2010 WL 5622419 (C.A.11) (Appellate Brief)
United States Court of Appeals, Eleventh Circuit.

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, Defendants-Appellees.

No. 10-14271-E.
November 15, 2010.

Appeal from the United States District Court for the Southern District of Florida Case No. 1:08-cv-23001-KMM

Initial Brief of Appellant Miccosukee Tribe of Indians of Florida

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*C-1 *CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT*

Pursuant to F.R.A.P 26.1, and Eleventh Circuit Local Rule 26.1, Appellant, the Miccosukee Tribe of Indians of Florida, hereby certifies that the following parties are, or may be, interested persons within the meaning of Local Rule. 26.1-1.
Bair, Ty

Barsky, Seth

Brooks, Kelly

Brown, Mark A.

Geren, Pete, Secretary of the Army

Gerstin, Ari

Gresko, John B.

Grosskruger, Paul, Col., District Engineer, Jacksonville District, Corps of Engineers

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Lehtinen Riedi Brooks Moncarz, P.A.

Martinez, Jose E. Judge

Miccosukee Tribe of Indians of Florida

***C-2** Moore, Brooks W.

Moore, K. Michael Judge

Moncarz, Felippe

Mukasey, Michael

Nicholson, Allene D.

O'Donnell, Sonia

Passarelli, Edward J.

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Sharpstein, Janice

Simonton, Andrea M. Judge

Stimmel, Anna K.

Tenpas, Robert J.

United States of America

United States of America Army Corps of Engineers

Van Antwerp, Robert, Lt. Col., Chief Engineer, U.S. Army Corps of Engineers

Williams, Jean

*I *REQUEST FOR ORAL ARGUMENT*

Appellant Miccosukee Tribe of Indians of Florida ("Tribe") respectfully requests oral argument because it may assist the Court in understanding the facts and issues in this case. The case involves interpretation of various agreements and requires analysis of numerous exhibits and depositions submitted by the Tribe in support of its Summary Judgment Response.

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***1** *STATEMENT OF JURISDICTION*

This is an appeal from final orders that disposed of all the parties' claims, and this Court has jurisdiction over this appeal under 28 U.S.C. § 1291. The Tribe invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, 28 U.S.C. § 1361, and 28 U.S.C. § 1362. Doc1-pg-8. On September 16, 2009, the district court issued an order dismissing three of the Tribe's four claims (Doc37), and on July 12, 2010, the district court granted summary judgment to the defendants on the Tribe's remaining claim (Doc175). The Tribe timely filed a notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B). Doc176.

*2 *STATEMENT OF THE ISSUES*

1. Whether the district court erred in entering summary judgment against the Tribe on its equal protection claim based on a misapplication of the law and misinterpretation of the evidence, and despite abundant record evidence showing genuine issues of fact remained in dispute.

2. Whether the district court erred in dismissing the Tribe's Florida Indian Land Claims Act claim based on the court's unreasonable interpretation, which leaves the Tribe with no meaningful rights under the agreement.

3. Whether the district court erred in dismissing the Tribe's due process claim when the Tribe adequately pled a property interest under the due process clause.

4. Whether the district court erred in dismissing the Tribe's request for mandamus relief when the Tribe adequately pled facts supporting its entitlement to such relief.

*3 I. *STATEMENT OF THE CASE*

A. Course Of Proceedings And Disposition In The Court Below

On October 28, 2008, the Miccosukee Tribe of Indians of Florida ("Tribe") filed a Complaint against Defendants United States of America, U.S. Army Corps of Engineers, and various members of the Army Corps of Engineers in their official capacities (collectively the "Corps") for: Count I, Violation of Plaintiff's Rights under the Florida Indian Land Claims Settlement Act ("FILCA"); Count II, Violation of Plaintiff's Due Process Rights; Count III, Mandamus Action for Defendants' Ongoing Violation of Plaintiffs' clear legal, constitutional, and contractual rights; and Count IV, Violation of Plaintiff's Equal Protection Rights. Doc1. The allegations stemmed from the Corps' ongoing water management actions in connection with the Central and Southern Florida Project for Flood Control and Other Purposes ("C&SF Project"), which directs water from Lake Okeechobee southward to the Everglades, including Tribal lands, through a series of canals and structures. *Id.*-pg-30. This includes the S-12 gate structures located north of Everglades National Park and south of Tribal lands in the area known as Water Conservation Area 3A ("WCA-3A") along Tamiami Trail, and the L-29 canal and levee. *Id.*-pg-9.

***4** On September 16, 2009, the court entered an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss ("Dismissal Order"). Doc37 (dismissing Counts I-III of the Complaint; the Tribe's Count IV remained).

In dismissing Counts I-III and finding the claims frivolous, the district court did not issue an order to show cause why sanctions should not issue, but rather, predetermined sanctions and invited Defendants to file a motion for attorneys' fees on Counts I and II pursuant to Fed. R. Civ. P. 11(b). Doc37-pgs-4, 6, 9. Defendants filed the motion, Doc40, and the Tribe responded that the motion lacked merit and did not comply with Rule 11 procedure. Doc46. Shortly thereafter, Defendants withdrew their attorneys' fees request. Doc59. The withdrawal of the Rule 11 motion occurred subsequent to the Tribe's appeal of the court's sanctions ruling, dismissed by this Court for lack of jurisdiction as an appeal from a non-final order. *See* Appeal No. 09-15858-BB, Order issued January 4, 2010 (11th Cir.). On April 29, 2010, Defendants filed a Motion for Summary Judgment. Doc134. On May 24, 2010, the Tribe filed its Response with numerous exhibits, many of them composite exhibits. Docs144, 145.

On July 12, 2010, the district court entered an Order Granting Defendants' Motion for Summary Judgment ("Summary Judgment Order") on the Tribe's equal protection claim. Doc175. The court denied Defendants' arguments that *res* ***5** *judicata* barred the equal protection claim and that the Tribe lacked standing. Doc175-pgs-4-6.

On September 9, 2010, the Tribe filed a timely notice of appeal of both the Dismissal and Summary Judgment Orders. Doc176. Defendants did not cross-appeal.

B. Statement Of Facts

The Miccosukee people, consisting of both Tribal members and ethnic Miccosukee Indians, are descendants of Miccosukee Indians forced from their homes by the United States government into North Florida, and ultimately into the Everglades, where those who escaped hid in tree islands to survive the federal government's actions displacing Indians. Doc144-pgs-6, 11-13. The surviving Miccosukee people were forced to make their home at the edge of Everglades National Park, including in WCA-3A. *Id*. The Tribe in this case represents all Miccosukee people aggrieved by the Corps' conduct and is suing on behalf of a racial minority and suspect class of Native Americans, not a political class. *Id*.-pg-6.

The Miccosukee Indians are the only ethnic group whose members live on lands leased in perpetuity in WCA-3A. Doc144-pg-6, Doc144-1¶35. The same is true of the residents of the Miccosukee Reserved Area ("MRA") located downstream from the S-12 structures. Doc144-pg-6, Doc144-1¶17. At issue here ***6** is the flooding of Tribal lands due to the Corps maintaining dangerously high water levels, and the safety and health issues relating to the levee. The Complaint alleges that the Corps' actions violated the Tribe's rights under certain agreements, as well as the Miccosukee people's equal protection and due process rights, by its discriminatory flooding of Tribal lands compared with similarly situated non-Indian lands. *See* Doc1.

In 1982, the Tribe entered into a Perpetual Lease Agreement ("Lease") with the State of Florida. Doc1, Ex.A. Among the purposes of the Lease was the parties' desires "to continue and expand [their] cooperative efforts" to protect the Everglades. *Id*.-pg-3. The Tribe "requested assurance that its rights shall not be subject to unilateral revocation by the State so that members of the Tribe and their descendants may be assured of the continued use of their traditional homeland." *Id*. The stated purpose of the Lease is: "(1) to preserve the Leased Area in its natural state for the use and enjoyment of the Miccosukee Tribe and the general public, as herein specified; (2) to preserve fresh water aquatic life, wildlife, and their habitat; and (3) to assure proper management of water resources." *Id*.¶3(e). The Lease was entered as part of the settlement of a lawsuit then pending between the Tribe and the State of Florida, which involved claims to land rights in the Everglades. *Id*.-pg-3.

7** Among those rights given the Tribe under the Lease were: hunting, fishing, frogging, subsistence agriculture, and the right to reside in the Leased Area and take and use native materials. *Id*.¶3. The Tribe's rights and use of the Leased Area were subject to "lawfully*** enacted rules and regulations of the SFWMD, both presently existing and those which may be promulgated in the future, and with all future laws and regulations ***not inconsistent with the rights granted the Miccosukee Tribe under this Lease Agreement***." *Id*.¶5 (emphasis added). The Lease provides that the Tribe's rights "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 [C&SF], conveyances, easements, grants, rules, statutes, or any other present or future ***lawful authority to manage, regulate, raise, or lower water levels within the Leased Area or [WCA-3A]***." *Id*.¶6 (emphasis added). The Lease further states that it "shall not be terminated...without consent of the Miccosukee Tribe, or with respect to any portion of the Leased Area, unless for a public purpose upon payment of just compensation[.]" *Id*.¶8.

