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NOTES

FLORIDA'S SEMINOLE INDIAN LAND CLAIMS AGREEMENT: VEHICLE FOR AN INNOVATIVE WATER RIGHTS COMPACT

Barbara S. Monahan*

Introduction

In November 1987, the Seminole Tribe of the State of Florida1 entered into the Florida Indian (Seminole) Land Claims Settlement (the Settlement) with the United States and the State of Florida.2 The Settlement is unique in that it embodies a Water Rights Compact3 (the Compact) among the State of Florida, the Seminole Tribe, and the South Florida Water Management District. Although the Ute Indian Tribe entered into a compact with the State of Utah in 1980 to quantify its fair share of water from the Colorado River4—the only agreement of its kind

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Actually, the Florida Seminoles are divided into two linguistic and four political groups:
North of Lake Okeechobee, on Brighton Reservation and near Fort Drum are the Cow Creek Seminoles. South of the lake, on the Big Cypress Reservation, are a group of Mikasukis. Along the Tamiami Trail are another group of Mikasuki, who do not wish to live on a reservation. At Dania [Hollywood] is a third band of Mikasuki, devout Christians ....

W. NEmL, FioRDA's SemmOLE INDDNS 9 (2d ed. 1956) [hereinafter FLORIDA'S SEMINOLES].


4. The Ute Indian Tribe entered into the Water Compact with the Utah Legislature in February 1980. UTAH CODE ANN. § 73-21-2 (1980). This compact resolved conflicts between the State of Utah and the Ute Indians regarding rights to surface and ground waters on the Uintah and Ouray reservations. The Utes principal economic activity is
at the time—the Seminole Compact is the first tripartite water compact entered into by a state, an Indian tribe, and a water permitting district in the eastern United States. It is also the first large-scale water rights settlement between a tribe and a state accomplished prior to the institution of litigation. The Compact is an agreement among the parties creating rights and obligations pertaining to water rights and water conservation for the Seminole Reservations throughout the State of Florida.

The Settlement came at a particularly propitious time. The State of Florida covers 58,560 square miles—4,424 square miles of which is water. Florida has 1,700 stream basins and 7,700 named lakes, more than any other state. Rainfalls average fifty-three inches per year. Water is usually abundant, although not always adequate in the coastal areas where the groundwater is too salty. However, Florida is plagued with years of below

agriculture and, therefore, sufficient water is of great significance to the Tribe. One commentator has suggested:

The Compact represents a meritorious attempt to resolve the continuing dispute over Utah's Colorado River water. Although the Compact does not resolve all the issues surrounding Indian water rights and does not preclude litigation, the parties have proceeded in a mode of negotiation and compromise that will allow both to develop their vital natural resources.


The Colorado River supplies water to seven western states in addition to the northern portion of Mexico, and allocation of the water has caused a multitude of disputes among competing political entities. Id. at 186. Tributaries from the Colorado River provide much needed water to the Ute Reservations. Id. at 183. Negotiations between the Tribe and other water users began as far back as 1950, which generated two agreements antedating the Compact. Id. at 190-91. In 1977, the Tribe insisted on an agreement between the Tribe, the United States and the State of Utah to quantify its water rights. The Compact does not abrogate the prior agreements, but allocates sufficient water to the Ute Reservations without employing costly litigation. Id. at 209.

5. Id. at 207.

6. Senate Hearings, supra note 3, at 22 (testimony of Frank Ryan, Deputy to the Assistant Secretary of Indian Affairs, Department of the Interior).


9. Id.

10. Id. at 444.

11. Id. During periods when rainfall is below average, it is necessary to monitor the water to avoid saltwater intrusion into the drinking water and at times to ration water use for lawn watering, etc. N.E. Broward to Ration Water, Miami Herald, Apr. 14, 1989, at 1A, col. 5.
average rainfall followed by years of deluges. If rainfall is below average, densely-populated coastal areas suffer from diminished water supplies as saltwater may seep into fresh water supplies.

Because Florida's population increased more than 43% between 1970 and 1980, and because Florida continues to remain the fastest-growing state in the Southeast, demand for water is expected to exceed available supplies in the near future. During 1989, it is anticipated that 27,163 new residents will move to Florida each week. Incredibly, 40.5 million more gallons of purified water per year will be required just to keep up with the demand generated by Florida's new residents.

