IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-14271-E

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

Plaintiff-Appellant

vs.

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

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

REPLY BRIEF OF APPELLANT MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

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ARGUMENT

I. THE COURT ERRED IN ENTERING SUMMARY JUDGMENT ON THE TRIBE'S EQUAL PROTECTION CLAIM AND THE CORPS HAS FAILED TO SHOW OTHERWISE

A. The Corps Has Failed To Rebut The Existence Of Genuine Issues Of Material Fact Which Preclude Summary Judgment On The Tribe's Equal Protection Claim

In its Response Brief, the U.S. Army Corps of Engineers ("Corps") argues that the Tribe failed to demonstrate genuine issues of fact showing disparate treatment compared to similarly situated persons. Govt. Resp. at 33. The Corps claims that the persons identified by the Tribe as similarly situated "live in areas that are not subject to the regulatory requirements applicable to WCA 3A," and therefore they cannot be similarly situated. *Id*. at 28-29. The Corps further argues that persons who are similarly situated to the Tribe are treated similarly. *Id*. at 29. The Corps' assertions are incorrect and are contradicted by record evidence.

The Corps acknowledges the Tribe's contention that the Miccosukee people and their lands are treated differently from similarly situated non-Indians and their lands. Govt. Resp. at 34. Rather than addressing this argument directly, the Corps' argues that, even if this assertion were generally true, the Tribe has not shown "that the comparators identified by the Tribe are 'identical in all relevant respects.'" *Id*. Significant record evidence, however, shows that the Corps treated the Tribe differently from similarly situated persons who are "identical in all

relevant respects." *See* Doc 144 (Tribe's Opposition to Summary Judgment) at 7-8 (Corps' discriminatory actions consist of stacking water in WCA 3A at dangerously high levels to benefit non-Indian lands at the expense of Tribal land, and placing the Miccosukee community at imminent risk of catastrophic levee failure); *see also id*. at 8-11 (adverse impact of the Corps' actions has not been distributed equally; high water levels have flooded tree islands, killed native species and hardwoods, destroyed Miccosukee traditional homes and crops, endangered indigenous animals and vegetation, and endangered the health and safety of the Miccosukee people; the record contains no evidence that the Corps' actions have caused similar damage to, or placed at similar risk, the natural resources or land of the non-Indian communities in Miami-Dade County or Everglades National Park); Doc 144-1 ¶35 (Miccosukee Indians are the only ethnic group whose members live on lands leased in perpetuity in WCA 3A); Doc 144 at 6-7 (same) Doc 144-1 ¶17 (the same is true for the Miccosukee Reserved Area); Doc 144 at 7 (the Miccosukee people are the only people living and engaging in subsistence agriculture and religious activities in WCA 3A); Doc 144 at 9-10 (unlike the extensive damage suffered on Tribal land, the Corps' actions have not caused similar damage to the land and natural resources of similarly situated non-Indians in Miami Dade County or Everglades National Park); Doc 144 at 9 (the Corps needlessly endangered the Miccosukee community and Tribal

land to prevent flooding of non-Indian property, and has not afforded protections to the Miccosukee people that it has routinely afforded similarly situated non-Indians and non-Indian land); Doc 144 at 15 (in contrast to the Corps' unilateral denial, in violation of procedure, of the Tribe's request not to close the gates because closure would threaten the health and safety of Tribal members, and in contrast to the Corps' routine denials of such requests from the Tribe on behalf of its members, the Corps promptly handled and approved similar requests from non-Indians); Doc 144 at 18-21 (Corps refused to fund a $117,000 proposed study to analyze levy strength in WCA 3A despite concerns of the Corps' own witness regarding the impact of wind and wave action on the safety of WCA 3A and document data regarding the risk of catastrophic levy failure; 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 health and safety of non-Indians and their lands). In light of this evidence demonstrating disparate impact and treatment caused by the Corps' actions, the district court erred in construing the issue of disparate impact and treatment in favor of the Corps and entering summary judgment against the Tribe.

Moreover, the fact that the Miccosukee people reside in an area that may be subject to Endangered Species Act ("ESA") requirements that vary from ESA requirements in other similarly situated areas does not mean those communities are

not similarly situated in all relevant respects. Equal protection cases have found minority communities to be similarly situated with non-minority comparators without consideration of zoning, environmental, or other federal, state or local rules or regulations which may give rise to varying requirements within each community. In *Dowdell v. City of Apopka, Florida*, a "class comprising the black residents of Apopka 'who are, or have been, subjected to the discriminatory provision of municipal services'" successfully sued the government for equal protection violations for the government's relative deprivation of the black community of municipal services compared to similarly situated members of non-black communities. 698 F.2d 1181, 1184, 1186 (11th Cir. 1983). The court did not require a finding that the white community was subject to all of the same requirements as the black community which might affect the city's ability to provide municipal services.

