IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 10-14271-E

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Plaintiff-Appellant,

v.

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

Defendant-Appellees.

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

APPELLEES' MEMORANDUM IN RESPONSE TO THIS COURT'S LETTER OF OCTOBER 25, 2011

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The United States submits this memorandum in response to the Court's letter of October 25, 2011, which directed the parties to answer two questions. The Court's questions are set out below, followed by the United States' responses.

* * *

*1) First, * * * Has the Secretary of Interior published in the Federal Register, pursuant to 25 U.S.C. § 1744, (a) findings that "the State of Florida satisfied the conditions set forth in [25 U.S.C. § 1743] and (b) "the Settlement Agreement?["] If so, please furnish this office with a copy of the Federal Register publication.*

We are informed by the Department of the Interior that it has been unable to locate any record of publication of the findings or the Settlement Agreement between the Miccosukee Tribe and the State of Florida described in 25 U.S.C. § 1744. To the best of our knowledge the prerequisites for the finding and publication listed in 25 U.S.C. § 1743 have all occurred. We have referred this matter to the Department of the Interior and asked the Department to investigate, consult with the State and the Tribe, and take further action if appropriate.

While the apparent absence of the findings and publication described in Sections 1743 and 1744 raises questions about the status of the Settlement Agreement and the related Lease Agreement (collectively, "the Agreements"), it is unnecessary for this Court to resolve those questions in this appeal. The Tribe's

claims in this case are dependant upon the Tribe's express assertion that the Agreements are in effect. *See, e.g.,* ER Doc. 1 (Complaint) at ¶¶ 3, 11, 33-40, 75-80, 83, 87-90. Yet, as demonstrated in the United States' Brief (pp. 8-9, 35, 47-50), the Tribe's claims are contrary to the Lease Agreement, which expressly and unambiguously makes the Tribe's interests in the Leased Area subject to the rights of the South Florida Water Management District and the Corps to operate flood control and water management projects in the Leased Area and WCA 3. Thus, the Tribe's claims fail whether or not the Agreements are in effect.

Moreover, there are strong prudential considerations that counsel against addressing the status of the Agreements in this appeal. First, no party raised the issue below, the district court did not consider the issue, the record relevant to the issue is undeveloped, and the State of Florida – one of the two principal parties to the Agreements – is not a party in this case.

Second and more broadly, any ruling that cast doubt on the status of the Agreements could upset long-settled expectations, contrary to what the Supreme Court has called "the special need for certainty and predictability where land titles are concerned[.]" *Leo Sheep Co. v. United States,* 440 U.S. 668, 687 (1979); *see also Arizona v. California*, 460 U.S. 605, 620 (1983) ("questions affecting titles to land, once decided, should no longer be considered open"). Indeed, when it

enacted the Florida Indian Land Claims Settlement Act in 1982, Congress expressly found that the pendency of the Tribe's aboriginal title suit "may result in economic hardships for residents of the State of Florida by clouding the titles to lands in the State, including lands not now involved in the lawsuits[.]" 25 U.S.C. § 1741(2). Congress also found that the Tribe's suit "has clouded the easement rights" of the South Florida Water Management District in lands necessary for water management, flood control and water supply in central and southern Florida. *See id.* § 1741(3). A ruling that cast doubt on the Agreements could re-open those questions.

A ruling on the status of the Agreements could upset long-settled expectations in other ways as well. The Tribe has brought multiple lawsuits prior to the instant case in which it has asserted rights under the Lease Agreement, and the courts have rendered several decisions based on the Lease Agreement. *See* U.S. Br. at 25-27, 35 n.16 (citing cases). In the decades since enactment of the Florida Indian Land Claims Settlement Act, the Corps of Engineers and other federal agencies have been proceeding in reliance on the Agreements, and Congress has approved at least two other settlements between the Tribe and the United States. *See, e.g.*, 25 U.S.C. § 1750 (Miccosukee Settlement Act of 1997); 16 U.S.C. § 410 Note, Pub. L. 105-313 (1998) (Miccosukee Reserved Area Act).

The State of Florida has also proceeded in reliance on the Agreements, by, among other things, granting the Tribe the lease and conveying a Trustee Deed to the United States of America, as Trustee for the Tribe. *See* ER Doc. 1 ¶¶ 33-36.

In sum, there are multiple reasons why the Court need not and should not address the status of the Agreements in this appeal.

2) Second, 25 U.S.C. § 1741(b)(2) [sic, should be 1744(b)(2)] states that after the State of Florida's Lease to the Miccosukee Tribe has been approved, "all claims against the United States [or] any State or Subdivision thereof . . . by the Miccosukee Tribe, arising subsequent to the [Lease] and based upon any interest in or right involving such [Lease] or natural resources, including but not limited to claims for trespass damages or claims for use and occupancy, shall be regarded as extinguished as of the date of the [Lease]."

