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Miccosukees and the Tamiami Trail Bridge: Examining the Tribe’s Attempts to Sink the Modified Waters Delivery Project

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I. A Brief History of the Tamiami Trail and the Miccosukee Indian Tribe

A. The Construction, Evolution, and Impact of the Tamiami Trail

The Tamiami Trail (U.S. Highway 41) cuts across the Everglades along Everglades National Park’s northern edge, linking the eastern and western coasts of Florida. The highway’s name derives from the connection it provides between Tampa and Miami (TA-MIAMI). Building the $8 million highway took thirteen years (1915-1928); the difficult terrain and numerous budget shortfalls delayed the road’s construction.\(^1\) Before becoming a critical land transportation route for commerce and emergency evacuation, the Trail project almost collapsed due to state and county budget constraints. Only after Barron Collier, an advertising mogul, pledged in 1922 to bankroll the completion of the highway, did engineers make major gains in the east-west portions of the project.\(^2\) To show their gratitude for his generous contribution and leadership, Florida legislators established a new Collier country.\(^3\)

Tamiami Trail (“The Trail”) has undergone minor modifications, such as widening, straightening, and paving upgrades since its 1928 completion, but the original route has not significantly changed. Traffic volumes actually decreased in the 1970’s due to the opening of Everglades Parkway (dubbed Alligator Alley) to the north.\(^4\) The Trail also avoided a potential

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2 *Id.* at 181.

3 *Id.*

major traffic increase when Marjorie Stoneman Douglas led a movement to defeat the proposed Everglades Jetport during the Nixon administration.⁵

Throughout most of the twentieth century, the Tamiami Trail was regarded as both a feat of engineering and a testament to man’s ability to conquer nature. However, the Trail’s devastating ecological impact on Everglades National Park and Florida Bay became evident during the latter half of the twentieth century.⁶ As the Park suffered year after year from decreased Lake Okeechobee to Florida Bay water flows, groups like the Audubon Society, Sierra Club, and World Wildlife Fund advocated for certain portions of the highway to be raised to allow for additional water flow to the Park.⁷ After years of studies on how to best increase flow from the Northeast Shark River Slough to Everglades National Park, the Army Corps of Engineers finally recommended in 2003 that a 3000-foot-long elevated causeway be built on a portion of the Tamiami Trail.⁸ In 2008, the Army Corps of Engineers and U.S. Department of the Interior altered the plan, recommending the construction of a mile-long “bridge” instead of 3000-foot-long elevated section.⁹ Congress approved funding for the bridge in the 2009 Omnibus Appropriations Act.¹⁰

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⁵ Id. at 254-59.

⁶ Id. at 239-54.


⁹ Id.

B. The Miccosukee Tribe and the Everglades

The Miccosukee Indians of Florida are descendants of the Lower Chiaha, a Muskogee Creek tribe that originated in the Tennessee Valley.\(^{11}\) By the 1500’s, the Miccosukee Indians had settled in the Carolinas, but they were eventually forced south to Florida as white settlers encroached on their lands in the 17\(^{th}\) and 18\(^{th}\) centuries.\(^{12}\) It was not until the Seminole Wars of the 1820’s and 1830’s that the Miccosukee moved to the Everglades.\(^{13}\) The tribe separated from the Seminoles in the 1950’s to become the Miccosukee Tribe of Indians of Florida; they were recognized by the state of Florida in 1957 and received federal recognition in 1958.\(^{14}\) Today, the tribe occupies several reservations in southern Florida, principally the Miccosukee Indian Reservation. The Miccosukee Resort and Casino as well as several tourist attractions, sports sponsorships, and land leases constitute the tribe’s major business interests.

Miccosukee relations with the federal government frequently have been strained since the tribe’s formal recognition. For the last several decades, the Miccosukee have viewed the federal government, particularly the Department of the Interior (DOI), as placing the needs of Everglades National Park above those of other parts of the natural system, including areas managed/leased by the tribe.\(^{15}\) Dexter Lehtinen, general legal counsel for the Miccosukee tribe, remarked as early as 2000 that, “Everglades restoration is in serious trouble due to misplaced


\(^{12}\) Id.

\(^{13}\) Id.


priorities, subordination of fundamental democratic values, federal intransigence, and bureaucratic arrogance and incompetence … Indians have been targets of land grabs themselves and recognize it when they see it.”\textsuperscript{16} Indeed, neither Lehtinen nor Miccosukee tribal leaders shy away from conflict with the state or federal government, especially in cases where government action could potentially affect tribal land.\textsuperscript{17} As the U.S. Army Corps of Engineers (USACE or “Corps”) finalized its plans for the Tamiami Trail bridge project, the Miccosukee legal team strategized how to halt construction before a single shovel could ever break ground.

\section{II. Introduction to the Modified Water Delivery Project and the Tamiami Component:}

\subsection{A. The Ebb and Flow of Progress toward Restoring the Hydrology of Everglades National Park}

The Modified Water Delivery Project (Mod Waters), as authorized by Congress in 1989, is a project designed to restore more natural hydrologic conditions in Everglades National Park.\textsuperscript{18} Mod Waters was authorized as part of the Everglades Expansion Act after a series of measures in the 1970s and 1980s failed to supply more water to the Everglades during an extended, historic drought.\textsuperscript{19} Further, the Everglades Expansion Act called for improved water deliveries into

\begin{itemize}
\item \textsuperscript{18}Public Law 101-229, Stat. 104 (“Everglades Expansion Act”).
\end{itemize}
Everglades National Park and outlined steps to restore natural hydrologic conditions in the park while maintaining flood protection for and water supply to man-made environments, which were created as part of the Central and South Florida Project (CS&F).

