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October 16, 2003

Michael P. Cantara, Commissioner
Department of Public Safety
State House Station #42
Augusta, ME 04333

RE: *Your Request for Legal Analysis of the Proposed Maine Tribal Gaming Act*

Dear Commissioner Cantara:

You have requested an opinion concerning certain legal aspects of the proposed Maine Tribal Gaming Act, should this citizen initiative be approved by the Maine voters and ratified by the Passamaquoddy Tribe and Penobscot Nation (hereafter "the Tribes").[1] The initiated bill would establish the Maine Tribal Gaming Act (hereafter "the initiated bill") as a new Subchapter II in Title 30 M.R.S.A. Chapter 601.[2] It is our understanding that you have raised the questions in your correspondence of September 5, 2003 and September 9, 2003 on behalf of various interested executive agencies, as well as your own department.

At the outset, it must be emphasized that it is not possible for this Office to opine with certainty on all of the issues you have raised. In large part, this is due to the lack of clarity of various provisions of the initiated bill. In the usual legislative process, the language of the bill would have been refined with input from state agencies, legislators and their staff, and other interested persons. Historically, the Legislature, the Executive, the Courts, as well as this Office, have been and continue to be highly respectful of the initiative process. Nonetheless, the absence of an opportunity to clarify intent before the people vote is significant in the case of a complex and detailed bill like the one before us.

[1] Such approval is required by the initiated bill. It is possible that only one Tribe will agree to the terms of the initiated bill. It would then be effective with respect to that Tribe only. Such a result would create some inherent contradictions, as definitions provide for a "tribal gaming agency" formed jointly by the governments of the Tribes, and a "tribal gaming operator" owned jointly by the Tribes. Proposed 30 M.R.S.A. § 6302 (22), (23).

[2] Existing provisions of 30 M.R.S.A. §§ 6201-6214, Chapter 601, "An Act to Implement the Maine Indian Claims Settlement" ("Implementing Act") would be redesignated as Subchapter I.

As a practical matter, we do not have available to us tools such as legislative debate, committee reports, and amendments to facilitate our efforts to construe the language of the initiated bill. Our analysis is based on the language of the initiated bill itself, accepted legal principles of interpretation, and an assessment of how the bill would fit into the larger body of existing Maine law.

The most significant issue raised by the initiated bill is the attempt to bar the Legislature, as well as the people of the State acting through the initiative process, from amending it for a period of twenty years unless the consent of the Tribes is obtained. The purported immutability of the initiated bill raises serious constitutional concerns, but their ultimate resolution is difficult to predict because of the complex relationship between the Tribes and the State under a combination of state and federal law provisions. This issue underlies all of your questions, and limits our ability to predict their answers with certainty. Further, the potential that a court could ultimately determine that the State is barred from amending any given provision of the bill raises the stakes on issues of statutory construction. In the past, the crafting of any legislation touching upon the State's relationship with the Tribes has been the subject of negotiation and substantial scrutiny. Such a process did not occur here. Moreover, to the extent there are ambiguities and internal inconsistencies in the initiated bill, the bill provides that its provisions "must be liberally construed in favor of gaming by and on behalf of the Tribes." Proposed §6314.[3]

Because the interpretive issues you raise are both affected and made more complex by the interaction between the initiated bill and existing state and federal law governing settlement of the Tribes' land claims against the State, we first address your question #3, which requires a review of that relationship.

Future Amendments and the Liberal Construction Requirement

> *3. You asked, "My read is that the Act may not be changed or amended without the consent of the Tribes during its 20 year life, and must be liberally construed in favor of gambling and the Tribes: Is this your analysis?"*
>
> *Summary response: The initiated bill may be viewed as an amendment to the Implementing Act, but the extent to which the twenty-year limitation on legislative change is binding depends on the applicability of the federal Settlement Act. The initiated bill mandates that it be liberally construed in favor of gaming by and on behalf of the Tribes.*

The first part of this question presents a particularly complex issue involving nuances of federalism. The initiated bill grants the Tribes the authority to conduct gaming for twenty years,[4] and it may be construed as prohibiting the Maine people, by

[3] Throughout this opinion we cite to provisions of the initiated bill in this manner, *i.e.*, with reference to their proposed placement in Title 30.

[4] Proposed §6303(6).

further initiative or through their duly elected Legislature, from repealing, amending or otherwise changing the new law that would be created by the initiated bill for twenty years unless the Tribes agree.[5] Such a result would be analogous to a binding treaty that cannot be altered without approval by both parties.

To the extent there is authority for such an unalterable statute, it arises not out of Maine's Constitution, as all statutes may be amended; indeed, even state constitutional provisions can be amended, though with greater difficulty. Rather, the possible authority for this binding "law" arises out of the federal Maine Indian Claims Settlement Act, 25 U.S.C. §§1721 - 1735 (the "Settlement Act"), which resolved the land claims and jurisdictional disputes between the Maine Tribes and the State. The Maine Implementing Act (30 M.R.S.A. §§ 6201-6214) established the jurisdictional relationship between the Tribes and the State, and the federal Settlement Act approved that arrangement. In addition, the federal Act authorized the State "to amend the Maine . . . Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation" provided that any such amendment is consented to by the affected Tribe and the amendment relates to:

> (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation; or (C) the allocation of jurisdiction between tribal courts and State courts.

