**Hearing Testimony of Congressman Jared Golden**
**Second District of Maine**
**Before the House Subcommittee for Indigenous Peoples of the United States**
**In Support of**
**H.R. 6707, the *Advancing Equality for Wabanaki Nations Act***
**March 31, 2022**

Chair Leger Fernandez, Ranking Member Obernolte, thank you for holding this hearing and for this opportunity to testify about the *Advancing Equality for Wabanaki Nations Act*.

The Wabanaki tribes in Maine are subject to one of the most restrictive settlement acts of any federally recognized tribe in the country. Part of the settlement act blocks any federal law enacted for the benefit of Indian tribes from applying in Maine if that federal law would affect the application of Maine state law, unless Congress specifically makes that federal law applicable in Maine. Out of the hundreds of beneficial tribal laws passed by Congress in the last 40 years, Congress has acted to make only one of them specifically applicable in Maine, this year's reauthorization of Violence Against Women Act (VAWA).

There are many examples of how this hurts the Wabanaki. In 2010, for example, Congress passed the *Indian Health Care Improvement Act*, which allows tribes to employ medical professionals who are licensed in another state. A few years later, the Passamaquoddy Tribe relied on that provision to recruit two pharmacists who were licensed in another state to work at the Pleasant Point Health Center. But because hiring those pharmacists would "affect" state licensing requirements, the state used MICSA to attempt to block the Passamaquoddy from doing so.[1] This is just an example of government regulation placed squarely between patients and healthcare providers for no reason other than the desire of a bureaucracy to maintain regulatory control.

The bill before you today proposes a modest fix to address these types of problems. Specifically, it would ensure that all *future* federal laws enacted for the benefit of Indian tribes apply to the tribes in Maine. This is an intentionally narrow approach. It doesn't go back and apply this change to laws that are already on the books.

This bill will cut through unnecessary red tape and bureaucratic efforts to block the Wabanaki tribes from benefiting from federal laws passed for their benefit and create future opportunities for improved standards of living and economic growth. What these tribes want is what all communities in my district want – economic opportunity for their families and safer and healthier communities. None of these tribes want to harm industry or put people out of business. In fact, many tribal members work in logging operations or at mills in my district, and some work directly with members of the Maine Forest Products Council. In short, they share an economic interest in the success of the forest products industry.

You may hear claims that this bill could lead to overregulation of water quality in Maine. That is factually incorrect for two reasons. First, this bill only affects the application in Maine of *future* laws that Congress may pass. Laws like the Clean Air Act and Clean Water Acts are already on the books and do not require reauthorization, so our bill does not implicate them. Some people may engage in hypothetical debates about the impact of future amendments to the Clean Water Act, but the members of this

[1] See correspondence between the Maine Department of Professional and Financial Regulation, Pleasant Point Health Center, and the U.S. Indian Health Service about this issue, submitted for the record.

subcommittee know that since the 1980s the provision of that law that treats tribes as states for some purposes has been amended only once. Further, we can provide the committee with a memo from the nonpartisan Congressional Research Service that dispels the hypothetical scenario of amendments to the Clean Water Act passed after our bill somehow making other, previous tribal provisions of the law applicable in Maine. Second, the issue of water quality in tribal waters has already been addressed in Maine. In 2019, Maine and the Wabanaki tribes reached an agreement on water quality standards that became law.[2] These are the highest water quality standards in the country and were supported by both the tribes and the state.

Some opponents of this bill will argue that even though this bill is prospective, over time, Congress will begin to erode the jurisdictional framework of the MIA. As members of this subcommittee, you know that is not how Congress operates. You write the federal laws pertaining to tribes in the United States. The work of this committee does not produce controversial law changes that introduce great uncertainty into the ability of non-tribal members to manage non-tribal lands.

H.R. 6707 does not alter the fundamental jurisdictional arrangement enshrined in the Maine Indian Claims Settlement Act (MICSA). Section 6(a) of MICSA clearly states that the tribes in Maine "shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein." H.R. 6707 does not propose to amend section 6(a). Concerns about a "patchwork" of state/federal management of tribal-owned lands coming about post-enactment of our bill are unfounded.