The Lease was referenced in the Settlement Agreement between the Tribe and Defendants in *Miccosukee Tribe of Indians of Florida v. State of Florida*, No. 79-253-Civ-JWK. The Settlement Agreement noted that "settlement of this litigation could not have been reached unless the Agreement included a grant of a leasehold interest in certain lands to the Miccosukee Tribe[.]" Doc1, Ex.B-pg-2. ***8** Like the Lease, the Settlement Agreement noted the Tribe's rights, and referenced and attached the Lease. *Id*.-pg-3. As consideration for the Lease, and in settlement of its land claims, the Tribe gave up substantial rights, including relinquishment of its claims to aboriginal title to the lands in question, and claims of right and/or title to approximately 5 million acres of land. *Id*.¶3(c). These agreements culminated in a Trustees' Deed given to the United States to hold the land in trust for

the Tribe (Doc1, Ex.C.), and were approved by Congress and incorporated into the FILCA, 25 U.S.C. § 1741 *et seq.* (the Lease, Settlement Agreement, Trustees' Deed and FILCA are collectively referred to as "Agreements").

The Tribe gave valuable consideration in exchange for its rights under the Lease, and Defendants received the right to perform lawful and proper water management activities on the leased lands that did not interfere with the Tribe's rights. Defendants, however, have treated the Agreements as granting all rights to Defendants and no rights to the Tribe. For over a decade, Defendants' actions have violated the Tribe's rights by conducting water management activities that needlessly and unlawfully flooded Tribal lands and prevented the Tribe from exercising its rights under the Agreements. These actions have caused water to be much higher for a longer period of time than when the Tribe signed the lease in 1982. Doc1¶¶42, 45. It is undisputed that the S-12 gates are the main discharge structures that allow water to leave WCA-3A. Doc144-pg-14. Since 1998, ***9** Defendants have ignored the original regulation schedule by keeping the S-12 gates that allow water to leave WCA-3A closed, by failing to maintain the vegetation in WCA-3A, and by failing to keep the culverts and S-12 structures free from debris and vegetation, thereby causing dangerously high and damaging water conditions on the Tribe's land. Doc1¶¶42-44, 49, 57, 64, 65, 72. Further, in 2008, in violation of their own regulations, Defendants failed to open the S-12A gate on the scheduled date, despite water levels on Tribal lands which exceeded the regulation schedule, and instead kept the gate closed an additional nine days. *Id*.¶¶54-57; Doc144-pgs-14, 16. Keeping the gates closed in July 2008 led to dangerously high and destructive water levels that occurred in WCA-3A in the fall of 2008. Doc144-pgs-14-16.

The Miccosukee people are the only people living and engaging in subsistence agriculture and religious and cultural activities in WCA-3A. Doc144-pg-7. The Miccosukee people also use WCA-3A for educational purposes to teach their children about their history, religion, and culture. *Id*. The Miccosukee people use tree islands to live, preserve customary housing, preserve tradition, grow herbal medicines used for religious and medicinal purposes, and preserve landmarks of historic significance to the Tribe's survival. *Id*.

The Corps and its employees are fully aware of the cultural and religious significance of these Tribal lands and of the tree islands, and that despite such ***10** knowledge, the Corps continues to destroy Tribal lands, including traditional homes (chickees) located on the tree islands in WCA-3A. *Id*. The Miccosukee people shoulder a disproportionate impact from the Corps' flooding activities compared to non-Indians, including exposure to imminent danger of catastrophic consequences to health and safety to the Miccosukee people who live immediately downstream, caused by the Corps' improper "stacking" of water in WCA-3A. *Id*. In addition, high water levels have flooded tree islands, killed native species and hardwoods, destroyed Miccosukee traditional homes and crops, and endangered indigenous animals and vegetation. Doc144-pg-10. Unlike the extensive damage suffered on Tribal land, the Corps' actions have not similarly destroyed, damaged or degraded the land or natural resources of non-Indians in Miami-Dade County or in Everglades National Park. *Id*.-pg-9.

The Corps' actions since 1998 have ignored the original regulation schedule which was in effect when the Tribe signed the Lease, Doc144-pg-9, and despite knowing the significant consequences of permitting water levels exceeding this cap, the Corps continually took actions which did just that. *See id*.-pg-10 ("Since 1998, the number and duration of high water events in WCA-3A has been significantly greater than at any time during the previous 40 years").

Additionally, the historical background and sequence of events that led to filing the lawsuit support the Tribe's claim of disparate impact and intentional ***11** discrimination against the Miccosukee people. Doc144-pgs-11-15. These events include, among other things, the Corps' decision to keep the S-12A gates closed nine days past the July 15, 2008 deadline without seeking the required deviation from the regulation schedule and the Corps' failure to respond to the Tribe's request not to close the gates on November 1, 2008, due to high water levels creating a situation that the Tribe informed the Corps was dire and threatened the health and safety of Tribal members. Doc144-pg-14. In contrast to the Corps' unilateral denial of the Tribe's request (which violated procedure requiring the Colonel to personally consult the Tribe's Chairman prior to making a decision), the Corps promptly handled requests from non-Indians according to the required procedure, considered most of them immediately, and

most significantly, approved them. *Id*. Requests by the Tribe were repeatedly denied. *Id*.-pg-15. In anticipation of the Tribe's 2009 request, the Corps actually pre-drafted a fill-in-the-blank letter denying the Tribe's request prior to the Corps even receiving a request from the Tribe. *Id*. Thus, in addition to presenting evidence that the Corps routinely denied the Tribe's requests, the Tribe also presented evidence that the Corps had no intention of considering the Tribe's future requests under proper procedures, or of granting any such request. *Id*.

The record evidence shows that the Corps departed from normal procedural sequences by failing to seek the required deviation from the regulation schedule ***12** and failing to heed its own General Design Memorandum ("GDM") for WCA-3A (1960), stating that one of the factors for establishing the regulation schedule and levee heights is retention of marsh vegetation, and that if loss of vegetation causes large areas of open water to develop, "the increased size of potential hurricane-induced wind tides would necessitate the construction of prohibitively costly levees." Doc144-pg-16. The Corps, which had built a lower levee on the theory that marsh vegetation would be maintained, did not ultimately ensure maintenance of the vegetation. *Id*. Thus, the density of marsh vegetation in WCA-3A was dramatically reduced, increasing the risk during a storm or hurricane. *Id*. Corps documents predict storm surges up to 24 feet during a hurricane -- 10 feet above the levee height. *Id*.-pgs-16-17.

The Tribe also presented evidence that, although water levels did rise in 1994 and 1995 without the levee breaking, *the S-12 gates were wide open* during that time. *Id*.-pg-17. Furthermore, at the time the Corps rejected the Tribe's request in October 2008, water levels were between 11.6 and 11.8 feet, exceeding the Corps' own engineering cap requiring S-12 structures to be open when water levels exceed 11.25 feet to prevent an unacceptable risk of catastrophic failure and loss of human life. *Id*. (citing the Corps' 1999 Final EA).

Additionally, the Corps knew and reasonably foresaw the discriminatory impact its actions would have on the Miccosukee people. Moreover, there were ***13** less discriminatory alternatives to flooding which the Corps rejected, and the Corps' stated reason of protecting the Cape Sable Seaside Sparrow ("Sparrow") was pretextual. Doc144-pg-18-21. Specifically, the Corps refused to fund a $117,000 proposed study to analyze levee strength in WCA-3A despite concern of John Zediak (the Corps' own witness) about the impact of wind and wave action on the safety of WCA-3A and despite documented data on the risk of catastrophic loss to the Tribe and its members. *Id*.-pg-18. In contrast, the Corps spent millions to analyze the safety of the Herbert Hoover Dike on the south end of Lake Okeechobee based on concerns for the health and safety of non-Indians and non-Indian land. *Id*.

Moreover, the Corps had alternatives to flooding the Tribe. *Id*.-pg-19. In particular, when the FWS first declared jeopardy on the endangered Sparrow, it suggested a Reasonable and Prudent Alternative ("RPA") that was not expected to have an adverse impact on WCA-3A and attendant Tribal lands. *Id*. The Corps rejected this alternative and chose to flood Tribal lands to avoid flooding private property of non-Indians, through a sequence of water management plans that closed the S-12 gates and flooded Tribal lands. *Id*. Then, in 2002, the Corps asked the FWS to remove the RPA that would have required the Modified Water Deliveries Project, a restoration project that would have alleviated flooding to Tribal lands to be completed by 2003. *Id*. Rather than complete the restoration ***14** project, the Corps continued to close the S-12 gate and flood Tribal Everglades and WCA-3A. *Id*. The Corps never even attempted to find alternatives to flooding WCA-3A. *Id*.

Finally, the Tribe presented evidence to rebut Defendants' argument on Summary Judgment regarding the Sparrow population. Doc144-pgs-20-21. The Tribe showed that the entire Sparrow population (more than 3, 000 *non*-indigenous birds) now far outnumbers the entire indigenous Everglade Snail Kite population (685 birds, which are negatively impacted by the Corps' flooding), and that the National Academy of Sciences concurs that the Corps has not helped the Sparrow, and that it has harmed both Tribal tree islands and the Everglade Snail Kite. *Id*.-pg-20. Furthermore, evidence upon which the Corps relies as an excuse for flooding the Tribe has been found "invalid" by a panel of Avian experts. Even the FWS itself rejected designation of the western area of the Park as critical habitat for the Sparrow because science indicated the area should be wetter than the Corps

currently keeps it. *Id*. Thus, the Corps' conduct risking catastrophic consequences to the Miccosukee people actually results in keeping the Sparrow dryer than it would be naturally. *Id*.-pgs-20-21.

