MEMORANDUM

Date: May 27, 2021

To: Joint Standing Committee on Veterans and Legal Affairs

From: Janet Stocco, Legislative Analyst

Re: **Proposed Amendments to LD 554, An Act To Create Gaming Equity and Fairness for the Native American Tribes in Maine** (*Rep. Collings*)

At the Work Session on May 20, 2021, the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians presented a proposed amendment to LD 554 that adds further detail to the bill's provisions. Since that time, the Aroostook Band of Micmacs has presented an additional amendment that would include the Aroostook Band of Micmacs within the provisions of the 5/20/21 proposed amendment. As a supplement to the bill analysis, this memorandum provides additional legal analysis of the proposed amendments.

A. Application of state laws (other than tax laws)

The original text of LD 554 provides that the State and the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians agree that the federal Indian Gaming Regulatory Act [IGRA] governs the "governmental responsibility and jurisdiction" of Maine and the tribe, nation or band with respect to ***gaming activities*** within the tribe's, nation's or band's respective Indian territory or trust land.[1] In addition, the bill provides that any law of the State that is contrary to IGRA "does not apply to the conduct of ***gaming activities***" by the tribe, nation or band "within their respective Indian territory or Trust land."

The proposed amendment dated 5/20/21 amends LD 554 to clarify that both *IGRA and its implementing regulations* govern governmental responsibility and jurisdiction over tribal gaming activities on tribal lands and that state laws that are contrary to either IGRA or *its implementing regulations* does not apply to such activities.

In addition, the proposed amendment provides:

> Except as otherwise provided in a tribal-state compact negotiated under paragraph A, as otherwise provided in a written agreement between the Passamaquoddy Tribe, Penobscot Nation or Houlton Band of Maliseet Indians and the State or any political subdivision of the State or as otherwise provided in this paragraph, the laws of this State do not apply to the ***gaming operations*** of the Passamaquoddy Tribe, Penobscot Nation and Houlton Band of Maliseet Indians.

The phrase "gaming operations" is defined by the proposed amendment as:

> the conduct of class I, class II and class III gaming activities as defined in [IGRA], the provision of related and complementary services, businesses and amenities to gaming facility patrons and the siting, planning, construction and operation of the gaming facility.

Accordingly, under the proposed amendment to LD 554, state laws will not apply to tribal "gaming operations"—including not only the conduct of gaming itself but also the provision of complementary services, business and amenities to gaming facility patrons—unless:

1. A tribal-state compact provides that state law governs the particular issue (class III gaming only);

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[1] The text of the bill is located within the Maine Implementing Act (MIA), 30 M.R.S. §§6201-6214. Under the MIA, the "Indian territory" of the Passamaquoddy Tribe and the Penobscot Nation are comprised of the tribe's or nation's reservation land as well as the first 150,000 acres of land purchased by the U.S. Secretary of Interior for the benefit of the tribe or nation using land claims settlement funds as described in 30 M.R.S. §6205. Under the MIA, the "Houlton Band Trust Land" includes land acquired by the U.S. Secretary of Interior using federally appropriated Land Acquisition Fund money. 30 M.R.S. §6203(2-A). Neither of these definitions includes any individual parcel of land owned in fee (i.e., outright and not through trust status) by the tribe, nation or band or by the members of the tribe, nation or band.

Note: IGRA specifically contemplates that a compact may include provisions regarding "the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of [class III gaming activities]" as well as the "allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 U.S.C. §2710(d)(3)(C)(i)-(ii).

2. The affected tribe, nation or band and the State or a political subdivision of the State enter into a written agreement that a particular state law will apply (class I, class II and/or class III gaming); or
3. Under §6206(4)(B)(i)-(iii) of the proposed amendment, state law will also apply in the following circumstances (class I, class II and/or class III gaming):
    - The relevant health and safety state law will apply if the tribe, nation or band does not have a law or ordinance "with respect to a health and safety matter" **or** if the tribe's, nation's or band's law or ordinance "relating to health and safety" is "less rigorous than the corresponding laws of this State relating to public facilities." The amendment provides several examples of the types of "health and safety matters" affected by these provisions: food safety, sanitation, building construction standards and inspections, fire safety and environmental protection.
    - State laws "regulating the sale, distribution and taxation of alcohol" will apply to tribal gaming operations, except that any local approval required for a liquor license may be provided by the tribe, nation or band and not by a municipality or the county commissioners.

