IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 10-14271-E

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MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA; U.S. ARMY CORPS OF ENGINEERS; JOHN McHUGH, Secretary of the Army; LT. GEN. ROBERT VAN ANTWERP, Chief Engineer; MAJ. GEN. TODD T. SEMONITE, Division Engineer; and COL. ALFRED A. PANTANO, Jr., District Engineer, in their official capacities.

Defendant-Appellees.

Appeal from the United States District court for the Southern District of Florida
Case No. 08-cv-23001(Honorable K. Michael Moore)

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BRIEF FOR APPELLEES

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Miccosukee Tribe of Indians of Florida v. United States
Case No. 10-14271

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for the United States hereby certifies that, in addition to the persons listed in the Certificate of Interested Persons in the Brief of the Miccosukee Tribe, the following persons have (or may have) an interest in the outcome of this appeal:

Durkee, Ellen

Grosko, Brett

Gross, Mark

Kilbourne, James

Mergen, Andrew

Moreno, Ignacia S.

Saxe, Keith

Shenkman, Ethan

Thome, Linda

Mark R. Haag

STATEMENT REGARDING ORAL ARGUMENT

Defendants-appellees submit that oral argument may assist the Court in understanding the facts and issues of the case.

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GLOSSARY

BiOp	biological opinion
C&SF Project	Central and Southern Florida Project for Flood Control and Other Purposes
ESA	Endangered Species Act
FILCSA	Florida Indian Land Claims Settlement Act
FWS	U.S. Fish and Wildlife Service
IOP	Interim Operational Plan for Protection of the Cape Sable Seaside Sparrow
ISOP	Interim Structural and Operational Plan
MRA	Miccosukee Reserved Area
Park	Everglades National Park
Project	Central and Southern Florida Project for Flood Control and Other Purposes
SFWMD	South Florida Water Management District
WCA	Water Conservation Area

STATEMENT OF JURISDICTION

Appellees United States of America *et al.* (the "United States") agree with the Statement of Jurisdiction set out in the brief of Appellant Miccosukee Tribe of Indians of Florida (the "Tribe").

STATEMENT OF THE ISSUES

The Tribe alleged that certain water management actions of the United States Army Corps of Engineers (the "Corps") violated the Tribe's rights under the Constitution and the Florida Indian Land Claims Settlement Act. The district court ruled in favor of the United States on all claims. The issues on appeal are:

I. Whether the district court correctly granted summary judgment against the Tribe on its equal protection claim.

II. Whether the district court correctly dismissed the Tribe's claim under the Florida Indian Land Claims Settlement Act for failure to state a claim.

III. Whether the district court correctly dismissed the Tribe's due process claim for failure to state a claim.

IV. Whether the district court correctly dismissed the Tribe's claim for mandamus relief.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This case is one in a long series of challenges by the Tribe involving the ongoing operation of the Central and Southern Florida Project for Flood Control

and Other Purposes (the "C&SF Project" or "Project"). The Project was first authorized by Congress in 1948, and is operated by the Corps and the local sponsor, the South Florida Water Management District ("SFWMD"). It is designed to provide water supply, flood protection, and benefits to fish and wildlife, and consists of thousands of miles of levees, canals, and water control structures located across the southern portion of the Florida peninsula. Act of June 30, 1948, ch. 771, 62 Stat. 1171, 1175-1176 (codified at 33 U.S.C. § 701-709b).

Since 2002, the Corps has operated the Project under the *Interim Operational Plan for Protection of the Cape Sable Seaside Sparrow* ("IOP"). As its name suggests, the IOP is an interim measure designed to protect the Cape Sable seaside sparrow from extinction – while also protecting other species, providing flood protection for developed lands, and satisfying other Project purposes – pending completion of congressionally-authorized operational and structural modifications to the Project that are intended to protect and restore the Everglades ecosystem. *See Miccosukee Tribe of Indians of Florida v. United States*, 566 F.3d 1257, 1262-64 (11th Cir. 2009) (discussing history of the Project and the IOP). As described below (pp. 25-27), the Tribe has brought numerous lawsuits challenging the adopting and implementation of the IOP on multiple grounds. Most of those challenges have been unsuccessful, and this Court and the district courts have substantially upheld the IOP.

The Tribe's claims in this case involve the Corps' operation of the S-12A structure under the IOP. S-12A is one of the water gates that regulates the flow of water into Everglades National Park from Water Conservation Area 3A ("WCA 3A"), an area immediately north of the Park. The Tribe holds a perpetual lease on a portion of WCA 3A. The Tribe contends that it was harmed by high water levels in WCA 3A as a result of (1) the Corps' July, 2008, decision to delay the seasonal opening of S-12A by nine days to protect nesting sparrows and recently-burned sparrow habitat; and (2) the Corps' denial of the Tribe's request to delay the seasonal closing of S-12A beyond the IOP's scheduled date of November 1, 2008.[1] Count I alleges violation of the Tribe's rights under the Florida Indian Land Claims Settlement Act ("FILCSA"); Count II alleges violation of the Tribe's due process rights; Count III seeks mandamus to require the Corps to reduce water levels in WCA 3A; and Count IV alleges violation of the Tribe's equal protection rights. ER Doc. 1 at 18-24.

In a September 16, 2009 order, the district court granted in part the United States' motion to dismiss. ER Doc. 37 (reported at 656 F. Supp. 2d 1375 (S.D. Fla. 2009)). The court found the Tribe's FILCSA and due process claims (Counts I and

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[1] The Tribe's complaint alleged injury from Corps operations under the IOP and prior operational plans dating back to at least 1999. However, as discussed below, (pp. 44-45), the Tribe subsequently limited its claims to the Corps' actions in 2008.

II) to be frivolous in light of the plain language of FILCSA and prior decisions rejecting the Tribe's previous lawsuits asserting similar claims. ER Doc. 37 at 4-7. The court found that the Tribe had failed to state a claim for mandamus (Count III) because the Corps has discretion to manage water levels in WCA 3A and therefore the court lacks mandamus jurisdiction. *Id.* at 9. The court declined to dismiss the Tribe's equal protection claim (Count IV), however, and allowed the Tribe to conduct extensive discovery on that claim.[2]

After discovery was concluded, the court granted summary judgment for the United States on the equal protection claim. ER Doc. 175 (reported at 722 F. Supp. 2d 1293 (S.D. Fla. 2010)). Reviewing the evidence regarding the basis for the Corps' decision to leave S-12A closed from July 15 to July 24, 2008, the court

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[2] The court subsequently denied the United States' motion for reconsideration. Doc. 85 (reported at 680 F. Supp.2d 1308 (S.D. Fla. 2010)). In doing so, the court rejected the United States' argument that the Tribe's equal protection claim was governed by the Administrative Procedure Act. 680 F. Supp. 2d at 1317, citing *Nat'l Park Conservation Ass'n v. Norton*, 324 F.3d 1229 (11th Cir. 2003) (*"NPCA"*). *NPCA* held that an equal protection claim may be brought directly under the Due Process Clause of the Fifth Amendment, 342 F.3d at 1241, but did not address the line of cases holding that a direct cause of action under the Constitution is precluded where, as here, Congress has provided for judicial review under the APA, 5 U.S.C. § 706(2)(B). *E.g., Carlson v. Green*, 446 U.S. 14, 18-19 (1980); *Miller v. U.S. Dep't of Agric. Farm Servs. Agency*, 143 F.3d 1413, 1416 (11th Cir. 1998). Nor did *NPCA* address the applicable scope of review, which under the APA is generally limited to the administrative record. *Florida Power & Light v. Lorion*, 470 U.S. 729, 743-4 (1985); *see also Miccosukee Tribe*, Case No. 02-22778, 396 F. Supp. 2d 1327, 1330 (S.D. Fla. 2005). Because the Tribe's equal protection claim should have been brought under the APA, the court erred in granting extensive discovery and proceeding with extra-record review.

found that the Corps' explanation that the decision was based on protection of the sparrow "is undisputed by direct evidence," ER Doc. 175 at 12, and that the record "[does] not support the inference that [the Corps] acted with [a] racial object or purpose, or that its decision cannot be supported on grounds other than race." *Id.* at 12, 19. Likewise, the court reviewed the evidence regarding the Corps' decision to close S-12A on November 1, 2008, and concluded that there is no genuine issue of material fact as to whether the decision was racially motivated or unexplainable on grounds other than race. *Id.* at 19-27. Accordingly, the court held that the Corps' actions were subject to rational-basis scrutiny, and that the Corp's actions satisfied that standard because they were rationally related to a legitimate government purpose – protection of the sparrow. *Id.* at 29.