From the inception of Mod Waters, those most familiar with the Park’s ecology realized that deterioration of natural conditions would continue until the Mod Waters project was fully operational. Several significant ecological repercussions include: 1) the loss of soil elevation and the characteristic ridge and slough pattern in Everglades National Park due to soil oxidation and more intense and more frequent fires, 2) the loss of tree islands in Water Conservation Area-3A (WCA-3A) as a result of unnaturally high water levels during wet years (drowning) and unnaturally low water levels during dry years (soil oxidation), 3) the movement of wading birds and other large animals away from Everglades National Park because of a lack of food, and 4) the continued population decline for the snail kite in WCA-3A and lack of recovery for the Cape Sable seaside sparrow in Everglades National Park.

The prevention of further ecological harm requires the completion of Mod Waters projects; the flow from water conservation areas could help recharge the Shark River Slough, thereby restoring the Park’s

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lifeblood and giving momentum to Everglades restoration as a whole.\textsuperscript{25} Building the Tamiami Trail Bridge is one of several steps necessary to achieve this ultimate goal of improving water flow, and timing is crucial to mitigating further ecological damage:

“Halting the decline soon is an essential and urgent step on the path to restoration. It took biological, geological, hydrologic, and climatological processes thousands of years to build the soils and tree islands, whereas an inch of soil can be lost in a single fire or by microbial oxidation of peat in a single year. Once the soil is lost and tree islands drown, it may not be possible to restore these characteristics. It is not clear how long restoration of such losses might take, but the replacement of continued decline with gradual improvement is one step on the path to restoration.”\textsuperscript{26}

In addition to plans to raise and reinforce portions of Tamiami Trail, Mod Waters includes levee modifications and seepage control pump installations to increase water flow into Water Conservation Area-3B (WCA-3B), a 128 square mile area that borders northern portions of Everglades National Park.\textsuperscript{27} The project also provides for flood mitigation measures in approximately 60 percent of a saturated 8.5 square-mile area on the northeast corner of Everglades National Park.\textsuperscript{28} The USACE and DOI agree that “Mod Waters is a prerequisite for

\begin{footnotes}
\footnote{See note 19, supra at 109.}
\footnote{Id. at 112.}
\footnote{Id. at 37.}
\footnote{Id.}
\end{footnotes}
the first phase of ‘decompartmentalization’ [Decomp] (i.e., removing barriers [canals and levees] to sheet flow), which is part of the Comprehensive Everglades Restoration Plan.” 29

In the overall scope of Everglades restoration, the Mod Waters project has often caused major frustration and discouragement for those hoping that Everglades National Park would exemplify successful environmental recovery. 30 Mod Waters should provide a crucial first step toward ecological restoration within the Park. However, since 1989 the project has been “plagued by changes in direction and scope, parochial interests, debilitating litigation, enormous cost escalation due both to inflation and to plan modifications, unanticipated engineering constraints (e.g., Tamiami Trail integrity), and the lack of coordinated leadership from the responsible agencies.” 31 Furthermore, project funding has served as another complicating factor. Specifically, the distinct budget priorities of the National Park Service, USACE, and Florida Department of Transportation have not provided adequate Mod Waters project funding. 32 The Conference Report that accompanied the Water Resources Development Act of 2007 (WRDA 2007) summarized the risks that Mod Waters’ delay and potential failure posed to Everglades restoration as a whole:

“Without a change in water delivery to the Park, restoration of the Everglades, and many of the projects authorized as components of the Comprehensive Everglades Restoration Plan (CERP) in 2000, will not succeed. To achieve more natural water deliveries to the Park, it is

29 Id.

30 Id. at 9.

31 Id.

32 Id.
necessary to modify the way water crosses under the Tamiami Trail Highway. The managers of the bill are concerned that nearly 18 years have passed since the 1989 Act, and the restoration of more natural water flows has not occurred.”

B. Mod Waters as a Cornerstone of CERP

Several goals transcend the various efforts to restore the South Florida ecosystem. In 2000 the South Florida Ecosystem Task Force, an intergovernmental body established to facilitate coordination in the restoration effort, announced three broad, strategic goals: (1) “get the water right,” (2) “restore, preserve, and protect natural habitats and species,” and (3) “foster compatibility of the built and natural systems.” These goals are interdependent and encompass the vision of CERP. They also directly apply to the objective of Mod Waters. Without the completion of Mod Waters, including the construction of the Tamiami Trail Bridge, the success of other CERP projects could be in jeopardy. Because Mod Waters is “an assumed precursor to Decomp,” the failure or further delay of projects like the Tamiami Trail Bridge could potentially alienate political support and slow future funding appropriations for CERP. Furthermore, the Water Resources Development Act of 2000 (WRDA 2000) specifically called for Mod Waters to be completed as a prerequisite for making appropriations to construct new restoration projects in


35 See note 19, supra at 28-29.


37 Id.
the east Everglades. Ecological factors, combined with legal requirements and funding issues, solidified the interdependence of Mod Waters and CERP. At times, this interdependence resembled a policy of mutual assured destruction.