When the population boom began in the early 1950s, the Florida Board of Conservation (now the Department of Natural Resources) began administering several water resource programs. The duties of the Board of Conservation included the "supervision, development and conservation of Florida's natural resources, including the management of state-owned lands." With the passage of the 1957 Water Resources Act, a division was established within the Board of Conservation which was authorized "to issue permits for the capture and use of excess


13. Because rainfall was one-third the usual amount and because of the threat of saltwater intrusion into local wells, in mid-April 1989, the South Florida Water Management System ordered a mandatory cutback on water use in the Broward County, South Florida area. "Without water from canals to recharge well fields, salt water from the Atlantic is pulled ever closer inland." N.E. Broward Ordered to Ration Water, Miami Herald, Apr. 14, 1989, at 1, col. 4.

14. Id. In fact, in 1950 the population of Florida was 2,771,305, and by 1980 that amount had more than tripled to 9,746,324. 1988 Florida Statistical Abstract 3 (Shoemeyen, Floyd & Drexel 22d ed. 1988).


18. Id.

19. Jurgens, Thoughts on the Environmental Efficiency Study Commission Report, in Local Comprehensive Plannings—Practical Problems Under the Growth Management Act at 4.3 (publication of the Florida Bar Continuing Legal Education Dep't, 1988). Florida is recognized as one of the leaders in protection of its natural resources. In fact, "[a]doption of Florida's groundwater protection rules is recognized as one of the nation's most advanced programs." Id. at 4.1.

20. Florida Water Law, supra note 12, at 120.

surface and ground water and to establish rules for the conservation of water . . . .”

However, when the water permitting system was implemented, the Board of Conservation failed to take into account the water requirements of the Indian reservations located within the state, thereby depriving the Seminole Indian Tribe of sufficient water to economically develop the agricultural aspects of its reservations. Water is vital to the Seminoles, since the Tribe derives almost 40% of its income from farming and forestry. In early 1986, it became obvious that the Seminoles would have to take action to obtain a fair share of the water available in South Florida or face virtual destruction of their land and livelihood.

This note will first review the historical events leading to the negotiation of the Settlement, which embodies the Compact. This note will also discuss settlement of Seminole land claims and briefly summarize the principles of Indian water rights to lay the groundwork for a discussion of the Compact. This note will then address the tradeoffs and concessions made by the parties to effectuate the terms of the Settlement and to quantify water rights for the Seminole Indian Tribe. Finally, this note will draw some preliminary conclusions about the utility of the Settlement as a model for future water rights agreements.

Background

The Seminole Indians were originally members of the Yamasee Indian Tribe, which was driven to Florida from the Carolinas in 1715. Tribal numbers increased when members of the Creek Indian Tribe, who fled Georgia after the Creek War, joined their ranks. Tribal numbers were also increased by fugitive slaves who sought refuge among the Indians. After Florida was an-

22. Florida Water Law, supra note 12, at 143. With the enactment of the 1972 Water Resources Act, the water management districts were placed under the administrative control of the Department of Environmental Regulation. Fla. Stat. § 373.019(1) (West 1972).

23. The only two federally recognized tribes in the state are the Miccosukee and the Seminoles. Senate Hearings, supra note 3, at 44 (testimony of Frank Ryan, Deputy to the Assistant Secretary of Indian Affairs, Department of the Interior).

24. Id. at 50 (prepared statement of James Billie, Chairman, Seminole Tribe).


26. Senate Hearings, supra note 3, at 52.

27. Confederation of American Indians, supra note 25, at 78. The name "Seminole" means runaway. Id.

nexed by the United States in 1821, numerous attempts were made by settlers to the area to remove or annihilate the Indians. The settlers wanted the fertile lands located in north central Florida which were occupied by the Seminoles. The settlers were also afraid that their slaves would escape and find shelter with the Tribe. Finally, in 1834, a portion of the Tribe was “transported to Oklahoma where they formed one of the Five Civilized Tribes.”