B. Statutory Background

1. The Central & Southern Florida Project

In the historic Everglades, water flowed south in a broad sheet from Lake Okeechobee to Florida Bay. *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 99-100 (2004). In 1948, Congress authorized the Corps to construct the C&SF Project to manage water in South Florida, including the Everglades. As a result of the Project, which encompasses 18,000 square miles from Orlando to Florida Bay, the historic Everglades are now segmented into roughly three parts. Doc. 128-6 at 7-2 to 7-3; Doc. 129-8 at 6. The

southern third of the original Everglades is now within the boundaries of the Everglades National Park ("Park"), managed by the National Park Service. The northern third, near Lake Okeechobee, was drained and is now known as the Everglades Agricultural Area. The area in-between is compartmentalized by levees and canals into three interconnecting reservoirs known as Water Conservation Areas, which total about 1,350 square miles in Miami-Dade, Broward, and Palm Beach counties. *Id.; see also South Florida Water Management Dist.,* 541 U.S. at 100.

> The Water Conservation Areas were created for several reasons, including:
>
> controlling flooding and water flow in Everglades National Park and surrounding areas; irrigating agricultural areas; directing water flow away from the developed, eastern seaboard of South Florida; and enhancing fish, wildlife, and recreation in and around the Park.

Miccosukee Tribe of Indians of Florida v. United States, 980 F. Supp. 448, 454 (S.D. Fla. 1997) (citations omitted), *aff'd,* 163 F.3d 1359 (11th Cir. 1998) (Table).

The 1948 Act authorizing the Project grants the Corps broad discretion in developing water management plans and managing the operations and water levels of the Water Conservation Areas.[3] In the exercise of its discretion, the Corps has

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[3] Recognizing that management of flood control projects requires the balancing of competing interests, Congress declined to waive the government's sovereign immunity from suits to recover damages for injury caused by flood or flood waters. *See* 33 U.S.C. 702c ("No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any

(continued...)

generated water management plans and manuals establishing operating instructions to permit the proper balance of storage water to accumulate during the wet season for use in the dry season. In developing its water management plans, the Corps is subject to the requirements of the ESA and the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*.

2. Everglades National Park Act

The Everglades National Park Act, enacted in 1934, established Everglades National Park and requires that the Park "be permanently reserved as a wilderness, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area." 16 U.S.C. § 410c. The Park is managed by the Department of the Interior, through the National Park Service. *Id.* § 410b. Section 410b specifically reserves certain rights to the Seminole Nation: "nothing in sections 410 to 410c * * * shall be construed to lessen any existing rights of the Seminole Indians *which are not in conflict with the purposes for which the Everglades National Park is created*." 16

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[3](...continued)
place."). Thus, Congress barred all suits, whether for damages or equitable relief, except those seeking limited review under the Administrative Procedure Act. *See United States v. James*, 478 U.S. 597, 604-05 (1986); *Reese v. South Fla. Water Management Dist.*, 59 F.3d 1128, 1130 (11th Cir. 1995).

U.S.C. § 410b (emphasis added).[4] Section 410b further states that the Park Service must manage the Park subject to the provisions of the National Park Service Organic Act, 16 U.S.C. § 1 *et seq.*[5]

3. Florida Indian Land Claims Settlement Act

The Florida Indian Land Claims Settlement Act of 1982 ("FILCSA"), 25 U.S.C. §§ 1741-1749, approves and incorporates by reference a Lease Agreement and a Settlement Agreement between the Tribe and the State of Florida in *Miccosukee Tribe of Indians v. Florida, et al.*, Case No. 79-253-Civ-JWK (S.D. Fla.). 25 U.S.C. § 1744. The Lease Agreement grants the Tribe a perpetual lease on a 189,000-acre tract of state-owned land in WCA 3A ("Leased Area").

The Lease Agreement gives the Tribe the right to farm and reside in the Leased Area and to use it for various religious, cultural and other purposes. The Tribe's rights include the right to hunt, fish, and take frogs; the right to be

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[4] The Miccosukee Tribe is a successor in interest to the Seminole Nation.

[5] The National Park Service Organic Act, 16 U.S.C. § 1 et seq. states that the purpose of creating national parks is to "conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 16 U.S.C. § 1. The Organic Act requires that "the protection, management, and administration of these areas * * * shall not be exercised in derogation of the values and purpose for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress." 16 U.S.C. § 1a-1.

compensated for public hunting and fishing; certain mineral rights; and the exclusive right to offer airboat rides, guide services, and other tourist services in the Leased Area. ER Doc. 1, p.34 of 98 (Lease Agreement ¶ 3). However, all of these rights are subject to the rights of SFWMD and the Corps to operate flood control and water management projects in the Leased Area and WCA 3. Specifically, paragraph 6 of the Lease Agreement provides:

> 6. Rights of South Florida Water Management District. The Leased Area has for many years comprised a portion of a large reservoir utilized for the flowage and storage of water servicing the area of Broward, Dade, Monroe and Collier Counties and designated as Water Conservation Area 3 as part of the federally authorized [C&SF Project]. The Commission and the Miccosukee Tribe agree that all of the rights set forth in paragraphs 1 through 5 and 7 are subject to and *shall not interfere with the rights, duties and obligations of the SFWMD or the [Corps]*, *pursuant to* the requirements of the aforesaid federally authorized project, conveyances, easements, grants, rules statutes, or *any other present or future lawful authority to manage, regulate, raise, or lower the water levels within the Leased Area or Water Conservation Area 3*[.]

ER Doc. 1, p.37 of 98 (Lease Agreement ¶ 6) (emphasis added).

4. Miccosukee Reserved Area Act

The Miccosukee Reserved Area Act ("MRA Act"), Pub. L. No. 105-313 (1998), 112 Stat. 2964, 16 U.S.C. § 410 (note), grants the Tribe the exclusive right to use and develop the Miccosukee Reserved Area ("MRA"), a strip of land 500 feet wide and approximately five and a half miles long located in Everglades National Park. The MRA is located immediately south of Tamiami Trail (U.S. 41),

a highway that runs along a portion of the northern boundary of the Park. The MRA contains residences where members of the Miccosukee Tribe and their family members live, in addition to various municipal buildings and facilities. Doc. 128-3 at p.5 of 47. Section 5 of the MRA Act provides that the Miccosukee Tribe "shall govern its own affairs. . . as though the [Miccosukee Reserved Area] were a Federal Indian reservation." However, Section 8(e)(1) of the MRA Act expressly preserves federal authority to restore and protect the South Florida ecosystem:

> Nothing in this Act [this note] shall be construed to amend or prejudice the authority of the United States to design, construct, fund, operate, permit, remove, or degrade canals, levees, pumps, impoundments, wetlands, flow ways, or other facilities, structures, or systems, for the restoration or protection of the South Florida ecosystem pursuant to Federal laws.

Id., 16 U.S.C. § 410 (note).

5. The Endangered Species Act

The Endangered Species Act of 1973 ("ESA"), 16 U.S.C. § 1531 *et seq.,* contains both substantive and procedural requirements designed to carry out its goal of conserving endangered and threatened species and the ecosystems on which they depend. *See* 16 U.S.C. § 1531(b); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 558 (1992).

ESA Section 4 provides for the listing of species as "threatened" or "endangered" and for the designation of "critical habitat" for such listed species. 16 U.S.C. § 1533. Section 9 and implementing regulations generally make it unlawful for any person to "take" any endangered fish or wildlife species, subject to certain limited exceptions. 16 U.S.C. §§ 1538(a)(1)(B), 1533(d); 50 C.F.R. § 17.31. "Take" is defined in the statute as "to harass, harm, pursue, shoot, wound, kill, trap, capture, or collect[.]" 16 U.S.C. § 1532(19). "Harm" has been further defined by the FWS to include "significant habitat modification or degradation" that "actually kills or injures wildlife." 50 C.F.R. § 17.3; see *Babbitt v. Sweet Home Chapter Of Communities For A Great Oregon,* 515 U.S. 687, 115 S. Ct. 2407 (1995).

ESA Section 7 sets out consultation provisions applicable to certain actions of federal agencies that may effect a listed species or its critical habitat. Specifically, Section 7(a)(2) requires each federal agency to insure, in consultation with the appropriate consulting agency – here, the United States Fish & Wildlife Service ("FWS") – that any action authorized, funded, or carried out by the agency "is not likely to jeopardize the continued existence of any [listed] species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. § 1536(a)(2).

To help the agency proposing an action (the "action agency" – in this case, the Corps) to comply with this obligation, Section 7 and the implementing regulations set forth a detailed consultation process for determining the biological impacts of a proposed activity. 16 U.S.C. § 1536; 50 C.F.R. part 402. When an agency action may adversely impact a listed species, FWS prepares a "biological opinion" ("BiOp") which advises the action agency whether the action is likely to jeopardize any listed species and, if so, whether "reasonable and prudent alternatives" exist to allow the action agency to avoid jeopardy and thereby comply with the ESA. 50 C.F.R. § 402.14. If FWS determines that the action (or a reasonable and prudent alternative) is not likely to jeopardize the species but may result in the incidental take of members of a listed species, FWS provides an incidental take statement along with the biological opinion. *Id.* Any taking of listed species which is subject to such an incidental take statement and in compliance with the terms and conditions in that statement is not considered a prohibited taking under ESA Section 9. 16 U.S.C. §§ 1536(o)(2), 1540(a), 1540(b); 50 C.F.R. § 402.14(i)(5).