Similarly, here, the requirements of the ESA in WCA 3A in comparison to similarly situated non-Indian communities does not render those communities dissimilar for equal protection purposes. All of these areas are regulated by the Corps' water management practices and consist of community members which reside in those areas. The fact is, certain ESA requirements in WCA 3A are bound to be area-specific because WCA 3A contains critical habitat for the endangered Everglade Snail Kite, among other things. This fact does not prevent the

Miccosukee people from asserting their rights to equal treatment by the Corps in its water management practices in comparison to non-Indian communities. In fact, it supports the Tribe's assertion of discriminatory motive because, even in spite of this critical habitat, the Tribe's lands were flooded and its people endangered by the Corps for the purpose of protecting non-Indian communities (and also purportedly to protect certain species therein). *See* Doc 144-1 (Tribe's Response to Defendant's Statement of Undisputed Facts) ¶¶ 35-38, 45, 57, 72, 77. The non-Indian communities referenced by the Tribe as comparators are similarly situated with respect to the Corps' water management activities, and the effect of those activities on the integrity of the land, the land's natural resources, the health and safety of the community, the rights and uses of the community on the land, and the health of native species and vegetation. Thus, this Court should reject the Corps' attempt to limit the definition of "similarly situated" beyond what is supported by precedent.[1]

That the general public makes use of some portion of WCA 3A does not alter the equal protection analysis. In *Dowdell*, this Court's analysis did not turn

[1] Furthermore, the Corps' unequal application of ESA requirements shows disparate treatment toward the Tribe. The Corps and the United States Fish and Wildlife Service ("FWS") applied the ESA to offer less protection to Tribal species and lands, permitting the degradation of vast areas of critical habitat for the endangered Everglade Snail Kite in WCA 3A, while at the same time expending vast resources to protect non-Indian lands in a purported (largely failed) effort to protect the Cape Sable Seaside Sparrow. *See* Doc 144 at 10, 20-21, 30-34; Doc 144-1 ¶¶ 45, 57-58, 62, 68-70, 72, 77.

upon whether there were a handful of white residents in the black community, whether some black residents lived in white communities, whether white residents made use of restaurants, sidewalks, buses, roads or any other parts of the black community and its municipal services, or whether non-members of the black community were also affected by the lack of municipal services in that area. The question was simply whether "the cumulative evidence of action and inaction . . . . objectively manifests discriminatory intent." 698 F.2d at 1185. The Court found that it did. *Id*. at 1186 (totality of facts showed that the city "engaged in a systematic pattern of cognitive acts and omissions, selecting and reaffirming a particular course of municipal services expenditures that inescapably evidences discriminatory intent.") (citing *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

Similarly, here, the recreational interests of the general public in Tribal lands have no bearing on the equal protection analysis. The Miccosukee people's interest in these lands, and the effect of the Corps' actions on the Miccosukee people, differ materially from those of non-Indians, who do not reside there. The lands are also of historic, cultural and religious significance to the Miccosukee people. *See* Doc 144 at 6-7. Thus, even assuming a handful of non-Indians reside in WCA 3A, the Corps has presented no evidence that its water management actions impacted those handful of non-Indian camps, or caused the devastation

those actions have caused to the Miccosukee people and their lands.[2] The record, however, shows that the Miccosukee people's health, safety, land, culture, religion and entire way of life has been damaged and threatened by the Corps' water management actions. Doc 144 at 4-11, 14-15, 16 n. 19, 17 n. 20, 32, 34-37.

The Corps further argues that it did not discriminate against the Miccosukee people because, "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." Govt. Resp. at 37. Here, again, the argument is inconsistent with Eleventh Circuit precedent. Applied to the facts of *Dowdell*, this argument would suggest that there was no equal protection violation there because all residents of Apopka, including those in the subject black community, benefited from the existing (albeit unequal) municipal services provided there or elsewhere by the city. However, that is not the correct analysis.

In *Dowdell*, the evidence "revealed a disparity in the provision of street paving, water distribution, and storm drainage" in the black community compared to the white community. *Id*. at 1185. The evidence also showed a substantial difference in the percentage of services in the black community as opposed to the white community (for example 42% of the street footage in the black community

[2] Record evidence contradicts the Corps' assertion that non-Indians live in WCA 3A, *see* Doc 144-1 ¶ 35; *see also* Doc 144 at 6; *id*. at n. 4, 6, and that the high water levels similarly affect non-Indians. Doc 144-1 ¶¶ 36-38.

was unpaved compared to 9% in the white community). *Id*. at n.3. If the Corps' argument had been applied to *Dowdell*, then the residents of the black community could not have prevailed on their equal protection claim because the black community received some overall benefit from the city's municipal services, even though it received significantly less when compared to the white community. Similarly, here, the fact that certain Miccosukee people may derive some benefit[3] from the Corp's water management actions does not change the fact that the Corps' water management has a disproportionately negative impact on the Miccosukee people and their lands in comparison to non-Indians and their land.

