**Testimony of Gerald D. Reid**

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**Before the House Committee on Natural Resources**

**Subcommittee on Indigenous Peoples of the United States**

**H.R. 6707, "Advancing Equality for Wabanaki Nations Act"**

**April 14, 2022**

I am writing on behalf of Governor Janet T. Mills to express the State of Maine's concerns with H.R. 6707, *Advancing Equality for Wabanaki Nations Act*. From the earliest days of her Administration, Governor Mills has made improvement of Tribal-state relations a priority and has worked with the Wabanaki Nations on a variety of initiatives to address identified problems. In some cases, this has involved symbolic but important issues, like banning the use of Native American mascots in Maine schools. But this work has extended far beyond the symbolic. Drawing on her own criminal law expertise, the Governor personally drafted amendments to a state law that recognizes the authority of the Penobscot Nation and Passamaquoddy Tribe to prosecute certain domestic violence offenses committed by non-tribal members on their lands in their Tribal courts. And under the Governor's leadership, Maine adopted what are by far the strictest water quality standards in the country to protect sustenance fishing in waters of significance to Tribal communities.

We have also just negotiated legislation – awaiting final enactment in the Maine Legislature – to establish a formal Tribal-state collaboration process governing certain state agency decision-making, to amend our tax laws to incentivize economic development on Tribal lands, and to provide the Wabanaki Nations exclusive mobile sports wagering opportunities in Maine. These achievements have come through respectful dialogue between the Mills Administration and the Wabanaki Nations on discrete issues. Through that government-to-government dialogue we have been able to develop clear legislative language, that is mutually agreeable, and the consequences of which are well understood. Our concerns with H.R. 6707 are both because it did not arise from such Tribal-state dialogue, and because its provisions are unclear, with uncertain consequences that are likely to lead to disputes and litigation over its meaning and effect.[1]

## Maine's Indian Land Claims Settlement Acts

In the 1970s, the Penobscot Nation and the Passamaquoddy Tribe asserted claims to nearly two-thirds of the land in the State of Maine. The complexity of the issues and the risk to all parties led the State and the Tribes to settlement negotiations. After several years of negotiation, the

[1] Some have suggested that the Maine Settlement Acts have been plagued by extensive litigation. In fact, in the 42 years since their enactment, there have been only 13 lawsuits of real substance arising out of these laws. The State of Maine was not a party to a number of these cases, and the State has never filed suit against any of the Wabanaki Nations under the Settlement Acts.

State and the Tribes not only agreed to settle the land claims, but also agreed to a nationally unique jurisdictional relationship. This negotiated agreement was embodied in two statutes, one state and one federal. The state law, the *Maine Implementing Act* (MIA), 30 M.R.S. §§ 6201 *et seq*., puts in place a jurisdictional framework that, with certain exceptions, makes state law applicable to Tribal lands and Tribal members to the same extent as non-tribal lands and citizens. The federal statute, the *Maine Indian Claims Settlement Act of 1980*, P.L. 96-420 (MICSA), ratified both the jurisdictional provisions of MIA and historical land transfers, the validity of which were challenged in the litigation. MICSA also extinguished aboriginal rights, created a settlement trust fund of $27,000,000, and a $54,500,000 land acquisition fund to allow the Penobscot Nation and Passamaquoddy Tribe each to acquire up to 150,000 acres of Indian Territory. The Houlton Band of Maliseet Indians was also included in MICSA, and the Aroostook Band of Micmacs (now known as the Mi'kmaq Nation) negotiated a separate Settlement Act with the State in 1991 through Pub. L. No. 102-171. Significantly, Congress gave advance approval to the State and the Tribes to amend MIA by agreement. 25 U.S.C. §§ 1725(e)(1) & (e)(2).

The Maine Settlement Acts were designed to allow the Tribes to acquire a substantial land base in addition to their then-existing Reservations from willing buyers. The settlement did not require the Tribes to purchase the newly created Indian territory in contiguous blocks of 150,000 acres, but instead authorized the purchase of multiple parcels that could comprise 150,000 acres for each Tribe, in the aggregate. Of necessity, many of these lands are located far from the existing Reservations, and had been privately owned by non-tribal parties since Maine first became a state. The jurisdictional terms of the settlement – that Maine law would apply uniformly to Tribal and non-tribal lands alike – were essential to avoid the disruptive effects that would otherwise result from numerous Tribal jurisdictional enclaves appearing throughout the State in areas that had long been regarded as non-tribal. The Maine settlement afforded the Penobscot Nation and Passamaquoddy Tribe among the greatest Tribal land holdings east of the Mississippi, on the condition that those lands would remain subject to state law as had historically been the case.

## **H.R. 6707**

Our objection to this bill is twofold. First, the Maine Settlement Acts were first negotiated between the State and the Wabanaki Nations and then approved by the State (through the Maine Legislature) and the Tribes (through the votes of Tribal members). The agreements that those negotiations produced were then presented to Congress for ratification. This bill would substantially amend MICSA at the request of the Wabanaki Nations without the consent of the counter-party to the settlements – the State of Maine. The Mills Administration was not consulted in the development or drafting of H.R. 6707, and we learned about the bill only shortly before it was printed in the House.

