

UNDERSTANDING EVERGLADES RESTORATION

Analysis of Everglades Restoration Issues

Miccosukee Tribe of Indians of Florida/January 2010

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THE DISTORTION OF EVERGLADES RESTORATION

Dexter Lehtinen, Member, South Florida Ecosystem Restoration Task Force, October 2009

Everglades restoration and its key component, the Comprehensive Everglades Restoration Plan (CERP), are off-course and close to dead. Several elements of its deterioration include:

1. Abandoning CERP Initial Projects – The abandonment of the Project Implementation Report (PIR) for the EAA Storage Reservoir, an Initial CERP Project (sec. 601 (b)(2)(C)), for which the Corps has a duty to prepare a PIR (Project Implementation Report) (sec. 601(b)(2)(D)) is unwarranted. The abandonment of the PIR is illegitimate and a violation of law.

2. Diverting Resources to Non-CERP Projects – The Corps is not authorized to expend any resources (including precious planning manpower) on non-CERP projects. CERP is a specifically defined plan (sec. 601(a)(4)), consisting of projects, which the Corps is directed to execute. The deviation of Corps resources to non-CERP projects, such as the “sugar buyout” political boondoggle, is illegitimate and a violation of law. CERP projects (e.g., EAA Reservoir) cannot lawfully be abandoned, and new or different projects can be added only by Congress.

3. Planning to Deliver 245,000 ac/ft/yr Additional Water Without Compliance with CERP Restrictions – The delivery of 245,000 ac/ft/yr water through the WCAs will destroy the WCAs, which comprise the Tribal and State Everglades (and which are larger than the Everglades in ENP). Accordingly, WRDA 2000 specifically prohibits such delivery without compliance with substantial restrictive requirements (sec. 601(g)(1), Project-Specific Feasibility Study). Compliance with these restrictions was abandoned in 2002. Planning for additional water without compliance with WRDA is illegitimate and a violation of law.

4. Planning to Deliver More Than 245,000 ac/ft/yr Additional Water – While the delivery of 245,000 ac/ft/yr additional water is restricted (sec. (g)(1)), delivery of greater amounts of water (which will destroy the WCAs, Tribal and State Everglades, is prohibited. No part of CERP authorizes, under any circumstances, such greater deliveries. Planning or considering such greater deliveries is illegitimate and a violation of law.

5. Abuses of Adaptive Management – “Adaptive management” anticipates using flexible procedures to implement CERP projects; but adaptive management does not in any way authorize changes in CERP not authorized by Congress. WRDA (sec. (H)(3)(C)(i)(II)) provides only that “programmatic regulations...shall...ensure that new information..., new scientific or technical information or information that is developed through the principles of adaptive management...are integrated into the implementation of the Plan...”. The role of adaptive management is restricted to implementation of projects, and does not authorize CERP project modifications. Only Congress can change CERP (see Programmatic Regulations, 33 CFR 385.32 and .34). “The Plan shall be updated to incorporate approved changes to the Plan from: (1) [pilot projects/not relevant]; (2) Authorization of projects by Congress; (3) Comprehensive Plan Modification

Reports approved by Congress; or (4) Other changes authorized by Congress” (33 CFR 385.34). Using adaptive management to circumvent specific CERP project requirements is illegitimate and a violation of law.

6. Abuses of Performance Measures – As with “adaptive management”, “performance measures” (PMs) are required to evaluate whether implementation of individual mandated CERP projects is achieving what CERP expected from the individual projects. PM are restricted to evaluating “restoration success of the Plan... throughout the implementation of the Plan” (sec. 601(h)(3)(C)(i)(III)). PMs are not a license to change project expectations, and thus change projects themselves, before implementation. Even after implementation, PMs can only recommend project changes, which can only be adopted by Congress. Surreptitious attempts to change CERP projects by changing the PMs is illegitimate and a violation of law.

7. Interior’s Violation of Its Trust Responsibility and Abuse of Its Limited Role in CERP – The US Department of the Interior has specific governmental responsibilities to Indian Tribes and for the national park system. In this role, the Department does not exercise broad authority over the C&SF Project, created by the Flood Control Act of 1948, nor over CERP (an amendment to the C&SF Project). WRDA 2000 speaks specifically to these points. First, the Secretary of the Interior is directed to “fulfill his obligations to the Indian tribes in South Florida under the Indian Trust Doctrine...” (Sec. 601(h)(2)(C)). The Secretary has repeatedly violated this Trust Doctrine obligation, by sacrificing Miccosukee Tribe lands in the WCAs for the benefit of Park land. The prior record of such disregard of the Trust Doctrine led Congress to insert the Trust Doctrine language and the prohibition of 245,000 ac/ft/yr (both cited earlier).

Second, Interior’s record of selfish attempts to wrestle control of the C&SF Project away from the Corps led congress to expressly prohibit undue Interior influence. WRDA requires that the programmatic regulations “shall expressly prohibit the requirement for concurrence by the Secretary of the Interior...on project implementation reports, project cooperation agreements, operating manuals for individual projects undertaken in the Plan, and any other documents related to the development, implementation, and management of the individual features of the Plan...” (Sec. 601(h)(3)(C)(ii)). Interior’s repeated abuses of the Trust Doctrine and its limited role in CERP, for its own benefit and to the harm of others, is illegitimate and a violation of law.

8. CERP and Ignoring the Rule of Law: “The horror! The horror!” – Actions of the US and its agencies should be governed by law at all times. The Rule of Law, as well as open and participative policymaking, is an indispensable element of our representative democracy and an essential prerequisite in achieving voluntary compliance by citizens. Many in the federal government believe that they are above the law and that they can dispense with law at will. While federal bureaucrats often have access to power to override law, this power does not create moral right. Whether or not allowed to act “notwithstanding any all”, bureaucrats who seek or exercise such power are fundamentally corrupt. Power corrupts their ethical judgement. Like Kurtz in Conrad’s Heart of Darkness, such individuals are “hollow to the core”, and at the end, will share his final insight: “The horror! The horror!”.

References: WRDA 2000, section 601; Programmatic Regulations (33 CFR 385.1 et seq)

***BREAKING PROMISES
in the
FLORIDA EVERGLADES***

Dexter Lehtinen/June 2009

“Great nations, like great men, should keep their word.”

Justice Hugo Black (joined by Chief Justice Warren and Justice Douglas), in dissent in FPC v. Tuscarora Indian Nation, 1960, , wherein the power (but not the morality) of the United States, to break treaties with Indian Tribes, was upheld

Consider the promises made by governments, relied upon by Native Americans, and broken in the course of Everglades restoration:

Promise #1 – US will preserve Miccosukee lands in WCA 3-A in their natural state

(Florida Indian Land Claims Settlement Act, PL 97-399, 1982)

Status – **BROKEN** (Miccosukee lands repeatedly flooded to benefit other lands)

Promise #2 – Water Quality Criteria will be met by December 2006

(Consent Decree and CERP Documents)

Status – **BROKEN** (discharges exceeding 10 ppb phosphorus are routine)

Promise #3 – Bridging of Tamiami Trail will be done as part of CERP

(WRDA 2000, sec. (b)(2)(D)(iv), prohibits bridging until after Mod Waters)

Status – **BROKEN** (2009 act directs bridging under Mod Waters notwithstanding any other provision of law)

Promise #4 – Everglades planning will be comprehensive, considering all effects on entire

Everglades; science-based; Decompartmentalization will follow comprehensive study

(WRDA 2000 provides for comprehensive, system-wide, science-based planning, see, e.g., PIR requirements, sec. (f) and (h)(4)(A); system-wide decomp)

Status – **BROKEN** (2009 Act directs decomp action for benefit of Park alone, without regard to damage to other areas; CERP PIRs abandoned; NEPA/CWA/ESA abandoned; analysis routinely covers “construction” only, excluding “operations” effects)

Promise #5 – EAA Storage Reservoir will be built, improving performance of STAs

(SFWMD to Special Master; WRDA 2000, sec. (b)(2)(C)(ii); ECART also promised)

Status – **BROKEN** (EAA SR Phase 1 stopped in mid-construction, mid-2008; PIR abandoned; ECART (Everglades conveyance) also abandoned)

Promise #6 – Water Quantity to Park will follow Project-Specific Feasibility Study, in light of adverse effects of excessive water deliveries on tribal lands in WCA 3-A

(WRDA 2000, rejecting 245,000 additional acre feet until Project-Specific Feasibility Study completed, including evaluations of all effects and delivery systems, sec. (g)(1))

Status – **BROKEN** (Required Study abandoned in 2003; Park now believes Study requirement can be eliminated through political power and influence)

Promise #7 – United States will fulfill Trust Responsibility to Indians

(WRDA 2000, sec. (g)(1)©)

Status – **BROKEN** (Miccosukee lands routinely flooded and destroyed to favor Park lands; water quality protection of Park and FWS lands priority over Miccosukee lands; DOI Bureau of Indian Affairs intimidated by DOI National Park Service, AWOL from legal responsibility to Tribes)

Promise #8 – Flood protection will be maintained

(WRDA 2000, sec. (h)(5)(B), requires maintenance of flood protection)

Status – **BROKEN** – (Studies intentionally ignore flooding issues, refuse to analyze flow effects related to flooding; seepage barrier projects delayed)

Promise #9 – The Rule of Law will control Everglades restoration activities

(WRDA 2000/National Environmental Policy Act/Clean Water Act/etc; WRDA, sec. (h)(4)(A) requires compliance with NEPA and water quality)

Status – **BROKEN** (The Rule of Law has been replaced by the Rule of Political Power; no legal rules apply; DOI has sought and received exemption from all laws regarding Tamiami Trail bridge; DOI expects to seek and receive exemptions from all laws regarding further bridging and water quantity deliveries; SFWMD expects to receive exemption from water quality criteria, with support of Park, because quality damage is visited primarily upon non-Park lands (tribal lands); any laws that are found to apply will be amended or repealed to sustain the illusion of law in the reality of naked power politics)

*** end ***

Failure in the Everglades
**THE GOAL AND THE TRAGIC REALITY
OF EVERGLADES RESTORATION**

Dexter Lehtinen, Miccosukee Tribe Representative
South Florida Ecosystem Restoration Task Force, May 2009

The Goal:
Save the “One” Everglades, Through “Comprehensive” Planning

The Miccosukee Tribe’s Reservation and other land interests in the Everglades are entitled to Indian Trust Doctrine protection from the Department of the Interior and other federal agencies. Notwithstanding the Trust Doctrine as applied to its own tribal interests, the Tribe’s highest priority is the preservation of the entire remaining Everglades, including both tribal and non-tribal lands and waters. This philosophy of “one Everglades”, ostensibly implemented through “comprehensive planning”, contrasts sharply with the current approach of government agencies which seek to preserve the subordinate parts of the Everglades in their control, at the expense of other parts of the Everglades. The Tribe believes in “one Everglades” and “shared adversity”, with tribal lands treated equally with respect to both injury and benefit.

The Reality:
**Partial Restoration and Unequal Treatment,
Through Limited Planning and Special Interest Domination**

The Tribe believes that the failure to adhere to the principles of “one Everglades”, “shared adversity” and “comprehensive planning” has resulted in a mad scramble among special interests, with government agencies as special interest themselves, to maximize their own benefits to their priority parts of the Everglades. This pattern of special interest maximization, in place of the Everglades overall, results in sub-optimization as a whole.

This special interest politicization of Everglades restoration places a premium on political power and diminishes the role of rational decision-making. As a “discrete and insular minority” (in the words of Justice Stone), the Miccosukee Tribe and its tribal Everglades are sacrificed to the interests of the more politically powerful.

History Repeating Itself:
U.S. Disregard for the Indian Trust Doctrine

The Department of the Interior has a unique duty under the Indian Trust Doctrine to protect these tribal Everglades interests. This Trust Responsibility is particularly important, in light of the irony that it is the Department’s own National Park Service which subordinates tribal interests in the Everglades to its own Park interests. In this regard, the Bureau of Indian Affairs has neither the clout nor the inclination to protect Indians (either in this case or elsewhere in the country) against the voracious and self-centered demands of the National Park Service.

Failure in the Everglades

***COMMON DECISIONMAKING FAILURES
PLAGUE EVERGLADES RESTORATION***

Dexter Lehtinen, Miccosukee Tribe Representative
South Florida Ecosystem Restoration Task Force, June 2009

Many commonly-recognized decisionmaking failures have shown their ugly heads in Everglades restoration. These include:

1. Lack of Common Goal/Interest Group Model – Special interests (including governmental agencies) have been permitted to substitute agency goals for the overall goal of restoring the entire Everglades. This produces group competition and emulates the interest group model of policymaking, excluding the rational actor model.

2. Biased Framing – Frames are mental models or viewpoints of an issue or problem. Frames inadvertently screen out otherwise relevant information. Improper framing in the Everglades includes equating Everglades National Park with the Everglades (even though more Everglades survives north of ENP than within ENP). Likewise, believing that Tamiami Trail blocks water flow (ignoring the other impediments) and bridges are therefore good for restoration without negative aspects (e.g., pollution and flooding). Overall, most people improperly frame the Everglades problem as water quantity (hydroperiod), therefore ignoring water quality.

3. Confirmation Bias – The conformation bias (another form of cognitive bias) leads to seeking out confirming information and avoiding contradictory information, such as no longer measuring tree island loss, not conducting analysis of effects of the Tamiami Trail bridge (pollution and flooding), avoiding snail kite bird data in WCA 3-A. This behavior demonstrates an acute form of the confirmation bias: refusing to create data which may be inconsistent with existing frames (rather just avoiding data).

4. Recency Bias – The recency bias (a form of the confirmation bias) places emphasis on recent information and events, ignoring sound historical data and experience which derives from further back in the past. Ignoring the threat of urban flooding from restoring natural water levels in the eastern Everglades (which is why water levels in the Everglades were reduced in the eastern edge of the Everglades in the first place), because the flooding has not occurred recently due to favorable weather conditions, illustrates the recency bias.

5. Normalization of Deviance – Scholars explain that small deviations from accepted practice, when not corrected or admonished, often lead over time to greater and greater deviations. This acceptance of improper procedures is known as the normalization of deviance. In Everglades restoration, small deviations from comprehensive planning principles have grown over time to the

point where the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), the Clean Water Act (CWA), the Federal Advisory Act (FACA) are waived and ignorance of effects championed. The nation's premier environmental planning laws are waived for the nation's premier environmental project. There is perhaps not better example of the normalization of deviance to be found anywhere.

6. Abuse of Science – Policy preferences masquerade as science while true science is ignored or avoided. Comprehensive planning should be based on science, consisting of empirical facts based on observation, experimentation, and proper inference and induction. Science is open to review, verification, recitation of outcome, and subject to be shown false (sometimes referred to as primary facts). Instead, much of the “science” as only pseudo-science, consisting of policy recommendations or policy advice masquerading as science (e.g., value judgments or trade-off advice; selective observations or inapplicable inferences; hidden or non-reviewable data; asserted accuracy by authority rather than proof; self-fulfilling hypotheses).

The so-called sparrow counts are an outstanding example, with the bridge debacle (requiring an explicit decision to ignore science) is a close second. The sugar buy-out uses no science whatsoever – vision and leaps of faith replace scientific analysis, which is too time consuming and produces stubborn facts not consistent with certain prevailing frames. In a choice between science or cognitive dissonance (the discomfort derived from recognizing facts that are contrary to one's core beliefs or frames), cognitive dissonance wins virtually every time and science loses to emotion.

7. Groupthink – The South Florida Ecosystem Restoration Task Force is virtually non-existent in any meaningful sense and is dysfunctional to the extent it exists at all. The phenomena of groupthink (role differentiation and hierarchy, signaling of apparent authority and discouragement of questioning, obvious disdain for challenges to asserted expertise, and social conformity resulting in suppression of true debate and consideration of alternatives) plagues the Task Force. The Task Force serves to rubber-stamp previously determined decisions, avoiding any discussion of any serious issue. Thus, it is counter-productive, being only a tool of special interests.

Examples include the total failure to ever discuss the abandonment of the EAA Storage Reservoir and the halting of the PIR (Project Implementation Report) for the project; the total failure to discuss the Tamiami Trail bridge; the total failure to discuss the Everglades Forever Act (invalidated by a federal Judge); the total failure to discuss the EPA effort to evade the CWA with the “water transfer” rule; and the total failure to discuss the sugar buyout. Likewise, the required Report to Congress, due in October 2008, has yet to be published.

