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## Miccosukee Tribe of Indians of Fla. v. United States, 716 F.3d 535 (11th Cir. 2013)

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Finally, the court addressed Katie John's argument that "public lands" under ANILCA extends to waters appurtenant to land allotted by the ANAA to an Alaska Native. The 1906 ANAA and its successor, the ANCSA of 1971, granted the Secretary of the Interior the power to allot a 160-acre piece of unappropriated land to an Alaskan Native. In the 1999 Rules, the Secretaries did not list waters appurtenant to these allotments as "public lands." Instead, the Secretaries delegated to the Federal Subsistence Board ("FSB") the authority to decide this issue. The FSB decided to identify which, if any, of these waters fall within "public lands" on a "case-by-case basis." In opposition, the State argued that none of the Native allotments, which were conveyed out of the public domain, could give rise to federal reserved water rights. However, the court asserted that it did not need to decide that issue to conclude the Secretaries reasonably delegated the difficult and complex matter to the FSB.

Accordingly, the court affirmed the district court's decision that (i) the Secretaries appropriately implemented *Katie John I* and the federal reserved water rights doctrine; (ii) ANILCA's rural subsistence priority can apply to appurtenant waters; (iii) the Secretaries properly excluded certain lands, including lands upstream and downstream from federal reserved land, from the definition of "public lands;" and (iv) agencies may determine reserved water rights for Alaska Native Settlements on a "case-by-case basis."

*Emily Miller*

## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

**Miccosukee Tribe of Indians of Fla. v. United States**, 716 F.3d 535 (11th Cir. 2013). (holding (i) the Florida Indian Land Claims Settlement Act created no obligation for the United States Army Corps of Engineers to administer its flood management system in a way that protects and does not interfere with the Miccosukee Tribe's rights of use and enjoyment for leased and reservation land, and (ii) the Miccosukee Tribe failed to adequately state due process and equal protection claims).

The Miccosukee Tribe of Indians of Florida ("Tribe") brought this appeal against the United States claiming the Army Corps of Engineers' ("Corps") management of the Central and South Florida Project ("C&SF Project") caused extreme flooding of tribal lands in violation of its rights under the Constitution and the Florida Indian Land Claims Settlement Act ("FILCSA").

Several pieces of legislation influenced the actions and outcome of the case. Congress passed the Swamp and Overflowed Lands Act of 1850 in order to bring development to the Everglades of Florida. The Overflowed Lands Act allowed the establishment of a system of canals, levees, locks, and dams to encourage a large migration of individuals and to bring development to the South Florida area. However, the system Florida established proved inadequate to protect against future disaster. Congress then passed the Flood Control Act of 1948, which created the C&SF Project and enlisted the Corps to work in conjunction with state and local agencies to better implement the project. Though considered a state project, the Corps maintained operational

control over critical areas of the C&SF Project, including the area at issue. The C&SF Project addressed three major concerns: preserving the Everglades, providing a water supply, and improving flood protection to South Florida. Prior to the C&SF Project, the land in and around the Everglades was commercially useless. The canals, water gates, and pump systems the C&SF Project constructed have kept much of the land drained and useable for agricultural and residential purposes.

The C&SF Project encompasses three geographical areas: the Everglades Agricultural Area, the Water Conservation Area ("WCA"), and Everglades National Park ("Park"). In order to keep the Agricultural Area usable, the Corps drains water from this land into the WCA and, when necessary, releases the water to flow south into the Park. The contested area lies within the WCA. The WCA consists of three reservoirs: WCA 1, WCA 2, and WCA 3 (divided into WCA 3A and 3B). Along the southern border of WCA 3 the Corps installed a series of four gates, referred to as the S-12 gates, to control water flow from the reservoir into the Park. The Corps maintains exclusive control over the flow of water from the reservoir into the Park and with this control comes the ability to influence the ecosystem of the Park. This appeal questions the propriety of the Corps' decisions concerning the operation of the S-12 gates.

The Corps determines the flow of water from the reservoir to the Park based on the water regulation schedules it promulgates, taking into consideration the maximum and minimum water levels for various areas of the project and the authorized purposes of the C&SF Project. These schedules consist of set times to open or close certain gates and channels. The Corps may apply its discretion and depart from the schedule under certain circumstances, such as a threat to an endangered species or as a means to maintain the health and safety of the Tribe. When creating the schedules, the Corps must consider the Endangered Species Act of 1973 ("ESA"). Previously, the Corps' water regulation schedules caused severe damage to the Cape Sable seaside sparrow's ("sparrow") habitat, thereby threatening the sparrow's population. In response, Congress implemented three experimental programs in 1983, 1999, and 2002. The 2002 program, the Interim Operation Plan for the Protection of the Cape Sable Seaside Sparrow ("IOP"), remains the current operating plan. The IOP works to create continuous dry periods ideal to accommodate the sparrow's nesting cycles.