C. Facts

1. The Cape Sable seaside sparrow

The Cape Sable seaside sparrow, *Ammodramus maritimus mirabilis* ("the sparrow"), is one of eight surviving subspecies of seaside sparrows in North America.[6] 71 Fed. Reg. 63980, 63981 (Oct. 31, 2006). The sparrow occurs primarily in short-hydroperiod freshwater prairies in South Florida in and around Everglades National Park. *Id*. The sparrow was listed as endangered in 1967. 32 Fed. Reg. 4001 (Mar. 11, 1967). FWS designated critical habitat for the species in 1977, 42 Fed. Reg. 47,840 (Sept. 22, 1977), and revised the critical habitat designation in 2007. 72 Fed. Reg. 62,736 (Nov. 6, 2007). The sparrow "has a short lifespan, and its nesting success depends on specific kinds of vegetation and water levels." *Miccosukee Tribe*, 566 F.3d at 1262. Consequently, "[i]f it is to survive, this species must have favorable breeding conditions without long periods of interruption." *Id*.

There are six subpopulations of the sparrow. Subpopulation A, the western subpopulation, is located west of Shark River Slough and immediately downstream of the Project's water control structure S-12A. Subpopulation A is geographically

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[6] A ninth subspecies, the dusky seaside sparrow, was declared extinct in 1990. Its extinction is attributed to habitat modification caused by historic flood control projects. 74 Fed. Reg. 66147, 66148 (Dec. 14, 2009).

isolated from the other five sparrow subpopulations, all of which are located east of Shark River Slough. *Id.*; *see also* 71 Fed. Reg. 63980, 63989-90.

Since 1992, the sparrow has suffered a dramatic decline in terms of both overall numbers and distribution. *See Miccosukee Tribe*, 566 F.3d at 1262-63. Subpopulation A has suffered the most dramatic population change; its estimated numbers decreased from 2,608 in 1992 to only 112 in 2006. Because subpopulation A is geographically separated from the other subpopulations, it provides protection against the risk that the species could be extirpated by a single local catastrophe. *Id*. FWS has determined that maintaining and restoring sparrow Subpopulation A is essential to maintaining the overall sparrow population. *See id.*

2. The Everglade snail kite

The Everglade snail kite, *Rostrhamus sociabilis plumbeus* ("snail kite" or "kite"), a bird that preys on snails, is one of three subspecies of snail kites that occur in lowland freshwater marshes in tropical and subtropical America from Florida, Cuba, and Mexico south to Argentina and Peru. The Everglade subspecies occurs in Florida (in the Everglades and lakes Okeechobee and Kissimmee) and Cuba. *Miccosukee Tribe*, 566 F.3d at 1262. FWS listed the subspecies as endangered in 1967, 32 Fed. Reg. 4,001 (Mar. 11, 1967), and designated critical habitat in 1977. 42 Fed. Reg. 47,840, 47,845 (Sept. 22, 1977). Like the sparrow,

snail kite populations are affected by hydrologic conditions. It is "a Goldilocks kind of bird when it comes to water levels – not too low, not too high." *Miccosukee Tribe*, 566 F.3d at 1262.

3. Effects of the C&SF Project

The C&SF Project largely has functioned as it was designed a half century ago – that is, to provide flood protection and water supply for the developed areas of South Florida – but it has also resulted in unanticipated adverse impacts, including impacts to the ecology of the Park. *See Miccosukee Tribe of Indians of Florida v. United States of America, U.S. Army Corps of Engineers*, 420 F. Supp. 2d 1324, 1329-30 (S.D. Fla. 2006). For example, the Project puts most of the surface water flows entering the Park into the northwest portion of the Shark Slough, and relatively little water into northeast Shark Slough. *Id.* This has resulted in water levels in the west being higher than water levels in the east – the opposite of natural conditions – with adverse ecological impacts. *Id.*; *see also South Florida Water Management Dist.,* 541 U.S. at 100-101. To restore a more natural flow of water through the Everglades and address unplanned adverse consequences of the original Project design, the Corps, in coordination with the National Park Service, the SFWMD, and other stakeholders, has undertaken a series

of congressionally-authorized structural and operational changes to the Project.[7] *Id.; see also Miccosukee Tribe,* 566 F.3d at 1263.

4. Water Conservation Area 3A

The Tribe's claims in this case involve the alleged impacts of the Corps' operations on WCA 3A and the MRA. WCA 3A is an area immediately north of the Park and Tamiami Trail, and consists of 491,049 acres – approximately 752 square miles – of marsh sloping from north to south. Doc. 128-8 at 1-17. WCA 3A is used for multiple purposes within the C&SF Project, including flood control storage, water deliveries during drier periods, and recharge of the aquifer system. *Id.* at 3-17; Doc. 133-6 (annotated area map).

As is true elsewhere in the Everglades, most of the water entering WCA 3A comes from direct rainfall. Doc. 128-5 at 13. Surface water also enters WCA 3A from water control structures on its northern boundary, and in particular the "S-11"

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[7] These restoration efforts include:

– the Experimental Program of Water Deliveries to Everglades National Park, authorized in Pub. L. No. 98-181, § 1302, 97 Stat. 1153, 1292-93 (Nov. 30, 1983);

– the Modified Water Deliveries Project, authorized by Pub. L. No. 101-229, 103 Stat. 1946 (Dec. 13, 1989) (codified at 16 U.S.C. §§ 410r-5 to 410r-8); and

– the Comprehensive Everglades Restoration Plan ("CERP"), approved by Congress in 2000. Pub. L. 106-541, Title VI, § 601, 144 Stat. 2572, 2680 (Dec. 11, 2000).

structures that release water from WCA 2A. Doc. 128-6 at 7-4 and Fig. 54 (map of C&SF Project features). Water leaves WCA 3A through water control structures on its southern boundary. In particular, the four S-12 structures (designated S-12A, S-12B, S-12C, and S-12D) allow water to flow from WCA 3A under Tamiami Trail into the northwestern portion of the Park. Doc. 128-5 at 14; Doc. 128-6 at 7-5. Another large water control structure, the S-333, also allows water to flow from WCA 3A eastward into the L-29 canal paralleling Tamiami Trail, from which it can be sent into canals east of the Park. *Id.*; Doc. 128-7 at EA-9 to EA 10 and App'n B. at 7-8.

5. The ISOP and IOP

The Corps, along with the SFWMD, operates the C&SF Project components pursuant to operating plans that include water regulation schedules. *See Miccosukee Tribe*, 980 F. Supp. 448, 454 (S.D. Fla. 1997).[8] The water regulation schedules are operational guidelines used by water managers in their management of the inflow and outflow of water through the Project's water control structures. *Id.*; *see also* Doc. 128-6 at 7-2; Doc. 128-8 at 3-17 to 3-18. The schedules set target ranges of water levels in the water conservation areas and canals at specified times

[8] The SFWMD is the Corps' local sponsor and primary operator of the C&SF Project. The SFWMD runs the various water control structures according to the Corps' operating criteria. However, the Corps directly controls the primary water control structures in the Water Conservation Areas, including the S-12 structures. *See Miccosukee Tribe*, 980 F. Supp. at 454.

of the year. *Id*. Due to the yearly cycle of wet and dry seasons, the schedules allow for the highest water levels in the fall (which is the end of the rainy season), so that there will be more water in storage for the dry season. *Id*. Within the parameters established by the schedules, the Corps retains operational flexibility. In addition, the Corps has procedures for deviating from the schedules when appropriate. *Miccosukee Tribe v. United States*, 259 F. Supp. 2d 1237, 1240 (S.D. Fla. 2003) ("Pursuant to its regulations, the Corps is permitted to deviate from the water regulation schedule under appropriate circumstances"), *aff'd*, 103 Fed. Appx. 666 (11th Cir. 2004).

The water regulation schedules for WCA 3A have been altered several times over the past decades. In the 1980s, the Corps, SFWMD, and the National Park Service engaged in a series of experimental tests of different water regulation schedules for delivering water to the Park under the authority of the Experimental Water Delivery Program (the "Experimental Program"). The most recent test in the Experimental Program was "Test 7," which governed water delivery methods in the Everglades from 1995 through 1999. *See Miccosukee Tribe*, 420 F. Supp. 2d at 1329. Test 7, however, had "consistent negative effects on the Sparrow population of the Everglades[.]" *Id.* In late 1997, FWS warned that if subpopulation A missed another breeding season, the sparrow could become extinct. *See Miccosukee Tribe*,

566 F.3d at 1263. In response, the Corps undertook an emergency deviation from Test 7 for the 1998 season to protect the sparrow. Doc. 129-8 at 3.

In 1999, FWS issued a biological opinion on the effects of Test 7 and other programs on the sparrow, the snail kite, and another endangered species, the wood stork (the "1999 BiOp"). *Id.* The 1999 BiOp concluded that continued operation of the C&SF Project under the terms of Test 7 would lead to the extinction of the sparrow. *Miccosukee Tribe*, 420 F. Supp. 2d at 1329-30. In keeping with that "jeopardy" conclusion, FWS included in the 1999 BiOp a "reasonable and prudent alternative" identifying actions that FWS believed the Corps could take that would protect the sparrow from extinction pending completion of the Modified Water Deliveries Project. *Id.* at 1330.

