



Janet T. Mills
GOVERNOR

STATE OF MAINE
OFFICE OF THE GOVERNOR
1 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0001

June 30, 2021

The 130th Legislature of the State of Maine
State House
Augusta, Maine

Dear Honorable Members of the 130th Legislature:

By the authority vested in me by Article IV, Part Third, Section 2 of the Constitution of the State of Maine, I am hereby vetoing L.D. 554, *An Act to Create Gaming Equity and Fairness for the Native American Tribes in Maine*.

From the earliest days of my Administration, I have made improvement of tribal-state relations a priority, and have worked collaboratively with the Tribes and the Legislature on a variety of initiatives to address identified problems. In some cases, this has involved symbolic but important issues, like the elimination of Native American mascots in Maine schools. In other cases it has involved providing for new tribal representation on boards and commissions. Bills have been enacted this session to add Wabanaki members to the Marine Resources Advisory Board, the Inland Fisheries and Wildlife Advisory Board, and the Board of Trustees for the University of Maine System. For the first time in many years we now have a full complement of members on the Maine Indian Tribal State Commission. I supported the creation and funding of the Permanent Commission on the Status of Racial, Indigenous and Maine Tribal Populations. Just this month I signed into law L.D. 159, removing time limits for placing additional lands into trust under Maine Implementing Act, 30 M.R.S. §§ 6201 *et seq.* (MIA).

But this work has also included substantial achievements in resolving some of the most contentious issues to arise in recent years. I personally worked on amendments to a bill that will facilitate the ability of the Penobscot Nation and Passamaquoddy Tribe to prosecute non-tribal members for certain domestic violence offenses in their tribal courts. And my Administration developed and implemented what are by far the strictest water quality standards in the country to protect sustenance fishing in waters of particular significance to tribal populations. These are major accomplishments and just a few examples of the many projects the Administration is working on to solve real world problems and begin forging a more constructive relationship with the Maine Tribes. We are making progress, but more hard work lies ahead.

Tribal gaming is another complex issue, and another complex issue that we can resolve by working together. How to make that happen in the most predictable and responsible way is the challenge. Regrettably, I do not believe L.D. 554 is the answer.



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What the Bill Would Do

L.D. 554 is a 30-page, eight-part bill that would authorize the expansion of tribal gaming in Maine in two ways. Parts A, C, E and G of the bill are designed to authorize the four Federally-recognized Tribes in Maine to conduct gaming, under the provisions of the Federal Indian Gaming Regulatory Act (IGRA), by amending and repealing various State statutes that are inconsistent with IGRA. Such gaming would be permitted within the respective territories and trust lands of each Tribe. In 1996, the First Circuit Court of Appeals ruled that Section 16(b) of the Federal Maine Indian Claims Settlement Act (MICSA) renders IGRA inapplicable in Maine. *Passamaquoddy Tribe v. Maine*, 75 F.2d 784 (1st. Cir. 1996). There is, therefore, a serious question as to whether a court would interpret these changes in *State* law, with no corresponding change in *Federal* statute, as being effective in making IGRA applicable in Maine.

The terms of the bill anticipate the possibility of a successful legal challenge by building in contingent provisions. But the prospect of expensive and time-consuming litigation over these issues is troubling and unnecessary. Legislation that provides for tribal gaming does not have to, and should not, set the stage for legal conflict which would exacerbate tensions at a time when we are working hard to improve relationships.

If Parts A, C, E, and G of the bill were effective in making IGRA applicable in Maine, each Federally-recognized Tribe would be permitted to conduct gaming within its territory or trust land as follows. The Tribes could conduct class I gaming (social games) within their territories or trust lands free from any state regulation.¹ The Tribes would also be permitted to conduct class II gaming activities (electronic games) under the oversight of the National Indian Gaming Commission (NIGC), and pursuant to a tribal ordinance approved by the NIGC.² Additionally, the Tribes could conduct class III gaming (casino gaming) under the regulation of the NIGC in accordance with a compact negotiated with the Governor.³ Neither the State nor any political subdivision of the State could impose any tax on the Tribes, any tribal member, or any tribal entity in connection with the Tribes' gaming operations, except as may be negotiated in a compact governing class III gaming.

If a court finds any of those Parts ineffective in making IGRA applicable in Maine, the bill would repeal and replace that Part, respectively, with Part B, D, F, or H, which Parts would

¹ Class I gaming "means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6).

² Class II gaming has a lengthy and complex definition in federal law. 25 U.S.C. § 2703(7). For present purposes, it is important to understand that class II gaming includes slot machines that have the look and feel of those used in class III facilities, but that do not use an "random number generator." Instead, class II slot machines work similarly to a bingo game, in which the draw of numbers is determined by internal software and later translated into slot reel combinations.

