Testimony in support of: LD 2094: An Act to Implement the Recommendations of the Task Force on Changes to the Maine Indian Land Claims Settlement Implementing Act

Senator Carpenter, Representative Bailey, and Members of the Committee:

My name is Corey Hinton. I am an attorney for the Passamaquoddy Tribe and am prepared to speak today in support of LD 2094.

In particular, I am prepared to speak on the following issues over the course of today: gaming; Federal Indian laws blocked by the Settlement Act; trust land acquisition; and dispute resolution.

I. Gaming

The State of Maine has been home to various forms of gaming since well before the Settlement Act. Nonetheless, the State of Maine has consistently fought against any attempt by the Tribes to exercise their inherent right to conduct gaming for the benefit of their communities.

Tribal Nations possess inherent sovereign authority to conduct and regulate economic development activities on tribal lands to the extent that right has not been eliminated or limited by treaty or federal statute. Many Tribal Nations across the United States, including the Penobscot Nation, began to conduct commercial bingo and other games in the 1970's pursuant to this inherent authority.

In 1987, the Supreme Court upheld the legitimacy of these early gaming operations through its landmark *Cabazon* decision, which held that gaming could be conducted under tribal sovereignty and in a manner not subject to state criminal or regulatory jurisdiction.

In response, Congress passed the Indian Gaming Regulatory Act (IGRA), which limited tribal sovereignty in the field of gaming and adopted a tribal-state-federal framework to balance each sovereigns' interests in the area.

Contrary to common misunderstandings, the net proceeds that Tribal Nations obtain through gaming are not "commercial profits".

Tribal Nations are required under IGRA to invest these governmental revenues in governmental services and economic development, delivering well-documented benefits to both Indians and non-Indians in their communities.

IGRA further stipulates that Tribal Nations must hold the "sole proprietary interest [in] and responsibility for" operation of all gaming conducted under the law.

Maine has been home to tribal gaming since well before *Cabazon* and IGRA but the Tribal Nations of Maine have yet to achieve the rights of economic development afforded by either. Maine has thus far enabled out-of-state corporations to proceed with for-profit gaming enterprises and rejected efforts by the Tribes to generate governmental revenues and attending local economic through gaming.

While the Tribal Nations have sought to establish gaming operations under state law, state lawmakers and voters have repeatedly rejected tribal attempts to expand beyond bingo halls, despite voter approval of the creation of gaming opportunities for non-tribal commercial interests.

Today, Maine is home to two casinos that are owned by out-of-state corporations: Hollywood Casino Bangor and Oxford Casino.

As a State of Maine commissioned report notes, both casinos were established pursuant to state referendums that were "overtly funded by commercial casino interests".

These publicly-traded corporations do not reinvest their revenues *locally* in government services or further local economic development, rather, revenue is exported to corporate shareholders *outside of Maine*.

Specifically, between 2014 and 2018, the two out-of-state owned casinos in Maine generated over $680 million in net revenue before any revenue sharing payments were made.

Of that amount, approximately $415 million was not subject to revenue sharing obligations and was exported from the state in the form of profits for out-of-state corporations that operate many casinos around the country.

Tribal Nations, however, would keep all of these gaming revenues local, circulating and creating ripple effects in the state economy.

In sum, LD 2094 would facilitate gaming-related economic development for the benefit of the Wabanaki communities, their neighbors, and the state, as a whole. The revenue generated from tribal gaming in Maine would stay in Maine and would benefit tribal and local economies for years, if not generations to come.

II. Federal Indian laws blocked by the Settlement Act

The Settlement Act contains two provisions that prevent certain federal laws enacted for the benefit of Indian country from applying in Maine.

The provision formerly codified at 25 U.S.C. § 1735(b), in particular, is responsible for preventing hundreds of millions of dollars from flowing into Maine since 1980.

Such funds would not only have been received, spent, and kept within tribal communities and the surrounding areas but they would have led to the creation of jobs, economic development, and overall stronger communities in rural Maine.

The Task Force commissioned a report that can be a roadmap to help identify exactly how such funds and benefits were blocked from coming to Maine.