***15 C. Standard Of Review**

1. This Court reviews *de novo* the district court's grant of summary judgment. *Fanin v. U.S. Dep't of Veterans Affairs*, 572 F.3d 868, 871-72 (11th Cir. Cir. 2009). Summary judgment is proper only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. at 872. The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party. *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1211 (11th Cir. 2010).

2. This Court reviews *de novo* an order granting a motion to dismiss, applying the same standard as the district court. *Sec'y of Labor v. Labbe*, 319 F. App'x 761, 763 (11th Cir. 2008). In so doing, the Court must accept as true all allegations in the Complaint and construe them in the light most favorable to the Plaintiffs. *Id*.

16 *SUMMARY OF ARGUMENT

The district court erred in granting Defendants' Motion to Dismiss the Tribe's claims in Counts I-III and in granting Summary Judgment on Count IV.

In entering summary judgment against the Tribe, the court disregarded evidence which clearly showed disputed issues of fact. The court improperly dispensed with the central issue concerning Defendants' decision to keep the S-12 gates closed nine days beyond the deadline, incorrectly concluding that Defendants' actions had a *de minimus* impact on water levels. The court should have considered the Tribe's evidence of disparate impact and circumstantial evidence of discrimination as evidence of the Corps' discriminatory intent. Instead, the court improperly created its own evidence by conducting its own “expert” analysis, which was not based on record evidence. Furthermore, the court recognized that the Corps' failure to follow procedure requiring consultation with the Tribe's Chairman supported the claim that the Corps' actions were racially motivated. Yet, the court resolved this issue in favor of the Corps on summary judgment.

The district court also misconstrued evidence and entered summary judgment despite disputed issues of fact concerning the Tribe's claims that closing the S-12 with water levels in WCA-3A above the 11.25 safety cap had a disparate impact on the Miccosukee people by placing them at disproportionate risk of levee ***17** failure. The court improperly dismissed those arguments simply by finding that the Corps disagreed. But that is precisely what makes it a disputed issue of fact. The court also erroneously found that the record contained no evidence of a less discriminatory alternative. Just the opposite is true. The Tribe provided evidence of a less discriminatory alternative, which was also a material issue of disputed fact.

The court also misapplied the equal protection analysis required by this Circuit. Proof of the Corps' discriminatory actions may rely on a pattern or practice of discrimination and need not identify an intentional or malevolent act. The Tribe need only establish that the Corps was motivated *in part* by a discriminatory purpose. The court, however, required the Tribe to prove Defendants were motivated solely by a discriminatory purpose by relying on the Corps' stated reasons for its conduct to disregard the Tribe's contrary evidence. Moreover, with respect to discriminatory intent, the court may consider evidence of disparate impact, as well as circumstantial evidence of historical background, sequence of events, departure from normal sequences and other similar factors. Here, however, the court did not allow for such consideration even though the Tribe satisfied its burden. The court, instead, narrowed its equal protection analysis to conduct occurring in 2008, despite the historical context, and despite evidence that the Corps' ongoing discriminatory actions have spanned over a decade.

***18** The court also erred in dismissing the Tribe's claims under Agreements which guaranteed the Tribe's rights, and under the due process clause of the Constitution. The court's decision essentially concludes that the Tribe relinquished its aboriginal rights in exchange for no meaningful rights. The language of the Agreements does not support this interpretation, the interpretation ignores fundamental rules of contract law, and such a conclusion would render the Agreements void and unenforceable. Finally, because the Tribe pled a sufficient property interest, the court also erred in dismissing its due process claim.

19** ***ARGUMENT

I. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE TRIBE'S EQUAL PROTECTION CLAIM BECAUSE GENUINE ISSUES OF MATERIAL FACT REMAINED IN DISPUTE

This Court reviews *de novo* the district court's grant of summary judgment. *Fanin*, 572 F.3d at 871-72 (citing *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1363 (11th Cir. 2007)). Summary judgment is proper only if "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)); Fed. R. Civ. P. 56(c)). The court should grant summary judgment only "when there is 'a complete failure of proof concerning an essential element of the nonmoving party's case.' " *Id.* (citing *Celotex*, 477 U.S. at 322-23). The Court "must view all evidence and draw all reasonable inferences in favor of the non-moving party." *Harrison*, 593 F.3d at 1211 (citation omitted). The trial court at this juncture should not "weigh the evidence and determine the truth of the matter but [ ] determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[B]ecause summary judgment is a drastic remedy, courts should grant it with caution so that no person will be deprived of his or her day in court to prove a disputed material factual issue." *Greenberg v. F.D.A.*, 803 F.2d 1213, 1216 (D.C. Cir. 1986).

***20 A. The Court Erroneously Disregarded The Tribe's Evidence Concerning Issues Of Disputed Fact And Failed To Construe Evidence In The Light Most Favorable To The Tribe**

i. The court improperly dispensed with the central issue of the Corps' decision regarding water levels in WCA-3A by concluding its impact was "*de minimus*" based on calculations made *sua sponte* by the court for the first time in its Summary Judgment Order

The factual issue at the heart of this case, whether the Corps' closing of the S-12 gates caused higher water levels and resultant harm on Tribal lands in WCA-3A, was not properly resolved by the district court and should have precluded summary judgment. Rather than confronting the Tribe's evidence of flooding directly, the district court dispensed with the issue by concluding, contrary to record evidence, that Defendants' actions had a *de minimus* impact on water levels. Doc175-pgs-17, 22, 26-27. The court decided this factual issue in favor of Defendants despite abundant evidence to the contrary. Doc144-pgs-4, 9-11, 16; Doc144-1¶¶21, 26, 84. The Tribe's evidence of disparate impact should have been considered under Eleventh Circuit precedent as evidence that the Corps acted "because of" a discriminatory motive. Direct evidence of a discriminatory motive is not required, and is in fact uncommon in equal protection challenges to discriminatory application of facially neutral rules. *See Jean v. Nelson*, 711 F.2d 1455, 1485 (11th Cir. 1983).

***21** Moreover, in deciding this disputed issue of fact at the summary judgment stage, it appears that the district court performed its *own* engineering analysis, which the Tribe has been unable to locate anywhere in the record. Doc175-pgs-17n.14, 26n.21. Based on its calculations, the court concluded that the gate closures had a *de minimus* impact on water levels. *Id.*-pg-17. Because the court presented these calculations for the first time in its Summary Judgment Order, the Tribe did not have an opportunity to challenge their validity or present its own evidence on this issue. Thus, based on the declaration of Sean Smith, who was not Defendants' 30(b)(6) representative, and on *sua sponte* calculations of unknown origin, the district court rejected record evidence and testimony that demonstrated high water levels had a significant impact on the Tribal lands. [1] As was the case

throughout the Summary Judgment Order, the court failed to properly apply the summary judgment standard, and instead, went out of its way ***22** to present its *own* evidence as grounds for resolving disputed issues in favor of the moving party. [2]

The court acknowledged that the Corps failed to follow procedure when it rejected the Tribal Chairman's request to keep the S-12A gates open in November 2008. The court found: "[T]he District Commander's apparent failure to consult with the Tribe as required lends some additional support to the proposition that the Corps' decision to close the S-12A gate was based on a racial purpose or object or is unexplainable on grounds other than race." Doc175-pgs-23-24. Yet, despite the court's recognition that this supported an inference of discriminatory intent, the court resolved this issue in favor of the Corps.

The court also failed to resolve the issue of the Corps' 2009 draft letter, preemptively denying the Tribe's request to keep the gates open in 2009, in favor of the Tribe. Doc175-pgs-25-26. The court construed the issue in favor of Defendants, finding that the evidence showed "that the Corps was considering the merits of the Tribe's anticipated request." Doc175-pg-25. To the contrary, this draft letter showed that the Corps had no intention of considering the merits of a request from the Tribe - regardless of what it said, it would be denied.

***23** Defendants also disputed that closing the S-12 gates under IOP caused high water in WCA-3A, despite the Tribe's evidence that IOP operations contributed to high water and habitat degradation there. [3] Doc144-pg-4. Defendants' own document showed that 184, 320 acres of Tribal Everglades was damaged each year that water exceeded 10.5 feet under IOP, and that this had occurred every year from 1998 through 2008, except for 2007. Doc144-pg-9. The evidence showed that in 2008 (the year of the events which prompted this lawsuit), water levels in WCA-3A reached 11.92 feet, the highest level to date. Doc144-pg-16. Photographic evidence of high water in WCA-3A in Fall 2008, exacerbated by the July 2008 gate closings, was substantiated by Everglades National Park Superintendant Dan Kimball, who admitted that closing the S-12 gates causes higher water in WCA-3A. Doc144-1¶21 (citing Ex.A-11-pgs-18-19). The Tribe's expert disputed Defendants' contention that closing the S-12A gates in November 2008 did not constitute a safety risk, or that the same amount of water could have been removed from WCA-3A with the S-12A closed. Doc144-1-¶44. The Tribe's evidence further showed that keeping S-12A open, contrary to the court's conclusion, would have allowed more water to leave. *Id*.

