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Cover Page Footnote

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THE SEMINOLE WATER RIGHTS COMPACT AND THE SEMINOLE INDIAN LAND CLAIMS SETTLEMENT ACT OF 1987

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I. INTRODUCTION

Under the doctrine set forth in *Winters v. United States*,[1] American Indians have unique rights to use the waters that arise on, border, traverse, or are encompassed within their reservations. Controversies have developed in western states, where many reservations are located, concerning the precise nature and extent of Indian water rights. Specifically, controversies have focused on how such rights are to be reconciled with the otherwise vested rights of non-Indians under the rules of the appropriation doctrine,[2] which generally govern western water law. In the East, Indian reservations are fewer in number and water supplies far more abundant.[3] Thus, Indian water rights have not

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1. 207 U.S. 564 (1908). Under the *Winters* doctrine, Indian tribes throughout the United States have been held to have "reserved" rights in all waters that arise on, border, traverse or underlie their reservations. The *Winters* case and its progeny recognized that lands set aside as reservations for Indian tribes to have as homelands would be worthless to the Indians unless they were assured adequate water to sustain their lives and livelihoods. *See* F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 578-79 (1982).

2. *See* J. SAX, WATER LAW, PLANNING AND POLICY, CASES AND MATERIALS 2-3 (1968). Under the doctrine of prior appropriation, water rights arise where water is taken and applied to a beneficial use. The first in time to appropriate water has priority over other competing users of the same water source. *Id.*

3. Eastern states generally recognize the riparian system of water rights. This type of water right is created by ownership of land adjacent to a stream or river. No riparian owner may diminish the natural flow of the stream to the detriment of other riparian owners. Each riparian owner is entitled to reasonable use of the water, taking into consideration the needs of all riparian owners. *Id.* at 1-2. Several states, including Florida, have adopted hybrid statutory permit systems integrating the more efficient water allocation characteristics of the appropriation doctrine into traditionally riparian systems. *See* D. GETCHES, WATER LAW IN A NUTSHELL 62 (1984).

yet been the subject of large-scale litigation or public controversy in eastern states. Consequently, the basic questions regarding how and if the *Winters* doctrine applies in eastern states remain unresolved.

This Article explains how, prior to 1987, the nature and extent of the water rights of the Seminole Tribe of Florida (Tribe) on its various federal reservations in Florida remained undefined. Florida enacted a comprehensive law governing the use of state waters by all state citizens in 1972,[4] but the statute failed to address how tribal water rights would be affected. The Tribe, as one of the State's largest landowners, had successfully resisted the State's repeated efforts to regulate its activities. The Tribe claimed that it was not subject to the new law because the State lacked regulatory jurisdiction over its reservations.[5] By early 1986, questions concerning tribal water use and management remained the subject of controversy, pointing to protracted and difficult conflict between the Tribe and the State.

In 1987, the situation changed dramatically. The Tribe, the State of Florida, and the South Florida Water Management District (SFWMD) agreed to a settlement (Agreement) of the pending litigation[6] by entering into an historic Water Rights Compact (Compact)[7] that recognized and defined federal water rights for the Tribe in Florida. This was the first time federally protected Indian water rights were recognized in an eastern riparian state.[8] The Compact was also unique because it was achieved without litigation.[9] Additionally, differences over the extent of State and tribal jurisdiction were set aside in favor of cooperative development of comprehensive solutions to fundamental problems regarding conservation of natural resources and the environment.[10]

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4. Florida Water Resources Act of 1972, Ch. 72-299, 1972 Fla. Laws 1082 (codified at FLA. STAT. ch. 373 (1989)).

5. *See infra* notes 28, 29, 35, 49, 62 and accompanying text.

6. The Settlement Agreement grew out of litigating Seminole Tribe of Indians v. State of Florida, No. 78-6116-CIV (S.D. Fla. 1978), and is published in the Federal Register. Seminole Indian Land Claims Settlement Act of 1987, 53 Fed. Reg. 25,214 (July 5, 1988) [hereinafter Agreement].

7. The Compact is published in *Seminole Indian Land Claims Settlement Act of 1987: Hearings on S. 1684 Before the Senate Select Comm'n on Indian Affairs*, 100th Cong., 1st Sess., 83-122 (1987) [hereinafter Compact].

8. For contrasting views regarding whether the Indian Reserved Water Rights doctrine applies in riparian states, compare Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 68-69 (1966) with Hanks, *Peace West of the 98th Meridian—A Solution to Federal-State Conflicts Over Western Waters*, 23 RUTGERS L. REV. 33, 39 n.25 (1968).

9. *See, e.g.*, Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. L. No. 100-285, 102 Stat. 2973. Congress found that compromise was desirable because the Ute Mountain Ute Tribe and the Southern Ute Indian Tribe's federal reserved water rights were "the subject of existing and prospective lawsuits involving . . . numerous parties in southwestern Colorado." 1988 U.S. CODE CONG. & ADMIN. NEWS at § 2. *See also* Pyramid Lake Tribe of Indians v. Hodel, 878 F.2d 1215 (9th Cir. 1989).

10. *See* Agreement, *supra* note 6, at 25,215.

The Agreement between the Tribe, the State, and the SFWMD was approved by Congress in the Seminole Indian Land Claims Settlement Act of 1987.[11] The Agreement, which included the Compact, dramatically changed the relationship between the Tribe and the State. The Tribe agreed to settle a long-standing claim it had against the State for unlawful flooding of a portion of its East Big Cypress Reservation and to extinguish all other major tribal land claims against the State.[12]

II. BACKGROUND LEADING TO THE 1987 SETTLEMENT

The Florida Seminoles are descendants of Miccosukee and Creek-speaking Indians who inhabited northern Florida in the mid-1600's.[13] In the 19th century, the Seminoles' aboriginal territory was ceded to the United States in a series of treaties which contemplated the removal of the entire Tribe to Oklahoma.[14] While the Indians rejected the validity of the treaties and fought three bitter wars against the federal government to resist their implementation, the Tribe eventually lost most of its territory in Florida. By 1860, the majority of tribal members had been removed to Oklahoma. A significant number, however, remained in Florida, hiding in the Everglades where they endured conditions of extreme poverty and were virtually ignored for more than a century.[15]

Concern for the Seminoles prompted the federal government to establish federal reservations at Hollywood,[16] Brighton,[17] and Big Cy-

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11. Pub. L. No. 100-228, 101 Stat. 1556 (codified at 25 U.S.C. § 1772(a)-(g) (1988)).

12. *See* Agreement, *supra* note 6, at 25,215.

13. For a succinct history of the Seminoles in Florida, see generally *Distribution of Seminole Judgment Funds: Hearings on S. 2000 and S. 2188 Before the Senate Select Comm'n. on Indian Affairs*, 95th Cong., 2d Sess. 961-71 (1978) (report to Congress on Seminole Land Rights in Florida and the award of the Indian Claims Commission submitted by the Indian Law Resource Center).

14. *Id.* at 65-87.