*** end ***

The Status of Everglades Restoration: **A Summary of the Reality “On The Ground” Today**

Dexter Lehtinen/December 2009

The following are the “facts on the ground and in the water”, as of December 1, 2009:

1. Northern Everglades Dying (Tribal Everglades/WCA 3A)

- * Water levels in October, 2009 = 11 feet (10.5 feet established as destructive)
- * Everglades Snail Kite now 685 birds (from 3,400 in 1999; down to 1,700 in 2006; down to 685- today); no successful nests 2006/7/8
- * Tree island loss continues (61% acreage lost by 1995)

2. Everglades Consent Decree Violated

- * Phosphorus Loads (LNWR and EPA)
- * Phosphorus Discharge Concentrations (All STAs)
- * Appendices (LNWR Interior and Park NESRS Inflow)
- * Western Basins (L-3/L-28I)

3. Lake Okeechobee Deteriorating Badly

- * 42 ppb in 1972
- * 91 ppb when lawsuit filed in 1988
- * 197 ppb in 2005-8

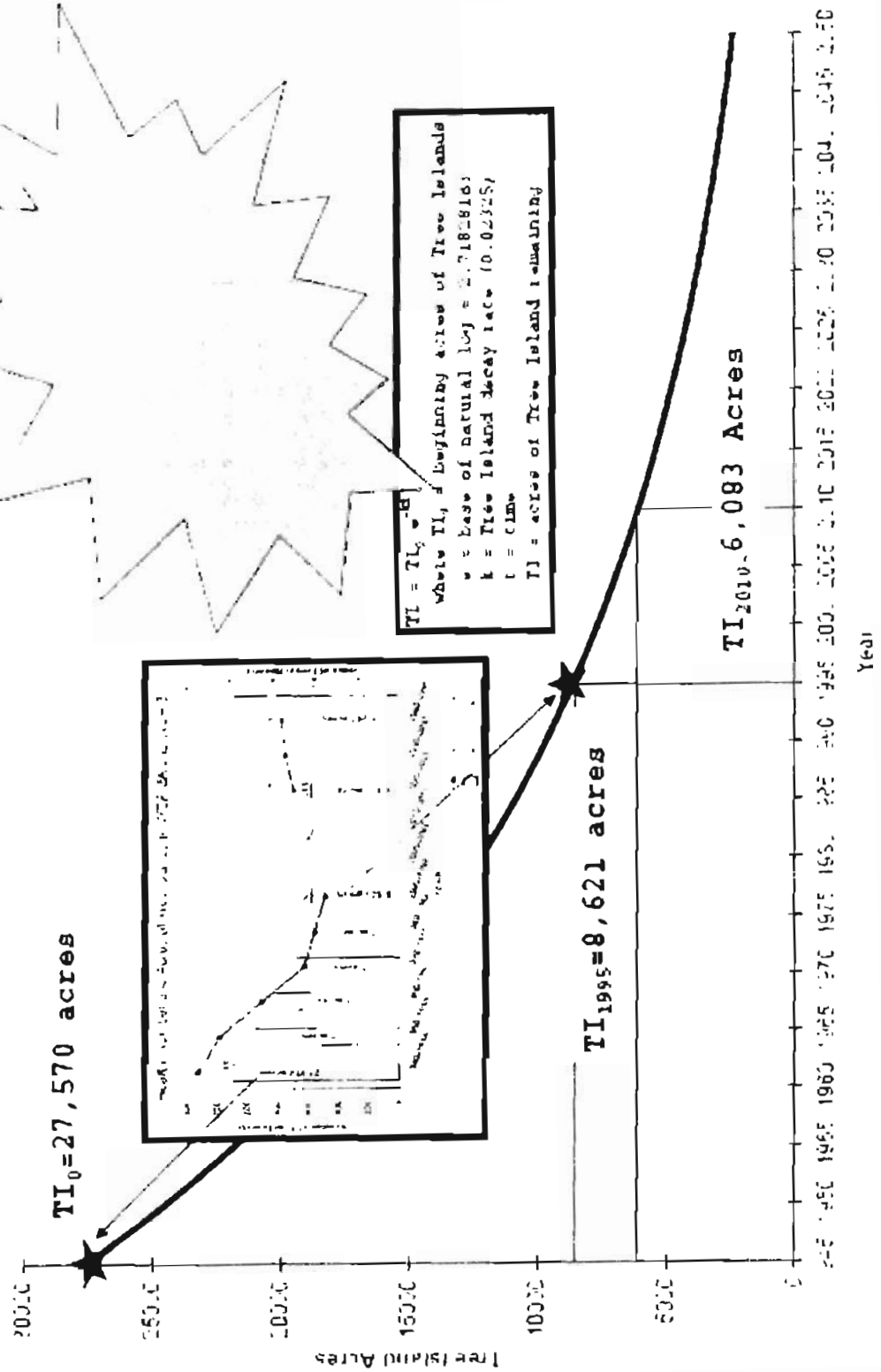
4. CERP Abandoned

- * SFWMD Withdraws from PIR for EAA Storage Reservoir (Initial CERP Project)
- * Corps Abandons PIR for EAA Storage Reservoir (Initial CERP Project)
- * Comprehensive Planning Abandoned (Effects north of Trail ignored for road)
- * SFWMD Diverts Abandons CERP, All Funds to Purchase Land to Lease to Sugar
 - No funds Beyond Buying 73,000 Acres (no funds for any construction; Leaseback of EAA land to US Sugar required by purchase agreement)
 - Judge Finds No Public Purpose for 103,000 Acres in EAA
 - US Sugar Corp Regains Control Over Everglades Restoration
- * Bridge To Be Built Without Plan, With Acknowledgment That Cannot Be “Operated” Until Flood Control Measures Completed/Determine Later “How to Operate” (Build Without Plan and Build Lowest Priority First)

*** end ***

Irreversible Damage – Tree Islands

Tree Island Destruction in WCA-2A & WCA-3
An Approximation of Continuing Irreversible Damage



Irreversible Damage – Tree Islands

Tree Island Destruction
in WCA-2A & WCA 3
by 1995



Projected Tree Island Destruction
in WCA-2A & WCA 3
by 2010



In approximately 15 years the percentage of Tree Islands destroyed in WCA-2A & WCA-3 of the Everglades has increased an approximation is from ~69% to ~78% ... approximately a 29% increase in Everglades irreversibly damaged ... and this during a period of time when most believed that Everglades restoration was being accomplished

THE MICCOSUKEE TRIBE CANNOT SUPPORT ANYTHING THAT EXACERBATES THIS IRREVERSIBLE DESTRUCTION ... AND THE ROG ACQUISITION DOES JUST THAT

The Everglades are drowning in their own tears

Dexter Lehtinen, a former U.S. attorney, filed the original Everglades lawsuit against the state and South Florida Water Management District and now represents the Miccosukee Indian Tribe.

A tragedy is unfolding in the Florida Everglades. The heart of the Everglades — the 752 square miles of fresh-water Everglades prairie marsh, studded with tree islands and teeming in biodiversity, known as Water Conservation Area 3-A — is drowning. And once its tree islands are washed away and its biodiversity transformed into a dull monoculture, once the area is dead, it cannot be brought back to life.

In December 1999 a Florida

DEXTER LEHTINEN

Fish and Wildlife Conservation Commission representative concluded that the conservation area "has degraded more in the last five years than in the entire 40 years before." The threat comes from destructive, high-water levels due to closing the gates along Tamiami Trail and bad water-management policies.

Does anyone care? Will anyone act?

The legal responsibility for protecting this precious resource rests with several state agencies. Ideally the federal government should care as well. Therein lies another problem: The federal government doesn't care, because it doesn't own the conservation area, even though the Everglades within it and within Everglades National Park compose the

"River of Grass."

The state agencies responsible for the conservation area include the governor and Cabinet sitting as trustees of the Internal Improvement Fund (it holds the legal title), the Fish and Wildlife Conservation Commission (it's responsible for managing wildlife resources) and the South Florida Water Management District (it's supposed to manage the water). But, in fact, the Central Everglades is an orphan, a beautiful child with unlimited potential but not worth the political trouble of fighting for.

No one expresses the belief that the conservation area isn't worth protecting. No one says that the Central Everglades should die. But all know that the current high-water levels will kill it, and no one will take

Does anyone care? Will anyone act?

responsibility for saving it.

We know, of course, that Water Conservation Area 3-A is not a living being, but from the air it appears so — a beautiful living creature struggling in a snare set by a twin sister, Everglades National Park.

Only a metaphor? Rain comes naturally in the Everglades ecosystem like tears; and rain, like tears, flows away naturally. But, if blocked, tears build to deadly levels. That's what's happening: The conservation area is drowning in its own tears.

There is no flood-protection,

human-health or property-right reason for holding the water back. Officials simply have found that they can use the artificial barriers along Tamiami Trail to protect the park, requiring Conservation Area 3-A to absorb any natural events or conditions that they don't like.

The conservation area and park were once one, but that relationship is now denied and disavowed as if the conservation area were some distant, no-account relative. The Department of the Interior uses the bridges and gates along Tamiami Trail to hold water levels artificially low south of the trail in the park and artificially high north of the trail.

This is being done so that about 10 percent of a subspecies of a bird that moved into

the artificially dry area (away from its 1977 officially declared "critical habitat") will not have to move again. Artificial, unnatural conditions are created in the name of "nature."

It wouldn't take much to save the Central Everglades: Just pull the plugs that block the flow of water, just open the drains, open the gates. The urban and agricultural areas to the east and west would not be harmed. In fact, flood protection would be improved because the water would flow through the Everglades naturally, where it belongs.

The Central Everglades needs a leader who, to paraphrase Abraham Lincoln describing the Mississippi, will enable "the mighty river to once again flow unvexed to the sea."

Irreversible Damage – Soil P

EPA REMA-P 1995-96 Study
Percent of Everglades Soil Above
CERP Goal of 400 mg/kg



66%
Everglades
Soil Meeting
CERP Goal

EPA REMA-P 2005 Study
Percent of Everglades Soil Above
CERP Goal of 400 mg/kg



49%
Everglades
Soil Not
Meeting
CERP Goal

In approximately 10 years the percentage of Everglades impacted by soil P above the Comprehensive Everglades Restoration Plan goal of 400 mg/ml increased from ~34% to ~49% ... approximately a 46% increase in Everglades irreversibly damaged ... and this during a period of time when most believed that Everglades restoration was being accomplished

EVERGLADES ECOSYSTEM ASSESSMENT

**Water Management and Quality,
Eutrophication,
Mercury Contamination,
Soils and Habitat**

Monitoring for Adaptive Management

A R-EMAP Status Report

**U.S. Environmental Protection Agency Region 4
Science and Ecosystem Support Division
Athens, Georgia**

2007

This document is available on the Internet for browsing or download at:
<http://www.epa.gov/region4/sesd/sesdpub_completed.html>

EPA Report

Harm inflicted by delay

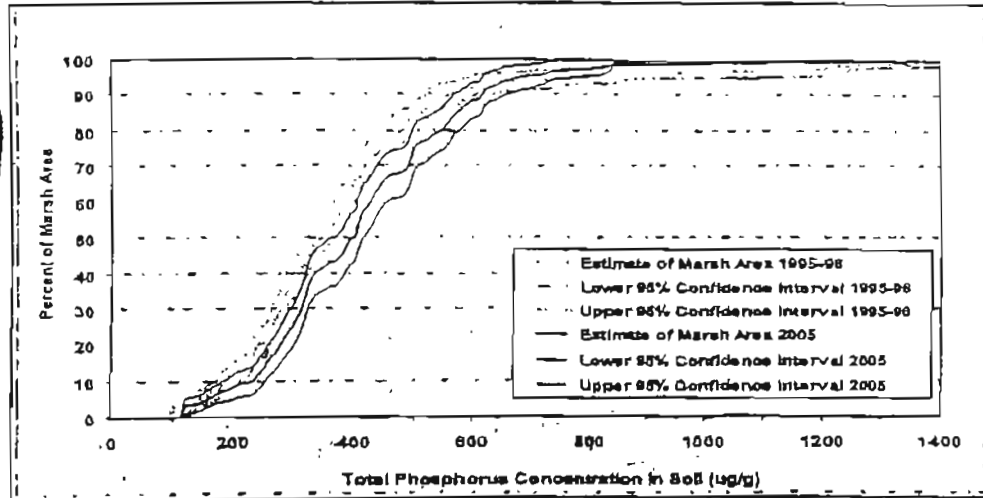


FIGURE 46. Soil total phosphorus estimates of marsh area wet seasons 1995-98 and 2005. About 25% of the Everglades had soil TP exceeding 500 mg/kg in 2005, as compared to 18% in 1995-98.

Soil phosphorus

1996
33.7%
(≥ 400 mg/kg)
(CERP Goal)

2005
74.3%
(≥ 400 mg/kg)

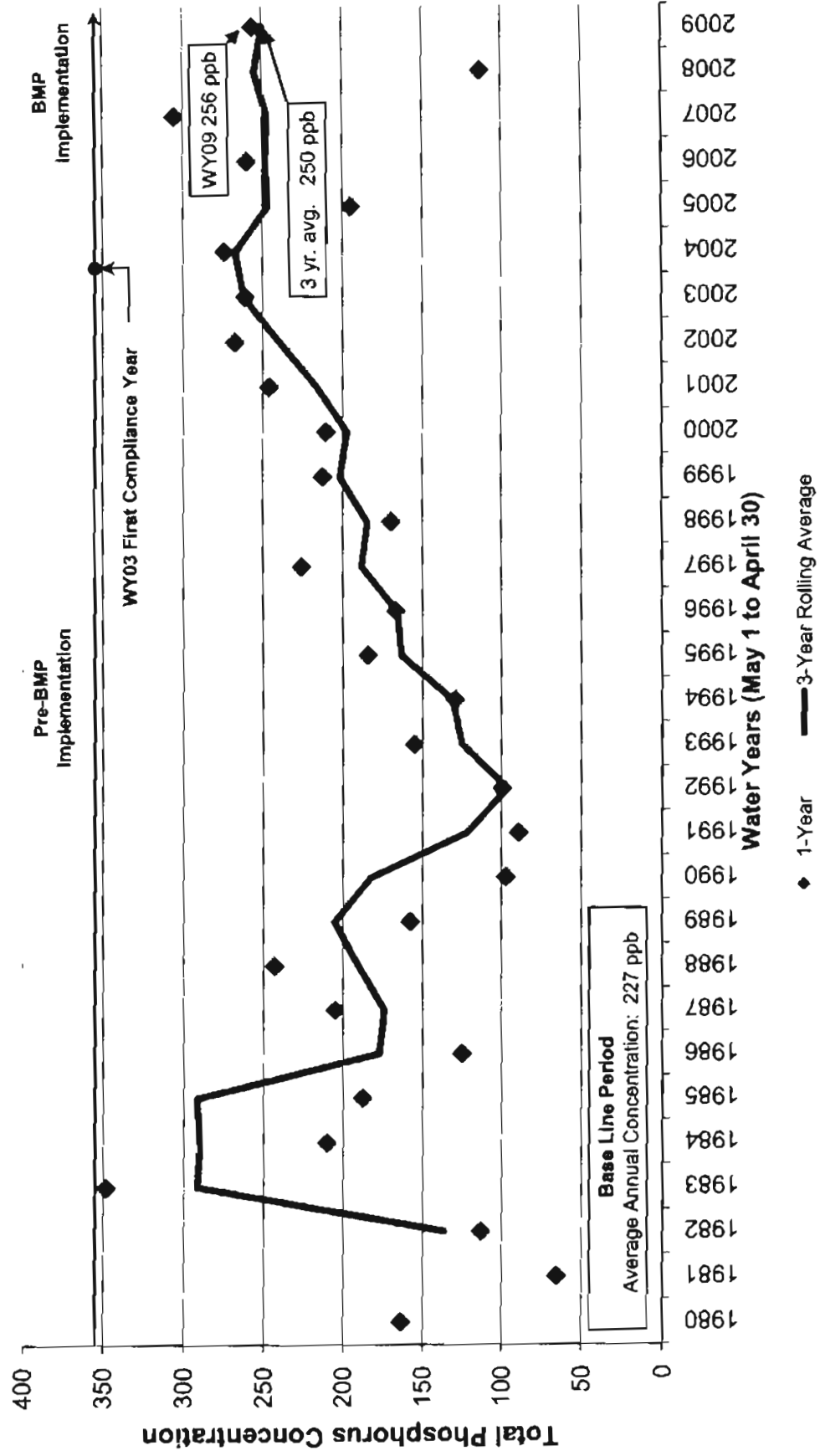
Soil phosphorus is expressed in Figure 45 (left) on a mass basis as milligrams of phosphorus per kilogram of soil. Results reported here are similar to those obtained by others in 2003 for the EPA (2003) Program data indicate that in 2005 the area of the Everglades with soil TP concentrations exceeding 500 mg/kg was $24.5 \pm 6.4\%$, while $48.3 \pm 7.1\%$ of the 2063 square miles sampled exceeded 400 mg/kg (Figures 45 and 46). This contrasts with $16.3 \pm 4.1\%$ exceeding 500 mg/kg in 1995-96, and $33.7 \pm 5.4\%$ exceeding 400 mg/kg. Figure 47 shows the most recent (2003-2005) soil TP data at 1270 locations from all of the programs sampling in the Everglades (R-EMAP, University of Florida - SFWMD, and Florida or federal permit transect monitoring). Depicted as mg/kg, WCA3A north of Alligator Alley, northern WCA 2A, and the edges of the Refuge most proximate to canals have the highest soil phosphorus in the portion of the Everglades underlain by peat soil (Figure 47). There are also several locations throughout southern WCA 3A and the Park with soil TP in excess of 500 mg/kg. However, these locations



FIGURE 47. Soil total phosphorus for 2003-2005 at 1270 locations from all sampling programs. Red dots indicate soil TP > 500 mg/kg. Data are from SFWMD, FDEP and USEPA.