A few hundred Seminoles escaped to the Everglades in South Florida, as the main portion of the Tribe was either escorted or dragged off to the West in what has been described as a “brutal and debilitating march.” White settlers continued to pressure the government to force the remaining Seminoles to migrate to the West and although many attempts were made to do so, the Tribe continued to live in various locations throughout South

29. There was ill feeling among the white settlers and the Indians. Seminole Country was constantly being invaded by bands of slave catchers causing much unrest among tribal members. American forces were sent to Florida to deal with the Indians which instigated the commencement of the First Seminole Indian War (1817-18). Florida's Seminoles, supra note 1, at 12-13.

30. Confederation of American Indians, supra note 25, at 379. Andrew Jackson, the first American governor of Florida, was extremely impatient “with Indians who stood in the way of white settlement. Most of the tribes of the southeast had been exterminated or sent to ‘reservations’ in the west; and Jackson urged that the same course be followed with the Seminoles.” Florida's Seminoles, supra note 1, at 15.


32. Id. at 380. The Five Civilized Tribes consist of the Seminoles, Choctaws, Chickasaws, Creeks and Cherokees. These tribes moved from the southeastern United States to what is now known as Oklahoma under a series of treaties during the early part of the 1800s. F. Cohen, Handbook of Federal Indian Law 772 (1982 ed.). The lands belonging to the Five Civilized Tribes were referred to as “Indian Territory,” and the boundaries were defined in laws passed in 1889 and 1890. Act of Mar. 1, 1889, ch. 333, § 1, 25 Stat. 783; Act of May 2, 1890, ch. 182, § 1, 26 Stat. 81. Id. at 772.

33. Marjorie Stoneham Douglas, a leading environmentalist in Florida who worked many years to get legislation passed to preserve the Everglades, first referred to it as the “River of Grass.” The Everglades consists of the greatest expanse of sawgrass on earth. The Everglades National Park which was created in 1947, covers 1,400,533 acres of land and water. 1985-1986 Handbook, supra note 8, at 438.


35. 1987-1988 Handbook, supra note 28, at 380-81. The Second Seminole War (1835-42) rose out of continual attempts by the government to remove the Seminoles from their homes. After eight years of fighting, many members of the tribe had been killed while others were captured and sent to the West. The remaining Seminoles, “war-weary but still undefeated, drew back into the swampy reaches of the Florida Everglades.” Florida’s Seminoles, supra note 1, at 19.
Florida. Many continue to live in swampy areas and hunt, fish, farm, and raise cattle. A five-million-acre reservation was established for the Tribe by presidential executive order in 1839. At the present time, the Seminole Tribe has 1,700 members, who reside on four reservations. The Brighton reservation lies just northwest of Lake Okeechobee, which is more than halfway down the Florida peninsula and consists of 36,925 acres of grazing land. The Hollywood (or Dania) Reservation is twenty miles north of Miami in suburban Broward County and consists of 445 acres of land. The West Big Cypress Reservation is south of Lake Okeechobee and encompasses 42,663 acres. The Tribe's income is "derived 10% from forestry, 25% from farming, 30% from business and 35% from other sources." Even though the Seminoles lived in the Everglades apart from the white settlers, the settlers continued to demand that the entire Seminole Tribe be removed from the State of Florida and continually harassed members of the Tribe. In 1855, engineers and surveyors mapping the swamplands in the Big Cypress Swamp happened upon an island in the swamp where the Seminoles had planted a garden. The surveyors confiscated the ripe fruit and vegetables and destroyed the remaining plants. The Seminole chief demanded restitution from the surveyors but received neither an apology nor compensation. The white man took away the Seminoles' land, drove them deeper and deeper into the swamps and, for no apparent reason, destroyed the simple fruits of their labor. The Tribe was outraged and the Indians attacked the surveyors' camps. This incident spawned the Third Seminole Uprising of 1855-58. Federal and state troops were sent to contain the Seminoles, but the Indians retreated even further into the swamp. The Tribe used guerrilla tactics to baffle the troops' efforts. A group of Seminoles was brought from the west to make peace offerings and to offer financial rewards if they would migrate to the west. The tribal chief left with approximately 150 of his followers. However, 300 members rejected the peace offerings and again sought refuge in the swamps. Florida's Seminoles, supra note 1, at 21-24.