The Everglades area also serves as home to the Tribe. The Tribe holds rights to land in the Everglades held in trust by the federal government ("reservation land") and land provided through a perpetual lease ("leased land") from the State of Florida.

Two treaties established the reservation land: the Treaty of Camp Moultrie of 1823 and the Treaty of Payne's Landing of 1832. These treaties required native groups in Florida to relinquish all claims to territory in Florida and attempted to create a reservation in central Florida. The treaties thus gave the United States control of the Everglades, which Congress transferred to Florida in 1850. Congress regained control over much of the land through the establishment of Everglades National Park in 1934. Florida then worked to establish a permanent reservation for the Seminole and Miccosukee tribes.

Ultimately, the United States established the Miccosukee reservation in Broward County on land within the northwest area of WCA 3A.

The Tribe gained additional land interests in the Everglades through lease agreements with Florida. The original land lease of 1960 was largely impermanent and rested on uncertain legal foundations. The Tribe challenged its legitimacy in 1979. Following several negotiations and public hearings, the Tribe and Florida entered into settlement and lease agreements in 1982 in which the Tribe relinquished all rights, title, interests, or claims to possession of any public or private lands or natural resources in Florida. Further, the Tribe conceded that the rights of use and enjoyment granted were not absolute but were subject to the water management activities of the South Florida Water Management District ("SFWMD"), which served as the local sponsor of the C&SF Project, and of the Corps. In return, Florida agreed to grant the Tribe a perpetual lease interest, including a right to use and enjoy 143,620 acres bordering the reservation land.

Because the settlement and lease agreements resulted in extinguishment of tribal land claims, both needed congressional approval to take effect. In order to approve these agreements, Congress passed FILCSA in 1982. FILCSA approved the settlement and lease agreements and granted the Tribe rights to enjoy and use the leased land. In exchange, the Tribe relinquished any aboriginal right, title, interest or claim to land. FILCSA also recognized that the Tribe received no greater rights or interests outside of those explicitly stated in the lease agreement. In addition, FILCSA transferred the reservation land from Florida to the United States ("Trustee Deed") and expressly subjected the land to all rights, easements, and reservations favoring SFWMD and the Corps. Ultimately, FILCSA granted Florida and the United States the ability to continue water management activities on the reservation and leased land without significant hindrance from the Tribe.

This case was first brought before the United States District Court for the Southern District of Florida ("district court") in 2008, after a fire in the Park threatened the sparrow habitat and required a deviation from the regulation schedules that resulted in flooding on tribal lands. The Tribe Chairman contacted the Corps and requested that it mitigate the flooding by keeping the gates open beyond the regular scheduled closure date, but the Corps, after review, denied the request. The Tribe brought four counts arising from the Corps' alleged mismanagement of the C&SF Project. The four counts included (i) a violation of the Tribe's rights under FILCSA, (ii) a violation of the Tribe's due process rights, (iii) an action under FILCSA for a writ of mandamus against the Corps, and (iv) a violation of the Tribe's equal protection rights. In response to all four counts, the Corps filed a motion to dismiss for failure to state a claim for relief. In support of the motion to dismiss, the Corps argued any rights granted in the lease agreement and Trustee Deed were subject to the express provisions of those agreements. From the Corps' perspective, the agreements provided easements to the SFWMD and the Corps superior to the rights granted to the Tribe, meaning the Corps was immune from the Tribe's suit. The district court dismissed the first three claims and granted summary judgment on the fourth. The Tribe appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit

("court") seeking a decision requiring the Corps to protect and not interfere with its rights of use and enjoyment of leased and reservation land.

The court considered all four counts on appeal. As a general matter, the court noted that the allegations did not comply with the requirements of *Ashcroft v. Iqbal* because the allegations were general, vague, and conclusory statements. However, the court concluded it could discern enough from the allegations to dispose of the appeal.