In sum, the report identified 151 laws or amendments to existing laws the benefits of which have not come to Maine because of the Settlement Act. As the pie chart prepared for the Task Force and shared with you all illustrates, the majority of these laws dealt with healthcare, education, and the environment. A narrow sampling of these laws include:

- Numerous amendments to the Indian Health Care Improvement Act that were intended to improve the quality and delivery of healthcare on tribal lands;
- amendments to the Stafford Act that enable tribes to obtain emergency disaster relief directly during natural disasters; and
- the Tribal Law and Order Act, which enabled tribes to exercise increased criminal jurisdiction over crimes committed by Indians on tribal lands, provided that specific legal protections are afforded to defendants in accordance with the Indian Civil Rights Act.

Some may disagree about the historical underpinnings of this section of the Settlement Act, but, as was noted in a report to the MITSC report on section 1735(b), "[w]hat is most remarkable about [the section] is how very late it appeared in the drafting process of MICSA; just five days before the House and six days before the Senate voted on the bill."

Despite what the drafters intended, this provision has been a constant source of friction and conflict between the Tribes and Maine since enactment of the Settlement Act.

Future conflict over this provision may have been contemplated in the back room dealings that led to its inclusion in the Settlement Act but few could have anticipated the human cost of its ambiguously broad language.

§ 1735(b) has been wielded as a weapon against the Tribes to blunt self-determination and self-governance time and time again.

It has directly prevented federal funds from coming into Maine. It has stalled tribal efforts to clean up the environment. It has blocked efforts to make Maine citizens safer and more secure in their communities. Make no mistake: the consequences of § 1735(b), whether intended or not, have been downright damaging to Maine, as a whole.

Failure to amend the MIA in a way that would resolve this glaring problem with the Settlement Act would only perpetuate the socioeconomic gap between Maine tribes and tribes elsewhere in the United States.

Congress does not pass laws for the benefit of tribes without considering the ramifications, and such consideration often occurs over multiple Congresses, over many years.

This regularly includes federal, state, tribal, and local input to help Congress understand the scope of the problem and the best way to address it.

When Congress passes a law for the benefit of Indian country, the law should not be viewed as a threat to the sovereignty of the State of Maine, yet the ambiguously broad language of § 1735(b) suggests otherwise.

This dynamic is unhealthy and only serves to hurt Mainers.

III. Land Acquisition

The Settlement Act authorized the Passamaquoddy Tribe and the Penobscot Nation to acquire up to 150,000 acres as part of their respective tribal territories.

This was a significant concession considering that their collective landholdings once constituted roughly 2/3 of the entire state.

The MIA specifically identified areas where the tribal lands could be acquired, but these areas largely consisted of land that had been relinquished or sold by pulp and paper companies after decades of logging or industrial use.

Outside of those areas, the MIA permits the Passamaquoddy Tribe and the Penobscot Nation to request to have tribally-owned fee lands taken into trust status but, in addition to complying with the federal regulations, they must obtain approval from the State and any the local government where the land is located.

There are no such restraints in the settlement acts for the Houlton Band of Maliseet and the Aroostook Band of Micmac.

In other words, the veto power that state and local governments in Maine hold over trust acquisitions creates an unequal divide between Maine tribes.

Such restraints are contrary to the spirit of tribal self-determination and have obstructed the ability of Tribal Nations to use, manage, and regulate their lands as they wish.

For example, in 1985, the Passamaquoddy Tribe sought to address a severe housing shortage on its Pleasant Point Reservation through the acquisition of 490 acres on which new housing would be built for tribal citizens.

The land at issue was located within the Town of Perry, so the MIA required approval of both the Town of Perry and the State legislature before the land could be acquired as part of the tribal reservation.

Perry voters and the legislature ultimately approved Passamaquoddy's request to acquire new reservation land for the purpose of housing, but not without an additional payment of $350,000 to the Town of Perry after purchasing the land.

The Settlement Act implicitly encourages a situation where Tribal Nations can be held financially hostage by local landowners and where municipalities will expect to extract valuable concessions from tribal governments seeking to reacquire tribal lands.

