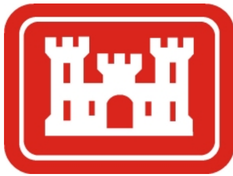


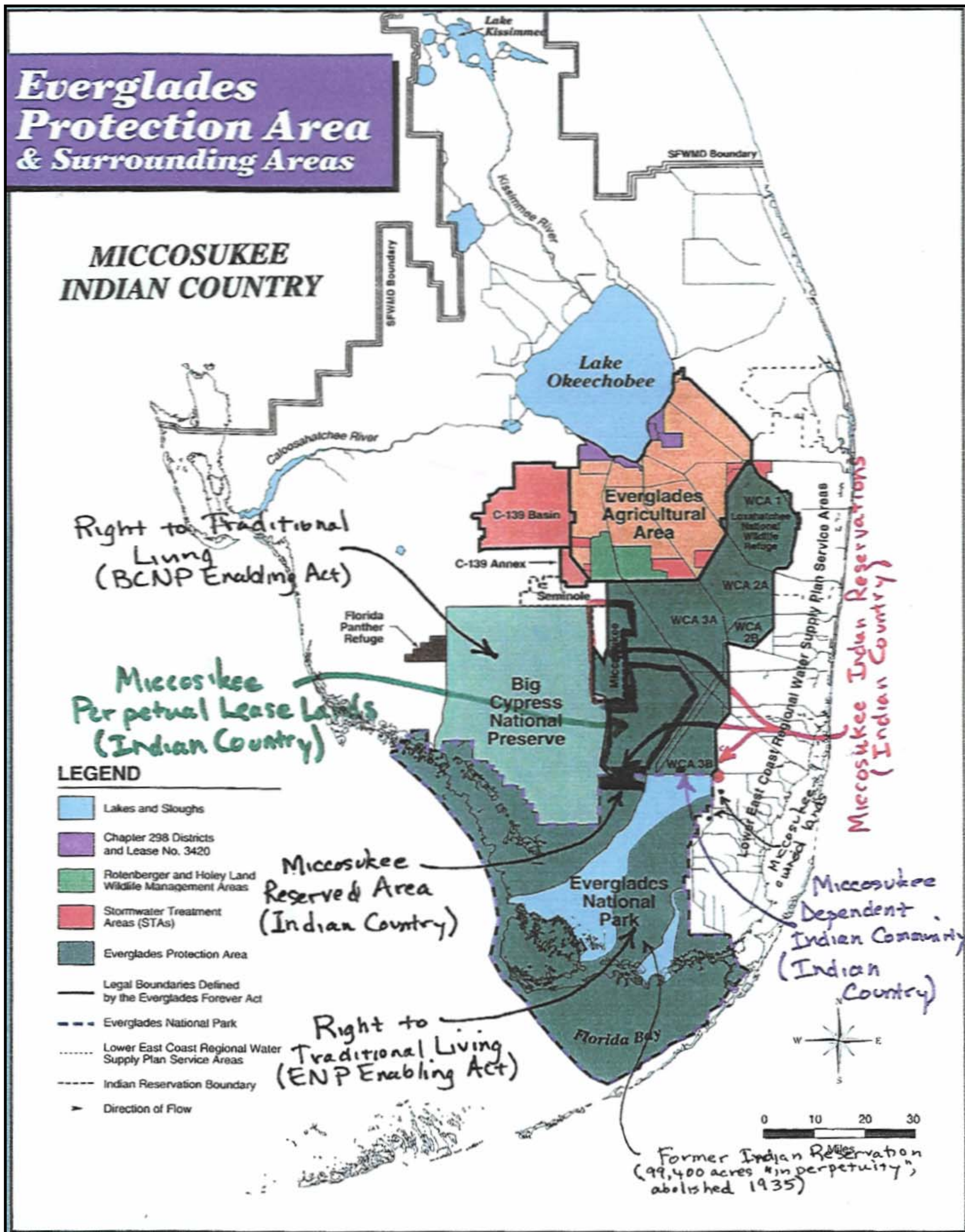
Chapter Fifteen
Preserving Their Interests: The Seminole and Miccosukee Indians

As the clash between sugar interests and environmentalists threatened the consensus formula for Everglades restoration, the Seminole and Miccosukee Indians were waging battles that many perceived as equally divisive. These people had resided in the Everglades since the 1800s, obtaining state and federal reservations of land, making them especially concerned about water issues in the area. Because the Seminole did not have as much actual land in the Everglades, they generally used conciliatory approaches to promulgate their views. The Miccosukee Tribe, on the other hand, had a land base primarily in the Everglades, making them turn to litigation in the 1990s to protect their interests. Under the guidance of Dexter Lehtinen, the Miccosukee combated what they perceived as lax water quality standards through lawsuits and by setting their own guidelines. They justified their stance by declaring that the push towards ecosystem restoration had not sufficiently provided for their input, thereby threatening their interests.[1] The tribe's actions forced federal, state, and local interests to pay more attention to the Indians in restoration efforts, and, at least in the minds of the Miccosukee, furthered progress towards a restored Everglades.

