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The Miccosukee Indians and Environmental Law: A Confederacy of Hope

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[31 ELR 10918]

"The Everglades is our mother, she is dying, and she is in the care of others who do not care."

—Billy Cypress, Chairman

Miccosukee Indian Tribe, July 31, 1993

"Their culture has survived because of an ability and will to endure and fight and hide in an inhospitable and trackless reach of swamp and marsh where heat and humidity, deer flies and mosquitos, and the tall, razor-edged sedge called sawgrass all became their formidable allies; it persists because of an unrelenting mistrust of the white man."

—Peter Matthiessen, 1979

Two legal orphans have found each other. The older one is "Indian Law," a confused, embarrassing, and twisted body of legal rules that "explain" the relationships between the United States and its native peoples. The newer one is "Environmental Law," a complex and jumbled stew of cases and statutes that "prescribe" proper behavior between modern Americans and the natural world. Both these children of the law are suspected of subversion—the one is tainted by advocates of separate sovereignties, the other by critics of the American way of life.

For Native Americans and environmentalists, their recent legal merger is a confederacy of hope and of opportunity and of revival—for the tribes themselves and for others in the world who want to save the parts of nature that are left.

The tribes are senior partners in this native-enviro confederacy. This Article examines what they bring to the alliance in the context of the efforts of the Miccosukee Tribe to preserve the Everglades.

A Key Geography

The Sierra Club can be found in South Florida, but it is a mere shadow compared to the Miccosukee and Seminole Indian Tribes. The physical action in this wet world is north to south, from the Kissimmee chain of lakes, then to Lake Okeechobee (Big Water to the natives) in the center of the state of Florida, then downhill. Majory Stoneman Douglas earned her fame by describing the incredible "River of Grass" (Grassy Waters or Pa-hay-okee to the Indians)—40 to 60 miles wide, one-inch deep, drifting slowly to the sea, known worldwide as "the Everglades."

Who is in the middle of this picture with one-third of the peninsula of Florida drifting down upon them? The Seminole and the Miccosukee. Their lands are fragmented, fractured, and qualified. But critical. The Miccosukee Tribe alone
has a 75,000-acre reservation in West Dade and Broward counties. The Tribe holds another 189,000 acres south of the reservation and north of Everglades National Park under "perpetual lease" from the state of Florida. It also possesses a critical 667 acres (formally called the Permit Area, now known as the Miccosukee Reserved Area, explicitly Indian Country). 5

The Miccosukee and Seminole thus live in the center of one of the world's unique environments. What a privilege.

They preceded and thus won recognition, acknowledgment, and protection under the Everglades National Park Act. 6

What a distinction. They use and touch and feel and enjoy a place so special it is called a World Heritage site. 7

What an honor. The Seminole and the Miccosukee are the only people who can call the Everglades their homelands.

With this special place comes a nurturing perspective.

[31 ELR 10919]

A Long View

"The land is a part of our body, and we are a part of the land."

—Buffalo Tiger, Miccosukee, 1979 8

"Indigenous People have ... the responsibility to take care of their Sacred Grounds."

—Bobbie C. Billie, Spiritual Leader

Independent Traditional Seminole Nation of Florida, 2000 9

Living in this treasured spot gives incentive to protect it. The Miccosukee have gone through the First Seminole War (where they met Andrew Jackson) and the Second Seminole War (where Zachary Taylor, Old Rough and Ready replaced Old Hickory) and the Third Seminole War. They have endured all means and manner of removal, obliteration, and nonrecognition. They have been visited by floods and fire and canals and real estate booms and the U.S. Army Corps of Engineers (the Corps). They have been touched just yesterday by the Florida Indian Land Claims Settlement Act of 1982 and the Miccosukee Settlement Act of 1997. 10

This is the stuff of long memories and longer views. This patient perspective is reflected in the Miccosukee flag—yellow, red, black, and white, four colors that represent "the circle of life—east, north, west, and south." The Miccosukee "view the whole universe spinning slowly in a circle," 11 symbolized by the placement of the four logs of their ceremonial fire—"what was, will be and will cease to be again."

A commitment to a single place through time is not found in the mainstream environmental laws. The Clean Water Act (CWA) says nothing of "Mother Earth," as the Clean Air Act is silent on the question of the "Seventh Generation." 12

To these advantages of a unique geography and a nurturing view must be added some character traits.

A Resolute Spirit

"Baffled the energetic efforts of our army to effect their subjugation and removal"

—Robert McClelland, Secretary

U.S Department of the Interior, 1855 13

Few groups remain unyielding in the eye of legal and political storms. For some reason, the South Florida Indians built their own tranquility. Perhaps it stems from their history of overcoming campaigns of extermination and removal. 14

This breeds confidence. The Seminole spell out "The Unconquered" on the front of their local high school. Perhaps it is due to the delay endured in securing recognition. The Seminole won a judgment in the U.S. Court of Claims in 1976.
acknowledging their original ownership. Land claims were not settled for years thereafter. The Miccosukee did not seek nor win recognition until 1962, long after the fact. This builds patience.

Perhaps it is the perpetual legal ambiguity they live with. The Miccosukee survived in the Everglades and Big Cypress without title or legal recognition for generations. They have been every version of a white man's trespasser, squatter, permittee, licensee, and invitee. Now they have a Miccosukee Reserved Area. This builds faith.

Perhaps it is the vulnerability of their position that makes them a peculiar target of law and lawyers. Like most Indian tribes, the Indians of South Florida grew up with law and litigation; it is as much a part of their being as the river of grass. One gets accustomed to living in a river of law. It builds immunity. It develops courage and toughness. The Indians of South Florida are no more fearful of lawsuits than they are of alligators.

Perhaps it is their successful resistance to divide-and-conquer campaigns and clever ploys to pit one Indian entity against another. This builds skepticism and a healthy caution against allowing others to define who you are.

This resolute spirit has served the Miccosukee well. Their adversaries in recent times have included the agricultural interests now residing to the north in the Everglades Agricultural Area. These land owners, in Billy Cypress' words, "use the land like the gold prospectors of old, and when the land is dead, move on." These are the people, says Dexter Lehtinen, Miccosukee attorney, "who receive special consideration in the councils of government and who cut special deals with government officials."

Few have stood up to big agriculture with the fervor, fury, and sophistication of the South Florida Indians.

To these advantages of a special place, a long view, and a fighting spirit, should be added a legal particular.

