

Spring 2014

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Online ISSN: 2643-7759

### Recommended Citation

Allison M. Dussias, *The Seminole Tribe of Florida and the Everglades Ecosystem: Refuge and Resource*, 9 FIU L. Rev. 227 (2014).

DOI: <https://dx.doi.org/10.25148/lawrev.9.2.7>

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## The Seminole Tribe of Florida and the Everglades Ecosystem: Refuge and Resource

Allison M. Dussias\*

*Our elders believe that the health of the Tribe and our members directly relates to the health of our ecosystem. We focus on managing our lands within our reservation boundaries; we also watch the land and water that surrounds this boundary because our history is not limited to the lines on current day maps.<sup>1</sup>*

*What we choose to protect helps define us as a people.<sup>2</sup>*

In the nineteenth century, the ancestors of the Seminole Tribe of Florida (the “Tribe”) were driven by the scorched earth policies of the American military into the Everglades and Big Cypress Swamp of South Florida.<sup>3</sup> Never surrendering, they took refuge in remote areas that most Americans regarded as uninhabitable, living a life shaped by fluctuating water conditions.<sup>4</sup>

In the twentieth century, the Tribe successfully resisted congressional efforts to terminate its existence; achieved formal recognition as a distinct self-governing political entity; and filed land-and-water-rights-related claims, ultimately achieving settlement of its land claims, and signing a water rights compact, recognizing its right to water and to participation in water regulation.<sup>5</sup> In addition to holding water rights guaranteed by the compact, the Tribe participates in a number of water protection programs. It administers Clean Water Act water quality standards on reservation lands<sup>6</sup> and partners with state and federal agencies in a number of water protection programs and initiatives, both on its reservation lands and

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<sup>1</sup> SOUTH FLORIDA ECOSYSTEM RESTORATION TASK FORCE, JULY 2010-JUNE 2012 STRATEGY AND BIENNIAL REPORT 75, [http://www.sfrestore.org/documents/2012\\_sbr.pdf](http://www.sfrestore.org/documents/2012_sbr.pdf) [hereinafter STRATEGY AND BIENNIAL REPORT].

<sup>2</sup> Alfred R. Light, *Miccosukee Wars in the Everglades: Settlement, Litigation, and Regulation to Restore an Ecosystem*, 13 ST. THOMAS L. REV. 729, 729 (2001).

<sup>3</sup> See *infra* notes 25-43 and accompanying text.

<sup>4</sup> See *infra* notes 44-47 and accompanying text.

<sup>5</sup> See *infra* notes 61-90 and accompanying text.

<sup>6</sup> See *infra* notes 97-114 and accompanying text.

beyond, aimed at restoring the health of the Everglades ecosystem.<sup>7</sup> Although the extensive damage done to the ecosystem over the years resulted from the policies and actions of other sovereigns, the Tribe has devoted considerable effort and resources to working with state and federal agencies on the shared goal of saving and revitalizing the ecosystem for the benefit of future generations.<sup>8</sup>

This Article examines the relationship between the Seminole Tribe of Florida and the Everglades ecosystem, focusing on the role that the ecosystem's water resources have played in the Tribe's historical and contemporary experiences. Part I examines water and Seminole history, relating how the remote wetlands of the Everglades ecosystem served as a refuge in the Seminole Wars and thereafter. Part II focuses on the Seminole Tribe's efforts in the twentieth century to vindicate rights to water, as a corollary to land rights that also had to be defended in court. Part III analyzes the link between water resources and sovereignty, as demonstrated by the Tribe's efforts to protect water resources on reservation lands, and to partner with other sovereigns in ecosystem protection programs and initiatives. Part IV offers concluding thoughts on the past and present relationship between the Seminole Tribe and the water resources of the Everglades ecosystem.

#### I. WATER AND SEMINOLE HISTORY: TAKING REFUGE IN THE EVERGLADES ECOSYSTEM

In the nineteenth century, the ancestors of today's Seminole Tribe of Florida, Miccosukee Tribe of Indians of Florida, and Independent Traditional Seminole Nation of Florida settled on the lands of the Everglades and the surrounding ecosystem, driven there by U.S. policies that began with efforts at forced exile and later degenerated into a scorched earth approach to tribal removal that brings to mind ethnic cleansing.<sup>9</sup> The surviving Seminoles, never conquered, took refuge on remote lands in the Everglades and Big Cypress Swamp areas, living a life shaped by fluctuating water conditions.<sup>10</sup> They adapted to survive in areas that Americans regarded, for many years to come, as difficult, if not impossible, for humans to live in.<sup>11</sup> This view of the area's utility changed over time, and the move to alter waterflow in the area to foster non-Indian agricultural operations and other forms of development threatened the Seminoles and

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<sup>7</sup> See *infra* notes 123-164 and accompanying text.

<sup>8</sup> See *infra* notes 121, 128-133 and accompanying text.

<sup>9</sup> See *infra* notes 25-43 and accompanying text.

<sup>10</sup> See *infra* notes 44-46 and accompanying text.

<sup>11</sup> See *infra* notes 40, 47 and accompanying text.

their relationship with the Everglades ecosystem.<sup>12</sup>

#### A. Settlement in Florida and Resistance to Removal

As recounted by the Tribe's Historic Preservation Office, the Seminole people are the descendants of the people known to British and later to American authorities as the Creeks.<sup>13</sup> The Creek Nation was created over time through a confederation of dozens of towns in the southeastern United States, whose members spoke Muskogee, Hitchiti, and several other languages.<sup>14</sup> Over the course of the seventeenth and eighteenth centuries, some Creek communities relocated to Florida. There, they interacted with other peoples who would later become part of the Seminole people, such as the Apalachicola people, who were settled along the Apalachicola River.<sup>15</sup> Two Seminole Nation "nuclei," one Hitchiti-speaking and one Muskogee-speaking, that were distinguishable from the Creek Nation further north, came to exist in the eighteenth century.<sup>16</sup> As the Seminole Nation took shape, its members became successful cattle raisers, which drew the attention of whites from Georgia, and other states, who grew eager to get hold of land and realize the cattle raising success that the Seminoles enjoyed.<sup>17</sup>

Although the Seminole population in Florida remained fairly small during these early years,<sup>18</sup> the population fluctuated over the course of the

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<sup>12</sup> For ease of reference, the term "Everglades ecosystem" is used herein to refer to "the greater Everglades ecosystem (spanning from the Kissimmee River basin north of Lake Okeechobee all the way south to Florida Bay)." *About Us*, U.S. DOI OFFICE OF EVERGLADES RESTORATION INITIATIVES, SOUTH FLORIDA ECOSYSTEM RESTORATION TASK FORCE, [http://www.sfrestore.org/about\\_us.html](http://www.sfrestore.org/about_us.html) (last visited Apr. 17, 2014).

<sup>13</sup> *Who Are the Seminole People? A Brief History*, SEMINOLE TRIBE OF FLORIDA, TRIBAL HISTORIC PRESERVATION OFFICE, <http://www.stofthpo.com/History-Seminole-Tribe-FL-Tribal-Historic-Preservation-Office.html> (last visited Apr. 17, 2014) [hereinafter *A Brief History*].

<sup>14</sup> *See id.* The Creek Nation's members spoke seven languages: five Muskogean languages (Muskogee, Hitchiti, Koasati, Alabama, Natchez), as well as Yuchi and Shawnee. *Id.*

<sup>15</sup> Some Creeks relocated from Georgia to areas near Spanish missions in Florida, including the Oconee at San Francisco De Oconi (1659); the Sawokali at Encarnacion de Sabacola el Minor (1675); and the Tamathli at Nuestra Senora de la Candelaria de la Tama (1675). *Id.* Other peoples who later became part of the Seminole Nation were the Yemassee, at San Antonio Anacape (1681), and Nuestra Senora de la Candelaria de la Tama (1675); the Tawasa, of the Timuqua; and the Yuchi, located between the Apalachicola River and the Choctawhatchee Bay area. *Id.*

<sup>16</sup> *See Seminole Indians of Fla. v. United States*, 13 Ind. Cl. Comm. 326, 362 (Ind. Cl. Comm. 1964) (noting that by "the mid-1700's, both groups were properly classifiable as Seminoles and not as Creeks or derivative Creek"). The Indian Claims Commission found in 1964 that the Hitchiti-speaking nucleus of Seminoles "fanned out from the Gainesville area [northern peninsular Florida] and pervaded peninsular Florida;" the Muskogee-speaking nucleus "spread from the Tallahassee area [northwestern Florida] through northern Florida and the Gulf [of Mexico] coast". *Id.*

<sup>17</sup> *A Brief History*, *supra* note 13.

<sup>18</sup> The Seminole population in Florida was around 1,200, whereas the Creek population in Georgia and Alabama numbered as many as 25,000. *Id.*

fifty years of warfare that began with the War of 1812 and culminated in the three Seminole Wars.<sup>19</sup> Although historians divide this violent period into several wars, these conflicts are best understood, as one commentator has noted, as the people of the time most likely viewed them, as “one long war against the Creeks.”<sup>20</sup>

By the 1820s, the flow of refugees from violence farther north into the Florida Seminole communities had increased the population to about six thousand.<sup>21</sup> The communities’ way of life was tied to the nature of their ecosystem, with agriculture being the focus of northern communities, and widespread hunting and fishing in the swamps of the Big Cypress and Everglades sustaining southern Seminole communities.<sup>22</sup> By this point, as the Indian Claims Commission found in 1964, Seminoles had established aboriginal title—ownership based on long-term and exclusive use and occupancy<sup>23</sup>—to almost all of Florida.<sup>24</sup>

In the First Seminole War, Seminole communities were attacked by American forces under Andrew Jackson, who (invading what was then Spanish territory without congressional authorization) killed Seminoles and destroyed their communities in northern and central Florida, striking as far south as where the Suwanee River empties into the Gulf of Mexico.<sup>25</sup> Worse was yet to come, as the members of these communities became the target of what has been described as “the fiercest of all the wars ever waged by the U.S. Government against native peoples,” the Second Seminole War.<sup>26</sup> Lasting seven years (1835-1842), this war, a reflection of government officials’ apparent frustration at the failure of efforts to remove the entire Seminole Nation from their Florida lands to the Indian Territory (in future Oklahoma),<sup>27</sup> cost more than the American Revolution and pitted

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<sup>19</sup> *Id.* (noting the following wars: War of 1812 (1812-1815); Creek War (1813-1814); the First Seminole War (1818-1819); the Second Seminole War (1835-1842); and the Third Seminole War (1855-1858)). Other sources date the beginning of the First Seminole War as 1814. *See, e.g.,* Willard Steele, *History: Brief Summary of Seminole History*, SEMINOLE TRIBE FLA., <http://www.semtribe.com/History/BriefSummary.aspx> (last visited Apr. 17, 2014) (dating the First Seminole War as 1814-1818).