36. CONFEDERATION OF AMERICAN INDIANS, supra note 25, at 78. At present, the Tribe's income is "derived 10% from forestry, 25% from farming, 30% from business and 35% from other sources." Id. Even though the Seminoles lived in the Everglades apart from the white settlers, the settlers continued to demand that the entire Seminole Tribe be removed from the State of Florida and continually harassed members of the Tribe. In 1855, engineers and surveyors mapping the swamplands in the Big Cypress Swamp happened upon an island in the swamp where the Seminoles had planted a garden. The surveyors confiscated the ripe fruit and vegetables and destroyed the remaining plants. The Seminole chief demanded restitution from the surveyors but received neither an apology nor compensation. The white man took away the Seminoles' land, drove them deeper and deeper into the swamps and, for no apparent reason, destroyed the simple fruits of their labor. The Tribe was outraged and the Indians attacked the surveyors' camps. This incident spawned the Third Seminole Uprising of 1855-58. Federal and state troops were sent to contain the Seminoles, but the Indians retreated even further into the swamp. The Tribe used guerrilla tactics to baffle the troops' efforts. A group of Seminoles was brought from the west to make peace offerings and to offer financial rewards if they would migrate to the west. The tribal chief left with approximately 150 of his followers. However, 300 members rejected the peace offerings and again sought refuge in the swamps. FLORIDA'S SEMINOLES, supra note 1, at 21-24.

37. Id.

38. The executive order set aside five million acres of Florida land for the use and benefit of the Seminole Indian Nation. It is commonly known as the "Macomb" Reservation Area. SENATE HEARINGS, supra note 3, at 69 (page 9 of the Settlement, which is printed in the appendix to the hearings).

Although there are documents indicating that the Seminoles signed a peace treaty with the United States, the individuals signing the treaty were never authorized to do so and did not represent the Tribe. Therefore, no treaty exists between the official Seminole Tribal government and the Federal government. Id. at 25 (testimony of Jim Shore, Seminole Tribal Counsel).

39. SENATE HEARINGS, supra note 3, at 25 (testimony of Jim Shore, Seminole Tribal Counsel).

40. FLORIDA'S SEMINOLES, supra note 1, at 44. Lake Okeechobee is the "second largest body of fresh water wholly within the United States." Id. at 41.

41. Id. at 44.

42. Id.
Brighton, Hollywood, and West Big Cypress reservations are federal reservations under federal trusteeship. The fourth reservation is East Big Cypress. It is a state reservation under state trusteeship.

The State of Florida first set aside 92,000 acres for a reservation for the Seminoles. When the southwestern portion of Florida was set aside as the Everglades National Park, the “park boundaries completely encompassed the state reservations, and so, once again, the Seminoles were forced to move.” In exchange for the 99,200 acres that were incorporated into the Everglades National Park, the State gave the Seminoles 104,800 acres adjacent to the West Big Cypress settlement. The East Big Cypress state reservation was first set aside for the Seminole and Miccosukee Tribes, but was later partitioned between the two Tribes by state statute. Although parcels of the southernmost portion of the state reservation are under water most of the year, “members of the Tribe have permits to run small numbers of cattle on limited acreage.” As one authority on the Seminoles notes, “Indians on these reservations are not supported by the government; they must work for everything they receive.” Tribal members who live on the Federal reservations earn their living by farming, raising mink and cattle, and managing various businesses, such as bingo parlors and smoke shops.

Disputes Over Seminole Tribal Property

During the mid-nineteenth century, the Florida legislature approved an act creating the Internal Improvement Trust Fund,