As explained previously, by the 1960s, the Seminole and Miccosukee had several state and federal reservations in South Florida. In addition to these lands, the Miccosukee obtained a 40-year special use permit from the National Park Service in 1964 for a five and a half mile strip of land along the Tamiami Trail, comprising 333 acres and known as the Permit Area (this was later expanded to 667 acres in 1998). The permit allowed the Miccosukee to build offices, housing, and schools, but made such development subject to NPS approval. Moreover, both tribes obtained a license from the state for the use of a large chunk of land north of the Permit Area and east of the reservation, although Conservation Area No. 3 flooded much of the northern part of this tract as well, and this license eventually transformed into a perpetual lease of the area.[2]

Because of the implementation of the C&SF Project in 1948, the Seminole and Miccosukee had little control over water policies that affected their land. The Corps of Engineers and the SFWMD made decisions about how much water went into Conservation Area No. 3 and the Everglades, as well as regulating the water in Lake Okeechobee.[3] These determinations affected not only the quantity of water flowing to Seminole and Miccosukee lands, but the quality as well. By the 1970s, the Seminole and the Miccosukee experienced the same ecological problems that the Everglades and the conservation areas faced as a consequence of water decisions and growth in South Florida. As Buffalo Tiger, a respected Miccosukee leader, related,

> As for Everglades' water, everything has changed. The water was very clean years ago. Miccosukees would swim in the Glades water and drink it. Today people are saying that the water is not clean. You can tell that is true because it is yellow-looking and does not look like water you would want to drink. You probably get sick from drinking it. That means that fish or alligators in the water are not healthy; white men did that, not Indians. Miccosukees were told that was what was going to happen many years ago, and now it has. We cannot just say that the water is no good or the land is no good and turn our back on that.[4]



Land holdings of Miccosukee and Seminole Indians. (Source: Joette Lorion, Consultant, Miccosukee Tribe of Indians of Florida.)

Because of the conviction that the Indians had to do something to improve the quality of their water, even though the degradation was not of their own making, the Seminole and Miccosukee struggled to gain some measure of control over the water flowing over their reservations.

The Seminole's efforts began in 1973, when the tribe investigated whether or not the state of Florida ever compensated it for 16,000 acres of reservation land flooded by Conservation Area No. 3. The Seminole contacted Governor Reubin Askew, telling him that, in contrast with the state's practice regarding private land, the tribe had never obtained a fee for the easement. One reason for this was that the easement had actually been granted by the Board of Commissioners of State Institutions in August 1950, rather than by the Seminole themselves, since the Trustees of the Internal Improvement Fund held title to the land in trust for the Indians.[5] R. L. Clark, Jr., chairman of the FCD's governing board, explained that the Board of Commissioners of State Institutions had determined that the land flooded by Conservation Area No. 3 was worthless to the Seminole, and that its creation actually increased the value of other Seminole lands by making them "suitable for a higher and better use than previously existed." Besides, Clark noted, if compensation had been warranted, it would have gone to the state, not the tribe, since the state held title to the land.[6]

The controversy soon extended into litigation. Alleging that they wanted to regain control over land that was rightfully theirs, the Seminole filed a civil action in 1974 against the state of Florida to establish their rights to the acreage flooded by Conservation Area No. 3. Over the next 13 years this suit languished in the courts, with settlement talks proceeding intermittently, including proposals to exchange state land outside of reservation boundaries for the Seminole's 16,000 acres. The state especially wanted Seminole land known as the Rotenberger Tract in order to allow for additional impoundment as a part of Governor Bob Graham's Save Our Everglades program. Finally, in 1985, the Seminole declared that unless a reasonable settlement was negotiated, they would oppose construction of the Modified Hendry County Plan, a $20 million flood control project planned by the Corps of Engineers and to be built by the SFWMD. This project was supposed to drain lands west of the EAA in order to provide acreage for citrus groves, placing the excess water in Conservation Area No. 3A. Because of this threat, the SFWMD and the state had more reason to resolve the litigation.[7]

In September 1986, the Seminole and the state finally reached a settlement. Under the agreement, the state would pay over $11 million to the Seminole for the Rotenberger Tract, the title and easement to other land flooded by Conservation Area No. 3, and for compensation for past projects conducted in Conservation Area No. 3A. The tribe, in turn, would withdraw its objections to the Modified Hendry County Plan. In addition, the settlement recognized that the Seminole wanted to develop a compact detailing its water rights and its responsibilities to preserve water quality.[8]

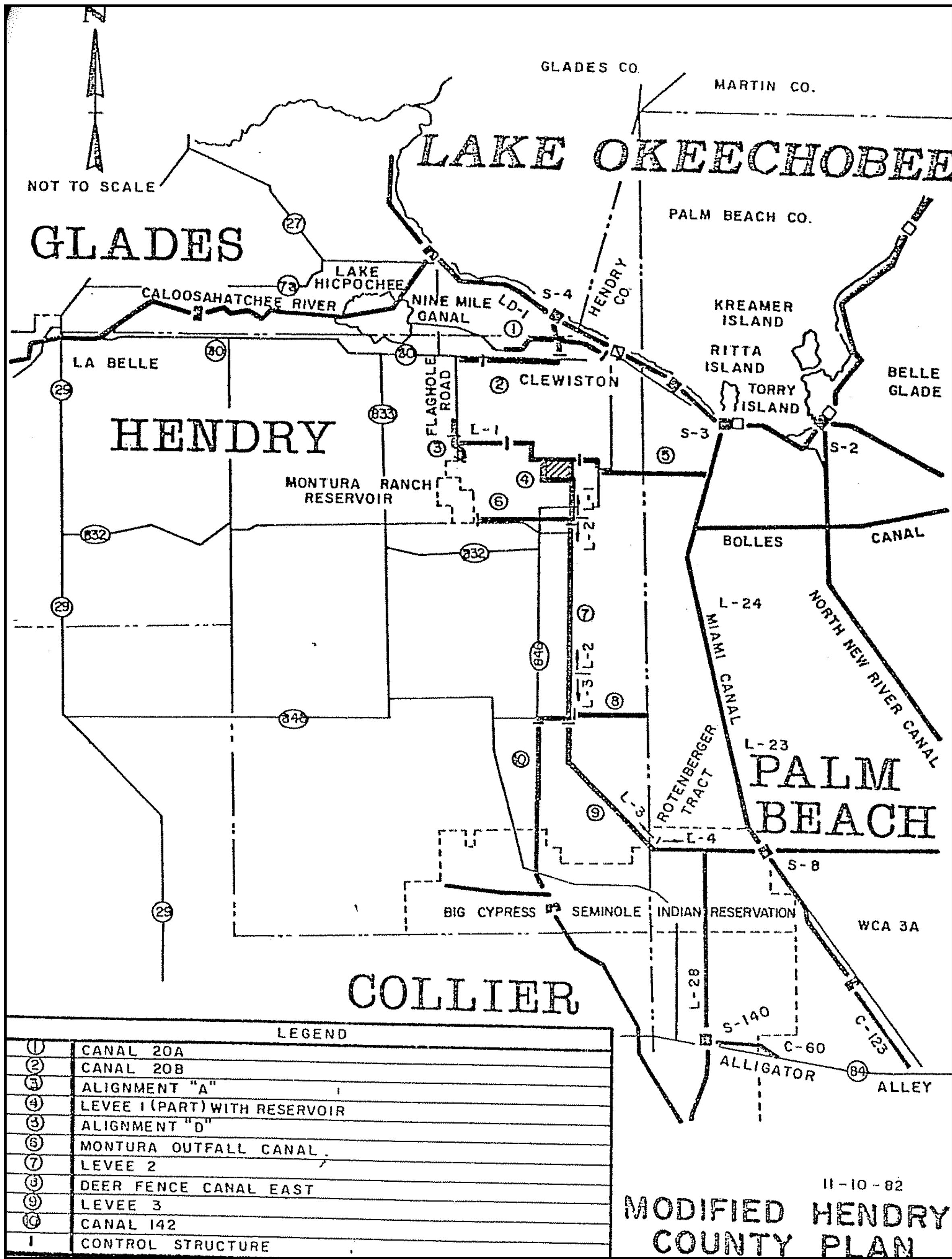
After state and tribal officials agreed to the settlement, the Seminole began work on the water rights compact. According to one source, the compact was "a way for the Tribe to integrate its own water use operations with most provisions of Florida water and environmental law."[9] It required the creation of a tribal water department and the development of a tribal water code, and it gave the Seminole responsibility for water management on their reservations. The tribe's legal representation claimed that the compact "recognize[d] the Tribe's sovereign power in the administration of reservation water resources," and that it allowed for "intergovernmental