B. Application of state tax laws

As is explained above, both LD 554 and the proposed amendment dated 5/20/21 provide that any state law "contrary . . . to any provision of [IGRA]" does not apply to the conduct of "gaming activities" by the Passamaquoddy Tribe, Penobscot Nation and Houlton Band of Maliseet Indians on their respective Indian territory or trust land. Under IGRA, a tribal-state compact may include a provision related to "the assessment by the State of [class III gaming] activities in such amounts as are necessary to defray the costs of regulating such activity." 25 U.S.C. §2710(d)(3)(C)(iii). IGRA does not otherwise grant states any authority "to impose any tax, fee, charge or other assessment upon an Indian tribe" for its class III gaming activities. 25 U.S.C. §2710(d)(4).

The proposed amendment presented at the work session on 5/20/21 also includes the following provision:

> The State and its political subdivisions may not impose any tax on the Passamaquoddy Tribe, Penobscot Nation, Houlton Band of Maliseet Indians, their respective tribal members or tribal entities in connection with the tribe's nation's or band's ***gaming operations***. A tribal-state compact . . . may include provisions whereby a tribe, nation or band shares a portion of its revenues generated from ***class III gaming activities*** in exchange for quantifiable benefits that the State is not otherwise required to negotiate or provide pursuant to [IGRA].

As is explained above, "gaming operations" is defined by the proposed amendments to include not only the gaming activity itself but also the provision of complementary services, businesses and amenities to gaming facility patrons. This language prohibits, for example, the imposition of state income taxes on an employee of a tribal gaming facility (ex: a poker dealer) or an employee of an attached complementary service for gambling facility patrons (ex: a hotel concierge) if either of these employees is a member of the tribe, nation or band that is operating the gaming facility. If the employee is not a member of the tribe, nation or band that is operating the gaming facility, however, the employee would be subject to state income taxes. Similarly, the proposed amendment prevents state business taxes from being imposed not only on the tribal entity (as defined in the proposed amendment) conducting the gaming activity itself but also on tribal entity that offers a complementary service for gaming facility patrons (ex: a hotel for gambling facility patrons). The tax law structure proposed in the amendment is analogous to the rules regarding state taxation of tribal members and tribal entities on tribal land that apply under general principles of federal Indian law in other states in the country.

C. Potential challenges to effectiveness of LD 554 (original bill and as proposed to be amended)

1. As the bill analysis explains, §16(b) of the federal Maine Indian Claims Settlement Act of 1980 (MICSA), provides that federal laws for the benefit of Indians that "affect or preempt the application of the laws of the State" do not apply within the State of Maine unless Congress specifically made them applicable in Maine. The U.S. Court of Appeals for the First Circuit has held that, under §16(b) of MICSA, IGRA does not apply in Maine. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 794 (1st Cir. 1996).

    - The Attorney General's Office has expressed concern whether §6(e) of MICSA, which is invoked in LD 554 and the proposed amendment, authorizes the State and the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians to enter into an agreement providing that IGRA nevertheless governs the conduct of gaming activities by affected tribes on their tribal lands in Maine. The AG's office observes that §6(e) of MICSA authorizes the State and the affected tribes to enter agreements regarding *the jurisdiction of the State and the tribe or nation* over tribal lands, but not necessarily *the application of federal laws* to tribal lands. The AG's office further notes that while MICSA expressly authorizes the State and the Passamaquoddy Tribe and the Penobscot Nation to amend the Maine Implementing Act (MIA) to effectuate agreements regarding the State's and the tribe's or the nation's jurisdiction over their tribal lands, MICSA does not expressly authorize the State and the Houlton Band of Maliseet Indians to amend the MIA in a similar manner regarding jurisdictional agreements over the band's trust lands.

