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MEMORANDUM April 12, 2022

To: Representative Jared Golden
Attention: Aaron Sege, Legislative and Communications Advisor

From: Mainon A. Schwartz, Legislative Attorney, maschwartz@crs.loc.gov, 7-9294

Subject: **Analysis of Hypothetical Scenario Involving H.R. 6707's Proposed Changes to MICSA's Rule of Construction**

This Memorandum[1] responds to your request for an updated legal analysis of a hypothetical legislative scenario in which Congress first enacts H.R. 6707, the Advancing Equality for Wabanaki Nations Act, and then amends section 518(e) of the Clean Water Act.[2] As introduced, H.R. 6707 would repeal an existing rule of construction in the Maine Indian Claims Settlement Act of 1980 (MICSA) stating that when Congress enacts certain federal laws applicable to tribes, such laws do not apply within the State of Maine unless "specifically made applicable within the State of Maine."[3] For simplicity, the Memorandum refers to this rule as "the MICSA presumption." As explained in more detail below, H.R. 6707 would adopt a similar presumption, but only for laws (such as the Clean Water Act) that were "in effect as of the date of the [H.R. 6707's] enactment."[4]

Against this background scenario, you posed the following question:

> If, after enacting the Advancing Equality for Wabanaki Nations Act (AEWNA), Congress enacts an amendment to the Treatment as States (TAS) subsection of the Clean Water Act (CWA) (33 U.S. Code § 1377(e)) that added another provision of the Clean Water Act to the list of such provisions under which tribes have treatment as a state (example of such an amendment is below), would:
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> a. TAS for only the newly TAS-referenced CWA provision apply to federally recognized tribes in Maine?
>
> b. TAS for all TAS-referenced CWA provisions—both existing and new—apply to federally recognized tribes in Maine?
>
> c. TAS for none of the TAS-referenced CWA provisions apply to federally recognized tribes in Maine?

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[1] Information in this memorandum may be of general interest to Congress. All or part of this information may be provided in other CRS written products. Your confidentiality as a requester will be preserved if this occurs.

[2] 33 U.S.C. § 1377(e). This provision of the Clean Water Act has been amended once since 1988. *See* Pub. L. No. 106–284, 114 Stat. 870 (2000) (adding one additional section to the list of provisions for purposes of which tribes may be treated as states).

[3] MICSA, § 16(b); H.R. 6707, § 2(e) (proposing to repeal Section 16(b) of MICSA).

[4] H.R. 6707, § 2(a)(2) (proposing an amendment to Section 6 of MICSA).

The example you provided to enable more concrete analysis proposed that Congress would add a new item, 33 U.S. Code section 1347, to the TAS provision's list of sections pursuant to which Indian tribes may be treated as States.[5] Thus, the question above may be restated as whether, following enactment of H.R. 6707 and the amendment to the TAS provision, federally recognized tribes in Maine could be treated as states:

1. only for purposes of section 1347, because Congress added that section to the TAS provision after it repealed the MICSA presumption;
2. for purposes of all the sections listed in the TAS provision, because Congress amended the TAS provision at a time when the MICSA presumption no longer applied; or
3. for no purpose in the TAS provision, because despite its amendment, that provision existed prior to the enactment of H.R. 6707.

This Memorandum examines the arguments for and against each interpretation, and offers additional insight based on available judicial interpretations of relevant or potentially analogous language. This Memorandum was prepared on an expedited basis to meet an abbreviated timeline, and is necessarily preliminary because H.R. 6707 is a pending measure subject to change. Additionally, future changes to the MICSA presumption may affect subsequent changes to other statutes depending on the text and context of both laws, and any agency or judicial interpretations of those laws in existence at that later time.[6] However, in the context of the assumptions and limitations described below, the outcome most consistent with the statutory language you have provided and with the existing judicial interpretations CRS has reviewed is likely **(a)** in your formulation, or **(1)** in the restated options above. In other words, following enactment of H.R. 6707 and the amendment to the TAS provision, the most likely outcome is that only the amendment itself would apply to tribes in Maine.