43. CONFEDERATION OF AMERICAN INDIANS, supra note 25, at 77-84.
44. Id. at 80-81.
45. FLORIDA'S SEMINOLES, supra note 1, at 45.
46. Id.
47. Id.
48. The Miccosukee Tribe live on a federal reservation in the East Big Cypress area of Dade County, Florida. The Tribe is an offshoot of the original Seminole Tribe of Florida. It differs from the Seminole Tribe politically and religiously. While the Seminoles are mostly Christian, the Miccosukee have retained their Indian religion. CONFEDERATION OF AMERICAN INDIANS, supra note 25, at 83.
49. FLA. STAT. § 285.061 (1965); CONFEDERATION OF AMERICAN INDIANS, supra note 25, at 77-84. Further, the lands are administered jointly by the two tribes. The Seminoles administer the northern third of the reservation and the Miccosukee administer the southern two thirds. Id. at 81.
50. Id. at 81.
51. FLORIDA'S SEMINOLES, supra note 1, at 46.
52. Id. at 78.
which was to hold and administer any remaining unsold public lands and was to be administered by a board of trustees.\textsuperscript{53} The members of the Board of Trustees of the Internal Improvement Trust Fund\textsuperscript{54} also serve as the trustees for the state reservation.\textsuperscript{55} The trustees are obligated by statute\textsuperscript{56} to hold the land in trust for the use and benefit of the Tribe as a reservation. Since the Board of Trustees also serves as the Board of Trustees for the state reservation, the trustees are in a position of possible conflict of interest because the trustees are also responsible for development of state lands in general.\textsuperscript{57} This conflict of interest surfaced in 1950 when the trustees conveyed an easement for water storage over the Big Cypress Reservation to the Central and Southern Flood Control District, now known as the South Florida Water Management District (the Management District),\textsuperscript{58} a state agency then under the realm of the Board of Conservation.

The events leading up to conveyance of the easement demonstrate how important water management matters are in Florida. After two hurricanes within one month in 1947, Florida began enacting flood control legislation.\textsuperscript{59} Flood control districts were created to work with the federal government regarding flood control projects as well as the "construction, maintenance, and operation of . . . canals, levees, dikes and pumping stations."\textsuperscript{60} The Management District was created to comply with

\textsuperscript{53} 42 FLA. JUR. 2d Public Lands § 39 (1982).
\textsuperscript{54} Title to the lands held in the Internal Improvement Trust Fund is vested in seven trustees consisting of the governor, secretary of state, attorney general, comptroller, state treasurer, commissioner of education, commissioner of agriculture and successors in office of such officers. FLA. STAT. ANN. § 253.02(1) (West 1982).
\textsuperscript{55} Section 285.14(4) of the Florida Statutes allows the board, in its discretion, "to convey and transfer to the board of trustees the title to any of said lands in trust for the use and benefit of said Indians." Id. § 285.14(4).
\textsuperscript{56} Id. § 285.011.
\textsuperscript{57} Senate Hearings, supra note 3, at 39.
\textsuperscript{58} Id. The South Florida Water Management District is an agency of the State of Florida created by chapter 25270 of the 1949 Laws of Florida. This chapter was implemented to regulate a water supply for the residents of South Florida. 1949 Fla. Laws ch. 25270. There are five water management districts. Each regional agency is responsible for managing the quantity of water within their jurisdiction. They issue consumptive use permits for certain water users; develop regional water use plans; issue emergency prohibition in case of water shortages and may assume water pollution control functions when necessary. 1985-1986 HANDBOOK, supra note 8, at 634.
\textsuperscript{59} FLA. STAT. §§ 378.01-.47 (1949). See also Blain, A History of Water Management—An Overview, in WATER USE—DIFFICULT DECISIONS FOR THE 90's at 1.6 (publication of the Florida Bar Continuing Legal Education Dep't, 1988) [hereinafter WATER USE].
\textsuperscript{60} WATER USE, supra note 59, at 1.6.
federal flood control plans. Pursuant to a congressionally-authorized joint conservation project between the State of Florida and the United States, known as the Central and Southern Florida Project for Flood Control, the Management District was required to acquire lands, easements and rights-of-way for the enterprise. 

This project created three interconnected water conservation areas which provided "flood protection for urban and agricultural areas, water conservation, water supply for east coast communities, salt water intrusion prevention and fish and wildlife protection in the Everglades." The lands granted to the Tribe as a state Indian reservation were among the lands included in the conservation area and were the same lands conveyed to the Board of Trustees of the Internal Improvement Fund to be held in trust for the Tribe.

In the mid-1950s and 1960s, Water Conservation Area 3A was constructed as part of the flood control project with "approximately one-half of the State Indian Reservation located within the final boundaries." In furtherance of the conservation project, the Management District flooded the easement lands in order to drain water from property adjacent to the project. The state's action deprived the Seminoles of the use and benefit of that area of the East Big Cypress reservation. By diverting possible flooding from surrounding areas, the conservation project used the Seminole lands as a "dumping ground" for excess water. Although much of the land in the southern-

61. Senate Hearings, supra note 3, at 51 (statement of Stephen Walker, District Counsel, South Florida Water Management District). This project was in response to a disastrous flood which occurred in south Florida in 1947. Florida Water Law, supra note 12, at 205.