Conclusion:
Ten years delay inflicts serious, possibly irreversible damage to Everglades

C-139 Basin Trends



FWS Predicted Degradation of Snail

Kite Critical Habitat in WCA 3A

FWS Prediction

The FWS 2006 Biological Opinion in the FSEIS anticipates that: *“habitat changes will occur whenever water levels rise above 10.5 ft NGVD as measured at gauge 3A-28.*

We expect these stages will result in degradation of 184,320 acres of Snail Kite habitat within WCA 3A in each of the next 4 years when stages exceed 10.5 ft” ...
deviations for sparrow been going on since

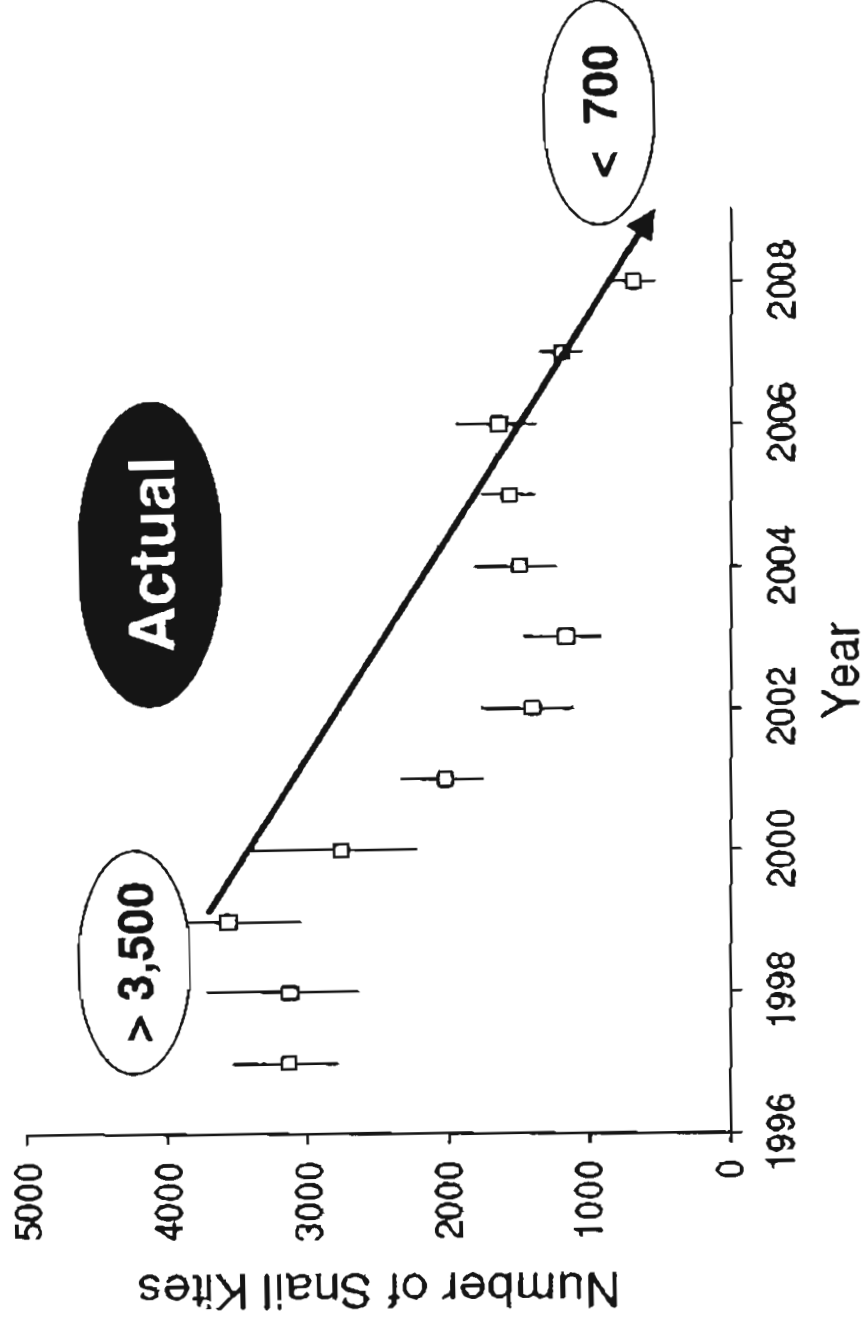
December 1997

Actual

Actual Result:

**Stages in WCA 3A have
exceeded 10.5 feet in 10 of
the past 13 years**

Actual Result ... Over 75% Decline in Snail Kite Population Since Sparrow Deviations Began





Miccosukee Tribe of Indians of Florida

WELCOME to MICCOSUKEE INDIAN COUNTRY

Interesting information about the Miccosukee Tribe of Indians of Florida:

*** The Miccosukee Tribe is a federally-recognized Indian Tribe

*** Miccosukee Indian Country is within the Everglades (Water Conservation Area 3-A and Everglades National Park, within the Everglades Protection Area)

*** The only Tribe with lands within the Everglades (Miccosukee Indian Country, consisting of Indian Reservation lands, Congressionally-recognized Perpetual Lease lands, Congressionally-established Miccosukee reserved Area lands, and Miccosukee Dependent Indian Community lands within the Everglades Protection Area)

*** Its members are the only people to live within the Everglades (Indian and non-Indian in Everglades Protection Area)

*** The Tribe is approved with state status under the Clean Water Act

*** The Tribe has set federally-approved water quality standards for the Everglades (including phosphorus)

*** The Tribe's members are guaranteed by Congress the right to live traditionally within Everglades National Park and Big Cypress National Preserve











Everglades Protection Area & Surrounding Areas

MICCOSUKEE INDIAN COUNTRY

Right to Traditional
Living
(BCNP Enabling Act)

Miccosukee
Perpetual Lease Lands
(Indian Country)

LEGEND

-  Lakes and Sloughs
-  Chapter 298 Districts and Lease No. 3420
-  Rotenberger and Holey Land Wildlife Management Areas
-  Stormwater Treatment Areas (STAs)
-  Everglades Protection Area
-  Legal Boundaries Defined by the Everglades Forever Act
-  Everglades National Park
-  Lower East Coast Regional Water Supply Plan Service Areas
-  Indian Reservation Boundary
-  Direction of Flow

Miccosukee
Reserved Area
(Indian Country)

Right to
Traditional Living
(ENP Enabling Act)

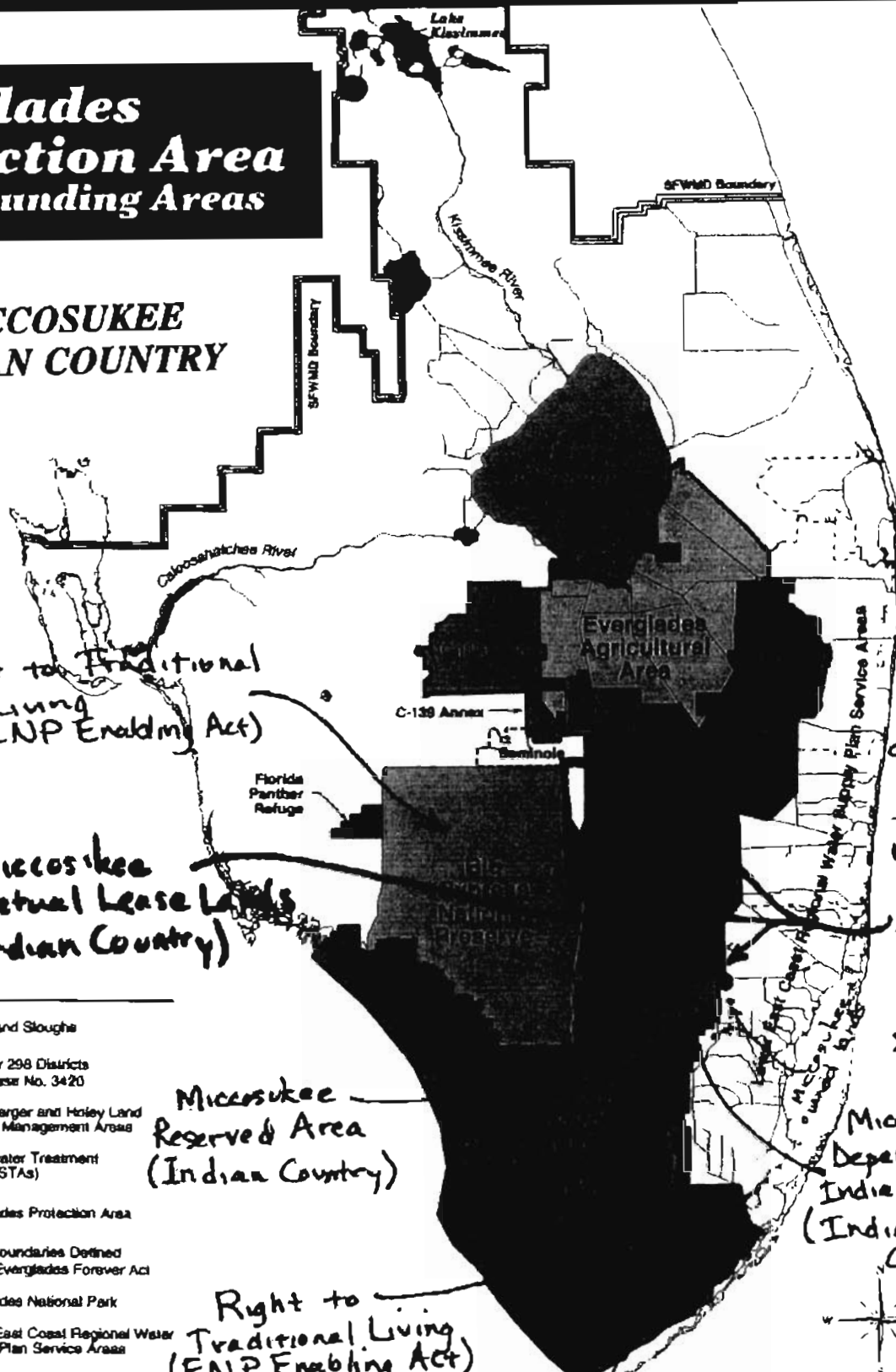


0 10 20 30

Former Indian Reservation
(99,400 acres in perpetuity)
abolished 1935

Miccosukee Indian Reservations
(Indian Country)

Miccosukee
Dependent
Indian Community
(Indian Country)



Miccosukee Tribe Florida Indian Land Claims Settlement Act of 1982 Lease Agreement

**Under the provisions of the Florida Indian
Claims Settlement Act of 1982 Lease
Agreement, the better part of WCA 3A is
perpetually leased to the Miccosukee Tribe
and is to be preserved “in its natural state
for the use and enjoyment of the
Miccosukee Tribe ...” and “fresh water
aquatic life, wildlife, and their habitat” are
to be preserved.**

Restoring the Everglades

The UNFULFILLED PROMISE of the INDIAN TRUST DOCTRINE

Dexter Lehtinen
March 2008

The most significant disappointment of federal Indian law, per se (as opposed to general law, such as the federal Administrative Procedure Act or the federal Clean Water Act), in the course of Everglades protection litigation, is the unfulfilled promise, in practice, the federal Indian Trust Doctrine.

The Indian "Trust Doctrine" (or, "Trust Duty", or "Trust Responsibility") holds that the federal government (US government) owes a special duty of "trust" or "responsibility" or "care" to Indian Tribes, based upon the relationship of Tribe to the United States. Chief Justice John Marshall of the US Supreme Court alluded to the concept in Cherokee Nation v. Georgia, 30 US (5 Pet.) 1 (1831). The concept was more fully articulated by the US Supreme Court in Seminole Nation v. United States, 316 US 286 (1942).

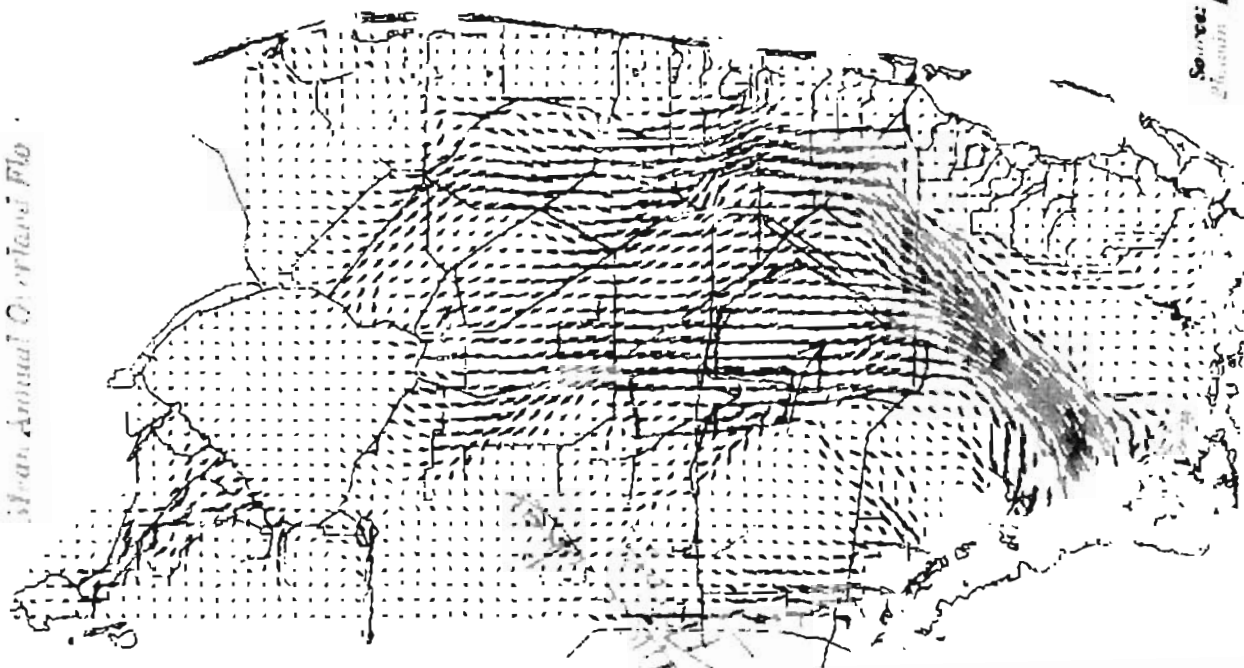
The Trust Doctrine is recognized (indeed, embraced) in principle and articulated in writing by the Congress, federal agencies, the courts, and Indian Tribes. However, in practice, the content of the Doctrine or Duty owed in any particular case or instance (the "teeth" of the concept) has been reduced to nothing more than the substantive requirements or elements of the particular law or agreement involved. That is, no independent duty of trust or care is found to exist, outside of the particular law or agreement involved. In other words, no broader trust or duty is recognized. See United States v. Mitchell, 445 US 535 (1980), United States v. Mitchell, 463 US 206 (1983), and United States v. Navajo Nation, 537 US 488 (2003). This makes the Doctrine hollow, a mere shell of its intended meaning.