In response to the 1999 BiOp, the Corps developed the *Interim Structural and Operational Plan* ("ISOP"), which was intended to achieve the same water levels in sparrow habitat called for in the 1999 BiOp's reasonable and prudent alternative while also allowing the Corps to meet other water-related needs. *Id.;* Doc. 129-8 at 4; *see generally* Doc. 128-7. The ISOP reduced inflows to WCA 3A through the S-11 structures, and allowed water levels to become lower in the spring than would have been the case under the Test 7 regulation schedule. Doc. 128-7 at EA-3, EA-7. The Corps subsequently implemented an updated version of the ISOP which made slight changes in the operation of certain water control structures,

including an earlier closure date for S-12A (November 1 instead of December 1). Doc. 129-3 at 1-2; Doc. 129-4 at 9 and Tables 1, 2.

While implementing the ISOP, the Corps began development of a longer-term interim strategy – the IOP – for protection of the sparrow and other species pending completion of the Modified Water Deliveries Project. The Corps consulted with FWS, prepared a draft environmental impact statement and a supplemental draft environmental impact statement, reviewed multiple rounds of public comment, coordinated with the National Park Service, SFWMD, and other federal and non-federal groups, participated in multiple mediation efforts through the Institute for Environmental Conflict Resolution, and prepared a final environmental impact statement. These efforts culminated in FWS's issuance of an amended biological opinion on the IOP in April, 2002 (the "2002 BiOp"), and the Corps' adoption of the IOP in July, 2002. Doc. 129-9 at 5; *see generally Miccosukee Tribe*, 566 F.3d at 1263-64; *Miccosukee Tribe*, 420 F. Supp. 2d at 1330. The 2008 Corps actions at issue in this case were undertaken pursuant to the IOP water regulation schedule.

One of the key features of the IOP involves operating the S-12 structures according to a schedule designed to protect the nesting habitat of sparrow Subpopulation A, which is located immediately downstream from S-12A. Doc. 129-8 at 65. The IOP retains the modified ISOP's November 1 closure date for S-12A. Doc. 129-5 at vii, 39; Doc. 129-6. In addition, the IOP provides for operating

the outlets of WCA 3A, including the S-12 structures, according to a schedule that is intended to protect the sparrow's nesting areas by providing 60 continuous days with water levels below 6.0 feet National Geodetic Vertical Datum ("NGVD") at reference site NP 205 in sparrow habitat during the period from March 1 to July 15. Doc. 129-8 at 65; *see Miccosukee Tribe*, 566 F.3d at 1263.

Under the IOP, the target percentages of discharge from WCA 3A are 55 percent through S-333 and 45 percent through the S-12 structures. Doc. 129-7 at ix, 36. The Corps' general practice is to release 10 percent of the S-12 discharge from S-12A. Doc. 129-5 at 26; Doc. 132-6 at 1. Thus, the discharge from S-12A is generally 4.5 percent of the total discharge from WCA 3A.

The Corps and FWS subsequently re-initiated ESA Section 7 consultation on the IOP, and in 2006 FWS issued a new biological opinion. Doc. 129-8. The 2006 BiOp concluded that the Corps' continued operation of the C&SF Project under the IOP through November, 2010, was consistent with the reasonable and prudent alternative for avoiding jeopardy to the sparrow, snail kite, and wood stork set out in the 1999 BiOp. *Id*. at 73; *Miccosukee Tribe*, 566 F.3d at 1264.[9]

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[9] The Tribe brought suit alleging that FWS's issuance of the 2006 BiOp violated the ESA. This Court affirmed it in part, reversed in part, and remanded. *Miccosukee Tribe*, 566 F.3d 1257. Following remand to the agency, the district court affirmed in part. *Miccosukee Tribe,* 697 F. Supp. 2d 1324 (S.D. Fla. 2010). The Tribe's appeal is pending. 11th Cir. No. 10-12379.

6. The Corps' 2008 water management actions

The Tribe's claims in this case turn on two 2008 Corps' operational decisions involving the S-12A structure. The first decision was taken in response to the West Camp Fire, which burned over 2000 acres of sparrow Subpopulation A habitat in June, 2008. Doc. 130-2; Doc. 129-10 at p.46 of 56. Term and Condition No. 3 of the 2006 BiOp provides that "if fire occurs within Sparrow subpopulation A habitat, the Corps will coordinate with the [FWS] and seek a deviation from the WCA 3A regulation schedule to ameliorate impacts to [sparrow] habitat, as necessary." Doc. 129-8 at 79. Accordingly, biologists from the Corps, FWS, and the Park agreed in a July 11, 2008 telephone conference that the Corps would delay the opening of S-12A from July 15 – the earliest closure date allowed under the IOP water regulation schedule – until July 24, so as to allow nesting habitat vegetation to recover from the fire and to allow time for fledging of remaining eggs and chicks. Doc. 130-2; *see also* Doc. 129-10 at pp.1-45 of 56 (emails); *id.* at pp.46-47 of 56 (memo). This determination was based on the number of observed active nests in subpopulation A habitat as of July 10; the total time for fledging of 21 days; water levels at the nest locations and in WCA 3A; and the vegetation height at the nest locations. Doc. 129-10 at p.46-47 of 56; Doc. 130-2. The Corps utilized its operational flexibility under the IOP to deliver the required flows through the other three S-12 structures (S-12B, S-12C, and S-12D), and kept S12A closed until July

24, 2008. *Id*. Because of the capacity of these other structures to handle all water to be released from WCA 3A, the Corps expected that the delayed opening of S-12A would have no effect on water levels in WCA 3A and "no adverse effect on snails, snail kite nesting habitat, or Tribal resources in WCA 3A." Doc. 129-10 at pp.32, 47, 55-56; see also Doc. 128-9 ¶¶ 11, 12; Doc. 130-3.

The second challenged action was the Corps' decision to close the S-12A structure on November 1, 2008, in accordance with the IOP schedule. The Corps did so notwithstanding an October 22, 2008, letter from the Tribe requesting that the structure be left open to address high water levels in WCA 3A (11.84 feet as of October 17, 2008). Doc 130-4 at 1. The Tribe's letter urged the Corps to reexamine the schedule for closing the S12 structures and to reinitiate ESA consultation with FWS concerning the need to continue the S12 closures as a means to protect sparrow subpopulation A. *Id*. at 2. The letter alleged that, because the chance of a storm or hurricane still existed, "[t]hese extremely high water levels pose a health, safety, and welfare threat to the Miccosukee Tribe." *Id*.

The Corps responded to the Tribe's letter on October 31, 2008. Doc. 130-5. The Corps' letter listed the numerous measures being taken to reduce WCA 3A water levels, and noted that water levels in WCA 3A were lower than on October 22, 2008, and had been on a receding trend since late September or early October 2008. *Id*. at 2. As to the Tribe's request to reconsider the S-12 closure schedule

through further ESA consultations with FWS, the Corps explained that "FWS has informed the USACE that it cannot endorse continued operation of S-12A beyond November 1, therefore, we intend to close S-12A pursuant to IOP." *Id.* Nevertheless, the Corps noted that "the USACE has been coordinating continuously with FWS on operations of the system and will continue to do so." *Id.* at 1.[10] As to Tribe's health and safety concerns, the Corps advised the Tribe that it was not aware of "any threat to the Miccosukee Tribe members' health or safety at the current WCA-3A water level" that the agency had not previously considered. *Id.* at 2.

The Corps' conclusion that the water levels did not pose a safety risk was based on several factors. First, the current water levels were well below previously observed peak levels – levels that did not result in any damage to the S-12 structures or the L-29 levee. *Id.*; Doc. 129-9 at pp.5-9 of 19. Furthermore, the headwater levels at the S-12 structures would have to rise to 12.4 feet, with tailwaters at least 5.4 feet lower, before there would be a significant risk to the integrity of the S-12 structures. Doc. 130-10 ¶¶ 4-7; Doc. 129-9 ¶¶ 15, 18; Doc.

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[10] Indeed, the Corps and FWS recently completed ESA consultations on the Corps' continued operations under the IOP and proposal to adopt a new operating plan known as the Everglades Restoration Transition Plan or "ERTP-1." FWS issued a new biological opinion on November 17, 2010, and the Corps expects to make a final decision on ERTP-1 in summer 2011. *See* 75 Fed. Reg. 9188 (Mar. 1, 2010).

130-9 at ¶ 14. Moreover, water levels had been decreasing for about a month, the hurricane season was nearing its end, and there were no hurricanes forecast, so at that time there was not a serious concern for wind and waves caused by storms and hurricanes. Doc. 129-9 ¶ 19 and p.12 of 19 (graph). Finally, in the event conditions changed, the District Commander retained the discretion to take any and all actions necessary to protect public health and safety – including opening the S-12A structure. *Id.* at ¶ 19; Doc. 131-1 at 7-16; Doc. 128-4 (Smith Tr. 256:2 to 257:13). The Corps' assessment ultimately proved correct, and the water level in WCA 3A receded without incident. *See* Doc. 129-9 p.12 of 19 (graph); Doc. 131-7 (Billie Tr. 45:5-6, 45:25-46:3).