A Revived Trust

The Indian trust doctrine is an environmental law unique to the tribes. It obliges the United States to protect a tribe's natural resources and to stand with the tribes in defending their properties from degradation and decline. This idea that the United States steadfastly will help the tribes save their Everglades and fishing grounds and timberlands and flowing waters of course is too good to be true. But hope springs eternal in this promising field.

In January 2001, the U.S. Department of Justice (DOJ) joined with the northwest fishing tribes to protect their treaty fishing rights from road building and culverts that blocked the salmon streams (in the so-called Boldt II case). The late Joe De La Cruz, Quinault, saw the trust doctrine used to require recompense for reckless Bureau of Indian Affairs timber harvesting practices on his reservation. And the Pyramid Lake litigation shows that this trust law can be used to protect an Indian water and fish resources from off-reservation water withdrawals.

In 1983, the U.S. Supreme Court did grave damage to the Indian trust doctrine by ruling that the U.S. could simultaneously represent the Pyramid Lake Paiute Tribe and its chief competitor for the water (the planned Newlands Reclamation Project). The Miccosukee and the U.S. Attorney's office of South Florida showed one way to escape from this conflict-of-interest neutering of the trust doctrine that the Court had recommended. In the middle of the Everglades litigation, the U.S. lawyers, Dexter Lehtinen and Suzan Ponzoli, took the simple step of advising the Miccosukee Tribe: "We are not representing you in this lawsuit." Fair notice. It should be required in every case in which the United States might be working against the interest of an Indian tribe. The Miccosukee responded, "Thank you. We'll get our own lawyers." They did. One was Dean Suagee, an established expert on environmental law in Indian country. Suagee's firm (Hobbes, Straus, Dean & Walker) secured intervention for the Miccosukee Tribe in the ongoing federal lawsuit and made it possible for the tribe to insist on enforcement. Another was Dexter Lehtinen, who signed on with the tribe after departing from the U.S. Attorney's office. He has the well deserved reputation as one of the most effective and creative environmental litigators in the U.S. Lehtinen's nickname? "Machine Gun"—after a picture of him wielding the appropriate weapon during the celebrated Noriega drug trial in South Florida. The name fits, as the man peppers the landscape with protective environmental initiatives. Suddenly, the most spirited and determined litigant in defense of the Everglades had become the Miccosukee Tribe, not the U.S. nor the state of Florida nor the environmental groups.
The tribe does not rest in its attempts to breathe legal life into the Indian trust doctrine. In 1994, the flooding caused by Tropical Storm Gordon was "nearly catastrophic" for the Miccosukee and for the flora and fauna of the Everglades. Some 85% of the white-tailed deer herd was lost. Breeding habits of birds, alligators, and other wildlife were interrupted. The precious tree islands were flooded, preventing the traditional spring corn-planting ritual of the tribe.

The tribe wanted to cut vegetation and take other steps to facilitate water flow through their properties in the Everglades. The tribe went so far as to prove arrogance within the National Park Service (NPS). But the court said there was no duty to afford the tribe flood relief and no duty to cut vegetation and open water control structures. The court deferred to park managers on the best way to manage the park.

The book is not closed on these trust issues. The tribe has made strong arguments that the park should not be managed to the disadvantage of other parts of the Everglades (such as Water Conservation Area 3A). The tribe has questioned water management practices that are supposed to assist the Endangered Species Act-listed Cape Sable Seaside Sparrow.

In the latest law enacted by Congress to "save" the Everglades (December 2000), there is a promising sleeper buried deep within the statute. It is entitled "Trust responsibilities":

[31 ELR 10921]

In carrying out his responsibilities under this subsection with respect to the restoration of the South Florida ecosystem, the Secretary of the Interior shall fulfill his obligations to the Indian tribes in South Florida under the Indian trust doctrine as well as other applicable legal obligations.

It is not clear whether this revived trust doctrine can save the Everglades and protect its native inhabitants. But it is clear that the Indians of South Florida will be in a legal position to make the attempt.

To these advantages of place, perspective, disposition, and law, should be added—

An Uncompromised Sovereignty

Sovereign status "is the only real hope for the Indian."

—Tim Coulter, Potawatomi, 1979

Sovereignty is "the act thereof .... You are sovereign if you are able to be."

—Hon. Oren Lyons, Chief

Onandaga Nation, 2000

Tribal sovereignty is the key weapon in modern environmental conflict. It is robust and useful because it is exempt from political nullification by dominant institutions. The tribes stand outside political channels in ways government agencies cannot hope for. It is the agencies that are the environmental policymakers today. The players in South Florida are the Corps, the NPS, the U.S. Fish and Wildlife Service, the U.S. Environmental Protection Agency (EPA); on the state side are the South Florida Water Management District (SFWMD), the Florida Department of Environmental Protection (DEP), and Florida Fish and Wildlife Conservation Commission, to mention a few. But all these entities are mere battalions in the larger armies of federal and state governments. They will desert the field and steal away if that is the desire of high political authority. One word from above and the game is over—wonderful scientists retired, extraordinary engineers reassigned, feisty lawyers silenced.

In theory, the citizen suit provisions of the environmental laws introduce a new "third force" into the traditional partnership of government and industry. In practice, environmental groups do enjoy certain powers of initiation. They can start trouble and keep it going. But when the dominant governments—state or federal—want to "settle" and make the problem go away, it is difficult for citizens to stand against them. Even groups with the necessary spirit, gumption and resources have legal obstacles to overcome if they resist settlements and compromises. Environmentalists are nine parts dead when governmental enforcers throw in the towel.
This means that the true "third force" in environmental law today is the Indian tribes. No better example can be found than the efforts of the Miccosukee who have worked to save the Everglades in their several legal roles as *intervenors, settlers, regulators*, and *enforcers*.

This requires a short elaboration of the circumstances of the Everglades.

