

relationship between the state and the southern tribes.

[T]he Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes, and shall be subject to all the duties, obligations, liabilities and limitations of a municipality of and subject to the laws of the State, provided, however, that internal tribal matters, including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

30 M.R.S.A. section 6206(1). MIA in turn defines “laws of the State” to include “the Constitution and all statutes, rules or regulations and the common law of the State * * *.” 30 M.R.S.A. section 6203(4). Therefore, the combination of MICSA and MIA makes state regulatory authority applicable to the southern tribes and their Indian Territories, with the very important exception of “internal tribal matters.”

MICSA and MIA make that state regulatory authority applicable to the water and water rights in the southern tribes’ Indian Territories. MICSA provides that the jurisdictional formula in MIA applies to the southern tribes “and the land and natural resources owned by, or held in trust for the benefit of the tribes, nation, or their members.” 25 U.S.C. 1725(b)(1). MICSA specifically defines “land or natural resources” to include “water and water rights.” *Id.* at section 1722(b). MIA section 6204 generally makes state law applicable to “any lands or other natural resources” owned by Indian tribes or held in trust for them. MIA also defines “land or other natural resources” to include “water and water rights.” 30 M.R.S.A. section 6203(3). When MIA section 6206(1) addresses the southern tribes in particular, it does not refer specifically to the “land or other natural resources” of the tribes when it applies state law to the tribes. But MIA section 6204 appears to operate in parallel with the language in MIA section 6206(1) providing that the southern tribes are “subject to the laws of the State” in their quasi-municipal status. And section 6204 makes it clear that under MIA this grant of jurisdiction was designed to cover “natural resources” defined to include “water and water rights.”⁵ Moreover, when Congress ratified MIA’s

jurisdictional arrangement as to the southern tribes, including section 6206(1), it used a parallel construction in MICSA, making that jurisdictional arrangement applicable to “natural resources,” defined to include “water and water rights.” 25 U.S.C. 1725(b)(1) and 1722(b). Therefore, MICSA and MIA clearly combine to apply state regulatory authority to the waters of the southern tribes’ Indian Territories.

ii. Statutory Structure of MICSA

MICSA includes a specific reference to state environmental laws, a provision that prevents the application of generally applicable federal Indian laws and regulations that would otherwise “affect or preempt the * * * jurisdiction of the State of Maine including, without limitation, laws of the State relating to land use or environmental matters, * * *.” 25 U.S.C. 1725(h)(emphasis added).⁶ This provision operates together with section 1735(b), which prevents subsequently enacted federal Indian statutes from inadvertently affecting or preempting state jurisdiction after the effective date of MICSA. 25 U.S.C. 1735(b).⁷

The combination of these two subsections, or “savings clause[s]” as the First Circuit has labeled them (*Passamaquoddy Tribe*, 75 F.3d at 789), prevents the general body of federal Indian law from unintentionally affecting or displacing MICSA’s grant of jurisdiction to the state. The two were the subject of considerable attention and deliberation during the legislative process. S. Rep. at 30–31 and 35; H.R. Rep. 96–1353 at 19–20 and 29 (1980), reprinted in 1980 U.S.C.C.A.N. 3786

⁶ In its entirety, section 1725(h) reads:

Except as otherwise [sic] provided in this subchapter, 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 [them] 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 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.

⁷ In its entirety, section 1735(b) reads:

The provisions of any Federal law enacted after October 10, 1980, 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 subchapter 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.

(H.R. Rep.). And in *Passamaquoddy Tribe v. Maine*, 75 F.3d 784 (1st Cir. 1996) the court upheld the operation of section 1735(b) when it found that the subsequently-enacted Indian Gaming Regulatory Act does not apply in Maine because Congress did not make it specifically applicable to the state. The court found that “section 16(b) of the Settlement Act [25 U.S.C. 1735(b)] gave the State a measure of security against future federal incursions upon [its] hard-won gains in settling the tribes’ land claims and gaining jurisdiction over the tribes and their lands. 75 F.3d at 787.

EPA agrees with DOI that these provisions, including section 1725(h), do not directly answer the question before us. DOI Op. at 2 n. 2. A provision that shields state authority from generic intrusions by federal law does not control the question of what authority Congress gave the state in the first place. Nevertheless, it is notable that one area of state authority Congress specifically called out in the savings clauses is the “laws of the State relating to * * * environmental matters.” This provision supports the conclusion that the original grant of jurisdiction to the state was designed to include some measure of environmental regulation. Otherwise, why would Congress have bothered to protect that area of state authority under section 1725(h)?

iii. Legislative History of MICSA

MICSA’s legislative history also demonstrates that Congress understood state environmental law would apply in the southern tribes’ Indian Territories. Indeed, the only passages in the Senate and House Committee reports EPA could find that specifically address environmental regulation under MICSA and MIA show quite explicitly that Congress understood it was making state environmental regulation applicable to the southern tribes’ Indian Territories.⁸

The Senate Report discusses the application of state environmental law under section 1725(b)(1), the provision in MICSA that ratified MIA and its

⁸ All sides refer EPA to extensive and conflicting remarks made in the debate of both MICSA and MIA during the federal and state legislative processes. We address those comments in our response to comments document. The focus of our inquiry, however, is not the statements of individual partisans in the debate, but the considered remarks made by the two congressional committees in reports designed to present the collective views of each committee. EPA relies especially on the Senate Report, which the House Report “accepts as its own” in part. H.R. Rep. at 20. *Akins v. Penobscot Nation*, 130 F.3d 482, 489 (“We look to the Committee Report of the Senate Select Committee on Indian Affairs concerning the Settlement Act.”) (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984)).

⁵ EPA here takes no position on the effect of MIA section 6204 on the northern tribes, other than to note that it is without effect on them absent some corresponding Congressional action in MICSA or another federal statute.