SUMMARY OF MICCOSUKEE TRIBE' FEDERAL WATER QUALITY CASES

The Miccosukee Tribe of Indians has waged a long struggle to attempt to obtain clean water for the Everglades, which is its traditional homeland. The Tribe has filed numerous administrative actions and permit challenges. The Tribe also adopted water quality standards for its Federal Reservation in 1998. The Tribe's water quality standards include a 10 ppb numeric criterion for phosphorus, which was approved by the EPA in 1999 as protective of the Everglades and scientifically defensible. The Tribe has also filed numerous cases in federal court, which are summarized below:

I. THE FEDERAL EVERGLADES LAWSUIT:

1988: U.S. Attorney, Dexter Lehtinen, on behalf of the Federal government, sued the State of Florida for not enforcing its water quality standards in the Everglades. United States v S. Fla. Water Mgmt. Dist., 88-1886-CIV-Hoeveler. Dexter Lehtinen now represents the Miccosukee Tribe, who intervened in this lawsuit in 199?.

1992: On February 14, 1992, Judge Hoeveler adopted the Settlement Agreement as a Consent Decree. United States v S. Fla. Water Mgmt. Dist. 847 F. Supp. 1567 (S.D. Fla. 1992), aff'd 28 F.3d 1563 (11th Cir. 1994). AS a result of the lawsuit the State of Florida agreed to build XXX acres of Stormwater Treatment Areas (STAs) and meet water quality deadlines for phosphorus concentrations and loads. The original deadline line for the State to meet long term water quality compliance was July 2002. The Miccosukee Tribe has a Memorandum of Agreement (MOA) that allows it to seek enforcement of the Settlement Agreement.

1994 to date: The Tribe has sought enforcement of the SA numerous times. Tribe also filed a motion to request that a Special Master be appointed to oversee the Settlement Agreement. When Judge Moreno took over the case, he appointed a Special Master over the objection of the State and federal government. After the 1994 EFA, was passed by the State, the Court approved extending this deadline to December 31, 2006 In 200?, it filed a motion alleging violations of the SA in Loxahatchee and the Judge ruled in its favor. The Judge ordered the Special Master to conduct a hearing on remedies. In response , the SFWMD agreed to build an addition 18,000 acres (?) of STAs. The Special Master's Report is currently pending before Judge Moreno.

II. THE EVERGLADES FOREVER ACT LAWSUIT:

1994: the State of Florida passed the Everglades Forever Act (EFA). This law was originally called the Marjory Stoneman Douglas Act, but she took her name off the law because it did not require the phosphorus criterion to be met until December 31, 2006.

1995: The Miccosukee Tribe sued the Environmental Protection Agency (EPA) under the Clean Water Act (CWA) for failing to review the Amended EFA as a change in water quality standards. Case No. 95-0533-CIV-Davis. The case was initially dismissed, and the Tribe appealed.

1997: In 1997, the 11th Circuit Court of Appeals ruled in favor of the Tribe. The 11th Circuit

reversed the lower court's decision and remanded it back to the Court. The 11th Circuit found that the Court should have conducted its own factual findings to determine whether the EFA changed Florida's water quality standards. *See*, Miccosukee Tribe v US EPA, 105 F.3d 599 (11th Cir. 1997). The Appeals Court remanded it back to the lower Court.

1998: In September 1998, Judge Davis issued his Omnibus Order in which he found the EFA changed Florida's water quality standards and that EPA's finding that it had not was arbitrary and capricious and contrary to law. Miccosukee Tribe of Indians v. United States ,Case No. 95-553-CIV-Davis (SD Fla.) The Judge set aside EPA's finding. Judge Davis found that by not requiring farmers to implement additional water quality measures until 2006, the EFA allows discharges of phosphorus that violate Florida's narrative standard until 2006 and that this was a de facto suspension of water quality standards. The Judge remanded the case to EPA and ordered it to treat the EFA as a change to Florida's water quality standards and to approve or disapprove the changes, as the CWA requires.

1999: EPA reviewed the 12 year compliance schedule and approved on the basis that it would be met. The 1999 Determination states: "as noted above, the reasonableness and acceptability of the 12 year schedule assumes that the December 31, 2006 deadline will be met.

III. THE S-9 LAWSUIT:

1998: The Miccosukee Tribe sued the South Florida Water Management District (SFWMD) alleging that It was discharging pollutant into the Everglades Protection Area from its S-9 pump.

1999: Judge Ferguson issued a decision in favor of the Tribe in which he concluded that the SFWMDS was required to obtain an NPDES permit because the S-9 pump station adds water and other pollutant from the C-11 canal into the Everglades in WCA 3A. Miccosukee Tribe of Indians of Fla. V. S. Fla. Water Mgmt. Dist., Nos. 98-CV-605698-CV-6057, 1999 WL 33494862 at *7 (S.D. Fla. 1999)..