The Corps also attempts to dispense with material factual issues by arguing that they are irrelevant. The Corps claims that, even if it were true that: (1) the Corps' closing of the S-12 gates caused higher water levels and resultant harm on Tribal lands, (2) the water in WCA 3A placed the Tribe at risk, and (3) there was a

[3] Record evidence shows that Tribal members who live in the Park are actually threatened by the Corps' discriminatory water management in WCA 3A. The Corps' own documents show that the Miccosukee community is at imminent risk if the levee breaks as a result of the Corps' actions and inactions, which caused dangerously high water levels in WCA 3A. Doc 144 at 7-8. The Corps' actions have flooded and destroyed tree islands in WCA 3A and made it impossible to grow corn there. Doc 144-1 at 7, 10-11. Moreover, unnaturally drying out the western area of the Park, Doc 144 at 20-21, does not support fishing, growing corn, or help tree islands. The evidence also contradicts the Corps' assertion that high water levels affect non-Indians who hold permits to recreate in WCA 3A to the same extent and manner as the Miccosukee people, who have a perpetual lease to live and use WCA 3A, and for whom WCA 3A is a part of their history, religion, culture and way of life. Doc 144-1 ¶ 35-36.

less discriminatory alternative, the Tribe's arguments would still be "unavailing" because these facts "are not material to the question of whether the Corps treated the Tribe differently from other similarly situated persons." Govt. Resp. at 34 n. 15. However, as demonstrated in the Tribe's initial brief, such factors are material considerations under the requisite equal protection analysis. *See* Tribe Br. at 31 (citing *Jean v. Nelson*, 711 F.2d 1455, 1485 (11th Cir. 1983)). Under *Jean*, evidence of discriminatory impact, as well as circumstantial evidence regarding the sequence of events leading to the challenged action, departures from normal procedure, and the availability of a less discriminatory alternative, is all relevant to finding discriminatory intent. *Id*. The Tribe presented ample evidence of these facts, *see* Tribe Br. at 5-14; *see also* Doc 144 at 3-21; Doc 144-1, which are relevant to showing an equal protection violation under *Jean*.

In short, the evidence shows that no reasonable governmental decision-maker would choose to flood WCA 3A, endangering the health, safety and land of the Miccosukee people, placing the levees at risk of catastrophic failure, and further decimating the endangered Snail Kite's critical habitat, all in order to avoid flooding non-Indian land and to purportedly protect the habitat of the less endangered Sparrow population (efforts which the record shows the Corps knew, or should know, have not actually helped the Sparrow population). Doc 144 at 18-21 (Sparrow population now far outnumbers the Snail Kite population, which is

negatively impacted by the Corps' flooding; the National Academy of Sciences concurs that the Corps has not helped the Sparrow and has harmed both Tribal tree islands and the Snail Kite; the evidence upon which the Corps relies as an excuse for flooding the Tribe has been found invalid by a panel of Avian experts; and the FWS itself rejected a designation of the western area of Everglades National Park as critical habitat for the Sparrow because the area should be wetter than the Corps maintains it). Thus, the district court erred in resolving these disputed issues in favor of the Corps, the moving party, and in granting summary judgment against the Tribe.

B. The Record Contains Substantial Evidence Of Discriminatory Intent

The Corps also argues that the Tribe fails to demonstrate a genuine issue of material fact regarding the Corps' discriminatory intent. Govt. Resp. at 39-43.[4]

[4] In its Statement of the Case, the Corps argues in a footnote that the Government has not waived its sovereign immunity to this suit and that the only type of suit cognizable based upon flooding is one "seeking limited review under the Administrative Procedure Act." Govt. Resp. at 4 n.2, 7 n.3. This is an improper attempt to attack a decision of the district court that was not appealed. The Corps raised this argument in its Motion for Reconsideration or for Judgment on the Pleadings. Doc 52 at 10-12. The district court addressed and ***rejected*** the argument. Doc 85 at 8-11. Neither the Corps, nor the Tribe, appealed that decision. Doc 176 (showing that the Tribe appealed the district court's Order Granting in Part and Denying in Part the Defendants' Motion to Dismiss (Doc 37) and the district court's Order Granting Defendants' Motion for Summary Judgment (Doc 175)). Thus, the time to appeal that decision has passed, given that the order rejecting the Corps' argument was issued on January 7, 2010 and the district court granted summary judgment on July 12, 2010. *Green v. Drug Enforcement Admin.*,