15. *Id.*

16. Lands at Dania (Hollywood) were "set aside as a reservation." Exec. Order No. 1379 (reprinted in C. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 678-79 (1913)). All but 360 acres of this 1911 Executive Order Reservation were later exchanged for lands owned by the State, but the Hollywood Reservation achieved what is essentially its present day form as a result of the Act of June 14, 1935. Ch. 238, 49 Stat. 339.

17. The Brighton Reservation lands, purchased under the so-called "Submarginal Lands" program, were taken under the jurisdiction of the Secretary of the Interior to be administered for the benefit of the Seminoles by executive order on April 15, 1938. Exec. Order No. 7868, 3 C.F.R. 395 (1936-1938). The Act of July 20, 1956, expressly declared the tribal lands at Brighton to be a reservation for the Florida Seminoles. Ch. 645, 70 Stat. 581 (codified at 25 U.S.C. § 465 (1988)).

press.[18] The Tribe also received a measure of support from the State of Florida. In 1935, the State established a reservation for the Seminoles in Broward and Palm Beach Counties. The reservation was exchanged for a reservation that had been established in 1917 in Monroe County, but which was part of the lands to be included in the Everglades National Park.[19] The exchange was necessary for the State to clear title to the area which was to make up the new national park.

The reservation established in 1935 was initially set aside for the Seminole and Miccosukee Tribes, but was ultimately partitioned between the two Tribes.[20] The Seminole Tribe's portion became known as the East Big Cypress Reservation. The reservation lands were held for the Indians in trust and administered by the Board of Trustees of the Internal Improvement Trust Fund (Board). The Board consists of the Florida Governor and Cabinet, which is the same body charged with the responsibility of developing state lands.[21] The State's role, as trustee of the state reservation, was analogous to that of the United States with respect to federal lands held in trust for the benefit of Indians.[22]

This arrangement led to an inherent conflict of interest. In 1950, the Board, charged by State law "to protect the Tribe's use and benefit of

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18. The West Big Cypress Reservation lands were purchased by the federal government for the benefit of the Seminoles around the turn of the century. *See* Act of June 6, 1900, ch. 785, 31 Stat. 280, 302; Act of March 1, 1899, ch. 324, 30 Stat. 924, 938; Act of June 7, 1897, ch. 3, 30 Stat. 62, 78; Act of June 10, 1896, ch. 398, 29 Stat. 321, 337; Act of March 2, 1895, ch. 188, 28 Stat. 876, 892. By 1919, over 23,000 acres were under the administration of an Indian Affairs Agency for the use and benefit of the Seminoles residing at Big Cypress. The 11,000 acres added to West Big Cypress pursuant to the Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-463 (1988)), were to be held, in addition to the lands purchased for Seminole use at Brighton, as a reservation. Exec. Order No. 7868, 3 C.F.R. 395 (1936-1938).

19. The State's decision to set up the 1935 reservation was not entirely voluntary. Congress provided that Indian rights in the new park area were to be protected. Act of May 30, 1934, ch. 371, § 3, 48 Stat. 816 (codified at 16 U.S.C. §§ 410-410c (1988)).

20. *See* Ch. 65-249, 1965 Fla. Laws 677 (codified at FLA. STAT. § 285.061 (1989)). This Article does not deal with the separate history of the Miccosukee Tribe of Florida, whose members are also Miccosukee-speaking descendants of the original Seminole Nation. The Miccosukee Tribe entered into a comprehensive settlement with the State on related claims which was approved in 1982. Florida Indian Land Claims Settlement Act of 1982, Pub. L. No. 97-319, 96 Stat. 2012 (codified at 25 U.S.C. §§ 1741-1749 (1988)). The Miccosukee settlement did not resolve the nature and extent of the Tribe's water rights, but essentially preserved the status quo. *See* 25 U.S.C. § 1747(c) (1988).

21. The Board was established by article IV, section 17 of the 1885 Florida Constitution. It has the responsibility of setting aside lands for reservations, which are then held in trust by the Department of General Services. *See* Ch. 69-106, 1969 Fla. Laws 490 (codified at FLA. STAT. § 285.06 (1989)).

22. *See* 1944 FLA. ATT'Y GEN. ANN. REP. 60; 1944 FLA. ATT'Y GEN. ANN. REP. 110; 1956 FLA. ATT'Y GEN. ANN. REP. 336. *See also* Seminole Tribe v. United States, 25 Ind. Cl. Comm'n 25 (1971).

the Big Cypress lands forever,"[23] conveyed a flowage easement over the lands to the Central and Southern Flood Control District[24] without providing any compensation to the Indians. The District eventually flooded the lands within the easement, creating the second largest lake in Florida[25] during the rainy season.[26] In recent years, development has caused ecological changes which have resulted in a lack of water. This water shortage has caused the lake to drastically recede. Consequently, portions of this area have been subject to wild fires.

The Tribe filed suit for ejectment and other relief in 1978,[27] alleging that the attempted transfer of the flowage easement to the District violated the federal Nonintercourse Act.[28] The Act requires congressional approval of all transfers of tribal real property interests—even where the legal title is held by the State or has been granted by the State.[29] In addition, the Tribe argued that State authorities had breached State law by violating the fiduciary obligations assigned to them by the Florida Legislature.[30]

By the end of 1985, the Seminole Tribe found itself at war with the State of Florida on many fronts. The federal lawsuit was at an impasse, pending for more than a year on unresolved motions. The prospect of many years of litigation loomed ahead. Additionally, the Tribe had an unresolved claim to a five million acre 1842 reservation in south-central Florida which had never been formally disestablished. Moreover, the Tribe had claims to significant amounts of Florida land to which it asserted continued aboriginal title. While these claims were not yet filed, the Tribe circulated a draft complaint to State officials advising them that litigation was imminent.

On another front, the Tribe possessed evidence that the State had unlawfully widened the highway right-of-way through its federal Hollywood Reservation, depriving the Tribe of highly valuable acreage.[31]

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23. Ch. 17065, § 3, 1935 Fla. Laws 653 (codified as amended at FLA. STAT. § 285.06 (1989)).

24. The Central and Southern Flood Control District was the predecessor of the South Florida Water Management District.

25. The largest lake in Florida is Lake Okeechobee.

26. *See* E. FERNALD & D. PATTON, WATER RESOURCES ATLAS OF FLORIDA 285 (1984).

27. Seminole Tribe of Indians v. State of Florida, No. 78-6116-CIV (S.D. Fla. 1978).

28. *See* Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (codified at 25 U.S.C. § 177 (1988)). *See generally* F. COHEN, *supra* note 1, at 109-17, 511-20.

29. *See, e.g.*, Tuscarora Indian Nation v. Federal Power Comm'n, 265 F.2d 338 (D.C. Cir. 1959), *rev'd on other grounds*, 362 U.S. 99 (1960); Alonzo v. United States, 249 F.2d 189 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958); United States v. 7405.3 Acres of Land, 97 F.2d 417 (4th Cir. 1938). *See also* United States v. University of New Mexico, 731 F.2d 703, 706 (10th Cir.), *cert. denied*, 469 U.S. 853 (1984).

30. *See* FLA. STAT. § 285.001 (1989).