Thus, in Everglades litigation, counts (each separate claim is a "count") alleging a breach of trust or the trust responsibility are often dismissed or deemed incorporated in the other counts. So, for example, a lawsuit might alleging violations of (1) the Clean Water Act, (2) the National Environmental Policy Act, and (3) the trust duty to the Tribe, all involving different aspect federal action causing pollution to enter (and damaging) tribal lands. The federal government will always move to dismiss the "trust" count (#3), claiming that the trust doctrine has no independent beyond the statutes cited. The courts often agree, either dismissing or "merging" the trust claim into the other claims.

This limited interpretation of the Trust Doctrine is not consistent with the doctrines origins or intent. Efforts to induce the agencies and courts to recognize the independent meaning and significance of the federal Indian Trust Doctrine will continue.

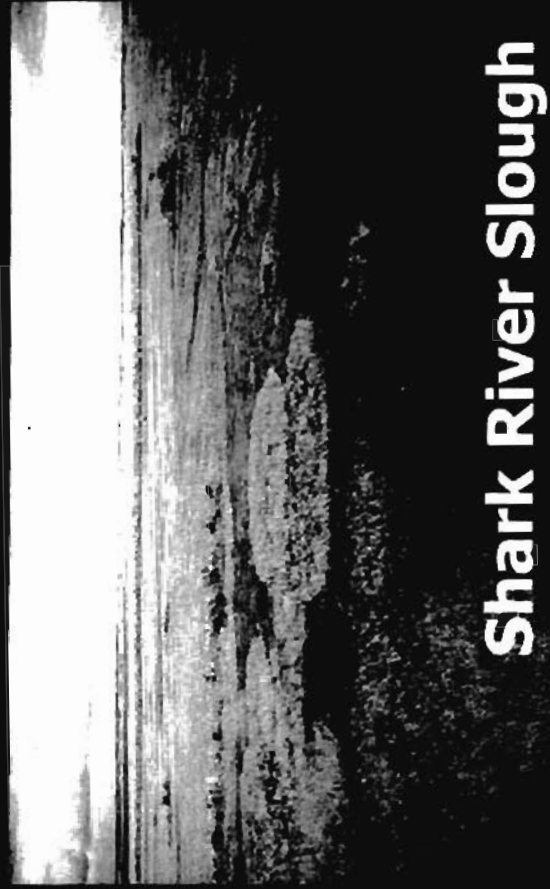
Natural System Model (NSM)

Mean Annual Overland Flow



The figure consists of two maps of the Sacramento-San Joaquin River Delta, illustrating the impact of levee construction on the natural flow path. The left map, dated ~ 1850, shows the 'Natural Flow Path Intact' with a complex network of channels and wetlands. The right map, dated ~ 1995, shows the 'Natural Flow Path Cut' with a simplified, straightened channel. Labels on the maps include 'Sacramento River', 'San Joaquin River', 'Delta', 'Wetlands', 'Cypress', 'Sawyer Plains', 'Cooper Marsh', 'Hydroelectric Dam', and 'Urban Area'.

Impact of Hydrologic Divide WCAs versus Shark River Slough



Everglades Restoration – Flow

CERP Yellow Book – The Effects of Decomartmentalization and the C&SF Restudy, Sue Perry, ENP; Cheryl Buckingham, FWS; Bill Loftus; BRD, USGS

“[1] The natural system has been reduced to approximately half of its historic spatial extent. [2] It can no longer handle the tremendous volumes of water necessary to maintain hydroperiods in Shark River Slough and proper salinities in Florida Bay without increasing the severity of damaging extreme depths and hydroperiods in the Water Conservation Areas. [3] Canals are capable of conveying water to the south quickly and efficiently, substituting for the missing part of the Everglades.”

CERP Plan for Providing Q(URBAN)

CERP Yellow Book 9.1.8.16 Diverting Water Conservation Area 2 and 3 flows to Central Lake Belt Storage Area (YY and ZZ) ... *“The purpose of this feature is to attenuate high stages in Water Conservation Areas 2 and 3 and transport this excess water to the Central lake Belt Storage Area where it will be stored to meet downstream demands in Shark River to meet downstream demands in Shark River Slough ...”*

What is the Tribe's position on restoration flows? Summary ...

- CERP got it right ... restore as much natural flow thru the Everglades as possible, but recognize and plan for additional flows for Shark River Slough ... must have both Q(WCA) and Q(URBAN) components
- Quality ... achieving Flows and Levels with Dirty Water produces IRREVERSIBLE DAMAGE
- Levels ... achieving Flows with destructive Levels produces IRREVERSIBLE DAMAGE
- Flows ... achieving Levels with less than optimum Flows is UNDESIRABLE
- Therefore, Flow should never be considered independently of Quality and Levels ... a balance among all 3 must be forged, implemented, and maintained

Incongruous Loss of Everglades

Constraint: The Tribe Will Not
Support Any Plan That
Drowns the WCAs in Order
to Deliver Flows to the Park

Water Quality

- All STAs consistently discharging above 10ppb ... as high as 93ppb for STA 6 in Water Year 2009 ... and this does not include Bypass Flows
- Rehydration with Dirty Water causes Irreversible Damage

Water Quality

Constraint: The Tribe Will Not
Support Any Plan That
Rehydrates With Dirty
Water ... the WCAs Will Not
Be Utilized As STAs

Quotes from U. S. Judge Alan Gold
Invalidating Florida Everglades Forever Act
Ruling for Miccosukee Tribe of Indians

July 29, 2008

** "...the Florida Legislature ...**violated its fundamental commitment** and promise to protect the Everglades...." [2]

** "Turning a '**blind eye**', the US Environmental Protection Agency concluded that there was no change in water quality standards." [2]

** "The Amended EFA is **an adroit legislative effort to obscure the obvious.**" [36]

** "... any further delay through endless, undirected rounds of remands to **EPA to do its duty, which it steadfastly has refused to do**, is, alone, insufficient, and that it is imperative that this Court exercise its equitable powers to avoid environmental injury to the Everglades through...the use of **blanket exemptions.**" [93]

** "The 'effect' of the Amended EFA is to replace the...phosphorus criterion with an **escape clause that allows non-compliance.**..." [46]

** "...the Amended EFA changes Florida water quality standards by **authorizing continuing violations.**..." [58]

** "...the Rule...is **layered with 'avoidance mechanisms'**...." [62]

** "The EFA has **condoned...a de facto moratorium on compliance.**..." [76]

** "Nothing could justify a schedule **so slow and 'glacial'** as to defeat the Clean Water Act's goals." [78]

Quotes from U.S. Judge Alan Gold
Everglades Forever Act
(continued)

** "...there is **no longer a date certain** when the phosphorus criterion will even be met." [78]

** "...the EFA's conclusions are '**not in accordance with law**' because the Clean Water Act does not allow state water quality standards to be replaced with...an **open-ended compliance schedule**" [43]

** "Federal law does not authorize anything like a **twenty-two year** compliance schedule.... **Any further delay** in enforcement must necessarily....result in **'careful judicial scrutiny.'**" [p. 92]

** "...**irreparable injury to the Everglades** and to the Plaintiff [Tribe] suffered unless this injunction issues..." [98]

** "Summary judgment is **granted in favor of the Tribe....**" [98]

Quotes from:

Miccosukee Tribe of Indians
of Florida

v.

United States of America,
US Environmental Protection Agency,
Fla. Dept. of Environmental Protection,
et. al.

#04-21448

United States District Court
So. District of Florida
July 29, 2008

Dexter Lehtinen,
Counsel for the Miccosukee Tribe

The Myth and Reality of the Tamiami Trail Bridge

Miccosukee Tribe of Indians of Florida, December 4, 2009

The ground-breaking for a Tamiami Trail bridge is a charade, designed to simulate “progress” on Everglades restoration by pouring concrete on an premature and harmful project while the important restoration projects remain stalled.

Water levels cannot be increased in NE Shark River Slough until the necessary flood protection barriers (“seepage” barriers) are constructed to avoid flooding in urban western Miami-Dade County. These flood protection barriers are not yet even designed, yet are an acknowledged prerequisite to restoring natural water flow. Because higher natural water levels in the Slough raise groundwater levels (underground) in the urban areas, through aquifer seepage, the ground in the urban areas cannot absorb even modest rains from “no-name” storms (much less tropical storms and hurricanes).

Although the government claims in press releases that the new bridge will facilitate more water flow, in technical documents and court testimony the government claims that it will not move more water. The government admits that it has not analyzed flooding impacts and other “operational” impacts, because it claims it will not “operate” the bridge until flood protection barriers are completed for many years to come. The government claims that the L-29 Levee, on the north side of the L-29 Canal, which forms Tamiami Trail’s north shoulder, will continue to block surface flow. But the bridge will induce more aquifer seepage of water into the Slough and into urban west Miami-Dade, so the government says it will pump the additional water back into the Everglades from urban west Miami-Dade and will also offset the additional underground flow by restricting surface flow from WCA 3A (tribal Everglades).

In other words, flooding of urban west Miami-Dade will be avoided by pumping the water back out of the urban areas and by flooding the Miccosukee Tribe in WCA-3A! And all of these “remedies” to the increased flooding threat are made up out of whole cloth, with no analysis, only to answer the reality which the government won’t acknowledge in the first place. So a federal Judge issued an injunction because of the lack of environmental analysis, but the government goes forward to pour concrete anyway, to simulate “progress” for the cameras.

History Repeats Itself

***THE TAMIAMI BRIDGE HARMS THE EVERGLADES
AND DEPRIVE THE MICCOSUKEE TRIBE OF INDIANS
OF ITS DUE PROCESS RIGHTS AND ITS DAY IN COURT***

A federal Judge said the bridge project risks

irreparable harm to the Miccosukee Tribe.

But the United States government said,

build it anyway.

A federal Judge said the bridge project is

an “environmental bridge to nowhere” and “a complete waste of taxpayer dollars”.

But the United States government said,

build it anyway.

A federal Judge said the United States

did not analyze the environmental impacts of the bridge.

But the United States government said,

build it anyway.

This action is a lamentable “blast from the past” in American history, regarding –

***** mistreatment of American Indians**

***** irresponsible spending**

***** disregard of environmental impacts**

The Miccosukee Tribe won an injunction (National Environmental Policy Act) against a harmful bridge. But the United States put itself above the law, directing construction despite legal violations, denying the Tribe its day in court and defying the Rule of Law.

Miccosukee Tribe of Indians of Florida

Contact: Miccosukee Chairman Collie Billie or Everglades Special Assistant Dexter Lehtinen

December 2009 305-279-3353 Fax:305-279-1365

**JUDGE FINDS PROPOSED BRIDGE ANALYSIS INADEQUATE,
SUBSTANTIAL LIKELIHOOD OF IRREPARABLE HARM
TO MICCOSUKEE TRIBE OF INDIANS**

On November 13, 2998, U.S. District Judge Ursula Ungaro (case #08-21747, Southern District of Florida) found the analysis of the proposed Tamiami Trail bridge project to be inadequate and a substantial likelihood of irreparable harm to the Miccosukee Tribe of Indians of Florida. No further analysis was conducted; instead, the US government just deprived the District Court of jurisdiction over the issue (an action with substantial negative constitutional ramifications and is undergoing legal challenge).

Among other comments, Judge Ungaro stated:

***** "...a further delay here would really be attributable to the Corps itself, for it could have avoided this lawsuit (and others like it) by scrupulously following all relevant federal laws." Order at 30.**

***** "From the testimony at the hearing, it appears that the Corps may not have done an intellectually honest analysis of the relative merits of the different alternatives considered in the LRREA." Order at 23.**

***** "The Court can fairly assume that Congress desires that other federal statutes, such as NEPA, are properly followed in the implementation of the long-awaited MWPD (Mod Water Delivery Project)." Order at 30.**

***** "It appears substantially likely that the Corps violated NEPA because in considering the differences between the two alternatives, it failed to evaluate whether and how those differences would alter the anticipated environmental effects of the MWPD [Modified Water Deliveries Project]." Order at 19.**

***** "Without those additional MWDP (Mod Waters Delivery Project} components, the TT [Tamiami Trail] component is no more than construction of an 'environmental bridge to nowhere' that accomplishes (and harms) nothing but which would be a complete waste of taxpayer dollars." Order at 20.**

Lehtinen/11-09

*** end ***

Why the Miccosukee Tribe Opposes the Tamiami Trail Bridge

Dexter Lehtinen, Special Assistant for Everglades Affairs
Miccosukee Tribe of Indians of Florida/August 10, 2009

The Miccosukee Tribe of Indians of Florida (the only residents of the Florida Everglades) oppose the premature construction of the Tamiami Trail one-mile bridge because the bridge:

1. Destroys Everglades by Flooding WCA-3A (Tribal Everglades), in Order to Avoid Violating Water Level Depth Constraint in NE Shark River Slough

2. Destroys Everglades by Flooding WCA-3A (Tribal Everglades) for More Than One Year During Construction, to Avoid Disturbed Sediment Flow into Park

3. Destroys Everglades by Transporting New Pollutants into Shark River Slough Via Circular "Backpumping" of Eastward Seeping Water to Avoid Flooding in Developed Western Miami-Dade

4. Creates Unnecessary Urban Flooding Threats, Threats Which Are Reduced by Unnatural Water Movements and Blockages, and Which Pollute the Everglades and Destroy the Everglades by Flooding WCA-3A

A discussion of these factors, including the unnecessary harm to the Everglades from premature construction of the bridge, follows.

Why the Miccosukee Tribe Opposes the Tamiami Trail Bridge

Dexter Lehtinen, Special Assistant for Everglades Affairs
Miccosukee Tribe of Indians of Florida/July 24, 2009

The following analysis was demonstrated in a District Court hearing (resulting in an injunction against the bridge), which the U.S. Congress and Executive Branch chose to ignore:

1. Destroys Everglades by Flooding WCA-3A (Tribal Everglades), in Order to Avoid Violating Water Depth Constraint in NE Shark River Slough

The bridge will induce increased subsurface water seepage from WCA-3B (under the L-29 levee), while the water level constraint at Gauge G-3273 (in Shark River Slough) prohibits levels above 6.8 feet. When G-3273 exceeds 6.8 feet, S-333 must be closed (holding water in WCA-3A, flooding tribal lands). The flooding from reduction of surface flows from WCA-3A (closing S-333) results in permanent loss of remaining tree islands (80% already lost) and biodiversity.

This is the “**deadly equation**”: $C = S + G$

C = “constant” depth constraint at G-3273 remains in place (unchanged) (6.8 feet)

S = “surface” flows into Shark River Slough (large amounts from WCA-3A through S-333)

G = “groundwater” flows (subsurface seepage underground, from WCA-3B)

When G increases and C remains constant, then S must decrease by an equal amount; that is, S-333 must be closed to reduce surface flows out of WCA-3A.

Put clearly, **Miami-Dade County will be protected from flooding, by flooding Miccosukee tribal lands**

2. Destroys Everglades by Flooding WCA-3A (Tribal Everglades) for More Than One Year During Construction, to Avoid Disturbed Sediment Flow to Park

The Corps of Engineers permit application indicated that flow through certain culverts under Tamiami Trail would be reduced so as to avoid construction debris and disturbed sediment discharge southward. This would be accomplished by closing S-333 more often and backing-up water into WCA-3A (according to the permit application) for possibly more than 400 days with more than one foot additional depth. Such action destroys tree islands and biodiversity in the Everglades (WCA-3A and Tribal Everglades therein).

Put clearly, **the Park will be protected from harm during construction by visiting the harm upon Miccosukee tribal lands.**

3. Destroys Everglades by Transporting New Pollutants into Shark River Slough Via Circular "Backpumping" of Eastward Seeping Water to Avoid Flooding in Developed Western Miami-Dade County

New pollutants will be added to the Everglades. This results because additional water that seeps eastward into western Miami-Dade County from Shark River Slough will be "backpumped" in a circular fashion back westward into the Slough through surface canals, picking up pollutants along the way and transporting the pollutants into the Everglades. Thus, the avoidance of flooding through circular "backpumping" will add pollutants into the Everglades which would otherwise not enter the Everglades.

Until seepage barriers and other anti-flooding barriers are constructed (probably a decade away from completion, as even design is not yet complete), excessive eastward seepage from higher waters in Shark River Slough threatens flooding in developed western Miami-Dade County. Seepage, rather than surface flow, has always been the primary threat to, and cause of flooding in, Miami-Dade County, because the higher water tables produced by seepage eliminate residual capacity of land to absorb any significant rain storm, causing surface flooding.