cooperation between sovereign governments," rather than "subordination of the Tribe's interests to the [SFWMD's]."[10] Upon the completion of the compact and its approval by the SFWMD, the entire settlement was forwarded to Congress for its authorization, provided in December 1987 under the Seminole Indian Land Claims Settlement Act. This law stipulated that the compact would have "the force and effect of Federal law for the purposes of enforcement of the rights and obligations of the tribe."[11]

Meanwhile, the Miccosukee made their own protests about the Modified Hendry County Plan. Fearing that the project would adversely impact water quality and vegetation in Conservation Area No. 3, the tribe filed an objection with the Corps, stating that the project had the potential of harming natural resources on tribal land. The SFWMD tried to assuage Miccosukee fears, stating that the project would have "no significant impact to the Indian land." Besides, the SFWMD continued, the plan was just a part of an "environmental enhancement" program that it was conducting for Conservation Area No. 3. Other components, according to the SFWMD, included restoring 30 square miles of the Everglades under the Holey Land project, using the Rotenberger Tract to prevent agricultural runoff from entering Conservation Area No. 3, and conducting the Shark River Slough Restoration to provide "major improvement to the natural flow system of the Everglades." Indeed, the SFWMD asserted that "the effects of the flood control portion of the Hendry County Project are inconsequential in comparison with the environmental benefits that will be associated with these three restoration projects."[12]

The Miccosukee were not so sure, and they worked with the SFWMD on a memorandum of agreement assuring that Miccosukee interests would not be harmed. This memorandum was concluded in May 1987. According to its provisions, the tribe agreed to withdraw its objection to the Modified Hendry County Plan and to develop a water rights compact and a tribal water resources department in exchange for certain concessions from the SFWMD. These included the monitoring of discharges into Conservation Area No. 3A and on tribal land for pesticides, and the development of a monitoring program for water quality. As part of this plan, the SFWMD would make quarterly water quality reports to the tribe, and it would develop "nutrient standards" for 3A that would prevent "excessive nutrient enrichment." Likewise, if a proposed SFWMD project had the potential to impact "water quantity or quality" on the Miccosukee Reservation, the district would consult with the tribe.[13] The Miccosukee Business Council approved the memorandum of agreement on 11 May 1987, and began work on its compact soon after.[14]

In the late 1980s and early 1990s, the Seminole and Miccosukee became more concerned about water quality on their lands as the condition of Lake Okeechobee and the conservation areas worsened. In 1989, for example, the SFWMD issued an interim SWIM plan for Lake Okeechobee. This document noted that "in spite of intensified management efforts, . . . water quality conditions in Lake Okeechobee have not improved." Instead, they hit "the highest [phosphorous] levels yet recorded" in 1988. According to the report, the Surface Water Improvement and Management Act had mandated that phosphorous levels be lowered by 1992, and the SFWMD had developed a management strategy that emphasized controlling phosphorous inflows and implementing practices within sub-basins to reduce how much of the nutrient reached the lake, but, so far, no significant downturn in phosphorous had resulted. The SFWMD therefore proposed that "a more aggressive management approach" be used, part of



The Modified Hendry County Plan. (Source: U.S. Army Corps of Engineers, Jacksonville District.)

which included continuing to divert nutrient-rich water from the EAA to the conservation areas – where it would affect Seminole and Miccosukee land.[15]

Because of these diversions, it was not surprising when the SWIM plan for the Everglades (defined as Conservation Area Nos. 1, 2A, 2B, 3A, 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Everglades National Park) noted in 1992 that the discharge of water with high phosphorous levels into the conservation areas had "caused changes in existing vegetative species composition" that had the potential to "threaten fish and wildlife populations." Cattails and other non-native plants, such as melaleuca, had overrun sawgrass in several areas, the report declared. The diversion of water from the EAA to the conservation areas, it claimed, had brought an additional 45.4 metric tons of phosphorus per year. To combat these problems, the plan proposed, among other things, to create a Scientific Advisory Committee for the Everglades, with representation from various state, federal, and local agencies, including the Seminole and Miccosukee. The plan would develop strategies to protect and restore water quality in the Everglades. It also called for the implementation of STAs to cleanse the water, as well as monitoring programs and better regulation of landowner discharges.[16]