31. *See* Agreement, *supra* note 6, at 25,214. This claim was not extinguished with the Tribe's other claims against the State or South Florida Water Management District. *Id.*

This action also appeared to violate the Nonintercourse Act and other federal statutes. Litigation appeared imminent on this claim as well.

Furthermore, the Tribal Chairman, James E. Billie, faced criminal prosecution in both State[32] and federal[33] court for killing a Florida panther on the Big Cypress Reservation. Tribal members believed that Billie was unfairly singled out for criminal prosecution because he was an Indian. Their outrage was fueled by the previously unchallenged belief that tribal members had the right to take any game found within the boundaries of the reservation[34] because of the status of their reservations as Indian homelands and the settled principle that states lack regulatory jurisdiction over Indian hunting and fishing on Indian lands within reservation boundaries.[35]

On yet another front, the State refused to allow the Tribe to use six sections of tribal land in Palm Beach County because they contained extensive wetlands.[36] Although the State needed this land for Everglades restoration, it could not obtain the Tribe's consent to transfer title to the lands. Moreover, it was politically infeasible and legally questionable for the State to seize the land unilaterally.[37] Despite a stern warning from the South Florida Water Management District (SFWMD) that any reclamation activity would be strongly opposed, the Tribe actively pursued plans to reclaim the six sections to use for pasture.

Finally, the Tribe had challenged the SFWMD's request for a dredge and fill permit from the Corps of Engineers for a flood control project known as the Modified Hendry County Plan,[38] located north

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32. State v. Billie, 497 So. 2d 889 (Fla. 2d DCA 1986).

33. United States v. Billie, 667 F. Supp. 1485 (S.D. Fla. 1987).

34. The Eighth Circuit Court of Appeals' decision in United States v. Dion, 752 F.2d 1261 (8th Cir. 1985) (en banc), *rev'd*, 476 U.S. 734 (1986), provided strong legal grounds for that belief at the time the panther was killed. In *Dion*, the Eight Circuit held that neither the Eagle Protection Act nor the Endangered Species Act extinguished Yankton Sioux Indian treaty hunting rights on their reservations, provided that such hunting was for non-commercial purposes only. *Id.*

35. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 330 (1983) (noting that the state conceded the tribe's exclusive jurisdiction over Indian hunting and fishing); *see generally* Laurence, *The Bald Eagle, The Florida Panther And The Nation's Word: An Essay on the "Quiet" Abrogation of Indian Treaties and the Proper Reading of* United States v. Dion, 4 J. LAND USE & ENVTL. L. 1, 15-29 (1988).

36. The six sections of land at issue were part of the East Big Cypress Reservation. *See* Agreement, *supra* note 6, at 25,214.

37. The Tribe's position, still undecided in the case then pending against the State and the South Florida Water Management District, was that no transfer could be effected without congressional and tribal approval. *See* 25 U.S.C. § 177 (1988).

38. The Modified Hendry County Plan was an outgrowth of the earlier, far more ambitious Hendry County Plan, which would have used the waters of Lake Okeechobee for irrigation. The earlier plan had been abandoned because it may have posed a severe ecological threat to the

of the Tribe's West Big Cypress Federal Reservation. The Tribe's opposition to the issuance of a permit and the request for a full-blown administrative hearing on the project threatened, at a minimum, to delay completion for several years. Some of the State's largest landowners believed the potential delay seriously threatened their plans to increase the amount of land dedicated to citrus production in South Florida.

At this point, key State and SFWMD officials reopened negotiations with the Tribe, adopting a more flexible approach.[39] Negotiations had been attempted several times before but were unsuccessful. The negotiations initially focused on the existing land title controversies. The participants soon realized, however, that a fundamental conflict also existed between the Tribe's water rights and the extent of State jurisdiction over tribal water-related matters—issues that had never been adjudicated. The conflict raised the prospect of large-scale Indian water rights litigation that could last for many years with uncertain results.[40] In 1986, after numerous meetings, a concept of linking the various controversies emerged, leading to the Agreement ratified by the Seminole Indian Land Claims Settlement Act of 1987.[41] As previously noted, the Agreement included the Water Rights Compact.[42]

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area. The Modified Plan had been approved, or at least not objected to, by various concerned groups, and proceedings before the Corps of Engineers had not been expected to cause any controversy. *See* Jacksonville Dist. Corps of Engineers, Permit Application No. 85-IPD-20126, Dep't. of the Army, (September 24, 1985) (copy on file at *J. Land Use & Envtl. L.*, Florida State University, Tallahassee, Florida).

39. The key individual negotiator on the State side was Timer Powers, then a member of the Governing Board of the South Florida Water Management District. Mr. Powers was given broad authority to pursue solutions to the various controversies and played a unique role in winning the trust of the Tribe, while keeping the parties at the bargaining table until solutions had been achieved.

40. *See, e.g.*, Arizona v. California, 373 U.S. 546 (1963).

41. *See supra* note 10 and accompanying text.

42. In addition to the Compact, *supra* note 7, the Agreement resolved all pending tribal claims for damages under federal and state law against the State and the South Florida Water Management District, with the exception of the claim against the State over the right-of-way for a highway through the Hollywood Reservation. *See* Agreement, *supra* note 6, at 25,214. Under the terms of the Agreement, the Tribe surrendered its ownership of 14,470 acres of land in the East Big Cypress Reservation. The Tribe transferred the acreage to the State in fee, but reserved tribal rights to hunt, fish, and frog in the area. The remaining fifteen sections of the state reservation were transferred to the United States in trust for the Tribe and added to the federal West Big Cypress Reservation.

The State acquired the Tribe's interests in the six sections of the state reservation in Palm Beach County, which the State needed for the Rotenberger Tract Everglades Restoration Program. The Tribe did not want to sell these lands, but their inclusion became a necessary element of the Agreement in order to secure the support of various entities involved on the State side. Although the Tribe had never filed a claim, it also waived its claim to a 5,000,000 acre reserva-

III. SEMINOLE TRIBE'S WATER RIGHTS PRIOR TO THE 1987 COMPACT

The Tribe had been concerned for many years about large-scale citrus operations and other development north of its West Big Cypress Reservation. Although no present shortage of water existed on that reservation, the Tribe feared that implementing the extensive plans for diverting groundwater to the north would affect both the quality and quantity of its only dependable source of water in the dry season—reservation groundwater.[43]

At Brighton, the situation was worse. The Seminole Tribe of Florida, Inc., the Tribe's business arm, had earlier obtained a permit from the South Florida Water Management District (SFWMD) for the use of approximately fifteen percent of the water in the canals within the Indian Prairie Basin. The permit made this water available to irrigate pastures for cattle and other related uses.[44] Despite the valid permit, the Tribe was often deprived of water in drier periods because of the SFWMD's management of the canal system.[45] This problem was exacerbated by neighboring landowners either flooding tribal lands or diverting water from them without legal authority or any effective SFWMD regulation.

