. 682, §38 (REV).]

3. Appeal. The commissioner, after consultation with the Public Utilities Commission, the Department of Environmental Protection and the State Geologist, may authorize transport of water for commercial purposes if the commissioner finds that:

A. Transport of the water will not constitute a threat to public health, safety or welfare; and [PL 2007, c. 399, §5 (AMD).]

D. For a source not otherwise permitted by the Department of Environmental Protection or the Maine Land Use Planning Commission, the water withdrawal will not have an undue adverse effect on waters of the State, as defined by Title 38, section 361-A, subsection 7; water-related natural resources; and existing uses, including, but not limited to, public or private wells, within the anticipated zone of contribution to the withdrawal. In making findings under this paragraph, the commissioner shall consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals. [PL 2005, c. 452, Pt. A, §2 (AMD); PL 2011, c. 682, §38 (REV).]

Any authorization under this subsection is for a period not to exceed 3 years but may be renewed subject to the same criteria. The department may adopt rules necessary for the implementation of this subsection. The rules may include imposition of a fee to cover the costs of providing permits, including any impact studies required by the department. Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A. [PL 2007, c. 399, §§5-7 (AMD); PL 2011, c. 682, §38 (REV).]

3-A. Conditions of authorization. Notwithstanding Title 1, section 302, the exceptions authorized in subsection 2 and any authorization granted under subsection 3 shall be subject to future legislative limitations of the right to transport water. [PL 1987, c. 745, §2 (NEW); PL 1987, c. 816, Pt. KK, §21 (NEW).]

4. Emergencies. In case of an emergency, any person may transport water as necessary for the duration of the emergency, but the person transporting the water must inform the commissioner within 3 days and the commissioner may determine when the emergency is over. [PL 1987, c. 531, §1 (NEW).]

5. Penalty. Any person who transports water in violation of this section is guilty of illegal transport of water. Illegal transport of water is a Class D crime. Each shipment or day of transport, if by pipeline, is a separate offense. [PL 1987, c. 531, §1 (NEW).]

SECTION HISTORY PL 1987, c. 531, §1 (NEW). PL 1987, c. 745, §§1,2 (AMD). PL 1987, c. 816, §§KK20, KK21 (AMD). PL 1989, c. 502, §B22 (AMD). PL 1997, c. 587, §2 (AMD). PL 2003, c. 121, §1 (AMD). PL 2005, c. 452, §A2 (AMD). PL 2007, c. 399, §§4-7 (AMD). PL 2011, c. 682, §38 (REV). PL 2013, c. 381, Pt. B, §2 (AMD).

§482. Definitions

As used in this article, unless the context otherwise indicates, the following terms have the following meanings.

...

2. Development of state or regional significance that may substantially affect the environment. "Development of state or regional significance that may substantially affect the environment," in this article also called "development," means any federal, state, municipal, quasi-municipal, educational, charitable, residential, commercial or industrial development that:

- A. Occupies a land or water area in excess of 20 acres; [PL 1997, c. 502, §5 (RPR).]
- B. Is an oil or gas exploration or production activity that includes drilling or excavation under water; [PL 2011, c. 653, §16 (AMD); PL 2011, c. 653, §33 (AFF).]
- C. Is a structure as defined in this section; [PL 1997, c. 502, §5 (RPR).]
- D. Is a subdivision as defined in this section; [PL 2009, c. 615, Pt. E, §13 (AMD).]
- E. [PL 1999, c. 468, §7 (RP).]
- F. Is an oil terminal facility as defined in this section; or [PL 2009, c. 615, Pt. E, §14 (AMD).]
- F. [PL 1993, c. 680, Pt. C, §7 (RP).]
- G. [PL 1993, c. 680, Pt. C, §7 (RP).]
- H. [PL 1993, c. 680, Pt. C, §7 (RP).]
- I. [PL 1997, c. 502, §5 (RP).]
- J. Is an offshore wind power project with an aggregate generating capacity of 3 megawatts or more. [PL 2009, c. 615, Pt. E, §15 (NEW).]

...

§483-A. Prohibition

1. Approval required. A person may not construct or cause to be constructed or operate or cause to be operated or, in the case of a subdivision, sell or lease, offer for sale or lease or cause to be sold or leased any development of state or regional significance that may substantially affect the environment without first having obtained approval for this construction, operation, lease or sale from the department.

[PL 2003, c. 452, Pt. W, §7 (NEW); PL 2003, c. 452, Pt. X, §2 (AFF).]

2. Compliance with order or permit required. A person having an interest in, or undertaking an activity on, a parcel of land affected by an order or permit issued by the department may not act contrary to that order or permit.

[PL 2003, c. 452, Pt. W, §7 (NEW); PL 2003, c. 452, Pt. X, §2 (AFF).]

SECTION HISTORY

PL 1987, c. 812, §§9,18 (NEW). PL 1991, c. 499, §19 (AMD). PL 1993, c. 383, §20 (AMD). PL 1993, c. 383, §42 (AFF). PL 1995, c. 704, §A7 (AMD). PL 1995, c. 704, §C2 (AFF). PL 2003, c. 452, §W7 (RPR). PL 2003, c. 452, §X2 (AFF).