The Maine Indian Claims Settlement Act of 1980

Congress enacted MICSA in 1980, codifying an agreement between the state of Maine and certain tribes that resolved aboriginal land claims and defined the jurisdictional relationship between the state and tribal entities. Among other things, MICSA enshrines applicability of certain state laws over tribes and tribal lands.[7]

As relevant to this Memorandum, MICSA contains two key provisions that govern the applicability of certain federal statutes within Maine. First, MICSA section 6(h) provides that federal laws and regulations do not apply in Maine if they (1) accord or relate to special status or rights for Indians or Indian tribes or lands, and (2) affect or preempt Maine's civil, criminal, or regulatory jurisdiction. The statute specifies that the latter includes Maine laws relating to land use or environmental matters.[8]

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[5] Title 33, U.S. Code § 1377(e) provides that, under certain conditions, an Indian tribe may be treated as a State "for purposes of subchapter II . . . and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, 1344, and 1346" to the degree necessary to carry out the objectives of section 1377.

[6] *See, e.g.*, F.R.G. v. Philipp, 141 S. Ct. 703, 714 (2021) (examining the "text, context, and history" of a disputed provision).

[7] More specifically, MICSA § 6(a) provides, with certain exceptions, that Indians, Indian tribes, and their lands or natural resources owned or held in trust for them, "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."

[8] MICSA § 6(h), Pub. L. No. 96–420, 94. Stat. 1794 (1980). The full provision reads:

> Except as otherwise provided in this Act, the laws and regulations of the United States which are generally applicable to Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians, Indian lands, Indian reservations, Indian country, Indian

Second, MICSA section 16(b)—the MICSA presumption—provides that federal statutes passed to benefit Indians and Indian tribes *after* MICSA's enactment also do not apply in Maine if they would affect or preempt state laws, *unless* Congress specifically makes those statutes applicable within Maine.[9] For example, when Congress passed the Indian Gaming Regulatory Act (IGRA)[10] in 1988, it did not expressly state whether IGRA did or did not apply within Maine. On its face, IGRA applies to any federally recognized tribe exercising powers of self-governance, which would include tribes in Maine.[11] However, because IGRA was enacted after MICSA, benefits Indian tribes, and would affect or preempt Maine state laws, its silence on applicability in Maine could indicate Congress's intent to exclude Maine, based on Congress's imputed awareness of the MICSA presumption.[12]

Determining that Congress had not specified IGRA's applicability in Maine, the U.S. Court of Appeals for the First Circuit (First Circuit) described the MICSA presumption as a "savings clause" that pointedly warns "that a specific reference or a similarly clear expression of legislative intent will be required to alter the status quo."[13] According to that court, the only reasonable conclusion that could be drawn from Congress's decision not to expressly discuss applicability in Maine when drafting IGRA was that Congress did not want to alter the MICSA-established default position: that IGRA would not apply in Maine.[14]

In the case evaluating IGRA's applicability in Maine, the First Circuit considered an argument that the MICSA presumption impermissibly attempts to bind future Congresses to a previous Congress's will. Rejecting that argument, the court determined that the MICSA presumption passed constitutional muster because it "does not prohibit a subsequent Congress from writing a new statute reflecting new policies and applying it to the Indian tribes in Maine." A future Congress could make a later statute fully effective in Maine by using express language, by otherwise making its intent clear, or by repealing MICSA section 16(b) altogether. Thus, the Court said, "section 16(b) is purely an interpretive aid" that binds future Congresses only to the extent that they consent to being so bound.[15]

H.R. 6707, the Advancing Equity for Wabanaki Nations Act

For purposes of this Memorandum, there are two relevant provisions of H.R. 6707: one amending MICSA section 6(h) and the other amending the MICSA presumption in section 16(b). MICSA section 6(h), as

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> territory or land held in trust for Indians, and also (2) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State.