It is within this restrictive framework that both the Passamaquoddy Tribe and Penobscot Nation have been unable to obtain the 150,000 acres of trust land authorized by the settlement act.

Elsewhere across the country, tribes reacquire and restore their homelands under a federal law called the the Indian Reorganization Act or IRA.

Under this law, the Secretary of the Interior is required to consider (1) the Tribe's need for additional land; (2) the purposes for which the land will be used; (3) the impact to state and local government tax rolls; and (4) any potential jurisdictional or land use conflicts that may arise.

Today, the Interior Department will rarely, if ever, approve "off-reservation" land acquisitions for gaming purposes. Further, the greater the distance between a proposed land acquisition and a reservation, the less likely Interior is to approve the acquisition.

Even where a proposed acquisition is close to existing tribal lands, Interior will only proceed if it has written input from local governments.

As a result, any reform of the MIA that would defer to federal law on trust acquisitions will continue to accommodate State and local government interests and will help directly fulfill a primary goal of the settlement act: the reacquisition of tribal lands.

IV. Dispute Resolution

Conflict and litigation are hallmarks of tribal-state relations dating back to before the Settlement Act. Making matters worse, the State of Maine has at times even encouraged the Tribes to take matters to court, knowing full well that the Settlement Act framework significantly disadvantages the Tribes in a litigation setting. Thus, the Tribes and the State of Maine are almost always reacting to disputes and very rarely take proactive measures to prevent disputes from arising in the first place.

For that reason, the Maine Indian Tribal State Commission (MITSC) and Tribal attorneys have collectively produced a proactive dispute resolution framework that is intended to greatly reduce the likelihood of litigation and conflict between the Tribes and the State of Maine. This framework includes four primary parts:

(1) Enhanced consultation;
(2) Government-to-Government cooperative agreements;
(3) Continued collaboration around the development of a more binding and reactive dispute resolution framework; and
(4) A Bicentennial Tribal-State Accord.

As a threshold matter, the State of Maine has never consistently observed any sort of tribal consultation model.

The absence of a tribal-state consultation framework has had an untold negative impact on tribal-state relations, and stands in stark contrast to federal and international consultation policy trends.

At the federal level, successive U.S. Presidents have announced Executive Orders and Presidential Memorandums to require federal agencies to consult with tribes.

At the international level, the United Nations Declaration on the Rights of Indigenous Peoples or UNDRIP includes a non-binding framework of enhanced consultation with the goal of obtaining free and prior informed consent prior to certain actions that would violate indigenous rights.

The 123rd Maine State Legislature even passed a joint resolution in support of the UNDRIP but there is still no consultation policy in place in Maine.

The proposal put forward by MITSC and the Tribal attorneys would require the State of Maine to consult with the Tribes in the development of regulations, policies, or actions that would directly affect the Tribal rights.

As part of this, the proposal lays out a consultation process and calls for the Executive Agencies to appoint tribal liaisons in every department to facilitate communications and consultation with the Tribes.

Government-to-Government Cooperative Agreements

The path to avoiding future conflict must also include partnerships. That is why MITSC and the Tribal attorneys have proposed a broad authorization for the State of Maine to enter into cooperative agreements with tribal governments.

The express purpose of these agreements is to "facilitate cross-jurisdictional cooperation and the delivery of government services and to avoid disputes on issues of mutual interest, including but not limited to law enforcement, taxation, environmental regulation, and natural resources."

Such agreements are common across Indian country and are a foundation for positive neighborly relations.

Governments across the United States routinely enter into such agreements with tribes for mutually beneficial reasons and the State of Maine should be no different.