7. The Tribe's prior related litigation

The Tribe has brought numerous other lawsuits challenging various aspects of the operation of the S-12 structures and management of WCA 3A. In Case Number 95-0532,[11] the Tribe claimed, among other things, that the Corps and the Department of the Interior violated the Tribe's right to equal protection by failing to alleviate flooding in WCA 3A. 980 F. Supp. at 465-67. The district court rejected that claim, finding that the Tribe had "produced evidence showing that the Federal

[11] All these cases are styled *Miccosukee Tribe of Indians v. United States* and were filed in the Southern District of Florida. Accordingly, we refer to them by district court case number.

Defendants' decisions adversely impacted them by prolonging flooding on tribal land," but had failed to produce evidence showing that the government acted with discriminatory intent. 980 F. Supp. at 466.

In Case Number 00-33, the Tribe challenged the Corps' decision to adopt the ISOP. That case became moot when the Corps adopted the IOP. 259 F. Supp. 2d 1237 (S.D. Fla. 2003), *aff'd,* 103 Fed. Appx. 666 (11th Cir. 2004).

In Case Number 02-22778, the Tribe alleged, among other things, that the Corps' decision to adopt the IOP violated NEPA, the ESA, and the Indian Trust doctrine as reflected in FILCSA. 420 F. Supp. 2d 1324. The district court (there, as in this case, Judge Moore) granted summary judgment for the Corps on most of the Tribe's claims, including the Indian Trust/FILCSA claim, but held that the Corps was required to prepare a supplemental environmental impact statement addressing the impact of certain pump stations and reservoirs. 420 F. Supp. 2d at 1330, 1345. The Corps prepared the SEIS, the Tribe challenged it, and the district court upheld it. 509 F. Supp. 2d 1288 (S.D. Fla., 2007). The Tribe did not pursue an appeal.[12]

The Tribe also challenged the Fish & Wildlife Service's 2002 BiOp on the IOP, alleging (as in Case No. 02-22778) violations of NEPA, the ESA, and the Indian Trust doctrine as reflected in FILCSA. Case No. 05-23045. The district

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[12] Again, the water regulation schedule in effect in 2008 was the same schedule implemented in the 2002 IOP and upheld in Case No. 02-22778.

court (again, Judge Moore) dismissed the Tribe's Indian Trust/FILCSA claim for failure to state a claim, granted summary judgment for FWS on the Tribe's NEPA claim, and denied summary judgment on the ESA claim. 430 F. Supp. 2d 1328, 1336 (S.D. Fla. 2006). When the 2002 BiOp was superceded by the 2006 BiOp, the Tribe amended its complaint to challenge the 2006 BiOp. As noted above (n.9), the district court upheld the 2006 BiOp. 528 F. Supp. 2d 1317 (S.D. Fla. 2007). The Tribe appealed the district court's ruling on the ESA claim (but not the Indian Trust/FILCSA and NEPA claims), and this Court upheld the BiOp in substantial part and remanded to FWS. 566 F.3d 1257 (11th Cir. 2009). After FWS revised the BiOp, the Tribe challenged it again, and the district court (again, Judge Moore) upheld it. 697 F. Supp. 2d 1324 (S.D. Fla. 2010). The Tribe's appeal is pending. 11th Cir No. 10-12379.

In addition – and notwithstanding the Tribe's professed concerns about high water levels in WCA 3A – the Tribe has brought four separate challenges to the federal government's implementation the Tamiami Trail Modification Project, a congressionally-mandated component of the Modified Water Deliveries Project intended to improve the flow of water into the Park – and facilitate lower water levels in WCA 3A – by replacing a one-mile stretch of Tamiami Trail (U.S. Highway 41) with a bridge. *See* Doc. 129-8 at 5. This Court has affirmed the district courts' judgments for the United States in all of those cases. *Miccosukee*

Tribe of Indians of Florida v. United States Army Corps of Engineers, 619 F.3d 1289 (11th Cir. 2010); *Miccosukee Tribe v. United States*, 619 F.3d 1286 (11th Cir. 2010); *Miccosukee Tribe v. United States*, No. 09-15085 (11th Cir. Feb. 1, 2011).

SUMMARY OF ARGUMENT

In 1999, the Fish & Wildlife Service issued a biological opinion finding that the Cape Sable seaside sparrow was likely to become extinct unless the Corps changed the way it operated the C&SF Project. In response, the Corps modified its operations to protect the sparrow. Beginning with the adoption of the ISOP in 1999, and continuing under the IOP, adopted in 2002, the Corps' operating plans have provided for the seasonal closure of the S-12 structures to protect the sparrows that nest immediately downstream in Everglades National Park. The Tribe has brought numerous lawsuits against the Corps and other federal agencies challenging the ISOP, the IOP, and related federal actions under a variety of legal theories. Those challenges have been largely unsuccessful, however, and the courts have substantially upheld the federal government's implementation of the Project.

The Tribe's claims in this case are similar – if not identical – to its prior unsuccessful claims. The district court declined to find that the Tribe's claims were *res judicata*, but correctly concluded that they are without merit. The Tribe's equal protection claim fails for multiple reasons. First, the Tribe has failed to show that it has been treated differently than other similarly situated persons. The persons

identified by the Tribe has comparators live in areas that are not subject to the regulatory requirements applicable to WCA 3A. And persons who *are* similarly situated to the Tribe *are* treated similarly. Second, the Tribe has failed to demonstrate that the Corps acted with discriminatory intent. The Tribe argues that discriminatory intent should be inferred based on the (alleged) disproportionate impact of the Corps' water management actions, but that argument is untenable given that the Lease Agreement that is the source of the Tribe's rights expressly authorizes the impacts of which the Tribe complains. As a result, those impacts do not raise a suspicion of discriminatory intent. And third, because the only governmental "classification" here is a classification of geographic areas, the Equal Protection Clause is not implicated. But even if Corps' actions are analyzed as a classification of persons, they are subject to rational basis review, and easily satisfy that standard.

The district court properly dismissed the Tribe's FILCSA, due process, and mandamus claims. The Tribe's rights under the Lease Agreement and FILCSA are expressly subject to the Corps' authority to raise water levels in the Leased Area. That limitation thus forecloses the Tribe's claims that the Corps violated FILCSA and a protected property interest by raising water levels. And the Tribe's mandamus claim fails because the Tribe has no substantive right to relief, the duty it

seeks to enforce involves the exercise of discretion, and an adequate remedy is available under the APA.

STANDARD OF REVIEW

1. This Court's review of the district court's grant of summary judgment on Count IV (the equal protection claim) is *de novo*, applying the same legal standard as employed by the district court. *Dees v. Johnson Controls World Services*, 168 F.3d 417, 421 (11th Cir. 1999). Summary judgment is appropriate if "there is no genuine issue as to any material fact and * * * the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The court must view all of the evidence and draw all reasonable factual inferences in favor of the non-movant. *Dees*, 168 F.3d at 421.

"Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action."' *Celotex Corp. v Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. Rule Civ. Proc. 1). Accordingly, "[t]he mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). An issue of fact is "material" if it is a legal element of the claim which might affect

the outcome of the case. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). "A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor." *Haves*, 52 F.3d at 921 (*citing Anderson*, 477 U.S. at 249-51). "[C]onclusory allegations without specific supporting facts have no probative value. [O]ne who resists summary judgment must meet the movant's affidavits with opposing affidavits setting forth specific facts to show why there is an issue for trial." *Leigh v. Warner Bros., Inc.*, 212 F.3d 1210, 1217 (11th Cir. 2000) (internal citations and quotation marks omitted).

2. Similarly, this Court's review of the district court's dismissal of Counts I, II, and III for failure to state a claim is *de novo.* On a motion to dismiss, the court must accept the allegations in the complaint as true and construe them in the light most favorable to the nonmoving party. *Kizzire v. Baptist Health System, Inc.*, 441 F.3d 1306, 1308 (11th Cir. 2006). As with a motion for summary judgment, however, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal,* — U.S. —, 129 S. Ct. 1937, 1950 (2009) (*quoting Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007)). "[C]onclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.,* 326 F.3d 1183, 1185 (11th Cir. 2003); *see also Ashcroft,* 129 S. Ct. at 1949;

South Florida Water Mgmt. Dist. v. Montalvo, 84 F.3d 402, 409 n.10 (11th Cir. 1996).