You might also hear concerns expressed that this bill could create new ambiguity and lead to litigation. But anyone in Maine can tell you there's been repeated litigation between the state and tribes over the past 40 years precisely because MICSA created ambiguity in this area. Our bill would eliminate this ambiguity in regard to future acts of Congress. That said, we remain open to working with members of this committee and staff to improve this bill while staying true to addressing the problems it aims to resolve.

I also wanted to address additional concerns that have been raised about this bill:

**State/Tribal Authority to Negotiate Change Absent Congressional Involvement:** Some have stated that the changes H.R. 6707 proposes could somehow be made via legislation at the state level, or that Congress in MICSA delegated to the state the ability to legislate the applicability of federal laws passed to benefit tribes. This is just not the case. First, the Maine attorney general (AG) has testified before the state legislature that the legislature's efforts to make such a change would likely run into legal challenges, as it's not clear a state can simply "deem" federal law applicable due to the language in MICSA. Second, the Maine AG has also noted that while MICSA has delegated certain authorities to the state and tribes to amend the Maine Implementing Act (MIA), those authorities do not include the application of federal law.[3]

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[2] Sharon, Susan. "New Measure Establishes Water Quality Standards For Sustenance Fishing in Maine Tribal Waters." *Maine Public*. June 21, 2019. https://www.mainepublic.org/maine/2019-06-21/new-measure-establishes-water-quality-standards-for-sustenance-fishing-in-maines-tribal-waters

[3] "Testimony of Attorney General Frey On L.D. 2094, 'An Act To Implement The Recommendations Of The Task Force On Changes To The Maine Indian Claims Settlement Implementing Act," pp. 20-21. February 14, 2020. https://legislature.maine.gov/bills/getTestimonyDoc.asp?id=141207#page=20

**Nature of Exclusion of Beneficial Federal Laws**: Some might find it difficult to imagine that a state would have any objection to actions such as a tribe receiving funding for a VAWA pilot program or dealing directly with FEMA for disaster relief. Unfortunately, those have both been positions of the state of Maine – that's a large part of why this bill is needed.

After the 2013 VAWA reauthorization, the Department of Justice initially designated the Penobscot Nation[4] in Maine as one of six tribes across the country to lead a pilot project of Special Domestic Violence Criminal Jurisdiction. However, the state blocked this, with the then-attorney general stating that MICSA "bars (the VAWA tribal provisions') application in Maine."[5] The state similarly blocked the ability of the Wabanaki tribes from being able to take advantage of a new authority granted by the 2012 Stafford Act reauthorization. In a memo at the time from the Maine AG's office to the staff of one of the Maine senators, the AG's staff wrote, "If enacted, the proposed Stafford Act Amendments (S. 2283) would *not* apply to Maine Tribes."[6] This was then enshrined in the Congressional Record via a colloquy between senators on the Senate floor.

**Congressional Precedent on Amending Settlement Acts:** I know that members of this subcommittee are thinking about the precedent that Congress could set by amending a settlement act that involves the federal government, a state, and tribes without the full support of all three parties. First, I wanted to underscore that our bill is supported by leaders of the Maine Legislature—a coequal branch of Maine's state government—including the Senate President, Senate Majority Leader, Assistant Senate Majority Leader, House Speaker, House Majority Leader, and Assistant House Majority Leader.

Few federally-recognized tribes in the country are subject to as restrictive an agreement as the Wabanaki tribes, and Congress has a unique responsibility to act in the best interests of federally recognized tribes. While the federal government can delegate certain aspects of its powers over a tribe to a state, that does not transfer or end the federal government's continuing trust responsibility to the tribe, nor subject it to a veto from a state.

In particular, it is worth remembering that the specific provisions of MICSA that H.R. 6707 would amend are those that govern *federal* treatment of the tribes in Maine. No state can dictate that to the federal government—it is the prerogative of Congress to determine how the laws it passes apply across the country. Moreover, in Section 16(b), MICSA already laid out a mechanism for Congress to determine whether future federal laws enacted for the benefit of Indian tribes would apply to tribes in Maine, with or without the state or tribes' permission.