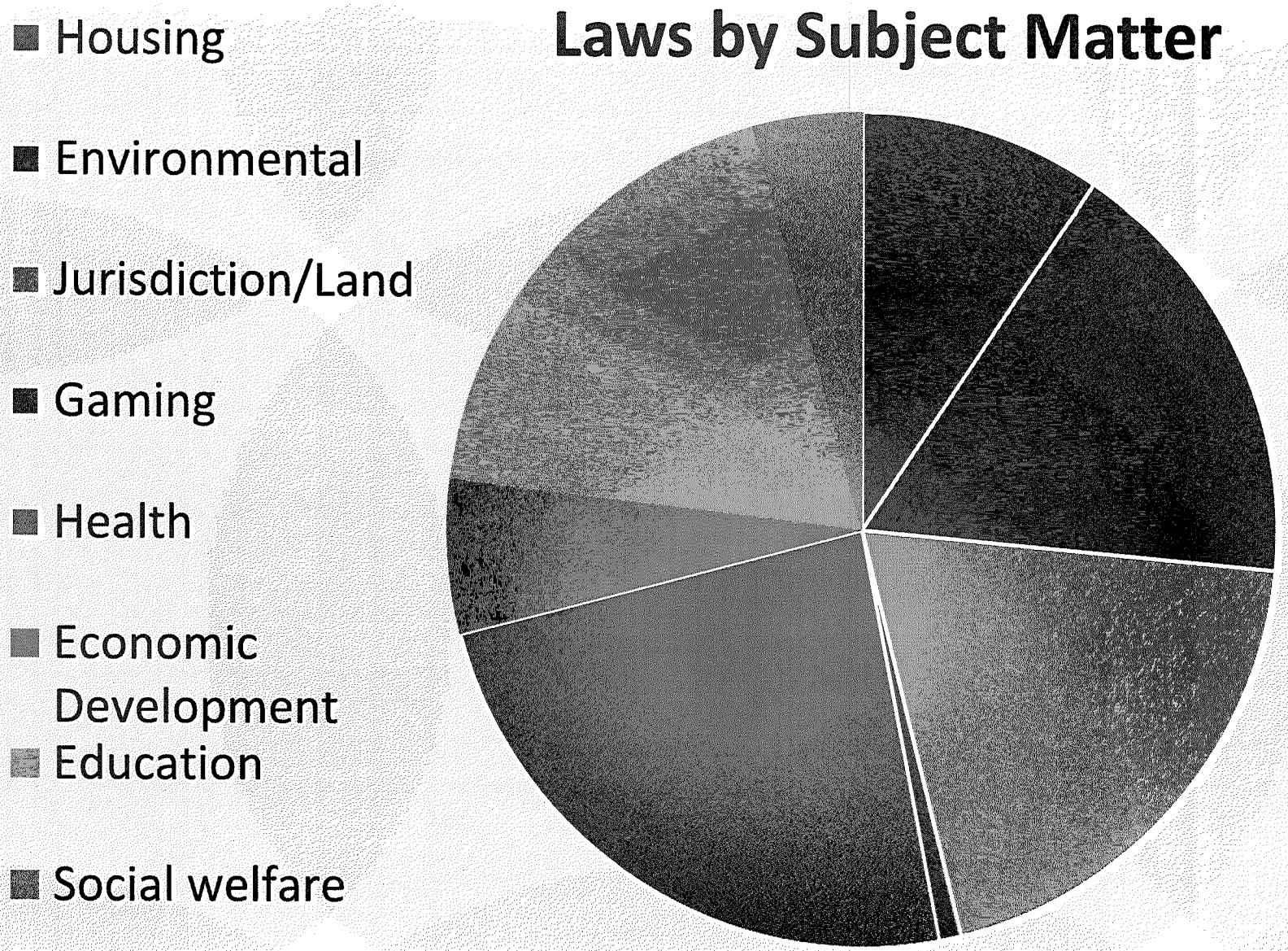
Bicentennial Accord and Next Steps

Lastly, the proposed framework calls for the completion of a detailed study into best practices for resolving tribal-state disputes and a Bicentennial Accord, which would establish general principles to govern tribal-state relations for years to come.

The Bicentennial Accord would include a commitment for the sovereigns to meet on a regular basis to discuss issues of mutual concern with hopes that discussions with build partnerships and foster productive dialogues for years to come.

Our hope is that implementation of these proactive dispute resolution principles will significantly enhance tribal-state relations.

This can only happen if all parties are committed to understand one another and to working together.



Federal Laws Enacted after October 10, 1980 Which May Benefit Indians and Indian Nations

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