***24** The district court also ignored testimony from the Tribe's expert biologist, Dr. Ronald Jones, and expert hydrologist and former Commander of the Corps, Colonel Terry Rice, that the sustained high water levels and damage caused to WCA-3A was due to the closing of the S-12 gates. Doc144-1¶21 (higher water levels and damage to Tribal lands is tied to the gate closings). Dr. Jones further testified that 55 more tree islands have been lost due to high water in recent years. Doc144-pg-10 (citing Ex.D-2¶8). Even the Corps' own Rule 30(b)(6) representative, John Zediak, testified that the dangerously high water levels in October 2008 were exacerbated by the Corps' keeping the S-12A gates closed beyond July 15, 2008. Doc144-pg-16 (citing Ex.A-19-pgs-200, 201, 233). In concluding, despite this evidence, that keeping the S-12A gates closed an additional nine days in July 2008 had a limited impact, and that leaving them open in November 2008 would also have a limited impact, the district court failed to apply the standard that genuine issues of fact in dispute *require* denial of summary judgment.

ii. The court failed to resolve the issue of whether S-12A gate closures endangered the Tribe by placing Tribal members at disproportionate risk of catastrophic levee failure in favor of the Tribe

The district court failed to resolve the disputed issue of whether closing the S-12A gates with water levels in WCA-3A above the 11.25 feet safety cap had a disparate impact on the Miccosukee people by placing them at disproportionate ***25** risk of L-29 levee failure. Rather than focus on the L-29 levee around WCA-3A, which the 11.25 feet limit was supposed to protect from failure, the district court concluded that the Corps disagreed that 11.25 feet was an appropriate engineering cap. Doc175-pg-21. The fact that the Corps disagrees with the Tribe's evidence only shows that summary judgment against the Tribe was inappropriate and that material issues of fact remained in dispute.

The Tribe provided abundant evidence that its concerns related to the failure of the levee and not the S-12 structures. Doc144-pg-17n.21. The Tribe also disputed that Defendants' *post hoc* "analysis" could substitute for a safety cap established in a formal Corps' document, which was subject to public comment and review. Doc144-pgs-17-18. The district court notes the absence of evidence regarding the Corps' knowledge of structural limits of the L-29 levee, and that the Corps nevertheless decided to close the S-12A gates without this information. Doc175-pgs-22-23. The court also notes that "it is unclear if the Corps knows what the maximum water level is that the L-29 levee can support," and that Corps witnesses testified they were "unaware of any safety analysis concerning the integrity of the L-29 levee." *Id*.-pg-22. [4] These facts show only ***26** that the Corps was willing to endanger the Miccosukee people without bothering to determine whether its actions (which were contrary to procedure and recommended levels) would result in levee failure.

The district court's aside that the Corps' reliance on historical water levels as a basis for concluding the levee was structurally stable "does not seem to be a prudent way to prevent disaster" will be of no comfort to the Miccosukee people who live in the shadow of the L-29 levee if it should break as a result of the Corps' discriminatory actions. [5] Doc175-pg-22. The court's acknowledgement of the Corps' reckless behavior, risking (in the court's own words) "disaster" to the Tribe, should have supported an inference that the Miccosukee people were treated differently from non-Indians, whose lives the Corps has not recklessly endangered in this manner. [6] The court, therefore, should not have granted summary judgment in favor of Defendants.

***27 iii. The court erroneously found that the record contained no evidence of a less discriminatory alternative**

The district court erroneously concluded that there was "no evidence that there was a less discriminatory alternative, particularly given the strong nexus between the extended closure of the S-12A gate and the protection of the Sparrow, as well as the de minimus impact the extended closure had on water levels in WCA 3A." Doc175-pg-19. Contrary to the district court's ruling, the Tribe provided evidence that the Corps had rejected a less discriminatory alternative suggested by the FWS. Doc144-pgs-5, 19. The Tribe further supported its claim of disparate treatment with evidence that the Corps never even attempted to provide relief from flooding in WCA-3A until non-Indians made the request. *Id*.-pg-5. Thus, the district court's conclusion that the record contained no evidence of a less discriminatory alternative is wrong, and does not support entry of summary judgment against the Tribe. [7]

***28** The Tribe also presented evidence refuting the Corps' assertions that a deviation was not required when the Corps kept the S-12A gates closed an additional nine days in July 2008, that the Corps was following the Rainfall Plan, and that the Corps had authority to keep the gates closed for Sparrow nesting after July 15th. Doc144-1¶¶60, 62. This dispute should have precluded summary judgment. Instead, the district court decided that even if the Corps' interpretation was wrong and it was actually required to seek a deviation, the error was reasonable and not the type of procedural defect supporting an inference of discrimination. Doc175-pgs-15-16. The Tribe should have been given the opportunity to litigate this issue. Additionally, the Tribe presented evidence refuting that a made-for-litigation document relied on by Defendants that was solely related to the S-12 gates, changed the 11.25 safety cap the Corps' had previously found was necessary to maintain the integrity of the L-29 levee, which was contained in a formal Corps document. Doc144-1¶69.

***29 B. The Court's Summary Judgment Order Misapplies The Equal Protection Analysis Required By Binding Authority**

The district court erred in interpreting applicable precedents to the Tribe's equal protection claim. The Equal Protection Clause of the Fourteenth Amendment guarantees that the government shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. This guarantee applies to the federal government through the Fifth

Amendment. *Davis v. Passman*, 544 F.2d 865, 868 (5th Cir. 1977) (due process clause of the Fifth Amendment "contains an equal protection component applicable to the federal government"). The equal protection analysis under the Fifth Amendment is therefore, "the same as that under the Fourteenth Amendment." *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

The Equal Protection Clause is "universal in [its] application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886). Thus, all persons within the United States "have the same right...to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens." *Id*. To that end, the equal protection guarantee applies equally to discriminatory enforcement of a law, as it does to the law itself. *See United States v. Falk*, 479 F.2d 616, 618 (7th Cir. 1973) ("The promise of equal protection of the laws is not limited to the enactment of fair and impartial ***30** legislation, but necessarily extends to the application of these laws."). As the Supreme Court explained:

> Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Yick Wo, 118 U.S. at 373-74; *see Williams v. Illinois*, 399 U.S. 235, 242 (1970) (citing *Griffin v. Illinois*, 351 U.S. 12, 17 n.11 (1956)) ("a law nondiscriminatory on its face may be grossly discriminatory in its operation").

Proof of the Corps' discriminatory actions may "rely on a pattern or practice of discrimination or arbitrariness and need not identify an intentionally discriminatory act or a malevolent actor in the defendant's particular case." *Jurek v. Estelle*, 593 F.2d 672, 685 n.26 (5th Cir. 1979) (citations omitted). Furthermore, because "legislative and administrative actions are rarely motivated by one purpose only," the Tribe need only establish that the challenged decision was "motivated in part by a discriminatory purpose," regardless of whether other reasons may have also motivated the action. *Jean v. Nelson*, 711 F.2d 1455, 1485 (11th Cir. 1983) ("Plaintiffs need not prove a discriminatory purpose was the primary, or dominant purpose, but must show that the action taken was, at least in part, 'because of,' and not merely 'in spite of' its adverse effects upon an identifiable group") (internal ***31** citations omitted).

In *Jean*, the Eleventh Circuit recognized that "the very nature of legislative and administrative action makes it difficult to ascertain the 'intent' of the acting body." *Jean*, 711 F.2d at 1485. Thus, the Eleventh Circuit provided examples of both circumstantial and direct evidence that could be used to prove intentional discrimination (that is, all of this evidence may be used to prove that Defendants' actions were motivated "because of" race, and that when similar decisions involved non-Indians and non-Indian land, the Corps treated non-Indians differently). *Id*. (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977)). First, the court may consider evidence of discriminatory impact, which means that "the challenged activity 'bears more heavily on one race than another.' " *Id*. Second, "where proof of impact alone is insufficient, where a stark pattern of discrimination is not evident, the courts should consider circumstantial evidence." *Id*. at 1485-86. Such circumstantial evidence includes, without limitation: (1) historical background of the decision, (2) the specific sequence of events leading up to the challenged decision, (3) departures from the normal procedural sequences, as well as substantive departures, (4) legislative or administrative history, (5) foreseeability of discriminatory impact, (6) knowledge of discriminatory impact, and (7) availability of a less discriminatory alternative. *Id*.

***32** Once the Tribe has presented a prima facie case, as it has here, the burden shifts to Defendants "to dispel the inference of intentional discrimination." *Id*. at 1486 (citing *Castaneda v. Partida*, 430 U.S. 482, 497 (1977)). The quantum of proof required from Defendants remains undefined by the Supreme Court, however, the "defendant must introduce evidence to support its explanations"; "mere protestations of lack of discriminatory intent and affirmations of good faith will not suffice to rebut the

prima facie case." *Id*. Thus, only if Defendants successfully rebut the Tribe's prima facie case should this Court then weigh and evaluate the evidence to determine whether the Tribe proved, "by a preponderance of the evidence, that defendant's actions were taken in part because of a discriminatory intent or purpose." *Id*. Based on the foregoing, the court's equal protection analysis was incorrect.

i. The court erroneously narrowed its equal protection analysis to Defendants' conduct in a single year, when it was required to consider evidence of Defendants' pattern or practice of discrimination against the Tribe

In its Summary Judgment Order, the court erroneously limits its equal protection analysis to the Corps' actions in 2008. The court states: "The Tribe's equal protection claim is limited to the challenged conduct that occurred in 2008. Thus, no prior conduct will be construed as forming the basis of the Tribe's equal protection claim." Doc175-pg-10n.8. Although the court references the Eleventh Circuit's requirement that such evidence is properly considered: "To the extent the ***33** Corps' water management actions since 1998 have relevance as part of the sequence of events leading up to the challenged conduct that occurred in 2008, they may be considered in determining whether the Corps acted with a racial purpose or object," *id*. (citing *Jean*, 711 F.2d at 1485), the court's Summary Judgment Order ultimately does not consider such evidence:

> The Miccosukee Tribe contends that the Corps has flooded WCA 3A for the purpose of protecting non-Indian lands from flooding. As stated above, this assertion must be limited to the Corps' challenged conduct relevant to its decisions to postpone opening the S-12A gate from July 15, 2008, to July 24, 2008, and its refusal of the Tribe's request to leave the S-12A gate open after November 1, 2008.