25 U.S.C. § 1725(e)(1). For the purposes of determining whether the twenty-year "no amendment" restriction applies, the question, then, is whether all or some portions of the initiated bill fall within these three defined subject areas.

Assuming the initiative process is a valid means to amend the Maine Implementing Act,[6] there are portions of the initiated bill, regarding regulation of the

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[5] Although the initiated bill does not expressly state that it cannot be changed for twenty years without the consent of the Tribes, the summary that accompanies the initiated bill explicitly provides that it "may not be amended or repealed without the consent of the Passamaquoddy Tribe and the Penobscot Nation."

[6] Because the use of the initiative process in this context is so novel and unprecedented, we cannot at this time determine its legal effects. Citizens certainly have the power to enact and amend statutes through the initiative process. While the Maine Constitution will be liberally construed to facilitate the people's power to legislate, the constitutional validity of an initiative is evaluated under ordinary rules of statutory construction. *League of Women Voters v. Secretary of State*, 683 A.2d 769, 771 (Me. 1996). "Unless and until changed by formal amendment, present provisions of the Constitution bind not only the Legislature but the people." *Common Cause v. State of Maine*, 455 A.2d 1 (Me. 1983) (*citations omitted*). To the extent that any given provision of the initiated bill is ultimately determined to come within the ambit of § 1725(e)(1) of the federal Settlement Act, and therefore to limit the Legislature's constitutional authority to amend or repeal it, that may exceed the constitutional limits of the citizens' initiative process. There is no precedent to guide us in determining how this conflict would be resolved.

proposed Tribal casino that arguably could fall within (A) or (B), above. There are other aspects of the initiated bill, however, such as allocation of revenue,[7] which appear to have nothing to do with the jurisdictional relationship between the Tribes and the State contemplated by §1725(e)(1). Moreover, there are aspects of the initiated bill that could be put into existing law without amending the Implementing Act.[8] It may turn out that the State can later amend at least portions of the initiated bill, but that may have to be determined by subsequent court action.[9]

Regarding the second part of your question, the initiated bill mandates that it "must be liberally construed in favor of gaming by and on behalf of the Tribes." Proposed § 6314. If there are ambiguities, the interpretation that favors Tribal gaming interests is likely to prevail. However, the canons of statutory construction also direct the courts to avoid illogical results, and interpret the language of the initiated bill in the context of the larger body of the Implementing Act and other relevant Maine laws.

Municipal Jurisdiction and Application of State Regulatory Standards

1. You asked, "Does the Tribal Gaming Act effectively expand tribal jurisdiction to non-Indian land, supplanting local municipal jurisdiction over the site of any casino?"

6. You asked, "Although the Maine Indian Land Claims Settlement Act makes the Tribes subject to all laws of the State, the initiated bill appears to cut back the State's jurisdiction by referring to only state criminal jurisdiction and certain limited health and safety codes. Notably excluded from the "application of state regulatory standards" are any state environmental permitting standards and required permits under the Site Location of Development Act and the Natural Resources Protection Act. Would this restrict the State's ability to enforce other types of violations? (Environmental, for example)."

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[7] Indeed, we suggest in our discussion of your question #5 that this revenue allocation provision raises other fundamental questions regarding the placement of an unconstitutional restriction on the Legislature.

[8] It is not necessary to amend the Maine Implementing Act to authorize casino gambling. The Maine Criminal Code, at Title 17-A M.R.S.A. Chapter 39, currently addresses unlawful gambling. Title 17 M.R.S.A. Chapters 13-A and 14 address Beano and Games of Chance, respectively. These statutes could be amended, without tribal approval and without a binding effect on the State, to authorize the Tribes to conduct casino gambling, much as the current language in 17 M.R.S.A. § 314-A authorizes the Chief of the State Police to license federally recognized Indian tribes to conduct high-stakes beano on "Indian Territory." Therefore, placing into the Implementing Act laws that could stand outside it and be effective suggests an intent to create a binding effect that could not otherwise result from any legislation or citizen initiative. The fact that such provisions could be effective if placed outside the Implementing Act suggests that they may not have the binding effect that appears to be intended.

[9] That some provisions may fall within and others outside the authority of §1725(e)(1) presents problems of severability as well.

Summary response: The initiated bill does not expand existing tribal jurisdiction beyond Indian territory. However, the language of the bill is somewhat unclear on issues such as the extent of municipal jurisdiction, the authority of local law enforcement, and the applicability of state regulatory and civil enforcement laws not explicitly referenced.

Because your questions concerning the impact of the initiated measure on existing municipal jurisdiction and state regulatory authority overlap, we address them together.