The Tribe's attorneys recognized that the precise nature of the Tribe's water rights had never been judicially defined. Tribal attorneys advised the Tribe that its water rights on federal reservations, held in trust by the United States, were entitled to protection under federal law and could be vindicated in federal court.[46]

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tion set up under an 1839 Executive Order (the Macomb Claim). Finally, the Tribe abandoned any claim it may have had based on aboriginal title, effectively recognizing the Supreme Court's decision in United States v. Dann, 470 U.S. 39 (1985). In *Dann*, the Court held that tribal claims based on aboriginal title were extinguished when the decision of the Indian Claims Commission, seeking compensation for the loss of aboriginally-held land, was reported to Congress. 470 U.S. 39 (1985).

For these various land claims and transactions, the Tribe received approximately $6,500,000, in addition to the Compact. The South Florida Water Management District was also to provide $500,000 in services for water-related projects and construction. *See* Agreement, *supra* note 6, at 25,216.

43. This was the focus of the Tribe's objections to the Modified Hendry County Plan mentioned above. *See supra* note 38 and accompanying text.

44. This was the genesis of the fifteen percent minimum share guaranteed to the Tribe under the Compact. *See* Resources Planning Department, S. Fla. Water Management Dist., Technical Report on Water Availability Estimates for the Brighton Seminole Indian Reservation, Water Resources Division, (Dec. 1988) [hereinafter Technical Report] (copy on file at *J. Land Use & Envtl. L.*, Florida State University, Tallahassee, Florida).

45. *Id.* at 1, 35.

46. *See* Memorandum for Seminole Tribe for Compact Negotiations, "Water Rights of the Seminole Tribe in the Federal Seminole Reservation" (copy on file at *J. Land Use & Envtl. L.*, Florida State University, Tallahassee, Florida).

In the past, state authorities had never precisely focused on the status of the Seminole Tribe vis-à-vis the state's water system regulation. They generally assumed that the *Winters* doctrine did not apply in the East.[47] Moreover, authorities argued that the Tribe was subject to state jurisdiction for the regulation of its water use and, therefore, subject to the requirements of the Florida Water Resources Act of 1972.[48] The Florida Water Resources Act established a permit system in lieu of the previous riparian system. The Tribe denied the State's right to regulate its water use. Regardless of the police power rights Florida might have to change from a riparian system to a permit system, the Tribe argued that Florida had no right to control tribal activities or rights on federal reservation lands absent tribal consent and congressional approval.[49]

Similarly, State and SFWMD officials were uncomfortable with the enactment of the Florida Water Resources Act because it did not specifically address Indian water rights. The new state permit system had been implemented without specific consideration of its affects on or relationship to Indian water rights. Despite its general assertion of jurisdiction, the State had never successfully accomplished or even attempted serious regulation of tribal water use.

Prior to the Water Rights Compact (Compact), the Tribe asserted federally protected reserved water rights in its federal Indian reservations under the *Winters* doctrine.[50] The *Winters* doctrine was developed in western states which followed the prior appropriation system,[51] as opposed to eastern states which followed the traditional riparian system.[52] At this point, however, no court had ever held that the *Winters* doctrine applied to eastern states. Nevertheless, the Tribe believed that the *Winters* doctrine's rationale—to assure Indians on federally reserved lands sufficient water to sustain their reservations as homelands[53]—applied with equal force to riparian states or to Florida, which follows a statutory hybrid system.

Alternatively, the Tribe argued that even if the *Winters* doctrine did not apply to the federal Seminole reservations, the Tribe had federal water rights based on riparian and groundwater use rights. These

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47. *See supra* note 1 and accompanying text.

48. FLA. STAT. ch. 373 (1989).

49. *See* California v. Cabazon Band, 480 U.S. 202 (1987); Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

50. *See supra* note 1.

51. *See supra* note 2.

52. *See supra* note 3.

53. Collville Confederated Tribes v. Walton, 647 F.2d 42, 46-49 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

rights attached to the reservation lands when the United States acquired them in trust for the Tribe.[54] At the time of acquisition, all water users in the state were under the common law riparian doctrine. Florida subsequently enacted the Florida Water Resources Act in 1972,[55] requiring Florida citizens to obtain permits to continue their consumptive water use. The complex statutory scheme created new "permit" rights to replace the riparian rights previously recognized under Florida law.[56]

The Tribe argued that the federal trust relationship precluded the State's adoption of a permit system that would destroy or weaken fundamental tribal property rights in the waters of the acquired reservation lands absent clear congressional approval or authorization. The Tribe pointed to the Supreme Court's decision in *United States v. Rio Grande Dam & Irrigation Co.*,[57] where the Court stated that "in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property."[58] In other words, riparian federal public lands are subject to common law riparian rights that cannot be abrogated by state law absent congressional consent. The Tribe asserted that the *Rio Grande* principle applied with added force where the United States had acquired riparian lands in its own name to be held in trust for the Indians' benefit and use.[59]

The Tribe also relied upon the State's lack of civil regulatory jurisdiction over the federal Seminole Reservation to reinforce its position that it was not subject to the Florida Water Resources Act.[60] While a change from a riparian system to a permit system may be a valid exercise of a state's police power with respect to state citizens,[61] the Tribe asserted that the State could not rely on its police power to civilly

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54. This acquisition was achieved in various transactions between 1894 and 1962. *See supra* notes 16-19.

55. FLA. STAT. ch. 373 (1989).

56. *See* Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla.), *cert. denied*, 444 U.S. 965 (1979); *see also* E. FERNALD & D. PATTON, *supra* note 26, at 247 n.16.

57. 174 U.S. 690 (1899).

58. *Id.* at 703.

59. *See* Colville Confederated Tribes v. Walton, 647 F.2d 42, 50 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981).

60. *See* California v. Cabazon Band, 480 U.S. 202, 209 (1987); Seminole Tribe v. Butterworth, 658 F.2d 310, 314-15 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982).

61. *See, e.g.*, Hines, *A Decade of Experience Under The Iowa Water Permit System*, 8 NAT. RESOURCES L.J. 23, 43-52 (1968). The Florida Water Resources Management Act of 1972 characterizes the permit system as a function of the State's police power. *See* FLA. STAT. § 373.617(2) (1989).

regulate the Tribe's water-related activities.[62] Further, the Tribe argued that the State lacked authority under the federal Nonintercourse Act to divest the Tribe of the riparian rights it had acquired prior to the establishment of the State's statutory permit system.[63] This argument applied equally to the East Big Cypress State Reservation and the federal reservations.

At the time the Compact was negotiated, the Tribe appeared to have the better legal argument. Nevertheless, the Tribe's water rights remained undefined. Any litigation involving those rights would present a case of first impression that could take years to adjudicate. Even if the Tribe managed to establish federal reserved water rights in court, they would be difficult to quantify. Additionally, the administration of these rights could result in endless controversy. The Compact was developed to solve problems that had not previously been the subject of litigation or public scrutiny, but needed attention. The parties agreed that a negotiated solution was highly desirable. Litigation was an expensive and uncertain alternative that no one desired.

Negotiating the Compact proved to be more difficult and complex than negotiating the overall Agreement.[64] The Compact negotiations were facilitated, however, by the Compact's tightly linked nexus to the other elements of the Agreement. Everyone agreed that if the Compact negotiations failed, the entire Agreement would unravel and the parties would be faced with multi-faceted litigation.