62. Senate Hearings, supra note 3, at 52 (statement of Stephen Walker, District Counsel, South Florida Water Management District).


64. Senate Hearings, supra note 3, at 52.

65. Further, the state reservation has remained a significant part of Water Conservation Area 3A and "remains a vital component of the fresh water everglades ecosystem." Senate Hearings, supra note 3, at 52 (statement of Stephen Walker, District Counsel, South Florida Water Management District).

66. H. REP. No. 258, 100th Cong., 1st Sess. 13 (1987). The Management District uses the easement for "water flowage and storage, as part of a flood control project ... and [is] essential ... in providing water and regulating water supplies to South Florida ..." House Comm. on Interior and Insular Affairs, Settling Seminole Indian Land Claims Within the State of Florida, and For Other Purposes, H.R. Doc. No. 188, 100th Cong., 1st Sess. 3 (1987) [hereinafter House Report]. The easement through the state reservation was conveyed to the Management District without the consent of the Tribe and without compensation. Id.

67. Telephone interview with Jim Shore, Seminole Tribal Counsel (May 9, 1989).
most portion of Big Cypress is swampy and under water during the rainy season, some of the land outside the conservation area is usable and members of the Tribe have been given permits to run cattle across portions of the land. Ultimately, in 1978, the Tribe sued the Management District and the State of Florida in the United States District Court for the Southern District of Florida for damages caused by the flooding and drainage projects.

A second issue contributing to the institution of the lawsuit arose from a dispute over a possible revocation of a license granting the Tribe permission to use state lands. Nearly two decades earlier, on April 5, 1960, the Board of Commissioners of State Institutions had approved a proposal to give the Tribe permission, in the form of a license, to use certain state lands adjacent to the Miccosukee Reservation. The license granted the Seminoles a revocable privilege to use 143,000 acres as tribal lands and to hunt and fish, subject to limitations. One of the problems with the license was that it was in “proposal form . . . and it was never reworded as a final action.” However, in a letter dated April 6, 1960, the Commissioner of Seminole Indian Affairs informed the Seminole Tribe of the pledge of land and that the Tribe was authorized to work up a plan for development of any portion of the 143,000 acres subject to approval by the Board of Commissioners. Unfortunately, the license was revocable and could be withdrawn if it conflicted with subsequent laws.

When the state legislature passed section 372.025 of the Florida Statutes in 1975, creating the Everglades Recreational Planning Board, the Attorney General of the State of Florida

68. Confederation of American Indians, supra note 25, at 81.
70. The Board membership consists of the Governor and his cabinet. The Board has the authority to acquire lands in the name of the state and pledge them for the use and benefit of the Indians to promote “the health, general welfare, safety and best interest of said Indians.” Fla. Stat. § 285.14(2) (1960).
72. Id. at 111.
73. Id. at 112.
74. Id. at 109.
questioned, in the form of an opinion, whether this constituted a partial revocation of the license since it conflicted with the newly created legislation. The Everglades Recreational Planning Board was responsible for the development and management of recreational sites in the water conservation areas of the Florida Everglades. If the Seminoles' license conflicted with the proposed statute, the license would be revoked and the Tribe would be deprived of the use of this land, which had been pledged to the Tribe by the agreement of the 1960 administration.

Since the Everglades Recreational Planning Board statute was in the planning stages at the time of the attorney general's opinion, the attorney general did not resolve whether or not the license had been partially revoked by the statute, but stated that if enacted as proposed the statute would be inconsistent with the license. Furthermore, the attorney general's opinion stated that although the statute contained a moral obligation that any "recreational development of the area should be harmonized with Indian interests," this moral obligation did not grant the Tribe a definitive right to the land.