During the two decades following Congress’s authorization of Mod Waters, complex and difficult obstacles continued to plague the project. These obstacles included:

“Planning and implementation being driven by litigation and threats of litigation rather than optimal restoration of the natural system; Congressional authorization and appropriation processes with limited ability to cope with a project of the scope of Mod Waters; limited experience of agencies working together resulting in lack of coordination and weaknesses in strategic planning; deep differences in stakeholder goals resulting in protracted conflicts over project design; Large, unanticipated scope changes; and dramatic cost escalations over time ($81 million in 1990 to $398 million estimated in 2006 and $523 million in 2008).”

These obstacles resulted in significant delays in project design and implementation. Mod Waters had been originally scheduled for completion in 1997, but the projected completion is now estimated for 2013. Cost increases and delays continue to threaten Mod Waters’ viability.

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38 WRDA 2000 § 601 (b)(2)(D)(iv); 114 Stat. 2572 § 601 (b) (2)(D)(iv)

39 See note 19, supra at 115.

40 Id.
C. The Evolution of The Tamiami Trail Modification Project (TTMP) within the Mod Waters Framework

Engineers repeatedly altered plans for the Tamiami component of Mod Waters since the original 1992 design. 41 According to the USACE’s 1992 General Design Memorandum, the original plan increased flows from WCA-3B into Northeast Shark River Slough by passing water from the L-29 Canal that borders Tamiami Trail through two weirs in the bordering levee and then through existing culverts beneath the road; only short sections of the roadway were targeted for elevation. 42 The original design failed to receive approval when subsequent analysis revealed that the targeted flow levels coming from the bordering canal could damage the road base or result in water “overtopping” the highway. 43

In 2003, the Corps developed a new plan for the road that recommended a single 3,000-foot bridge. 44 The Corps did not implement this plan because it allowed “some potentially damaging high water levels along the rest of the road in return for funding placed in escrow that FDOT could use for any necessary road repairs … Increased FDOT safety requirements resulted in reconsideration of the 2003 plan.” 45 Another proposed solution to increasing the flow under the Trail came in the form of a 2005 plan that consisted of two bridges (a 2-mile western bridge and a 1-mile eastern bridge), and the raising/widening of 7 miles of roadbed to accommodate

41 Id. at 117-30.


43 See note 19, supra at 118.


45 Id. at 120.
increased L-29 canal levels of up to 9.7 feet.\textsuperscript{46} According to the National Research Council, these design changes and an escalation in construction costs led to dramatic increases in project costs.\textsuperscript{47} The USACE and DOI estimated the projected two-bridge 2005 Tamiami Trail modification plan would cost approximately $430 million.\textsuperscript{48}

In 2007, Congress rejected the 2005 two-bridge plan as too expensive and directed the USACE to complete a Limited Reevaluation Report and Environmental Assessment (LRREA) of Tamiami Trail alternatives by July 2008.\textsuperscript{49} After assessing 27 alternatives to the 2005 plan, a joint USACE and DOI committee recommended an alternative plan (alternative 3.2.2a) consisting of:

“A single 1-mile eastern bridge that would achieve the immediate goal of permitting peak flows in excess of 1,400 cubic feet per second (cfs) at approximately half the cost of the 2005 two-bridge plan (alternative 4.2.3). However, the eventual goal of 4,000 cfs required to achieve the desired ecological effects would not be achieved. Maximum flow under the recommended plan is 1,848 cfs. This committee recognizes the importance of completing this initial step of increased flows in Mod Waters. If completed, this plan will provide important steps toward restoration in Everglades National Park by increasing the volume of


\textsuperscript{47} See note 19, supra at 120.


\textsuperscript{49} See note 19, supra at 120.
water entering Northeast Shark River Slough by at least 163,000 acre-feet per year over the current level [an increase of at least 92 percent over current yearly levels].

The LRREA concluded that achieving the increments of flow referenced above would provide more ecological restoration benefits than the alternatives of doing nothing or culvert and swale additions. Furthermore, although other Mod Waters alternatives could have resulted in greater restoration benefits, they would have been inconsistent with cost constraints imposed by Congress. After two decades of effort, achieving some benefits from Mod Waters is critical for the overall CERP program, especially in light of continuing deterioration of the Northeast Shark River Slough ecosystems that feed Everglades National Park. Thus, the Tamiami Trail modifications proposed by the USACE and DOI in the current plan (alternative 3.2.2a) would provide a necessary but partial first step toward restoration.

III. Litigation concerning the TTMP’s Status as a Transportation Project

A. Alleged Violations of the Department of Transportation Act

In its 2008 Limited Reevaluation Report and Environmental Assessment, the United States Army Corps of Engineers concluded that the Tamiami Trail Modifications Project would make “no significant [negative environmental] impact,” and could therefore proceed in accordance with the National Environmental Protection Act. The LRREA also noted that

50 Id. at 120-21.

51 See note 48, supra at 1-16.

52 See note 19, supra at 128.

53 See note 48, supra at 6-9; 42 U.S.C. § 4321, The National Environmental Policy Act ("NEPA").
portions of Everglades National Park would need to be conveyed from the U.S. Department of the Interior (DOI) to the Florida Department of Transportation (FDOT) in order to complete the project. The Miccosukee Tribe, in its first legal challenge of the current bridge plan, focused on this planned conveyance to allege violations of section 4(f) of the Department of Transportation Act.