<sup>20</sup> Steele, *supra* note 19.

<sup>21</sup> *Seminole Indians of Fla.*, 13 Ind. Cl. Comm. at 359.

<sup>22</sup> *Id.* at 360.

<sup>23</sup> To establish aboriginal title, a tribe must prove that it had “actual, exclusive, and continuous use and occupancy ‘for a long time’ prior to the loss of the property.” *Sac & Fox Tribe of Indians of Okla. v. United States*, 315 F.2d 896, 903 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 921 (1963).

<sup>24</sup> *Seminole Indians of Fla.*, 13 Ind. Cl. Comm. at 367.

<sup>25</sup> *Id.* at 360.

<sup>26</sup> *See A Brief History*, *supra* note 13. Another commentator has described the seven years that the Second Seminole War lasted as framing “the last, the greatest, and arguably the most tragic years in the history of US-Indian relations east of the Mississippi River.” Steele, *supra* note 19.

<sup>27</sup> U.S. relations with the Seminole Nation in the nineteenth century began with efforts to concentrate the tribe on a reservation. An 1823 treaty signed by some leaders of the Seminole Nation

thousands of U.S. soldiers against many fewer Seminole warriors.<sup>28</sup> Historian Grant Foreman characterized the events of the Second Seminole War and related removal efforts as the “blackest chapter” in the United States’ dealings with Indians.<sup>29</sup> At the end of the war, during the course of which many Seminoles were killed or were taken under military escort to the Indian Territory,<sup>30</sup> there were only several hundred Seminoles left in Florida.<sup>31</sup> Their villages and supplies had been destroyed by American forces, even after the flight of the inhabitants, leaving the remaining Seminoles to rely on hunting, fishing, and harvesting wild plants in remote areas for survival.<sup>32</sup>

The United States was not satisfied, however, with this drastic reduction in the Seminole population in Florida, left to the Everglades and Big Cypress Swamp of South Florida.<sup>33</sup> The Everglades ecosystem had not yet been impacted by the drainage canals that were dug in the twentieth century, and the Everglades was then a huge sawgrass swamp, with nearly

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with the United States established a Seminole reservation in south-central Florida. *Seminole Indians of Fla.*, 13 Ind. Cl. Comm. at 353 (citing the Treaty of Camp Moultrie, Sept. 18, 1823, 7 Stat. 224). The Treaty was signed by representatives of less than half of the Seminole villages. JAMES A. GOSS, USUAL AND CUSTOMARY USE AND OCCUPANCY BY THE MICCOSUKEE AND SEMINOLE INDIANS IN BIG CYPRESS NATIONAL PRESERVE, FLORIDA 76 (1995). The 1823 Treaty created a large inland reservation extending northward from the north shore of Lake Okeechobee nearly as far north as present day Gainesville. William C. Sturtevant & Jessica R. Catellino, *Florida Seminole and Miccosukee*, in 14 HANDBOOK OF NORTH AMERICAN INDIANS 429, 432 (Raymond D. Fogelson, ed., 2004). With the passage of the Indian Removal Act in 1830, the government switched to a focus on removal of the Seminole Nation from Florida entirely. *Seminole Indians of Fla.*, 13 Ind. Cl. Comm. at 353. Under the terms of an 1832 treaty, the Seminole Nation was to cede its Florida reservation of over 4 million acres and receive lands in the Indian Territory, to which the Nation would remove within three years. *Id.* at 354 (citing the Treaty of Payne’s Landing, May 9, 1832, 7 Stat. 368). The 1832 Treaty’s legitimacy was undermined by the fact that it was only signed by fifteen Seminole representatives, which was less than half of the number that had signed the 1823 Treaty of Camp Moultrie. *Id.* at 353. The Second Seminole War was launched when the three-year deadline in the 1832 treaty passed and members of the Seminole Nation were still living in Florida. *Id.* at 354.

<sup>28</sup> See *A Brief History*, *supra* note 13 (stating that fifty-two thousand U.S. soldiers fought against fewer than two thousand Seminole warriors). See also Sturtevant & Catellino, *supra* note 27, at 434 (stating that about 800 Seminole men had fought 5,000 or more regular and militia soldiers). By the end of the war, over \$20 million had been spent and 1500 American soldiers had died. Steele, *supra* note 19.

<sup>29</sup> Glenn Boggs, *Free Florida Land: Homesteading for Good Title*, 83 FLA. B.J. 10, 15 (2009).

<sup>30</sup> *Seminole Indians of Fla.*, 13 Ind. Cl. Comm. at 354 (noting that various Seminole leaders surrendered at different times during the war and immigrated with groups of Seminoles to the Indian Territory, under military escort).

<sup>31</sup> *A Brief History*, *supra* note 13 (stating that there were only three hundred Seminoles left); see also Sturtevant & Catellino, *supra* note 27, at 434 (stating that an “estimated 4,420 Seminoles and associated Blacks were sent west because of the Second Seminole War, while 500-600 remained in Florida”).

<sup>32</sup> See Sturtevant & Catellino, *supra* note 27, at 434.

<sup>33</sup> *Id.*

level water slowly draining across it southward.<sup>34</sup> The swamp was dotted by hammocks, slightly higher spots with small clumps of trees and shrubs.<sup>35</sup> The less open Big Cypress Swamp had dense areas of cypress trees growing out of the water.<sup>36</sup> The Seminoles maintained small fields and kept hogs and chickens on the hammocks.<sup>37</sup> Hunting and fishing were important for Seminole survival in the ecosystem, through which the Seminoles traveled in canoes that were poled along trails resulting from repeated travel through the sawgrass.<sup>38</sup> Although this area was not yet of great interest for American settlement, the government nonetheless continued to move troops into Seminole territory and sought to remove the remaining Seminoles.<sup>39</sup> Hunting down Seminole families in the inhospitable conditions of the Everglades posed many problems for military operations, prompting one soldier to write home that, “If the Devil owned both Hell and Florida, he would rent out Florida and live in Hell!”<sup>40</sup>

Despite these obstacles, by the end of the Third Seminole War (1855-1858),<sup>41</sup> most of the Seminoles had been removed, but a significant number—an estimated three hundred<sup>42</sup>—remained in the wet, wild refuge of the Everglades ecosystem.<sup>43</sup> The descendants of these survivors, who had never surrendered, are the members of today’s Seminole Tribe of Florida, Miccosukee Tribe of Indians of Florida, and Independent Traditional Seminole Nation of Florida.<sup>44</sup> Seminoles have credited their ancestors’ survival to their intimate knowledge of the Everglades’ waterways and cypress hammocks.<sup>45</sup> This knowledge continued to be crucial to Seminoles as they faced new challenges to their survival in the Everglades ecosystem.

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<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 434, 436.

<sup>38</sup> *See id.* at 436.

<sup>39</sup> *Id.*

<sup>40</sup> Steele, *supra* note 19.

<sup>41</sup> *A Brief History*, *supra* note 13 (noting that the Third Seminole War led to the removal of 200 more Seminoles to the Indian Territory). Although the precise number of Seminoles then remaining in Florida is not known, a federal official recorded a Florida Seminole population of sixty adult males, and a total population of two hundred and sixty-nine men, women and children, in 1887.

<sup>42</sup> Sturtevant & Catellino, *supra* note 27, at 436.

<sup>43</sup> Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. LAND USE & ENVTL. L. 1, 3 (1990). For a discussion of Seminole life in the later years of the nineteenth century as described in government reports, see GOSS, *supra* note 27, at 85-97.

<sup>44</sup> Steele, *supra* note 19.

<sup>45</sup> Jessica R. Cattelino, *Florida Seminoles and the Cultural Politics of the Everglades*, 9 (May 2009) (unpublished manuscript), available at <http://www.sss.ias.edu/files/papers/paper36.pdf>.

## B. Survival in the Everglades Ecosystem and the Emergence of New Threats

Finally left in peace in the Everglades, the Seminoles hunted, trapped, fished, and traded with non-Indians at outposts in what was still the frontier.<sup>46</sup> Non-Seminoles continued to regard the area as “one big, soggy, malaria-infested impediment to prosperity.”<sup>47</sup> The extension of a railroad line down the east coast of Florida, however, which reached West Palm Beach in 1894 and Miami in 1896,<sup>48</sup> began an increase in migration to South Florida that has continued to this day.<sup>49</sup> Drainage canals that were excavated between 1906 and 1917, in accordance with the “drain-the-Everglades” mentality of contemporary developers and politicians, lowered the water levels of the eastern and northern Everglades, facilitating settlement into the Everglades’ eastern edge.<sup>50</sup> The completion of the Tamiami Trail across Florida in 1928, which expanded development possibilities, also created new pressures on Seminole communities.<sup>51</sup> The damage to the Everglades ecosystem from the canals, and from the development made possible by the draining of the Everglades and by the Tamiami Trail, have posed serious threats to continued Seminole survival on tribal lands.

Early in the twentieth century, the Federal Government reserved several areas of land for the Florida Seminoles, at Dania (Hollywood), Brighton, and Big Cypress.<sup>52</sup> By 1919, over 23,000 acres were being administered for the benefit of the Seminoles residing at Big Cypress, with another 11,000 acres added pursuant to a 1934 statute.<sup>53</sup> In Broward and Palm Beach Counties, the State of Florida established a reservation in 1935,

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<sup>46</sup> Sturtevant & Catellino, *supra* note 27, at 436.

<sup>47</sup> Richard J. Ansson, Jr., *Ecosystem Management & Our National Parks: Will Ecosystem Management Become the Guiding Theory for Our National Parks in the 21st Century?*, 7 U. BALT. J. ENVTL. L. 87, 102 (2000).

<sup>48</sup> Sturtevant & Catellino, *supra* note 27, at 436.

<sup>49</sup> *Id.* For an analysis of population trends in Florida, documenting population increases, and predicting continued growth, in Broward, Dade, and Palm Beach Counties, see Florida Dep’t of State, *Travel Demand: Population Growth and Characteristics* 9-10 (Dec. 2011), <http://www.dot.state.fl.us/planning/trends/tc-report/Pop120811.pdf>.