But the Miccosukee and Seminole believed more needed to be done to protect their interests. The Seminole were especially concerned about water quality on the Big Cypress and Brighton reservations. Under the authority of its water rights compact, the tribe had implemented a water quality monitoring program in 1989 that demonstrated that "the quality of water entering the [Big Cypress] reservation from upstream sources is severely degraded," exceeding phosphorous levels of 300 parts per billion (ppb).[17] The Seminole therefore received permission from the EPA to set its own water quality standards for its lands, and it began work on a water conservation plan for the Big Cypress Reservation, designed to "provide a comprehensive, fully integrated water management system" that could "support sustainable agriculture while contributing to the restoration of significant portions of the Everglades ecosystem."[18] As part of this plan, the tribe proposed to use surface water management structures to treat, control, and redirect water, and to implement BMPs in order to reduce nutrient levels, targeting 50 ppb as the accepted phosphorous level. In 1994, the Seminole completed the design phase of this plan, but more money was needed to implement it. In the meantime, the tribe discussed phosphorous levels in Lake Okeechobee with the SFWMD, including how they affected the Brighton Reservation (located to the northwest of the water body) since water from the lake was backpumped to the reservation.[19]

From 1993 to 1995, the SFWMD and the Seminole negotiated an agreement detailing water quality efforts for Big Cypress and Brighton. This accord attempted to define the sources of water for these reservations, as well as outline efforts to preserve water quality. The agreement delineated that the main source of water for the Big Cypress Reservation would be the Rotenberger Tract, and Lake Okeechobee would serve as a secondary source. The SFWMD would ensure that the design of STA-5 and -6 would, in the words of SFWMD General Counsel Barbara Markham, "effectuate deliveries from both primary and secondary sources," and it promised to conduct studies on water quality entering Big Cypress and Brighton reservations.[20] For its part, the tribe agreed to monitor the quality of water leaving the reservation, and it would also implement its Big Cypress water conservation plan as long as it could get the necessary funding.[21]

There were several objections to the agreement between the SFWMD and the Seminole. Both environmentalists and the Miccosukee were concerned that it required only that phosphorous concentrations not exceed 50 ppb in water both entering and leaving the reservation. Vida Verde, a non-profit organization dealing with social and environmental issues, stated that "water entering and leaving the Reservation should be below 50 ppb in phosphorous concentrations."[22] The association also objected to a provision in the agreement involving the Rotenberger Tract. The original design of STA-5, located in Hendry County and bordered by the L-3 canal on the west and the Rotenberger Tract on the east, contemplated taking water from C-139 and routing it through STA-5 to the Rotenberger Tract to allow for a more natural hydroperiod on the land. Water from C-139 could then be filtered to 50 ppb before entering Rotenberger, which would cleanse it further to 10 ppb before discharging it to Conservation Area No. 3A. Under the Seminole/SFWMD agreement, however, the Seminole could take water from the Rotenberger Tract, use it on their citrus plantations and ranches, and then discharge it with a phosphorous level of 50 ppb. In Vida Verde's view, this constituted "receiving clean water, polluting it and releasing it downstream."[23]

Aerial view of WCA 3. (Source: South Florida Water Management District.)

Likewise, the Miccosukee objected to the plan, insisting that their own interests would be harmed if the Seminole did not mandate that water have a lower phosphorous level than 50 ppb. "Both the Seminole's [*sic*] and the District has [*sic*] been advised that it is the Tribe's intention to set a numeric standard for [total phosphorous] of approximately 10 ppb," Miccosukee Water Resources Director Truman E. "Gene" Duncan, Jr., explained. "If the District executes the Draft Agreement, this action will be interpreted as a willful anticipatory violation of the Tribe's water quality standards."[24] SFWMD officials did not see the situation in the same light, especially since the Everglades Forever Act did not set an immediate limit on phosphorous, pending more

scientific research. “It is possible that phosphorous concentrations exceeding ten parts per billion (ppb) cause imbalances in Everglades’ flora and fauna,” Executive Director Samuel Poole III told Miccosukee Chairman Billy Cypress, “but we have not seen the scientific basis for this.” He also reassured Cypress that the SFWMD had “no intention of violating any applicable water quality standards,” including that of the Miccosukee.[25]

The problems that environmentalists and the Miccosukee articulated about the SFWMD/Seminole agreement spoke to the issues that both groups had with the Everglades Forever Act and its lack of a stringent phosphorous requirement. Whereas the Settlement Agreement had delineated 10 ppb as the appropriate criterion, the Everglades Forever Act had backed away from that figure, presumably at the bequest of the sugar industry and other agriculturists. Environmentalists and the Miccosukee used the scientific research of Ron Jones from Florida International University to show that any standard above 10 ppb would not effectively protect the Everglades. The Miccosukee were also concerned about the effects of the Everglades Construction Project – which would implement the structural features of the Everglades Forever Act, such as the STAs – on their water supply. The SFWMD insisted that STA-5 had to cleanse water only to 50 ppb, but the Miccosukee disagreed, stating that original conceptual design of STA-5 planned for a 10 ppb discharge.[26]

These differences convinced the Miccosukee that the state of Florida, through the SFWMD, had become misguided in its efforts to cleanse Everglades water, and that Miccosukee interests were at risk. The Miccosukee claimed that their reservation was being used as a “toilet” to collect phosphorous-laden farm water runoff. “Do you expect your neighbor to drink your garbage?” Miccosukee tribal chairman Billy Cypress asked. “We would not do that to anyone. We don’t want it done to us.”[27]