MICSA expressly contemplates that the Tribes and the State may negotiate amendments to the settlement, and as we have successfully done dozens of times in the past. Such amendments have been and should continue to be made in MIA, as Congress authorized under 25 U.S.C. §§ 1725(e)(1) & (e)(2), in which case they will necessarily reflect a negotiated agreement.

Alternatively, if done through amendments to MICSA, it is essential that such amendments likewise reflect an agreement negotiated by the Tribes and the State and presented to Congress for ratification. If Congress were to amend MICSA at the request of only one party, it would set a troubling precedent that disincentivizes negotiation between the settling parties, and instead encourages those parties to petition Congress continually seeking their preferred amendments, all of which would be dependent on the politics of the moment. That result would serve no one's interest.

Second, this bill would amend MICSA in a manner that is certain to lead to future disputes over its meaning and effect, and would undermine the jurisdictional compromise under which Maine agreed to a settlement that allowed for the establishment of scattered parcels of Indian Territory in non-tribal areas throughout the state. MICSA provides that laws enacted by Congress after 1980 that accord special status to Tribes and their members and that also affect or preempt the State of Maine's jurisdiction do not apply in Maine unless specifically made applicable. 25 U.S.C. §§ 1725(h) & 1735(b). These provisions "act[] as a warning signal to later Congresses to stop, look, and listen before weakening the foundation on which the settlement between Maine and the Tribe rests." *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1996).

To be clear, this limitation of MICSA only applies to those federal laws that would "affect or preempt" Maine's jurisdiction. Some testimony submitted on this bill reflects confusion on this point. It is important to understand that federal laws that provide monetary or other benefits to federally recognized tribes but that do not affect or preempt the State's jurisdiction apply in Maine just as they do in other states. Therefore, the vast majority of federal statutory provisions that benefit Indians – including those governing Indian health and education programs – are fully effective in Maine.

H.R. 6707 proposes to repeal these key negotiated terms of MICSA, so that Congressional acts would apply in Maine without further Congressional action or designation. This would create significant uncertainty when Congress amends an existing law, because it is unclear whether only the amended provisions would apply to the Tribes in Maine or whether the entire law, as amended, would apply.

For example, currently pending in the House are several bills that would amend the Safe Drinking Water Act to address, among other issues, PFAS contamination of drinking water supplies. The Safe Drinking Water act is one of many federal environmental laws that allows qualified federally recognized Indian tribes to seek "treatment as state" status. Would amendments to the Safe Drinking Water Act to address PFAS contamination result in the entire Act, including the treatment as state provisions, applying in Maine? A different bill pending in the Senate, S. 1663, would amend 18 U.S.C. § 1154(a), a statute that criminalizes distribution and sale of alcohol in Indian country. Section 1154 is a criminal statute that *expressly* does not apply in Maine under section 6(c) of MICSA. Would amendments to Section 1154 result in the entire statute applying in Maine, despite conflicting language in MICSA? H.R. 6707 leaves these critical issues unanswered, which will inevitably result in future disputes and litigation.

These concerns are not hypothetical. MIA provides for extensive, exclusive criminal jurisdiction by the state over most crimes committed on Wabanaki lands. But just last month, Congress reauthorized the Violence Against Women Act (VAWA), which reauthorization included amendments to the Indian Civil Rights Act (ICRA), 25 U.S.C. §§ 1301-04, that expand the scope of Tribal court jurisdiction over crimes committed by non-tribal members in Indian Country. Pub. L. No. 117-103 § 804. These amendments to section 1304 of ICRA include language ostensibly designed to allow the Tribal courts of the Wabanaki Nations to exercise this expanded VAWA jurisdiction, but that conflict with existing language in section 1304(b)(3)(A), at least as applied to Maine. That provision states that nothing in that section "creates or eliminates any" "State criminal jurisdiction over Indian country." But to be effective in Maine, the recent amendments to section 1304 would necessarily eliminate certain state jurisdiction.

These inconsistencies in federal statutes are the result of a lack of understanding of MICSA's unique provisions, and a failure to take the time necessary to draft language that properly takes account of those provisions. Defendants in domestic violence prosecutions may seize on this confusion to argue against the assertion of Tribal court jurisdiction, or to overturn Tribal court convictions, undermining the core purpose of the VAWA amendments. This illustrates the problems that can arise when such legislation is enacted without review that is focused on Maine's particular circumstances. We respectfully request that Congress ensure that the State of Maine, including its Attorney General, are consulted in the development of such legislation in the future to avoid problems like this one.

Even if the effect of H.R. 6707 were clear, we object to its categorical approach to making federal laws applicable in Maine, which would erode the Settlement Acts' foundational jurisdictional compromise. Questions of whether federal statutes should be made applicable in Maine should be answered on a case-by-case basis so that the effects of each such decision on Tribal lands and adjacent non-tribal communities can be thoroughly evaluated and understood. H.R. 6707's categorical approach to the issue fails to account for the unique manner in which Tribal Territory has evolved and continues to evolve in Maine, and should be rejected.

Thank you for your consideration of our testimony.