The Implementing Act, in 30 M.R.S.A. §6206(1), gives the Tribes the powers and duties of municipalities under state law "within their respective Indian territories." "Indian territory" is specifically and separately defined for both the Passamaquoddy Tribe and the Penobscot Nation in § 6205(1) & (2). The Tribes' authority to enforce their own ordinances and certain specified state laws is limited to their respective Indian territories. *See* 30 M.R.S.A. §§6206, 6207, 6209-A, 6209-B, and 6210. The initiated bill specifies that the gaming facility may not be located on any land over which the Tribes exercise jurisdiction. Proposed §§ 6302(18), 6303(5). Thus, it appears that the Tribes' authority under the Implementing Act to adopt ordinances and to enforce those ordinances and certain state laws will not extend to a casino located outside of Indian territories.

Although the initiated bill does not explicitly provide any exemption for the proposed casino from existing State or local laws, other than those that prohibit gambling, it does contain several provisions that generate questions about the applicability of existing state and local laws.[10] Your question leads us to proposed §6311(1), which provides, in pertinent part, "Each gaming facility is subject to the laws and regulations of the State relating to public facilities with regard to building, sanitary and health standards and fire safety and to the laws and rules of the State relating to water discharges by public facilities." This language raises several issues.

Municipal jurisdiction.[11] The term "State" is defined in proposed §6302(19) to mean "the State of Maine and its authorized officials, agents and representatives." In contrast, the definition of "laws of the State" found in the language of the Implementing Act is "Constitution and all statutes, rules or regulations and the common law of the State *and its political subdivisions*, and subsequent amendments thereto or judicial

[10] While it might be argued that the language in proposed § 6303 authorizing the Tribes to conduct gaming subject to this subchapter and "notwithstanding any other provision of the laws of the State" excepts the gaming operations from laws not specifically cited, we do not think this interpretation is correct. Because this provision is placed in the section that authorizes the games themselves, it appears intended to exempt this casino from the existing prohibitions against gambling, not the State's non-gaming regulatory oversight of the casino site.

[11] While your question focuses on municipal jurisdiction, the analysis would be similar regarding the counties.

interpretations thereof." 30 M.R.S.A. §6203(4) (*emphasis supplied*).[12] The omission of any reference to political subdivisions in § 6302(19) and § 6311(1) could be read as an indirect way of exempting the casino site from municipal ordinances.

State laws not enumerated. Proposed §6311(1) provides that the gaming facilities would be subject to the laws, regulations and rules of the "State" regarding "building, sanitary and health standards," "fire safety," and "water discharges by public facilities." It does not reference any other state environmental laws that are generally applicable to such developments, nor any local ordinances. As a matter of statutory construction, the specific inclusion of certain items without referencing others suggests that the items not listed are not applicable. *Westcott v. Allstate Insurance*, 397 A.2d 156, 169 (Me. 1979). This principle could be invoked to exclude laws not referenced in § 6311(1). Another canon of statutory construction directs courts to construe all statutory provisions to have meaning and to avoid interpreting language as mere surplusage wherever possible. *Home Builders Ass'n v. Town of Eliot,* 2000 ME 82, ¶¶ 7-8, 750 A.2d 566, 570. The required location of the casino outside Indian territory suggests that all generally applicable laws would apply. If that is the intent however, then there would be no need to include the language § 6311(1) in the initiated bill, and its provisions therefore become mere surplusage.

In interpreting the language of the initiated bill, we are mindful that courts will avoid results that are "inconsistent, unreasonable or illogical." *Town of Eagle Lake v. Com'r, Dept. of Education*, 2003 ME 37 ¶7, 818 A.2d 1034, 1037 (*citations omitted*); *see also Interstate Food Processing. Corp. v. Town of Fort Fairfield*, 1997 ME 193 ¶4, 698 A.2d 1074, 1075-76. A court may reject an assertion that the casino site, which has no special status as tribal land or a federal enclave, is shielded from laws of general applicability, such as municipal ordinances, that are not explicitly identified or made inapplicable. *See Whorff v. Johnson,* 143 Me. 198, 206, 58 A.2d 553 (1948) (rejecting maxim "*expressio unius est exclusio alterius*" to avoid "unreasonable, inconsistent, and unjust" result).

Similar issues arise as to proposed §6304, which in subsection (1) provides that the "State has jurisdiction to enforce all criminal laws of the State that are consistent with this subchapter on the site, including enforcement within the gaming facilities." The specific grant of authority regarding criminal offenses implies that the casino site may be exempt from civil laws normally within the purview of law enforcement officers.[13] As with proposed §6311(1), the question of municipal enforcement arises from the various definitions of "State," and it takes yet another twist here as the result of language in

[12] Proposed § 6311(2) raises another question regarding local jurisdiction in the context of regulation of alcoholic beverages. The proposed language provides that the tribal gaming operator is "entitled" to certain permits for the sale of liquor. The wording suggests that the tribal gaming operator may not be subject to the local review and approval process currently required for the issuance of on-premise licenses. *See* 28-A M.R.S.A. § 263.

[13] *See, e.g.*, 28-A M.R.S.A. Chapter 81 (Prohibited Acts by Minors); 22 M.R.S.A. Chapter 558 (Marijuana. Scheduled Drugs, Imitation Scheduled Drugs and Hypodermic Apparatuses).

proposed §6304(2), which governs access to the gaming facilities for law enforcement purposes.