[9] MICSA § 16(b) reads, in full:

> The provisions of any Federal law enacted after the date of enactment of this Act for the benefit of Indians, Indian nations, or tribes or bands of Indians, which would affect or preempt the application of the laws of the State of Maine, including application of the laws of the State to lands owned by or held in trust for Indians, or Indian nations, tribes, or bands of Indians, as provided in this Act and the Maine Implementing Act, shall not apply within the State of Maine, unless such provision of such subsequently enacted Federal law is specifically made applicable within the State of Maine.

Pub. L. No. 96-420, 94 Stat. 1797 (1980).

[10] Pub. L. No. 100-497 (1988).

[11] 25 U.S.C. § 2703(5).

[12] *See* Passamaquoddy Tribe v. State of Me., 75 F.3d 784, 789 (1st Cir. 1996) ("In such circumstances, section 16(b) provides that Maine will be exempt from such a statute unless Congress has 'specifically made' the statute 'applicable within the State of Maine.'").

[13] *Id.* at 789.

[14] *Id.*

[15] *Id.*

amended by H.R. 6707, would preserve the exclusion of Maine from federal laws and regulations benefiting Indian tribes that affect or preempt state jurisdiction, as long as (a) those laws and regulations are in effect before H.R. 6707 is enacted, and (b) no other federal or state law provides for their applicability in Maine.[16]

H.R. 6707 would also strike the MICSA presumption in section 16(b).[17] By doing so, H.R. 6707 would eliminate the presumption that tribes in Maine are excluded from *future* legislative benefits that affect or preempt state jurisdiction, seemingly positioning tribes in Maine to receive benefits from future federal legislation according to the same standards as other federally recognized tribes.

For the purposes of this Memorandum, you have asked us to assume that H.R. 6707 is enacted in the same form in which it was introduced.

The Hypothetical Clean Water Act Amendment

Assuming H.R. 6707 is enacted, and that your hypothetical amendment to the Clean Water Act, 33 U.S. Code section 1377(e), is also enacted, a court would likely take the following approach to any legal challenge to the amendment's applicability in Maine.

Analyze the Changes that H.R. 6707 Makes to the MICSA Presumption

To determine how a newly enacted law affects existing law, a court first has to interpret the new law.[18] Courts generally interpret federal statutes by first examining their text and considering the text's plain meaning.[19] This step involves reading a provision's text in the context of the broader statutory scheme.[20]

Following these traditional steps of statutory interpretation, a court reviewing H.R. 6707 might first observe that the bill repeals the MICSA presumption. To determine what effect this change would have on existing law, though, a court might need to evaluate the legal effect of the MICSA presumption before its repeal.

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[16] As amended by H.R. 6707, MICSA § 6(h) would read:

> The laws and regulations of the United States which are generally applicable to or enacted for the benefit of Indians, Indian nations, or tribes or bands of Indians or to lands owned by or held in trust for Indians, Indian nations, or tribes or bands of Indians shall be applicable in the State of Maine, except that no law or regulation of the United States (1) that is in effect as of the date of enactment of the Advancing Equality for Wabanaki Nations Act, (2) which accords or relates to a special status or right of or to any Indian, Indian nation, tribe or band of Indians Indian lands, Indian reservations, Indian country, Indian territory or land held in trust for Indians, and also (3) which affects or preempts the civil, criminal, or regulatory jurisdiction of the State of Maine, including, without limitation, laws of the State relating to land use or environmental matters, shall apply within the State, unless Federal law or the state laws of Maine provide for the application of such Federal law or regulation.

[17] *See* H.R. 6707, § 2(c)(2) ("Section 16 of the Maine Indian Claims Settlement Act of 1980 (Public Law 96–420) is amended . . . by striking subsection (b).").

[18] *See, e.g.*, Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (construing a savings clause in the Federal Arbitration Act before analyzing how that provision interacts with the National Labor Relations Act).