To protect its interests, the tribe decided to develop stringent water quality standards for its land, especially after the state of Florida’s Environmental Regulation Commission refused to look at the 10 ppb standard despite a petition from the Miccosukee and several environmental groups such as Friends of the Everglades. The Miccosukee thus requested authority from the EPA to set its own water quality standards, and the EPA granted permission in December 1994, giving the tribe “treatment as state” recognition under the Clean Water Act. Certain conditions existed, however. The standards had to apply only to those water resources that the Miccosukee actually held or that were held in trust for them by the federal government, and the tribe had to follow the same public participation regulations mandated by the EPA that states did. These included the publication of the proposed standards, public hearings on the criteria, and the opportunity for other groups to comment.[28]

Following these guidelines, the Miccosukee formulated their water quality standards. The stated purpose of these standards was not only to protect Miccosukee land, but also to ensure that water flowing into the conservation areas and Everglades National Park did not harm threatened and endangered species. Moreover, the tribe wanted to promote the social and economic well being of its members. Therefore, the tribe “vowed” that it would not “compromise” the health of its tribal members or of the Everglades ecosystem in setting its standards; instead, it would require that all water entering and leaving the reservation contain “a nutrient standard consistent with natural oligotrophic levels (including a total phosphorous limitation of 10 parts per billion of water),” oligotrophic meaning a low nutrient system. In enforcing these standards, the tribe

insisted that it would not let “adjacent water users” utilize its water or its “vegetative communities . . . as a biological filter.”[29]

When the Miccosukee held public hearings on these criteria in 1997, however, many objected to the stringent requirements. Although the Miccosukee considered them necessary in order to preserve the Everglades ecosystem, others disagreed, especially since the standards conflicted with the Everglades Forever Act, which had stipulated that 50 ppb would be used until the state developed a firm, numerically based criterion (which did not have to happen until 2003 and which did not have to be implemented until 2006). The Florida Sugar Cane League, for example, stated that the Miccosukee should wait to implement the 10 ppb standard until after the state had completed its scientific research on phosphorous loads.[30] Likewise, SFWMD official Frank Williamson, Jr., explained that the district’s “most significant concern” with the Miccosukee’s proposal was its “potential conflict” with both the Everglades Forever Act and the Settlement Agreement in *United States of America, et al. v. South Florida Water Management District, et al.* “If adopted,” Williamson noted, the Miccosukee standards “would arguably establish a 10 ppb total phosphorous standard immediately.” Williamson explained that this did not take into account “the needs and thresholds of the Everglades” and “the physical realities of water management within South Florida.” In addition, he continued, the tribe was proposing only phosphorous limits “without providing a blueprint for improving water quality,” and it had failed to produce any scientific analysis or data supporting its 10 ppb standard. The requirements in the Everglades Forever Act were in the general public’s best interest, Williamson concluded, while the tribe’s standards only benefited the Miccosukee.[31] In response, the Miccosukee declared that the law did not govern the tribe’s federal reservation lands.[32]

Another problem that the SFWMD had with the Miccosukee’s standards was that they did not conform to those developed by the Seminole Tribe. The Seminole’s standards proposed phosphorous levels of only 50 ppb, keeping them in conformity with the Everglades Forever Act. The SFWMD foresaw difficulties if the Miccosukee adopted the 10 ppb rule, since this would mean that two different standards would exist for “the same water body,” causing “unreasonable consequences” and “social and economic disruption.”[33] In response to this concern, the EPA reminded the SFWMD that it had a dispute resolution mechanism in place that could “mediate disputes where the difference in water quality standards results in unreasonable consequences.”[34]

Meanwhile, environmentalists applauded the Miccosukee’s efforts. Joette Lorion, president of Friends of the Everglades and a Miccosukee consultant, stated that the tribe’s action was necessary because “right now, state enforcement officers are like the Maytag repairman: They have nothing to do until Dec. 31, 2006.” Charles Lee, senior vice president of the Florida Audubon Society, agreed, claiming that the sugar industry’s “game plan” was to “prevent” the 10 ppb standard “from ever being set.” The Miccosukee’s water quality proposal, however, would make it more difficult for the industry to carry out its strategy. “We’re tired of waiting,” Miccosukee Water Resources Director Gene Duncan explained. “Broken promises – that’s the history of the Indians and the Everglades.”[35]

Accordingly, despite the concerns expressed by the SFWMD and others, the Miccosukee adopted its 10 ppb standard in December 1997 and submitted it to the EPA for approval.[36] The tribe also explained that it would determine whether water met the 10 ppb standard by measuring phosphorous content at five different locations: in the L-28 Interceptor Canal on the tribe’s

western boundary, in the L-28 Interceptor Canal at its dogleg (where water was discharged into the Gap Area), at a site in the C-60 Canal east of the S-140 pump station (measuring water emptying into the North Grass and South Grass areas), at the northeastern corner of the Alligator Alley Reservation in the North Grass region, and in the western portion of the Gap Area.[37]

Although the EPA usually had to approve water quality standards within 60 days, it took the agency two years before it issued a decision on the tribe's request. Some speculated that the reason for this was that the Miccosukee was the first entity – state or otherwise – to set a numeric criterion for phosphorous and it took considerable time for EPA personnel to wade through the stacks of scientific literature on the subject. Finally, in May 1999, the EPA approved the Miccosukee's water quality standards, a significant victory for both the tribe and environmentalists. The EPA called the criteria "a significant step forward in protecting the health of the Everglades"; EPA Administrator Carol Browner, former secretary of Florida's Department of Environmental Protection, lauded the "tough standards," seeing them as a way to "protect and restore this national treasure [the Everglades] for future generations."[38] According to an article in *Time* magazine, the standards meant that "everyone" around the Miccosukee would have to meet the same criteria, even "sugar companies, which argue that they don't have the technology to comply."[39] The EPA agreed. Regional Administrator John Hankinson explained that the EPA's review provided "a strong foundation for developing future water quality standards and the technology necessary to meet those standards."[40] But the state continued its own scientific studies of phosphorous, unwilling to accept the 10 ppb without further review.