<sup>50</sup> *See id.*

<sup>51</sup> GOSS, *supra* note 27, at 97-98.

<sup>52</sup> Shore & Straus, *supra* note 43, at 3-4 (discussing the establishment of these reservations); *see also A Brief History*, *supra* note 13 (noting that in 1907, 540 acres were set aside near Dania (now Hollywood, in Broward County); that in 1911, President Taft set aside lands in Martin, Broward and Hendry Counties as reservations; and that by 1913, there were eighteen Indian reservations, ranging in size from 40 acres to 16,000 acres).

<sup>53</sup> Shore & Straus, *supra* note 43, at 4 n.18 (noting that West Big Cypress lands were purchased for the benefit of the Seminoles around the turn of the century and that 11,000 acres were added pursuant to the Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-463 (1988)).

which was eventually partitioned between two Seminole components, the Seminole Tribe and the Miccosukee Tribe.<sup>54</sup> By 1938, the amount of land set aside for the Seminoles in the Dania, Brighton, and Big Cypress areas totaled over 80,000 acres.<sup>55</sup>

The Indian Reorganization Act of 1934 (“IRA”)<sup>56</sup> encouraged greater formalization of tribal governments and the adoption of tribal constitutions,<sup>57</sup> as part of the broader federal policy of recognizing tribal self-determination rights. The IRA also provided authority for the acquisition of lands to be held in trust for tribes and for the establishment and expansion of reservations.<sup>58</sup> Although the Florida Seminoles did not adopt a tribal constitution under the IRA framework at that time, and had differences of opinion as to the wisdom of settling on reservation lands,<sup>59</sup> a group of Seminoles met with Secretary of the Interior Ickes in 1935 to express concerns about Seminole lands and the wellbeing of the Everglades ecosystem:

We, a group of the Seminole Indians of Florida, assembled in conference on the one-hundredth anniversary of the Seminole war, beg you to hear us:

The Seminole Indians have not been at war with the United States for one hundred years. The Seminole Indians live in peace and happiness in the Everglades, and have pleasant relations with the United States government. The Seminole Indians want a better understanding with the United States government and want to hear no more about war. We have learned from our forefathers about the losses of our people in the Seminole War, and during recent years have witnessed the coming of the white man into the last remnant of our homeland. We have seen them drain our lakes and waterways,

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<sup>54</sup> Shore & Straus, *supra* note 43, at 4 (citing Ch. 65-249, 1965 Fla. Laws 677 (codified at Fla. Stat. § 285.061)); *see also* Sturtevant & Catellino, *supra* note 27, at 438 (stating that the state had set aside lands in Monroe County in 1917, some of which were exchanged for areas in Broward and Palm Beach counties when lands within the 1917 reservation were put into the Everglades National Park in 1935).

<sup>55</sup> Steele, *supra* note 19.

<sup>56</sup> Indian Reorganization Act, Pub. L. No. 73-383, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-479 (2012)).

<sup>57</sup> *Id.* § 16 (codified as amended at 25 U.S.C. § 479). The IRA also authorized the issuance of charters of incorporation to tribes to facilitate tribal economic development and self-determination. *Id.* § 17 (codified as amended at § 476).

<sup>58</sup> *Id.* §§ 5, 7 (codified as amended at §§ 465, 467).

<sup>59</sup> *See e.g.*, Steele, *supra* note 19 (describing differences of opinion as to reservations between the group that became the Miccosukee Tribe of Seminole Indians of Florida and the group that became the Seminole Tribe of Florida). For some Seminoles, reservations were suspect on the grounds that they might serve as a springboard for removal. Theda Perdue, *The Legacy of Indian Removal*, 78 J. SOUTH. HIST. 3, 14 (2012).

cultivate our fields, harvest our forests, kill our game, and take possession of our hunting grounds and homes.<sup>60</sup>

In addition to threats to Seminole lands and concomitant threats to the Everglades ecosystem, threats to the survival of the Florida Seminoles as a people with a continuing government-to-government relationship with the United States also arose. Two Seminole groups, the Seminole Tribe of Florida and the Miccosukee Tribe of Indians of Florida, were formally acknowledged by the Federal Government as distinct political entities in 1957 and 1962, respectively,<sup>61</sup> following successful resistance to congressional plans to terminate the government's relationship with the Seminoles.<sup>62</sup> The lands of the Seminole Tribe of Florida today consist of three main reservations—Big Cypress (in Broward and Hendry Counties), Brighton (in Glades County), and Hollywood (in Broward County)—along with smaller reservations at Immokalee (in Collier County), Tampa (in Hillsborough County), and Fort Pierce (in St. Lucie County).<sup>63</sup> When Everglades National Park was created in 1934, the legislation creating the Park provided that the Seminole and Miccosukee Tribes would continue to be able to exercise their rights within the Park “which are not in conflict with the purposes for which the Everglades National Park is created.”<sup>64</sup>

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<sup>60</sup> See *A Brief History*, *supra* note 13.

<sup>61</sup> Sturtevant & Catellino, *supra* note 27, at 443 (discussing the Seminole Tribe's approval of a constitution and bylaws in 1957, pursuant to the Indian Reorganization Act of 1934, which tribal members had voted to accept in 1935); *id.* at 444 (discussing the Miccosukee Tribe's ratification of a constitution and bylaws in 1962). The Seminole Tribe established the Tribal Council as the Tribe's governing body in the tribal constitution and also created the Seminole Tribe of Florida, Inc. to oversee tribal business matters. *A Brief History*, *supra* note 13. An additional Seminole group, the Independent Traditional Seminole Nation of Indians, has not sought federal recognition. Sturtevant & Catellino, *supra* note 27, at 444; see also Bobby Billie, *The Independent Traditional Seminole Nation: Defending Our Heritage and Our Land*, 14 ST. THOMAS L. REV. 337, 337 (2001) (discussing the author's tribe, as distinguished from the Seminole and Miccosukee tribes, and stating that “[n]obody has to recognize us as to who we are as long as the Creator recognizes us . . .”).

<sup>62</sup> Sturtevant & Catellino, *supra* note 27, at 443.

<sup>63</sup> *Id.* at 444. The addition of the Tampa and Immokalee reservation lands to existing reservation lands brought Seminole federal trust holdings to more than 90,000 acres. *History—Where We Came From, Seminoles Today*, SEMINOLE TRIBE FLA., <http://www.semtribe.com/History/SeminolesToday.aspx> (last visited Apr. 17, 2014). The reservations of the Miccosukee Tribe include the Tamiami Trail Reservation Area (four parcels of land located forty miles west of Miami, held under different ownership forms); the Alligator Alley Reservation (the Tribe's largest reservation, comprising 74,812.37 acres located west of Fort Lauderdale); and the two Krome Avenue Reservations (located south of Miami at the intersection of Krome Avenue and Tamiami Trail). *Reservation Areas*, MICCOSUKEE TRIBE OF FLA., <http://www.miccosukee.com/tribe> (last visited Apr. 17, 2014).

<sup>64</sup> 16 U.S.C. § 410(b) (2014); see also *Everglades National Park Management Objectives*, NAT'L PARK SERV., <http://www.nps.gov/ever/parknews/managementobjectives.htm> (last visited Mar. 10, 2014) (stating that the tribes “have the opportunity to exercise their existing tribal rights within Everglades National Park to the extent and in such a manner that they do not conflict with the park purpose . . .”). The Park was authorized by Congress in 1934 but was not officially established until 1947. Ansson,

Tribal members also have the right, under the 1974 legislation creating the Big Cypress National Preserve (“BCNP”) south of the Big Cypress Reservation, to “continue their usual and customary use and occupancy” of lands and waters in the BCNP, “including hunting, fishing, and trapping on a subsistence basis and traditional tribal ceremonials.”<sup>65</sup> A 1995 study of tribal use and occupancy of the BCNP noted its extensiveness, with every suitable hammock being utilized at various times, as dictated by fluctuating water conditions.<sup>66</sup> The Seminole Tribe thus has a great stake in the protection of the Everglades ecosystem, extending beyond the lands belonging to the Tribe.

## II. WATER AND LAND: DEFENDING SEMINOLE LAND AND WATER RIGHTS

In the 1970s and 1980s, the Tribe confronted new challenges, which necessitated engaging in litigation to seek redress for infringements on its water and other rights. The Tribe’s water rights and land claims litigation ultimately resulted in a settlement agreement, a water rights compact, and land claims settlement legislation. The agreements recognized tribal water rights and acknowledged the Tribe’s authority, based on tribal sovereignty and the right of self-determination, to take part in water regulation.

### A. Litigating Land Claims Before the Indian Claims Commission

Seminole efforts in the 1970s and 1980s to vindicate rights to their Florida territory were not the first efforts of their kind. The Seminole Indians of Florida filed a claim with the Indian Claims Commission in 1950, seeking compensation based on the value of the land of most of the state of Florida. The Seminole Nation of Oklahoma filed a similar compensation claim, which was considered together with the Florida Seminoles’ claim.<sup>67</sup> In 1964, the Indian Claims Commission concluded that

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*supra* note 47, at 103.

<sup>65</sup> Act of Oct. 11, 1974, Pub. L. No. 93-440, § 5, 88 Stat. 1260 (codified as amended at 16 U.S.C. § 698(j)). The use rights, which are “subject to reasonable regulations established by the Secretary,” extend to the original BCNP lands and lands added in 1988 (termed the “Addition”). *Id.* Members of the Miccosukee Tribe are also entitled to these rights. *Id.*

<sup>66</sup> GOSS, *supra* note 27, at 113-14.