The Miccosukee plaintiffs’ motion for a preliminary injunction against the TTMP alleged that the United States Department of Transportation (USDOT) failed to perform a section 4(f) evaluation, as required for transportation projects “requiring the use of publicly owned land of a public park, recreation areas, or wildlife or waterfowl refuge of national, State, or local significance.” Despite the federal government’s labeling the TTMP an “environmental restoration project,” the Tribe argued that the bridging constitutes a transportation project because it involves changes to a highway – the Tamiami Trail (U.S. 41) – that is used daily by 5,200 vehicles, and because the Federal Highway Administration (the “FHWA”) will regulate the bridge. The plaintiffs further asserted that the DOT was “arbitrary and capricious” in its decision that the Tamiami project “does not constitute a transportation project subject to Section 4(f).”

54 Id.
56 49 U.S.C. § 303(c). Note: Section 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f), was repealed in 1983 but was recodified without substantial change at 49 U.S.C. § 303.
57 See note 55, supra at 6.
58 Id. at 7.
The Miccosukee’s efforts to delay or enjoin the Tamiami bridge project conflict with statements Dexter Lehtinen, the Tribe’s general counsel, made earlier in the decade during a Senate hearing on Everglades restoration. In 2000 he complained; “Pre-existing authorized restoration projects are stalled. The Modified Water Deliveries Project was directed by 1989 congressional Act to relieve flooding in the central Everglades and restore flows to the Park through Northeast Shark River Slough. But bureaucratic ineptitude and selfishness has blocked the project.”

Just when the various government bureaucracies were finally poised to help “relieve flooding in the central Everglades and restore flows to the Park through Northeast Shark River Slough,” Tribal priorities suddenly took precedent and Lehtinen moved to block the project. Other sources of “selfishness” now delayed the TTMP.

B. The Government’s Rationale for not Designating the TTMP a “Transportation Project”

Federal government officials never disputed that the DOT did not complete a Section 4(f) review in regard to the TTMP because they did not consider it a transportation project requiring such evaluation. Indeed, the government defendants labeled the TTMP an “environmental restoration project,” and requested assistance from the FWHA only because the Department of the Interior did not have direct statutory authority to convey the necessary strip of land at the northern edge of the Park to the Florida Department of Transportation. The DOI’s National

59 See note 16.

60 Id.

61 See generally Defs.’ Resp., supra note 55.

62 See note 55, supra ¶ 3.
Park Service made the Highway Easement Deed request pursuant to 23 U.S.C. § 317, explaining that the transfer would help to “implement the beneficial aspects of relocation and modification of the road in order to promote the increased flow of water into the [Park].” As the LRREA noted, the TTMP’s purpose is not to enhance transportation over the Tamiami Trail, as it will simply relocate a portion of the existing Tamiami Trail into the Park. The defendants maintained that the main goal of the TTMP centers on improving water flows in the Everglades, not improving transportation.

C. Federal District Court Judge Ungaro’s Decision

After evaluating the Tribe’s claims that the TTMP is necessarily a transportation project because 1) it will involve changes to a highway and 2) the FHWA will regulate the bridge, the US District Court for the Southern District of Florida found that “such facts alone do not establish a substantial likelihood that the DOT’s finding that the TTMP constitutes an environmental restoration project—not a transportation project—within the meaning of Section 4(f) was arbitrary and capricious.” Judge Ungaro’s order denying the motion for preliminary injunction continued: “The Tamiami Trail already exists and the FHWA will continue to regulate

63 23 U.S.C. § 317. The law provides in pertinent part (a): “If the Secretary determines that any parts of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which is desired to appropriate.”

64 See note 61, supra at 1-2.

65 See note 48, supra at 2-3.

66 See note 55, supra at 7.

67 Id.
it, including any altered portions; the TTMP proposes modifying it solely for environmental reasons.” 68

To define “transportation project,” the district court relied on National Trust for Historical Preservation in U.S. v. Dole, a 1987 Court of Appeals case from the District of Columbia Circuit. 69 National Trust involved the installation of suicide prevention barriers on a bridge that is an historic landmark, and the parties disagreed over whether Section 4(f) was applicable. 70 The appellate court affirmed the district court’s decision that no Section 4(f) review was required, concluding that “appellants have failed to demonstrate the existence of the requisite transportation purpose…We see no obvious relationship between preventing individuals from leaping off a bridge and facilitating the flow of traffic over it.” 71 Similarly, in the case at hand, Judge Ungaro determined that the purpose of the proposed Tamiami Trail modification - environmental restoration - “appears to be unrelated to any issue regarding the flow of traffic over the roadway.” 72 Before dismissing the Tribe’s case, Ungaro elaborated:

“While the Court does not necessarily agree with the DOT’s conclusion that the TTMP does not fall into the category of ‘transportation projects,’ the Court’s ultimate role is merely to ensure that the DOT came to a rationale conclusion, not to undertake its own investigation and substitute its own judgment for the DOT’s decision…It is hereby