Although acknowledging that circumstantial evidence such as "substantial disparate impact, a history of discriminatory official actions, and procedural and substantive departures from the norms generally followed by the decision-maker" are relevant to finding discriminatory intent, *id*. at 40, the Corps overlooks the Tribe's ample evidence of these and other factors. The Corps emphasizes that "a showing of disproportionate impact alone is not sufficient to prove discriminatory intent unless no other reasonable alternative can be drawn." *Id*.

First, as demonstrated above in § I.A., and as shown in the Tribe's Initial Brief, the record contains substantial evidence not only of disproportionate impact, *see* Doc 144 at 6-11, 28-35, but also of numerous other factors relevant to proving discriminatory intent. *See* Tribe Br. at 5-14; *see also* Doc 144 at 11-21, 35-39.[5]

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606 F.3d 1296, 1300-01 (11th Cir. 2010) (dismissing appeal because appellant failed to timely file a notice of appeal and "the time limit to file notice of appeal is jurisdictional, and [this Court] may not entertain an appeal out of time"). Further, the Corps cannot attack the district court's adverse ruling by "hitch[ing] a ride" on the Tribe's notice of appeal. *Lawhorn v. Allen*, 519 F.3d 1272, 1285 n.20 (11th Cir. 2008) (internal quotations and citations omitted); *Campbell v. Wainwright*, 726 F.2d 702, 704 (11th Cir. 1984); *Green v. Comm'r of Soc. Sec.*, 390 F. App'x 873, 874 n.1 (11th Cir. 2010); *United States v. Dorval*, 283 F. App'x 745, 747 (11th Cir. 2008).

[5] As noted by the Corps, the Tribe's summary judgment briefing in the district court contained numerous citations to a voluminous record. Rather than confront the evidence against it, the Corps complains that the pages cited by the Tribe "typically include a dozen or more cites to the record," and then the Corps summarily concludes, without making any kind of showing or including any citation to the record which would rebut the Tribe's facts, that "most" of these citations are "not on point." Govt. Resp. at 41 n. 19.

Second, even if the evidence of disparate treatment were the only record evidence of discriminatory intent, which it clearly is not, only one inference may be drawn from the Corps' history of water management actions with respect to the Miccosukee people when compared to similarly situated non-Indians. The Corps has a history of deciding that it is acceptable to risk catastrophe to the Miccosukee people and their lands. Doc 144 at 3 (allowing water to exceed recommended levels endangers Miccosukee lives); *id*. at 5 (for more than a decade, the Corps has used the pretext of protecting the Sparrow as an excuse to close the S-12 gates and stack water on Tribal lands in WCA 3A); *id*. at 4-21; Doc 144-1 ¶¶ 7, 21, 25-26, 35-38, 43, 50-52, 68-70, 84, 87. It has not done so with respect to non-Indians and their land. *Id*. at 5 (in order to protect vegetation in the Everglades National Park, Corps granted deviation to send less water to the Park; Corps protected non-Indians in Miami Dade County from flooding; Corps lowered water levels in Lake Okeechobee to protect vegetation in that area; Corps has taken expensive actions to shore up the levee around Lake Okeechobee to protect non-Indian communities who live south of the Lake); *id*. at 8-9, 13-15, 18-21. In fact, the Corps has often flooded Miccosukee land for the benefit of non-Indian lands, even when those actions could not protect the Sparrow habitat, which the Corps was claiming to protect, and even when the Corps had less discriminatory alternatives for achieving its stated objectives. *Id*. There is no evidence that the Corps has taken similar

risks with non-Indian land for any reason, let alone to protect Tribal land or the critical habitat contained therein at the expense of non-Indians and their land.

The Corps argues incorrectly that its actions were "authorized by statute and the IOP – which was reviewed and upheld in prior litigation brought by the Tribe." Govt. Resp. at 42; *see also id*. at 43 ("Corps' decisions to delay the opening of the S-12A for nine days in July, 2008, and to close S-12A in accordance with IOP schedule, were based entirely on the legitimate water-management concerns embodied in the IOP – and in particular, concerns about protecting the sparrow Subpopulation A."). The evidence shows the contrary. The Corps departed from proper procedure under the IOP by failing to seek the required deviation when it decided to keep the S-12A gates closed an additional nine days beyond the July 15, 2008 deadline. Doc 144 at 14-15; Doc 144-1 ¶¶ 14, 40, 45, 60 and 85. The Corps also deviated from IOP procedure by failing to have the Colonel consult with the Miccosukee Tribal Chairman prior to closing the S-12A gates on November 1, 2008 with dangerously high water levels on Tribal lands. Doc 144 at 14-15; Doc 144-1 ¶ 80. The evidence also shows that the Corps' actions could not have been motivated to protect the Sparrow and its habitat. Doc 144-1 ¶¶ 54, 58; *see also* Doc 144 at 5, 20-21. Finally, no statute or procedure authorizes the Government to violate the Tribe's equal protections rights.