<sup>67</sup> *Seminole Indians of Fla. v. United States*, 13 Ind. Cl. Comm. 326, 343 (1964). As the Indian Claims Commission noted in its 1964 opinion addressing the claims, the Seminole Nation of Oklahoma represented “that segment of The Seminole Nation which removed to the Indian Territory,” and the Seminole Indians of Florida represented “that segment of The Seminole Nation which did not remove to the Indian Territory.” *Id.* Three areas (referred to as “enclaves”) were excepted from the claims, based on pre-U.S. sovereignty conveyances. *Id.* at 344. In 1961, the effort of a group of Seminoles identified as The Everglades Miccosukee Tribe of Seminole Indians to have the claims dismissed on the ground that the group declined to be bound by Commission proceedings was rejected. The rejection of the claim was based on the group’s having not timely filed a separate claim. *Id.* at 344. The Miccosukee group had sought to dismiss the claim for compensation in favor of seeking restoration of title to the

prior to an 1823 treaty, the Seminole Nation “had aboriginal title, based upon exclusive use and occupancy in Indian fashion to most of the now State of Florida.”<sup>68</sup> The Commission rejected attempts by the defendant United States to minimize the extent of Seminole use and occupancy (and hence title) by focusing on a low point in the Seminole population in the eighteenth century.<sup>69</sup> The Commission further concluded that the Oklahoma and Florida Seminole plaintiffs “together comprise The Seminole Nation as it existed in Florida until 1823.”<sup>70</sup>

The 1964 decision was just the first step in the effort to obtain compensation, with further actions needed as to “such matters as boundaries, reservations, coastal configurations, and acreage computations.”<sup>71</sup> A 1964 BIA press release commenting on the Commission’s opinion noted that many steps were yet to be taken to address issues related to boundaries, acreages, and land values, and that consequently “it cannot be indicated with any degree of certainty how much more time may elapse before final decision is possible.”<sup>72</sup> The BIA warning of the potentially protracted nature of the process of settling the details of the award proved prescient, as the settlement process, which included congressional hearings<sup>73</sup> and further Indian Claims Commission proceedings,<sup>74</sup> took over twenty additional years.

In April 1976, the Commission awarded the Seminole plaintiffs a total of \$16,000,000, but the funds needed to be allocated between them.<sup>75</sup> Following negotiations between the Oklahoma and Florida Seminole tribes,

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lands. *Statement by Commissioner of Indian Affairs Philleo Nash on Status of Seminole Indian Land claims case*, U.S. DEP’T OF THE INTERIOR, (Sept. 4, 1964), available at <http://www.bia.gov/cs/groups/public/documents/text/idc017108.pdf> [hereinafter Nash Statement]; see also Sturtevant & Catellino, *supra* note 27, at 444 (discussing opposition to the land claim petition on the grounds that settlement of the claim would require foregoing any further land claims).

<sup>68</sup> *Seminole Indians of Fla.*, 13 Ind. Cl. Comm. at 367. Four areas or classes of land were subtracted from the lands to which the Seminole Nation had aboriginal title. *Id.*

<sup>69</sup> *Id.* at 362-63. The Commission noted that “the Seminoles, few or many of them, used in Indian fashion” all of the claimed area and that “Indian use and occupancy has never been dependent upon the claiming Indians treading upon every acre every day.” *Id.* at 363.

<sup>70</sup> *Id.* at 368. The U.S. Court of Claims affirmed the decision in 1967. *United States v. Seminole Indians of Fla.*, 180 Ct. Cl. 375 (1967).

<sup>71</sup> *Seminole Indians of Fla.*, 13 Ind. Cl. Comm. at 355.

<sup>72</sup> Nash Statement, *supra* note 67.

<sup>73</sup> *Distribution of Seminole Judgment Fund, Hearing Before the U.S. Senate Select Committee of Indian Affairs*, 95th Cong. (1978).

<sup>74</sup> The Commission made a determination of the extent of the area covered by the Seminole claim in 1968 and of the amount they were entitled to recover in 1970. *Seminole Indians of Fla. v. United States*, 455 F.2d 539, 540 (Ct. Cl. 1972) (citing 19 Ind. Cl. Comm. 179 (1968) and 23 Ind. Cl. Comm. 108 (1970)). After a “final award” was entered for \$12,262,780.63, both the United States and the Seminole plaintiffs appealed to the Court of Claims, which remanded the matter back to the Commission for more detailed findings on valuation. *Id.*

<sup>75</sup> *Seminole Indians of Fla. v. United States*, 38 Ind. Cl. Comm. 62 (1976).

a settlement was reached in 1990.<sup>76</sup> By this point, the total settlement value had reached \$40,000,000. In 1992, the Seminole Tribe of Florida received its share, totaling almost \$10,000,000.<sup>77</sup>

The focus of the Indian Claims Commissions proceedings was land itself. As the detrimental impact of federal and state water resources management projects became more apparent, later efforts to seek redress for infringement of tribal rights have also focused on rights to water, as an integral component of the use and enjoyment of land.

#### B. Litigating and Settling Water Rights Claims

As a sovereign with responsibility for, and authority over, its territory, it stands to reason that the Seminole Tribe of Florida should be involved in the development and implementation of water quality protection planning and restoration initiatives impacting waters on tribal lands in South Florida. Where water is concerned, regulation needs to address both the quality of water and its quantity. Water must be of sufficient quality so as to be suitable for its intended uses and be available in particular places in quantities that cause neither drought nor flooding. Decisions related to water quantity also need to address fluctuations in its availability at particular times. The water's method of arrival can also be important—does it arrive in narrow channels or is it spread over a broader area, and does it flow in at a fast or slow pace? In short, water needs to be evaluated, and protected, with regard to quality, quantity, timing, and distribution.

It seems logical for the Tribe to be a necessary partner of state and federal governments engaged in making decisions related to these questions. The Tribe's rights and role with respect to South Florida water protection have not, however, always been unquestioned. The Tribe's successful quest for recognition of tribal water rights via litigation and ultimately a settlement agreement led to the development of legal frameworks to recognize and implement tribal rights. In addition, as discussed in Part III below, the Tribe has relied on tribal sovereignty as the basis for involvement in decision-making with respect to water resources.

Until fairly recently, decisions related to water quantity and quality that would impact tribal lands were largely made without tribal involvement. In the past, the U.S. Army Corps of Engineers ("USACE") and the South Florida Water Management District ("SFWMD"),<sup>78</sup> a state

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<sup>76</sup> Sturtevant & Catellino, *supra* note 27, at 444. The settlement provided for three-quarters of the award money to go to the Seminole Nation of Oklahoma and one-fourth to the Seminoles of Florida.

<sup>77</sup> Charles Flowers, Peter B. Gallagher & Patricia Wickman, *History—Where We Came From, Seminole Timeline*, SEMINOLE TRIBE FLA., <http://www.semtribe.com/History/SeminoleToday.aspx> (last visited Apr. 15, 2014).

<sup>78</sup> MATTHEW C. GODFREY & THEODORE CATTON, RIVER OF INTERESTS: WATER MANAGEMENT

agency that oversees the water resources in sixteen counties in the southern half of Florida, developed water policies that affected Seminole land.<sup>79</sup>

As it became clear that water policy decisions and population growth in South Florida adversely affected the water coming into its reservations, the Tribe saw the need to gain control over water flowing onto, and over, reservation land. In the 1970s, the Tribe sued the State of Florida<sup>80</sup> to vindicate tribal rights with respect to 16,000 acres of land that had been flooded by Conservation Area No. 3, an area in Dade and Broward counties created by the USACE for flood control-related water storage.<sup>81</sup> This was one of three conservation areas set aside as part of the implementation of the Central & South Florida Project (“C&SF Project”), constructed by the USACE from 1948-1962.<sup>82</sup> Since the creation of Conservation Area No. 3, which the USACE had helped to impound by building a north-south levee bisecting reservation lands, the potential negative impact of the Area on Seminole lands had concerned the Tribe.<sup>83</sup>

In 1986, a settlement of tribal claims (reflected in a settlement agreement) was reached and work began on a water rights compact, setting out the Tribe’s rights and responsibilities with respect to water quantity and quality.<sup>84</sup> The resulting Water Rights Compact afforded the Tribe recognition of federal water rights.<sup>85</sup> In addition, the Compact “recognize[d] the Tribe’s sovereign power in the administration of reservation water resources,” and provided for “intergovernmental cooperation between sovereign governments,” in place of subordination of

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IN SOUTH FLORIDA AND THE EVERGLADES, 1948-2010, at 229-30 (Historical Research Assocs, Inc. ed., 2011).

<sup>79</sup> *About Us*, South Florida Water Management District, <http://www.sfwmd.gov/portal/page/portal/xweb%20about%20us/sfwmd%20about%20us> (last visited Mar. 7, 2014).

<sup>80</sup> *Seminole Tribe of Indians v. State of Florida*, No. 78-6116-CIV (S.D. Fla. 1978).

<sup>81</sup> GODFREY & CATTON, *supra* note 78, at 230; *see also id.* at 35-37 (discussing the creation of Conservation Area No. 3). For a discussion of the lawsuit and events leading up to it, see Shore & Straus, *supra* note 43, at 4-11. In addition to claims related to Conservation Area No. 3, the Tribe also objected to being deprived of water on the Brighton Reservation and had an unresolved land claim based on a five million acre reservation established in south-central Florida in 1842, which had never been formally disestablished, along with an aboriginal title claim. Shore & Straus, *supra* note 43, at 5, 8.

<sup>82</sup> Light, *supra* note 2, at 730; *see also* Jane Graham & Julie Hill-Gabriel, *Jump-Starting Everglades Restoration Via Tools for Interim Progress*, 27-SPG NAT. RESOURCES & ENV'T 7, 7 (Spring, 2013) (noting that the “primary C&SF system includes about 1,000 miles of levees, 720 miles of canals, and almost 200 water control structures”). For a discussion of projects that altered the natural flow of water in the Everglades ecosystem and their impact, see Ansson, *supra* note 47, at 103-09.

<sup>83</sup> GODFREY & CATTON, *supra* note 78, at 37.

<sup>84</sup> *Id.* at 230-31. Under the 1986 settlement, the State agreed to pay the Tribe for land that had been flooded and to compensate the Tribe for the impact of other State projects. GODFREY & CATTON, *supra* note 78, at 230-31.

<sup>85</sup> Shore & Straus, *supra* note 43, at 12 n.67.

tribal interests to SFWMD interests.<sup>86</sup> The significance of the Compact extended beyond its importance to the Tribe, as this was the first recognition of federally protected tribal water rights in an eastern state with a water rights regime founded upon the riparian rights system (as opposed to the prior appropriation-based system developed in western states, in which tribes' reserved water rights had long been recognized).<sup>87</sup> The Compact acknowledged the Tribe's authority to adopt a tribal water code to implement the Compact, and ensured the Tribe "an opportunity for significant input into water related land use decisions," on lands surrounding reservation lands located in the area under the SFWMD's authority.<sup>88</sup>

Congress acquiesced in the settlement arrangement in the Seminole Indian Land Claims Settlement Act of 1987.<sup>89</sup> Summarizing key aspects of the Compact, a Senate Committee report observed that "the Tribe will regulate its own water use through a newly created tribal water office;" and that although the Tribe had agreed to follow "essential aspects of Florida's ground water management plans and Federal environmental laws," it would "not need permits subject to district processes."<sup>90</sup> In short, in addition to

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<sup>86</sup> GODFREY & CATTON, *supra* note 78, at 231 (quoting Letter from Hobbs, Straus, Dean & Wilder to Ralph W. Tarr, (Feb. 15, 1989), available at [http://www.evergladesplan.org/about/river\\_interest\\_history.aspx](http://www.evergladesplan.org/about/river_interest_history.aspx)).