Accordingly, water seeping to the east from Shark River Slough must be pumped back westward into the Slough, in a circular fashion. Although the existing pumps are insufficient in capacity to "backpump" the full amount of seepage in some circumstances, a significant amount of water will be "backpumped" into the Everglades. This "backpumped" water will pick up considerable pollutants as the water seeps eastward, entering urban western Miami-Dade County, and is then pumped westward again through surface canals. These pollutants, picked up in the circular movement, will be added to the Everglades.

The refusal to analyze this acknowledged problem illuminates the obvious conclusion that the Corps and DOI do not want any data generated that would demonstrate this negative effect. The United States simply refuses to ask any questions with respect to which the United States does not want an answer.

Thus, the avoidance of flooding through circular "backpumping" will add pollutants which would otherwise not enter the Everglades.

4. Creates Unnecessary Urban Flooding Threats, Which Threats Are Reduced by Unnatural Water Movements and Blockages, and Which Pollute the Everglades and Destroy the Everglades by Flooding the Everglades

The goal of bridging is allegedly to restore natural flow levels in Shark River Slough, which natural flow levels unmistakably caused flooding in the past in western Miami-Dade County. Accordingly, flood protection features are required before natural flow is re-established (particularly in light of much greater urban development in western Miami-Dade County than in earlier periods when natural flow levels in the Slough caused flooding).

The United States offers inconsistent explanations of the reason for, and effects of, the one-mile bridge. First, the U.S. claims that the bridge is needed in order to move more water into the Shark River Slough, restoring natural flow levels. But, in light of the acknowledged flooding danger, the US says, second, that there is no threat of flooding in Miami-Dade County because the bridge will not, in fact, move more water until flood protection features are constructed many years hence.

The claim that the bridge poses no flooding threat is based on three ideas: (I) the bridge will not increase flow (despite its supposed *raison d'être* of increasing flow); (II) increased subsurface seepage into Miami-Dade from increased subsurface seepage from WCA-3B into the Slough will be offset by reduced surface flows through S-333, backing up surface water in WCA-3A; and (III) increased subsurface seepage into western Miami-Dade County will be offset by “backpumping” the water westward through surface canals, back into the Slough.

(I) The claim that no additional new water will flow into the Slough is based on the existence of a parallel levee, on the north side of Tamiami Trail, which will continue to block flow after the bridge is built. The L-29 Levee, which runs parallel to the L-29 canal and Tamiami Trail, on the north edge of the canal, will not be breached, so that new flow will be restricted. As strange as this sounds, the argument is that the levee will block flow, so the free flow under Tamiami Trail will be irrelevant. In other words, the L-29 Levee will render the bridge superfluous to flow. This leaves unanswered, of course, the question of why immediate construction of the bridge is important, if the L-29 Levee will remain in place to block flow and avoid any flood threat from increased flow (as flow will not increase).

(II) Avoiding flooding in western Miami-Dade County by reducing surface flows from WCA-3A through S-333, sacrifices tribal lands in WCA-3A (which Congress promised would be preserved in their natural state) to avoid flooding in Miami-Dade. In other words, flood the Tribe so as not to flood Miami-Dade County. This issue is discussed in detail in section #1 (above). The tragedy is that there need not be this “trade-off”; there need not be a threat of Miami-Dade flooding which is “solved” by flooding the Tribe. It is action of the United States which threatens Miami-Dade with flooding, which is then answered by substituting flooding of the Tribe. The United States should flood neither area (neither western Miami-Dade nor the Tribe). The United States should wait on the bridge until flood protection components of Everglades restoration (such as the planned seepage barriers) are completed.

(III) The transporting and discharging of pollutants into the Everglades through circular “backpumping”, so as to avoid flooding in urban Miami-Dade County, is shortsighted and unnecessary. This issue is discussed in section #3 (above). It is caused by US action in prematurely building a bridge before the flood protection barriers are in place.

In sum, the United States is creating unnecessary damage to the Everglades and to the Tribe, to avoid flooding in urban Miami-Dade, which the United States is itself prematurely causing. Proper planning and construction sequencing would construct the prerequisite projects

(flood protection features) first, ahead of the projects that cause the events which the prerequisite projects are designed to address (project which increase flow).

The United States is deliberately planning to “close the gate after the horse gets out”. In short, **the United States should not increase water flow until the projects designed to accommodate the increased flow are in place; and it is unfair and immoral to place the damage caused by this inept planning on the Miccosukee Tribe.**

*** end ***

THE RULE OF LAW and THE RULE OF POLITICAL POWER

Dexter Lehtinen
June 24, 2009

There are two distinct ways that government can ensure that its behavior is not found to violate the law. Compliance with the law (the obvious method) is often rejected in favor of changing the law (to avoid having to comply). Consider:

First, government can conform its behavior to the requirements of law.

-or -

Second, government can change the requirements of law to conform to its behavior.

The first approach (conforming behavior to law), demanded by the Barons in 1215 CE of King John (England) in the Magna Carta, is known as the Rule of Law. Under the Rule of Law, government is subject to the law. Law seeks to control power.

The second approach (conforming law to behavior), followed by the United States in Everglades restoration, is known as the Rule of Power. This approach is contrary to and inconsistent with the Rule of Law. This approach is commonly used by dictatorial leaders to create the illusion of law in a reality of power. Its use brands its users as violators of the Rule of Law, and as individuals who place immediate gain from the exercise of pure power over principle and respect for the dignity of law.

The United States has the power to change the law as it wishes, to break its word at its whim; but the United States does not have the moral right to do so. The power of the United States to break its word to Indian Tribes was upheld in FPC v. Tuscarora Indian Nation, 1960. But the moral right to break its word has never existed. As Justice Black said in dissent in Tuscarora, "Great nations, like great men, should keep their word".

The Everglades

Diktat

The order to build an Everglades restoration project, without regard to law or science or analysis, and without regard to the finding of irreparable harm to an Indian Tribe, is a

diktat.

A “diktat” is a dictated or directed outcome, based purely on the power of the dictators, without regard to the legitimate rights or interests of others affected by the decision.

Special interests (including government agencies) with political power, whose plans cannot otherwise pass comprehensive analysis, scientific scrutiny, and legal review, resort to **diktat** to achieve their special interest goals.

To implement or mask “**diktat**”, agencies engage in “**gleichschaltung**” behavior – activities designed to bring everyone “into line” with their plans. Meetings of the South Florida Ecosystem Restoration Task Force, directed by the US Department of Interior and Florida Department of Environmental Protection, have been conducted as exercises in “**gleichschaltung**”.

***The Problem of
BYSTANDERS and COMPANY MEN
in Everglades Restoration***

The government official who acts as nothing more than a “bystander” is a significant problem in Everglades restoration. While noting certain clear facts or conditions, the “bystander” does not want to get involved, even when his/her assignment is, in fact, to get involved. It is so much easier to “stand by” and let the flow of events pass by, rather than act on the clear truth. Action often involves making moral judgment, a task avoided by many bureaucrats.

By providing clear facts, the Miccosukee Tribe hopes to deny all United States officials the option of occupying the position of innocent “bystander”.

“ Bystanders” are people who deny any responsibility for events around them, ignore facts, and pretend ignorance to obvious circumstances. Bystanders are the “pilgrims” and “company men” of Joseph Conrad’s *Heart of Darkness*, who remain completely oblivious to truth and values.

Lehtinen
October 2009

Flooding Threats to Miami-Dade County From Inconsistencies in Tamiami Bridge Analysis

Dexter Lehtinen, December 2009

SUMMARY

The Corps did not analyze the potential effects of higher water in NE Shark River Slough in its Environmental Assessment, claiming that no higher water would result for many years because the Corps would “not operate” the bridge until another environmental analysis covering the effects of higher water is completed (many years after construction is completed) and until other components of the Modified Water Deliveries Project were completed (including the necessary seepage barriers). This claim is made despite the virtual impossibility of “not operating” a bridge under which water freely flows.

The illogic of claiming environmental benefits from higher water as a result of the bridge, but simultaneously claiming that no higher water will result and conducting no analysis of higher water flooding effects caused the federal Judge to enjoin the bridge construction until proper analysis pursuant to the National Environmental Policy Act (NEPA) was completed.

ANALYSIS

1. Higher Water: The Raison d’Etre of the Bridge – Higher water in NE Shark River Slough (contiguous to developed western Miami-Dade County) is, as everyone knows, the very purpose (“reason for being”) of the Modified Water Deliveries Project (in general) and the proposed Tamiami Trail Bridge (in particular).

2. Benefits Claimed from Higher Water – As would be expected, the Corps claims substantial environmental benefits from the higher water which the one-mile bridge would deliver.

3. Higher Water Simultaneously Denied – However, the Corps simultaneously claims that there will be no higher water from the proposed bridge because the bridge will “not operate”, after construction, for many years. Thus, the Corps avoids answering any questions about the possible negative effects of higher water, including the danger of flooding in Miami-Dade.

4. Impossibility of “Not Operating” a Bridge – The Corps claims no necessity of analyzing the flooding potential of higher water, because it will “not operate” the bridge for many years after construction is completed. This is impossible, logically and factually. Logically, if a bridge moves more water by southerly gravity flow from the L-29 canal and the WCAs (as is the claim for this bridge), then the bridge cannot be “not operated”. Factually, any attempt by the Corps to “starve” or “dehydrate” the L-29 canal on the north side of Tamiami Trail, by blocking water flows to the canal, would have substantial negative environmental effects itself and would require a substantial change to the Corps’ Water Control Plan (not proposed or analyzed). Furthermore, significant amounts of water enter the L-29 canal from seepage, seeping southerly, under the L-29 levee (on the north side of the L-29 canal) from WCA-3B into the canal. This

water cannot be stopped and sometimes constitutes as much as 50% of the water which flows into NE Shark River Slough.

5. Historical Flooding in Miami-Dade and the Creation of WCA-3B Barriers to Stop Such Flooding – Flooding in developed Miami-Dade County is not merely a hypothetical problem. When WCA-3 (not yet divided into 3A and 3B) was constructed in the 1950s, flooding in western Miami-Dade resulted. This flooding was the reason that the Corps was forced to divide WCA-3 into WCA-3A and WCA-3B, with the construction of significant barriers (L-67A and L-67C) to block water from entering WCA-3B (and then south into NE Shark River Slough), and the L-67Ext (extension) south of Tamiami Trail, blocking easterly flow into NE Shark River Slough. To avoid flooding in Miami-Dade, WCA-3B is held at lower water levels than WCA-3A.

6. Modified Water Deliveries Project, Designed to Re-establish Higher Water with Simultaneous New Features to Avoid the Return of Flooding in Miami-Dade – For this reason, the Modified Water Delivery (MWD or “Mod Waters”) Act of 1989 recognized that higher water could not be re-established in WCA-3B and in NE Shark River Slough without providing new features to protect against flooding. MWD will eliminate (by cutting flowways or degrading) the L-67A and L-67C Levees and the L-67 Extension Levee, which were in fact constructed in order to alleviate the resulting flooding. The necessary “seepage barriers” at the western edge of developed Miami-Dade (e.g., along the L-31N Canal and Levee, west of Krome Avenue) are critical to avoiding the return of flooding under the MWD Project.

7. Flood Protection Components of the Mod Water Project Ignored, Delayed and Not Underway – Although the Corps acknowledges that higher water should not be delivered to NE Shark River Slough until the flood protection components of MWD are completed, the Corps is under some political pressure to show some “progress”. Therefore, the Corps chose to proceed with bridge construction (thereafter, enjoined by the federal Judge) despite no progress on flood protection (in fact, not even a plan for the flood protection components). This obviously is disjointed and threatens adverse consequences. The federal Judge stopped the bridge, requiring the Corps to conduct a comprehensive analysis, including the effects of higher water.

8. Conclusion: Don’t Build a Bridge, Which Will Obviously Produce Higher Water, Until the Flooding Effects of the Higher Water Are Analyzed and the Flood Protection Components Designed to Protect Against the Higher Water, Are Constructed – Higher water in the past flooded Miami-Dade. The components of the Central and South Florida Project which were built to stop the higher water (WCA-3B, L-67A and L-67C, L-67 Ext, etc) will be eliminated by the Modified Water Deliveries Project. Therefore, Mod Water requires (by law) that new flood protection components be included in Mod Waters. Accordingly, Mod Waters components which deliver the higher water (and which cannot be controlled) should not precede the flood protection components. Political pressure to “build a bridge”, from special interests with no interest in protecting people from the historically-experienced flooding, should not be allowed to override the health and safety of Miami-Dade residents. Both goals can be achieved with proper planning.

*** end ***

***How Not to Save the Everglades:
Irrational Planning, Sweetheart Deals, and the
Political Uses of Restoration***

Dexter Lehtinen, December 2, 2009

The “sugar buyout” is bad planning, bad financial practice, and bad restoration, for many reasons:

No Restoration Plan/Deviation from CERP

Mere acquisition of land is inadequate and even counter-productive. There is no plan for utilization of the land in any rational way (e.g., no studies of the size or magnitude or location of needed stormwater treatment areas or storage reservoirs), and no demonstration that 73,000 acres is needed at the locations being purchased. CERP has been abandoned and CERP goals surreptitiously changed to justify the unnecessary buyout, to the detriment of the WCAs (e.g., add. 245,000 acft/yr delivery to federal Park changed to more than 1 million, drowning state WCAs). Furthermore, there is no money to buy the additional 107,000 acres to complete the 180,000 acre total proposal.

No Money for Restoration

The cost of land acquisition alone (\$650 million for 73,000 acres) would be less than 10 % of final costs after engineering and construction of facilities. There is no plan for raising \$8 billion or more additional money (note that approximately 16,000 acre EAA Storage Reservoir cost \$750 million, so 180,000 acres of construction would cost over \$8 billion). The debt service bonds for purchase alone will constrain future funding of other projects, and there is no way to raise another \$8 billion.

Abandoning Existing and Future Restoration Efforts

Present restoration projects are being stopped to divert funds to this future proposal. For example, the EAA Storage Reservoir, a critical CERP Project necessary to maximize existing STA efficiency, and for which SFWMD Acceler8 bonds were issued and more than \$250 million already spent, has been abandoned in mid-construction and work on the Project Implementation Report (PIR) halted. Caloosahatchee and St. Lucie estuaries projects also abandoned. The unspecified “River of Grass” proposal is at least fifteen years away from any restoration effect on the ground. Even ten years is a death warrant for the Everglades.

Abusive Financing, Ignoring Referendum, and Sweetheart Deal

The funds raised through COPs will not accomplish any restoration activities on the land, so the projections of STAs and reservoirs are illicit as COPs. The future financial condition of the SFWMD will be wrecked. Too much is paid for the land and too little charged for the leases to sugar. Due to leases, bonds will not be tax-exempt and rates charged will be excessive. Ad valorem taxes are in effect being pledged in violation of the Florida Constitution without a referendum (see Art. VII, sec. 12, and County of Volusia v. State, 417 So.2d 968 (Fla. 1982)).

Construction Stopped mid-2008
Project Implementation Report (PIR) Stopped
EAA Storage Reservoir (Phase I or A-1)
An "Initial CERP Project", in WRDA 2000

Exhibit II-B-6-12

Date: 01/08/2008 -- 9:48am

Source: SEWMD, PR-09-306

Still removal, ground prep

at the end of the project

The Irony of Everglades Restoration

Bad Land Deal Exposes Political Rhetoric and Reality in Everglades Restoration

Dexter Lehtinen, April 9, 2009

After his first and second new “visions” for Everglades restoration collapsed, Governor Crist announced a third ill-conceived idea for buying US Sugar Corporation land. In a supreme irony, Everglades restoration is suffering from its own popularity. Because continued implementation of on-going restoration projects produces no new “credit” for the politicians who assume office after implementation began, such politicians choose to stop on-going work, substituting a different approach for which they alone can claim credit. These officials refuse to simply implement critical restoration plans; they refuse to simply “carry a message to Garcia” in Everglades restoration (the famous phrase for working without fanfare or excuses, derived from the remarkable delivery of a message from President McKinley to Cuban leader Garcia in 1898).

Implementation of comprehensively-planned projects is the key to Everglades restoration, but press releases about “new initiatives” are the key to political credit. The jockeying for political benefit is the underlying element of Governor Crist’s new “vision” – a “vision” which lacks specificity, cannot be achieved for at least two decades, and abandons current restoration projects in mid-stream.