> Officers of the *state law enforcement agency* [defined in proposed §6302(21) as the Maine State Police] must be accorded free access to any gaming facilities for the purpose of maintaining public order and public safety and enforcing applicable criminal laws of the State as permitted under this section; and personnel employed by the tribal gaming operator shall for such purposes provide officers of the *state law enforcement agency access to locked and secure areas of the gaming facilities* in accordance with the standards of management and operation adopted pursuant to section 6307.

Proposed § 6304(2) (*emphasis supplied*). On its face, the initiated bill grants enforcement authority and access only to the Maine State Police. Access is explicitly provided for with respect to the gaming facilities pursuant to standards that will track those in effect in Connecticut,[14] and only for the purposes of enforcing criminal laws and maintaining public order and safety, presumably on the entire site.[15] For example, the law enforcement authority identified for the Maine State Police may be interpreted as an acknowledgement rather than a grant of authority that is not otherwise intended to limit the existing authority of municipal and county law enforcement officers to enforce the civil and criminal laws. However, the language leaves open the question of whether municipal law enforcement officers, who would otherwise have jurisdiction and authority to enforce criminal and civil violations of the law,[16] would have the authority to respond to and enforce the laws of the State with respect to either the gaming facilities or the larger site.

There is some degree of uncertainty about whether a court, in applying the rules of statutory construction, might conclude that the initiated bill precludes application of state laws that it does not explicitly reference. The Legislature *may* lack the authority to amend the bill, if enacted by the voters, to eliminate these uncertainties, absent consent of the Tribes. However, we think a court would hesitate before reaching the conclusion that an implication drawn from an incomplete list of state laws is a sufficient legal basis to set aside the jurisdictional agreement that is the foundation of Maine's Implementing Act.

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[14] Standards of operation and management adopted in Maine must be substantially consistent with the Connecticut Compact, as discussed in response to question # 2, *infra*.

[15] The language of this section is less than consistent on this point. Section 6304(4) speaks of enforcement "on the *site*"; section 6304(2) grants access "to any *gaming facilities*…[for the purposes of enforcement] as permitted under this section." However, without access to the entire site, the enforcement authority outlined in section 6304(1) could not be exercised. The distinction between site and facility may be relevant in other areas as well. *See, e.g.*, proposed § 6311(1) (enumerated laws applicable to "gaming facility").

[16] 30-A M.R.S.A. § 2671. A similar analysis would apply for county law enforcement officers. *See* 30-A M.R.S.A. §§ 404, 405; 15 M.R.S.A. § 704, regarding the general enforcement authority of sheriff's deputies.

The Federal Indian Gaming Regulatory Act and the Connecticut Compact

2. You asked, "Is it accurate that because the Connecticut Compact was negotiated under the federal Indian Gaming Regulatory Act, it provides for regulatory oversight and enforcement by the National Indian Gaming Commission, as well as the State? Does/would the commission have the power to fine and close a casino? Here, because the Indian Gaming Regulatory Act does not seem to apply, there is not federal oversight nor any power to close a casino, even temporarily, should there be problems. Do you see it that way? Are Maine's hands tied in this regard?"

Summary response: The National Indian Gaming Commission would have no authority to regulate a tribal casino in Maine. The initiated bill requires certain state rulemaking to conform to the Connecticut Compact, which was established under federal laws that do not apply in Maine, namely IGRA and the substantial body of rules adopted under IGRA.

The federal Indian Gaming Regulatory Act (hereafter "IGRA")[17] establishes requirements applicable to gaming on Indian lands that are enforced by the National Indian Gaming Commission (hereafter "the Commission"). 25 U.S.C. §§ 2701-2721. The Commission has adopted a body of rules that further detail the substantive requirements and regulatory authority established by IGRA. The Chairman of the Commission has the authority to levy and collect fines of up to $25,000 per violation of IGRA, rules adopted under IGRA, or certain IGRA-required tribal ordinances or resolutions governing gaming, for which opportunity for a hearing before the Commission is provided. The Chairman may temporarily suspend activities at a gaming establishment for substantial violations, and the Commission has the authority to make such a suspension permanent. 25 U.S.C. §2713.

It is settled law that IGRA does not apply in Maine. *Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784 (1st Cir. 1996). Accordingly, the regulatory oversight provided by the Commission under IGRA will not apply. The terms of the initiated bill do provide for fines to be imposed against the tribal gaming operator or any gaming services enterprise for violations of the bill or rules adopted thereunder (proposed §6310), but do not contain provisions like those in IGRA described above authorizing the closure of a gaming facility. The fines authorized by the initiated bill are civil penalties, available only for violations of the statute or standards of operation. There is no provision for criminal enforcement of any part of the

[17] IGRA has been generally described by the First Circuit Court of Appeals as follows:

> The Gaming Act is an expression of Congress's will in respect to the incidence of gambling activities on Indian lands. The statute sets in place a sophisticated regulatory framework, defining a species of gambling, called "gaming," and dividing it into tiers, called "classes." Each class connotes a different level of gambling activity and, consequently, each class is regulated to a varying degree of stringency.