The federal government that is going to save the Everglades today ruined it a half century ago. In the briefest of outline, Congress in 1946 authorized the Central and South Florida Project with a major purpose of creating the Everglades Agricultural Area (EAA) south of Lake Okeechobee and adjoining the Loxahatchee National Wildlife Refuge. Thus it was, says DeWitt John, that over 700,000 acres, an area "almost the size" of Rhode Island, was "drained and levied." "Gigantic pumps" were built to pump irrigation water into the EAA from Lake Okeechobee "during the dry season and droughts" and "to move water out of the EAA during the rainy season after torrential summer thunderstorms." The water was diverted either north, into the lake, or south into the "Water Conservation Areas and canals that eventually lead to Miccosukee lands, the National Park and the Atlantic Ocean."36

The plumbing left behind by the Central and South Florida Project is awesome. Lake Okeechobee (Big Water) is invisible from the ground level—hidden behind massive levees; this second largest freshwater lake in the United States (750 square miles or so) sits in a teacup built by the Corps; the St. Lucie Canal that swings off to the east is like a massive manmade river. Altogether, there are 6 major canals leading away from Lake Okeechobee, with 1,400 miles of smaller canals and levees—spreader canals, extension canals, replete with sundry pumps, diversions, and control points.37

The environmental damage from this enterprise was equally awesome and was not slow to materialize. In a few decades the Corps and its cohorts interrupted the Everglades' overland flow patterns, redistributed the water, and introduced gigantic sources of nutrients (from sugar cane and vegetable farming in the EAA). The Everglades system itself has shrunk by 50% (from an area roughly 40 miles wide and 100 miles long), one-fourth of it turned over to agriculture; sawgrass marsh has surrendered to cattails (30,000 acres); the South Florida Bay is dying, coral reefs and fishing off the Florida keys in great jeopardy; to the north the Loxahatchee Wildlife Refuge limps along, a supplicant [31 ELR 10922] alternatively asking for more water or to be spared from flooding; wading birds are down 90% in the last 50 years. Everywhere are signs of decay and decline.

_Miccosukee as Eager Intervenors_

"At current rates of loss, it is estimated that farming can continue [in the Everglades Agricultural Area] for another 20 years."

—C. S. "Buzz" Holling

University of Florida, 199538

This sorry condition begged for a fix and the fix took the form of the "Everglades lawsuit" that is one of the most creative contributions in the history of modern environmental law.39 This lawsuit was filed on Oct. 11, 1988. It is known as "Dexter Lehtinen's lawsuit." Lehtinen was then the U.S. Attorney for the Southern District of Florida.

This lawsuit was brilliantly conceived. It was brought on behalf of the Everglades National Park and the Arthur R. Marshall Loxahatchee National Wildlife Refuge. It included as defendants the SFWMD and the Florida Department of Environmental Regulation (DER; now DEP). Its theory was simple and unarguable—what lawyers generally describe as a nuisance theory. The basic claim was that Florida failed to enforce its own water quality standards, particularly the narrative standard for high quality waters that required "propagation and maintenance of a healthy, well-balanced population of fish and wildlife."40 This enabled the Lehtinen litigation team to focus on the nutrient inflows as the keystone pollutant that had transformed the Everglades for the worse.

Before handing his case off safely to the Miccosukee, Lehtinen had to defend it twice against improvident settlements. The pressures for hasty settlements are enormous in high-stakes environmental litigation. The Everglades "problem" has been "settled" more often than the Arab-Israeli conflict. Why? The Everglades dispute offers high notoriety, enduring fame, and self-satisfaction to any public figure who can lay claim to solving it. Its complexities, long time
frames, and slow feedback gives every politician and the lawyers that serve them the win-win mythology they prefer: "We can have big agriculture and water and the Everglades if you stick with me for the next ten years." 

The 1991 Everglades Protection Act

Dexter Lehtinen's improvisation was the direct spark for a Florida statute that became known as the Marjory Stoneman Douglas Everglades Protection Act of 1991. In the fall elections of 1990, Democrat Lawton Chiles defeated incumbent Republican Robert Martinez in a campaign that featured Chiles' criticism of millions of dollars spent by the SFWMD on Washington, D.C., lawyers in futile defense of Lehtinen's pollution lawsuit. Chiles and his new staffers (which included Carol Browner) were primed for settlement when they walked into federal court with their attorneys to ask for a year's continuance to work out a deal. Lehtinen opposed the continuance by raising a glass of water as he addressed the court: "I haven't heard anything in court today saying that the water is any better than it was six months ago…. Why won't they stand at this podium and say that this water is dirty?" Sitting in the courtroom, Chiles rose to the bait, and announced his "surrender." "I've brought my sword," he said, "I want to find out who I can give my sword to." 

Chiles had surprised all the lawyers, mostly his own. He had put Lehtinen's federal lawsuit on a fast track that would lead to a settlement. The state legislature acted first. With input from the sugar industry and environmentalists, it enacted the Marjory Stoneman Douglas Act in 1991. This marked a tentative first step in a long campaign to save the Everglades. This law validated parts of Lehtinen's lawsuit (by requiring permits for back-pumping of phosphorus-polluted waters into the canals and new rules on farmland discharges) and took steps to authorize the SFWMD to condemn farmlands and raise funds to construct artificial wetlands (called Stormwater Treatment Areas (STAs)) that would be part of the remedy in Lehtinen's case. But the Act bought into an expensive buy-back policy for the sugar industry (which must have been particularly ironic to the Miccosukee, who had faced removal by all means other than buy-back), touched gingerly the permitting issue (authorizing a "single master permit" that industry usually prefers), barely addressed the question of who pays (while insisting with exactitude that polluters not be overassessed), and said not a word about restoring essential flows through the Everglades. Marjory Stoneman Douglas, age 103, showed up for the signing ceremony of the law that bore her name. But she withheld her praise.

1992 Settlement of Lehtinen's Case

Innovative as it was, Dexter Lehtinen's initial lawsuit had bruised feelings within the federal establishment. In the DOJ, some thought Lehtinen had "trapped" the United States into filing the lawsuit—by leaving his superiors out of the loop, by soliciting quick intervention by environmental groups, and by choosing a filing date (Oct. 11, 1988) just before the election that would preclude the United States from pulling out. (Recall George Bush's Boston Harbor pollution ads that were used in the campaign against Michael Dukakis?) Also, the Lehtinen lawsuit proved to be a bully pulp for critics of conditions in the Everglades; Mike Finley, Superintendent of the Everglades National Park, and Burkett Neely, manager of the Loxahatchee National Wildlife Refuge, the Lehtinen "clients," were visible and effective proponents of an Everglades policy that urged radical changes.

The principal promoter of the Everglades settlement was Richard Stewart, who arrived on the scene in August 1989 as assistant attorney general in the Bush Administration. Stewart had been a lawyer at Covington & Burling in Washington, D.C., and earned his stripes as an expert in "environmental law" by representing the copper smelters, the worst single sources of air pollution in the nation. He later taught environmental law, first at Harvard, more recently at New York University, and is an important figure in the field.

