

affected tribes. According to this argument, it would be inconsistent with the trust doctrine for EPA to authorize the state to assume the NPDES program.

b. Continued Operation of the Trust in Maine

EPA believes that neither set of arguments is completely correct, and the answer lies somewhere in between. As a threshold matter, the argument that the trust doctrine finds no application in Maine defies the terms of MICSA. The statute specifically provides for the federal government to hold land, natural resources, and settlement funds in trust for the southern tribes. See generally 25 U.S.C. 1724. Congress specifically recognized the tribal governments of the Passamaquoddy Tribe and the Penobscot Nation in MICSA. 25 U.S.C. 1721(a) (3) and (4), 1722(h) and (k), and 1726. Therefore, MICSA itself establishes trust resources for which the federal government is responsible and identifies tribal governments with which agencies such as EPA should work on a government-to-government basis consistent with that trust responsibility. This analysis, for example, provides the basis for EPA's extensive consultations with the southern tribes concerning Maine's application. Meeting this general element of our trust responsibility to the Maine tribes in no way affects or preempts the state's jurisdiction under MICSA, and therefore, does not run afoul of any limits in the savings clauses. See *Nance v. EPA*, 645 F.2d 701, 710–11 (9th Cir.), cert. denied 454 U.S. 1081 (1981).

Finding that the federal government has a trust responsibility to the southern tribes under MICSA, however, does not compel the conclusion that EPA must withhold the NPDES program approval from Maine pursuant to that responsibility. Indeed, if EPA were to rely on the trust responsibility as a basis for denying Maine's application in the southern tribes' Indian Territories, the state may well be correct that MICSA's savings clauses would prohibit the application of the trust doctrine in such a manner. Under that interpretation, the trust would act as a federal law that "affects or preempts" the jurisdiction we believe Congress granted the state under MICSA, precisely the class of federal Indian law the savings clauses are designed to block. When deciphering the more specific content of the trust responsibility in Maine, EPA must apply the trust consistent with applicable federal law, which includes MICSA and its grant to the state of authority in the southern tribes' Indian Territories. See *Shoshone-Bannock*

Tribes v. Reno, 56 F.3d 1482 (D.C. Cir. 1995); *State of California v. Watt*, 668 F.3d 1290, 1324 (D.C. Cir. 1981).

c. The Trust, MICSA, and CWA

Thus, EPA is left to reconcile how to protect the southern tribes' natural resources consistent with the jurisdictional relationship which Congress established in MICSA among the southern tribes, the state, and the federal government. Those natural resources include water and water rights, and this decision involves the NPDES program under the CWA. Therefore, EPA will focus on the interplay between MICSA and the CWA to sort through how the trust applies to those resources.

Although EPA does not agree with DOI's ultimate conclusion about the state's jurisdiction under MICSA, DOI's opinion and the parallel comments from the Maine tribes make an important contribution to our analysis. As DOI points out, MICSA's legislative record is abundantly clear that Congress was not terminating the southern tribes or completely abrogating their sovereignty. Indeed, both committee reports devote entire identical chapters to a discussion of how MICSA is designed to preserve the tribes' culture and to avoid their assimilation into the general population. S. Rep. at 14–17; H.R. Rep. at 14–17.

It is also clear from the terms of MICSA and MIA that the southern tribes' riverine cultures and the natural resources on which they rely are part of the cultural heritage Congress intended to preserve. S. Rep. at 11. MIA specifically reserves the southern tribes' right to take fish within their reservations for their individual sustenance, consistent with that cultural practice. 30 M.R.S.A. section 6207(4). MIA generally leaves it to the southern tribes to regulate their own fishing practices, and establishes a carefully balanced regulatory framework for joint state and tribal regulation of fish and wildlife on the southern tribes' Indian Territories and in certain waters where there are off-reservation impacts. 30 M.R.S.A. sections 6207(3) and (6), and 6212. Moreover, as to ponds under ten acres in surface area and entirely within their Indian Territories, the southern tribes have exclusive jurisdiction to regulate fishing. 30 M.R.S.A. section 6207(1).

Therefore, EPA concludes that both MICSA and MIA reserve to the southern tribes uses of natural resources consistent with the preservation of their culture. In the context of surface water quality regulation, it is especially notable that the statutes specifically protect the tribes' fishing practices.

Some commenters, including the state, have suggested that the tribes' right to take fish is essentially unrelated to the water quality on which that fishing resource depends. Ad. Rec. 5a-75, ex. B at 1–6. This argument maintains that the tribes are freed from creel or bag limits when exercising their statutory right, but that right has no implications for the regulation of the natural resources, including the water, which determine the quality of whatever fish an Indian might catch. EPA cannot accept this suggestion for obvious reasons; the right to take fish must mean more than "the right to dip one's net into the water * * * and bring it out empty." *United States v. Washington-Phase II*, 506 F.Supp. 187, 203 (W.D. Wa. 1980), aff'd in part and rev'd in part on other grounds 759 F.2d 1353 (9th Cir. 1985), cert. denied 474 U.S. 994 (1985). Correspondingly, the right to take fish for individual sustenance must mean more than the right to reel in fish that expose the tribe to unreasonable health risks. MICSA and MIA make this fishing right a matter of federal law that must be addressed by any authority, be it EPA or the state, charged with regulating the natural resources on which that right depends. *United States v. Adair*, 723 F.2d 1394, 1408–11 (9th Cir. 1983), cert. denied 467 U.S. 1252.

The question that remains is what tools are left to EPA under MICSA and the CWA to protect that right? The CWA reserves substantial authority to EPA in states authorized to administer the NPDES program so that the Agency can oversee the state program and ensure its consistency with the CWA. The most obvious authority EPA retains is the ability to object to proposed state NPDES permits that EPA determines violate the CWA. Following an EPA objection, the state must either address EPA's concerns or EPA ultimately takes over issuance of the permit. 33 U.S.C. 1342(d)(2). Where states have authority to promulgate water quality standards, EPA is also charged with reviewing those standards and can object to any standards that do not meet the requirements of the CWA. Again, if the state does not address EPA's objection, EPA ultimately has authority to take over promulgation of such standards. 33 U.S.C. 1313(c)(3). These oversight mechanisms attach to any state program implementing the CWA. They are not unique to programs in Indian country, and EPA's exercise of these oversight mechanisms in no way affects or preempts the jurisdiction or authority Maine has under MICSA and the CWA. No state can claim to have jurisdiction under the CWA to issue NPDES permits