The Tribe's aim in pursuing the Compact was to preserve its sovereignty while securing clearly defined rights to water necessary to satisfy tribal needs and to allow orderly development of its lands. The Tribe also desired to protect tribal lands and waters from any activities of neighboring landowners that might violate its rights. Conversely, the State desired to bring the tribal lands under some measure of control or influence. Thus, the State sought to obtain an enforceable commitment from the Tribe to manage tribal lands and waters

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62. *See, e.g.*, Seminole Tribe v. Butterworth, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); Santa Rosa Band v. King's County, 532 F.2d 655 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977).

63. *See* Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663 (Fla.), *cert. denied*, 444 U.S. 965 (1979); Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896).

64. On October 7, 1986, the overall Agreement was approved in theory by the Florida Governor and Cabinet. It took until July 21, 1988, however, to obtain final approval of all elements of the Agreement. It is on this date that the federal district court issued its approval order. The principle reason for this delay was the controversy which developed over the provisions of the Compact. *See* Blain, *Florida Seminole Indian Dispute Settlement Including Water Rights Compact and Manual*, INDIAN WATER RTS & WATER RESOURCES MGMT June 1989, at 145.

consistently with Florida water and environmental law.[65] Both sides achieved their essential goals in the Compact.

IV. THE WATER RIGHTS COMPACT

A. The Federal Nature of the Tribe's Compact Rights and Obligations

Under the Water Rights Compact (Compact), the Tribe achieved state and federal recognition of substitute *federal* water rights[66] in exchange for *Winters* doctrine rights. The Compact rights and obligations reflect the special status of the Seminole Tribe as one of the successor entities to the original Seminole Nation. Their rights and obligations differ substantially from the rights and obligations of Florida's citizens.

Section seven of the Settlement Act of 1987[67] specifically provides that, "[t]he compact defining the scope of Seminole water rights and their utilization by the tribe *shall have the force and effect of Federal law* for the purposes of enforcement of the rights and obligations of the tribe."[68] The Senate Committee Report explained that:

> A separate water rights compact is incorporated into the bill which settles several outstanding issues that might otherwise mean years of litigation. Under the compact, the Tribe will regulate its own water use through a newly created tribal water office. Although the Tribe must follow essential aspects of Florida's ground water management plans and Federal environmental laws, the Tribe will not need permits nor be subject to district processes. The Tribe will receive an immediate preference for development of its ground water, and, in the future, the highest priority permissible under Florida law. The Seminole water rights defined in the compact will be perpetual and not subject to renewal by the State.[69]

The statement of the Department of the Interior in support of the bill, reproduced in the Senate Report, provides further guidance:

> With respect to tribal jurisdiction for water management and its relationship to State of Florida water law, it is our understanding

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65. *See, e.g.*, FLA. STAT. § 373.016 (1989).

66. *See* Compact, *supra* note 7.

67. Seminole Indian Land Claims Settlement Act of 1987, Pub. L. No. 100-228, 101 Stat. 1556 (codified at 25 U.S.C. § 1772(a)-(g) (1988)).

68. 25 U.S.C. § 1772e (1988) (emphasis added).

69. S. REP. No. 258, 100th Cong., 1st Sess. 3, *reprinted in* 1987 U.S. CODE CONG. & ADMIN. NEWS 2706, 2708.

that the Tribe would have the jurisdiction to manage its water resources, but that it has agreed to a notice procedure. Upon tribal notice of a management action, if the State or South Florida Water Management District believe the management action is not consistent with the Compact, the Tribe may proceed with implementation, and the State and District would have the alternative of resolving the question of tribal jurisdiction in the Federal District Court.

The Water Compact states in part "Those State laws and rules, orders, and regulations which are applicable to the Tribe under the terms of the Compact as specified hereafter are expressly incorporated into federal law, and apply to the Tribe as federal law." This provision is of critical importance to the Tribe. *The Tribe, in its sovereign status, would never subject itself to State law willingly.* It is our understanding that there was a great deal of reluctance on the part of many tribal members to the whole concept of harmonizing tribal operations with the State system, but the Tribe finally came to the view that it was better to do this and to formulate a cooperative arrangement with the State. Though the Tribe would have to follow many of the substantive provisions of State law, the Tribe's governmental status and special Federal protection *would not* be compromised.[70]

The Department of the Interior Statement further states that:

One of the basic theories of the Compact is that the Tribe is protected because it is not subject to State administrative control. While the State has certain powers to affect the Tribe's activities through the processes agreed upon, *the State cannot, on its own initiative, stop tribal action*, if the Tribe chooses to proceed. If a dispute arises, for any reason, the recourse of the State or the Water District is to take the Tribe to Federal Court where the burden will be on the District or State agency, as the case may be, to show that the Tribe has violated its commitments under applicable provisions of the Compact.

It is critical that the Tribe be in the position to enforce the Compact rights as Federal rights against the State and the Water District. This can only be accomplished, if all the provisions of State law, which are made applicable to the Tribe by the Compact, have the force of Federal law for purposes of enforcing the Tribe's rights and obligations. Also, by affording the terms of the Compact the status of Federal law for purposes of enforcing the Tribe's rights and obligations, the Tribe could bring an action in Federal Court to compel the State or the District to implement or enforce a State law.[71]

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70. *Id.* at 15, 1987 U.S. CODE CONG. & ADMIN. NEWS at 2720 (emphasis added).
71. *Id.* at 15-16, 1987 U.S. CODE CONG. & ADMIN. NEWS at 2720-21 (emphasis added).

B. *The Scope of the Tribe's Obligations Under the Compact*

The Tribe obligated itself under the Compact to comply with the "essential terms and principles of the state system."[72] Consequently, the Tribe was left completely free from direct State and South Florida Water Management District (SFWMD) administrative control. Although its actions were subject to correction in federal court if it violated the Compact, the unique procedural status accorded to the Tribe essentially preserved its freedom to act unilaterally.

Ordinarily, to obtain permits or other authorization for water use, applicants must demonstrate to the SFWMD or other concerned state agencies that all state requirements have been satisfied.[73] The practical reality is that demonstrating the underlying facts for the permit or authorization is often difficult. Even where little or no substance to an objection exists, applicants generally find they are forced to modify their plans to satisfy the concerns of governmental authorities or third parties. The alternative is to become involved in protracted and expensive administrative or judicial proceedings. The Tribe is a sovereign with special status. Although it has agreed to follow certain essential portions of the state system, it is not subject to such direct administrative control by the State or coercion by third parties under the Compact. The Tribe's actions cannot be challenged unless it has clearly violated the Compact.

The essential principles of the Compact are restated in more detail in the Criteria Manual (Manual) attached to the Compact. The Manual restates SFWMD regulations with some modification to reflect the Tribe's special status. Nonetheless, the Tribe does not have to follow the detailed rules of the Manual if it complies with the underlying general principles of the Compact.[74]

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72. These were generally defined in the Compact as follows:

> Non-procedural provisions of the Florida Water Resources Act of 1972 as presently codified in Chapter 373 of the Florida Statutes (supp. 1986) and which are necessary to provide for the beneficial use and management of water and related land resources; to promote the conservation, development, and proper utilization of surface and groundwater; to prevent damage from floods, soil erosion, and excessive drainage; and to protect natural resources, fish, and wildlife.