2002:SFWMD appealed the decision and the 11th Circuit Court of Appeals agreed with the Tribe and upheld Judge Ferguson's decision. The 11th Circuit affirmed Judge Ferguson's decision that the S-9 pump needed an NPDES permit. Miccosukee Tribe of Indians of Fla. V. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1371 (11th Cir. 2002).

2004: In 2004, in response to the SFWMD, and EPA's taking the S-9 case to the U.S. Supreme Court, the Supreme Court ruled in the Tribe's favor that the SFWMD did not have to be the creator of the pollutant. See, S. Fla. Water Mgmt. Dist. V. Miccosukee Tribe of Indians, 541 U.S. 92 (2004). The Supreme court rejected as "untenable" the SFWMD's argument that NPDES permitting applies to a point source only when the point source creates the pollutant. Id. at 104-105. The Supreme Court explained, the CWA "makes it plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters." Id. at 105. The Supreme court remanded the case to address the narrow point of whether the C-11 canal and WCA 3A were meaningfully distinct bodies of water.

2007: The S-9 case is currently on stay in Case No. 98-CIV-6056-Lenard.

IV. THE LAKE OKEECHOBEE S-2, S-3, S-4 LAWSUIT

2002: On December 9, 2002, the Miccosukee Tribe was granted leave to intervene in Friends of the Everglades v South Fla. Water Mgmt. Dist. et al, Case No. 02-80309-CIV-ALTONAGA/Turnoff. . The Plaintiffs in this case, which included the Tribe, contended that the S-2, S-3 and S- 4 pumps that were backpumping water containing pollutants into WCA 3A needed National Pollutant Discharge Elimination System ("NPDES") permits. The Miccosukee maintained that the backpumping of pollutant latent waters by the SFWMD into Lake Okeechobee threatened the Miccosukee's way of life in the Everglades and lake Okeechobee.

2005: On May 2, 2005, the EPA intervened in this case on the side of the SFWMD. On the eve of Summary Judgment in the case, EPA issued an "agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers," which the Tribe contended was a made-for-litigation document that was contrary to the CWA. The EPA made-for-litigation document turns into an EPA Proposed Rule on "National Pollutant Discharge Elimination System (NPDES Water Transfers Proposed Rule." See 71 Fed. Reg. 32887. Although, EPA told the Court it expected to take final action on the Rule by the spring of 2007, to date it has not done so.

2006: On December 11, 2006, Judge Altonaga issues an Order finding in favor of the Tribe and the other Plaintiffs and against SFWMD and EPA. In her Order, the Judge declared that "in the absence of a NPDES permit, the operation of the S-2, S-3 and S-4 pump stations to backpump pollutant-containing waters from the canals in a northerly direction into the Lake Okeechobee is in violation of the CWA. The Court further found that the canals and the Lake were meaningfully distinct bodies of water; that requiring permits for backpumping is consistent with the CWA goal of restoring and maintaining the chemical, physical and biological integrity of our nation's waters. The Court rejected EPA's Agency Interpretation on Water Transfers as contrary to the unambiguous language in the CWA. EPA's agency interpretation.

2007: On June 14, 2007, the Judge issued the Final Order, and a permanent injunction, in favor of the Tribe and the other Plaintiffs and ordered the SFWMD Executive Director to apply for a NPDES permit forthwith. [And NPDES permit will have an enforceable schedule of compliance to clean the water. (TERRY ADD HERE) The Court maintained jurisdiction over the matter. The SFWMD has filed a notice of appeal on the Judge's Order.

V. THE AMENDED EFA AND PHOSPHORUS RULE LAWSUIT

2004: The Tribe filed a lawsuit against EPA for its failure the review the 2003 Amendments to the EFA as a change in Florida's water quality standards under section 303 of the CWA and for failure to review all part of the State's 2004 Phosphorus Rule as a change in water quality standards. Miccosukee Tribe of Indians v. EPA (S.D. Fla. Lead Case 04-21448-CIV-Gold)

2006: On February 16, 2006, the Judge issued on a motion by the Tribe stating that it would hold an evidentiary hearing to determine whether the EPA discharged its mandatory duty of review on subsections 1, 2 and 5 of the Phosphorus Rule. On April 12, 2006 the Judge issued an Order stating that he would hold a hearing to make his own determinations whether these sections

changed water quality standards. In response, EPA requested a stay to review these sections.

2007: This case is currently at the summary judgment stage before Judge Gold. The Tribe contends that both the Amended EFA and the Rule changed Florida's water quality standards, and violate the CWA. For instance, the Tribe contends that the moderating provisions in the Amended EFA and Rule have changed the December 31, 2006 compliance deadline previously approved by EPA as "reasonable." The moderating provisions allow dischargers who adopt these moderating provisions not to meet the phosphorus criterion until 2016.