Stewart and Lehtinen are like night and day. Stewart is pompous, well organized, and conniving. Lehtinen is down-to-earth, frantic, and candid. Stewart bores while Lehtinen sparkles. Stewart preaches efficiency while Lehtinen is after justice. Lehtinen later said of this famous Everglades lawsuit, with condescension he is capable of, that "Lehtinen had not thought through what he wanted." This sums up the differences in the men. Asking Lehtinen to "think through" his lawsuit is like asking George Patton to "think through" the consequences of the invasion at Normandy. Lehtinen was starting a war to clean up the Everglades and his lawsuit was the beachhead. Stewart's version of litigation is not about revolution; it is about incremental and limited change.

True to character, Stewart's major contribution to the lawsuit was to "get the federal family together," which took the form of unified comments on the Surface Water Improvement Management Plan (SWIM Plan) being developed for South Florida by the SFWMD. Stewart is good at what he does. These comments tell the cause-effect story of the
Everglades' decline in a convincing way. They presaged the settlement of Lehtinen's case that was approved by Judge Hoeveler on Feb. 24, 1992. This settlement was another small but tangible step toward restoration of the Everglades. It obligated the SFWMD to purchase, design, and construct STAs covering 34,700 acres. It required the state to establish and enforce an "Everglades Agricultural Area Regulatory Program," imposing best management practices to reduce total phosphorus loads from the Everglades Agricultural Area to the STAs. It put numbers on the arrangements, calling for "interim concentration limits" of 50 parts per billion (ppb) for phosphorus to be attained by July 1, 1997, and for unspecified "long-term concentration limits" to be attained by July 2, 2002. It set up a research and monitoring program to determine the long-term limit (thought to be 10 ppb) that would protect the Everglades. It acknowledged the Miccosukee and Seminole Indian Tribes—by saying that their lands should not be used for the stormwater treatment without their consent.

But there was much this settlement could not do. The arrangement was really a glorified variance, announcing that "waters delivered to the Park and the Refuge [must] achieve state water quality standards, including Class III standards, by July 1, 2002." It was nice to have cleaner phosphorus numbers on promised future water deliveries but Lehtinen had begun his case in 1988 by reciting a 1979 memorandum of agreement (MOA) assuring the delivery of high quality waters to the park. The MOA depended upon heroic actions by state authorities whose heroism was not in evidence. It compelled hard judgments on compliance and violations and used gross averaging (annual flow-weighted concentration limit) that is notorious for masking departures from the norm. This settlement raised no taxes and closed no polluters. It restored no flows and did not go beyond treating the park and the refuge as the unfortunate victims of pollution.

But as Lehtinen well knew, the chief weakness in the settlement of his case stemmed not from the legal documents but from the pusillanimity of the federal establishment. The DOJ is notorious for forgetting its own settlement agreements, as employees come and go, as elections pass, as priorities drift out of focus. If the federal government would not enforce its own decree, the Miccosukee would. The legal steps that made this possible included formal intervention by the tribe in the principal case (approved by the court on Jan. 24, 1992) and the development of a memorandum of understanding between the tribe and the federal agencies allowing the tribe to enforce the settlement. Reinforcements arrived when the Miccosukee searched out and found a lawyer who did not fear enforcement—his name was Dexter Lehtinen, who had left the U.S. Attorney's Office late in 1992. Since joining forces in late 1992, this Lehtinen-Miccosukee legal team has done more to save the Everglades than the phalanx of celebrated authorities that crowd the field.

By mid-1993, the ubiquitous Mr. Lehtinen, now speaking as general counsel for the Miccosukee Tribe, was quick to point out that the much-heralded federal agreement was in danger of becoming an ancient and forgotten history. "For example," Lehtinen said, "the required new research to aid in establishing final numerical water quality standards has not even begun (a violation of the settlement). The 'final numerical standard' is the standard to be reached under the settlement by the year 2002, sufficient to preserve and protect the Everglades." This was the "only standard that really counts," Lehtinen added, and it was known to be 10 ppb compared to the 50 ppb that was the "interim standard" to be reached in the federal settlement by 1997 and the 150-250 ppb discharged for years into the Everglades by the SFWMD structures.

In 1995, the tribe went to court to enforce the federal settlement, over objections that earlier deadlines and commitments had been displaced by more recent events. This case has been delayed and delayed again, as the parties argue that this or that new development excuses revisiting of the original agreement. The judge is hoping it will go away. Fortunately, the case sits there as a big tribal reminder of the value of agreements with the federal government. (The Miccosukee Tribe presented evidence and the court heard argument on this case as recently as April 2001.)

Miccosukee as Reluctant Settler

"Everglades Settlement is myth, but it should not be a hoax."

—Alfred R. Light, Professor of Law

St. Thomas University School of Law, 1998
The Marjory Stoneman Douglas Act in 1991 and the settlement of Lehtinen's case in 1992 did not come close to saving the Everglades or sending the parties home happy. In the next phase, the Miccosukee's fierce independence assured they would become no part of empty settlement number three.

Conspicuously missing from the resolution of Lehtinen's case was participation by big sugar. This was an omission noticeable to the Clinton Administration that took office early in 1993 vowing to bring "consensus" and "collaborative" decisionmaking to relieve the pain of environmental conflict. ("Collaborative" decisionmaking in Secretary of the Interior Bruce Babbitt's parlance is directly opposed to the "train wreck" of no-holds-barred litigation—a term he used often to describe the spotted-owl lawsuits in the Pacific Northwest; Lehtinen was of the "train wreck" school in Babbitt's mind, and perhaps he did not know that the sugar people were competent "train wreckers" themselves.) The Miccosukee point out that in 1992 the sugar industry filed three dozen lawsuits challenging every aspect of Everglades' restoration and settlement.56

The choice for squeezing "collaborative" decisions out of the sugar industry was Gerald Cormick, Seattle mediator par excellence and leader of the school of alternative dispute resolution. Cormick saw an opportunity (none of the principals thought the federal settlement was the last word) and used his considerable social skills to get the parties to surrender contested ground. One especially clever move—remember, Cormick has been down this path many times—was to separate the players into "policy" and "scientific" forums. The "policy" group was all talk and pretense. No progress guaranteed. The "scientific group" was all data and laptops and hypotheses. Progress assured. Curious scientific theories, buoyed by industry advocacy, have a way of melting down in a group of strong scientists.