The Corps further contends that the record contains "no direct evidence" of purposeful discrimination. Govt. Resp. at 41; *id*. at n. 18. However, the record contains substantial direct evidence of disparate impact and treatment which proves purposeful discrimination under *Jean*. *See Jean*, 711 F.2d at 1485 (circumstantial evidence may be used to prove the Government's actions were motivated "because of" a discriminatory motive). Moreover, if by "direct evidence" the Corps means that the record contains no statement by a United States official to the effect that "the Corps shall hereby take water management actions which intentionally discriminate against the Miccosukee people," such a statement is not in the record, and is rarely to be found in an equal protection case. *See Jean*, 711 F.2d at 1485 ("[t]he very nature of legislative and administrative action makes it difficult to ascertain the 'intent' of the acting body"). This is precisely why courts have held such statements are unnecessary to prove intentional discrimination. *See Williams v. City of Dothan, Ala.*, 745 F.2d 1406, 1414-15 (11th Cir. 1984) (holding summary judgment inappropriate where genuine issues of fact existed regarding discriminatory intent, noting that intent may be found even where the record contains no direct evidence of bad faith or evil motive, and that courts "cannot expect to find a 'smoking gun' in discrimination cases").

The Corps also attempts to claim that the constitutional rights of Miccosukee Tribal members are somehow limited in the Leased Area and the MRA. Govt. Resp. at 41-42 (footnote omitted). According to the Corps, it has permission to violate the Miccosukee people's equal protection rights because it has "authority to manage WCA 3A for Project purposes and to protect the South Florida ecosystem." *Id*. at 41-42. Apparently, the Corps believes that the Tribe has signed away the constitutional rights of its members. *Id*. at 42 ("the Tribe expressly consented to such actions in the Lease Agreement"). However, nothing the Corps has cited gives it permission to violate the Miccosukee people's equal protection rights within their ancestral home.

C. The District Court Misapplied The Equal Protection Analysis Required By Eleventh Circuit Precedent

Despite admitting that the district court failed to apply the correct analysis when it disregarded evidence showing a pattern or practice of discrimination against the Miccosukee people, *see* Govt. Resp. at 33, n.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."), the Corps argues that the district court's equal protection analysis was proper. Govt. Resp. at 44. The Corps claims that the district court's analysis was correct because it "***cited*** *Jean*, identified the relevant historical background, and correctly concluded, based upon the undisputed facts, that the historical

background does not support an inference of intentional racial discrimination." *Id*. (emphasis added). Although the district court referenced *Jean*'s requirement that circumstantial evidence is properly considered, *see* Tribe Br. at 32-33, the court did not ultimately consider such evidence in its summary judgment analysis. *Id*. at 33. Instead, the court ignored a majority of the Tribe's evidence and erroneously required the Tribe to present direct evidence of purposeful discrimination. *Id*. at 34-36. Moreover, the court erroneously required the Tribe to prove that the Corps was motivated solely by a discriminatory purpose, when the Tribe was only required to prove that the Corps was motivated at least in part by a discriminatory purpose. *Id*. (district court erred in using the Corps' stated explanations for its conduct as a basis for ignoring the Tribe's evidence of purposeful discrimination).

The court also failed to resolve genuine issues of fact in favor of the Tribe, the non-moving party. *Id*. at 24-26 (the court failed to resolve the disputed issue regarding whether S-12A levee closures showed discriminatory intent by placing the Tribe's safety at risk in favor of the Tribe, despite abundant record evidence of damage and risk to the Miccosukee people; the court also failed to resolve the issue regarding the impact of gate closure on the Miccosukee people in the Tribe's favor, despite abundant record evidence of a substantial impact on the Miccosukee people). Thus, genuine issues of material fact preclude summary judgment. *See*

Miccosukee Tribe of Indians of Florida v. EPA, 516 F.3d 1235, 1255 (11th Cir. 2008).