Compact, *supra* note 7, pt. I, § E, at 90.

73. *See, e.g.*, FLA. STAT. § 373.223 (1989).

74. The Compact provides that the Manual will apply in conjunction with the Compact in the following manner:

> If the Tribe complies with the applicable requirements and objectives of the Compact, then the Tribe, with the exception of the procedural chapter of the Manual, does not need to meet the specific criteria outlined in the Manual. If the Tribe satisfies the specific criteria outlined in the Manual, a presumption shall arise that the Tribe has met the requirements and objectives of the Compact.

Compact, *supra* note 7, pt. II, § J(2), at 98.

Stated otherwise, the Tribe is in full compliance if it abides by the basic general principles set forth in the Compact. This provides significant protection for the Tribe in two ways. First, in proceedings charging a tribal violation, the burden of proof is on the accuser, whether the accuser is the SFWMD or a third party. Second, the Tribe is free to use "any form of testing and monitoring to fulfill obligations under the Compact, if such testing and monitoring is reasonably equivalent to the accuracy and reliability of testing and monitoring customarily used or required by the District."[75] This provision frees the Tribe from following the complex testing or monitoring procedures outlined in the Manual, where reasonably equivalent alternatives exist.

In addition, the Tribe has grandfathered rights for the benefit of "facilities, projects and improvements" existing on the effective date of the Compact.[76] This provision was necessary because the Tribe could not accept the burden of upgrading its existing facilities to comply with the new rules regarding consumptive water use and surface water management. The Tribe argued that the modest development of its reservations had not significantly contributed to either poor water quality or other environmental problems in South Florida. Thus, the Tribe argued that it should not bear the same burdens as imposed on others to correct preexisting problems. The parties compromised, agreeing that the Tribe would bring its existing facilities into compliance only if those facilities were used as part of some new project, or if it could be proven that the tribal facilities will "substantially harm, or pose a threat of substantial irreparable harm, to lands other than Reservation and Tribal Trust lands."[77]

As a result of the Compact, the Tribe's main obligation is to comply with the provisions of a specified notice procedure. This requires filing a "work plan" each year and gives the SFWMD or an affected third party, through the SFWMD, an opportunity to review the detailed tribal plans and to register objections and requests for change.[78] The SFWMD or an affected third party may file a federal lawsuit if

75. *See id.* pt. II, § A(3), at 93.

76. *Id.* pt. II, § F(1), at 95.

77. *See id.* pt. II, § F(1)(b), at 96.

78. At one point in the Compact negotiations, the Florida Department of Environmental Regulation (DER) insisted on the right to participate independently in the process. The Tribe was unwilling to submit to a review process by other state agencies and wanted to limit proceedings to those before the SFWMD on review of the tribal work plan. The dispute was compromised by giving the DER, and certain other named state agencies, a rebuttable presumption that they have the status of Substantially Affected Third Persons, with the right to participate in the process of approval of tribal work plans and to initiate challenges in federal court to any South Florida Water Management District approvals that they believe to be unlawful. *See id.* pt. I, § J, at 91.

the Tribe proceeds with a project the SFWMD or third party believes to be violative of the Compact. The complaining party has the burden of proof on any dispute with the Tribe.[79]

C. *Consumptive Water Use*

1. *General Provisions*

The nature of the Tribe's obligations are illustrated by some of the Compact's substantive provisions. Under consumptive water use, for example, the Tribe agreed to provide "reasonable assurance" in connection with the examination of its work plan. Any proposed consumptive water use is required to meet the following criteria:

1. will not cause significant inland movement of either surface saline water or the underground saline water interface; will not cause either significant upconing of saline water that may be beneath freshwater or vertical leakage of connate saline water; or otherwise reduce the amount of potable water;
2. will not have a significant adverse impact on lawful land uses including wetlands located on lands other than Reservation and Tribal Trust lands;
3. will not cause significant adverse environmental impacts;
4. will not cause significant pollution of the surface water or the aquifer;
5. is a reasonable-beneficial use;
6. will not interfere with presently existing legal uses of water and users of water protected under the Compact; and
7. is consistent with the essential terms and principles of the State system as defined in the Compact.[80]

While the Criteria Manual sets forth seventy pages of detailed technical criteria governing water use, the Tribe need not follow the detailed provisions if it satisfies the general principles quoted above and other relevant provisions of the Compact.[81] Moreover, in any proceeding challenging the Tribe's compliance with the Compact, either before the SFWMD or in federal court, the Tribe is free to demonstrate its compliance with the general provisions of the Compact, using any

79. *See id.* pts. VII and VIII, at 114-21.
80. *Id.* pt. III, § B(1)-(7), at 101.
81. *See supra* note 74 and accompanying text.

form of testing and monitoring that is reasonably equivalent to that which the SFWMD requires.[82]

Another significant deviation from the SFWMD rules is the perpetual protection of the Tribe's consumptive water use rights. These rights are insulated from "any change subsequently made in the state system or the District rules, regulations, and orders affecting preference or priority of water use."[83] A related clause specifically provides that, in the future, the Tribe will have a preference or priority "equal to any preference or priority which may be established for the same use under state law for any other party after the effective date of the Compact."[84]

As previously stressed, in a number of important matters the Tribe has not obligated itself to follow all aspects of the substantive rules of the state system. The Tribe agreed to have its activities governed by the most essential aspects of those rules, applied as federal law, only because the Compact allowed significant tribal deviations from the usual substantive rules.

2. *Third Party Rights to Water*

The parties to the Compact negotiations shared a fundamental concern regarding vested rights to consumptive water use previously acquired by third parties under the state system. The Tribe was not willing to accept regulations that would allow state permit holders to challenge existing tribal water withdrawal facilities if challenges were based upon a permitting process to which the Tribe was not legally bound. Looking forward, the Tribe sought to avoid challenges that new tribal projects would interfere with consumptive water rights ostensibly vested under the state system prior to the Compact.

Eventually, the parties resolved the problem by giving the Tribe a specific preference for competing uses of groundwater. Limited protection was extended those who had vested rights under the state system.[85] This "ground water preference" became controversial when neighboring landowners demanded its elimination or alteration. By July of 1988, when the Compact was approved, the ground water preference was of limited importance. By this time, as authorized by

82. *See supra* note 75 and accompanying text.
83. *See* Compact, *supra* note 7, pt. III, § A(2), at 100.
84. *Id.*
85. *See id.* pt. III, § C(1)(a)-(b), at 101-02.

the Compact,[86] the Tribe had entered into Private Landowner Agreements with the two major landowners adjoining its reservations for the comprehensive allocation of groundwater resources. These negotiations gave the Tribe essential protection while making a reasonable allocation of the water resources actually available in the vicinity of its reservations. Consequently, the Tribe agreed to compromise on the terms of the general groundwater preference originally negotiated with the SFWMD.