[19] *E.g.*, Babb v. Wilkie, 140 S. Ct. 1168, 1172 (2020).

[20] *See* Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (explaining that the "plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole"). If the meaning of a particular provision is unclear based on its text and context alone, a court may consider the legislative history or purpose of the law to help discern the provision's meaning. *E.g.*, Int'l Paper Co. v. Ouellette, 479 U.S. 481, 493–94 (1987) (examining a statute's "purposes and its history" to decide the legal effect of a savings clause because the statute "itself [did] not speak directly to" the question). For more on statutory interpretation principles, *see* CRS Report R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations*, by Victoria L. Killion.

The MICSA presumption is similar to an "express-reference provision" that attempts to "protect" a certain statutory rule by requiring Congress to exempt new laws from that rule expressly.[21] In a similar vein, MICSA provides that a future law will not apply within Maine unless Congress "specifically" makes the law applicable there.[22] In other contexts, the Supreme Court has not treated these types of provisions as binding on a future Congress.[23] Instead, the Court has suggested that a future Congress can make its intentions clear in other ways,[24] and need not employ "magical passwords" to achieve its legislative objectives.[25] As previously noted, the First Circuit has treated the MICSA presumption as just that—a presumption (albeit a strong one).[26] In deciding that IGRA, which was silent on its applicability to Maine, did not apply in Maine, the Court also noted the absence of other evidence of congressional intent to apply the law to Maine.[27] For example, the Court observed that Congress could have repealed the MICSA presumption entirely if it wanted the new law to apply to Maine.[28]

In light of these judicial interpretations, a court interpreting H.R. 6707 would likely conclude as a preliminary matter that by repealing the MICSA presumption, Congress removed the presumption that laws enacted after MICSA do not apply to Maine unless Congress specifies otherwise.

This conclusion would not complete the analysis, however, because H.R. 6707 preserves a similar presumption for *previously* enacted laws. Specifically, the act amends MICSA Section 6(h) to state that certain types of laws "in effect as of the date of enactment" of H.R. 6707 do not apply within Maine "unless Federal law or the State laws of Maine provide for the application of such Federal law or regulation."[29] While this provision does not use identical language as the MICSA presumption in Section 16(b), it reinstates a similar presumption for laws in place on H.R. 6707's date of enactment. As a result, laws enacted *after* H.R. 6707's enactment are subject to no statutory presumption about their applicability to Maine, and would likely be evaluated based on their text and context in the first instance.[30] In contrast, laws in effect when H.R. 6707 is enacted are subject to the statutory presumption in Section 6(h): that they *do not* apply within Maine unless federal or state law so provides.

Evaluate the Applicability of the New Clean Water Act Language to Maine

As a next step, a court likely would analyze the amendment to § 518(e) of the Clean Water Act—the TAS provision—to determine whether it applies within Maine. Under the hypothetical, Congress added a new item (section 1347) to the list of sections covered by the TAS provision, thereby allowing tribes to be treated as states for purposes of that new section. If that act contained an express or otherwise clear indication of Congress's intent for its amendment to apply with respect to Maine, then a court would

[21] Lockhart v. United States, 546 U.S. 142, 144 (2005).

[22] MICSA § 16(b).

[23] *See* Dorsey v. United States, 567 U.S. 260, 273–74 (2012) (observing that while a provision required Congress to "expressly provide" for a certain application in a later-enacted law, "the Court has long recognized that this saving statute creates what is in effect a less demanding interpretive requirement" because "statutes enacted by one Congress cannot bind a later Congress").

[24] *See id.* at 274 (explaining that Congress "remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as modified").

[25] Marcello v. Bonds, 349 U.S. 302, 310 (1955).

[26] *See* Passamaquoddy Tribe v. Maine, 75 F.3d 784, 789 (1st Cir. 1996) (reasoning that "section 16(b) is purely an interpretive aid; it serves both to limn the manner in which subsequently enacted statutes should be written to accomplish a particular goal and to color the way in which such statutes thereafter should be read").