68 Id.

69 Id. at 8-9.


71 Id. at 779

72 See note 55, supra ¶ 9.
ORDERED AND ADJUDGED that the Plaintiff’s Motion for Preliminary Injunction is DENIED.\(^{73}\)

Despite achieving victory in this legal battle with the Miccosukees, the federal government had little time to celebrate. Two days prior to Judge Ungaro’s decision, Lehtinen, on behalf of the Tribe, filed another motion for preliminary injunctive relief with the U.S. District Court for the Southern District of Florida.\(^{74}\)

**IV. Litigation concerning TTMP’s Compliance with the National Environmental Policy Act (NEPA) and the Federal Advisory Committee Act (FACA)**

**A. The Statutory Framework of NEPA and FACA and the Court’s Standard of Review**

The National Environmental Policy Act ("NEPA") imposes procedural requirements upon federal agencies, like the Corps and DOI, to ensure that they adequately assess the environmental impacts of actions they undertake.\(^{75}\) In particular, NEPA contains a congressional mandate that federal agencies must consider the environmental impact, and potential alternatives, for every proposed “major Federal action significantly affecting the quality of the human environment.”\(^{76}\) The first requirement NEPA imposes on an agency is to determine whether an action is a “major” action with a “significant effect.”\(^{77}\) Before making this determination, the

\(^{73}\) *Id* at 9-10 (citing *Sierra Club v. Van Antwerp*, 526 F.3d 1353, 1360 (11th Cir. 2008)).


\(^{76}\) *Id*. at § 4332(2)(C)).

\(^{77}\) *Sierra Club v. U.S. Army Corps of Eng’rs*, 295 F.3d 1209, 1214-15 (11th Cir. 2002)
agency must prepare an environmental assessment (“EA”), which should provide enough
evidence and analysis to guide the agency to one of two conclusions: (1) a finding that the
project will have a significant effect, or (2) a finding of no significant impact (“FONSI”).\textsuperscript{78}

When the agency issues a FONSI, it must incorporate the EA in a report that explains
why the action will not have a significant effect on the environment.\textsuperscript{79} If the agency concludes in
the EA that the action will have a significant effect, then the agency must prepare an
environmental impact statement (“EIS”), and the action will be designated “major.”\textsuperscript{80} Not only
must the EIS “provide full and fair discussion of significant environmental impacts . . . [to] be
used by Federal officials in conjunction with other relevant material to plan actions and make
decisions,”\textsuperscript{81} but the EIS should also discuss any potential impact the action would have on
endangered or threatened species.\textsuperscript{82} NEPA further requires the agency to prepare a supplemental
EIS (“SEIS”) if, after an EIS is prepared, the agency “makes substantial changes in the proposed
action that are relevant to environmental concerns,” or if there are “significant new
circumstances or information relevant to environmental concerns and bearing on the proposed
action or its impacts.”\textsuperscript{83}

\textsuperscript{78} \textit{Id.} at 1215.
\textsuperscript{79} \textit{Id.} (citing 40 C.F.R. § 1508.13).
\textsuperscript{80} \textit{Id.} (citing 42 U.S.C. § 4332(2)(C)).
\textsuperscript{81} 40 C.F.R. § 1502.1.
\textsuperscript{82} See note 77, \textit{supra} at 1215.
\textsuperscript{83} \textit{Id.} (citing 40 C.F.R. § 1502.9(c)(1)).
Advisory committees, like the Corps’s LRR team, must comply with the Federal Advisory Committee Act (“FACA”). FACA strives to achieve committee transparency on projects such as the TTMP through openness to public observation and debate. The timing of such observation and comment are crucial to compliance with the statute; thus the public observation and comment must be contemporaneous to the advisory process itself. In the event the public commentary is limited to retrospective scrutiny, courts in the Eleventh Circuit may grant injunctive relief for violations of FACA.

The court should apply a standard that is “highly deferential” to the agency when evaluating the FONSI, EIS, SEIS, and FACA procedures. Under § 706 of the Administrative Procedure Act (“APA”), a court may set aside an agency’s decision only if it finds the decision to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” Judge Ungaro relied on three prior decisions involving administrative agencies in Florida to summarize the court’s role in the case at hand:

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84 5 U.S.C. App. 2 §§ 1-16, The Federal Advisory Committee Act (“FACA”). Note: FACA defines an “advisory committee” as “any committee, board, commission, council, conference, panel, task force, or other similar group” that is “established or utilized” by the President or an agency “in the interest of obtaining advice or recommendations” for one or more federal agencies or officers.” 5 U.S.C. App. 2 § 3(2).