The Tribe eventually agreed to limit its groundwater preference rights and to exercise those rights subject to the application of a reasonableness standard.[87] The Tribe was willing to accept a dilution of the stronger preference initially negotiated with the SFWMD because of the settlements with neighboring landowners and because it realized that any tribal preference achieved through litigation in the absence of the Compact would not be absolute. Under the *Winters* doctrine, tribal water claims usually have been diluted to accommodate the necessities of non-Indian water use.[88]

3. *The Brighton Problems*

On the Brighton Reservation[89] the Tribe was deprived for many years of water to which it was clearly entitled—even when sufficient water was actually available. This happened, in part, because of the SFWMD's management of the canal system within the Indian Prairie Basin and, in part, because of unauthorized and unlawful diversions of water by neighboring landowners. Consequently, floods and water shortages alternatively plagued the Reservation.

A cure for the Brighton Reservation problems was fundamental to the successful negotiation of the Compact. As a demonstration of good faith, the SFWMD, before Compact negotiations were complete, performed extensive investigations in the basin to identify the true causes and the extent of the problems the Tribe experienced at Brighton. The investigations facilitated the development of Compact provisions which provided an effective solution to the Brighton prob-

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86. Compact, *supra* note 7, pt. VI, § A, at 110. The Landowner Agreements were given "the force and effect of the Compact and, specifically, shall prevail in any dispute between the parties to such a private agreement in the event of a conflict with the Compact, the Manual or with other applicable permitting criteria of the District." *Id.*

87. *See id.* pt. III, § C(3), at 102.

88. Tribal water rights have often been diluted by the practice of measuring the extent of tribal water rights by reference to the "practicably irrigable acreage on the reservations." *See* Arizona v. California, 373 U.S. 546, 600 (1963).

89. *See* Compact, *supra* note 7, pt. VI, § B, at 111-12 (section specifically addresses remedies with respect to problems on Brighton Reservation).

lems. In early 1987, as a result of these investigations, the SFWMD immediately began making major changes in canal regulation to ameliorate the water shortages. These changes were made before the Compact was effective and long before a specific solution was negotiated.[90]

In the final Compact provisions, the SFWMD undertook sweeping commitments designed to assure the Tribe that the Brighton Reservation would receive its fair share of water resources within the Indian Prairie Basin.[91] In effect, a defined share of available surface water in the basin was allocated to the Tribe as a minimum entitlement;[92] this share is closely akin to the quantified water rights that many tribes in the West had achieved under the *Winters* doctrine.[93] Moreover, the Tribe was not left on its own to secure the minimum allocation that had been promised; the SFWMD specifically obligated itself to complete its formal investigation of Brighton water shortages and to design a specific solution acceptable to the Tribe by a certain date.

The resulting study formally confirmed that the Tribe had in fact been deprived of water it should have received in the past:

> It is concluded in this report that there were times in the historic past when sufficient volumes of water were not discharged into canal reaches traversing the Brighton Seminole Indian Reservation to satisfy the fifteen percent entitlement as it presently exists. However, when sufficient volumes of water were discharged to these canals, this water was subject to withdrawals upstream of the reservation and diversion into the neighboring Okeechobee basin downstream of the reservation. Therefore, it is also concluded that there may have been times in the past when the fifteen percent entitlement was not available to the reservation due to withdrawals and diversions.[94]

Subsequently, the SFWMD planned to install two large-scale pumps to draw water from Lake Okeechobee in order to guarantee the Tribe's fifteen percent minimum share and to relieve other water shor-

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90. *See* Technical Report, *supra* note 44.

91. After specifying that the Tribe "shall be entitled to fifteen percent (15%) of the total amount of water which can be withdrawn from the District canals," it was provided that "[t]he Tribe shall not be entitled to any preference to withdrawals *in excess* of fifteen percent (15%) from such District canals." Compact, *supra* note 7, pt. VI, § B(1), at 111 (emphasis added). This made clear that the fifteen percent guarantee was a minimum share and the Tribe was free to consume additional water under ordinary rules it had agreed to follow. *See* Blain, *supra* note 64, at 151.

92. This was defined as an entitlement to "fifteen percent (15%) of the total amount of water which can be withdrawn from the District canals and from District barrow canals by all users within the Indian Prairie Basin." Compact, *supra* note 7, pt. VI, § B(1), at 111.

93. *See, e.g.*, Arizona v. California, 373 U.S. 541 (1963).

94. *See* Technical Report, *supra* note 44, at 2.

tages in the basin. The first of these pumps, a 60,000 gallon per minute surface water pump, has been completed and the second is scheduled for completion in mid-1991. Other surface water management problems involving flooding and water diversions have been solved by agreements with neighboring landowners pursuant to Landowner Agreements authorized under the Compact.[95]

The SFWMD has assured the Tribe that pumping a relatively small amount of Lake Okeechobee water into the Indian Prairie Basin and making that water available to the Tribe and other water users from the specified canals will greatly curtail water shortages in the Basin. This pragmatic solution probably avoided litigation. Otherwise, the Tribe, or the United States as trustee for the Tribe, would have sued to stop the diversion of what the Tribe believed was its federally protected water supply.[96] In many ways, the Brighton situation paralleled the facts of the *Winters* case itself, where the United States sued to stop non-Indian diversion of water protected by federally reserved water rights.[97]

As to consumptive water use, the Tribe forfeited the possibility of establishing broader rights than the Compact recognized in return for an expeditious resolution of its claims. The State, in turn, gave up the possibility of defeating or curtailing any special water use rights of the Tribe in return for tribal compromise and an immediate agreement to put tribal development in harmony with the state system.

D. Surface Water Management

The Tribe's obligations under the Compact regarding surface water management follow an approach similar to that adopted for consumptive water use. The Tribe obligated itself to give "reasonable assurances" that any "surface water management system" it installs will satisfy the following principles:

1. provides adequate flood protection and drainage;
2. will not cause significant adverse water quality and quantity impacts on receiving waters and non-Tribal lands;
3. will not cause discharges to ground or surface waters which result in any violation of State water quality standards;
4. will not cause significant adverse impacts on surface and groundwater levels and flows;
5. will not cause significant adverse environmental impacts;

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95. Compact, *supra* note 7, pt. VI, § A, at 110.
96. *See* Winters v. United States, 207 U.S. 564 (1908).
97. *Id.*

6. can be effectively operated and maintained;
7. will not adversely affect public health and safety;
8. will not otherwise be harmful to the water resources of the District; and
9. is consistent with the essential terms and principles of the State system as defined in the Compact.[98]

Again, the Tribe did not obligate itself to follow all substantive rules of the state system. As with consumptive water use, the Tribe must only satisfy the general principles set forth above. The twenty-three pages of detailed criteria for surface water management set forth in Chapter Four of the Manual serve only as a general guide and as a means for the Tribe to create a presumption that it has fulfilled its Compact obligations.[99]

The unique situation of the Tribe's West Big Cypress Reservation posed a potentially severe problem for surface water management. The West Big Cypress Reservation is made up primarily of wetland systems of varying sizes. A wetlands rule that would preclude development of this entire area was clearly unacceptable to the Tribe. Thus, a special wetland rule was adopted. The Tribe was given the unqualified right to disturb wetlands of forty acres or less, "provided that an upland system of equivalent size is set aside in an area committed for passive uses."[100] In fact, the Tribe had already formulated plans to set aside the southwestern portion of the reservation as a semi-wilderness in which only passive uses would be allowed.