D. The District Court Improperly Made *Sua Sponte* Calculations For The First Time In Its Summary Judgment Order And Relied Upon Those Calculations To Dispose Of A Key Issue Of Disputed Fact

As noted *supra* at § I.C., the district court erroneously decided the factual issue regarding water levels in WCA 3A in favor of the Corps, the moving party, despite record evidence that the Corps' actions had a significant impact on the Miccosukee people and their lands. Tribe Br. at 20-24. The court did so by concluding, contrary to record evidence, that the Corps' actions had a *de minimus* impact on water levels. *Id*. The Corps fails to rebut this contention, and instead argues in a footnote that the court's analysis was proper because it "relied on uncontested data on water levels in WCA 3A in 2008." Govt. Resp. at 43 n.23. However, the conclusion which the district court then drew from that data (that the impact of the Corps' actions on Tribal land was *de minimus*) is contradicted by record evidence demonstrating that high water levels had a significant impact on Tribal lands. Tribe Br. at 21; *id*. at n.1. The court concluded this, moreover, based on *sua sponte* calculations made for the first time by the court in its own summary judgment order. The Tribe was not provided an opportunity to analyze or contest those calculations prior to the court's entry of summary judgment. Engaging in *sua sponte* calculations based on record data goes beyond the proper role of the

district court, which cannot weigh its own credibility. *See Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 1542 (11th Cir. 1993) (ALJ was "not free to set his own expertise against that of a physician who present[ed] competent evidence.") (citation omitted). Thus, the district court's judgment should be reversed because the court created and used evidence not contained in the record to conclude that no genuine issue of material fact exists with respect to the impact of the Corps' actions on water levels in WCA 3A.

E. Rational Basis Review Is Not Appropriate

The Corps erroneously claims its actions involve "classifications of geographical areas" rather than persons. Govt. Resp. at 46. This argument is belied by the Tribe's evidence, which shows a clear distinction between the Corps' treatment of and impact upon the Miccosukee community and their interests compared to non-Indian communities and their interests, Tribe Br. at 5-14; Doc 144 at 3-21, Doc 144-1, and by case law, which has upheld similar classifications as pertaining to persons, rather than geography. *See Dowdell*, 698 F.2d 1181 (finding racial discrimination by the city based on its provision of lesser municipal services to black community compared to white community). Moreover, the Corps' disputed claim that non-Miccosukee persons are similarly affected by the flooding in WCA 3A, Govt. Resp. at 46-47, is clearly contradicted by the record. *See supra* at §§ I.A-B. The Corps' argument that the Miccosukee people constitute

a political class in this case is similarly unavailing. *See id*. at 47 (citing *Morton v. Mancari*, 417 U.S. 535, 553 (1974)). *Morton*, cited by the Corps, lends no support to this argument. *Morton* held, based on the unique relationship between Indian tribes and the Federal Government, that the Government's preference toward Indians in that case did not constitute racial discrimination, but rather, was a function of the unique relationship between Indian tribes and the Government.[6] That relationship, which in *Morton* supported a preferential treatment toward Indians by Congress based on the history of employment discrimination against Indians, does not, in turn, support the Government's race based discrimination *against* them. Finally, the Tribe here is not suing on behalf of itself as a political entity, but rather, on behalf of the Miccosukee people as a racial and ethnic minority. Doc 144 at 6, 30 n.34. Thus, rational basis review is not appropriate.[7]

[6] *Morton* concerned employment preferences for qualified Indians in the Bureau of Indian Affairs, stemming from "longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or 'on or near' reservation employment." *Morton*, 417 U.S. at 548. The court found that the "exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal reservation-related employment did not constitute racial discrimination of the type otherwise proscribed." *Id*.

[7] Even under rational basis review, summary judgment was inappropriate because, as shown herein, in the Tribe's Initial Brief, and in the Tribe's summary judgment briefing, the Tribe demonstrated that all of the Corps' excuses for its actions were pretextual and based on claims which the record clearly contradicts.

II. THE DISTRICT COURT ERRED IN DISMISSING THE TRIBE'S FLORIDA INDIAN LAND CLAIMS SETTLEMENT ACT CLAIM AND THE CORPS HAS FAILED TO SHOW OTHERWISE

The Tribe's Brief shows that its Complaint adequately pled a claim for the Corps' violations of the Florida Indian Land Claims Settlement Act ("FILCA"), that the district court's interpretation of the Lease, Settlement Agreement, Trustees' Deed and the FILCA (collectively the "Agreements") was flawed, and that the district court relied on inapplicable case law to draw its erroneous conclusion that the Corps can conduct on the Tribe's lands any water management activities it sees fit. Tribe Br. at 37-50. In response, the Corps offers the same unsupportable interpretation of the Agreements it proffered below. Govt. Resp. at 47-49. However, the Corps' arguments fail to buttress the district court's flawed conclusions and do not show that the court was justified in dismissing the Tribe's FILCA claim.

