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Section 6: Update on Miccosukee Tribe of Indians of Florida V. South Florida Water Manangement District

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Water Manangement District**

Mr. McCarthy concluded with an analysis of claims against the state and federal governments. Except for a few situations, the state of Colorado is generally immune because of the Colorado Governmental Immunity Act. Claims against the federal government are also generally abrogated by sovereign immunity. However, Mr. McCarthy provided a succinct outline of situations where the doctrine of sovereign immunity and remedies may be partially waived.

Caitlin Quander

SECTION 6: UPDATE ON MICCOSUKEE TRIBE OF INDIANS OF FLORIDA V.
SOUTH FLORIDA WATER MANAGEMENT DISTRICT

Mr. Peter D. Nichols, of the law firm Trout, Raley, Montano, Witter & Freeman, discussed the implications and impacts of Miccosukee Tribe of Indians of Florida v. South Florida Water Management District, 541 U.S. 95 (2004) ("Miccosukee") on Western water law.

In 2004, the United States Supreme Court found in Miccosukee that transfers among meaningfully distinct bodies of water required a National Pollutant Discharge Elimination System ("NPDES") permit under the Clean Water Act ("CWA"). The case is currently on remand for a determination of whether the water bodies at issue are "meaningfully distinct."

Mr. Nichols stated that the imposition of an NPDES permit requirement on transfers of water from one waterbody to another raises complex issues, particularly in the western States. He argued that requiring such permits for engineered transfers is contrary to the plain language of the CWA and Congress' mandate to defer to the states' allocation of water. He stated that in the CWA Congress expressed its clear intent to preserve state water allocations and individual water rights. Mr. Nichols argued that the requirement of an NPDES permit would undermine the principles of prior appropriation and disturb numerous vested water rights. He argued that if required to operate under a permit, many western water users would have no alternative but to curtail their transfers to meet the CWA's water quality standards and anti-degradation requirements, as it would be impractical and cost prohibitive to construct treatment facilities.

Finally, Mr. Nichols stated that Congress created a number of tools in the CWA to address water quality in water transfers while giving states independent authority over water transfers. He argued that by using these tools states can protect both water quality and water rights allocated under state law.

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