The Miccosukee also began pursuing means to end the Special Use Permit relationship with Everglades National Park for the 333 acres on the park's northern border. The catalyst for this action was Everglades National Park Superintendent Richard Ring's objections to the

The S-140 pumping station. (Source: South Florida Water Management District.)

construction of houses in the Special Use area. In order to resolve the matter, the Miccosukee worked with Florida's congressional delegation – including Alcee Hastings and Carrie Meek – to pass legislation ending the Special Use relationship. In 1998, Congress enacted the Miccosukee Reserved Area (MRA) Act that terminated the Special Use Permit, expanded the area to approximately 660 acres, and granted the Miccosukee the right to govern the land "as though the MRA were a Federal Indian reservation."[41] After the passage of the act, the Miccosukee began developing water quality standards for that area as well, which, because of its location, affected Everglades National Park. The tribe essentially applied the same 10 ppb numeric criterion to the region as it did to its reserved lands, and the EPA approved this action in October 1999.[42]

Meanwhile, the Miccosukee employed another tactic in its fight to preserve the Everglades ecosystem: litigation. Throughout the 1990s, the tribe sued several federal and state agencies for many different reasons. In 1995, for example, the tribe filed a lawsuit, ultimately unsuccessful, against the U.S. Department of the Interior, the Corps of Engineers, and the SFWMD because of flooding on their land in 1994 and 1995 caused by Tropical Storm Gordon. The Miccosukee claimed that the Corps and the SFWMD did nothing to alleviate the flooding because of NPS opposition to receiving more water.[43] Other Miccosukee lawsuits included one in 1999 alleging that deviations from Conservation Area No. 3A's regulation schedule by the Corps and the SFWMD (done at the request of the National Park Service to preserve the endangered cape sable seaside sparrow) violated the Endangered Species Act by threatening the wood stork and the snail kite in 3A.[44]

Perhaps the most prominent Miccosukee litigation, however, dealt with water quality standards under the Everglades Forever Act. As explained above, in 1994, the tribe had joined other petitioners to request that the Florida Department of Environmental Protection establish a numeric water quality standard of 10 ppb. The department rejected the petition, but the state's Fourth District Court of Appeals reversed that decision (*Miccosukee Tribe v. Florida Department of Environmental Protection*), ruling that only Florida's Environmental Regulation Commission had the authority to either accept or reject the petition. The Environmental Regulation Commission decided that it would review the standards at some undesignated point, and the court subsequently found that this meant that the state was working as expeditiously as possible under provisions of the Everglades Forever Act. Only the Florida legislature, the court ruled, could hasten the timeline.[45]

At the same time, the Miccosukee sued the U.S. Department of the Interior, requesting that the U.S. District Court for the Southern District of Florida require the enforcement of the 1991 Settlement Agreement and 1992 Consent Decree. The genesis for this action was a 1994 settlement between the U.S. Department of the Interior and Flo-Sun Sugar Company, whereby the corporation agreed to pay $4 to $6 million a year in Everglades clean-up costs in exchange for the Interior Department not enforcing phosphorous standards until 2008. The Miccosukee objected to this arrangement, saying that it was opposed to "government attempts to substitute less stringent provisions of the Everglades Forever Act for those of the Settlement and Consent Decree."[46] The compromise between the Interior Department and Flo-Sun merely delayed the implementation of strict phosphorous standards to the detriment of the ecosystem. "Delay is the enemy of the Everglades," Cypress related. "The Miccosukee Tribe will not accept delay."[47] Dexter Lehtinen was even more forceful, claiming that the federal government, through its

concurrence with the Everglades Forever Act, had authorized not only the continued pollution of the Everglades, but had also "polluted the democratic process." Lehtinen vowed that "the Miccosukee Tribe will not allow their Everglades homeland to be sacrificed on the altar of political expediency."[48]

The Miccosukee continued its assault by filing an action against the EPA as well, charging that the Everglades Forever Act had changed Florida's water quality standard and that the EPA therefore had the responsibility to either approve or reject the changes, as stipulated by the Clean Water Act. According to one observer, the tribe claimed that, under the Everglades Forever Act, the state was allowing water with high levels of phosphorous to flow across South Florida, causing "an imbalance in the natural aquatic flora and fauna through 2006."[49] After representatives of the EPA testified that the presence of polluted waters did not necessarily mean that water quality standards had changed, the U.S. District Court for the Southern District of Florida rejected the tribe's claim. The tribe appealed the ruling, leading the Eleventh Circuit Court of Appeals to remand the case back to the district court, instructing it to decide independently whether water quality standards had been altered. After its review, the district court ruled that a change had been made, and it instructed the EPA to take action. The EPA again stated that the act did not alter the standards, claiming, according to one legal scholar, that "it did not change any designated uses of downstream waters" and that "it did not change anti-degradation policy."[50]

A Miccosukee Indian village. (Source: U.S. Army Corps of Engineers, Jacksonville District.)