<sup>87</sup> Shore & Straus, *supra* note 43, at 2, 9. Under the Winters Doctrine, recognized in 1908 in *Winters v. United States*, tribes have reserved rights as to waters that arise on, border, traverse, or underlie their reservations. *Id.* at 1 n.2 (describing *Winters v. United States*, 207 U.S. 564 (1908)). Eastern states historically recognized the riparian water rights system, which bases water rights on ownership of land adjacent to a river or stream, whereas many western states have relied on the prior appropriation doctrine, which bases water rights on taking water and applying it to beneficial use. Allison M. Dussias, *Protecting Pocahontas's World: The Mattaponi Tribe's Struggle Against Virginia's King William Reservoir Project*, 36 AM. INDIAN L. REV. 1, 93 (2012). Some states, including Florida, now rely on a hybrid permit system. Shore & Straus, *supra* note 43, at 1 nn.3, 12.

<sup>88</sup> Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida, and the South Florida Water Management District §§ II(A)(6) & III(A)(3) [hereinafter Water Rights Compact]. The Tribe was recognized as being entitled to withdraw and use specified percentages of available water from canals and surface waters for the Brighton and Big Cypress Reservations. *Id.* §§ VI(B)(1) & (D).

<sup>89</sup> Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, § 101, Stat. 1556 (1987) (codified at 25 U.S.C. § 1772(a)-(g) (1988)). The Act also resolved tribal land claims, including claims pending in federal district court. Under the terms of the settlement agreement, tribal rights, titles, and interests in claims to lands or natural resources in Florida were to be extinguished other than specified "excepted interests," such as the West Big Cypress, Brighton, and Hollywood (Dania) reservations ("Federal Reservations") and portions of the Seminoles' state reservation that were to be transferred to the United States in trust for the Tribe as a reservation. Seminole Indian Land Claims Settlement Act of 1987; Validation of Settlement Agreement, 53 Fed. Reg. 25214-2, 25215 (1988); see also Shore & Straus, *supra* note 43, at 8 n.42 (describing matters resolved by the Settlement Agreement in addition to the Water Rights Compact).

<sup>90</sup> Shore & Straus, *supra* note 43, at 12 (quoting S. REP. NO. 258-100, at 3 (1987), reprinted in 1987 U.S.C.A.N. 2706, 2708). For further discussion of the provisions of the Water Rights Compact, see *id.* at 12-23.

vindicating tribal water rights, the Water Rights Compact set the stage for the Tribe to assume an active role in water policy development and implementation, and to partner with fellow sovereigns in addressing common concerns with respect to water and ecosystem protection.

### III. WATER AND SOVEREIGNTY: PROTECTING EVERGLADES ECOSYSTEM WATER RESOURCES

In addition to enjoying water rights guaranteed by the Water Rights Compact, the Seminole Tribe participates, as a sovereign, in a number of water protection programs. As the Tribe has explained, “Seminole cultural, religious, and recreational activities, as well as commercial endeavors, are dependent on a healthy Everglades ecosystem. In fact, the Tribe’s identity is so closely linked to the land that tribal members believe that if the land dies, so will the Tribe.”<sup>91</sup> Observing the evidence that the Everglades ecosystem is in decline, the Tribe recognized the need to take action to mitigate human impacts on the ecosystem. Stressing the need to sustain the Tribe’s economic and cultural future, tribal environmental projects are designed to protect both reservation land and water resources.<sup>92</sup>

The Tribe’s concern for Everglades ecosystem protection and restoration, for cultural preservation and other reasons, is reflected in its administration of the Clean Water Act water quality standards on its Big Cypress and Brighton reservations (as one of the first tribes to get the nod from the EPA to administer such a program). The Tribe also participates with state, tribal, and federal partners in a number of water protection programs and initiatives, such as the Big Cypress Water Conservation Plan and the Everglades Restoration Initiative.

#### A. Protecting Water Resources Pursuant to the Clean Water Act

Congress amended the Clean Water Act (“CWA”) in 1987 to provide a mechanism to treat tribes in the same manner as states for the purpose of administering certain CWA programs on their reservations,<sup>93</sup> including water quality standards (“WQS”) programs under the CWA, Section 303.<sup>94</sup> Tribes that are interested in administering a WQS program submit an application to the Environmental Protection Agency (“EPA”) for approval to do so. An interested tribe must demonstrate in its application that it is

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<sup>91</sup> *Culture—Who We Are, Seminoles and the Land*, SEMINOLE TRIBE FLA., <http://www.semtribe.com/History/SeminolesToday.aspx> (last visited Apr. 10, 2014) [hereinafter *Seminoles and the Land*].

<sup>92</sup> *Id.*

<sup>93</sup> See Clean Water Act § 518(e), 33 U.S.C. § 1377(e) (2000).

<sup>94</sup> 33 U.S.C. § 1313 (2000).

federally recognized; that its government carries out substantial duties and powers over a defined area; that it has regulatory authority over surface water quality; and that it is capable of administering an effective WQS program.<sup>95</sup> A tribe applying for EPA approval to administer CWA programs is seeking an acknowledgment of the tribe's authority, based on retained tribal sovereignty, to protect water quality in waters and lands on its reservation.

If the EPA approves a tribe's application, the tribe then develops WQS for reservation waters based on appropriate uses for particular waters, and then establishes criteria to protect those designated uses. The public is given the opportunity to comment on proposed tribal WQS, which are submitted for EPA approval after the comment process is completed. Once a tribe obtains EPA approval and is running a water quality program, it also has authority to grant or deny certification for activities that may result in discharges into waters, on the basis of whether or not they would violate the tribe's WQS.<sup>96</sup>

The EPA found the Seminole Tribe of Florida eligible to administer a WQS program in 1994.<sup>97</sup> Because of the differences among the Tribe's reservations in terms of topography, and in terms of urban and business impacts on land use, the Tribe rejected a once-size-fits-all approach to establishing WQS and decided to develop WQS for individual reservations, in accordance with tribal water protection priorities. The EPA signed off on the Tribe's first WQS, for the Big Cypress Reservation, in 1997, and on the WQS for the Brighton Reservation in 1998.<sup>98</sup>

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<sup>95</sup> See 33 U.S.C. § 1377(e) (2000) (defining "Indian tribe" to require federal recognition and stating criteria for treating "an Indian tribe as a State" for the purposes of specified CWA provisions); see also 40 C.F.R. § 131.8 (2010).

<sup>96</sup> See Clean Water Act § 401. Once a tribe is treated as a state for the purpose of establishing WQS, it automatically has TAS status for the certification of federal permits under CWA § 401's discharge certification program. 40 C.F.R. § 131.4(c) (2013). Tribes may review any federal permit or license for pollutant-discharging activities within reservation boundaries to determine if the activities will comply with tribal WQS, and decide to certify that the activities will comply with the WQS, certify with conditions, or refuse certification, accordingly. See Clean Water Act § 401, 33 U.S.C. § 1341(d) (include conditions for certification) & § 1341(a) (deny certification). Tribes with treatment as a state status are also entitled to notice of, and the opportunity to object to the issuance of, federal licenses or permits outside tribal jurisdiction that may affect tribal waters' quality. See Clean Water Act § 401, 33 U.S.C. § 1341(a)(2) (2006).

<sup>97</sup> EPA, Indian Tribal Approvals for the Water Quality Standards Program (stating that the Tribe was found eligible on June 1, 1994), available at <http://water.epa.gov/scitech/swguidance/standards/wqslibrary/approvable.cfm>. The Tribe was the fifth tribe to be approved to administer a WQS program; the sixth was another Florida tribe, the Miccosukee Tribe, which was approved in December 1994. *Id.*

<sup>98</sup> *Case Study: The Seminole Tribe of Florida Uses Water Quality Standards to Solve a Nutrient Problem*, U.S. EPA (2003), available at [http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/2003\\_04\\_15\\_tribes\\_seminole.pdf](http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/2003_04_15_tribes_seminole.pdf) [hereinafter *Seminole WQS Case Study*]. The WQS for the remaining reservations are under

The Environmental Resource Management Department (“ERMD”) and the Seminole Water Commission (the “Water Commission”) are the key players in the Tribe’s efforts to protect reservation waters. The mission of the ERMD “is to protect and evaluate the Tribe’s land and water resources and to facilitate the wise use and conservation of these resources by other departments.”<sup>99</sup> The Tribal Council created the Water Commission in 1989 to oversee the ERMD and also empowered it to administer and enforce the Tribal Water Code.<sup>100</sup>

The Tribe’s WQS play an important role in the protection of reservation waters and of tribal members’ health and welfare.<sup>101</sup> The Tribe has adopted a narrative water quality criterion to address increased nutrients in water bodies. The Tribe was particularly concerned about an alarming increase in phosphorus on the Big Cypress Reservation, stemming largely from upstream large-scale agricultural activities around Lake Okeechobee and the Everglades, which was disrupting natural plant and animal communities. Under the terms of the Tribe’s Water Rights Compact with the State and the SFWMD, the Tribe can request conditions on state-issued water protection permits that directly affect activities upstream of the Big Cypress Reservation. The Tribe’s WQS provide a basis for permit conditions. Five years after the Tribe started its WQS program for that reservation, nutrient levels in the waters were measured and had decreased.<sup>102</sup> By partnering with federal, state, and regional agencies working on water resource planning and permitting, the Tribe has been able to play an important role in protecting water quality.

The water quality provisions in the rules adopted by the Water Commission (the “SWC Rules”) to carry out the Tribal Water Code set out water policy goals for the Big Cypress and Brighton Reservations (termed the “Reservations”), including protecting surface and groundwater quality to support economic development (which, the SWC Rules recognize, cannot be pursued in isolation from environmental protection) and ensuring that wetlands’ functions and values are protected.<sup>103</sup> The water quality

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development. *Id.*

<sup>99</sup> *Environmental Resource Management*, SEMINOLE TRIBE FLA., <http://www.semtribe.com/Services/WaterResource.aspx> (last visited Apr. 10, 2014) [hereinafter *Environmental Resource Management*]. The Tribal Council created the ERMD in 1987. *Id.*

<sup>100</sup> *Id.*; Tribal Water Code of the Seminole Tribe of Florida §§ 2.4, 12.1, available at <http://www.semtribe.com/Services/WaterResource.aspx>. The Commission is comprised of two representatives each from the Hollywood, Big Cypress, and the Brighton reservations, and one from the Immokalee reservation. *Environmental Resource Management*, *supra* note 99.