Id.-pg-10; *see id*.-pg-19n.15 ("The bulk of the Tribe's arguments... refer to conduct dating back to 1998. The limitation of the Tribe's equal protection claim to the challenged conduct that occurred in 2008 moots a large part of the Tribe's substantive arguments").

The court's limitation of the analysis was incorrect because under relevant precedents, the Tribe was permitted to show that the Corps engaged in a pattern or practice or discrimination. *See Jean*, 711 F.2d at 1485-90; *Jurek*, 593 F.2d at 685 n.26 (citations omitted). As recognized by this Court, evidence of an ongoing pattern of disparate treatment supports a claim for violation of equal protection. *Jean*, 711 F.2d at 1490. Thus, the Corps' 2008 actions cannot be considered in a vacuum and must be considered in light of evidence showing a pattern and practice of discrimination against the Tribe. The district court erred in disregarding ***34** evidence of the Corps' discriminatory conduct leading up to the 2008 incident which prompted this litigation and in granting summary judgment for Defendants on Count IV.

ii. The court erroneously required the Tribe to prove Defendants were motivated solely by a discriminatory purpose

The court erroneously treated Defendants' stated reasons for their discriminatory actions as dispositive even though the Tribe need only demonstrate that Defendants were motivated *in part* by a discriminatory purpose. The court concluded that in light of "the facts upon which the Corps, FWS and Everglades National Park based its decision to leave the S-12A gate closed for an additional nine days, there is no basis for concluding that there was any foreseeable or actual discriminatory impact." Doc175-pg-19 (referring to the Corps' response to a fire near the Sparrow population which purportedly caused the Corps to postpone gate openings and allow the Tribe to flood); *see also id*.-pg-15 (finding that the Corps' interpretation of the WCA-3A regulations schedule "was a reasonable one and is not the type of procedural defect that supports the inference that the Corps postponed opening the S-12A gate because of a racial object or that its decision is unexplainable on grounds than race").

Whether the Corps' actions helped the Sparrow population, however, is beside the point. Even assuming the Corps' actions helped the Sparrow population ***35** (which the Tribe's evidence shows they did not), the Corps' choice to flood the Tribe, when the Tribe presented evidence that less discriminatory alternatives existed, supports the Tribe's equal protection claim. The court erroneously dispensed with that issue by concluding that, because the Corps produced an ostensibly legitimate reason for its risky decision, it did not have discriminatory intent. This was clearly a disputed issue of fact and inappropriate for summary judgment. As stated in the Tribe's Summary Judgment Response, the Tribe easily met its burden of showing that: (a) the Corps' Sparrow excuse was pretext (and therefore indicative of a discriminatory motive), Doc144-pgs-20-21, and (b) when it comes to such decisions, the Corps chooses to flood the Tribe and its lands rather than non-Indians and their land. *Id*.-pgs-7-11.

Moreover, the Tribe presented evidence that the Corps deviated from the regulation schedule as further proof of discriminatory motive. Doc144-pgs-15-18. The court erroneously found that the Corps' interpretation of the schedule was reasonable and that the Corps, therefore, did not act with discriminatory intent even if it technically deviated from the schedule. Doc175-pgs-15-16. The court's conclusion was erroneous because: (1) it resolved a disputed issue of fact in favor of Defendants when the Tribe presented ample evidence of deviation; and (2) it was incorrect as a matter of law to conclude that it was reasonable for the Corps to interpret the schedule as giving it "operational flexibility" to flood the Tribe, even ***36** when it endangered the Miccosukee people's health and safety, and compromised Tribal lands.

Thus, because the Tribe presented sufficient evidence of discriminatory motive, the Corps' assertion of potentially nondiscriminatory reasons for its actions is not dispositive. The Tribe need only show the Corps was motivated *in part* by discriminatory intent. [8] The district court erred in using the Corps' stated explanations for its conduct as a basis for granting summary judgment on the Tribe's equal protection claim.

II. THE DISTRICT COURT ERRED IN DISMISSING COUNTS I, II AND III OF THE COMPLAINT BECAUSE THE TRIBE ALLEGED FACTS SUFFICIENT TO STATE A CLAIM

This Court reviews *de novo* an order granting a motion to dismiss, applying the same standard as the district court. *Sec'y of Labor v. Labbe*, 319 F. App'x 761, 763 (11th Cir. 2008). The Court must accept as true all allegations in the Complaint and construe them in the light most favorable to the Tribe. *Id*. A complaint need only contain a "short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A motion to dismiss for failure to state a claim should be granted only where the complaint fails to state a plausible claim for relief by presenting "factual content that allows the court to ***37** draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). This is not a " 'probability requirement,' " but the factual allegations in the complaint must present "more than a sheer possibility of unlawful activity." *Id*. Instead, the complaint must "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Counts I, II and III of the Complaint plainly satisfy the requisite pleading standard, therefore dismissal of these claims was improper.

A. The District Court Erred In Dismissing The Tribe's Claims That Defendants Violated Its Rights Under The Agreements.

i. The Tribe adequately pled a claim for violation of FILCA

The Tribe adequately pled a claim for violation of the FILCA based on breach of the Lease and supporting Agreements. "To state a cause of action for breach of a contract, a complaint need only allege facts that establish the existence of a contract, a material breach, and resulting damages." *Baron v. Osman*, 39 So.3d 449, 451 (Fla. 5th DCA 2010). The Lease and supporting Agreements were attached to the Complaint. [9] The Complaint alleged the existence of the Lease (Doc1-pgs-10-12), and its existence cannot be disputed. The Tribe alleged that ***38** Defendants breached the Agreements through *unlawful* water management activities.

Doc1-pgs-12-19. The Tribe further alleged that Defendants' breaches resulted in damages to the Tribe by flooding its lands and preventing it from exercising its rights under the Agreements. Doc1-pgs-17-19. Thus, the Tribe adequately pled a cause of action for breach of contract and this Court should reverse the district court's dismissal of the Tribe's Count I.

The court nevertheless dismissed Count I, adopting Defendants' unreasonable interpretation of the Agreements, which would permit Defendants to carry out any water management activities they saw fit, regardless of their impact on Tribal members or the Tribe's rights under the Agreements. Doc28-pgs-6-7. [10] ***39** Focusing narrowly on two paragraphs of the Lease and one passage of the FILCA, the court found that the Tribe's rights under the Agreements were subject to Defendants' water management decisions on Tribal land, regardless of the Tribe's rights, Defendants' obligations, the parties' intentions and a reasonable interpretation of the Agreements. Doc37-pgs-3-4. The court further found that any attempt by the Tribe to assert its rights under the Agreements was frivolous. *Id*.-pg-4. Thus, under the district court's interpretation, Defendants can flood Tribal land with impunity, and any attempt by the Tribe to challenge Defendants' violation of the Tribe's rights by damaging its land is baseless. [11] The Tribe argued that such an interpretation was contrary to the parties' intent, to the stated purpose of those Agreements, and to Defendants' obligations to adhere to *lawful and appropriate* water management activities *that do not infringe on the Tribe's rights*. ***40** Doc33-pgs-7-9. The Tribe further stated that such an interpretation would render the Agreements unenforceable for lack of mutuality. *Id*.

The district court's interpretation of the Agreements ignored fundamental rules of contract construction. To form a contract, mutuality of obligation must exist between the parties or the agreement is illusory and unenforceable. *Maccaferri Gabions, Inc. v. Dynateria, Inc.*, 91 F.3d 1431, 1443 (11th Cir. 1996). If one party can choose not to perform its obligation under an agreement and cannot be held liable for non-performance, then there is no consideration and the agreement is unenforceable. *Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1311 (11th Cir. 1998). Further, a "contract clause should not be interpreted in such a way as to destroy mutuality of obligation and, thereby, invalidate the contract." *Maccaferri*, 91 F.3d at 1443 (citing *Am. Med. Int'l v. Scheller*, 462 So. 2d 1, 8 (Fla. 4th DCA 1984)). Thus, each party to an agreement must have the right to enforce the agreement against the other party, otherwise the agreement is illusory. *Miami Coca-Cola Bottling Co. v. Orange-Crush Co.*, 291 F. 102, 103 (S.D. Fla. 1923), *aff'd*, 296 F. 693 (5th Cir. 1924).

The court apparently believed that the Tribe can never bring a claim under the Settlement Act even if Defendants are unlawfully operating the water management system. Under the court's interpretation (Doc37), the Lease would be illusory, and thus void *ab initio*. *See, e.g., Johnson Enterprises of Jacksonville,* ***41** *Inc., v. FPL Group, Inc.*, 162 F.3d 1290, 1311 (11th Cir. 1998) (agreements where the promisor is free not to perform are illusory and lacking of consideration); *Maccaferri Gabions, Inc. v. Dynateria Inc.*, 91 F.3d 1431, 1443 (11th Cir. 1996) ("Under Florida law, as generally, a contract clause should not be interpreted in such a way as to destroy mutuality of obligation and, thereby, invalidate the contract").