[27] *Id.* at 789.

[28] *Id.*

[29] H.R. 6707, § 2(a)(2)(B).

[30] *Cf.* Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016) (deciding that a judicially-recognized presumption against preemption did not apply and turning to the language of an express preemption clause).

likely construe the act to effectuate Congress's intent, concluding that the newly added TAS item would apply within Maine (and thus to tribes in Maine).[31]

If the TAS amendment was silent regarding its applicability within Maine, then a court would likely ask whether, by its plain language, the amendment applies within Maine. In this scenario, because H.R. 6707 would have repealed the MICSA presumption in § 16(b), MICSA would no longer spur a court to presume that an otherwise generally applicable statute is inapplicable within Maine. Thus, in the absence of contrary language, the hypothetical TAS amendment would apply within Maine (and to tribes in Maine) on the same basis and under the same conditions as other states.

Evaluate the Applicability of the Pre-Amendment Clean Water Act § 518(e) Language to Maine

A potentially more difficult question would arise if a litigant were to argue that the entire TAS provision and each of its cross-referenced items applies within Maine. In this scenario, a litigant might argue that Congress amended the TAS provision with full awareness that the MICSA presumption is no longer in force, and therefore intended for the TAS provision, as a whole, to apply within Maine.

Courts generally presume that Congress enacts new laws with an awareness of other relevant laws.[32] However, in this instance, the repeal of the MICSA presumption is not the only relevant consideration. In this scenario, Congress also changed the presumption with respect to laws in effect at the time of H.R. 6707's enactment. Under the amended MICSA Section 6(h), such pre-existing laws are presumed *not* to apply with respect to Maine unless Congress or a state so provides. In these circumstances, a court could reasonably conclude that the TAS provision does not apply to Maine because it is a "law" that was "in existence" at the time of H.R. 6707's enactment.[33] By contrast, because it is a separate enactment, the post-H.R. 6707 amendment to the TAS provision could apply to Maine for the reasons discussed in the previous section.

Conclusion

Returning to your original framing of the hypothetical, the analysis above informs the most likely answer among the options presented. You asked whether, after Congress has enacted H.R. 6707 (AEWNA), and subsequently has amended the TAS subsection of the Clean Water Act to add another provision to the list of such provisions under which tribes have treatment as a state, would:

a. treatment as a state be authorized for federally recognized tribes in Maine only under the newly added TAS-referenced CWA provision?

b. treatment as a state be authorized for federally recognized tribes in Maine under all TAS-referenced CWA provisions—both pre-existing and new?

c. treatment as a state be *not* authorized for federally recognized tribes in Maine under any TAS-referenced CWA provision?

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[31] Macello v. Bonds, 349 U.S. 302, 310 (1955) (stating that despite an express-reference provision, the Court could not "ignore" the legislation's background, including evidence that Congress intended the prior law's procedures to apply to the new statute).

[32] *E.g.*, Ortega v. Holder, 592 F.3d 738, 743 (7th Cir. 2010) ("[W]e must take into account the relationship of the statute to other provisions of the code. Congress does not legislate in a vacuum. We must assume that Congress is cognizant of other statutory provisions and expects its new enactments to work in harmony with existing provisions.").

[33] H.R. 6707, § 2(a)(2)(B). Consistent with the hypothetical, this analysis assumes that (1) the pre-existing provisions of § 1377(e) are viewed as according special status or rights to Indian tribes (which authorization for treatment as a state likely fulfills), and (2) authorization for treatment as a state is viewed as preempting state regulatory jurisdiction.

Given the assumptions and limitations on our analysis noted above, outcome **(a)**—that treatment as a state would be authorized for federally recognized tribes in Maine only under the newly added TAS-referenced CWA provision—is the outcome most consistent with the statutory language you have provided and with the existing judicial interpretations CRS has reviewed.