Please submit to this office a memorandum not to exceed 15 pages explaining whether such language bars any claim (other than a claim based on the U.S. Constitution) the Tribe may have against the United States or the South Florida Water Management District arising out of the operation of the Central & Southern Florida Project and the Interim Operational Plan for the protection of the Cape Sable seaside sparrow.

The same considerations discussed above counsel against addressing the interpretation of Section 1744(b) in this appeal. The extinguishment of claims under Section 1744(b)(2) turns on the publication of findings and the Settlement Agreement pursuant to Sections 1743 and 1744(a). As described above, the Department of the Interior has been unable to locate any record of such findings or publication. Accordingly, it is uncertain whether Section 1744(b)(2) has taken

effect. And here again, it is unnecessary for the Court to decide the scope of Section 1744(b)(2) because, as demonstrated in the United States' brief, the Tribe's claims fail for multiple reasons even assuming they are not barred by that section.[1/]

In any event, we do not think Section 1744(b) bars all subsequent claims (other than constitutional claims) the Tribe may have against the United States or the South Florida Water Management District arising out of the operation of the Central & Southern Florida Project and the Interim Operational Plan for the protection of the Cape Sable seaside sparrow.

In summarizing the language of Section 1744(b)(2), the Court's question substitutes the bracketed word "Lease" for the statutory terms "transfer of lands or natural resources effected *by this section*, or an extinguishment of aboriginal title effected thereby[.]" (emphasis added). The other provisions of Section 1744 and

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[1/] On the other hand, even if Section 1744(b)(2) were read to extinguish the Tribe's claims based on the Lease – a reading we think is incorrect – that would not dispose of this case. Section 1744(b)(2) does not bar the Tribe from pursuing claims under the Administrative Procedure Act – that is, claims challenging "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court[.]" 5 U.S.C. § 704. As explained in our brief, the Tribe here attempted to frame its claims as constitutional claims in order to avoid the APA's limitations on the scope and timing of review of agency action. *See* U.S. Br. at 4 n.2 and 6 n.3.

the purposes of the Florida Indian Land Claims Settlement Act suggest, however, that the Lease is not a "transfer" within the meaning of Section 1744.

First, Section 1744(a)(1) provides that, upon the Secretary of the Interior's publication in the Federal Register of the Settlement Agreement and the findings described in Section 1743, "the transfers, waivers, releases, relinquishments, and other commitments made by the Miccosukee Tribe in paragraph 3 of the Settlement Agreement * * * shall be of full force and effect *on the terms and conditions therein stated*[.]" (emphasis added). Paragraph 3(c) of the Settlement Agreement in turn provides the Tribe's agreement to the extinguishment of certain claims "other than certain 'excepted interests[.]'" ER Doc. 1 Ex. B p.7 (page 60 of 98). Those "excepted interests" include "rights granted the Miccosukee Tribe under the Lease Agreement." *Id.* Similarly, Section 1744(b)(1) expressly provides that "nothing herein shall be construed as extinguishing * * * rights or interests defined as 'excepted interests' in paragraph 3c of the Settlement Agreement[.]" Thus, Section 1744 does not extinguish the Tribe's rights under the Lease Agreement.

Second, Section 1744(b)(1) refers to transfers "by, from, or on behalf of" the Tribe. The Lease is arguably not such a transfer; rather it is a transfer *to* the Tribe. This reading comports with the purpose of Section 1744 and the Florida

Indian Land Claims Settlement Act as a whole. Congress enacted the Act to provide federal approval for the transfers from the Miccosukee Tribe to the State of Florida embodied in the Settlement Agreement, which include the Tribe's release of its aboriginal title claims against the State. Such federal approval was required because, ever since the enactment of the Act of July 22, 1790, 1 Stat. 137, 138 (the first Nonintercourse Act), any transfer of lands or title *from* an Indian nation or tribe *to* a person or state has been invalid absent federal approval. *Oneida Indian Nation of New York State v. Oneida County, New York*, 414 U.S. 661, 667-68 (1974); *see also* 25 U.S.C. § 177 (the current codification of the Nonintercourse Act, which dates from 1834 and provides in relevant part that "No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.").[2/] Section 1744(a)(2) expressly states that the "transfers, waivers, releases, relinquishments, and other commitments validated [in Section 1744] shall be deemed to have been made in accordance with" the Constitution and applicable laws, including "the Act of July 22, 1790" – that is, the Nonintercourse Act.

[2/] On the other hand, no federal approval is required for a transfer *to* a tribe.

Thus, Section 1744(b)(2) provides the requisite federal approval for the Settlement Agreement's extinguishment of the Tribe's aboriginal title claims, but it does not prospectively extinguish all future claims by the Tribe seeking to enforce the terms of the Lease.

Respectfully submitted,

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November, 2011
90-2-4-12658/1

CERTIFICATE OF SERVICE

I hereby certify that on November, 23, 2011, a copies of the foregoing were served by United States Mail, postage prepaid, upon counsel at the addresses listed below:

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