The land purchase is bad planning and bad restoration. First, land acquisition alone is inadequate. There is no plan for utilization of the land in any rational way. There is no demonstration that the land is needed at these locations. It’s little more than an “impulse buy” at the supermarket check-out – with public money.

Second, the proposed contract terms do not reflect the “vision’s” claims. This is the third version of the “vision”, which started with acquiring all US Sugar Corporation land and assets; then changed to buying 184,000 acres only; and now changed to buying 72,500 acres with a “right” to buy a remaining 107,500 acres at an unspecified market price. Of this 72,500 acres, 32,000 acres are in citrus production, poorly located, disconnected, and of little use in restoration. US Sugar retains the right to sell this remaining land to private buyers at any price; the government can acquire the land only by matching the price. Furthermore, if the government does not buy the remaining land within the 20 year period (at an unspecified market price), US Sugar has a right during that period to remain on 30,000 acres of the sugar cane land that the government did buy.

Third, there is no additional money to buy the remaining 107,500 acres or to build the construction projects, which are necessary to achieve any benefits to the Everglades. The 107,500 acres would cost at least \$850 million. The cost of land acquisition alone (\$1.35 billion) would be less than 20% of final costs after engineering and construction of facilities (at least \$5 billion). The debt service for bonds for the 72,500 acre land purchase alone will block future funding for land acquisition and construction.

Fourth, present restoration projects are being stopped to divert funds to this future proposal. For example, the EAA Storage Reservoir, a critical CERP (Comprehensive Everglades Restoration Plan) project (for which the government has already spent more than \$250 million), has been abandoned in mid-construction and work halted on the Project Implementation Report (PIR), required under CERP. The Caloosahatchee and St. Lucie estuaries projects (C-43 and C-44) are also stopped. These CERP projects provide more water storage than the new proposal.

The unspecified "River of Grass" proposal is at least twenty years away from any restoration effect on the ground. Even ten years is a death warrant for the Everglades (a recent Environmental Protection Agency report indicates that an additional 16% of Everglades soil exceeds CERP goals every ten years).

This proposed land purchase amounts to nothing more than restoration rhetoric masking special interest pork, while restoration reality sinks deeper into a quicksand of political exploitation. It's time to stop proposing new, unanalyzed schemes; it's time to get on with the work of carrying out sound existing projects; it's time to send "a message to Garcia" in Everglades restoration.

*** end ***

POLITICAL AND LEGAL LESSONS **from** **EVERGLADES POLICY-MAKING**

Dexter Lehtinen, October 2009

***** ROLE OF IMPLEMENTATION *****

The "implementation" of laws and/or policies is as important as their initial passage or adoption; execution, enforcement, follow-through is critical; intent, purpose, and/or effect of laws and policies can be negated or reversed in implementation; "How a Bill Becomes a Law" is no more important than "What Happens to a Bill That Becomes a Law"

***** GROUP MODEL OF POLICY-MAKING *****

"Interest Group Theory" of politics explains Everglades policy history; contrary to "Rational Actor" Model or "Bureaucratic Politics" Model: interest groups are critical; law is a factor insofar pursued by interested parties (groups); "consensus" is generally a myth; there are winners and losers in politics (the "authoritative allocation of values"); positive sum games are rare and mutual advantage can be achieved only when all sources of power are exploited and accurate information available to all sides regarding this distribution of power

***** GOVERNMENT IS A SPECIAL INTEREST *****

Government and government agencies have special agendas and special interests like any so-called private special interest; the public interest is amorphous if it exists at all, and is not necessarily reflected by public agencies

***** LITIGATION AS ELEMENT OF POLICY PROCESS *****

Litigation (lawsuits) plays an important and legitimate role in the overall policy process; the argument that "lawsuits just cause unnecessary delay, expense, and hostility and block negotiated consensus" is inaccurate and is merely a tool as an argument for the side which would not benefit by litigation; litigation should not be isolated or independent of other elements of the process

[Research Issue -- What are the core sources of power and the fundamental sources of influence in the Everglades policy process? How are they developed? How are they exercised?]

**** END ****

The Myth of Everglades Restoration

An Additional View of the Miccosukee Tribe of Indians of Florida

Supplement to Coordinating Success 2008: Strategy for Restoration of the South Florida Ecosystem

Submitted to the U.S. Congress, Florida Legislature,
Seminole Tribe of Florida and All Interested Parties

By Dexter W. Lehtinen, Task Force Member, October 2008.

"The Everglades is our mother and she is dying."

- Billy Cypress, Chairman of the Miccosukee Tribe of Indians

I. EXECUTIVE SUMMARY

The Miccosukee Tribe of Indians of Florida is submitting this *Additional View to the South Florida Ecosystem Restoration Task Force Biennial Report, Coordinating Success 2008*, to inform Congress, and the public, about the irreversible damage to Tribal Everglades being caused by misguided agency policies and the delay of vital restoration projects. Everglades Restoration is a myth. Since the Comprehensive Everglades Restoration Plan (CERP) was adopted eight years ago, no CERP projects have been completed; Pre-CERP projects have yet to be completed; and the agencies are moving farther away from restoration goals. The Tribe has long warned the Task Force that vast areas of Tribal Everglades are being destroyed by disastrous water management policies and restoration delay. These warnings have fallen on deaf ears.

Major problems with Everglades Restoration continue to exist. These problems include: a lack of commitment to water quality; the continued delay of the Modified Water Deliveries Project (Mod Waters); the rapidly escalating costs of projects; single-species management policies that are moving us farther away from restoration goals; a lack of a comprehensive approach to restoration; the *pro forma* use of the Task Force; the lack of meaningful Tribal and public input on restoration decisions; a failure of federal agencies to abide by their Trust Responsibility; and the fact that the Everglades is being left out of the *Everglades* Restoration process.

The Task Force preaches *environmental justice*, while it ignores compelling scientific evidence that current water management policies are destroying the homeland of an Indian Tribe. The observation of Chairman Cypress that: "The Everglades is our mother and she is dying," is now supported by abundant science. The *Biennial Report* touts *progress*, but the Tribe sees *none*. Instead, the Tribe sees scientific evidence that: soil phosphorous in the Everglades is spreading, Tribal Everglades in Water Conservation Area 3A (WCA 3A) is being rapidly degraded, and the endangered Snail Kite population has suffered an alarming 50% decline.

The Miccosukee Tribe, whose members have lived in the Everglades since time immemorial, wants its traditional homeland to be restored. Its entire culture and way of life depend on a healthy Everglades. However, the Tribe does not believe that restoration benefits from claims that progress has been made where none exists. The National Research Council (NRC) of the National Academy of Sciences (NAS) echoed many of the Tribe's concerns in its 2006 and 2008 *Biennial Reviews*. The 2006 *Biennial Review* warned that: "CERP progress in the Water Conservation Areas (WCAs) and Everglades National Park appears to be lagging behind

the production of natural system benefits in other portions of the South Florida ecosystem." The 2008 *Biennial Review* warns that: "Ongoing delay to South Florida ecosystem restoration not only has postponed improvements to the hydrological condition but has also allowed ecological decline to continue." [3]. The *Review* further finds that: "It is too early to evaluate the response of the ecosystem to CERP Projects because none have been implemented." [4]

Congress can no longer be fooled into believing that progress is being made in Everglades Restoration. The Task Force must work to resolve the problems that threaten restoration before Congressional, and public, support is lost. The Tribe has been pushing the Army Corps of Engineers (Corps) for more than a decade to implement the Mod Waters Project, so that CERP Decomp can move forward. Instead, the Corps has once again embarked on a *dead end excursion* that will further delay Mod Waters and result in more irreversible damage to Tribal Everglades. The health of the Everglades, and the prospects for its restoration, has never looked more bleak. Yet, there is still time to save both the Everglades, and Everglades Restoration, if the Task Force embraces its leadership position and works to resolve the problems that exist.

II. GETTING THE WATER RIGHT IN THE EVERGLADES

"The Indians, before anyone else, knew the Everglades were being destroyed"
- Marjory Stoneman Douglas The Everglades: River of Grass

A. THE EVERGLADES CANNOT BE RESTORED WITH DIRTY WATER

*"As for Everglades water, everything has changed...
We cannot just say that the water is no good ... and turn our back on that."*
- Buffalo Tiger, Tribal Elder in: A Life in the Everglades

1. 1988 Landmark Everglades Lawsuit Is Still Protecting Water Quality

The Miccosukee Tribe knows that the Everglades cannot be restored with dirty water. The Tribe will not turn its back on the fact that "*the water is no good.*" The Tribe disagrees with the Task Force statement in the *Report* that, "litigation may divert resources away from restoration efforts." The Tribe will not ignore the water quality problems that exist in the Everglades. It believes that litigation has been, and continues to be, a vital force for protecting the Everglades from pollution. It was a lawsuit the federal government brought against the state in 1988 for not enforcing pollution laws that brought the plight of the Everglades, and the need to restore it, to national attention. This landmark Everglades lawsuit is the reason that over 40,000 acres of Stormwater Treatment Areas (STAs) have been constructed to treat phosphorous laden water before it flows into the Everglades. To this day, the Miccosukee Tribe has a Memorandum of Agreement that allows it to seek enforcement of the Settlement Agreement entered in the case if its provisions are being violated. As a result of a motion seeking such enforcement filed by the Tribe a few years ago, the State agreed to construct an additional 18,000 acres of STAs.

2. 2008 Federal Court Ruling in Favor of the Tribe and Clean Water

The *Biennial Report* continues to rely on the State's 2003 Amended Everglades Forever Act (Amended EFA), and the Phosphorus Rule, as tools for its sub-goal of getting the water quality right. The *Report* fails to acknowledge that a 2008 federal court ruling in favor of the Tribe found that the Amended EFA, and major portions of the Phosphorus Rule, does not comply with the Clean Water Act. The ruling resulted from a 2003 lawsuit (*Case No. 04-21448-CIV-Gold*) filed by

the Tribe against the Environmental Protection Agency (EPA) that contended both the Amended EFA, and the Phosphorus Rule, violated the requirements of the Clean Water Act; and that the moderating provisions (i.e. Long Term Plan), authorized by the Amended EFA allowed water quality in the Everglades Protection Area not to be met until at least 2016.

On July 29, 2008, Judge Gold issued a 101 page ruling in favor of the Tribe agreeing that the Amendments to the EFA, and the majority of the Phosphorus Rule, violated the Clean Water Act. Some of the findings in Judge Gold's Order include:

- "[T]he Florida legislature...violated its fundamental commitment and promise to protect the Everglades..." [2]
- "The effect of the Amended EFA is to replace the ...phosphorus criterion with an escape clause that allows non-compliance..." [46]
- "The EFA has condoned...a de facto moratorium on compliance..." [76]
- "There is no longer a date certain when the phosphorus criterion will even be met." [78]

A Congressional Appropriation Committee expressed concern about the Amended EFA while it was a bill. An April 29, 2003 statement issued by Congressmen Young, Regula, Hobson, Taylor, Shaw, and Goss questioned whether water quality would be met: "The earlier agreed upon deadline for achieving compliance is December 2006, which is the foundation for implementing the \$8 billion equally cost shared and congressionally authorized Comprehensive Everglades restoration Plan or CERP." The statement further addressed the Long Term Plan: "The bill directs that the Long Term Plan be implemented over 23 years. This makes uncertain the time period for compliance. This is inconsistent not only with the Everglades Forever Act, but also with the 1992 Consent Decree that settled the federal and state water quality litigation."

Despite Judge Gold's ruling, and Congressional concerns about the 2006 deadline not being met, the Task Force continues to turn a blind eye to this issue. Although the *Report* admits that final water quality standards have not been met, it fails to discuss the impact on restoration of not meeting the deadline. There is much reason to be concerned about the water quality delay wrought by the discredited Amended EFA and its Long Term Plan. In its 2008 *Biennial Review*, the NAS recommends: "[r]estoration planners should consider the consequences of the likely failure to achieve phosphorus goals and develop alternative approaches." [150]. The Task Force has a duty to advise Congress about Judge Gold's ruling, and how the State's failure to meet the water quality deadline in the Everglades impacts CERP, but has not done so.

3. Judge Gold's Ruling and the Tragedy of the Long Term Plan

The *Biennial Report* continues to rely on the Long Term Plan as a strategy for improving the performance of the STAs despite Judge Gold's ruling. A review of the Plan shows that the 10 ppb phosphorus criterion will not be met in all basins analyzed even by 2056. Both the 1992 federal Consent Decree, and the 1994 Everglades Forever Act, required water discharged to the Everglades to meet the final phosphorus criterion by December 31, 2006. This deadline was also the base condition for CERP. The *Biennial Report* does not discuss the impact of Judge Gold's finding that the Long Term Plan moderating provision is contrary to the Clean Water Act has on its continued acceptability as a tool by the Task Force. Nor does the *Report* analyze the impact of not meeting this water quality deadline in terms of the continued degradation of the Everglades, the spread of cattail, and the delay of vital restoration projects that require clean water to operate.

4. NPDES Permits and Enforcement Should be Water Quality Tools

The Tribe is concerned that National Pollutant Discharge Elimination System (NPDES) permits, regulation, and enforcement are not listed as tools to Get the Water Quality Right Subgoal in Section 1-B of the *Biennial Report*. The *Report* appears to heavily rely on Total Maximum Daily Loads (TMDLs), which will not be attained until at least 2015. [The NAS *Biennial Review* finds that water quality initiatives are not likely to achieve the TMDL by 2015.] The *Yellow Book* presented to Congress requires CERP implementation to comply with the Clean Water Act and its NPDES permit requirements. (PEIS at pp. 5-5 to 5-6.) It also states that pursuant to the CWA, "NPDES permits are required for all new and existing point sources from which pollutants are to be discharged to navigable waters." (*Id.* at App. H-12). Both the CWA and NPDES permitting should be listed, along with regulatory and enforcement action, as tools to achieve the water quality Subgoal. The *Biennial Report* does not discuss the significant federal court ruling in favor of the Tribe and environmental groups in (*Case No. 02-80309-CIV-Altonaga*), which required the SFWMD to obtain NPDES permits for its discharge of pollutants into Lake Okeechobee. Nor does it mention the lawsuits that the Tribe and environmental groups have brought against the EPA Water Transfer Rule in federal court (*Case No. 08-21785-Civ-Altonaga*) (*Case No. 08-13652-C*) contending that the Rule is contrary to the Clean Water Act.

5. Lake Okeechobee Water Quality: The Elephant in the Restoration Room

The *Biennial Report* discusses the Lake Okeechobee Protection Program, and its goal of attaining a TMDL of a long term rolling average of 140 metric tons phosphorus by 2015, as a way to meet the water quality Subgoal. It fails to acknowledge the TMDL has no regulatory enforcement, and that scientists acknowledge the 40 ppb phosphorus concentration goal may not be met until hundreds of years after the TMDL is attained. The 2008 *South Florida Environmental Report* shows that the average phosphorus load to the Lake for WY 1998-2007 was a whopping 584 metric tons with an average phosphorus concentration of 238 ppb for WY 2007 alone. The NAS 2008 *Biennial Review* predicts: "given the uncertainties associated with current management measures, this committee judges it unlikely that the current TMDL of 140 mt of phosphorous input to the lake will be met by the year 2015." [9] Without tools such as NPDES permits, compliance, and enforcement deadlines, there is no assurance that water quality will ever be met in Lake Okeechobee or in its discharges to the Everglades and the estuaries.

Recent concerns about the integrity of the Herbert Hoover Dike have lead the Corps to adopt a lower lake regulation schedule, which will cause more phosphorus laden lake water to be discharged to the Everglades and the estuaries. Despite 30 years of state initiatives to allegedly to address Lake Okeechobee's pollution problem, phosphorus concentrations into, and in, the Lake continue to be extremely high. As the Special Master in the Everglades case noted in his July 5, 2006 Report, "The Lake's woes have been with us for a while and if history is a guide, they are not going away any time soon." Even though Lake Okeechobee is the *liquid heart of the Everglades*, and its water will be used for restoration, the entities implementing CERP continue to ignore this *Elephant in the Restoration Room*. The Task Force must take a leadership role in addressing the Lake Okeechobee water quality problem, which is jeopardizing Everglades Restoration.