Mutuality of obligation is an essential element of any agreement, *see Maccaferri*, 91 F.3d at 1443, thus, interpreting a contract to preserve mutuality is preferred because its absence would render an agreement unenforceable. *See Maccaferri*, 91 F.3d at 1443; *W.C. Shepherd Co. v. Royal Indem. Co.*, 192 F.2d 710, 715 (5th Cir. 1951) ("A construction which renders the contract valid will be preferred to one which renders it void"); *Matter of Burkey*, 68 B.R. 270 (Bankr. M.D. Fla. 1986) (mutuality of obligation is an elementary principle of contract law, and only valuable consideration from both sides will make an executory bilateral contract enforceable).

The court's interpretation eliminates mutuality in the Agreement. The Miccosukee people were promised that the Leased Area would be preserved in its natural state in perpetuity, and that their descendants would be assured the continued use and enjoyment of their traditional homeland. Doc1¶¶4, 37, 39-40. The ***42** court's interpretation allows Defendants to flood the Tribe's lands without lawful authority and leaves the Tribe with no meaningful rights or protections.

Moreover, the court's interpretation is unreasonable. It is well established that every agreement is subject to a reasonableness requirement. *See, e.g.*, *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 90 (N.Y. 1917) (J. Cardozo) (reading reasonableness requirement into contracts). The Settlement Act gives the Tribe specific rights under the Trustee Deed to the Reservation and under a Perpetual Lease to the Tribal lands in WCA-3A. *See* 25 U.S.C. § 1741. The Perpetual Lease requires the government to preserve the leased lands in a natural state for the use and enjoyment of the Tribe. Doc1¶4. The Perpetual Lease gives the Corps and the SFWMD certain authority regarding the water levels on Tribal lands, but this authority must be exercised "lawfully" and in a manner that preserves WCA-3A in its natural state. *See* Lease, Doc1-Ex.A¶6 (emphasis added). The Complaint alleges that Defendants *unlawfully* directed water onto Tribal lands, and flooded and degraded those lands, which the government promised to preserve in a natural state in perpetuity for the use and enjoyment of the Miccosukee people. [12] ***43** Doc1¶¶2, 4, 37, 39-40, 43-44, 54-57, 59, 65, 70, 72. It is patently unreasonable to interpret the Agreement as allowing an unbridled right to flood Tribal lands, including by unlawfully *deviating* from the regulation schedule, despite the fact that the Lease *requires* Defendants to operate pursuant to lawful authority. Doc1-Ex.A¶6; Doc1¶¶54-55.

Furthermore, where a contract contains provisions that appear repugnant to each other, a court must attempt to harmonize those provisions. *Fla. Power Corp. v. City of Tallahassee*, 18 So. 2d 671, 674 (Fla. 1944). In so doing, a court must give a reasonable interpretation and avoid absurd results. *Id.*; *Triple E Dev. Co. v. Floridagold Citrus Corp.*, 51 So. 2d 435, 438-39 (Fla. 1951). A court must be guided by the parties' intentions "as gathered from the entire instrument." *Fla. Power Corp.*, 18 So. 2d at 674.

The district court failed to apply the rules of contract interpretation and reached an absurd construction which renders the Agreements unenforceable. First, the district court's construction renders the Agreements unenforceable for lack of mutuality. Moreover, under the court's interpretation, the Tribe's rights under the Agreements exist only so far as Defendants allow it. Thus, Defendants are free to flood Tribal land, as they have since 1998. In other words, under the district court's interpretation, the Tribe received nothing in return for its promise to relinquish its claims to its lands because Defendants do not have to perform their ***44** promise to conduct water management in accordance with the Tribe's rights or with the law. Defendants are even free to flood Tribal lands when it would threaten the health and safety of Tribal members, and further degrade Tribal lands. Further, under the district court's interpretation, the Tribe cannot enforce Defendants' promises under the Agreements to preserve the land in perpetuity and to act in a lawful manner. Such an absurd construction renders the Agreements null and void, and the Tribe would be entitled to reclaim all the lands it supposedly surrendered in reliance of the Agreements.

In addition, the district court's interpretation renders the Lease provisions granting rights to Defendants to conduct water management activities repugnant to those granting rights to the Tribe to reside, hunt, fish and grow crops in the leased area. It was the district court's duty to harmonize those provisions, if possible, considering the parties' intent when they entered the Agreements to reach a reasonable result. *Fla. Power Corp.*, 18 So. 2d at 674. As stated in the Complaint and the Tribe's Response to Defendants' motion to dismiss, the parties intended that Defendants would respect the Tribe's rights under the Lease and conduct water management activities that did not infringe on those rights, as was the case when the Agreements were entered and for some time thereafter.

The Tribe, therefore, correctly asked the court to determine whether the Corps' actions were legal and reasonable under the Lease. It was in no way ***45** frivolous to argue that when the Tribe agreed to the settlement it obtained certain rights. A determination of what "lawful" rights Defendants possess under the Act, and whether Defendants acted pursuant to lawful authority in keeping the S-12A gates closed when they were required to be open, requires factual analysis that cannot be disposed of by motion to dismiss and cannot be considered frivolous.

A fair reading of the Lease is that none of the terms allows the government to deprive the Tribe of an essential benefit of its bargain, least of all through flooding of Tribal lands, including by an unlawful deviation from the operating criteria. The Tribe's rights were to be balanced against the government's right not to have the Tribe interfere with *lawful* water management under

the agreed parameters. Doc1--Ex.A¶6. Here, the Tribe alleges that the Corps deviated from the lawful water management plan by refusing to open the S-12A gates as required on July 15, 2008. Doc1¶¶54-55, 57. Moreover, when the Tribe agreed not to interfere with *lawful* water management, it justifiably expected the government to preserve the Leased Lands in a natural state in perpetuity, as promised, that the water would be managed within the parameters that existed when the Tribe signed the Lease and that the government would not take actions that destroy its land. Doc1¶¶4, 37.

A decision of the Honorable William Hoeveler in Case No. 88-1886-Civ-Moreno (the "landmark Everglades case"), describing the Tribe's proprietary ***46** interests in areas that are also asserted as affected Tribal lands in this Complaint, refers to these lands as the "homeland of the Miccosukees." *See* Appendix at 5-7. Indeed, Judge Hoeveler found that: "[i]n this case, the Tribe has more than a proprietary interest in its property. At stake is the protection of its tribal homeland from ecological damage caused by nutrient pollution." *Id*. at 6. Therefore, even though Rule 11 is not intended to chill novel legal arguments, the Tribe's arguments in the case were not even novel, but were consistent with previous precedent acknowledging that the Tribe possesses rights in WCA-3A. *Id*. at 8. Neither the landmark Everglades case, nor any case cited by the court, specifically addresses the factual and legal issues raised by the Complaint here, but the landmark Everglades case acknowledged proprietary and important interests of the Tribe in the areas detailed in the Complaint. The court's dismissal of the Tribe's claim under the Settlement Act was erroneous, and its finding that the claim was frivolous is unsupported by any precedent.

A proper interpretation of the Agreements leads to reasonable and just balancing of the parties' rights. Only under Defendants' and the district court's interpretations is there a conflict between the provisions granting rights to the Tribe and Defendants. It is unreasonable to conclude that the Tribe, or the United States with its trust obligation to the Tribe, would enter an agreement under which all of the Tribe's rights in the land were exchanged for rights that could be ***47** extinguished at the whim of a government agency. *Fla. Power Corp.*, 18 So. 2d at 674 (court must avoid construction of contract that leads to a result that is "unequitable, unnatural, or such as a reasonable man would not be likely to enter into"). The Tribe's is the only reasonable interpretation, according both parties the benefits for which they bargained. The Tribe, therefore, sufficiently pled a cause of action under the FILCA and the district court erred in dismissing that count of the Complaint.

ii. The district court relied on inapposite case law

In addition to proffering an untenable interpretation of the Agreements, the district court relied on inapplicable case law to support its conclusion that the Tribe "cannot challenge the water levels in the Leased Area or WCA-3A based on provisions of the Lease or the [FILCA] [.]" Doc37-pg-5. From the outset of its opinion, the district court seems to have been confused about the issues in this case. The district court noted early in its opinion that the Tribe alleged that "Defendants' water management actions have infringed on their constitutional and statutory rights by ***permitting*** high water levels to exist in the Leased Area." Doc37-pg-2 (emphasis added). The Tribe, however, is not challenging Defendants' actions because they permit high water levels to exist on the Tribe's land. The Tribe is challenging Defendants' direct actions which cause, contribute to, and result in flooding of Tribal lands.

***48** The district court relied on two sentences from Judge Davis' decision in *Miccosukee Tribe of Indians of Florida v. United States*, 980 F. Supp. 448, 461-62 (S.D. Fla. 1997). However, that opinion addressed the issue of whether the government had an obligation to *relieve* Tribal lands from flooding *caused by natural forces*, *id*. at 455-58, and the section from which the district court quoted addressed whether Defendants had a fiduciary obligation to lower water levels on Tribal lands after natural flooding. *Id*. at 461. Judge Davis did not find that Defendants were justified under the Agreements to flood Tribal lands at will, and in fact, Judge Davis found that Defendants acted in accordance with their prescribed operating procedures, which is not the case here. *Id*. at 462-63.