ARGUMENT

I. The United States is entitled to summary judgment on the Tribe's equal protection claim.

The Tribe claims that the Corps has "violated the Miccosukee people's equal protection" rights by "discriminatory flooding of Tribal lands compared with similarly situated non-Indian lands." Br. at 6. The Equal Protection Clause of the Fourteenth Amendment, which is made applicable to the federal government by the Fifth Amendment, "commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (citation omitted). Where, as here, a plaintiff brings an equal protection claim based on the alleged unequal administration of a facially neutral law or regulation, the plaintiff must show (1) that it was treated differently from other similarly situated persons, and (2) that the defendant unequally applied the facially neutral ordinance for the purpose of discriminating against plaintiff. *Campbell v. Rainbow City, Ala.*, 434 F.3d 1306, 1314 (11th Cir. 2006) (*citing Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996)); *see also United States v. Armstrong*, 517 U.S. 456, 465-66 (1996)

(discussing "similarly situated" requirement).[13] The Tribe has failed to identify the existence of any genuine issues of material fact on either of these elements, and the United States is therefore entitled to judgment on this claim as a matter of law.[14]

A. The Tribe has failed to demonstrate the existence a genuine issue of material fact regarding its contention that it was treated differently from other similarly situated persons.

This Court has made clear that "different treatment of *dissimilarly* situated persons does not violate the equal protection clause." *Campbell*, 434 F.3d at 1314 (emphasis added, citation and quotation omitted). Rather, a plaintiff must show that it was treated differently from other similarly situated individuals. *Id.* This showing requires some specificity that the two comparators actually are similarly situated. To be considered similarly situated, comparators must be "*prima facia* identical in all relevant respects." *Campbell*, 434 F.3d at 1314; *see also Grider v.*

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[13] A plaintiff need not plead the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification or where there is other direct evidence of intentional racial discrimination. Such classifications are subject to strict judicial scrutiny. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). Here, however, the Tribe does not claim that any law or policy contains an express racial classification, and has produced no direct evidence of intentional racial discrimination.

[14] The district court did not address the question of whether the Tribe was treated differently than similarly situated persons, focusing instead on the absence of evidence of discriminatory intent. ER Doc. 175 at 28 n.23. However, this Court can affirm on any grounds supported by the record. *American United Life Ins. v. Martinez*, 480 F.3d 1043, 1059 (11th Cir. 2007).

City of Auburn, Ala., 618 F.3d 1240, 1263-64 (11th Cir. 2010); *Griffin Industries v. Irvin*, 496 F.3d 1189, 1203-04 (11th Cir. 2007).

The Tribe claims that its members within WCA 3A and the MRA were treated differently – and less favorably – than persons outside of those areas. *See*, *e.g.,* Tribe's Br. at 6, 10-11, 13, 25 n.4 (alleging Corps has given preferential treatment to the "land and natural resources of non-Indians" in Miami-Dade County, Everglades National Park, and around Lake Okeechobee); ER Doc. 1 (Compl.) at ¶¶ 49, 60-62 (alleging the Corps has sought to protect the Park and the Loxahatchee National Wildlife Refuge at the expense of Tribal lands). Even accepting those assertions as true, they fall far short of the required showing that the comparators identified by the Tribe are "identical in all relevant respects." *Campbell,* 434 F.3d at 1314; *see Leigh*, 212 F.3d at 1217 (party opposing summary judgment must meet movant's affidavits with opposing affidavits setting forth specific facts to show why there is an issue for trial).[15]

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[15] The Tribe argues (Br. at 20-28) that the district court erred in granting summary judgment because of disputed issues of material fact. According to the Tribe, the "factual issue at the heart of this case" is "whether the Corps' closing of the S-12 gates caused higher water levels and resultant harm on Tribal lands[.]" Br. at 20; *see also* Br. at 24 (arguing that there are disputed facts as to whether high water in WCA 3A placed Tribe at risk); Br. at 27 (arguing that there are disputed facts regarding existence of a less discriminatory alternative). The Tribe's arguments are unavailing, because even assuming these facts are genuinely in dispute, they are not material to the question of whether the Corps treated the Tribe differently from other similarly situated persons. *See Haves*, 52 F.3d at 921 ("The (continued...)

There is no genuine dispute that WCA 3A is subject to a variety of area-specific regulatory requirements that are not applicable to other areas used by the individuals that the Tribe contends are "similarly situated." WCA 3 is specifically designated as one of the C&SF Project's water conservation areas, and is managed for flood control and other Project purposes. *See, e.g.,* Doc. 128-8 at 3-17. Indeed, WCA 3 was set aside for those purposes "many years" before the Tribe was granted its perpetual lease on the Leased Area, as codified in the Florida Indian Land Claims Settlement Act. ER Doc. 1 p.37 of 98 (Lease Agreement ¶ 6). The Lease Agreement expressly provides that the Tribe's right to use the Leased Area is "subject to and shall not interfere with" the Corps and SFWMD's authority to use WCA 3A for Project purposes, including "any * * * present or future lawful authority to manage, regulate, raise, or lower the water levels within the Leased Area or Water Conservation Area 3[.]" *Id.*[16] Similarly, while the MRA Act grants the Tribe certain rights in the MRA, it also provides that the Act does not "amend or

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[15](...continued)
mere existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case").

[16] The Tribe's arguments to the contrary have been rejected in several prior cases. *See, e.g., Miccosukee Tribe*, 980 F. Supp. at 461 ("the Lease and Settlement Agreement subject the Tribe's rights in the Leased Area to the Corps' authority to raise and lower water levels within WCA 3A"); *Miccosukee Tribe*, 430 F. Supp. 2d at 1336 (FILCSA "affirmatively denies the Tribe the right to 'interfere' with the actions of the Corps with respect to the water levels in WCA 3A").

prejudice the authority of the United States to * * * operate * * * impoundments, wetlands, flow ways, or other facilities, structures, or systems, for the restoration or protection of the South Florida ecosystem pursuant to Federal laws." MRA Act § 8(e)(1), 16 U.S.C. § 410 (note). In addition, WCA 3A contains critical habitat of the Everglades snail kite, an endangered hawk. And WCA 3A – in particular, the S-12A structure – is directly upstream from sparrow Subpopulation A. The presence of these endangered species in and downstream of WCA 3A triggers a host of requirements under the ESA. *See Miccosukee Tribe*, 566 F.3d at 1262-64. WCA 3A is also directly upstream from Everglades National Park.

In contrast, the comparators offered by the Tribe are not subject to these requirements. The portions of Miami-Dade and Broward counties and the area south of Lake Okeechobee cited by the Tribe are outside of WCA 3A. Likewise, the Park and the Loxahatchee National Wildlife Refuge are outside of WCA 3A and are managed under different, area-specific regulatory mandates. Accordingly, these geographical areas – and by extension, the people who use them or residing within them – are not "similarly situated." *Campbell*, 434 F.3d at 1314; *see also Griffith*, 496 F.3d at 1203 ("Governmental decisionmaking challenged under a 'class of one' equal protection theory must be evaluated in light of the full variety of factors that an objectively reasonable governmental decisionmaker would have found relevant in making the challenged decision.").

Moreover, to the extent that areas outside WCA 3A benefit as a result of the use of WCA 3A for flood control, those benefits redound to all similarly-situated persons, including the Tribe and its members. For example, flood protection for the Park benefits the Tribe, because Tribal members grow corn, fish, and use tree islands inside the Park for traditional purposes. Doc. 132-5; Doc. 132-7; Doc. 132-8. Flood protection for the Park also benefits the MRA, where many members of the Tribe live and where the Tribe's administrative offices are located, because the MRA is located within the Park. Doc. 128-3 (Duncan Tr. 37:4-9, 46:5-6; 56:12-13). Similarly, members of the Tribe live in – and benefit from the flood protections provided to – the suburban and urban areas that the Tribe claims are unconstitutionally favored at the expense of WCA 3A. Doc. 131-7 (Billie Tr. 68:19-69:8). The Tribe's Chairman testified that he lives in one of these areas himself, and that other members live in Redlands, Kendall, Miramar, and areas close to downtown Miami. Doc. 131-7 (Billie Tr. 68:19-69:8). Tribal members also live within the Big Cypress National Preserve, which benefits from the Corps' flood control measures in WCA 3A. Doc. 128-3 (Duncan Tr. 53:19-54:20; 108:17-109:1; 109:8-17; 113:9-23). Further, the Tribe's Chairman acknowledged that to the extent containment of water in WCA 3A protects suburban Miami areas such as Sweetwater, it also protects the Miccosukee Indian Gaming resort. Doc. 131-7 (Billie Tr. 81:9-23). The Tribe's expert, Col. Rice, also acknowledged that

the Tribe's property, including the Gaming Resort, Miccosukee Smoke Shop, and property in the Eight and One Half Square Mile Area, derive flood protection from the use of WCA 3A for flood control. Doc. 131-2 (Rice Tr. 32:25-34:22).