The Tribe's Brief shows that its Complaint contains allegations sufficient to support its FILCA claim, including allegations regarding the existence of the Agreements, that the Corps breached the Agreements by unlawfully flooding the Tribe's land and that the Tribe was damaged by the Corps' breaches. Tribe Br. at 37-38. The Corps responds by summarily stating that the district court was correct in dismissing the Tribe's FILCA claim, and that the "Tribe's assertion that the Corps' action were 'unlawful' (Br. at 38) is 'a legal conclusion couched as a

factual allegation,' and is not entitled to the assumption of truth." Govt. Resp. at 47-48 (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009)).

The Corps' argument ignores the fact that the Tribe's Complaint contains nearly seven pages of factual allegations demonstrating the unlawfulness of the Corps' water management actions on the Tribe's land. Doc 1 at 12-19. Further, the Corps cites the Tribe's Initial Brief instead of the Complaint to support its assertion that the Tribe offered only a legal conclusion. However, a motion to dismiss tests the sufficiency of a *complaint*, not an appellate brief challenging a district court's erroneous dismissal of a count in a complaint. *See Speaker v. U.S. Dep't of Health & Human Serv. Ctr. for Disease Control & Prev.*, 623 F.3d 1371, 1379 (11th Cir. 2010).

Even a cursory reading of the facts alleged in the Tribe's Complaint shows that it provides much more than legal conclusions. For instance, the Complaint alleges that the Corps has, since 1998, taken actions that have caused high water levels on the Tribe's land for extended periods of time, and that those actions and high water levels have affected the Tribe's rights. *See, e.g.*, Doc 1 ¶¶ 42-44, 65-70, 74-80. The Complaint also alleges that the Corps' actions were taken in contravention to the Corps' own regulations and in disregard of the Tribe's rights under the Agreements and the United States Constitution. *See id.* ¶¶ 45-99. Accepting these allegations as true and viewed in the light most favorable to the

Tribe, as they must be, the allegations establish that the Corps acted in an unlawful manner that violated the Tribe's rights under the Agreements, including the FILCA. *Speaker*, 623 F.3d at 1379 (when ruling on a motion to dismiss "the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff"). Consequently, this Court should not countenance the Corps' argument that the district court was justified in dismissing the Tribe's FILCA count simply because the Tribe's Brief correctly summarizes as unlawful the myriad actions taken by the Corps, which are alleged in the Complaint.

The Tribe's Brief shows that the district court failed to properly analyze the Agreements to determine the parties' rights, and as a result, the district court's interpretation of the Agreements destroys mutuality of obligation, is unreasonable and makes several clauses in the Lease repugnant to one another. Tribe Br. at 38-47. The Corps responds by claiming that the Tribe's interpretation is contrary to the plain language of the Lease. Govt. Resp. at 48. The Corps makes no attempt to confront the fact that its interpretation destroys the mutuality of obligation necessary to support a contract. *Maccaferri Gabions, Inc. v. Dynateria, Inc.*, 91 F.3d 1431, 1443 (11th Cir. 1996) (holding that mutuality of obligation is necessary to support a contract). Nor does the Corps address the Tribe's argument that the district court's interpretation is unreasonable and puts several provisions of the

Lease at odds with each other. Tribe Br. at 38-47. It is, in fact, absurd to argue that the Tribe would relinquish, and the United States with its trust obligation to the Tribe would allow the Tribe to relinquish, substantial land rights in return for "rights" that could be extinguished at will by the Corps' by unlawfully flooding the Tribe's lands. *See* Tribe Br. at 46-47.

The Corps also cites no support for its position that the Agreements allow the Corps to carry out the alleged detrimental water management actions on the Tribe's land and that, based on a constrained reading of the Agreements, the Tribe cannot challenge those actions because the Corps apparently can manage water levels in any manner it sees fit. However, as made explicit by the Lease, the Corps' water management actions must be lawful. *See, e.g.*, Doc. 1, Ex. A, ¶¶ 5, 6. As discussed above, the Tribe's Complaint alleges several ways in which the Corps' water management actions failed to comport with the Agreements, the Corps' regulations and the Untied States Constitution. The district court was bound to accept those allegations as true and view them in the light most favorable to the Tribe. *Speaker*, 623 F.3d at 1379. Thus, the district court's interpretation was erroneous because it ignored numerous allegations, including the existence of the Agreements, the duties under the Agreements, and that the Corps' water management actions deviated from the terms of the Agreements. Those allegations are sufficient to state a claim under the FILCA.