Great mediators are masters at using currencies that are valued differently by the parties. The "threat of litigation" was a valuable currency that the sugar people could print for themselves. They made "war" in the courts, contesting the federal settlement, trying to get Lehtinen removed from the case, challenging the district's cleanup actions "while under the coercive influence of Federal court litigation."57 One of the lawyers for the Sugar Cane Growers of Florida actually had the chutzpah to propose to Carol Browner (then head of the DER, soon to become Clinton's EPA Administrator) that she desist from attempts to regulate big sugar—in return for which the industry would stay its many lawsuits.58 These industry lawyers that strutted on the stage of the Everglades were of the "scorched earth" school—sweeping discovery requests, depositions without end, flashy cars and big fees,59 aggressive to the nth degree.

What value does litigation bombast of this type have in a mediation before somebody like Gerald Cormick? Some [31 ELR 10925] value to the industry that has sunk costs in this strategy and still hopes to snare a friendly decision or two that could be leveraged in the bigger picture. A great deal of value to state and federal policymakers for whom conflict is anathema and "cooperation" a treasured end. They will pay dearly to make litigation go away. Next to no value for somebody like Dexter Lehtinen and the Miccosukee Tribe who are unimpressed by legal posturing and focused on substantive relief for the Everglades.

Another great currency industry brings to the table is money. The more it is and the better it compares to historical figures the more impressive the impact. Cormick did in Florida what he has done in many other cases, namely ask the parties to disclose at the outset their "best imagined outcome." Environmentalists are usually the leading low ballers, poorly informed about the overall value of the case and unaccustomed to thinking big. Cormick is quite comfortable with big numbers and high expectations. Talking money in his presence has a way of arousing economic commitments and introducing serious cost estimates. So it was in Florida; when Cormick had finished his work impressive numbers had appeared on the table: EAA farmers had agreed to pay 47.99% of total costs of cleanup, with contingencies ranging between $ 233 and $ 322 million.60

Cormick's work was done on July 1, 1993. The Statement of Principles hashed out under his guidance solidified the science, drew the sugar industry into the cleanup, and put restoration of flows on the front burner. But it had long and casual timelines, open ends, and it relied heavily upon the strategy of STAs that drafted substantial acreage within the Everglades to the cause of treatment. It also ignored the deadlines established earlier in the settlement of Lehtinen's lawsuit. It reached its final refinements without participation by the Miccosukee.

It drew mixed reviews. Bruce Babbitt was "exultant," declaring that the "River of Grass" has been given a "new lease on life."61 Alfred Fanjul of Flo-Sun Sugar announced "the end of gridlock" in the Everglades, observing that "the Clinton administration delivers."62 Environmentalists were less complimentary. And, Dexter Lehtinen, speaking for the Miccosukee, said of the Statement of Principles, "it has the potential to be the Munich of the Everglades, in which
government buys peace in our time with Big Sugar, leaving to others the difficult task of actually saving the Everglades.\textsuperscript{63}

The differences between Cormick the mediator and Lehtinen the litigator are profound. Cormick believes in "consensus" and sees the collaborative process as a true alternative to litigation. He thinks the collective self-interest of the parties is the true barometer of good policy and that mediation can mark a new beginning as parties "buy into" the accord. Lehtinen rejects "consensus" (all politics is about winners and losers in his mind) and thinks that settlement without enforcement is a cruel fiction. He resents "mediation" between parties of unequals where the world is freely "renegotiated" with but casual acknowledgement of prior commitments. And he sees "consensus" as a way for the robber to ask for your wallet before he takes it by other means.

Cormick's mediation and "consensus" is the current rage. It allows a full flowering of form over substance that proves irresistible in environmental conflict. The Clinton Administration perfected this feat by taking Cormick's 1993 Statement of Principles and turning it into a document called \textit{United States and Agricultural Parties Agreement 1/13/94}.\textsuperscript{64} known to the parties as the Flo-Sun agreement. This was strictly a "consensus" concocted by the Clinton Administration, the DOJ, and the U.S. Department of the Interior (DOI) with big sugar. The South Florida litigators (the Miccosukee Tribe, Suzan Ponzoli, still in the U.S. Attorney's office) were on the outside looking in. The essence of Flo-Sun was strictly cash for peace. Each agricultural party would make payments to facilitate cleanup and would win protection from a U.S. lawsuit. Each would be deemed in compliance with state water quality standards until a distant December 31, 2006. (The Miccosukee's simpler view is that polluters should \textit{comply} not simply pay money and \textit{walk}.)

For their own protection, the sugar interests thought it wise to transform Cormick's Statement of Principles and the Clinton Administration's Flo-Sun "consensus" into enforceable state law. Having named the 1991 law after Marjory Stoneman Douglas, the 1994 version had to be called something else—The Everglades Forever Act.\textsuperscript{65} This law recites the water quality and quantity woes of the Everglades. It supplanted the SFWMD's earlier Everglades SWIM Plan with other permitting, land acquisition, and stormwater treatment measures. It imposes, with refinements and qualifiers, an annual Everglades Agricultural Privilege Tax. It prescribes a construction plan for the building of STAs.

But this legislation is conspicuously weak on enforcement. It settles for merely a good try. It invents a term, "collective compliance,"\textsuperscript{66} which is a negation of individual compliance. It puts off again the basic question of the quantitative legal standard for phosphorus or the date for meeting it. (The Miccosukee Tribe has long urged a 10 ppb standard as the best expression of available science and the rest of the world is slowly drifting in this direction.) The 1994 Act requires the DEP to propose a phosphorus criterion for the Everglades Protection Area by December 31, 2001, with a 10 ppb default standard to take effect if the DEP does not act by December 31, 2003.\textsuperscript{67} All permit holders are given the extravagant variance postponing compliance for 12 years—until December 31, 2006.\textsuperscript{68}

Those with lesser resolve than the Miccosukee Tribe would have called it quits. It was six years since Lehtinen had opened fire with his famous lawsuit. The case had been "settled" three times. Political and legal exhaustion can set in.

In the interim, problems in the Everglades had been "acknowledged," [31 ELR 10926] industry brought "on board," science "credited," managers "empowered," new institutions "established," state and federal decisionmakers "in accord," good will had "surfaced." Conditions would be much better in the future, especially in the distant future where hopes roam free of empirical reality.