85 Id.


87 See note 74, supra at 5 (citing Alabama-Tombigbee at 1107).

88 See note 73, supra at 1360.


90 See note 74, supra at 6.
“The court’s role is to ensure that the agency came to a rational conclusion, ‘not to conduct its own investigation and substitute its own judgment for the administrative agency’s decision.’ 91 Rather, the ‘task of the reviewing court is to apply the appropriate . . . standard of review . . . to the agency decision based on the record the agency presents to the reviewing court.’” 92

B. Tribal Allegations that the Corps Violated NEPA and FACA

The plaintiff’s tribal members, who have customary use and occupancy rights in certain areas of the Park and live on the northern border of the Park in an area called the Miccosukee Reserved Area (the “MRA”), first alleged that the Corps violated NEPA. 93 The claimed violation occurred when the Corps failed to issue a SEIS for Alternative 3.2.2.a, the current plan developed in 2008 to bridge a one-mile section of the Trail. 94 Thus, the plaintiffs asserted, Alternative 3.2.2.a could have significant environmental effects that were not previously analyzed when the Corps considered Alternative 14, a two bridge plan analyzed in the 2005 LRREA. 95 The Tribe considered the EIS completed for Alternative 14 insufficient for Alternative 3.2.2.a. 96

91 See note 73, supra at 1360 (quoting Preserve Endangered Areas of Cobb’s History, Inc. (“PEACH”) v. U.S. Army Corps of Eng’rs, 87 F.3d 1242, 1246 (11th Cir. 1996).

92 PEACH, 87 F.3d at 1246 (quoting Florida Power and Light Co. v. Lorion, 470 U.S. 729, 743-44 (1985)).

93 See note 74, supra at 12-13.

94 Id.

95 Id.; See note 46.

96 Id. at 12.
The Plaintiff Tribe claimed failure to conduct a SEIS for Alternative 3.2.2.a. would have the following environmental impact:

“(1) Concentrating the flow volume through one bridge in the east instead of through one bridge in both the east and the west will (a) impact the environmental health of the Park because it may cause flooding in some areas and leave other areas too dry, and (b) lead to increased water levels and/or flooding in western Miami-Dade County; (2) the 8.5 foot level in the L-29 Canal will have diminished benefits for the environmental health of the Park and WCA 3A; and (3) decreasing the amount of total bridged roadway from three miles to one mile will change flow volumes and diminish the benefits that Alternative 14 would have brought to the Everglades.”

Relying on Southern District of Florida and appellate court precedent, the Tribe asserted that irreparable harm results where environmental concerns have not been addressed by the NEPA process. The plaintiffs further stated that this harm is not merely a procedural harm; “the risk implied by a violation of NEPA is that real environmental harm will occur through inadequate foresight and deliberation.” In addition to the irreparable harm inherent in any NEPA violation, the Tribe contended that allowing the Corps to implement Alternative 3.2.2.a, both by itself and in conjunction with the other MWDP elements, would cause flooding and high water levels in WCA-3A, which:

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97 See note 74, supra at 16.

98 Protect Key West, Inc. v. Cheney, 795 F.Supp. 1552, 1563 (S.D. Fla. 1992) (citing Sierra Club v. Marsh, 872 F.2d 497, 504 (1st Cir. 1989)).

99 Marsh, 872 F.2d at 504.
(1) Will adversely affect the vegetation and wildlife there, including the endangered snail kite and its habitat, and (2) could affect Plaintiff’s Miccosukee Resort, private property in Miami-Dade County, and Plaintiff’s Osceola Camp. Additionally, flooding in western Miami-Dade County could have disastrous effects on Plaintiff Tribe’s property interests there, as well as on other nearby property. Plaintiff also argues that it will suffer irreparable harm if the MWDP is allowed to proceed because such project would involve construction on lands in the Park, to which Plaintiff Tribe has customary use and occupancy rights.\textsuperscript{100}

Lastly, the Miccosukees alleged that federal government agencies involved with the TTMP violated FACA through their use of the “LRR Team,” which the plaintiff believed constituted an advisory committee.\textsuperscript{101} Throughout the LRREA development process, the “Team” helped develop performance measures and cost estimates, screened out alternatives, and made recommendations.\textsuperscript{102} Therefore, according to the Tribe, the LRREA ultimately represented the recommendations urged by the LRR Team, and the recommendation process did not adhere to FACA mandated opportunities for public openness and comment.\textsuperscript{103}

In sum, the Miccosukee Tribe of Indians argued that federal government agencies should be immediately enjoined from commencing the construction of modifications to Tamiami Trail because they violated NEPA and FACA, violations the plaintiffs claimed would result in irreparable harm to the environment.

\textsuperscript{100} See note 74, supra at 25-26.
\textsuperscript{101} Id. at 13.
\textsuperscript{102} See note 48.
\textsuperscript{103} See note 74, supra at 13.
C. The Corps’s Position Regarding the Adequacy of Prior Studies and the Cost of Further Delay

The Corps was anxious to commence construction of the Tamiami Trail bridge component because it had been repeatedly criticized for delays throughout the entire Modified Water Deliveries Project, and the Corps viewed and continues to view the TTMP as the “lynchpin” of the MWDP. In its analysis as to why the alterations to the 2005 plan did not require a SEIS, the Corps concluded that a FONSI, rather than SEIS, sufficed for its adoption of Alternative 3.2.2.a because Alternative 3.2.2.a “did not change the previously approved alternative (Alternative 14) in a way that would have significantly new impacts not studied in the 2005 GRR/EIS.” Indeed, the Corps viewed Alternative 3.2.2.a as a scaled-down version of Alternative 14 because:

(1) It only involved one bridge instead of two; (2) this one bridge was identical to the eastern bridge from Alternative 14; (3) the water (stage) levels in the L-29 Canal were anticipated to be lower in Alternative 3.2.2.a than in Alternative 14; and (4) the roadbed could be merely reinforced rather than raised as contemplated by Alternative 14, because it would only need to accommodate a water level of 8.5 feet.

