

jurisdictional provisions for the southern tribes:

State law, including but not limited to laws regulating land use or management, conservation and environmental protection, are fully applicable as provided in this Section and Section 6204 of the Maine Implementing Act. That the regulation of land or natural resources may diminish or restrict maximization of income or value is not considered a financial encumbrance and is not barred from application under this Act.

S. Rep. at 27.

In addition, when explaining the operation of the savings clauses, 25 U.S.C. 1725(h) and 1735(b), discussed in the previous section, the Senate Report provides a specific example of a federal environmental law that would be excluded from operating in Maine Indian Territories to avoid interfering with state environmental law. Although the example in this passage focuses on the provision in the Clean Air Act that allows Indian tribes to reclassify their lands under the prevention of significant deterioration air permitting program, the passage ends by emphasizing that this exclusion would also operate more generally to protect state environmental regulations.

It is also the intent of this subsection, however, to provide that federal laws according special status or rights to Indian [sic] or Indian Tribes would not apply within Maine if they conflict with the general civil, criminal, or regulatory laws or regulations of the State. Thus, for example, although the federal Clean Air Act, 42 U.S.C. 7474, accords special rights to Indian tribes and Indian lands, such rights will not apply in Maine because otherwise they would interfere with State air quality laws which will be applicable to the lands held by or for the benefit of the Maine Tribes. This would also be true of police power laws on such matters as safety, public health, environmental regulations or land use.

S. Rep. at 31; *see also* H.R. Rep. at 29. In addition, this passage makes clear that Congress was not limiting the application of federal Indian law in Maine solely to avoid any interference with state environmental regulation as it applies to lands outside the Indian Territories. The report specifically discusses Congress's intent to protect the application of state air quality laws which will be applicable to land held "for the benefit of the Maine Tribes." Again, this discussion would be pointless if Congress did not specifically intend to make state environmental regulation applicable in the southern tribes' Indian Territories.

iv. Concurrent Jurisdiction

Several tribal commenters have argued that the southern tribes have concurrent jurisdiction with the state

under MICA, and this concurrent jurisdiction prevents the state from exercising adequate authority to implement its NPDES program in the Indian Territories. In our consultations, those commenters specifically asked EPA to address the question of concurrent jurisdiction. Indeed, the First Circuit has held that simply because Congress has made state law applicable in Indian country does not mean that Congress has necessarily limited an Indian tribe's inherent sovereignty. In *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), cert. denied 513 U.S. 919 (1994), the court reviewed the effect of the Rhode Island Indian Claims Settlement Act (25 U.S.C. 1701–1716) and the Indian Gaming Regulatory Act on the Narragansett Tribe. In language very similar to MICA section 1725(b) and MIA section 6204, the Rhode Island settlement act provides that the tribe's "settlement lands shall be subject to the civil and criminal laws and jurisdiction of the State of Rhode Island." 25 U.S.C. 1708. In analyzing the effect of this language, the court concluded:

[T]he mere fact that the [Rhode Island] Settlement Act cedes power to the state does not necessarily mean, as Rhode Island suggests, that the Tribe lacks similar power and, thus, lacks "jurisdiction" over the settlement lands. Although the grant of jurisdictional power to the state in the Settlement Act is valid and rather broad, . . . we do not believe that it is exclusive. To the contrary, we rule that the Tribe retains concurrent jurisdiction over the settlement lands and that such concurrent jurisdiction is sufficient to satisfy the corresponding precondition to applicability of the Gaming Act.

Narragansett, 19 F.3d at 701. In a subsequent dispute over the law applicable to construction of a tribal housing complex, the District Court sorted through the overlapping authorities of state and tribal concurrent jurisdiction using a preemption analysis, generally finding that state law was preempted, with the one exception of the state's coastal resources management plan. *Narragansett Ind. Tribe of RI v. Narragansett Elec.*, 878 F.Supp. 349, 361–66 (D.R.I. 1995), rev'd on other grounds 89 F.3d 908 (1996). The District Court specifically found the state regulations to implement the CWA were preempted. 878 F.Supp. at 362; *see also Narragansett*, 19 F.3d at 703. Therefore, it is important to assess whether MICA allows the southern tribes to assert concurrent jurisdiction that might preempt the laws of the state.

Notably, the First Circuit in the *Narragansett* case briefly compared the Rhode Island settlement act with

MICA. The court intended to highlight the extent to which Congress had not impaired the Narragansett's sovereignty in Rhode Island:

Comparative analysis is also instructive. We think it is sensible to compare the jurisdictional grant embedded in the [Rhode Island] Settlement Act with the jurisdictional grants encased in two other Indian claims settlement acts that were to some extent modeled after the Settlement Act. Both of the latter pieces of legislation—one involving Massachusetts, one involving Maine—contain grants of jurisdiction parallel to section 1708, expressed in similar language. *See* . . . 25 U.S.C. 1725 (1988). Yet both acts also contain corresponding limits on Indian jurisdiction, conspicuously absent from the Settlement Act. *See* . . . 25 U.S.C. 1725(f). By placing state limits on the retained jurisdiction of the affected tribes, these newer acts imply that the unadorned grant of jurisdiction to a state . . . does not in and of itself imply exclusivity.

Id. at 702. The cross reference to MICA is to a section specifically addressing the southern tribes' concurrent jurisdiction:

The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.

25 U.S.C. 1725(f) (emphasis added). While MICA specifically reserves the southern tribes' exclusive jurisdiction over Indian child custody proceedings (25 U.S.C. 1727(a)), Congress provided in section 1725(f) that MIA generally defines the extent of the southern tribes' jurisdiction. Section 6206(1) of MIA defines the scope of the general powers of the southern tribes as generally the same as those of municipalities in Maine. In matters where MIA accords the southern tribes a status similar to Maine municipalities, they enjoy considerable home rule authority. *See International Paper Co. v. Town of Jay*, 665 A.2d 998 (Me. 1995); *Central Maine Power v. Town of Lebanon*, 571 A.2d 1189 (Me. 1990). But that authority is ultimately subject to definition and preemption by the state. *Midcoast Disposal v. Town of Union*, 537 A.2d 1149 (Me. 1988). In the case of Maine's MEPDES program, the state has not delegated to municipalities the authority to issue permits that would implement the NPDES program under the CWA. Therefore, EPA sees no basis under MIA for finding that the southern tribes' concurrent jurisdiction could exclude or preempt state regulation of