<sup>101</sup> *Seminole WQS Case Study*, *supra* note 98.

<sup>102</sup> *Id.*

<sup>103</sup> See Rules to Carry out the Tribal Water Code, Chapter B, Water Quality § 11.4(b), available at <http://www.semtribe.com/Services/WaterResource.aspx> [hereinafter STOF Water Rules].

standards established by the Water Commission divide all Reservation surface waters into three categories of designated uses: potable water supply (Class 1); fish and wildlife protection and water-related recreation (Class 2); and agricultural purposes (Class 3).<sup>104</sup> Class 2 waters are further divided into three sub-classes,<sup>105</sup> with the default classification set as Class 2-B, referred to as “General Purpose Class 2,” for which the designated uses are protection, propagation and harvesting, and maintenance of a well-balanced population of fish and wildlife, along with “recreation in and on the water.”<sup>106</sup> The establishment of water resource protection, for the support of fish and wildlife as the default use, reflects the nature of the Reservations and the values and priorities of the Tribe.

The SWC Rules’ narrative standards require that all Reservation surface waters be free from all pollutant sources that would have specified adverse impacts, such as forming objectionable deposits or floating matter, or causing adverse impacts on humans, wildlife, plants, or aquatic life.<sup>107</sup> The Water Commission determined that, as a general matter, tribal interests would be adequately served by adopting numeric criteria for Reservation surface waters for each designated class that are based primarily on the EPA-approved criteria adopted by the State.<sup>108</sup>

Mentioned specifically in the SWC Rules, in addition to the general goals of the Tribe’s water policies, is the goal of maintaining water quality for cultural reasons:

For the conservation of the habitat of culturally important fish and wildlife and for the conservation of culturally important plant life, in order to protect the right of each member of the Tribe to carry on hunting, fishing and other traditional Seminole cultural practices.<sup>109</sup>

Protecting tribal members’ rights to carry on traditional cultural activities is also identified as a purpose of the SWC Rules, along with the related goal of protecting “the wild plants and wildlife and other aspects of the natural environment that are important for carrying on traditional

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<sup>104</sup> *Id.* at § 12.2(a)(1).

<sup>105</sup> *Id.* at § 12.2(a)(2).

<sup>106</sup> *Id.* at §§ 12.2(b) (providing that all Reservation waters are designated as Class 2-B, except as otherwise provided), 12.2(a)(2) (defining Sub-Class 2-B, “General Purpose Class 2”). The waters assigned to use classes other than Class 2-B included some waters designated as Class 2-C (covering “Artificial Conveyances; Water Resource Areas, Irrigation Cells and Pasture Runoff Collection and Transportation Systems”) and some designated as Class 3 (“Agricultural purposes”). *Id.* §§ 12.2(a), 12.2(b).

<sup>107</sup> *Id.* at § 12.3(a).

<sup>108</sup> *Id.* at § 12.3(c). The numeric criteria were set out in Table 12 and were approved by the Commission “as applicable to Reservation surface waters for the corresponding classes of designated uses.” *Id.*

<sup>109</sup> *Id.* at § 11.4(b)(2).

cultural activities.”<sup>110</sup> Among the Class 2 waters sub-classes is Sub-Class 2-A, encompassing “waterbodies that are important for ceremonial and religious uses.”<sup>111</sup> The SWC Rules define “ceremonial and religious use” as “a particular use of a water body by members of the Seminole Tribe that because of its unique diverse plant and wildlife has a historic, cultural or religious significance.”<sup>112</sup> In addition to meeting the Reservation water standards narrative criteria and Class 2-B numeric criteria, Class 2-A waters are to be free from activities and substances attributable to pollutant sources that “disturb, injure or in any way jeopardize the continued existence of the unique diverse plant and wildlife used in the religious ceremonies and customs of the Tribe.”<sup>113</sup> The 1998 WQS thus created room for designating specific culturally and religiously significant waters as Class 2-A waters, if existing standards prove inadequate for their protection.<sup>114</sup>

Other tribes administering CWA programs have also focused on the cultural and religious significance of waterbodies on their reservations as a basis for mandating increased protection. The Lac du Flambeau Band of Lake Superior Chippewa Indians, for example, received EPA approval of its application to administer the CWA Section 303 WQS program on its reservation in Wisconsin in 2008.<sup>115</sup> A key concern underlying the Tribe’s decision to seek to administer the WQS program was the need to protect spiritual and cultural uses of reservation water, including subsistence hunting, fishing, and wild rice harvesting, rights to which were guaranteed to the Tribe by an 1837 treaty.<sup>116</sup> These uses necessitate stricter water quality regulation than the State deemed sufficient for water that it regulates.<sup>117</sup> The Lac du Flambeau Band’s WQS,<sup>118</sup> like those of the

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<sup>110</sup> *Id.* at § 11.4(c). Other purposes include protecting the health and welfare of tribal members (and of others who reside or conduct business on the Tribe’s Big Cypress and Brighton Reservations) and protecting aquatic life and wildlife on these reservations. *Id.*

<sup>111</sup> *Id.* at § 12.2(a).

<sup>112</sup> *Id.* at § 11.5.

<sup>113</sup> *Id.* at § 12.3(b). Also prohibited for Class 2-A waters are activities and substances that “impair the biological community as it naturally occurs in the designated area due to physical, chemical or hydrologic changes.” *Id.*

<sup>114</sup> *Id.* at § 12.2(b)(1); see also STRATEGY AND BIENNIAL REPORT, *supra* note 1 (noting that the “Seminole Tribe is working to develop numeric nutrient criteria by 2015, making Public Notice in 2016 and submitting to USEPA for approval in 2017”).

<sup>115</sup> EPA, *Decision Document: Approval of the Lac du Flambeau Band of Lake Superior Chippewa’s Application for Treatment in the Same Manner as a State for Sections 303(c) and 401 of the Clean Water Act*, Apr. 8, 2008, available at [http://www.epa.gov/region5/water/wqs5/pdf/ldf\\_app/approval\\_docs/LDFDD.pdf](http://www.epa.gov/region5/water/wqs5/pdf/ldf_app/approval_docs/LDFDD.pdf).

<sup>116</sup> Treaty with the Chippewas art. 5, July 29, 1837, 7 Stat. 537, available at <http://digital.library.okstate.edu/Kappler/Vol2/treaties/chi0491.htm>.

<sup>117</sup> Lac du Flambeau Band of Lake Superior Chippewa Indians Clean Water Act Section 303 and 401 Eligibility Application “Treatment as a State,” at 1, Oct. 12, 2005, available at [http://www.epa.gov/r5water/wqs5/pdfs/ldf\\_app/ldf\\_tas\\_app.pdf](http://www.epa.gov/r5water/wqs5/pdfs/ldf_app/ldf_tas_app.pdf) [hereinafter Lac du Flambeau

Seminole Tribe, provide a mechanism for establishing stricter requirements for particular waters with cultural and religious significance. Use categories for reservation waters include “water contact,” which can include contact with water in connection with ceremonies and cultural activities.<sup>119</sup> For the purposes of the anti-degradation policy in the WQS, water bodies are divided into tiers, with a high level of water quality protection established for each water body designated as an “Exceptional Tribal Resource Water,” meaning a water body that “has a high level of cultural, recreational or ecological significance.” The highest level of protection is to be given to each water body designated as an “Outstanding Tribal Resource Water,” a designation that indicates that a water body “has the highest level of cultural, recreational or ecological significance.”<sup>120</sup>

In addition to its role in administering the Tribe’s CWA programs, the ERMD assists other tribal departments with their work, such as the development and management of tribal natural resources. It also investigates, assesses, and coordinates the remediation of hazardous and non-hazardous materials on tribal lands, to protect surface and ground water from potential contamination caused by industrial and agricultural land uses. The ERMD’s work entails testing, monitoring, and removing contaminated water and soil, as well as work aimed at preventing such pollution.<sup>121</sup> The ERMD’s activities also extend to working with the Big Cypress National Preserve and the SFWMD on monitoring the quality and quantity of water entering and leaving the reservations, and at the common borders; and in general acting as the Tribe’s liaison with federal and state agencies managing water resources.<sup>122</sup> Other cooperative activities involving the ERMD, and other tribal departments, and state and federal agencies are explored below.

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Application]. For an analysis of the Lac du Flambeau Band’s (and other tribes’) use of a CWA water quality standards program to protect reservation waters for cultural and religious purposes, see Allison M. Dussias, *Spirit Food and Sovereignty: Pathways for Protecting Indigenous Peoples’ Subsistence Rights*, 58 CLEV. ST. L. REV. 273, 313-32 (2010).

<sup>118</sup> *Lac du Flambeau Water Quality Standards*, EPA (July 2010), [http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/ldf\\_wqs\\_0001\\_070110.pdf](http://water.epa.gov/scitech/swguidance/standards/wqslibrary/upload/ldf_wqs_0001_070110.pdf).

<sup>119</sup> *Id.* at § 104(A)(2). Water contact-designated waters also include waters used for the purpose of recreational activities that include water contact. *Id.* Supporting the habitat of culturally significant wild rice is another use category. *Id.* at § 104(A)(4). Similar designated uses were created for wetlands. *Id.* at § 104(B)(2) & (4).

<sup>120</sup> *Id.* at §§ 103(V), (GG). Generally, the water quality of a water body classified as an Outstanding Tribal Resource Water “has not been significantly modified by human activities.” *Id.* at § 103(GG); see also *id.* at §§ 106(B)(3)-(4) (setting requirement for issuance of discharge permits for Exceptional and Outstanding Tribal Resource Waters).

<sup>121</sup> *Environmental Resource Management*, *supra* note 99.