Therefore, the Corps reasoned:

(1) Whatever environmental impacts would have resulted from the second bridge were now irrelevant; (2) whatever environmental impacts would result from the one-mile eastern bridge had already been

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104 Id. at 7.

105 Id. at 12. (Defs.’ Resp. 6.)

106 Id.
studied in 2005; (3) there would be fewer indirect impacts from the
water level being raised from the current level of 7.5 feet to 8.5 feet (as
opposed to 9.7 feet); and (4) and merely reinforcing the roadbed would
require less roadbed modifications, which would cause less
environmental impact. 107

In response to the Tribe’s claim that irreparable harm would result from the project, the
Corps argued that plaintiff had not demonstrated a substantial likelihood of irreparable harm,
failing to show how the TTMP would compromise any of its proprietary interests in the Park. 108
In its final response to the alleged irreparable harm resulting from NEPA violations, the
defendant Corps contended that the proposed bridge construction would have a negligible effect
on local endangered species. 109

The Corps chose not to deny the Tribe’s allegations that its actions, at face, appeared to
violate FACA’s requirements for public openness and comment. 110 Instead, the defendant
contended that the administrative record showed that the LRR Team’s actions fell within an
exemption to FACA for “meetings [held] solely for the purposes of exchanging views,
information, or advice relating to the management or implementation of Federal programs
established pursuant to public law.” 111 Thus, the Corps claimed no violation occurred because it

107 Id.
108 Id. at 26.
109 Id.
110 Id. at 24.
followed procedures outlined in the LRREA falling within the exceptions of the Unfunded Mandates Reform Act of 1995.\textsuperscript{112}

The defendants also opposed the motion for preliminary injunction through reliance on public policy arguments. In response to the Tribe’s calls for further delay, the federal government stated, “The issuance of even a temporary injunction here could have profound adverse ripple effects on other Everglades restoration projects for years to come.”\textsuperscript{113}

Furthermore, Mod Waters was far from complete as it approached its twentieth anniversary, and Congress, in a September 30, 2008 resolution, had ordered the Corps to “immediately carry out Alternative 3.2.2.a.”\textsuperscript{114} The resolution read:

“Amounts provided by section 101 for implementation of the Modified Water Deliveries to Everglades National Park shall be made available to the Army Corps of Engineers, which shall immediately carry out Alternative 3.2.2.a to U.S. Highway 41 (the Tamiami Trail) as substantially described in the Limited Reevaluation Report with Integrated Environmental Assessment and addendum, approved August 2008, which, for purposes of this section, is determined to meet the requirements of section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), including subsection (r), in order to achieve the goals set forth in section 104 of the Everglades National Park Protection and Expansion Act of 1989 (16 U.S.C. 410r-8).”\textsuperscript{115}

\textsuperscript{112} See note 48; “UMRA” § 1534(b).

\textsuperscript{113} See note 74, supra at 29-30. Defs.’ Resp.

\textsuperscript{114} H.R. 2638; Pub. L. No. 110-329; 110th Cong. 2d Sess.; 122 Stat. 3574 at Sec. 153.

\textsuperscript{115} Id.
Despite calls for the TTMP to go forward from environmentalists, federal, state, and local government agencies, and Congress, the bridge’s proponents remained uncertain as Judge Ungaro prepared her ruling on the Tribe’s motion for preliminary injunction. The Park’s future appeared to hang in the balance.

D. The Decision

In considering both the NEPA and FACA arguments brought by the Miccosukees, the court acknowledged that a “preliminary injunction is an extraordinary and drastic remedy, one ... should not be granted unless the movant, by a clear showing, carries the burden of persuasion.”116 As an initial matter, the court agreed with the Tribe that obvious physical differences exist between Alternative 14 and Alternative 3.2.2.a.; Ungaro specifically noted:

“The selection of the one mile bridge in the eastern portion of the Everglades over the combination of the two mile bridge in the west and the one mile bridge in the east, in the amount of roadway to be bridged, in the decision to reinforce, but not raise, the unbridged roadway, and the decision to raise the water level in the L29 canal to 8.5 feet.”

After reviewing the Corps’s decision not to issue an SEIS for Alternative 3.2.2.a under the APA’s arbitrary and capricious standard,117 the court first found that the Corps sufficiently explained its decision not to issue an SEIS and that the facts upon which it purported to rely had

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117 See note 89.
some basis in the record. However, Ungaro decided that a substantial likelihood existed that the Corps violated NEPA, “because in considering the differences between the two alternatives, it failed to evaluate whether and how those differences would alter the anticipated environmental effects of the MWDP.” By only considering Alternative 3.2.2.a’s pre-MWDP effects in the LRREA and FONSI when comparing it to Alternative 14, the Corps performed “an incomplete analysis.”

The court considered the Corps’s explanation that because the environmental effects of the one-mile eastern bridge were already studied in the 2005 GRR/EIS, “tiering” was appropriate in the environmental assessment of Alternative 3.2.2.a from its NEPA analyses in the 2005 GRR/EIS. However, Ungaro judged this argument to be inapplicable to the situation at hand because the Corps’s “proposed utilization of tiering involves applying analysis from one action (Alternative 14) to another action (Alternative 3.2.2.a), which do not represent different stages of the same action (the TT component).” In regard to the defendants’ contention that TTMP’s potential to harm endangered species and the Tribe’s Osceola Camp was “speculative, remote, and uncertain,” the court found the argument to be without merit.