The court, moreover, relied on inapposite case law to draw its erroneous conclusion that the Tribe can never challenge the Corps' water management actions under the Agreements. Tribe Br. at 47-50. The Corps' only response is to state that "[t]he district court was also correct when it held that [the Tribe's FILCA 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 [FILCA]." Govt. Resp. at 48. The Corps fails to address the Tribe's arguments that the cases upon which the district court relied are inapplicable to the facts at issue here. Tribe Br. at 47-50. The Corps also attempts to narrow the issue by stating incorrectly that the Tribe is merely challenging "water levels" on its land. In fact, the Tribe is challenging the Corps' direct actions of unlawfully flooding the Tribe's land. Neither of the opinions on which the district court relied addressed this issue. Tribe Br. at 48-50. Thus, the district court erred in relying on those cases for the erroneous principle that the Tribe can never challenge the Corps' water management actions under the Agreements, even when those actions flood and damage the Tribe's land.

The Corps' interpretation of the Agreements thus ignores fundamental tenets of contract interpretation, leaving the Tribe with none of the rights for which it bargained and resulting in an absurd construction of the Agreements. Tribe Br. at 38-47. The Corps responds by asserting that the Tribe's argument "is contrary to

the plain language of the Lease Agreement and [FILCA]." Govt. Resp. at 48-49. The Corps further asserts that "[t]he fact that [the Tribe's] rights are subject to the Corps' right to manage water levels does not render those rights 'meaningless.'" Govt. Resp. at 49. Again, the Corps overlooks the Tribe's claim that this language does not, and cannot, authorize unlawful water management actions such as those alleged in the Complaint. The Corps also makes no attempt to proffer a reasonable interpretation of the Agreements that accords both parties the rights for which they bargained. Rather, the Corps simply argues that the Agreements allow it to do as it pleases and flood the Tribe's land at will. This is not a proper reading of the Agreements, and as shown in the Tribe's Brief, the district court erred in approving such an interpretation.

III. THE DISTRICT COURT ERRED IN DISMISSING THE TRIBE'S DUE PROCESS CLAIM AND THE CORPS HAS FAILED TO SHOW OTHERWISE

As shown in the Tribe's Brief, this Court should reverse the district court's dismissal of the Tribe's due process claim because: (1) the Tribe pled sufficient facts to support its due process claim; and (2) the Tribe demonstrated that the district court relied on inapposite case law in arriving at its erroneous conclusion that the Tribe lacks a sufficient property interest to state a claim based upon the Corps' unlawful water management activities. Tribe Br. at 50-58. The Corps again responds by asserting that, based on the Agreements, it has the right to

"manage [ ] water levels" on the Tribe's land, and thus the Tribe lacks a protected property interest in "water levels" on its land. Govt. Resp. at 49-50.

The Tribe's Complaint, however, adequately pled the necessary elements to state a due process claim. Tribe Br. at 50-53. Moreover, the Tribe has demonstrated that its interest in its lands is sufficient to state a due process claim. Tribe Br. at 50-52. The Corps responds that "[t]he Tribe lacks a constitutionally-protected property interest in water levels in the Leased Area, because . . . the Lease Agreement and the [FILCA] reserve to the Corps and SFWMD the right to manage those water levels." Govt. Resp. at 49. However, the Complaint does not challenge the Corps' authority to engage in lawful and appropriate water management actions; it challenges the Corps' unlawful and inappropriate flooding of the Tribe's land in this case, which was undertaken in contravention of the Agreements and the United States Constitution. The Corps' attempt to mischaracterize this action as nothing more than a suit about "water levels" ignores the nature of the allegations, which claim that the Corps unlawfully flooded and damaged the Tribe's lands.

Furthermore, the Tribe's Brief shows that the district court relied on inapposite case law to reach its erroneous conclusion that the Tribe lacks a sufficient property interest in its land to state a due process claim. Tribe Br. at 53-58. The Corps responds only by stating that "the Tribe lacks a property interest

sufficient to support a due process claim based on water levels in the Leased Area or WCA 3A" and that the "Tribe's attempt to distinguish [the decisions upon which the district court relied] on their facts is unpersuasive." Govt. Resp. at 50. As discussed herein, the Tribe's due process claim is not based simply on "water levels," and the Corps fails to show why the Tribe's distinctions are inapplicable. The Tribe, therefore, adequately pled a due process claim and neither the district court's analysis nor the Corps' unsupported arguments show otherwise. Thus, the district court erred in dismissing the Tribe's due process claim.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I certify that this Reply Brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(A). This Reply Brief contains 6,861 words.

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Dated: March 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2011 copies of the foregoing Reply Brief Of Appellant Miccosukee Tribe of Indians of Florida were served by U.S. mail upon counsel at the address listed below.

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