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*March 31, 2021*

*Testimony of Representative Christopher W. Babbidge*

*in opposition to*

### **LD 554, An Act to Create Gaming Equity and Fairness for the Native American Tribes in Maine**

*before the Committee on Veterans and Legal Affairs*

Senator Luchini, Representative Caiazzo, and distinguished colleagues on this prestigious Committee on Veterans and Legal Affairs, I am Rep. Christopher Babbidge of Kennebunk, and I thank you for considering my comments regarding my concerns about **LD 554, An Act to Create Gaming Equity and Fairness for the Native American Tribes in Maine**. I offer a perspective different than most of the testimony you heard, and I hope you'll find it helpful as you move forward.

Indian gaming is a phenomenon of the last half-century, and tribal casinos of the last three decades. More than 300 federally-recognized tribes still do not have casinos; that is more than half of all federally-recognized tribes. But the small band of people related to two Pequot grandmothers whose family organized to prevent tribal extinction and the surrender of their reservation, and their resulting success to create what is the Foxwoods casino bonanza today, has become a financial model that other tribes want for themselves. However, whether the enterprise is large or small, Indian gaming operations have provided important income for many previously impoverished tribes. I believe, however, that gambling is an unhealthy model for Maine, and it is particularly concerning if asserted sovereign rights bar Maine government from regulation that could protect its citizens.

HISTORY: Allow me to summarize relevant historical events as I see them.

Most native tribes, including Maine's tribes, fought on the side of the French in the many wars in the 1600s and 1700s. When the French lost mainland North America in 1763, a major remaining threat to English colonists, and British sovereignty, was the potential

for ongoing conflict with tribes across the Appalachians. When the young and vulnerable United States was formed, the first Congress in New York was still concerned about the threat of conflict that could result between traders/settlers and Indians in the Midwest where new states were soon to form. The Non-Intercourse Act of 1790 declared that the new federal government, not the states, was sovereign and had the sole authority to enter into treaties with the tribes.

In what is Maine today unfolded the evolutionary story of the meeting of cultures, one an indigenous somewhat mobile hunter/gatherer/fisher society that regards land in terms of use, and the other a growing agricultural/commercial society that regarded land as wealth with stakes-in-the-ground ownership. Over the first half-century of nationhood Massachusetts and later Maine would make agreements with their tribes, mostly with the tribes permitting greater land for white settlement in exchange for what were primarily short-term gains such as supplies to get them through Maine winters.

In the late 1960s and early 1970s the tribes went to court, first for 6,000 acres, and then for more than 60% of Maine, including the entire Penobscot and St. Croix watersheds, and a federal judge found that the 1790 law prevailed over state-tribal treaty agreements. This legal decision jeopardized the land titles of 350,000 Mainers, and the New York bonding agencies balked at backing state bonds. Negotiation among the federal government, the State of Maine, and the two tribes brought an historic, unprecedented agreement. Facing uncertainty and knowing that a friendly administration in DC could be replaced in the 1980 election, the tribes signed on to an \$81.5 million settlement, one-third for trust payments, and two-thirds for land purchases of up to 300,000 acres, in exchange for relinquishing all claims and submitting to state jurisdiction. Many Mainers were angry that a two-century-old law was used to overturn legal agreements and threaten title to lands they had had for generations. Their concern was tempered when the agreement was funded by federal money. Many tribal members were angry that the settlement didn't result in a government-to-government relationship with the state. Their concern was tempered by federal money, and reservations did have self-governmental rights like municipalities, equal to any other citizen of Maine.

Within the last four decades the federal government created a path for legalized gambling operations on tribal lands. The Cabazon decision of the U.S. Supreme Court was delivered in 1987, and the Indian Gaming Regulatory Act (IGRA) was passed by Congress in 1988.

But these developments came about AFTER the Penobscot Nation, the Passamaquoddy Tribe, State of Maine, and the United States Government approved the Settlement Act where money was provided to buy 300,000 acres in various plots around Maine. If this committee and the legislature pass LD 554, the carefully-crafted limitations, geographic and otherwise, on the casino presence in Maine would be negated by the scattered purchases of Indian trust lands and the ability of EACH of the tribes to attract investor-corporations who are anxious to be free of state taxes and

regulation. IGRA's rule, providing that a state that allows casinos must allow Indian casinos, doesn't apply to Maine because the settlement paid them about \$274 million in today's money in exchange for their agreement.