Furthermore, Ungaro chose to harshly criticize the project’s effectiveness by referencing one particularly memorable section of plaintiff’s expert testimony. She remarked, “Without additional MWDP components, the TT component is no more than construction of an

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118 See note 74, supra at 18.

119 Id. at 19. (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 (1977)).

120 Id. at 19-20.

121 Id. at 21. (quoting Defs’. Resp.)

122 Id. at 22.

123 Id. at 26.
'environmental bridge to nowhere' that accomplishes (and harms) nothing but which would be a complete waste of taxpayer dollars.” 124 This statement appeared to depart from the standards of review she had earlier quoted (i.e. “The court’s role is … not to conduct its own investigation and substitute its own judgment for the administrative agency’s decision.”). 125

Ungaro also dismissed the defendants’ public policy rationale by stating, “There is no evidence that the delay would set back the MWDP for years, but, in any event, a further delay here would really be attributable to the Corps itself, for it could have avoided this lawsuit (and others like it) by scrupulously following all relevant federal laws.” 126 In regard to Congress’s order to proceed on the project, the court wrote:

This resolution does not exempt the Corps from complying with all attendant federal laws (except for section 404 of the Federal Water Pollution Control Act), and the Court can fairly assume that Congress desires that other federal statutes, such as NEPA, are properly followed in the implementation of the long-awaited MWDP. 127

Thus, Ungaro found that granting an injunction would not be adverse to public interest.

Although the court found no substantial likelihood that the defendants violated FACA, 128 the

124 Id. at 20.
125 See note 73, supra at 1360
126 Id. at 30.
127 Id. (referring to H.R. 2638; Pub. L. No. 110-329).
128 Id. at 25.
court decided that the Corps’s NEPA violations were “arbitrary and capricious.” Ungaro’s decision to grant the Tribe’s preliminary injunction read:

Defendants are PRELIMINARILY ENJOINED from taking any further steps toward implementing the Recommended Plan (Alternative 3.2.2.a), as described in the LRREA, unless and until the Corps reviews the LRREA and then properly analyzes all relevant factors to determine whether to issue an SEIS or a FONSI in connection with its chosen plan for the Tamiami Trail component of the Modified Water Deliveries Project.

VI. Renewed Congressional Action, a New Ruling, and Looking Forward

Approximately five months after the district court granted the Miccosukee’s preliminary injunction, the federal government filed a new complaint to dissolve the November 13th injunction, alleging that the court lacked subject matter jurisdiction over the TTMP. The defendants’ new argument relied on the recently passed “2009 Omnibus Act.” The represented government agencies asserted the act divested the Tribe of any NEPA or FACA claim upon which relief could be granted. The “2009 Omnibus Act” read in part:

129 Id. at 28.
130 Id. at 30-31
133 Id. at 3.
That funds appropriated in this Act, or in any prior Act of Congress, for the implementation of the Modified Water Deliveries to Everglades National Park Project, shall be made available to the Army Corps of Engineers which shall, notwithstanding any other provision of law, immediately and without further delay construct or cause to be constructed Alternative 3.2.2.a to U.S. Highway 41 (the Tamiami Trail) consistent with the Limited Reevaluation Report with Integrated Environmental Assessment and addendum, approved August 2008.134

In a decision that renewed the Mod Waters Tamiami Trail bridge component, Judge Ungaro found that Congress exempted the project from compliance with NEPA and FACA.135 The court explained, “The timing and contents of the 2009 Omnibus Act, in light of the Court’s Order on Defendants’ previous motion to dismiss, further make clear Congress’s intent to suspend the operation of NEPA and FACA here.”136 As such, the court ruled that it lacked “subject matter jurisdiction over this matter because it [could] no longer give [p]laintiff meaningful relief, as the controversy between the parties [had] been mooted by the 2009 Omnibus Act.”137

Ungaro’s order and the subsequent Corps action led to inevitable divide. In the following months, the Corps announced it had awarded Kiewit Southern Co. the contract to build the bridge. Dan Kimball, superintendent of Everglades National Park, stated, “This is a very, very significant step. It really puts us on a path for a ground-breaking we’ve been looking forward to

134 See note 132.
135 See note 131 at 6-7.
136 Id at 6.
137 Id.
for 20 years." In contrast, Tribe attorney Dexter Lehtinen quipped, “Interesting that we would repeal the nation's preeminent environmental laws in the nation's preeminent environmental project.”

On December 4, 2009 environmentalists, lawmakers, government officials (including Secretary of the Interior Ken Salazar), and other supporters of the TTMP gathered for the ground-breaking ceremony. The Modified Waters Delivery Project took a crucial step forward, and the new $81 million expected cost of the Tamiami Trail component was $121 million lower than expected. Kirk Fordham, chief executive officer of The Everglades Foundation, reflected the optimism of those invested in Everglades restoration: “There are few projects as important to the recovery of the Everglades and Florida Bay as the bridging of Tamiami Trail.”

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139 *Id.*

140 *Id.*

141 *Id.*