      By contrast, counsel for the tribes observe that §6(e) of MICSA expressly authorizes the State and the tribes to enter agreements providing that *the State's gaming laws* do not apply to the Passamaquoddy Tribe, the Penobscot Nation and the Houlton Band of Maliseet Indians. If such an agreement is made, they argue, IGRA will no longer "affect or preempt the application of the [gaming] laws of the State" and thus will not be rendered inapplicable in Maine under §16(b) of MICSA.

    - The AG's office has also expressed a concern that, if LD 554 is enacted and a court later concludes that the State and affected tribes lacked the authority to render IGRA applicable in Maine, it is possible that that the remaining portions of LD 554—which make any state law contrary to IGRA inapplicable to the conduct of gaming activities by the affected tribes—may nevertheless continue to be effective. *See* 1 M.R.S. §71(8) ("The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity does not affect other provisions or applications which can be given effect without the invalid provision or application."). This possibility could be avoided by adding a nonseverability clause or a contingent repeal clause to the bill.

2. It is also unclear whether the Aroostook Band of Micmac's proposed amendment to LD 554 effectively extends IGRA to the Band and effectively renders state gaming laws that conflict with IGRA inapplicable to the Band's conduct of gaming on its trust lands.

    - If LD 554 is effective in applying IGRA to the gaming activities of the Passamaquoddy Tribe, Penobscot Nation and Houlton Band of Maliseet Indians on their tribal land, an argument can be made that §6(b) of the federal Aroostook Band of Micmacs Settlement Act (ABMSA) will render IGRA similarly applicable to the Band. *See* ABMSA §6(b) ("For purposes of application of federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of [MICSA]."). The Band cites to this provision in its proposed amendment to LD 554.

    - Nevertheless, under §6(a) of MICSA, the Band, its members and any lands owned by the Band or its members are "subject to . . . the laws of the State . . . to the same extent as any other person or land therein." Congress thus specifically provided that state law governs the Band's activities in the State. Although Congress granted the Band and the State the authority in §6(d) of ABMSA to enter agreements altering *the jurisdiction of the State and the Band* over the Band's lands, Congress only provided advance consent to amend "the Micmac Settlement Act for this purpose." Although the Band cites to this

provision of the ABMSA in its proposed amendment to LD 554, there are at least two potential issues: (1) The bill is not drafted as an amendment to the Micmac Settlement Act, it is drafted as an amendment to MIA. Although Congress provided advance consent to certain specific types of amendments to MIA in MICSA, it did not authorize amending the MIA to affect the jurisdictional relationship between the State and the Aroostook Band of Micmacs over the Band's lands. (2) It may be difficult to move the provisions of LD 554 that affect the Aroostook Band of Micmacs to the state Micmac Settlement Act, because the Band has taken the position in the past that the Micmac Settlement Act has never taken legal effect.

There may be other arguments for and against the effectiveness of LD 554 and the proposed amendments that are not included in this memorandum. All of these questions are ultimately subject to decision-making by a court of competent jurisdiction; the Office of Policy and Legal Analysis does not take a position on which argument is likely to prevail should a court challenge be brought. Instead, this section of this memorandum is merely intended to provide the committee information on some of arguments that have been or may be raised regarding the effectiveness of LD 554 and the proposed amendments.

E. Drafting Issues

1. Based on the information provided to the committee regarding the intent of the proposed amendments, the committee may wish to consider adding additional language clarifying that "gaming operations"—which are affected by the state law provisions in paragraphs 4(B) and 4(C) of the proposed amendment—only include activities that take place on each tribe's, nation's or band's respective Indian territory or trust land.
2. Because there is no applicable definition in MIA, the committee may wish to consider defining the phrase "trust land" with respect to the Aroostook Band of Micmacs.
3. If there is a possibility that the governments of the Passamaquoddy Tribe, the Penobscot Nation, the Houlton Band of Maliseet Indians and the Aroostook Band of Micmacs will not all agree to the legislation, the committee may wish to consider redrafting the contingent effective date clause. As the clause is drafted in the proposed amendments, it appears that a lack of consent from any one of these governments will prevent the Act from taking effect.