But the Miccosukee and Mr. Lehtinen steadfastly resisted all collective self-deception. In 1995, the tribe filed suit against EPA, arguing that the Agency was duty-bound to review and approve the relaxation in Florida water quality standards represented by the 1994 Everglades Forever Act. The claim was that the 1994 law would allow discharges of phosphorus above levels that caused an imbalance in the natural aquatic flora and fauna through 2006. This was a clever legal stratagem—nobody had challenged a "down-grading" of water quality standards under the CWA quite this way before. And it was successful. The tribe won a ruling in the Eleventh Circuit on February 10, 1997\textsuperscript{69} that EPA had a mandatory duty to review the standards and then won a ruling (on September 15, 1998) that the standards had been relaxed as the tribe alleged.\textsuperscript{70} The exercise had the collateral benefit of drawing EPA—the "expert" water quality agency—into the South Florida water wars. EPA since has given support to the 10 ppb standard urged by the Miccosukee.\textsuperscript{71}

\textit{Miccosukee as Regulator}
A third front opened by the tribe in defense of the Everglades is its embrace of the "treatment as state" provisions that made an appearance in the 1987 Amendments to the CWA. Under the leadership of Truman E. Duncan Jr., "Gene" Duncan, Tribal Water Resources Director, the tribe has tried to do for itself what the United States could not do. Duncan is a geologist and former helicopter pilot in the U.S. Army who has built up a tremendous store of practical knowledge in his work in the Everglades.

The tribe won "treatment as state" recognition from EPA on December 20, 1994, and adopted standards (later amended once) December 19, 1997. There is nothing quite like these standards in the annals of federal water pollution law. In language not seen in state standards, the tribe "vows that there will be no compromise with respect to discharges of pollutants which constitute a valid hazard to human health or the preservation of the Everglades within Water Conservation Area 3-A [outstanding' Miccosukee waters within the reservation] and Everglades National Park." Furthermore, "it shall be the Tribe's policy to limit the introduction of nutrients from anthropogenic sources into waters of the Tribe." Beyond this, "it is the intent of the Miccosukee Tribe to prevent adjacent water users from using Tribal waters or vegetative communities within Tribal jurisdiction as a biological filter with respect to nutrient removal." The bottom line feared by their adversaries—10 ppb—is mentioned twice in the standards. And the equally feared prospect of enforcement is not left to the imagination: "The Miccosukee Water Quality Standards shall be the basis for regulatory enforcement against discharges outside the boundaries of the Federal Reservation pursuant to all applicable federal enforcement procedures as may be necessary to protect the quality of the water within the Federal Reservation."

This is new terrain the Miccosukee are treading on. It is fraught with legal ambiguity. But no one doubts that the tribe will make the most of what the law allows in its campaign to protect the Everglades.

**Miccosukee as Initiator and Enforcer**

Time never stops in these global environmental conflicts. The Miccosukee have worked tirelessly to make sure on-the-ground commitments match political professions to save the Everglades. The tribe has been joined by environmental groups in a petition to the Florida Environmental Regulatory Commission seeking to establish the 10 ppb standard. It is an active participant in the proceedings of EPA to develop and enforce a permit for the Everglades Nutrient Removal Project. (This is a pilot project for 40,000 acres of pollution treatment ponds to be built, mostly at taxpayer expense, to clean up agricultural pollution before discharge into the Everglades; there is continuing doubt about whether these ponds will do the job and whether they will aggravate further mercury pollution within the Everglades.) The Friends of the Everglades has joined the tribe in its challenge to yet another permit to the SFWMD that would allow continued maintenance, operation, and discharges from 37 flood control structures that would not meet water quality standards.

In more recent times, two great lurches in law and policy have affected the future of the Everglades. One is the Miccosukee Reserved Area Act, enacted by Congress in 1998, which secured the tribal position in its 667 acres along the northern edge of the park. This law confirms that the Miccosukee Reserved Area is "Indian country" and imposes duties on the tribe to prevent pollution and protect hydrologic flows into the park. In this law the tribe accepts nondegradation responsibilities it would happily impose on others upstream; the tribe is obliged to pass on the bottom line feared by their adversaries—10 ppb—is mentioned twice in the standards. And the equally feared prospect of enforcement is not left to the imagination: "The Miccosukee Water Quality Standards shall be the basis for regulatory enforcement against discharges outside the boundaries of the Federal Reservation pursuant to all applicable federal enforcement procedures as may be necessary to protect the quality of the water within the Federal Reservation."

Now recently arrived is the Comprehensive Everglades Restoration Plan that Congress prescribed in December 2000. This is the law that contains the extraordinary Indian trust provisions in text. It also states that programmatic regulations to implement the restoration plan can issue only after consultation with the Seminole and Miccosukee tribes. Implementation of this law is expected to cost $8 billion and extend over the next 20-36 years. Its goals are to restore a unique national treasure, save 68 endangered or threatened species, protect coastal resources, and reserve a quality of life for the booming human populations of South Florida. Its techniques are to replumb the plumbing that the Corps brought to South Florida—by opening gaps in levees, filling in canals, raising 10 miles of the eastern Tamiami Trail to restore historical flows, replacing the natural connection between Shark Slough and the Big Cypress National Preserve, and restoring flows to east Florida Bay.

This plan is the last chance to save the Everglades. It might work—but only because the Indian tribes of South Florida are watching closely.

1. *Quoted in* Testimony of Dexter Lehtinen, Natural Resources Subcommittee Field Hearing, Key Colony Beach, Fla. (July 31, 1993) [hereinafter Lehtinen Testimony].
2. PETER MATTHEISSEN, INDIAN COUNTRY 18 (1979).


6. 16 U.S.C.A. § 410b (Everglades National Park). See also ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS & NATIONAL PARKS 223-25 (Univ. of Arizona Press 1998) (when the park was authorized in the 1930s, Secretary of the Interior Harold Ickes insisted on protection of native rights; the Everglades "provided a refuge to the Seminole Indians, to whom it once belonged exclusively").

7. In 1979, the United States nominated the Everglades National Park to the World Heritage List under the Convention Concerning the Protection of the World Cultural and Natural Heritage. The Miccosukee insist that the Everglades includes much more than the park, which was authorized in 1934 but not designated until 1944.

8. MATTHEISSEN, supra note 2, at 45. Compare id. at 50 (interview with Howard Osceola; "a homeland would hold the tribe together as nothing else could") with PETER LOURIE, EVERGLADES: BUFFALO TIGER AND THE RIVER OF GRASS (Boyd's Mills Press, Honesdale, Pa. 1994).