6. December 31, 2006, Water Quality Deadline Was Not Met

The *Biennial Report* provides an overly rosy report of the Everglades Construction Project and water quality. It provides a meaningless average of 58 ppb for all the STAs when it should report that the outflow from STA 1 West (which discharges into the Loxahatchee National Wildlife Refuge) was 119 ppb, and that the outflow from STA 5 was a whopping 192 ppb. Even

using the 58 ppb figure, the State did not meet the final limit of 10 ppb at discharge, nor even the interim Settlement Agreement requirement of 50 ppb. While the *Report* blames hurricanes for poor STA performance, the Tribe has long warned that the STAs are not designed to treat all the water and phosphorus loads that need to be treated before entering the Everglades. The *Report* does not discuss the implications of the State not meeting the Class III phosphorus limit (10ppb) or long term limit of the Settlement Agreement by December 31, 2006. The *Yellow Book* expected the Everglades Construction Project to treat the water delivered to the Everglades, to meet either the adopted criterion or the default numeric criterion of 10ppb phosphorus, by December 31, 2006, as a base condition for CERP. (PEIS at p. H-F-17). The NAS 2008 *Biennial Review* warns restoration planners to "consider the consequences of the likely failure to achieve phosphorus goals on the South Florida ecosystem restoration and develop alternatives." The Task Force must address the implications for restoration of the State not meeting the December 31, 2006 deadline.

7. EPA REMAP Report Shows Impacted Areas in the Everglades Spreading

The failure to meet the 10 ppb phosphorous criterion at discharge to the Everglades Protection Area has had deleterious impacts. A 2007 Report by the Environmental Protection Agency entitled *Monitoring for Adaptive Management: A REMAP Status Report* shows that in the last ten years, areas of phosphorus impacted soil in the Everglades have continued to grow. The EPA REMAP Report shows that in 2005 the areas of the Everglades that had soil phosphorus exceeding the CERP goal of 400 mg/kg had grown to 49.3% as compared to the 33.7% that existed in 1995-96, despite a decade of Settlement Agreement mandated improvements. Like a cancer, impacted areas will continue to spread until the phosphorus concentration in water discharged to the Everglades Protection Area is reduced to 10 ppb or less.

8. 10 ppb is Protective of the Everglades; It is Not the Holy Grail

Concerned that the State was dragging its feet on water quality, the Tribe took action to establish water quality standards to protect the Everglades on its Federal Reservation long ago. In 1999, the EPA approved the Tribe's water quality standards, which included a 10 ppb phosphorus criterion, as *scientifically defensible* and *protective* of the Everglades. With the Tribe leading the way, the State had no choice but to adopt a 10 ppb, which it did in 2004. Recently, questions have been raised about whether 10 ppb should be sacrificed to flow. In a recent discussion about 10 ppb, SFWMD Governing Board members made startling statements such as: "Ten parts per billion is the holy grail around here..." ; "we can't get to that...can't we just change that to 20? "; "...I'm not sure we are going to do as well as God with this system." Incredibly, one Board member, apparently unaware the State had adopted 10 ppb, asked: "Who set this 10 ppb...?" Abundant science shows that 10 ppb is necessary to protect against an imbalance of flora and fauna in the Everglades. 10 ppb is *scientifically defensible* and *protective*. It is not the *holy grail*. If water delivered by CERP does not meet 10 ppb, it will hurt, not help, the Everglades.

9. The Must Do Water Quality Feasibility Study Still Undone

The Water Quality Feasibility Study (WQFS) has been on the Task Force *must do* list since 1999. A June 17, 1999, letter from then Task Force Chair, Patricia Beneki, to Secretary of the Army stated: "The Task Force recommends that important water quality improvements have been added to the plan that will when combined with the follow-on-feasibility study provide the water quality capability necessary for restoration. We believe that these features are essential to restoration and should be cost shared with the non-federal sponsor. It is vitally important that the follow-on-feasibility study and detailed component designs continue to focus on this requirement." The July 1999 CERP *Yellow Book* presented to Congress states: "To ensure that the

South Florida Ecosystem restoration objectives are achieved, a Comprehensive Integrated Water Quality plan that links water quality restoration remediation programs to the hydrologic restoration objectives of the recommended plan must be developed for the entire study area...Development of a comprehensive integrated water quality plan for South Florida is consistent with the recommendations of the South Florida Ecosystem Restoration Task Force and the Florida Governor's Commission for a Sustainable South Florida." (PEIS pp. 9-52 to 9-53.)

Concerned that no progress on the WQFS had been made, the Tribe asked the Task Force to reiterate support in its 2006 *Biennial Report*, which urged: "the USACE and other agencies to undertake and complete the Comprehensive Water Quality Feasibility Study for the restoration of the Florida Everglades." Two years later, the *Report* states that the Corps and DEP are still working on a *draft design agreement* for the WQFS. The Task Force should be expressing chagrin that the WQFS, which it described as *must do* in 1999, continues to be seriously delayed. The Tribe contends that the ten year delay on the WQFS is indicative of the overall lack of priority that has been given to water quality in the restoration process. The *NAS 2008 Biennial Review* stressed that: "An integrated, system-wide view of water quality management is essential to the achievement of restoration goals for the South Florida ecosystem." [149]. The Task Force needs to make the WQFS essential for restoration a *must do*, so that it will finally be implemented.

B. REALITY: MOVING FARTHER AWAY FROM RESTORATION

1. White Elephant Bridge = More Mod Waters Delay and Destruction

The most glaring example of the problems that plague restoration is the dismal failure to complete the Pre-CERP Modified Water Deliveries Project. Authorized by Congress in 1989, the Corps told Congress it could complete this simple project by 1997. The purpose of Mod Waters is to restore more natural flows to the Everglades and the Park "to the extent practicable." Doing so will benefit more than 900,000 acres of Everglades wetlands. Implementation of this Pre-Cerp project has been seriously delayed by a lack of leadership and constantly changing plans. This delay has been recognized by Congress, the Department of the Interior (DOI) Inspector General, and the National Research Council of NAS. Originally priced at \$76 million dollars for both construction and land costs, the cost has sky-rocketed to more than *half a billion dollars* just for construction. In 2008, the Corps hastily adopted yet another *dead end excursion* plan that will further delay Mod Waters implementation and cause more Everglades destruction.

After the Tribe submitted its *Additional View* in April 1999, Congress held hearings on the failure to complete Mod Waters. Congress was so concerned about its delay that the law authorizing CERP, WRDA 2000, contained language to ensure Mod Waters completion. WRDA 2000 mandated that CERP components important to restoring natural flows to the historic Everglades, such as Decompartmentalization, could not move forward until Mod Waters was completed. Yet, rather than complete Mod Waters and move onto Decomp, the agencies cleverly pushed CERP projects located outside the historic Everglades forward for authorization and funding. Rather than bridge Tamiami Trail under CERP Decomp, as envisioned by WRDA 2000, the Corps rubber stamped a politically expedient and expensive two bridge plan for Mod Waters that was rejected by Congress. After this plan was rejected, a group worked behind closed doors to hastily put together another plan, which was then rubber stamped by the Corps. Under the new plan, the federal government will give away land in Everglades National Park to the State of Florida to build an expensive one mile bridge that is unnecessary to pass Mod Waters flows.

The Tribe contends that the quickest, and least expensive, way to pass Mod Waters flows "to the extent practicable" is to clean out the sediment and vegetation built up downstream of the

existing culverts and structures. Corps documents show that the current culvert system has the capacity to pass Mod Waters flows. Yet, bowing to political pressure from those who insist that Tamiami Trail should be bridged under Mod Waters, rather than wait for CERP Decomp, the Corps rubber stamped a plan that will delay Mod Waters completion for at least four more years. The Tribe, who believes compliance with federal laws is vital to restoration, was forced to file a lawsuit against the Corps (*Case No. 08-21747-CIV-Ungaro*) for its failure to conduct the Supplemental Environmental Impact Statement (SEIS) required under the National Environmental Policy Act (NEPA) and for violations of the Federal Advisory Committee Act (FACA). The Tribe is disturbed by the recent attempts to bypass federal law, and the Tribe's lawsuit, through legislation. Such attempts will not stop the Tribe from pursuing its claims in federal court. The Tribe contends that the Corps can not possibly know whether its Tamiami Trail plan will help or harm the Everglades, flood Miami-Dade County, or even pollute the Park, because the agency did not conduct the required analysis. The Tribe further contends that FACA does not allow an advisory group to meet behind closed-doors to select a plan for the Corps to rubber stamp. The Tribe believes that if the Corps is forced to do the analysis required by law, it will show that this hastily put together plan is a *White Elephant Bridge to Nowhere*.

2. Pushing Up Daisies and the Losing 246 Acres of Tree Islands a Year

The operational plan to be created for the Mod Waters and C-111 Projects is called the Combined Structural and Operational Plan (CSOP). The Task Force created a CSOP Advisory Team that met in 2005 to analyze the plan and report back. Now that the Corps has once again changed the plan for Mod Waters, the advice of the CSOP team that met for over a year, is unusable. Moreover, the 2010 implementation date for CSOP has now been delayed to 2013. Today, the comment that Congressman Hansen made at the 1999 Congressional hearing on Mod Waters that, "we will all be pushing up daisies before you fully get it resolved" still rings true.

The *Biennial Report* fails to mention the important study on the delay of Mod Waters conducted by the Inspector General of the U.S. Department of Interior (DOI). Report No. C-IN-MOA-0006-2005 entitled: *Modified Water Deliveries to Everglades National Park AUDIT REPORT* was released in March 2006. The IG *Audit Report* found that DOI's failure to communicate a comprehensive and unified restoration strategy, and clearly define its consultation role, has contributed to project delays and cost increases. It found that DOI's participation in Mod Waters has been *ineffective*, and that it has not effectively communicated with stakeholders to build consensus. The *Audit Report* acknowledged the *cost of delay*: "The Corps estimates that damage to tree islands resulting from current high water levels could be as much as 246 acres per year and the cost to restore the islands ranges from \$12.3 million to \$123 million per year." [This is based on a 2000 Corps estimate each year Mod Waters is delayed, 8.4 tree islands in WCA 3A are lost.]

3. The Everglades Is Being Left Out of Everglades Restoration

The *Biennial Report* does not emphasize the impact that the delay of Mod Waters has had on restoration of the historic Everglades. This Pre-CERP project, necessary to restore a more natural flow through the Everglades, has been delayed, while other projects that merely attach themselves to the name *Everglades* have been expedited. The Tribe agrees that all ecosystem projects are important, but it does not believe that Congress, or the public, intended for the Everglades to be left out of *Everglades* Restoration. It appears that many are starting to realize that the Everglades is not being restored. The NAS 2008 *Biennial Review* acknowledges: "The current planning process also appears to reward the least contentious projects, regardless of their potential contribution to ecosystem restoration. Without clear priorities for project planning and funding, projects with large potential restoration benefits may see lengthy restoration delays." [6]

The NAS 2006 *Biennial Review* recognized: "anticipated restoration progress in the Water Conservation Areas and Everglades National Park appears to be lagging behind the production of natural system benefits in other portions of the South Florida ecosystem." It echoed previous Tribe warnings that: "Since the Mod Waters project is an assumed precursor for the WCA 3A Decompartmentalization and Sheet Flow Enhancement Part 1 (Decomp) project, further delays in the project's completion may ultimately delay funding appropriations for Decomp." It recommended: "[M]od Waters should be completed without further delay. The NAS 2008 *Biennial Review* warns: "If this relatively modest restoration project cannot proceed and provide some restoration benefits, the outlook for CERP is dismal."

If the Corps had not constantly bowed to political pressure to expand the scope of this modest Pre-CERP project, Mod Waters would be completed and benefiting the Everglades today, and CERP Decomp would be well underway. Instead, constant changes to the plan have resulted in delay and a draconian water management actions that backed water up on Tribal Everglades causing excessive tree island loss and environmental damage; contributed to high water in Lake Okeechobee and damaging releases to the St. Lucie and Caloosahatchee estuaries; and resulted in a 50% decline in the endangered Snail Kite population. Until Mod Waters is operational, the natural flow of water through the Everglades and the Park will not be restored, and the historic Everglades, no matter how much progress is touted, will continue to be destroyed.

While some look at another new plan for Mod Waters as progress, the Tribe sees it as more of the same. Once again, the Corps has chosen political expediency over a simple plan that would allow the project to be completed quickly. The result of the Corps capitulation will be at least a four year delay in Mod Waters, and a bridge that may never be operated for its intended purpose. The delay in Mod Waters will also mean a delay in CERP Decomp. This in turn means that the historic Everglades will continue to suffer irreparable harm. While federal agencies could take immediate steps to help prevent the serious environmental damage that is occurring, they continue to be unwilling to take simple steps on behalf of the Everglades. As a result, not only is the historic Everglades being left out of restoration, the agencies are taking anti-restoration actions that are actually moving the Everglades farther away from restoration goals.

4. So-Called Short- Term or Interim Actions Are Anti-Restoration

a. Destroying the Everglades of a Native People Is Not Environmental Justice

The Tribe strenuously objects to the pronouncement in the *Biennial Report* that, "The Task Force recognizes that it may on occasion be appropriate to take *short-term* or *interim* management actions that are not immediately consistent with long range strategic goals." This statement has been used by certain agencies to condone *short-term* actions that have caused *long-term* irreversible damage to the Tribal Everglades and the endangered Snail Kite. The Tribe is disturbed that this statement remains in the *Report* even though scientific evidence shows how harmful these actions have been. While the *Biennial Report* touts environmental justice, the short-term or interim actions this statement supports are devastating the homeland of a native people. The Tribe, and the Everglades, have suffered greatly from *short-term* actions that have turned out to be *long-term* both in duration and damage. Since 1998, the FWS has forced the Corps to take *interim* water management actions that close massive gates that allow water to flow through the Everglades nine months a year, allegedly to protect the Cape Sable seaside sparrow, that flood Tribal lands. A decade of *short-sighted actions* have not helped subpopulation A of the sparrow; resulted in a 50% decline in the endangered Snail Kite population; devastated vast areas of the

Everglades; and caused high water in the WCAs and Lake Okeechobee, which in turn resulted in damaging water releases to the St. Lucie and Caloosahatchee estuaries.

These *short-term* actions, including the Interim Operational Plan (IOP), have caused severe man-made flooding of the Tribal Everglades in WCA 3A, which is also the designated critical habitat for the endangered Snail Kite. They have also moved the Everglades farther away from strategic restoration goals. The Corps keeps the water in the area of subpopulation A of the sparrow unnaturally low (well below CERP levels), while the water levels in WCA 3A, Snail Kite critical habitat, are kept unnaturally high (above CERP levels). Even though the scientists studying the impact of IOP on the Snail Kite and its critical habitat have expressed alarm at the *rapid* decline of the WCA 3A habitat, and the *precipitous* decline of the Snail Kite, the agencies continue to turn a blind eye to the damage they are perpetrating on the Everglades and the Tribe. It is extremely disconcerting to the Tribe that the Task Force continues to support actions that are causing irreversible harm to the Miccosukee Tribe's culture and way of life.

b. Turning a Blind Eye to Scientific Evidence of Irreversible Harm

Scientific evidence shows that a decade of closing flood control gates for nine months of the year has caused the number of Sparrows in subpopulation A to decline, rather than increase as predicted by FWS. The 2008 NAS Report finds that: "Emergency water management for Cape Sable Seaside Sparrows under the Interim Operational Plan (IOP) illustrates the failure of species by species management. The resulting water management regimes have led to the unwanted flooding of tribal lands and probably have contributed to declines of snail kites and tree islands in WCA 3A." It appears to be obvious to everybody, except the agencies perpetrating the harm, and apparently the Task Force, that these so-called *short-term* actions have not helped the Sparrow and have harmed Tribal Everglades and the Snail Kite.

Snail Kite Demography Annual Reports prepared for FWS show that the Snail Kite population has declined an alarming 50% during IOP operations, and that no young Kites fledged out of WCA 3A both in 2005 and 2007. The scientists studying the impact of IOP on the Snail Kite also expressed concern that water levels in WCA 3A have been kept at *alarmingly high* levels. Despite this, the FWS reached the incredible conclusion in its 2006 Biological Opinion, that it is acceptable for IOP to degrade 184,320 acres of Snail Kite critical habitat a year in WCA 3A! To the Tribe, this is proof that the Tribal Everglades, and the endangered species that live there, are given *second class status* by agencies that have a *Trust Responsibility* to protect them.