Rhode Island v. Narragansett Tribe of Indians, 19 F.3d 685, 689-690 (1st Cir.), *cert. denied*, 513 U.S. 919 (1994).

proposed subchapter.[18] While the Department of Public Safety may employ "subpoena powers with which it may be vested under the laws of the State" to investigate violations of the Tribal Gaming Act by the tribal gaming operator (proposed § 6310(2)), we are not aware of investigatory subpoena powers available under current law to the Department for this purpose.[19]

Although IGRA does not apply within Maine and the National Indian Gaming Commission would have no jurisdiction or authority with respect to the proposed casino, the regulation of the casino would be governed to a large extent by the terms of the "Connecticut Compact." This compact is in fact not a negotiated agreement, but a body of federal procedures prescribed by the Secretary of the Interior pursuant to IGRA after the State of Connecticut refused to negotiate a compact. *Mashantucket Pequot Tribe v. State of Connecticut*, 737 F. Supp. 169 (D. Conn.), *aff'd.* 913 F.2d 1024 (2nd Cir. 1990), *cert. denied,* 499 U.S. 975 (1991); 56 Fed. Reg. 24996, May 31, 1991 (Notice of Final Mashantucket Pequot Gaming Procedures). The Connecticut Compact defines the relationship between the State of Connecticut and the Mashantucket Pequot Tribe with respect to that Tribe's casino operations in Connecticut, and governs the details of the casino operation.[20] Under the initiated bill, the Connecticut Compact would define aspects of the relationship between the State of Maine and the Tribes operating the Maine casino, the Department of Public Safety's regulatory and enforcement authority.

The vehicles carrying the Connecticut Compact into Maine law would be the Tribes' standards of operation and management and the Department of Public Safety's rules. The initiated bill gives the "tribal gaming agency" the authority to adopt "standards of operation and management to govern all gaming operations by the tribal gaming operator."[21] Proposed § 6307. The initial standards "must be substantially identical to those currently in effect pursuant to the Connecticut Compact." *Id.* Although "subject to the approval of" the Department of Public Safety, there may be no basis for

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[18] The Criminal Code addresses unlawful gambling at Title 17-A M.R.S.A. Chapter 39. Gambling conducted pursuant to the initiated bill would be specifically exempted from Chapter 39. Proposed § 6304. This language would have the effect of authorizing all forms of gambling, *see infra* question #7. It would also eliminate any authority on behalf of the State to pursue forfeiture of illegal gambling machines and proceeds. *See* 17-A M.R.S.A. § 959.

[19] The Department of Public Safety has subpoena powers specific to its other licensing functions. *See, e.g.*, 17 M.R.S.A. §§ 317-A(1)(F), 343-A(1)(D) (State Police investigation of beano and games of chance violations); 32 M.R.S.A. § 8116 (investigations concerning licensed private investigators). Grand Jury subpoenas are available for criminal investigations.

[20] The Compact is several hundred pages long.

[21] "Tribal gaming agency" is defined as "a gaming commission or other such agency formed jointly by the governments of the Tribes as the Tribes may from time to time jointly designate by written notice to the State as the single tribal agency responsible for regulatory oversight of gaming on the part of the Tribes..." Proposed § 6302(22). "Tribal gaming operator" is defined as an entity "established by the Tribes for the purpose of developing, owning or operating a gaming facility or gaming facilities or a gaming operation or gaming operations, all of the equity and voting securities of which are owned beneficially, directly or indirectly, 50% by the Passamaquoddy Tribe and 50% by the Penobscot Nation..." Proposed § 6302(23).

the Department to disapprove the standards if they are consistent with the Connecticut Compact.

The initiated bill gives the Department of Public Safety certain rule-making authority. In all instances of Department of Public Safety rule-making, the rules must be "substantially in the form and substance of the corresponding provisions of the Connecticut Compact." The Department has the authority to propose rules regarding the licensing of "gaming employees" and the registration of gaming services enterprises. The Department of Public Safety also has the authority to adopt rules regarding the operation of the gaming facility that the tribes fail to adopt as their standards of operation and management, but only to the extent that these areas are covered by the Connecticut Compact. The rules are major substantive rules,[22] but the Legislature may have no authority to amend or reject those rules for reasons other than lack of conformity to the Connecticut Compact. Proposed § 6308.

Tax and Liability Issues

4. You asked, "Although the Maine Indian Land Claims Settlement Act provides that the Tribes are to be treated as a corporation organized under the laws of the State when carrying out commercial enterprises, which makes them fully subject to federal and State corporate income taxation and the liabilities associated with any commercial operation, it appears that the Act seeks (i) to exempt the casino operation from corporate income taxes (or to provide a credit that might be used to offset all Tribal income regardless of its source); and (ii) to limit the Tribes' liability for casino operations. Is this an accurate read of the Act, in your view?"

Summary response: The language regarding the tax status of the Tribes and the tribal gaming operator is ambiguous as a result of apparent misstatements of existing law and internal inconsistencies. The initiated bill does include language that, on its face, seeks to limit the liability of the Tribes for acts or omissions of the tribal gaming operator.