The district court also relied on its previous opinion in *Miccosukee Tribe of Indians of Florida v. United States*, 430 F. Supp. 2d 1328, 1336 (S.D. Fla. 2006). In that case, the Tribe challenged the lawfulness of a biological opinion. *Id*. at 1330-31. The district court here relied on a portion of that opinion in concluding that the government did not owe the Tribe a trust obligation under the FILCA. *Id*. at 1336. Apparently, the district court here found compelling the language from its previous opinion stating that the FILCA "affirmatively denies the Tribe the right to 'interfere' with the action of the Corps with respect to the water levels in WCA-3A." Doc37-pg-5 (quoting *Miccosukee*, 430 F. Supp. 2d at 1336). However, that ***49** line was used to support the district court's conclusion that no trust obligation existed under the FILCA.

Neither case upon which the district court relied addresses the issue presented here: Whether under the Agreements Defendants can take actions with impunity to flood the Tribe's land and thereby prevent the Tribe from exercising its rights under the Agreements. Nevertheless, the district court still gleaned from those opinions its conclusion that the Tribe "cannot challenge the water levels in the Leased Area or WCA-3A based on provisions of the Lease or the [FILCA] [.]" Doc37-pg-5. As discussed above, such a conclusion leads to the absurd result that the Agreements provide the Tribe with no meaningful rights because they place the Tribe completely at the mercy of the Corps, which has unbridled discretion to damage Tribal lands pursuant to its water management authority. According to the district court, the fact that one court found that the government does not have a fiduciary obligation to the Tribe under the FILCA and another court held that the government does not have a trust obligation under the FILCA, prevents the Tribe from challenging Defendants actions under the Agreements even if, for instance, Defendants decided to permanently store on the Tribe's land enough water to make the land completely uninhabitable, or destroy all wildlife and vegetation on the land. Such a conclusion is indefensible and contrary to the Tribe's rights under the Agreements. Moreover, the issue of what rights are guaranteed to the Tribe under ***50** the Perpetual Lease, and the Settlement Act as a whole, has not been settled in this Circuit and therefore, it is incorrect to conclude that the Tribe's attempt to protect its lands by enforcing the Act is frivolous. At minimum, the court was required to analyze the specific facts to determine how the cases were similar. Thus, the district court's dismissal of the Tribe's FILCA claim should be reversed.

B. The District Court Erred In Dismissing The Tribe's Due Process Claim Because The Tribe Has Pled A Sufficient Property Interest To State A Cause Of Action For Violation Of Its Due Process Rights

i. The Tribe adequately pled a claim for violations of its due process rights

For a plaintiff to be entitled to relief based on violations of their due process rights, they must show: (1) a protected property interest; and (2) government deprivation of that property interest without due process of law. *See Ward v. Downtown Dev. Auth.*, 786 F.2d 1526, 1531 (11th Cir. 1986); *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 818-19 (D.C. Cir. 1997). At a minimum, due process requires notice and an opportunity to be heard. *Greene v. Lindsey*, 456 U.S. 444, 449 (1982) (citing *Mullane v. Cen. Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950)).

The Tribe adequately pled a protected property interest. The Complaint stated that the parties entered the Perpetual Lease, under which Defendants guaranteed that the leased land would be maintained in its natural state in ***51** perpetuity. *See, e.g.*, Doc1-pgs-2, 12-13. The Tribe's Perpetual Lease is a sufficient protected property interest to state a due process cause of action for deprivations of its rights under the Lease. *Greene*, 456 U.S. at 450-51 (finding that lessees were "deprived of a significant interest in property" through the deprivation without due process of their rights to reside in leasehold property); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (property interest as defined under the Fifth Amendment "addresses every sort of interest the citizen may possess," including a lease); *Ward*, 786 F.2d at 1526 (reversing dismissal of claim for due process violation based on deprivation of rights of continued occupancy and finding that under Florida law "any tenancy, no matter the duration, is a property interest that can be the subject of a compensable taking."). [13]

Further, the United States Supreme Court has recognized that an Indian Tribe's right to occupy land as recognized by an agreement with the government is a property interest under the Fifth Amendment to the United States Constitution. *Shoshone Tribe of Indians of the Wind River Reservation in Wyo. v. United States*, 299 U.S. 476, 497-98 (1937) ("The right of the Indians to the occupancy of the lands pledged to them may be one of occupancy only, but it is as sacred as that of ***52** the United States to the fee.") (internal quotations and citations omitted); *see Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-79 (1955) (finding that congressional intent to grant legal rights in land to Indian Tribe creates a compensable property interest under the Fifth Amendment). [14]

The Tribe also pled the fact that the Lease guaranteed certain rights to the Tribe, including the rights to reside in the Lease Area, use the Leased Area for religious purposes and use native materials. *See, e.g.*, Doc1-pgs-4, 11, 13. In fact, the Tribe pled that, under the Agreements, it had the rights to hunt and fish, take frogs, engage in agriculture, reside in the Leased Area, use the area for religious purposes, take and use native materials, have the area preserved in its natural state and have fresh water aquatic life, wildlife, and their habitat preserved. *Id*. at 13.

The Tribe also pled that Defendants' water management activities deprived the Tribe of its protected property interests under the Lease and supporting Agreements. Doc1-pgs-4-6, 13. ("The Tribe and the Miccosukee people have been denied their constitutional rights to practice the religious traditions and to the use and enjoyment of the Leased Lands as a result of Defendants' actions [.]"). In addition, the Tribe pled the specific actions taken by Defendants that lead to the deprivation of its rights, and the fact that it was never given notice or opportunity ***53** to be heard regarding Defendants' actions, which were often taken in contravention of their own regulations and established procedures. Doc1-pgs-12-18, 19-20. Thus, the Tribe pled a protected property interest and Defendants' deprivation of that interest without due process of law.

Despite adequately pleading its due process claim, the district court found that the Tribe "lack[ed] a sufficient property interest to support a due process claim" and that the Tribe's claim was "frivolous." Doc37-pg-6. The district court based this conclusion, and its belief that under the Lease Defendants can take action with impunity to flood the Tribe's lands, on prior decisions of district courts in Southern District of Florida. As shown above, this is not a proper interpretation of the Agreements, and as shown below, the district court relied on inapposite case law in reaching its erroneous conclusion. Consequently, the district court erred in dismissing the Tribe's due process claim and this Court should reverse the district court's disposition of this claim.

ii. The district court based dismissal of the Tribe's due process claim on inapposite case law

The district court relied on "precedents" that do not support its conclusion that the Tribe lacked a sufficient property interest to state a due process claim. For example, the district court relied on *Miccosukee Tribe of Indians of Florida v. United States*, 980 F. Supp. 448 (S.D. Fla. 1997). However, the facts in that case are distinguishable from those pled in the Complaint. There, the Tribe was ***54** challenging the government's failure to take action to relieve flooding on Tribal lands, and the court defined the issue as whether the Tribe had a constitutionally protected property interest in a government benefit. [15] *Miccosukee*, 980 F. Supp. at 463. As so defined, the court found that the Tribe did not have a due process right to the government benefit of flood relief. *Id*. The court noted that the Due Process Clause generally does not confer an "affirmative right to government aid," and that the "Clause acts as a *constraint* on governmental power to act." *Id*. (emphasis in original). The court also stated that "[t]he only duties the Federal Defendants assumed were those delineated by the applicable laws and agreements." *Id*.

Those conclusions show why that opinion is inapposite here. The Tribe is not claiming a due process property right to a government benefit. Instead, the Tribe is asserting its protected due process property right to exercise its rights under the Lease and supporting Agreements. However, Defendants' actions prevent the Tribe from enjoying those rights. Thus, the Tribe is not seeking a government benefit; it is seeking to *constrain* the government from interfering with its established due process rights. Further, as discussed above, in order for the ***55** Agreements to be enforceable they must be read as the parties intended;

with the Tribe relinquishing its claims to the land in return for a Perpetual Lease that allows them to exercise certain rights in a way that comports with Defendants' rights, and Defendants agreeing to exercise their water management rights in a way that comports with the Tribe's rights. Consequently, the very opinion on which the district court relied to support its conclusion that the Tribe lacks a sufficient property interest to state a due process claim actually supports the opposite conclusion: that the Tribe has a sufficient property interest to state a due process claim.

The district court also relied on Magistrate Judge O'Sullivan's Report and Recommendation in *Miccosukee Tribe of Indians of Florida v. United States*, No. 02-22778 (S.D. Fla. Apr. 28, 2003) (Doc18-5). Doc37-pg-6. Magistrate O'Sullivan found in his report that the Tribe had "no constitutionally-protected property interest" in its property located in WCA-3A because the Lease and the FILCA recognize Defendants' right to carry out water management activities in that area. *Miccosukee*, No. 02-22778 at 8-9. However, as previously discussed, the Agreements cannot be interpreted to allow Defendants to flood the Tribe's land at will. To hold otherwise leads to an interpretation that renders the Agreements unenforceable. Further, it does not follow from Defendants' rights to conduct *appropriate* and *lawful* water management activities that the Tribe lacks a property ***56** interest in its lands to support a due process claim when Defendants' activities *deviate* from the Agreements and *prevent* the Tribe from exercising the rights for which it bargained and gave valuable consideration.

In addition, Magistrate O'Sullivan cites *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), *cert denied*, 532 U.S. 941 (2001), to support his conclusion that the Tribe lacks a sufficient property interest to state a due process claim. In *Karuk*, the Federal Circuit held that an Indian Tribe did not have a sufficient property interest in land portioned through a Settlement Act to state a Fifth Amendment takings claim because the executive order that originally allowed the Tribe to occupy the land did not evince an intention to create any property rights in the Tribe. *Karuk*, 209 F.3d at 1375-78. Here, however, the Tribe has a property interest created by the Lease and recognized in the Settlement Agreement, the Trustee Deed and the FILCA. In fact, through the FILCA, Congress specifically recognized the Tribe's property interest. *See, e.g.*, 25 U.S.C. § 1742(6) (stating that the Tribe is "granted certain express rights and interests" in the Leased Lands); 25 U.S.C. § 1745 (recognizing that the State of Florida may not take or diminish the Tribe's interests under the Lease without a public purpose or without paying just compensation). The Lease also sets out the Tribe's rights in the land, including the right to reside on the land in perpetuity. Thus, Magistrate ***57** O'Sullivan's finding was based on his apparent misunderstanding of the Agreements and the applicable law.