³ Class III gaming "means all forms of gaming that are not class I gaming or class II gaming. 25 U.S.C. § 2703(8).

permit each Federally-recognized Tribe to conduct class I and class II gaming within its territory or trust land as a matter of state law, incorporating certain provisions of IGRA.

Importantly, and unlike L.D. 1144, the tribal gaming bill in the 129th Legislature, most of the statutory changes L.D. 554 would make would be in MIA. In order to be effective, each Part of the bill would require ratification by the appropriate Tribe, Tribal Nation, or Band. Once ratified, the Maine Legislature could not amend these statutory provisions to address mistakes or unintended consequences without the approval of the affected Tribe. This unique feature of legislating in this area makes it imperative that the bill's language be explicitly clear and its impacts well understood. A "pass it now, fix it later" mentality is not appropriate and invites many unintended consequences.

Problems with the Bill

This bill provides no predictability or meaningful limitations on where tribal gaming may occur, or on the size of the size of each facility. The tribal gaming facilities that the legislation would authorize could be large or small, anything from a grand casino to a few slot machines in a convenience store, and the State and adjacent non-tribal communities would have little or no influence over their placement. Maine's existing casinos were approved only when it was clearly understood where they would be located, what they would look like, and where strong local support existed. Although the tribal facilities could only be located on tribal territory or trust lands, in separate legislation now pending before the Legislature, the Tribes are seeking amendments to MIA that would allow for the acquisition and establishment of additional trust lands throughout the State. *See* L.D. 1626. The combined effect of these bills would potentially authorize untaxed tribal gaming facilities, unlimited in size and unrestricted in the number of slot machines, anywhere in Maine, which, I believe would be of significant concern in communities around the State.

L.D. 554 contains no provisions to mitigate the bill's substantial fiscal impact on the State budget. This legislation would allow the proliferation of class II gaming facilities on tribal territory or trust land, which includes popular and highly profitable electronic slot machines that are indistinguishable to most users from Class III machines found in Las Vegas-style casinos. Under state law, Hollywood Slots pays 40 percent in revenue sharing to the State on its slot machines, while Oxford Casino pays 46 percent. The Tribes' class II slot revenue would be free from any state or local taxation. The Gambling Control Board estimates the diversion in business away from the two existing casinos would reduce State revenue by \$17 million annually. Legislation that authorizes the expansion of tribal gaming should include measures that minimize and account for the fiscal impact of these facilities.

One other issue that I have raised with the tribes is the workability of the language that exempts tribal gaming facilities, wherever located, from all state laws relating to health and safety, including "food safety, sanitation, building construction standards and inspections, fire safety and environmental protection," unless the individual Tribe has laws or ordinances similar to state laws that apply to gaming operations generally. This language raises concerns about implementation and interpretation that could leave gaps in the protection of tribal and nontribal employees and patrons.

Some have suggested that these and other issues can be resolved in the negotiation of a gaming compact. I am not convinced that will ever come to pass. The profitability of class II gaming would leave the Tribes little incentive to negotiate a compact with the State for class III gaming, which means the State may never see any revenue as a result of the tribal gaming that L.D. 554 would authorize, and would have no ability to address the other health, safety, and welfare concerns that are typically the subject of such compacts. We cannot defer any of the questions this bill raises to be answered later in a negotiated compact, because a state-tribal compact may never come to pass.

I also note that under current law, the Penobscot Nation and Passamaquoddy Tribe each receive two percent of the State's 46 percent share of slot revenue from the Oxford County Casino. In 2019, this resulted in payments of more than \$1.5 million to each of those Tribes. Although L.D. 554 authorizes the Penobscot Nation and Passamaquoddy Tribe to operate their own gaming facilities free from state and local taxation, it does not appear that the Committee revisited whether these payments from the Oxford County Casino to the Tribes should continue. This issue should be considered as part of any proposed expansion of tribal gaming in Maine.

I believe that Maine's Federally-recognized Tribes have been unfairly excluded from the opportunity to operate their own gaming facility – a problem that I believe can and should be rectified. In a recent meeting with Tribal leaders, I informed them of my interest in developing legislation that would provide for the expansion of tribal gaming in Maine – legislation that is distinct from MIA, that provides clarity and certainty as to what can be expected from it, and that is the product of a thorough review of its social, economic, and fiscal consequences. I asked that this bill be recalled from my desk so as to avoid a veto, and that it be carried over until next session so that we would have the opportunity to continue working in good faith to resolve the issues I see in L.D. 554. In doing so, I committed to Tribal leaders that I would support tribal gaming legislation that addresses the concerns I have identified.

Unfortunately, that offer was not accepted, and this bill remains flawed. While many of these issues are complicated, I remain committed to working in good faith with Maine's Tribes to make progress on important issues like this one, and firmly believe that compromise can be achieved. In the meantime, for the reasons identified above, I return L.D. 554 unsigned and vetoed, and I urge the Legislature to sustain this veto.

Sincerely,



Janet T. Mills
Governor