<sup>122</sup> *Id.*

## B. The Seminole Big Cypress Water Conservation Plan

In addition to setting tribal WQS, since 1999 the Tribe's ERMD has also taken the lead in developing and implementing a water conservation plan ("Plan") for the Big Cypress Reservation,<sup>123</sup> which was designed to "provide a comprehensive, fully integrated water management system' that could 'support sustainable agriculture while contributing to the restoration of significant portions of the Everglades ecosystem.'"<sup>124</sup> More specifically, the Plan's purposes include improving water quality, increasing water storage capacity, and supporting habitat diversity by restoring a more natural hydroperiod (the period of time during which a wetland is covered by water).<sup>125</sup> The project to implement the Plan was authorized by the 1996 Water Resources Development Act and deemed a "Critical Project."<sup>126</sup>

Historically, surface water on most of the Big Cypress Reservation (located north of Big Cypress National Preserve ("BCNP") in the western part of the Everglades ecosystem) flowed toward the area now designated as the BCNP, but the natural hydrology was disrupted by canals and levees (constructed as part of the C&SF Project) that cut off water flow to most of the Reservation. Hydrology plays a crucial role in determining which animal and plants species can thrive; changes in hydrology can provide opportunities for non-native species to come to dominate areas where native species once flourished. Restoring natural hydrology can help to reverse these changes.<sup>127</sup>

The Tribe has committed substantial resources to the project to implement the Plan, under a 50-50 cost share partnership with the USACE.<sup>128</sup> The project is the largest partnership project between a tribe

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<sup>123</sup> *See id.*

<sup>124</sup> GODFREY & CATTON, *supra* note 78, at 232 (quoting Letter from Seminole Tribe of Florida to Subcommittee on the Interior, House Committee on Appropriations (June 1, 1995)) (internal quotations omitted).

<sup>125</sup> Graham & Hill-Gabriel, *supra* note 82, at 7; *see also Seminole Big Cypress Reservation: Water Conservation Plan*, EVERGLADES PLAN (Aug. 2013), [http://www.evergladesplan.org/docs/fs\\_seminole\\_big\\_cypress\\_aug\\_2013\\_508.pdf](http://www.evergladesplan.org/docs/fs_seminole_big_cypress_aug_2013_508.pdf) [hereinafter *Big Cypress Plan*] (stating that the Plan "consists of constructing water control and treatment facilities in the western portion of the Big Cypress Reservation that will improve the water quality of agricultural water run-off within the reservation and restore water storage capacity and native vegetation").

<sup>126</sup> Graham & Hill-Gabriel, *supra* note 82, at 8.

<sup>127</sup> *See generally Ecological Impacts of Changes in Hydrology on the Big Cypress Seminole Indian Reservation*, FLA. ATLANTIC UNIV. (July 11, 2001), [http://water.epa.gov/type/wetlands/assessment/upload/2001\\_07\\_11\\_wetlands\\_bawwg\\_natmtg2001\\_duns\\_on\\_dunson.pdf](http://water.epa.gov/type/wetlands/assessment/upload/2001_07_11_wetlands_bawwg_natmtg2001_duns_on_dunson.pdf) (highlighting biological responses to hydrology changes); *2009 Everglades Invasive Species Summit*, EVERGLADES COOPERATIVE INVASIVE SPECIES MANAGEMENT AREA (2009), <http://www.evergladescisma.org/summit09/seminole.pdf> (highlighting invasive species management programs and the impact of such programs and of the Big Cypress Water Conservation Plan on invasive species).

<sup>128</sup> Graham & Hill-Gabriel, *supra* note 82, at 8; *see also Big Cypress Plan*, *supra* note 125

and the USACE.<sup>129</sup> The irony of a partnership between the Tribe and the Army to help protect the Everglades ecosystem was noted by Seminole Tribe Councilman Max Osceola, Jr. at a 2002 groundbreaking ceremony for the project: “[i]t’s ironic that the military forced us here and pushed us here [to South Florida], and now the military is working hand in hand with us.”<sup>130</sup>

The project includes features designed to revive the historic patchwork of wetlands, hardwood hammocks, cypress sloughs, prairies, and pine flatwoods in the western part of the Reservation.<sup>131</sup> Project components include a network of conveyance and storage systems (including a canal to receive and convey the Tribe’s water entitlement); rehydrated historic wetlands; structures to move water across C&SF Project canals; and water quality treatment of agricultural water runoff, by naturally removing pollutants that otherwise would be discharged to the BCNP and other areas within the Everglades.<sup>132</sup> The project, to which the Tribe has dedicated about 4,145 acres on the Big Cypress Reservation, is now about two-thirds complete.<sup>133</sup>

### C. The Everglades Restoration Initiative

The project to implement the Big Cypress Reservation Water Conservation Plan is part of the Tribe’s broader Everglades Restoration Initiative. Recognizing the connection between the water resources of the Big Cypress Reservation, and those of the Everglades and the broader Everglades ecosystem, the Tribe has taken action to foster the restoration and protection of the ecosystem.

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(noting that there is a \$60 million authorized cap for the project). Under the terms of the Plan, the Tribe is to expand conveyance canals in the Reservation’s eastern basin, to carry water (delivered through a new SFWMD pump station for delivery of the Tribe’s water entitlement) to water storage cells and water resource areas constructed by the USACE in the west basin.

<sup>129</sup> U.S. Army Corps of Engineers, *Big Cypress Reservation Project Will Enrich Tribal Lands and Culture*, EVERGLADES REPORT 1, 2 (Sept./Oct. 2008), [http://www.evergladesplan.org/docs/eg\\_report\\_sep\\_oct\\_2008.pdf](http://www.evergladesplan.org/docs/eg_report_sep_oct_2008.pdf).

<sup>130</sup> Cattelino, *supra* note 45, at 15.

<sup>131</sup> Graham & Hill-Gabriel, *supra* note 82, at 8; Big Cypress Plan, *supra* note 125 (stating that the project will “improve 14,000 acres of swamp, hardwood hammocks, cypress sloughs, prairies and pine flatwoods”).

<sup>132</sup> Graham & Hill-Gabriel, *supra* note 82, at 8; Big Cypress Plan, *supra* note 125; *Non-CERP South Florida Ecosystem Restoration Projects: Seminole Big Cypress Reservation Water Conservation Plan*, JOURNEY TO RESTORE AMERICA’S EVERGLADES, [http://www.evergladesplan.org/pm/projects/non\\_cerp\\_sf\\_projects.aspx](http://www.evergladesplan.org/pm/projects/non_cerp_sf_projects.aspx) (last visited Apr. 17, 2014) (stating that the “Tribe will construct an expansion of conveyance canals in the eastern basin of the Big Cypress Reservation to transport water from Confusion Corner, where the SFWMD will deliver the Tribe’s water entitlement through a new SFWMD pump station”).

<sup>133</sup> Graham & Hill-Gabriel, *supra* note 82, at 8; *see also* Big Cypress Plan, *supra* note 125 (outlining the completion schedule for plan components).

The Everglades, recognized as a unique natural treasure, historically consisted of 2.9 million acres of wetlands, sawgrass plains, tree islands (hammocks), cypress and mangrove swamp areas, and sloughs supporting “an incredible diversity of life.”<sup>134</sup> When the Everglades’ natural conditions prevailed, slow moving freshwater flowed through the system from north to south, prompting early Everglades protection proponent Marjorie Stoneman Douglas to refer to the Everglades as a “River of Grass”<sup>135</sup>—a possible reference to the Seminole word *pahay-okee* (“grassy water”).<sup>136</sup> Appreciation of the abundance of life supported by the Everglades led to the establishment in 1947 of Everglades National Park as the first National Park System unit created solely because of its biological diversity.<sup>137</sup> Everglades National Park is only a small part of the 18,000 square-mile Everglades ecosystem, which begins with the Kissimmee Chain of Lakes near Orlando, then flows through Lake Okeechobee (the second largest freshwater lake in the continental United States), the Caloosahatchee and St. Lucie estuaries, and south to Florida Bay.<sup>138</sup> As discussed above, the natural flow of water in the Everglades has been substantially altered, with deleterious consequences for the Everglades ecosystem.<sup>139</sup> According to one analysis, half of the Everglades ecosystem has been destroyed since 1900.<sup>140</sup>

The multi-year Seminole Everglades Restoration Initiative has been designed to “have a significant impact on the quality and quantity of water flowing off of the Big Cypress Reservation and into the Florida Everglades,” by mitigating the environmental impacts of development.<sup>141</sup> More specifically, the initiative aims at improving the water quality in the Everglades Protection Area by removing phosphorus and other pollutants from water leaving Big Cypress Reservation lands and flowing into the BCNP, and ultimately into the Everglades Protection Area.<sup>142</sup> The sixty-five million dollar program will also increase water storage capacity, enhance hydroperiods, and help rewater the BCNP. Supported by both state and federal task forces focused on the improvement of the South Florida environment, the program was identified in a report of the Governor’s Commission for a Sustainable South Florida as one of the projects that is

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<sup>134</sup> GODFREY & CATTON, *supra* note 78, at xii.

<sup>135</sup> Graham & Hill-Gabriel, *supra* note 82, at 7.

<sup>136</sup> Ansson, *supra* note 47, at 102.

<sup>137</sup> See Graham & Hill-Gabriel, *supra* note 82, at 7.

<sup>138</sup> *Id.*; see also GODFREY & CATTON, *supra* note 78, at xi (discussing the natural flow of water in the ecosystem).

<sup>139</sup> See *supra* notes 50, 127 and accompanying text.

<sup>140</sup> Ansson, *supra* note 47, at 88 n.15.

<sup>141</sup> See *Seminoles and the Land*, *supra* note 91.

<sup>142</sup> *Id.*

needed for Everglades restoration.<sup>143</sup>

The Tribe's efforts with regard to this initiative, as well as the Big Cypress Reservation Water Conservation Plan, are particularly noteworthy in view of the slow pace with which federal efforts to implement Everglades restoration projects are moving forward. In 2000, Congress authorized the Comprehensive Everglades Restoration Plan ("CERP") in the Water Resources Development Act ("WRDA") of 2000.<sup>144</sup> This complicated multi-component project, with an estimated total cost of tens of billions of dollars if fully implemented, has been described as the world's largest ecological restoration project.<sup>145</sup> CERP was set up as a partnership between the USACE and the SFWMD, with the state generally being responsible for costs of necessary land acquisitions and the USACE responsible for construction costs.<sup>146</sup> The WRDA provides that, with the exception of specifically listed pilot or initial projects, "any project included in the Plan shall require a specific authorization by Congress," without which federal funding cannot be considered.<sup>147</sup> Twelve years after CERP's authorization, only four projects out of more than sixty had been authorized and were under construction.<sup>148</sup>

CERP contemplates tribal involvement in efforts to implement CERP, identifying "tribal partners," along with federal and regional agencies and other governments, as participants. As one commentator has observed about the tribal role in CERP, "Seminoles are at the table again, staking a claim to this massive ecological, social, and political experiment."<sup>149</sup> The CERP website highlights the Tribe's Big Cypress Reservation Water Conservation Plan as a non-CERP project that is moving ahead.<sup>150</sup> The Tribe's moving ahead with such projects while CERP is being fleshed out is

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<sup>143</sup> *Id.*

<sup>144</sup> Water Resources Development Act of 2000, Pub. L. No. 106-541, § 601, 114 Stat. 2572 (2000).