Before discussing certain tax issues raised by the initiated bill, we believe it would be helpful to review our understanding of some underlying income tax principles. The Implementing Act provides that either the Passamaquoddy Tribe or the Penobscot Nation "when acting in its business capacity as distinguished from its governmental capacity, shall be deemed to be a business corporation organized under the laws of the State and shall be taxed as such." 30 M.R.S.A. § 6208(3). The legislative history of the Implementing Act suggests strongly that, regardless of whether the Tribes are subject to federal income tax, they are nonetheless subject to Maine income tax on income resulting from any business activity.[23]

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[22] Major substantive rules are rules that are adopted by an agency on a provisional basis and are subject to legislative review before they become effective. 5 M.R.S.A. §§ 8071-8074.

[23] S.Rep.No. 96-957, 96th Cong., 2d Sess. 31, 38 (1980).

On the federal level, it is the view of the Internal Revenue Service, as set forth in a 1994 Revenue Ruling, that "a corporation organized by an Indian tribe under state law is subject to federal income tax on the income earned in the conduct of the commercial business on and off the tribe's reservation." Rev. Rul. 94-16, 1994-1 C.B. 19. We are not aware of any federal case law that is contrary to this ruling.

Thus, the Tribes (since they would be viewed under the Implementing Act as Maine corporations organized under state law when participating in the operation of the casino) would be subject to Maine income tax on any income they earned from the gaming operations or other business activity at the site in the same way that any Maine corporation would be subject to Maine income tax on such income. *See* 36 M.R.S.A. §§ 5102(6) & 5200 (corporation is subject to Maine income tax on its Maine net income when it is subject to federal income tax). This is true regardless of whether the tribal gaming operator[24] is established as a corporation or in some other form permitted by proposed § 6302(23) of the initiated bill.

The initiated bill provides that the tribal gaming operator is subject to Maine "corporation taxes in accordance with its particular form of organization." Proposed § 6312(2). That subsection also states that "[i]n accordance with section 6208 [of the Implementing Act], so long as the Tribes are exempt from the payment of federal income taxes on business corporations, they are not subject to taxation under the laws of the State applicable to business corporations." This language implies that the Tribes are not subject to federal income tax and, accordingly, are also not subject to state tax on income from commercial activity,[25] such as income from the gaming operations or other business activity at the site. In our view, such an assumption is contrary both to IRS Revenue Ruling 94-16 and to § 6208(3) of the Implementing Act.

The assumption that the Tribes are not subject to state or federal income tax is also present in the language of proposed § 6312(3), which establishes the fee on video facsimile revenues, providing that "[s]o long as no change in state law occurs to tax or exact any fee on the gaming operations or other activities at the site except as provided in subsections 1 and 2 [of proposed § 6312], the tribal gaming operator shall pay to the State an annual fee of 25% of the gross revenues of video facsimile revenues operated by the tribal gaming operator." This language, particularly when coupled with § 6312(2), could support an argument that if income tax is assessed, as we believe is required, then such an assessment represents a change in the law[26] sufficient to eliminate liability for the fee.[27]

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[24] Proposed § 6312(2). *See supra* note 21.

[25] The phrase "taxation under the laws of the State applicable to business corporations" appears to refer to the Maine corporate income tax and, perhaps, other taxes to which business corporations may be subject.

[26] In our view, the better argument is that the "change" in state law referred to in this provision is intended to be limited to new legislation that created some new tax or fee on the gaming operations or on the income from such operations; however, the initiated bill is not explicit on this point.

[27] As for other types of taxes, proposed §§ 6312(1) and 6312(2) provide that, with respect to gaming operations and other activities at the site (A) real and personal property owned by the Tribes or the tribal

The ultimate tax liability of the Tribes and the tribal gaming operator is also impacted by the tax credit provision in the language of proposed § 6312(3) quoted above. If, as we believe, the Tribes and the tribal gaming operator are subject to Maine income tax on the income from the gaming operations or other business activity at the site,[28] this portion of proposed § 6312(3) would entitle them to a credit against their Maine income tax liability in the amount of the fee paid that year by the tribal gaming operator. Such a credit would enable the Tribes or tribal gaming operator to reduce or eliminate their Maine income tax liability, which liability might include income unrelated to their gaming operations.[29]

This initiated bill also provides that neither the Tribes nor a third party is liable for the acts or omissions of the tribal gaming operator "except as specifically provided by a contract to which such Tribe or third party is a signatory or otherwise as provided by law without regard to this subchapter." Proposed §6302(23). There is no indication as to who the "third party" might be. Under current law, the Tribes are immune from suit only when acting in their governmental capacity. 30 M.R.S.A. § 6206(2); 25 U.S.C. § 1725(d). If the present statutory provisions are "otherwise as provided by law," it would appear that the Tribes would continue to be subject to civil and criminal liability when operating a casino, an activity which would not fall within their governmental capacity.