Further, Magistrate O'Sullivan found that the Tribe alleged sufficient facts to support a claim for deprivation of due process with regard to land not covered by the FILCA. *Miccosukee*, No. 02-22778 at 9-10 (Doc -18-5). The Tribe states in its complaint in this case that Defendants' actions affect the Tribe's rights in its land outside WCA-3A and the Leased Area, and violate its rights under the due process clause. *See, e.g.*, Doc1-pgs-9, 17-18, 19-20. In a footnote in their Motion to Dismiss, Defendants "assumed for purposes of [their motion] that the Tribe [was] asserting due process violations in connection with its interests in the 'Leased Lands' in WCA 3A." Doc28-pg-11n.5. The Tribe responded in a footnote, explaining that Defendants' reliance on Magistrate Judge O'Sullivan's holding that the Tribe could not state a due process claim for water management activities on the Leased Lands was mistaken and that Magistrate O'Sullivan found that the Tribe's due process claim should not be dismissed in its entirety because the Tribe's lands outside of the Leased Area were not covered by the FILCA. Doc33-pg-10n.4. Despite that the Tribe pled violations across multiple land holdings, the district court limited its analysis to the "Leased Area or WCA 3A." Doc37-pg-6. In so doing, the district court dismissed the Tribe's due process claim, which included violations throughout its land holdings, based on its analysis of the ***58** Agreements that covered only the Leased Area and a Magistrate's recommendation finding that certain of those claims should not be dismissed. Thus, the district court erred in dismissing the Tribe's due process claim, and this Court should reverse that decision.

C. The Court Erred In Dismissing The Tribe's Request For Mandamus Relief

Because the Tribe adequately pled Counts I and II, the court also erred in dismissing the Tribe's related request for mandamus relief in Count III. Doc1-pgs-20-21. Mandamus relief pursuant to 28 U.S.C. § 1361 is appropriate under the district court's discretionary authority when: (1) the plaintiff has a clear right to the relief requested; (2) the defendant has a clear legal duty to act; and (3) no other adequate remedy is available. *Cash v. Barnhart*, 327 F.3d 1252, 1257-58 (11th Cir. 2003). "In resolving whether section 1361 jurisdiction is present, allegations of the complaint, unless patently frivolous, are taken as true to avoid tackling the merits under the ruse of assessing jurisdiction." *Id*. (citation omitted). The district court denied mandamus relief based on its erroneous conclusion that the Tribe adequately failed to plead entitlement to relief in Counts I and II. Doc37-pg-9. The court also erroneously found that it did not have discretion to prevent Defendants from taking discriminatory actions which threatened Tribal members and land. *See id*. As argued in *supra* §§ II.A.-B., the Tribe stated a claim for relief under the Agreements and under the due process clause. Therefore, the court erred in ***59** concluding that the Tribe's request for relief was not within the court's mandamus jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Counts I, II and III of the Tribe's Complaint, as well as its grant of summary judgment on Count IV, the Tribe's equal protection claim.

Footnotes

1 The district court's conclusion that the Corps' decision to leave the S-12A gate closed an additional nine days did not disproportionately impact the Miccosukee people is contradicted by abundant record evidence that keeping the gates closed an additional nine days in July 2008 created antecedent conditions that caused extremely high water levels of 11.92 feet in WCA-3A in October 2008. Doc144-pg-16. These extremely high water levels not only had a disparate impact on vegetation in the Tribal Everglades in WCA-3A compared to non-Indian lands, but also created health and safety issues for Tribal members living downstream. Doc144-pgs-6-11. The Tribe's evidence further showed that non-Indians were not impacted in the same manner, Doc144-1¶¶7, 32, 34-38, and this evidence was more than sufficient to survive summary judgment.

2 Although the court acknowledged the *existence* of the Tribe's evidence, it nevertheless used its improper "*de minimus*" analysis to disregard it.

3 Defendants also disputed from the outset of this case that keeping the S-12 gates closed beyond July 15, 2008 contributed to the high water levels. Doc1¶57, Doc42¶57.

4 The district court acknowledged that the Corps rejected a request from John Zediak to conduct a wind and wave analysis of the L-29 levee. Doc.175-pg-22n.19. The district court ignored that the Miccosukee Indian community is at imminent risk if the levee fails, and that the Corps treats the non-Indians who live south of the Lake Okeechobee levee differently by taking expensive actions to shore up the levee that protects them. Doc144-pgs-5, 8, 18.

5 The Tribe showed that the reliance on historical water levels cited by the district court for 1994 and 1995 was also misplaced because the S-12 gates were open, not closed, under the water management plan in place at that time. Doc144-1¶87.

6 As noted above, whether the impact gate closures had on the Tribe was *de minimus* is a disputed issue. The Tribe has presented ample evidence supporting its position that the impact is significant. Even assuming the court had properly found the Corps' actions increased the Tribe's risk by only a small percentage, the effect would still be significant because the risk it is increasing is one of catastrophe and of danger to human life. The Tribe made a sufficient showing on summary judgment, and was entitled to trial on the issue of whether the Corps' actions had a disparate impact.

7 The court elevated the Corps' interest in protecting the Sparrow above Tribal member's interests in health and safety without even affording the Tribe its day in court. The Tribe presented ample evidence that the Corps' activities disproportionately impacted native species, including the endangered Snail Kite, and vegetation in the flooded areas. The Tribe also showed that the Corps' risked the health and safety of Tribal members. The Tribe should have been permitted to try this issue of disputed fact. The court's finding that the risk to, and damage sustained by, Tribal members was *de minimus* is not supported by the facts and incorrect as a matter of law. If, as the court seems to suggest, the choice was between protecting the Sparrow and protecting the Miccosukee people, the Corps' apparent choice in that scenario is clear evidence of discriminatory intent.

8 The Corps also asserted that it based its decision on receding water levels, a claim which the Tribe's evidence refuted. Doc144-pg-17n.20.

9 The Lease, Settlement Agreement and Trustee Deed were attached to the Complaint, and thus became part of the Complaint. *Kaloe Shipping Co., Ltd. v. Goltens Serv. Co., Inc.*, 315 F. App'x 877, 879 (11th Cir. 2009) (citing Fed. R. Civ. P. 10(c)).

10 Although the court stated it was not deciding whether collateral estoppel applied, Doc37-pg-4 (dismissing Count I "without respect to" collateral estoppel) it relied on two previous district court cases that the court said barred the claims in this case. *Id*.-pgs-4-5. Although acknowledging that the "underlying facts" in this case could be different, the counts were dismissed as frivolous largely in reliance on those cases. *Id*.-pg-5. In *Nicholson v. Shafe*, 558 F.3d 1266, 1279-80 (11th Cir. 2009), the Eleventh Circuit reversed the imposition of sanctions, stating that the application of res judicata and collateral estoppel in that case depended on close questions of fact and the district court's ruling, as the one here, contained little analysis on these issues. *Id*. at 1279-80; *see also CSX Transp. Inc. v. Bro. of Maintenance of Way Employees*, 327 F.3d 1309, 1317-18 (11th Cir. 2003) (requiring careful comparison of facts and law in previous and current cases and rejecting a finding of similarity on a high level of abstraction).

Moreover, the Perpetual Lease provides that the rights and privileges of the Tribe shall remain in perpetuity unless abandoned by the Tribe, and the Act provides that those rights may not be diminished except for a public purpose and upon payment of just compensation. Doc1¶¶38, 40. It is well established that land settlement treaties "must... be construed, not according to the technical meaning of [their] words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 676 (1979). This contractual analysis was not part of previous litigation

11 The court-initiated sanction failed to provide any notice or opportunity to be heard, as required by Fed. R. Civ. P. 11(c)(3). Nor did it make any of the required findings on sanctions under 28 U.S.C. § 1927 or the Court's inherent power. Moreover, there was no basis for the Court's conclusion that the claims were frivolous, or that they were the same as other cases, particularly at the motion to dismiss stage without any examination of the record.

12 The agreement provides that the Tribe's rights in paragraphs 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...." Doc1-Ex.A¶6.

13 "[P]roperty interest protected by the procedural due process and the takings clauses are identical [.]" *Cone v. Fla. Bar*, 626 F. Supp. 132, 137 n.10 (M.D. Fla. 1985).

14 "A property interest is the same under the Fifth Amendment due process clause as under the Fifth Amendment takings clause." *Foggy Bottom Ass'n v. Dist. of Columbia Office of Planning*, 441 F. Supp. 2d 84, 90 n.3 (D.D.C. 2006).

15 The court appears to have confused the issue in its opinion. The court began by noting that the Tribe was asserting a violation of its due process right to "enjoy their tribal lands." *Miccosukee*, 980 F. Supp. at 463. The court even used an argument header that reads "The Right to Enjoy Tribal Lands." *Id*. However, the court defined the issue as whether the Tribe had a due process right to a government benefit, not whether the Tribe has a due process right to "enjoy their tribal lands." *Id*.

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