Count One and Count Three alleged the Corps had a duty to protect and avoid interference with the Tribe's rights of use and enjoyment under FILCSA. The counts differed, however, in the remedy sought. The Tribe sought preliminary and permanent injunctive relief from the Corps' actions in Count One and sought a writ of mandamus in Count Three. The Tribe alleged its right of use and enjoyment originated in the settlement and lease agreements ("agreements") and the Trustee Deed, while the obligation to protect and not interfere originated in FILCSA. The court found this interpretation of FILCSA erroneous. The language of FILCSA only approves the Lease Agreement and creates the reservation through the Trustee Deed. FILCSA does not create an obligation to protect or avoid interference with the Tribe's rights, nor does the language of either the Lease Agreement or the Trustee Deed create such an obligation. The court acknowledged that the Tribe might find this obligation in the Corps' responsibility under its easements to conduct *lawful* water management activities. The Tribe may have considered the flooding of tribal lands to be beyond the scope of the Corps' responsibilities, equating the flooding to trespassing on tribal lands. The court ultimately dismissed this notion as the easements were not on record and therefore a determination of the scope was not possible. Ultimately, the court dismissed both Counts One and Three as insufficient to state a claim.

Count Two alleged the Corps deprived the Tribe of property without due process. The court agreed the Corps could not take all or part of the Tribe's property granted under the agreements and Trustee Deed without due process, but questioned what process was due to the Tribe. The court presented three factors a plaintiff must allege to claim denial of property without due process of law: (i) deprivation of a constitutionally protected property interest, (ii) governmental action, and (iii) constitutionally inadequate process. The court found the Tribe failed to allege what process was adequate before the Corps could flood its lands. As such, the Tribe failed to adequately establish a due process claim.

Count Four alleged the Corps deprived the Tribe of equal protection under the law through its water management practices. The Tribe argued they were due protections under the Fourteenth Amendment (which the court corrected to refer to the Fifth Amendment) and that the acts of the United States deprived the Tribe of these protections. Further, the Tribe argued that as a discrete and insular minority, it was unable to take advantage of the majoritarian protections of the political system. The court again found the allegations in Count Four to be so vague and ambiguous that it would have to make multiple assumptions to determine a violation of equal protection rights, including the identity of the beneficiaries of the allegedly discriminatory flooding management. The court refused to entertain such assumptions and found the allega-

tions to be insufficient to overcome a motion to dismiss or a motion for summary judgment.

Accordingly, the court affirmed the district court's decision to dismiss the claims arising under FILCSA and the due process clause of the Constitution, as well as its decision to grant summary judgment for the equal protection claim.

*Lillie Parker*

## STATE COURTS

### COLORADO

**In re Water Rights of the City and Cnty. of Denver v. City of Englewood**, 304 P.3d 1160 (Colo. 2013) (holding (i) municipality may use properly quantified transmountain lawn irrigation return flows ("LIRFs") as substitute supply for decreed appropriative rights of exchange, by virtue of the fact that such LIRFs are legally indistinguishable from reusable imported transmountain effluent; and (ii) junior appropriator cannot claim injury based solely upon municipality's proper operation of its decreed exchanges).

In 2004 the City and County of Denver ("Denver") filed an application for determination of water right in the Colorado District Court for Water Division 1 ("water court"). Denver requested approval of its use of properly quantified transmountain LIRFs as a substitute supply of water for its appropriative rights of exchange decreed in Civil Action ("C.A.") 3635. The C.A. 3635 decree, which the Colorado District Court for Douglas County issued in 1972, rests upon Denver's intent to effectuate exchanges on the South Platte River of public stream water as substitute supplies for appropriated water supplied or taken by Denver. In 1992 the Colorado Supreme Court ("Court") interpreted the C.A. 3635 decree in *City and County of Denver v. City of Englewood* and approved imported Colorado River water and imported transmountain water returning to the South Platte River as wastewater effluent ("transmountain effluent") as permitted substitute supplies for the C.A. 3635 exchanges.

Just as it did in 1992, Englewood filed a statement of opposition to Denver's 2004 application. In response, Denver filed a C.R.C.P. 56(h) motion for determination of questions of law, requesting the water court to decide (i) whether Denver could use properly quantified LIRFs as a substitute supply of water for the C.A. 3635 exchanges, and (ii) whether a junior appropriator within the exchange reach could claim injury based solely on the use of such LIRFs as a substitute supply source.

Addressing the Rule 56(h) motion, the water court concluded Denver could use properly quantified transmountain LIRFs as a substitute supply. The water court compared transmountain LIRFs to reusable transmountain effluent, which was approved as a decreed substitute supply in *Englewood*, and noted that the two are legally indistinguishable. In addition, the water court reasoned that junior appropriators have no expectation as to imported reusable water because senior appropriators can use and reuse imported transmountain water to extinction. Therefore, junior appropriators could not claim