Finally, there is no dispute that the areas that *are* similarly situated to the Leased Area and the MRA – and the persons who use them – are all treated similarly. For example, the Lease Area (which is 189,000 acres) constitutes only about 2/5ths of WCA 3A (which totals 491,049 acres). *See* Doc. 128-3 (Duncan Tr. 43:22). The Corps' operations impact all of WCA 3A, not just the Leased Area. Doc. 128-4 (Smith Tr. 135:15-21).[17] Likewise, many persons who are not members of the Tribe use the Leased Area and other parts of WCA 3A. The general public has access to and frequently uses the lands within WCA 3A, including the Leased Area, to hunt, camp and fish. Doc. 128-3 (Duncan Tr. 47:13-51:12; 52:10-14; 53:2-9); Doc. 131-8 (Cypress Tr. 111:22-112:7). Doc. 131-7 (Billie Tr. 33:5-35:5, 66:14-67:2). About 20 non-Indians live full time in camps within WCA 3A that were grandfathered under the FILCSA. Doc. 128-3 (Duncan Tr. 48:14-51:12). The Corps' operations affect all of those users, whether or not they are Indians and whether or not they are members of the Tribe. *Id.* (Duncan Tr. 205:2-206:9;

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[17] In addition, the Corps' operation of the S-12 structures impacts water levels in WCA 2, a separate water conservation area located upstream of WCA 3A. Doc. 128-3 (Duncan Tr. 176:4-7). No Miccosukee Indians reside in WCA 2. *Id.* 244:5-9.

206:19-207:4); Doc. 131-7 (Billie Tr. 34:11-12). Similarly, the MRA is not the only area located downstream from the S-12 structures and the L-29 Canal. The Park and Tamiami Trail – both of which are used by many persons who are not members of the Tribe – are also downstream. The Corps' operations effect those areas and users as well. Doc. 131-7 (Billie Tr. 82:25-83:7).

In short, the Tribe has failed to demonstrate the existence of a genuine issue of material fact with respect to its claim that its members are being treated differently than other similarly situated persons. That failure, standing alone, is fatal to the Tribe's equal protection claim. *Campbell*, 434 F.3d at 1314.

B. The Tribe has failed to demonstrate the existence of a genuine issue of material fact regarding its contention that the Corps acted with discriminatory intent.

The Tribe's equal protection claim fails for the additional, independent reason that the Tribe has failed to make the requisite showing that the Corps acted with discriminatory intent or purpose. *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Campbell*, 434 F.3d at 1314. Discriminatory intent entails more than "intent as volition or intent as awareness of consequences. It implies that the decisionmaker * * * selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation omitted). Mere error or mistake in judgment

does not violate the equal protection clause, and even arbitrary administration of a facially neutral statute does not violate the equal protection clause in the absence of intentional or purposeful discrimination. *E & T Realty v. Strickland*, 830 F.2d 1107, 1112-14 (11th Cir. 1987).

"Discriminatory intent may be established by evidence of such factors as substantial disparate impact, a history of discriminatory official actions, procedural and substantive departures from the norms generally followed by the decision-maker, and discriminatory statements in the legislative or administrative history of the decision." *Elston v. Talledega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 256, 266-68 (1977) (discussing potential types of evidence). However, "[A] showing of a disproportionate impact alone is not sufficient to prove discriminatory intent unless no other reasonable inference can be drawn." *McCleskey v. Kemp*, 753 F.2d 877, 892 (11th Cir. 1985) (citations omitted); *see also Feeney*, 442 U.S. at 271; *Washington v. Davis*, 426 U.S. 229 (1976). "Only if the evidence of disparate impact is so strong that the only permissible inference is one of intentional discrimination will it alone suffice." *Adams v. Wainright*, 709 F.2d 1443, 1449 (11th Cir. 1983).

The Tribe has failed to demonstrate the existence of a genuine issue of material fact with respect to its contention that the Corps intentionally discriminated

against the Tribe. The Tribe offers no direct evidence of invidious discriminatory intent,[18] but argues that such an intent should be inferred from the (purportedly) disproportionate impact of the Corps' "flooding" of WCA 3A on the Leased Area and the MRA and the Corps' (alleged) failures to adopt a "less discriminatory alternative" and to follow proper procedures. Br. at 20-29. This argument does not withstand scrutiny.

Even if the Tribe's conclusory factual assertions concerning impacts assertions are accepted,[19] they are insufficient to support an inference of discriminatory intent given the legal limitations on the Tribe's rights in the Leased Area and the MRA. As discussed above (pp. 8-10 and 34-35), the Tribe's rights in the Leased Area and the MRA derive entirely from the Lease Agreement (codified in the FILCSA) and the MRA Act.[20] Those rights are expressly subject to the United States' authority to manage WCA 3A for Project purposes and to protect the

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[18] The Tribe tacitly acknowledges that it has failed to produce any direct evidence of invidious discriminatory intent. Br. at 20, citing *Jean v. Nelson*, 711 F.2d 1455, 1485 (11th Cir. 1983).

[19] It is difficult to identify the evidentiary basis for many of the Tribe's asserted "facts." Instead of citing to the evidence, the Tribe's brief frequently cites to its district court briefs. The cited pages in turn typically include a dozen or more cites to the record, most of which are not on point.

[20] The Tribe's rights in the Leased Area and the MRA reflect the Tribe's status as a federally-recognized Indian tribe. Membership in a tribe is a political classification, not a racial classification. *Morton v. Mancari*, 417 U.S. 535, 553 and n.24 (1974); *see also* Doc. 128-3 (Duncan Tr. 40:17-23).

South Florida ecosystem. Indeed, in the Lease Agreement, the Tribe expressly agrees that "all" of its rights under the relevant lease provisions "are subject to and shall not interfere with the rights, duties and obligations" of the Corps, pursuant to the Flood Control Act and "any other present or future lawful authority," to "manage, regulate, raise, or lower the water levels within the Leased Area or Water Conservation Area 3[.]" ER Doc. 1, p.37 of 98 (Lease Agreement ¶ 6).[21]

Thus, the Tribe's argument, at bottom, is that invidious discriminatory intent may be inferred from the (allegedly) disproportionate impact of the Corps' management of water levels in WCA 3A, even though (1) the Corps' actions are authorized by statute and the IOP – which was reviewed and upheld in prior litigation brought by the Tribe;[22] and (2) the Tribe expressly consented to such actions in the Lease Agreement. Such an inference is untenable. As the Supreme Court has explained, "an inference is a working tool, not a synonym for proof. When, as here, the [disproportionate] impact is essentially an unavoidable

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[21] The Tribe (Br. at 7) quotes paragraph 5 of the Settlement Agreement to argue that its rights to use the Leased Area are only subject to future laws "not inconsistent with the rights granted the Miccosukee Tribe under this Lease Agreement." But the Tribe omits the opening clause of paragraph 5, which states that the Tribe's rights under paragraph 5 are "[S]ubject to the provisions of paragraph 6." As described above, paragraph 6 provides that the Tribe's rights in paragraphs 1 through 5 and 7 are "subject to and shall not interfere with" the Corps' authority to manage, regulate, raise or lower water levels within the Leased Area or WCA 3. ER Doc. 1 at 37 of 98 (Lease Agreement ¶6).

[22] Case No. 02-22778, 420 F. Supp. 2d 1324 and 509 F. Supp. 2d 1288.

consequence of a legislative policy that has in itself always been deemed to be legitimate, * * * the inference simply fails to ripen into proof." *Feeney,* 442 U.S. at 279 n.25.

Furthermore, the Tribe's inference argument ignores the overwhelming evidence showing that the Corps' decisions to delay the opening of S-12A for nine days in July, 2008, and to close S-12A in accordance with the IOP schedule on November 1, 2008, were based entirely on the legitimate water-management concerns embodied in the IOP – and in particular, concerns about protecting sparrow Subpopulation A. *See* ER Doc. 175 at 11-27. The Tribe's response to this evidence is to assert that the Corps is using protection of the sparrow as a "pretext" to discriminate against the Miccosukee people. Br. at 13, 14, 35. That conclusory assertion is contradicted by the long, well-documented history of the Corps' sparrow protection efforts described above (pp. 14-25), *see Miccosukee Tribe*, 566 F.3d at 1263, and is insufficient to defeat federal defendants' motion for summary judgment.[23]

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[23] Nor is there merit to the Tribe's contention (Br. 16, 21-22) that the district court "improperly created its own evidence" in concluding that the impact of the Corps' actions on water levels in WCA 3A was *de minimus.* The court relied on uncontested data on water levels in WCA 3A in 2008, the number of days the S-12A remained open, and the percentage of the total flow through the S-12 structures that is attributable to S-12A. ER Doc. 175 at 16-18, 26-27. The Tribe had ample opportunity to contest this data – including two separate depositions of Sean Smith, the Chief of the Corps Water Engineering Branch, who provided much

(continued...)

C. The Tribe's argument that the district court misapplied the law is without merit.

The Tribe argues that the district court misapplied the law by "limit[ing] its equal protection analysis to the Corps' actions in 2008" (Br. at 32) and failing to consider the Tribe's argument that discriminatory intent should be inferred from the Corps' alleged "pattern and practice" of discrimination against the Tribe, a pattern that the Tribe contends began in 1998. Br. at 30, *citing Jean v. Nelson*, 711 F.2d 1455, 1485 (11th Cir. 1983). But the district court did consider this issue: it cited *Jean*, identified the relevant historical background, and noted that the Tribe has brought numerous claims – mostly unsuccessful – challenging the Corps' ongoing water management decisions. The court correctly concluded, based on the undisputed facts, that the historical background does not support an inference of intentional racial discrimination. ER Doc. 175 at 9, 10 n.8, 18.