This proposal was acceptable to the Tribe because it did not require the Tribe to forego necessary development of its reservation lands. It was acceptable to the SFWMD because it achieved meaningful regulation of wetland development. Once again, the terms negotiated provided a solution that accommodated essential principles of the state system with tribal plans and concerns.

E. Activities of Third Parties

The direct impact of the Compact was not limited to tribal activities; it also provided an orderly procedure to resolve problems between the Tribe and neighboring landowners. The Tribe's concerns about the Modified Hendry County plan,[101] coupled with its resultant objections to the Corps of Engineers, prompted a re-examination of

98. *See* Compact, *supra* note 7, pt. IV, § A(1)-(9), at 106.
99. *See supra* notes 72-75 and accompanying text.
100. *See* Compact, *supra* note 7, pt. V, § D(4), at 108.
101. *See supra* note 38 and accompanying text.

the State and SFWMD's basic stance towards the Tribe. The Tribe argued that a fundamental requirement of any compact was to provide effective protection from large-scale development of neighboring lands.

After extensive negotiations, the parties devised a complex procedure for the orderly resolution of tribal objections to activities of neighboring landowners which would affect tribal property.[102] Under the Compact, the SFWMD is required to give the Tribe notice of any pending permit applications or requests for approval by third parties which might conflict with tribal rights under the Compact. In return, the Tribe is required to register any objections within the time-frame set forth in the Manual[103] before bringing any challenge in federal court.

If the Tribe fails to assert its rights, the Tribe waives its challenge to an approved permit or application unless the SFWMD failed to give the Tribe proper notice.[104] If the SFWMD takes action overriding the Tribe's objections, the Tribe has the right to bring the matter to federal court for immediate review. If the SFWMD agrees with the Tribe's objection, but the affected third party requests an administrative hearing under Florida law,[105] the Tribe has the right to allow the state process to run its course or immediately file suit in federal court.[106]

From the SFWMD's perspective, providing the Tribe with specific procedural rights and obligations will avoid recurrence of the difficulties incurred in the final processing of the Modified Hendry County Plan. As previously outlined, the Tribe became aware that the Modified Hendry County Plan threatened its rights long after various interests in the state had resolved their differences over that plan.[107] Despite its late objection, the Tribe successfully blocked completion of the approval for a permit required from the Corps of Engineers. Because State authorities had earlier ignored tribal rights in granting approval, the Corps of Engineers could not lawfully proceed to issue the permit requested without granting the Tribe a hearing.[108]

Under the Compact, the Tribe will receive notice of major actions which may affect its rights and must act promptly if it has any objection. This practice satisfies the State's concerns by providing clear

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102. *See* Compact, *supra* note 7, pts. VII and VIII; Blain, *supra* note 64, at 150.
103. *See* Blain, *supra* note 64, at 151.
104. *See* Compact, *supra* note 7, pt. VII, § E, at 115-16.
105. *See* FLA. STAT. ch. 120 (1989).
106. *See* Compact, *supra* note 7, pt. VIII, at 119-21.
107. *See supra* note 38 and accompanying text.
108. *Id.*

guidelines that assure tribal concerns will be addressed at the same time concerns of other parties are addressed. The Tribe was satisfied because the State's agreement allows violations by third parties to be adjudicated in federal court rather than in state court. Federal court gives the Tribe the essential procedural protection it needs.

F. Impact of the Compact on the Seminole Tribe

Undoubtedly, the Compact imposes substantial burdens on the Tribe in exchange for the benefits it confers. The Tribe had to agree to significantly change the conduct of its affairs. Among other things, the Tribe was required to enact a tribal water code to assure that tribal members, as well as others engaging in reservation activities, complied with the complex rules regarding consumptive water use and surface water management. The Tribe also agreed to waive sovereign immunity and be answerable in federal court to the SFWMD or third parties who allege that the Tribe violated any of the provisions of the Compact.

The Seminole Tribe has set up a water office, headed by a full-time professional director and two assistants, and a water commission, empowered by the Seminole Tribal Council, to enforce and administer the tribal water code. For all new tribal projects, planners must obtain permits from the water commission and, as a matter of tribal law, be able to demonstrate that the proposed projects are in compliance with the provisions of the Compact. In at least one instance, a major construction project on the Big Cypress Reservation was questioned and delayed until the relevant issues were resolved. The plans submitted with the application showed that a serious violation of the Compact could result from the construction due to a possibility that floods could damage neighboring lands within the Reservation.

With respect to activities of neighboring landowners, the Tribe has been quite active in invoking the protective rights it achieved under the Compact. Recently the Tribe has been engaged in a protracted struggle with a neighboring landowner over the extent of restoration required for an area adjacent to the Brighton Reservation where unpermitted excavation of twenty-two miles of ditches through and adjacent to wetlands occurred. In that proceeding, the Tribe has been strongly allied with the SFWMD in asserting the requirements of various environmental laws that dovetail with tribal Compact rights.[109] In a number of other instances where the Tribe has asserted its rights vis-

109. South Florida Water Management District v. Lykes Bros., Inc., Case No. 90-1733 (Fla. Div. of Admin. Hearings 1990) (petition for final hearing granted on Aug. 22, 1990).

à-vis third parties, it has been possible to achieve negotiated settlements.

V. CONCLUSION

Despite its rapid progress on many fronts in recent years, the Seminole Tribe is still one of the most traditional American Indian tribes. Tribal meetings are often conducted, in whole or in part, in the Indian language and traditional lifestyle is followed by a large percentage of tribal members. The Seminoles' refusal to accept federal government supervision until well into the present century began a tradition of independence that causes tribal members to be uncomfortable with formal rules outside the tribal tradition—whether they are enacted and enforced by federal, state or tribal governments. Integrating the complex rules of the Compact into tribal affairs has not been easy for the tribal government to accomplish or for tribal members to accept.

In the settlement achieved under the Compact, the Tribe relinquished the possibility of establishing broader water rights in exchange for early resolution of tribal claims without the uncertainty and delay of litigation. Similarly, the State forfeited the possibility of defeating tribal claims to superior federal water rights in return for tribal compromise and an immediate agreement to conduct tribal activities affecting state waters in harmony with the state system.

The Compact marked a significant departure in relations between the State and the Tribe. Despite the distrust that each had for the other and the conflicts that had raged between them, they succeeded in forging an agreement that satisfied each party's essential concerns. Conflict between the Tribe and the State can never be fully eliminated. Some conflict may be inevitable due to the Tribe's special status as a semi-autonomous sovereign and the fact that its reservations in Florida are not under state civil regulatory authority. Nevertheless, the successful negotiation of this Compact teaches that constructive solutions of problems between states and tribes are achievable, even in disputes that had been thought incapable of resolution through settlement.