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gaming operator would be subject to tax, and (B) the Tribes and tribal gaming operator would be "subject to all sales and use taxes, including liquor and tobacco taxes, of general application within the State." The meaning of this language is unclear. The Sales and Use Tax Law (36 M.R.S.A. §§ 1751-2113) imposes a tax on the sale of tangible personal property, which would include in general sales of liquor, cigarettes, and tobacco products. In addition, Maine also has a liquor tax (28-A M.R.S.A. § 1651), a cigarette tax (36 M.R.S.A. §§ 4361-4383), and a tobacco products tax (36 M.R.S.A. §§ 4401-4404). While these latter "liquor and tobacco taxes" are not technically part of the Sales and Use Tax Law, they are taxes of general application. The initiated bill's language suggests that the Tribes and tribal gaming operator are subject to these taxes. Less clear is whether the State's motor fuel tax (or other taxes of general application that may or may not be viewed technically as "sales and use taxes") would apply. While a court would likely view the motor fuel tax as a tax "of general application," it too is not part of the Sales and Use Tax Law and it is not specifically mentioned in the initiated bill.

[28] Again, proposed § 6312(2) & (3) can arguably be read to suggest that any income tax imposed is a "change" in law; if a court were to accept this argument, no fee would be owed (and consequently no credit generated). If such an argument were advanced and the State required to bring an action to collect the fee, there is no specific provision in the initiated bill for the imposition of interest and penalties in the event that a required payment is not timely made, nor is there any explicit provision for the enforced collection by the State of any required payment that is not made at all. While a court might well conclude that the "fee" more closely resembles a "tax" (*see Cumberland Farms, Inc. v. State Tax Assessor*, 116 F.3d 943, 946-47 (1st Cir. 1997) (milk handling surcharge held to be "tax")), such a conclusion may be insufficient to trigger the collection provisions of Title 36.

[29] We note also that under §6312(3), the amount of this fee may already have been deducted as a business expense before income tax liability is determined. Further, the language can be read to suggest that, although the tribal gaming operator is the entity responsible for paying the "fee," both the Tribes and tribal gaming operator could claim the credit, which is not typically the case with respect to taxation of business corporations and their shareholders, or other business entities that distribute earnings.

Such an interpretation would appear to render § 6302(23) surplusage, raising uncertainties as to how this provision would be construed.

Enforceability of Dedicated Revenue Provisions

5. You asked, "Although the Act purports to dedicate certain revenues to be paid to the State for property tax relief and education, that purported dedication would seem to be wholly unenforceable because only a constitutional amendment, like the constitutional amendments establishing the gas tax or the fees dedicated to the Department of Inland Fisheries and Wildlife, can restrict spending decisions of future legislatures. Is this consistent with the Attorney General's view?

Summary response: The proposed dedicated revenue provisions are not binding on the Maine Legislature.

This question concerns the provisions in proposed §6312(4) of the initiated bill, which specify how proceeds from the annual fee on video facsimile revenues are to be allocated by the State. First, "costs resulting from gaming operations"[30] conducted under the initiated bill are to be mitigated, with the remainder of the proceeds to be allocated as follows: fifty percent to supplement, not supplant, required deposits to the Local Government Fund to be used for residential property tax relief; forty percent to supplement, not supplant, the state appropriation for the program cost portion of general purpose aid to local schools; five percent to the Maine State Grant Program; and five percent to the Finance Authority of Maine to be distributed to private nonprofit organizations with a principal purpose of providing scholarships and otherwise enhancing postsecondary education of Maine students.

You correctly note that the initiated bill was not proposed as a constitutional amendment, in whole or in part, unlike the dedication of the gas tax to the Highway Fund or the fees effectively dedicated to Inland Fisheries & Wildlife. Me. Const., Art. IX, §§19 and 22. Article 4, Part Third, §1 of the Maine Constitution vests in the Legislature "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." It is well established that the Legislature may not enact a law that purports to bind a future Legislature. *SC Testing Technology, Inc. v. Dept. of Environmental Protection*, 688 A.2d 421, 425 (Me. 1996) (*citing Opinion of the Justices*, 673 A.2d 693, 695 (Me. 1996)).

There is nothing in the constitutional provisions governing the process of legislation by initiative to suggest that the people may enact laws that supersede or amend the Maine Constitution. To the contrary, the people may not propose an amendment to the Constitution by initiative. Me. Const., Art. III, Pt. 3d, §18(1). Thus, as a matter of

[30] These costs are not further defined.

state law, the terms of proposed §6312(4) that purport to direct the Legislature to spend state revenues resulting from imposition of fees on the casino are unenforceable.[31]

To the extent it may be argued that this part of the initiated bill would override these constitutional provisions by reason of its proposed placement in the Implementing Act, we disagree. While lack of certainty on this issue permeates this opinion, in this instance we cannot conceive of an argument that would support a determination that the Maine Legislature's constitutional authority to appropriate funds is properly a part of the jurisdictional relationship between the State and the Tribes.

Extent of Gambling Activities Permissible under the Act

7. You asked, "What limitations, if any, are there on the types of gambling activities that are authorized?"

Summary response: The initiated bill authorizes the tribal gaming operator to conduct all forms of gambling on the site.

