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SUMMARY
FOR ICWA IMPLICATIONS IN THE LAND CLAIMS SETTLEMENT

You have asked me to research the deliberate carve-out for ICWA in the Maine Indian Claims Settlement Act. In so doing, you have asked me to focus in state legislative work that surrounded the implementation of MICSA, relative to child welfare. Specifically, you had asked me to look into 1999 legislation that made it possible to amend Maine law without tribal approval.

General Information

Generally, it has been common practice on the part of the State to argue that MICSA constitutes a "fair compromise," which was reached at great political cost to both sides. Therefore, the state has found it a convenient argument to argue, historically, that MICSA *should not* be amended and that if it is, all parties (tribes and State) must agree to it. The alternative, of course, would be unilateral amendment by Congress, who has unfettered authority to engage the tribes directly and single-handedly alter legislation. In sum, the practice has thus been that in order to amend MICSA, both the State and the tribes must be in agreement on a given bill.

Specific to the prompt you have provided, there are four bodies of law that need to be considered: MICSA, the federal Implementing Act, the federal ICWA, and Maine state legislation. They relate to each other in the following way:

- Under the Indian Nonintercourse Act of 1790, Congress is granted sole authority to interact with the tribes for land claims and settlements. Therefore, any land settlement/transaction between a tribe and State/third party must be approved by Congress.
- As a settlement between the State of Maine and the Maine tribes, MICSA could be enacted as a state law, but would carry no legal authority unless ratified by Congress—hence the federal Implementing Act, which ratified MICSA, allowing it to be a "working" state law in Maine.
- As part of the federal Implementing Act, ICWA is specifically mentioned (25 USC §1727) and applied to the Maine tribes. In other words, the federal Implementing Act states that the federal ICWA applies in Maine to give the Maine tribes exclusive jurisdiction over child custody cases in Maine, as qualified under ICWA.
- After Congress ratified the federal Implementing Act both it, and MICSA, became law. The Penobscot, Passamaquoddy, and Maliseet received federal recognition, and ICWA standards were mandated to apply to the tribes, granting them authority under ICWA. However, Maine lawmakers did not make appropriate adjustments to Maine state law to change the language to reflect the standards of ICWA. As a result, Maine DHS continued to discount and disregard tribal authority to license foster facilities under ICWA. To remedy this, state legislation was passed to bring Maine law into compliance with the federal ICWA (with which it was required to be compliant since the ratification of the Implementing Act).

Maine Indian Claims Settlement Act & ICWA-related Legislation:

As it stands today, MICSA does not explicitly mention the ICWA. Instead, there have been two bills brought before the Maine Legislature regarding ICWA and its application in the State, relative to MICSA: LDs 523 (119th Legis.) and 415 (122nd Legis.).

LD 523

Brought before the House in 1999, LD 523 was brought to the Legislature out of concerns that Maine DHS was not sufficiently complying with the mandates of the federal ICWA. In addressing these shortcomings, LD 523 sought to amend the Maine Child Protection Act to explicitly provide that Maine DHS must fund/provide benefits to any federally recognized tribe or facility providing foster care for a child who is a member of a federally recognized tribe.

LD 523 further amended Maine's CPA by augmenting the definition of the CPA's definition of "family foster home." LD 523 amended the definition to include "Indian family foster home" which was defined, within the meaning of ICWA, as a home wherein Native American culture was taught and encouraged, as approved by the Native child's tribe.

Consistent with the federal ICWA, LD 523 further exempted the tribes from foster licensing requirements *as determined by DHS*, and instead inserted those requirements enumerated in ICWA and also explicitly made mention that the LD recognized the authority of the Maine tribes under federal ICWA, as applied in Maine. This is important because, the *federal implementing act* which ratified MICSA incorporated ICWA into the Settlement, however, changes to Maine state child welfare laws were never made to bring State law into compliance with the federal ICWA. LD 523 attempted to bring Maine into compliance with the federal ICWA.

Prior to LD 523, Maine DHS was refusing to acknowledge the licensing rights of the Maine tribes to appropriate Native American family foster homes and facilities, based on tribal standards. There were also some funding concerns when it came to Native children recipients. Simply put, Maine DHS was in error; under the ICWA the tribes (as federally recognized tribes under the Settlement Act) have the explicit authority to license and approve child foster facilities for Native children. *From a research perspective, I am assuming that this is the "changes without the tribes' approval" to which Jamie alluded. Prior to LD 523, Maine DHS "ran the show" any way it pleased, without regard to the legitimacy of the tribal entities to license and approve facilities for Native foster children. The State, wrongfully, was acting unilaterally on several issues.*

LD 415

This bill established a commission of tribal and state officials to monitor DHS compliance with the federal ICWA to ensure that the shortcomings addressed by LD 523 did not resurface.

Summary

Even though MICSA never specifically mention(ed/s) ICWA, ICWA still applies as a federal law (applied through the ratification of the federal Implementing Act for MICSA), endowing the Maine tribes with several powers and stipulating standards of fostering for Native American children. As a result of Maine DHS shortcomings and a failure by Maine lawmakers to bring Maine child welfare law into ICWA compliance after the federal Implementing Act, Maine tribes were denied their ICWA authority. To remedy this, LDs 523 and 415 augmented Maine state law to amend the state CPA to bring it into compliance with ICWA and monitor compliance.

Concerns about "amending MICSA" without tribal approval likely stem from those concerns addressed by LDs 523 and 415 in which the tribes were being denied authority with regard to child welfare legislation.