In 1998, after conducting a judicial review of the EPA's decision under the Administrative Procedure Act, Judge Edward B. Davis of the district court overturned the EPA's decision as "arbitrary and capricious."[51] According to Davis, the Everglades Forever Act did not establish a legitimate compliance schedule as required by the Clean Water Act, and, because no numerical criterion had to be in place until 2006, the EPA was effectively allowing violations of state water quality standards by agricultural interests until that time. Therefore, Davis ordered the EPA to view the Everglades Forever Act as violating Florida's water quality standards. This seemed to be a significant ruling in favor of the Miccosukee, but the EPA stated that it would have to carefully analyze the decision before taking any action.[52] According to scholar William Rodgers, whatever the outcome, the case "had the collateral benefit of drawing EPA – the 'expert' water quality agency – into the South Florida water wars."[53]

Throughout the 1990s, then, the Miccosukee and the Seminole worked to protect the interests of their reservations and their interest in the Everglades – an area where they had resided for many decades. This fight focused on water quality, especially in relation to phosphorous concentrations. Although the Seminole generally used conciliatory methods to achieve their objectives – formulating water quality standards in conformance with the Everglades Forever Act, establishing a water conservation plan for Big Cypress Reservation in collaboration with several state and federal agencies – the Miccosukee took the opposite approach. Believing that the desire to achieve consensus was sacrificing its interests, the Miccosukee implemented water quality standards significantly more stringent than those set up by the Everglades Forever Act and sued federal and state entities over both water quality and quantity. Although these suits deepened conflicts with the SFWMD, the Corps, the EPA, the NPS – in short, almost every entity with a stake in water resource management – the Miccosukee regarded them as necessary to preserve the Everglades ecosystem. "The Everglades are dying," Buffalo Tiger declared. "The land cannot recover from this."[54] Besides, according to Gene Duncan, the "only time" the Miccosukee could "get anyone's attention is when we're in court."[55] If nothing else, the lawsuits focused attention in the late 1990s on the importance of lowering phosphorous concentrations to 10 ppb and made state and federal agencies take both tribes more seriously in water management decisions. As environmentalist Nathaniel Reed observed, the Seminole and the Miccosukee now had "a large say in how the Everglades is restored."[56]

Chapter Fifteen Endnotes

[1] Billy Cypress, Chairman, Miccosukee Tribe of Indians of Florida, to Honorable Harry A. Johnston, Member of Congress, 9 July 1993, File Everglades Mediation Miccosukee, Box 19706, SFWMDAR.

[2] Robert H. Keller and Michael F. Turek, *American Indians & National Parks* (Tucson: The University of Arizona Press, 1998), 230; Parker Thomson to The Honorable Reubin O'D. Askew, Governor, 14 April 1977, File Conservation Area 3, Miccosukee Tribe, 1966-78, Re: Declaration of Trust, Box 02194, SFWMDAR. This license was later amended to become a perpetual lease.

[3] Harry A. Kersey, "Introduction," in Buffalo Tiger and Harry A. Kersey, Jr., *Buffalo Tiger: A Life in the Everglades* (Lincoln: University of Nebraska Press, 2002), 2.

[4] Buffalo Tiger and Kersey, *Buffalo Tiger*, 126.

[5] Joel Kuperberg to Hugh McMillan, 15 November 1973, File Re Seminole Tribe, Trustees Correspondence, State Lands Records Vault, Division of State Lands, Florida Department of Environmental Protection, Marjory Stoneman Douglas Building, Tallahassee, Florida.

[6] R. L. Clark, Jr., Chairman, to The Honorable Reubin O'D. Askew, 7 January 1974, File Re Seminole Tribe, Trustees Correspondence, State Lands Records Vault, Division of State Lands, Florida Department of Environmental Protection, Marjory Stoneman Douglas Building, Tallahassee, Florida.

[7] Kersey, "The East Big Cypress Case, 1948-1987," 466-474.

[8] Kersey, "The East Big Cypress Case," 474.

[9] Hobbs, Straus, Dean & Wilder to The Honorable Sidney R. Yates, Chairman, Subcommittee on Interior, House Committee on Appropriations, 9 March 1989, File Miccosukee Campground Project, Box 19707, SFWMDAR.

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[11] Quotation in Seminole Indian Land Claims Settlement Act of 1987 (101 Stat. 1556). For more information on the Seminole water rights compact, see Jim Shore and Jerry C. Straus, "The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987," *Journal of Land Use and Environmental Law* 6 (Winter 1990): 1-24.

[12] "Summary Information on the Modified Hendry County Plan," File Memorandum of Agreement, Miccosukee Tribe, Box 19707, SFWMDAR.

[13] "Memorandum of Agreement between the Miccosukee Tribe of Indians of Florida and the South Florida Water Management District," attachment to Miccosukee Tribe of Indians of Florida, Business Council Resolution No. MBC-27-87, File Memorandum of Agreement, Miccosukee Tribe, Box 19707, SFWMDAR.

[14] Miccosukee Tribe of Indians of Florida, Business Council Resolution No. MBC-38-88, File Indian Affairs Miccosukee Research 94, Box 22792, SFWMDAR.

[15] South Florida Water Management District, *Interim Surface Water Improvement and Management (SWIM) Plan for Lake Okeechobee, Part 1: Water Quality & Part VII: Public Information* (West Palm Beach, Fla.: South Florida Water Management District, 1989), Executive Summary – 1-2, 7-8.

[16] South Florida Water Management District, *Surface Water Improvement and Management Plan for the Everglades: Planning Document* (West Palm Beach, Fla.: South Florida Water Management District, 1992), 5, 10-14, 36, 40.

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[20] Barbara A. Markham, General Counsel, to Governing Board Members, 30 June 1995, File Micco WQ Standards, Box 19706, SFWMDAR.

[21] Draft Agreement Between the South Florida Water Management District and the Seminole Tribe of Florida Providing for Water Quality, Water Supply and Flood Control Plans for the Big Cypress Seminole Indian Reservation and the Brighton Seminole Indian Reservation, Implementing Sections V.C. and VI.D of the Water Rights Compact, 26 June 1995, ibid.

[22] Phillip C. Garcia, President, and Shannon Larsen, Acting Secretary-Treasurer, to Valerie Boyd, et al., 8 December 1995, unlabeled file, Box 22792, SFWMDAR (emphasis in the original).

[23] Garcia and Larsen to Boyd, 8 December 1995.

[24] Truman E. Duncan, Jr., Water Resources Director, to Mr. Sam Poole, III, Executive Director, South Florida Water Management District, 25 September 1995, unlabeled file, Box 22792, SFWMDAR.