Under the status quo of 16(b), certain beneficial federal Indian laws are presumed to not apply in Maine unless Congress specifies otherwise. Our bill would simply flip this presumption to ensure that certain

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[4] Woodard, Colin. "Bill would allow Maine tribes to hold trials for non-Indians in domestic violence cases." *Portland Press Herald*. April 4, 2019. https://www.pressherald.com/2019/04/04/maine-tribes-could-try-non-indians-charged-in-domestic-violence-cases-under-bill-passed-by-u-s-house/

[5] Woodard, Colin. "Maine tribes seek authority to try domestic violence cases. *Portland Press Herald*. February 23, 2015. https://www.pressherald.com/2015/02/23/maine-tribes-seek-authority-to-try-domestic-violence-cases/

[6] November 14, 2012 Memo from Maine Attorney General's Office. Linked here: https://www.mitsc.org/state-of-maine-communications

future beneficial federal Indian laws would apply in Maine unless Congress specifies otherwise. This is not a question of whether Congress should take a categorical or case-by-case approach to whether federal Indian laws should apply to the Wabanaki. In either case, MICSA sets a default and then future Congresses can create an exception from that default. In either case, Congress is free to make the policy determination it sees best.

In practice, the status quo, where the Wabanaki are excluded by default, places a burden on the Wabanaki tribes to lobby—at great expense and difficulty—for their explicit inclusion in practically any beneficial federal Indian law. Our bill would shift the burden to the state to advocate for tribes in Maine to be excluded from any beneficial federal Indian law. We believe the state government is much better equipped to secure an exception to a future federal Indian law, if it is so inclined, than the Wabanaki tribes are. As discussed previously, in the more than four decades since MICSA's enactment, the only time the tribes in Maine have been specifically written into a federal law pursuant to MICSA 16(b) was in the 2022 reauthorization of the *Violence Against Women Act*. Expecting the tribes to do this continually is neither viable nor consistent with the federal trust responsibility.

Further, there already is precedent for Congress peeling back policies that have diminished the benefits of certain federally recognized tribes relative other federally recognized tribes. The 1994 amendments to the *Indian Reorganization Act* (IRA) codified at 25 U.S.C. §5123(f) prohibited federal departments and agencies from making any regulation "decision or determination pursuant to [the IRA] **or any other act of Congress,** with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes..."[emphasis added]. Then, 25 U.S.C. §5123(g) voided any such regulation, decision, or determination retrospectively.

In a May 19, 1994 colloquy on the Senate floor about the amendment containing these two provisions, the then-Vice Chairman of the Senate Committee on Indian Affairs, Senator John McCain, said "Our amendment is intended to prohibit the Secretary or any other Federal official from distinguishing between Indian tribes or classifying them based not only on the IRA but also based on any other Federal law."[7]

The then-Chairman of the Senate Committee on Indian Affairs, Senator Daniel Inouye, added, "Our amendment makes it clear that it is and has always been Federal law and policy that Indian tribes recognized by the Federal Government stand on an equal footing to each other and to the Federal Government…Each federally recognized Indian tribe is entitled to the same privileges and immunities as other federally recognized tribes and has the right to exercise the same inherent and delegated authorities. This is true without regard to the manner in which the Indian tribe became recognized by the United States."[8] Nowhere in this legislative record is the consent of the state of Maine or any other state noted for this amendment.

As a matter of policy, Congress has already declared that the federal government should treat all federally recognized tribes equally. Our bill would take an important step in that direction in regard to the

[7] Congressional Record. May 19, 1994. Vol. 140, Part 8—Bound Edition, pp. 11234-11235. https://www.congress.gov/bound-congressional-record/1994/05/19/senate-section
[8] *Ibid.*

Wabanaki. Future Congresses could still choose to create an exception for the Wabanaki nations, but the burden to justify doing so would correctly fall on those who would advocate for any disparate treatment.

All members of Congress—not just those from Maine—share the federal trust responsibility to these tribes. These are sovereign nations with a government-to-government relationship with the United States. We all have a responsibility to do right by the tribes represented before you.