Environmental justice demands that the Task Force refuse to support *short-term* actions that are devastating Tribal lands and moving the Everglades farther away from restoration goals. These actions harm restoration. Tree islands, once destroyed by high water take geological time frames to return, if they ever do. A Corps employee testified that it would cost more than the entire CERP to restore all the tree islands that have been lost in WCA 3. If these damaging water management actions are not stopped soon, there will be no tree islands in WCA 3 left to restore. The impact these actions are having on the culture and way of life of the Miccosukee Tribe, and its ancestral homeland, is a tragedy. If the Task Force truly cares about *environmental justice*, it will denounce these *short-term actions* and adopt the oath of the physician: *First do no harm*.

5. The FWS Rule Furthers Multi-Species Management and Restoration

The Cape Sable seaside sparrow is one of more than 60 threatened and endangered species in South Florida. As described herein, since 1998 natural flows of water into the western side of the Park have been stopped for nine months a year allegedly to help one of six Sparrow

subpopulations. By all measures, the unnatural dry-out of this portion of the Park has not helped the Sparrow and has flooded WCA 3A, the critical habitat of the Snail Kite and homeland of the Miccosukee Tribe. As a result, the Snail Kite population declined from over 4,000 birds in 2001 to about a 1,000 today, while nearly 200,000 acres of critical habitat a year is being degraded.

Regardless of the facts, some pushed the FWS to make this area of the Park critical habitat for the Sparrow, even though doing so would have perpetuated damage to the Tribal Everglades and prevented Everglades Restoration. The FWS held an Avian Workshop, weighed the facts, and wisely rejected this idea. Reasons that warranted rejection included:

- Everglades Restoration calls for the Sparrow subpopulation A area to be considerably wetter than it is being artificially kept now... the critical habitat designation would have forced water managers to dry-out this area in perpetuity, thus preventing restoration.
- Unnaturally drying out areas for the Sparrow causes much harm to the Snail Kite and its critical habitat in WCA 3A...the success of Everglades Restoration demands that single-species management be jettisoned in favor of a true, multi-species approach.
- A panel of scientists agreed that Sparrow survival rates, freedom of movement, and interaction of subpopulations are all much greater than originally thought, which led to the conclusion that subpopulation A is not critical to the continued existence of the Sparrow.
- The dry-out policy that has been demanded for over 10 years simply has not worked ... institutionalizing a disproven hypothesis would not have made sense.

The FWS Rule is an example of how when an agency leader solicits, and listens to, all the evidence, and has the courage to stand up for what is right, the Everglades benefits. The FWS Rule was a bold action that will allow restoration to move forward. The 2008 NAS *Biennial Review* acknowledges: "The recent revised critical habitat designation for the Cape Sable seaside sparrow (USFWS 2007) shows that the FWS and other parties can and are willing to make such difficult decisions, in this case trading off possible increased risk for sparrow subpopulation A to improve restoration prospects for several others species including wood storks and snail kites."

6. Cost and Progress of Projects Should Be Fully Reported

The Tribe is concerned that the *Biennial Report* does not fully and accurately inform Congress about the full cost, and progress, of restoration projects. The *Report* should contain a summary of the full cost of each project from the time it was authorized to the present. It should also discuss whether the project is subject to Section 902 cost constraints. Without such information, there is no way for Congress to know from the *Report* that the Modified Water Deliveries Project has experienced significant cost overruns. This project was initially estimated to cost \$76 million dollars for both construction and land costs. The 1994 Project Cooperation Agreement (PCA) with the local partner estimated \$114 million dollars in construction costs, which included a Section 902 cap at 20% above the estimated cost. Under Section 902, the agencies would be forced to go back to Congress if the cap was exceeded, but the agencies later determined that Section 902 did not apply to Mod Waters. Removal of the 902 cap has caused the cost of the Mod Waters Project to now escalate to \$509 million dollars. The *Report* should give Congress the information it needs to ensure that similar unrestrained cost escalations do not occur on other restoration projects. It should also accurately report the progress of all restoration projects. For example, the EAA Reservoir Project is reported as currently being under construction in the *Report*, when construction on this project was halted many months ago.

7. Cost of Delay to the Everglades Should Be Fully Assessed

The Tribe believes that the *Biennial Report* should include an estimate of environmental damage caused by the delay of restoration projects. For instance, it is well known that from the

time the C&SF Project went into operation in the 1940s through 1995, Water Conservation Area 3A (WCA 3A) has lost 45% of its tree islands and 68% of the tree island acreage. The Corps used this data to calculate the cost of delay of the Mod Waters Project in its General Reevaluation Report (GRR) on the 8.5 Square Mile Area. The Corps estimated that each year of delay of the Mod Waters Project would result in the loss of 8.4 tree islands[246 acres] per year in WCA 3 alone. (8.5 SMA GRR, July 2000 at Table 7.) The NAS 2008 *Biennial Review* recognizes: "Tree islands have undergone a multi-decadal decline in both number and surface area - a trend that appears likely to continue until significant CERP and non-CERP restoration progress has been made." [3] Assessing the cost of delay in the *Biennial Report* would help Congress decide whether plans are reasonable in light of the environmental cost to the Everglades. The *Report* should also assess the spread of soil phosphorus and cattail in the Everglades for each reporting period.

8. Hydrologic Performance Measures Should Be Used for Restoration

The Tribe does not agree with the use of the ecological performance indicators contained in the *Report*. The Tribe continues to support the use of hydrological performance measures for restoration. It believes that if proper water quantity and quality are achieved, the biology will follow. The Tribe urges that any performance measures developed by the Science Coordination Group of the Task Force be consistent with, and not conflict with, those of RECOVER for CERP.

9. No Mention of the SFWMD Proposed Land Deal Game Changer

The *Biennial Report* makes no mention of the SFWMD proposal to spend \$1.75 billion dollars to purchase land and assets from U.S. Sugar. If this proposal is implemented, farming will continue for at least six years; and SFWMD Executive Director stated that water quality projects associated with the purchase "could take 15 to 20 years to build." The Everglades is dying today, not 15 or 20 years from now. While acquiring the land could be useful, the Tribe is concerned that funds might be diverted from essential restoration projects, and immediate clean-up efforts, that are needed now. Construction on the EAA Reservoir Project has already been halted, and may be abandoned, along with the Caloosahatchee and St. Lucie Reservoir projects. While the acquisition of the land may be positive, if existing restoration projects are abandoned to pay for the land, it could interfere with restoration goals. Federal lawmakers have criticized the secrecy surrounding the proposed deal and lack of federal input. There are also many questions about the proposal that still need to be answered such as: how the land will be used; how many restoration projects might be abandoned to provide the funding; how the purchase will impact ACCELER8 and CERP; whether CERP will have to be reformulated and reauthorized by Congress; what delay caused by the change of course will mean to the health of the Everglades; and the *environmental justice* impacts on certain communities. The Tribe believes that it is vital that specific planned restoration projects be carried out. While there is still no detailed plan on how restoration will be impacted by the SFWMD proposal, the *Biennial Report*, should have at least alerted Congress about what may be a major CERP game changer.

11. Current Restoration Process, If There Still is One, Should Be Defined

The current restoration process (*i.e.* project construction, funding, and sequencing implementation) has changed from that adopted by Congress in the *Yellow Book*. The state's ACCELER8 program changed the priority of certain CERP projects and shifted construction responsibility for those projects from the Secretary of the Army to the State. The *Biennial Report* claims certain ACCELER8 projects will be complete by 2011. Yet, the construction of the EAA Reservoir Project has been halted, and it has been reported that the EAA Reservoir Project, and the St. Lucie and Caloosahatchee Reservoir Projects, will be delayed or perhaps never completed.

The ACCELER8 program, and the recent SFWMD proposed land purchase, call into question whether the CERP described in the *Yellow Book* is still viable. Congress should be fully advised of the status of the current process, so that it can ensure that changes in sequencing and authority do not adversely impact restoration goals. Federal agencies must ensure that any acceleration does not result in legally inadequate NEPA documents or disregard for federal law. Congress must ensure that federal funds are only spent on projects that are consistent with the CERP *Yellow Book* and comply with all applicable federal laws.

III. Trust Responsibility Not Being Met in the Restoration Process

*"The River of Grass is a world of beauty and life...
and the world and life of the Miccosukee."*

- Houston Cypress, Miccosukee Tribal member and writer

These words of Houston Cypress illustrate the importance of the Everglades to the Miccosukee. The Miccosukee Tribe not only has a unique relationship with the Everglades, it has a unique relationship with the federal government. Congress recognized the fact that federal agencies have a solemn Trust Responsibility to the Tribe in the Water Resources Development Act of 2000 that authorized CERP. WRDA 2000 mandates: "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." While this language is included in the *Biennial Report*, the reality is that any meaningful adherence to these Congressional mandates is a rare exception.

The law mandates that federal agencies must consult with the Tribe, whose members live in the Everglades, before restoration decisions are made. Yet, these agencies continue to conduct perfunctory meetings with the Tribe after restoration decisions have been made. A recent example, are meetings that were held without the Tribe behind closed doors to select a plan for Tamiami Trail, even though Tribal Trust resources would be adversely impacted. Although these agencies have a *solemn duty* to protect the Tribe and their land in the restoration process, they either do not understand, or care, that the Everglades is the *"world and life of the Miccosukee."* Indeed, these same agencies have engaged in actions that are destroying Tribal natural resources.

IV. Congressional Oversight and Public Scrutiny - Not Closed Door Meetings - Are Critical to Restoration Accountability

President Thomas Jefferson said: "Information is the currency of democracy." Information, and Congressional scrutiny, are also necessary for agency accountability in Everglades Restoration. WRDA 1996 and WRDA 2000 dictate an open public process as an important element of the restoration process. Unfortunately, the public process, much like the Task Force process, is often used *pro forma* to give an appearance of public involvement where none exists. Instead, the Corps utilizes teams and/or advisory groups, comprised of federal and non-federal members, to make recommendations without complying with the Federal Advisory Committee Act ("FACA"). Restoration plans, arrived at behind closed doors, are brought to the public only after the decision has been made. The Task Force must insist that Everglades Restoration decisions be made in an open public process, as directed by Congress. Such an open public process requires bringing restoration proposals before the Task Force and the public before decisions are made. Full public scrutiny and input is the only way that citizens, and Congress, will ensure accountability in Everglades Restoration.

V. The Comprehensive Everglades Restoration Plan Must Be Comprehensive and Include Restoration of the Everglades

Federal agencies charged with restoration do not treat all parts of the Everglades equally. The Tribal Everglades, and its endangered species, are given *second class status*. In its 2004 and 2006 *Additional View*, the Tribe warned that the historic Everglades itself was being left out of the Everglades Restoration process, and that in the eagerness to push CERP forward, the need to restore more natural flows to the Everglades was being left behind. The reason is simple. WRDA 2000 directed the agencies to complete the long delayed Mod Waters Project before funds would be authorized for the CERP projects designed to restore the natural flow of water through the historic Everglades. The failure to complete Mod Waters has resulted in the agencies pushing CERP projects on the periphery of the Everglades forward while the Everglades is left behind. Both Congress, and the public, have expressed concern about the lack of progress.

In a July 22, 2004, news release, Congressman John J. Duncan, Jr. (R-TN), Chairman, reminded us, "The principal goal of this effort is to restore water to the Everglades, but at the same time recognizing the water supply needs of agricultural and urban areas." He warned, "And, even if we focus on Everglades restoration alone, we have to recognize that doing expensive projects early in the process will effect how other Everglades projects can be implemented." He emphasized the importance of taking "a logical, system-wide approach" to restoration. The 1999 *Yellow Book* adopted by Congress took a comprehensive approach and promised that project implementation and sequencing would be an open process, subject to public and scientific review. The selection of ACCELER8 projects did not go through a prior public process. Some are priority projects that benefit the Everglades, others have been moved up based on a state decision to construct them on its own. The multi-billion dollar question is: How much will the Everglades actually benefit from the plan that benefits from its name?

Progress in Everglades Restoration will only be made when restoring the Everglades once again becomes the overarching purpose of the Comprehensive Everglades Restoration Plan. The concern that the historic Everglades is being left out of restoration was echoed in the NAS 2006 *Biennial Review*, which finds that important projects necessary to re-establish sheet flow in the Everglades are "far behind the original schedule." The NAS 2008 *Biennial Review* observes: "The current planning process also appears to award the least contentious projects, regardless of their potential contribution to ecosystem restoration." [6] The Tribe agrees with the NAS that the "Completion of Mod Waters is crucial to the success of Everglades Restoration and the CERP Projects that follow." [8]. It also agrees with the observation that: "If this relatively modest restoration project can not proceed and provide some restoration benefits, the outlook for CERP is dismal." *Id.* The Tribe continues to contend that Mod Waters must be implemented expeditiously. The current plan to build a *White Elephant Bridge to Nowhere* will only cause more delay and Everglades destruction. The Tribe supports the quick and simple solution of cleaning out the areas of downstream of the culverts and structures to pass Mod Waters flows, so that we can move on to CERP Decomp and put the historic Everglades back into Restoration.

VI. WITH NO LEADERSHIP, RESTORATION STANDS STILL

"In periods where there is no leadership, society stands still. Progress occurs when courageous, skillful leaders seize the opportunity to change things for the better."

-Harry S. Truman, *This Week*, February 22, 1959

The South Florida Ecosystem Restoration Task Force was created in 1993, so that federal agencies with a role in Everglades restoration could work together to resolve issues, integrate

resources, and be a catalyst for progress. In WRDA 1996, Congress formalized the Task Force under federal law and added representatives from the State of Florida, Miccosukee Tribe, and Seminole Tribe. In the 1990s, the Task Force assumed a leadership role, and worked through its sub-organizations (the Working Group and the Science Coordination Team), to attempt to resolve controversial issues through public debate. Although often uncomfortable, resolving conflict was necessary to advance the Everglades Restoration process.

In the 2000s, the Task Force began to reflect the *process that has replaced progress* in Everglades Restoration. Significant resources are spent preparing reports on the *progress* of the restoration process even though no progress is being made in the Everglades itself, where it counts. Task Force meetings, now scheduled about four times a year, and often at fancy hotels, have done little to advance the restoration process. Instead, they are dominated by *show-and-tell* briefings, which are often preceded by unnecessary and expensive field trips. Meaningful debate on controversial Everglades issues is discouraged. Once the meeting ends, there is no follow-up to ensure that actual progress is being made on the ground. An example of this is that the Task Force *Biennial Report* informs Congress that the EAA Reservoir Project is currently under construction when construction on that project was halted many months ago.

The NAS 2008 *Biennial Review* recognized the leadership vacuum that exists. It states: "Strong leadership, focused on building and maintaining support among stakeholders and overcoming conflicts, is essential for Everglades restoration projects to achieve their restoration goals." This is the type of leadership role envisioned for the Task Force in WRDA 1996. The Task Force must once again embrace its leadership role in the restoration process if any meaningful progress is to be made. Leadership in any endeavor is essential for success. Without talented, decisive, bold leadership, there will be no progress in Everglades Restoration.

VII. TURNING THE MYTH OF RESTORATION INTO REALITY

"Perhaps even in this last hour, in a new relation of usefulness and beauty, the vast, magnificent, subtle and unique region of the Everglades may not be utterly lost."

- Marjory Stoneman Douglas in The Everglades: River of Grass

Today, more than 60 years after Marjory Stoneman Douglas wrote her book, the last hour for the Everglades has moved closer to midnight, and the chances for restoration are slipping away. Those who love the Everglades must act quickly to turn the myth of Everglades Restoration into a reality. Doing so, will require a *unity of effort* and *unity of ecosystem* in which all parts of the Everglades are treated equally. There can be no second class status. People must work together to agree on what must be done, the priorities for doing it, and see that goals are accomplished. Leadership must emerge to inspire agreement and teamwork; execution of programs and projects must be coordinated and relentless; those in charge of executing projects must be held accountable for progress and resources. If the Everglades Restoration process continues to be a gaggle of disparate interests, each with its own pet project, it will ultimately fail. The Everglades cannot afford to have restoration fail. Each day that restoration is delayed, irreversible damage occurs, and our opportunity to make Everglades Restoration a reality fades farther away. No great challenge has ever been met without *leadership* and *unity of effort*. Everglades Restoration, an immense challenge, demands both. Leadership that instills *unity of effort* must be the top priority of the Task Force if it is serious about accomplishing restoration. The time to act is now, before it's too late. The Everglades, "a world of beauty and life...and the world and life of the Miccosukee," is rapidly running out of time.