11. Miccosukee Tribal History, supra note 10, at 3.


13. MATTHEISSEN, supra note 2, at 29.

14. PATRICIA R. WICKMAN, NATIVE AMERICANS IN FLORIDA 7-8 (undated; on file with author) (the United States spent $ 40 million to remove 3,000 Seminole and kill 1,500 more; but the 200-300 courageous survivors resisted every effort to "assimilate, convert, or even count them"); BRENT RICHARDS WEISMAN, UNCONQUERED PEOPLE: FLORIDA'S SEMINOLE AND MICCOSUKEE INDIANS (Univ. of Florida Press 1999); PATSY WEST, THE ENDURING SEMINOLES: FROM ALLIGATOR WRESTLING TO ECOTOURISM (Univ. of Florida Press 1998); Rennard Strickland, Things Not Spoken: The Burial of Native American History, Law, and Culture, 13 ST. THOMAS L. REV. 11, 13-14 (2000). DOUGLAS, supra note 3, at ch. 10 (entitled "War in the Glades: The Undefeated").

15. See COVINGTON, supra note 4, at chs. 11 (on a 1935 petition of the Seminole seeking lands), 13 (at 235; 1976 Court of Claims final judgment of $ 16 million; no funds distributed as of 1992; many Seminole preferred land to money), 14 (on the origins of the Trail Seminole; how claims disputes led to the formation of the Miccosukee Tribe); LUTHER J. CARTER, THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWTH STATE 80-81 (Johns Hopkins Univ. Press 1974); MATTHEISSEN, supra note 2, at ch. 2 (entitled "The Long River") (good account of the Trail Indians, enrolled and unenrolled, traditional and modern, counted or not).
16. COVINGTON, supra note 4, at 268-69.

17. Lehtinen Testimony, supra note 1, at 2.

18. Id. See also Introduction by the President, The Wilderness Society, An Analysis of Public Subsidies and Externalities Affecting Water Use in South Florida (December 1990) (Craig Diamond, Principal Investigator) (Florida Atlantic University/Florida International University) (agricultural subsidies in the Everglades, mostly for sugar, are estimated to be $135 million per year—in tax breaks, public works projects, water use rates, import quotas and guaranteed federal loans; big agriculture consumes two-thirds of South Florida's water and represents 1.7% of its tax base). For further background, see ALEC WILKINSON, BIG SUGAR: SEASONS IN THE CANE FIELDS OF FLORIDA (1989) (discusses the labor issues, but contains not a word on the environmental destruction caused by big sugar).


23. This was the gist of the communication.

24. At the time, Suagee was an associate with the Washington, D.C., firm, Hobbs, Straus, Dean & Wilder, which had represented the Miccosukee Tribe for many years, and which continues to represent the tribe in a range of matters. Suagee is now the Director of the First Nations Environmental Law Program, Vermont Law School. He maintains an Of Counsel relationship with the firm, which has changed its name to Hobbs, Straus, Dean & Walker, LLP. See, e.g., Dean B. Suagee & James J. Havard, Tribal Governments and the Protection of Watersheds and Wetlands in Indian Country, 13 ST. THOMAS L. REV. 35 (2000).


26. See id. at 462-63 (quoting NPS official "that the Tribe had a diminished status and lesser flood protection rights because the land where tribal members lived is a permit area in Everglades National Park").

27. See Dexter Lehtinen, The Everglades Are Drowning in Their Own Tears, MIAMI HERALD, Jan. 20, 2000 (Water Conservation Area 3-A is "drowning in its own tears"; "the central Everglades is an orphan, a beautiful child with unlimited potential but not worth the political trouble of fighting for").

28. There are questions of characterization of the population. The dusky seaside sparrow was declared extinct in 1987. For the Cape Sable Seaside Sparrow homepage, see http://web.utk.edu/~grussell/cssshtml/csss.html (last visited May 21, 2001).

29. The Comprehensive Everglades Restoration Plan is enacted as Title VI of the Water Resources Development Act of 2000. See Pub. L. No. 106-541, 114 Stat. 2572 (Dec. 11, 2000). This law has been described as the most ambitious environmental restoration effort in the world. See Jim Abrams, Everglades Project Nears Completion, Associated Press, Oct. 20, 2000 (quoting Rep. Clay Shaw (R-Fla.)). See also Corps of Eng'rs, Principal Features of the Comprehensive Plan (undated); Everglades Coalition, The Greater Everglades Ecosystem Restoration Plan (undated) (prepared by a coalition of 28 conservation and environmental groups).

30. Section 601(h)(2)(C), 114 Stat. at 2680.
31. MATTHEISSEN, supra note 2, at 43.


34. Id. at 75-76 (on problems with "diligent prosecution" by the authorities); MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 6.06 (1995).

35. A superb analysis of the damages to the park and the wildlife refuge is found in the Memorandum in Support of the Motion of the United States for Partial Summary Judgment on Liability, authored by Suzan Hill Ponzoli and others (Nov. 19, 1990), 119 pp., University of Miami Everglades Litigation Collection [hereinafter cited as 1990 U.S. Motion for Summary Judgment]; DOUGLAS, supra note 3, at ch. 16 (entitled "Forty More Years of Crisis").

36. DEWITT JOHN, CIVIL ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES 125, 133 (1994). For a splendid account, see STEPHEN S. LIGHT ET AL., The Everglades: Evolution of Management in a Turbulent System, in BARRIERS & BRIDGES TO THE RENEWAL OF ECOSYSTEMS AND INSTITUTIONS 103, 130 (Stephen S. Light ed., 1995) (configuration of the water conservation areas gave us loss of transverse glades, transformation of flows (attenuated to pulsed), unnatural pooling and overdrainage, accelerated reversal of muck building, abandonment of nesting areas because of loss of water volume) [hereinafter BARRIERS AND BRIDGES].

37. E.g., SFWMD, Surface Water Improvement and Management Plan (SWIM Plan) for the Everglades, Vol. III (Sept. 12, 1990), esp. III-87 ("WCA-1 is encircled by 56 miles of levees and canals"; this is the wildlife refuge).