In responding to your question regarding the scope of gambling activity, we first outline the current status of legalized gambling in Maine. The Maine Legislature has legalized some types of gambling activities in highly regulated formats. The Maine Law Court has reaffirmed what is clear from Maine's statutory framework—all gambling in Maine is illegal unless expressly permitted by statute. *Penobscot Nation v. Stilphen*, 461 A.2d 478, 482 (Me. 1983). The law specifically exempts activities conducted by non-profit organizations and licensed by the State Police such as beano, certain games of chance, and raffles from the definition of unlawful gambling.[32] Wagering on harness racing and the State-run lottery are permitted to the extent authorized. 8 M.R.S.A. §§ 261-A - 295; 8 M.R.S.A. §§ 371-389. Telephone and Internet wagering are not expressly permitted by statute, and are thus illegal. *See* Op. Me. Att'y Gen. 01-02 (December 10, 2001) (telephone wagering).

In contrast, the initiated bill would allow the Tribes to engage in any and all forms of gambling, without limitation, at a single site. In the words of proposed §6303(1), "The Tribes may jointly, through one or more tribal gaming operators, as the Tribes may elect, conduct, on one site and subject to this subchapter [the initiated bill], and notwithstanding any other provision of the laws of the State, *any and all forms of gaming and wagering...*" (*emphasis provided*). The list of examples set out in the bill, *e.g.*, card games, bazaar games, lottery games and video facsimiles, is not an exclusive list.[33]

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[31] Of course, the Legislature would be free to decide, as a matter of policy, to abide by the terms of §6312(4), should it choose to do so.

[32] Some unlicensed raffles are also permitted. 17-A M.R.S.A. § 951. *See generally* 17-A M.R.S.A. §§951-957 (Chapter 39, Unlawful Gambling).

[33] Because the initiated bill would legalize all forms of gambling on the site, even those not currently authorized by Maine law, its authorization of gambling activity is more expansive than that in states to which the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 (IGRA) applies. IGRA, which as

Recoverable Costs

8. *You asked, "To what extent are State & local costs resulting from casino operations recoverable?*

Summary response: State regulatory and law enforcement costs recoverable through annual assessment may be limited by the language of the initiated bill to those incurred by the Department of Public Safety and the State Police. The Legislature may set aside part of the video gaming fees in mitigation of other costs (resulting from gaming operations that are otherwise not provided for). It is unclear whether the State's initial costs of creating the required regulatory structure will be recoverable.

Proposed §6309 authorizes the State to assess the Tribes annually for "the *reasonable and necessary* costs of regulating gaming operations and conducting law enforcement investigations pursuant to this subchapter." This provision may result in reimbursement only for the Department of Public Safety and the State Police, as they are the only agencies with a regulatory and enforcement role expressly stated in the initiated bill. Costs incurred by other state agencies, District Attorneys' Offices, and other local law enforcement may not be covered.

To the extent these costs are not covered by proposed § 6309, the Legislature would have discretion to allocate funds from the 25% fee on video facsimile gaming revenues to cover such costs. Proposed § 6312(4) provides that "a portion" of the fee is to be allocated annually to pay for "mitigation of costs resulting from gaming operations," language that appears to leave the Legislature discretion in determining both the costs to be reimbursed and the exact portion of the fee to be dedicated to this purpose. If the Legislature elects to allocate funds to cover state and local costs not covered by the proposed § 6309 assessment, that will reduce the money available for allocation pursuant to the formula established by proposed § 6312(4).[34]

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noted above (response to question #2) does not apply within Maine, provides that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5). Although current Maine law prohibits those forms of gambling that are not specifically authorized, the initiated bill would permit those activities at the casino site.

[34] There is no provision for payment of up-front costs involved in establishing the basic structures within state government to handle regulation and law enforcement relating to the casino. There is some question about the extent to which those costs might be recoverable under § 6309. The Department of Public Safety, for example, is required to promulgate rules within ninety days of the effective date of the initiated bill. Under proposed §6309(2), however, the annual assessment process begins on August 1st "following commencement of gaming operations" and includes costs incurred "for the preceding fiscal year ending June 30th." Without knowing how long it might take for a casino to be open for business it is not clear that the State's "start-up" costs would be covered under this provision. While any costs incurred during the time prior to the fiscal year immediately preceding the commencement of gaming operations can be established and assessed in consultation with the tribal gaming agency, recovery through that avenue is of course dependent on reaching agreement.

Conclusion

The initiated bill raises a number of serious and significant legal issues concerning taxes, revenue, jurisdiction of local and state law enforcement authorities, applicability of state and local laws, and the extent to which this proposed act may be immune from legislative amendment for twenty years. As we have indicated, your questions regarding these issues do not lend themselves to unqualified answers. The legal uncertainties reflected in this opinion are an outgrowth of the fact that the initiated bill contains a number of ambiguities and provisions that do not integrate well with existing state laws. On these questions, should there be legal challenges, ultimately the courts would have to decide.

Sincerely,

G. Steven Rowe
Attorney General