[25] Samuel E. Poole III, Executive Director, South Florida Water Management District, to Billy Cypress, Chairman, Miccosukee Tribe of Indians of Florida, 11 August 1995, File Micco WQ Standards, Box 19706, SFWMDAR.

[26] Duncan to Poole, 25 September 1995; see also Joette Lorion interview by Matthew Godfrey, 18 January 2006, 5 [hereafter referred to as Lorion interview].

[27] As quoted in "Indians Seek to Have Say in Everglades Suit," *The Miami Herald*, 28 March 1993.

[28] Elizabeth D. Ross to Distribution List, 4 September 1996, File Indian Affairs, Seminole Water Quality Standard Research 94-98, Box 22792, SFWMDAR; Lorion interview, 5; Rodgers, "The Miccosukee Indians and Environmental Law," 10926.

[29] "Miccosukee Environmental Protection Code Subtitle B: Water Quality Standards for Surface Waters of the Miccosukee Tribe of Indians of Florida" [hereafter referred to as Miccosukee Water Quality Standards], File Micco WQ Standards, Box 19706, SFWMDAR.

[30] "March 21, 1997 Summary of Comments Submitted by Interested Parties Concerning Micosukee Tribe's Proposed WQS," File Miccosukee WQ Standards, 1997-98, Box 19706, SFWMDAR.

[31] Frank Williamson, Jr., to Secretary Murley, Florida State Clearinghouse, Department of Community Affairs, 13 October 1997, File Micco WQ Standards, Box 19706, SFWMDAR.

[32] Miccosukee Tribe's Proposed Water Quality Standards (WQS)," File Miccosukee WQ Standards, 1997-98, Box 19706, SFWMDAR.

[33] Quotation in Williamson to Murley, 13 October 1997; see also Seminole Water Commission, Seminole Tribe of Florida, "Proposed Rules: Water Quality Protection and Restoration: Rules to Carry Out the Federal Clean Water Act and the Tribal Water Code, Including Water Quality Standards for the Big Cypress Reservation," File Indian Affairs, Seminole Water Quality Standard Research 94-98, Box 22792, SFWMDAR.

[34] Robert F. McGhee, Director, Water Management Division, United States Environmental Protection Agency, to Mr. Frank Williamson, Jr., Chairman, Governing Board, South Florida Water Management District, 17 November 1997, File Miccosukee WQ Standards, 1997-98, Box 19706, SFWMDAR.

[35] Lorion, Lee, and Duncan quotes all cited in Neil Santaniello, “Cleanup Pace Prompts Tribe to Take Hard Line,” *Sun-Sentinel*, 15 October 1997.

[36] Miccosukee Water Quality Standards. The Miccosukee Reserved Area had previously been called the Permit Area, but under the Miccosukee Reserved Area Act of 1998, Congress recognized the 667 acres that the tribe had leased from the state as “Indian country.” Rodgers, “The Miccosukee Indians and Environmental Law,” 10926-10927.

[37] “Methodology for Determination of Compliance with the 10 Parts Per Billion Numeric Criterion for Total Phosphorous,” 6 December 1998, Miccosukee WQ Standards, 1997-98, Box 19706, SFWMDAR.

[38] Quotations in “EPA Approves Tough Phosphorous Limit for Tribal Waters in Everglades,” U.S. Environmental Protection Agency Press Release, 26 May 1999 <http://www.epa.gov/Region4/oeapages/99press/052699.htm> (25 November 2003); see also Lorion interview, 5.

[39] Tim Padgett, “Last Stand,” *Time* 154 (5 July 1999): 61.

[40] As quoted in Light, “Miccosukee Wars in the Everglades,” 736.

[41] Act of 30 October 1998 (112 Stat. 2964).

[42] Lorion interview, 5-6.

[43] See Omnibus Order, *Miccosukee Tribe of Indians of Florida v. United States of America, et al.*, copy provided by James W. Vearil, Chief, Water Management Section, Met Section, Jacksonville District, U.S. Army Corps of Engineers; Rodgers, “The Miccosukee Indians and Environmental Law,” 10920.

[44] See Dexter W. Lehtinen, Esquire, for the Miccosukee Tribe of Indians, to Honorable Secretary Bruce Babbitt, U.S. Department of the Interior, 16 March 1998, File Miccosukee WQ Standards, 1997-98, Box 19706, SFWMDAR.

[45] Keith W. Rizzardi, “Alligators and Litigators: A Recent History of Everglades Regulation and Litigation,” *The Florida Bar Journal* 18 (March 2001): n.p. (copy provided by John D. Brady, principal assistant, Jacksonville District Office of Counsel, Jacksonville, Florida).

[46] Miccosukee Tribe of Indians of Florida, Press Release, 6 November 1995, File Everglades Mediation Miccosukee, Box 19706, SFWMDAR.

[47] As cited in Miccosukee Tribe of Indians of Florida, Press Release, 6 November 1995.

[48] As cited in Miccosukee Tribe of Indians of Florida, Press Release, 6 November 1995; see also “Tribe Sues U.S. Agency Over Cleanup,” unidentified newspaper clipping in File Everglades Mediation Miccosukee, Box 19706, SFWMDAR.

[49] Quotation in Rodgers, “The Miccosukee Indians and Environmental Law,” 10926; see also Light, “Miccosukee Wars in the Everglades,” 731.

[50] Quotations in Rizzardi, “Alligators and Litigators”; see also Light, “Miccosukee Wars in the Everglades,” 731-732.

[51] As cited in Rizzardi, “Alligators and Litigators.”

[52] Rizzardi, “Alligators and Litigators”; Light, “Miccosukee Wars in the Everglades,” 731-732.

[53] Rodgers, “The Miccosukee Indians and Environmental Law,” 10926.

[54] Buffalo Tiger and Kersey, *Buffalo Tiger*, 3.

[55] Unidentified transcript, File Everglades Mediation Miccosukee, Box 19706, SFWMDAR.

[56] Reed interview, 36.