38. BARRIERS AND BRIDGES, supra note 36, at 113 (citing J.C. Stephens).


40. Florida Class III waters are to be maintained for the "propagation and maintenance of a healthy, well-balanced population of fish and wildlife." F.A.C. § 17-3.121 (1990). Also, substances "in concentrations that result in the dominance of nuisance species" shall not be present in Class III waters. Id. § 17-3.061(3)(q). See 1990 U.S. Motion for Summary Judgment, supra note 35, at 68-69 (arguing water quality standards violations). The Everglades and Loxahatchee are "outstanding Florida waters."


42. 1991 Fla. Laws ch. 80, codified at FLA. STAT. ANN. § 373.4592 (West 2001); David Gluckman, The Marjory Stoneman Douglas Everglades Protection Act: Through Environmental Glasses, 19 ENVTL. & URB. ISSUES 17, 27 (1991) (by a senior partner in the Tallahassee law firm of Gluckman & Gluckman, representing environmental interests; a blow-by-blow description of enactment. The author applauds the stormwater utility provisions that, for the first time, require agriculture to clean up its pollution; "the agricultural interests were defeated for the first time in the 17 years the author has been actively involved in the legislative process").


44. Id. at 125, 165.

45. Compare id. at 164 with http://magazine.audubon.org/century/champion.html#Mdouglas (publicly demands that her name be stricken from the Act; believes state is retreating from its commitment to restore the Everglades) (last visited Apr. 10, 2001).

46. See JOHN, supra note 36, at 141.
47. Id. at 155.

48. Id. at 156-57 (discussing comments of the United States on the April 1990 Draft Everglades SWIM Plan, 21 pp., with nine-page appendix; describing draft plan as a "grave disappointment"; claiming it provides "fuzzy goals and targets"; threshold concentration must be set at less than 0.030 milligram/liter; should give "more serious consideration" to individual permitting; "more detail" with respect to best management practices (BMPs); "in defining 'imbalance of flora and fauna,' the District must commit to resolving scientific uncertainty in favor of ensuring nondegradation of downstream resources"; should specify actions the Corps should take; the statement that there are no "known" violations is "unbelievable" since 30,000 acres of sawgrass marsh has been converted to cattail).


51. Lehtinen's original lawsuit relied upon a "Memorandum of Agreement Among the Army Corps of Engineers, the South Florida Water Management District and the National Park Service for the Purpose of Protecting the Quality of Water Entering Everglades National Park" (February 1984), which insisted that "the quality of existing water deliveries to the park does not depart significantly from that of waters which have not been altered by the works of man" and "that surface waters delivered to the park are not degraded." With one promise to deliver high quality water to the park in its pocket, it is not surprising that Lehtinen was not eager to settle his lawsuit for another promise much like the first.

52. An example in the Everglades is the so-called Flo-Sun agreement. Lori Rozsa, Tribe Sues U.S. Agency Over Cleanup, MIAMI HERALD, Apr. 8, 1994, at 6B (a challenge to an Everglades cleanup agreement between U.S. Department of the Interior (DOI) and Flo-Sun Sugar Corp.; Flo-Sun agreed to drop its lawsuits and pay $ 4-6 million a year to help the cleanup; the DOI says phosphorus coming from Flo-Sun farms does not have to meet an interim target of 50 ppb until 2008; the company is deemed "in compliance with state water quality requirements" simply by signing the agreement other sugar growers refused to sign).

53. See Memorandum of Gene Duncan, Water Resources Director, Miccosukee Tribe to Ron Logan, Tribal Planner (Sept. 16, 1998), re: "Update of Planning Document" (summarizing litigation history) [hereinafter Duncan Update].

54. 1993 Lehtinen Testimony, supra note 1.


56. Duncan Update, supra note 53.


58. Letter from counsel for the Florida Sugar Cane League to Carol Browner, Florida Department of Environmental Regulation (Feb. 24, 1992), offering to stay litigation in the state courts if the DER and the SFWMD would refrain from publishing Everglades regulations, from adopting the Everglades SWIM Plan, and from issuing Everglades

59. See supra note 43.

60. Statement of Principles (July 3, 1993), University of Miami Everglades Litigation Collection (other financial shares: SFWMD (25.8%), state (15.7%), federal government (8.4%), western basin farmers (2.2%). The Statement of Principles addressed "An End to Litigation," "A Commitment to Increasing Water Quantity to the Everglades," and "Reduced Phosphorus Outputs Achieved Through Performance-Based BMPs," among other topics.

61. JOHN, supra note 36, at 181.

62. Id. at 181-82.

63. Id. at 185.

64. Miccosukee Tribe of Indians of Fla. v. United States, Case No. 94-0662 (S.D. Fla. 1994), Exh. I, University of Miami Everglades Litigation Collection; see also supra note 52.

65. Codified in FLA. STAT. ANN. § 373.4592.

66. Id. § 373.4592(2)(i) (defining "master permit" as including a single permit affording an opportunity to achieve "collective compliance" with applicable department and district rules).

67. Id. § 373.4592(4)(e)(2).

68. Id. § 373.4592(4)(f)(4).

69. Miccosukee Tribe of Indians of Fla., v. EPA, 105 F.3d 599, 27 ELR 20705 (11th Cir. 1997).

70. Duncan Update, supra note 53. A Special Master found that the state had violated the antidegradation clause of its standards.


72. Section 518(e) of the CWA, 33 U.S.C. § 1377(e), ELR STAT. FWPCA § 518(e).


74. Id. § 1D (Policy), at 2-3.

75. Id.

76. Id. § 3E (Tribal Water Quality Standards: Nuisance Conditions) ("total phosphorus shall not exceed 10 [ppb] in Class III-A waters"); § 3N (Nutrients) ("total phosphorus concentrations shall not exceed 10 [ppb] in Class III-A waters").

77. Id. § 1B (Applicability).

78. Duncan Update, supra note 53.

79. Id.

80. Lori Rozsa, A New Fear Over Glades Rescue Plan; Experts: Birds May Be Imperiled, MIAMI HERALD, Apr. 6, 1994 (researcher Marilyn Spalding says that the 40,000 acres of "manufactured wetlands" could attract the parasite Evstrongylides ignotus, which is deadly to wading birds; a tapeworm problem).
81. Miccosukee Tribe of Indians of Fla. v. South Fla. Water Management Dist., 721 So. 2d 389 (Fla. App. 3d Dist. 1998) (unsuccessful challenge to permit that would allow continued maintenance and operation of 37 flood control structures that would, in the court's words, "provide compliance with water quality standards to the maximum extent practicable").


85. See supra note 30 and accompanying text.