Moreover, while the district court did focus its equal protection analysis on the Corps' actions in 2008, the court did so because that was the Tribe's position below. In response to the United States' argument that the Tribe's claim was *res judicata*, the Tribe explicitly limited its claim to the events of 2008. Doc. 144 at 25

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[23](...continued)
of the data – but it failed to do so, and failed to come forward with "opposing affidavits setting forth specific facts to show why there is an issue for trial." *See Leigh*, 212 F.3d at 1217. Accordingly, the district court's reliance on this data was proper.

(Tribe's Resp. in Opp'n to Summ. J.) ("This lawsuit is predicated upon the Corps' actions in 2008"); *id.* at 26 (Tribe's equal protection claim based on Corps' purported "failure to seek a deviation in July of 2008 * * * and failure to follow the IOP procedures * * * in October, 2008"). The district court took the Tribe at its word and held that, because its claim was limited to events in 2008, it was not barred by *res judicata*. ER Doc. 175 at 5-6. The Tribe's current argument that the district court mischaracterized its claims is therefore untenable.

D. In the alternative, summary judgment is appropriate under "rational basis" review.

When a plaintiff brings an equal protection challenge to a statute or administrative action that classifies people, the court's analysis begins with a determination of the degree of scrutiny to apply. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003) ("*NPCA*"). Classifications based on race or alienage are suspect; they are subject to strict scrutiny and may be upheld only if they serve a compelling governmental interest and are narrowly tailored to further that interest. *Id.* Classifications based on gender are "quasi-suspect" and subject to intermediate scrutiny; they may be upheld only if substantially related to an important governmental objective. *Id.* All other classifications of persons are subject to rational basis review. Under this deferential standard, courts must uphold

the classification "so long as it bears a rational relation to some legitimate end." *Id.* at 1245; *see also Haves*, 52 F.3d at 921-22.

Here, the challenged Corps actions do not involve a classification of persons, and so the Court need not reach the question of what level of scrutiny to apply. To the extent there are any "classifications" here, they are classifications of geographical areas. Such classifications do not implicate the Equal Protection Clause. *Salsburg v. Maryland*, 346 U.S. 545, 551 (1954) ("The Equal Protection Clause relates to equality between persons as such rather than between areas"); *Missouri v. Lewis*, 101 U.S. 22, 31 (1879) (Equal Protection Clause means "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances").

But even if the Corps' actions are analyzed as a classification of persons – the analysis employed by the district court – any such classification does not violate the Equal Protection Clause. Under the district court's reasoning, the relevant classes here are (1) persons who are situated above and below S-12A who are affected by the changes in water level, and (2) all other people. ER Doc. 175 at 10 n.1; *see NPCA*, 324 F.3d at 1244-45 (for purposes of equal protection claim, the relevant classes were (1) persons who had long-term leases to campsites in Biscayne National Park and (2) all other people who wished to enjoy the relevant

area of the Park). Because such a classification is not based on a suspect or quasi-suspect class, this classification is subject to review under the rational basis standard. *NPCA*, 324 F.3d at 1245. And such a classification satisfies the rational basis standard, because operation of the C&SF Project and protection of sparrow Subpopulation A are legitimate government purposes and the classification is rationally related to those purposes. *See NPCA*, 324 F.3d at 1245-46; *Haves*, 52 F.3d at 921-22.

Finally, even if the facts supported the Tribe's assertion that the Corps has classified persons based on whether or not they are members of the Miccosukee Tribe – and the facts do not support that assertion – such a classification would still be subject to review under the rational basis standard. Tribal membership is a political classification, not a racial classification. *Morton*, 417 U.S. at 553 and n.24.

II. The district court properly dismissed the Tribe's FILCSA claim for failure to state a claim.

Count I of the Tribe's complaint alleges that the Corps has "taken affirmative actions that have stopped the flow of water through the Everglades and backed up water onto [the Tribe's] property and flooded the Tribal Everglades, directly contrary to, and without regard to the protected interests of the Tribe that are guaranteed under the Lease Agreement" and FILCSA. ER Doc. 1 ¶ 72; *see also* ¶¶ 75-79. The district court correctly held that this count fails to state a claim upon

which relief may be granted. ER Doc. 37 at 3-5. The Tribe's assertion that the Corps' actions were "unlawful" (Br. at 38) is "a legal conclusion couched as a factual allegation," and is not entitled to the assumption of truth. *See Ashcroft*, 129 S. Ct. at 1950. As described above, the Lease Agreement and FILCSA unambiguously provide that the Tribe's rights in the Leased Area are "subject to and shall not interfere with" the rights and duty of the Corps and SFWMD to "manage, regulate, raise, or lower the water levels within the Leased Area or Water Conservation Area 3[.]" ER Doc. 1, p.37 of 98 (Lease Agreement ¶ 6). The Tribe's assertion that the Corps violated the Lease Agreement and FILCSA by flooding the Leased Area and WCA 3A is thus contrary to the plain language of the Lease Agreement and FILCSA.

The district court was also correct when it held that this claim is flatly inconsistent with two prior decisions holding that the Tribe cannot challenge water levels in the Leased Area or WCA 3A based on the Lease Agreement or FILCSA. ER Doc. 37 at 4-5, discussing Case No. 95-0532, 980 F. Supp. at 461-62, and Case No. 05-23045, 430 F. Supp. 2d at 1336.[24]

The Tribe argues (Br. at 39-50) that the district court's reading of the Lease Agreement and FILCSA produces an absurd result and leaves the Tribe with no

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[24] The district court found that these precedents so clearly bar this claim as to render the claim frivolous. ER Doc. 37 at 4. The district court ultimately did not impose sanctions on the Tribe, however.

meaningful rights. That argument, too, is contrary to the plain language of the Lease Agreement and FILCSA. The Tribe's rights include, among other things, the right to hunt, fish, and take frogs; the right to be compensated for public hunting and fishing; the right to reside in the Leased Area; certain mineral rights; and the exclusive right to offer airboat rides, guide services, and other tourist services in the Leased Area. ER Doc. 1 at pp. 33-36 of 98 (Lease Agreement ¶¶ 3-4). The fact that those rights are subject to the Corps' right to manage water levels does not render those rights "meaningless."

III. The district court properly dismissed the Tribe's due process claim.

In Count II, the Tribe alleges that the Corps' water management actions deprived it of "life, liberty and property without due process of law" by "[stopping] the flow of water through the Everglades and [backing] up excessive amounts of water on Tribal lands." ER Doc. 1 ¶ 82. As the district court correctly found, Count II fails to state a claim upon which relief may be granted. ER Doc. 37 at 6-7. The Tribe lacks a constitutionally-protected property interest in water levels in the Leased Area because, as explained above, the Lease Agreement and FILCSA reserve to the Corps and SFWMD the right to manage those water levels. The Tribe's argument (Br. at 50-53) that it "adequately pled a protected property

interest" and a government deprivation of that interest simply ignores the unambiguous language of the Lease Agreement and FILCSA.

The district court was also correct when it held that Count II is foreclosed by prior decisions holding that, under the Lease Agreement and FILCSA, the Tribe lacks a property interest sufficient to support a due process claim based on water levels in the Leased Area or WCA 3A. *Id*., *citing* Case No. 95-0532, 980 F. Supp. at 463-64, and Case No. 02-22778, Doc. 135, 142.[25] The Tribe's attempt to distinguish those decisions on their facts is unpersuasive.

IV. The district court properly dismissed the Tribe's claim for mandamus.

Finally, Count III seeks mandamus relief to compel the Corps to reduce water levels in the Leased Area. ER Doc. 1 ¶¶ 87-91. Mandamus is an extraordinary remedy that is only appropriate when (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear duty to act; and (3) no other adequate remedy is available. *Cash v. Barnhart*, 327 F.3d 1252, 1257-58 (11th Cir. 2003).

None of those requirements is satisfied here. First, as demonstrated above, the Tribe is not entitled to the relief on any of its substantive claims. Second, as the district court explained, mandamus is only available to enforce a duty that is "clear, ministerial, and non-discretionary." ER Doc. 37 at 8-9, *quoting Kirkland Masonry,*

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[25] Here again, the court found that Count II was frivolous, but ultimately did not impose sanctions. ER Doc. 37 at 6.

Inc. v. C.I.R., 614 F.2d 532, 534 (5th Cir. 1980); *see also Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004). Here, the Corps' management of water levels is a quintessential example of action that involves discretion and the exercise of judgment, and is thus not subject to mandamus. And third, the Administrative Procedure Act provides an alternative remedy for claims concerning the Corps' management of water levels. 5 U.S.C. § 706(1).[26] Accordingly, the Tribe's mandamus claim fails to state a claim upon which relief may be granted.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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[26] As with mandamus, APA § 706(1) empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* the agency shall act. *Norton*, 542 U.S. at 64.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C)

I certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 12,978 words.

Mark R. Haag

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2011, copies of the foregoing Brief for Appellees were served by overnight delivery upon counsel at the addresses listed below:

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