<sup>145</sup> Cattelino, *supra* note 45, at 15.

<sup>146</sup> Graham & Hill-Gabriel, *supra* note 82, at 7-8 (discussing CERP).

<sup>147</sup> Pub. L. No. 106-541, § 601 (d)(1), 114 Stat. 2684 (2000); Graham & Hill-Gabriel, *supra* note 82, at 7.

<sup>148</sup> Graham & Hill-Gabriel, *supra* note 82, at 8. Even CERP projects that seemed ready to move forward have been slowed down:

While there is a list of eleven projects that were initially authorized in CERP, the application of a cost cap found in WRDA 1986, 33 U.S.C. 2280, has effectively prevented all initially authorized projects from moving forward under this authority. This cap limits the increase in project expenditures to not more than 20 percent of the entire authorized project cost. The dramatic increase in land costs, construction materials, and changes in the scope of project planning (especially between 2000 and 2005) increased the cost of all these initially authorized projects beyond the 20 percent threshold. *Id.*

<sup>149</sup> Cattelino, *supra* note 45, at 15.

<sup>150</sup> *See supra* note 132 and accompanying text.

important because “while advocates and government officials await implementation of these large-scale, long-term projects, protective measures must be put in place in the interim.”<sup>151</sup> Moreover, as the National Research Council of the National Academy of Sciences has noted, when it comes to Everglades restoration, “to do nothing is in fact, to do harm.”<sup>152</sup> Recognizing the Tribe’s leadership and accomplishments, its old foe, the SFWMD, issued a proclamation in 2012 to express appreciation for the Tribe’s “continual efforts to advance resource protection and restoration of the Everglades ecosystem” and its demonstration of “shared values in the management and protection of natural resources while maintaining sovereignty and Tribal right of self-determination.”<sup>153</sup>

The Tribe is also partnered with state, federal, and other tribal agencies in a number of other initiatives and intergovernmental task forces, such as the South Florida Ecosystem Restoration Task Force. Authorized by Congress in 1996, the Task Force “brings together the federal, state, tribal, and local agencies involved in restoring and protecting the Everglades” in order to “facilitate the coordination of the myriad conservation and restoration efforts being planned and implemented.”<sup>154</sup> It acts as a forum in which participating agencies can “share information about their restoration efforts, resolve conflicts, and report on progress.”<sup>155</sup>

It is important to recognize, however, that having a seat at the table to advocate for particular protective measures for water resources does not guarantee results. This has been a sobering aspect of the Seminole Tribe’s participation in intergovernmental endeavors like the Task Force. The most recent biennial report of the Task Force, covering the period July 2010-June 2012, included a statement of the minority view of the Tribe, expressing its concerns about limitations imposed by the USACE on the scope of a key CERP project, the Central Everglades Planning Project (“CEPP”).<sup>156</sup> CEPP’s goal is to complete, within two years, a finalized plan, called a Project Implementation Report, for a group of central Everglades restoration projects to prepare for congressional authorization, as part of

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<sup>151</sup> Graham & Hill-Gabriel, *supra* note 82, at 9.

<sup>152</sup> *Id.* at 9 (quoting *Progress Toward Restoring the Everglades: The Second Biennial Review* (2008)). Delay in building restoration projects has “not only postponed improvements—it has allowed further ecological decline to continue.” *Id.*

<sup>153</sup> *Proclamation*, S. FLA. WATER MGMT. DIST. (Feb. 9, 2012), [http://www.sfwmd.gov/portal/page/portal/xrepository/sfwmd\\_repository\\_pdf/proclamation\\_seminole.pdf](http://www.sfwmd.gov/portal/page/portal/xrepository/sfwmd_repository_pdf/proclamation_seminole.pdf).

<sup>154</sup> STRATEGY AND BIENNIAL REPORT, *supra* note 1, at ii.

<sup>155</sup> *Id.* For descriptions of other plans and programs to restore and protect the Everglades, see Ansson, *supra* note 47, at 109-14.

<sup>156</sup> STRATEGY AND BIENNIAL REPORT, *supra* note 1, at 75.

CERP.<sup>157</sup> The Tribe noted that it had been actively engaged in the effort to restore the South Florida ecosystem for nearly twenty years and that it had “supported this effort technically and politically through all of these years.”<sup>158</sup> Among these supportive efforts is the Tribe’s construction, in partnership with the USACE, of the extensive water control system on the Big Cypress Reservation. The Tribe asserted (as it had repeatedly done before) its view that “focusing solely on the land and water within our Reservation’s legal boundaries is short-sighted” and that, similarly, the scope of CEPP should be not be unduly narrow.<sup>159</sup> Specifically, the Tribe expressed its disagreement with the decision to exclude waters in the western basins of the Central Everglades system from “monitoring, modeling, data gathering, design, planning, and project implementation.” While “applaud[ing] the Corps’ drive to complete the CEPP planning process in 18 months,” the Tribe remained concerned about the lack of attention to the western basin.<sup>160</sup> The decision to exclude the western basin waters from CEPP’s coverage meant that CEPP projects would not be available to help resolve continuing hydrology problems on the Big Cypress Reservation.<sup>161</sup> The Tribe observed further that, at a minimum, the federal government has an obligation, under its trust responsibilities, to restore a specific area (the northwest corner of Water Conservation Area 3A) in which the Tribe has hunting and fishing rights.<sup>162</sup> The Tribe’s views were acknowledged in the Draft Integrated Project Implementation Report and Environmental Impact Statement for CEPP that the USACE released in August 2013, which noted that the Tribe had expressed the importance of its concerns about the natural systems of the western basins “as factors affecting the traditional Seminole cultural, and recreational, activities, as well as commercial endeavors, which are dependent on a healthy Everglades ecosystem.”<sup>163</sup> The Tribe’s frustration with the USACE’s stunted view of the scope of CEPP, despite the Tribe’s role as “a valued partner in Everglades Restoration by all accounts,”<sup>164</sup> is palpable in the

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<sup>157</sup> U.S. Army Corps of Engineers, *Facts & Information: Getting to the Heart of CERP, CENTRAL EVERGLADES PLANNING PROJECT* (Jan. 2013), [http://www.evergladesplan.org/docs/fs\\_cepp\\_jan\\_2013.pdf](http://www.evergladesplan.org/docs/fs_cepp_jan_2013.pdf).

<sup>158</sup> STRATEGY AND BIENNIAL REPORT, *supra* note 1, at 75.

<sup>159</sup> *Id.* at 75-76.

<sup>160</sup> *Id.* at 76.

<sup>161</sup> *See id.* at 75.

<sup>162</sup> *Id.* at 76.

<sup>163</sup> U.S. ARMY CORPS OF ENGINEERS, DRAFT INTEGRATED PROJECT IMPLEMENTATION REPORT AND ENVIRONMENTAL IMPACT STATEMENT 5-57 (Aug. 2013), *available at* [http://www.evergladesplan.org/pm/projects/project\\_docs/pdp\\_51\\_cepp/dpir/082813\\_cepp\\_dpir\\_main\\_report.pdf](http://www.evergladesplan.org/pm/projects/project_docs/pdp_51_cepp/dpir/082813_cepp_dpir_main_report.pdf).

<sup>164</sup> STRATEGY AND BIENNIAL REPORT, *supra* note 1, at 76.

minority statement. Clearly, from the Tribe's perspective, shaped by almost two hundred years of intimate knowledge of the Everglades ecosystem, much work remains to be done to get restoration efforts fully on the right track.

#### IV. CONCLUSION

*Here are no lofty peaks seeking the sky, no mighty glaciers or rushing streams wearing away the uplifted land. Here is a land tranquil in its quiet beauty, serving not as the source of water, but as the last receiver of it. To its natural abundance we owe the spectacular plant and animal life that distinguishes this place from all others in our country.*<sup>165</sup>

The Tribe's efforts to protect and restore the Everglades ecosystem mark a new chapter in the story of the Tribe's relationship with the water resources of this unique area. In the nineteenth century, the Tribe's ancestors relied on the watery remoteness of the swamps and hammocks of the ecosystem to protect them from military campaigns to remove them from the land, whether by relocation or death. Tribal settlements and supplies were destroyed whenever they could be found. In the modern day, the Tribe has once again faced challenges to its survival in the Everglades ecosystem—challenges for which the U.S. Army (in the form of the Army Corps of Engineers) is largely responsible. Projects carried out by the USACE and its state partner, the South Florida Water Management District, altered water flow and destroyed so much of the ecosystem.

The Tribe has come far from the days when the USACE and the SFWMD alone determined the fate of the water resources of the Everglades ecosystem, and consequently the fate of its reservations' water resources. The Tribe has successfully litigated water rights claims, taken the lead in regulating reservation water quality, and launched programs to conserve reservation water in ways that benefit the rest of the ecosystem. As anthropologist Jessica Cattelino has asserted, the Tribe's "dedication to controlling their environment is, at least in part, a process of *reterritorialization* whereby they assert their sovereignty and indigeneity against a history of dispossession."<sup>166</sup> The Tribe's recent experiences as a member of the South Florida Ecosystem Restoration Task Force serve as a reminder that challenges remain. In short, what might be termed the Fourth

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<sup>165</sup> Ansson, *supra* note 47, at 104 (remarks by President Harry Truman at the dedication of Everglades National Park).

<sup>166</sup> Cattelino, *supra* note 45, at 17. "Reterritorialization" refers to indigenous nations "grounding themselves in the land"—land from which the dominant society has tried to erase them. *Id.*; *see also id.* at 5-8 (discussing the concept of "erasure" as to indigenous peoples in general and as to the Florida Seminoles).

Seminole War—the fight to protect and restore the Everglades in the face of the refusal of federal and state authorities to share the Tribe’s vision of what needs to be done for the ecosystem that has supported the Tribe for many generations—is still being fought.