Although only 2/3 of the agreed-to lands have been purchased, the two tribes are, according to one source, the largest tribal landowners east of the Mississippi River. Maine had previously agreed to allow scattered tribal purchases of large tracts of land under different, pre-IGRA, rules, being assured that tribal members, who are also Maine citizens, would have the same rights and responsibilities as every citizen in a Maine city or town.

The voters passed the first casino at Oxford in 2010 by eight-tenths of one percent of the statewide vote; At that time Mainers were likely unaware of the consequence: when tribes want a casino on any of their trust land, the federal courts have grounds in federal law to favor tribes over the State of Maine for each and every tribal casino proposed...if the legislature undoes the Settlement Act.

To proceed with LD 554, the committee must answer the following:

As this bill amends the Settlement Act, does the state maintain any regulatory jurisdiction? What rules, revenue sharing, and oversight powers ensuring transparency and honesty will be retained in a "compact"?

What will happen to that jurisdiction if and when the legislature passes recognition of tribal sovereignty? A destination resort casino on Sugar Island, the biggest island in Maine's pristine Moosehead Lake, would break my heart.

The Tribes and out-of-state casino interests want this bill for one reason: money. The Oxford and Bangor opposition to this bill is for one reason: money. Some people favor the bill because of a wish to aid indigenous peoples. I, too, want prosperity for them, but, for me, the end doesn't justify the means. I believe gambling, drugs, and prostitution can be financially lucrative – they always have been for organized crime – but they also are predatory enterprises, and I believe inconsistent with the Maine brand.

Of course, I may be in the minority on this issue, and I know games of chance can be fun. I do believe previous rules on legal gambling to keep investment small scale was a responsible course. And I do believe amending the Settlement Implementing Act possibly could allow for unbridled expansion of gaming, not merely by different tribes on various reservations, but on purchased tribal trust lands scattered around the state. IGRA does provide for state-tribal compacts for gaming, but the default position, knowing that federal law justifies Indians' right to operate casinos in states that have approved commercial casinos, puts the state at a legal disadvantage to assert regulatory authority that the tribes resist.

What we do in crafting law sometimes often determines winners and losers. If this committee feels compelled to move forward on this bill, I ask three things:

First, do not amend the Settlement Act but put it in separate statute that is amendable by the state. A Maine casino to be built on tribal land is not built to extract money from tribal members; it's built to attract Mainers, and perhaps nearby people from across the border. Maine's jurisdiction to protect its citizenry should not be surrendered.

Second, bring it to referendum. The people have expressed their will three times, that I recall, in this new century. The people's will as expressed in a referendum supersedes legislative will. A change that surrenders jurisdiction on this issue, disallowing any future vote of the people, should require their approval. This committee's charge would be to address negative potentialities and arrive at wording we can live with if it does pass.

Third, consider benefitting all of Maine's tribal citizens. For example, if Maine's third casino is built by the Passamaquoddy tribal members near the Canadian border, have it benefit all of Maine's indigenous people by sharing net income above a certain threshold. If it is built elsewhere by a different tribe, have the same apply. If out-of-state casino operators will benefit, and they will, please make sure all tribes get a piece of this "economic development" activity.

Given concerns and unanswered questions, I believe that the cautious and responsible course is to reject LD 554. If your rationale going forward is to benefit the tribes, I ask that you reject expansion of casinos in Maine and instead consider LD 1060 to distribute a portion of total net income from both existing casinos to the tribes. Both LD 554 and LD 1060 stand on their own. If both should pass, LD 1060 would provide income to all Maine tribes until the first Indian casino is built.

When voters made Maine a "casino state" with 50.4% of the vote in 2010, they thought they were approving one casino in Oxford County. That, as I understand it, is relevant because IGRA law provides that states that have casinos cannot disallow a tribal casino on Indian trust land. That does not apply to Maine now because, in exchange for continued Maine jurisdiction, Maine provided in the Settlement for up to 300,000 acres of land to become Indian trust land. If you choose to amend the Settlement Act as LD 554 proposes, it seems to me that the 2010 vote will become the permission slip for undetermined casino growth that, because we are surrendering sovereignty, the state of Maine will be powerless to correct unilaterally. Most mistakes by a legislature can be corrected by a future legislature; that ability is lost once we surrender it by amending the Settlement Act as proposed.

I want good things for the tribes. For me, this issue is not about who is asking, but the consequences of what is being asked. I believe control and jurisdiction of gambling in Maine, impacting Maine's people, should remain with Maine's government.

These words are mine only, on the facts as I see them. I thank you for your attention and consideration, and your acceptance of the responsibility you have as a member of the important Committee on Veterans and Legal Affairs. Please contact me if I can assist you further.