With the threat of possible revocation of the license, the Seminoles began negotiating with the State of Florida to reach an agreement clarifying the Tribe's rights to the land. The Tribe also requested compensation for damages caused by the flooding of the East Big Cypress Reservation where Water Conservation Area 3A was located. When negotiations reached an impasse, the Tribe instituted proceedings against the State of Florida in the United States District Court for the Southern District of Florida. The lawsuit was actively litigated from 1978 to 1984. The Seminole Indians claimed inverse condemnation, breach of trust under state law and attempted alienation of its property interests.

75. FLA. STAT. ANN. § 371.025(1) (West 1988).
76. Extent of License, supra note 71, at 118.
77. Id. at 109.
By 1986, the Seminole Tribe had become extremely concerned with diminishing water resources on the Brighton Reservation. At the Tribe's request, the Bureau of Indian Affairs employed the Corps of Engineers to perform a study of the water problems on the Brighton Reservation. The Tribe believed that diversion of upstream surface water by various citrus growers contributed to the Brighton Reservation water shortages. When the results of the study revealed that the internal water system at Brighton was deteriorating, it appeared that if an agreement concerning water rights was not reached promptly, further litigation would be inevitable. Because of the critical water shortage on the Brighton Reservation and the need to proceed with conservation plans as quickly as possible to avoid any further ecological damage to the Brighton Reservation, negotiations seemed the most advantageous manner in which to settle the disputed water rights. Therefore, in 1986, the parties again attempted a negotiated resolution. These negotiations led to the establishment of the Settlement and the Seminole Water Claims Settlement Act. The Settlement contains provisions which are unique to the Seminole-Florida situation, and other provisions which are generic in nature and may be used as models for other compacts.

Significantly, through land exchanges in the Settlement, and quantification of the Tribe's water rights in the Compact, the parties can now move forward and institute a restoration of the "fragile ecosystem of the Florida Everglades, as well as provide meaningful water resource management for the citizens of south Florida and for the Seminole Tribe of Florida." Although Indian water rights litigated throughout the West have spawned various water rights agreements, the Compact between the Seminole Tribe, the State of Florida, and the Management District

80. Senate Hearings, supra note 3, at 41.
81. The Brighton Reservation was located south of citrus groves, which utilized all the water so that no water flowed past the groves in the north to the reservation in the south. Telephone interview with Jim Shore, Seminole Tribal Counsel (May 9, 1989).
82. Senate Hearings, supra note 3, at 41.
83. Senate Hearings, supra note 3, at 24 (testimony of Jim Shore, Seminole Tribal Counsel).
84. Although the desire to settle was not one-sided, the Tribe was well aware how long Indian tribes in the western states had to wait to complete water rights litigation and, therefore, the Tribe was more than willing to work out a settlement. Telephone interview with Jim Shore, Seminole Tribal Counsel (May 9, 1989).
86. Senate Hearings, supra note 3.
87. Id. at 26 (testimony of Stephen Walker, District Counsel, South Florida Water Management District).
is unique because a large-scale water rights settlement has never been effectuated between a state and tribe prior to prolonged litigation.  

An Overview of Indian Reserved Water Rights

Although the Seminoles have never litigated their water rights, Indian water rights have been the subject of extensive litigation since the beginning of this century. Comparing the Seminole compact solution to litigation-based resolutions suggests that the Seminole method may be more efficient and productive.

Indian water rights were first addressed by the Supreme Court in 1908 in *Winters v. United States*. In *Winters*, the Court held that when the federal government created the Indian reservations it "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless." The *Winters* decision was reaffirmed in 1963 in *Arizona v. California*, in which the Court held that:

> It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the Indian Reservation ... they were unaware that ... water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

These two cases stand for the proposition that when the federal government reserves a portion of public land, it is implied

88. In any congressionally-approved interstate water compacts, Indians have been expressly kept outside the scope of the compacts. F. Cohen, *supra* note 32, at 598 (referring in note 10 to Act of Aug. 30, 1987, Pub. L. No. 85-222, art. 10, 71 Stat. 497, 505 (congressional consent to the Klamath Basin River Compact)); Act of Mar. 21, 1950, ch. 73, art. 14, 64 Stat. 29, 34 (congressional consent given to the Snake River Compact)).

Numerous cases have been litigated regarding Indian water rights. See United States v. Ahtanum Irrig. Dist., 236 F.2d 321 (9th Cir. 1956); Montana v. United States, 450 U.S. 544 (1981).

89. 207 U.S. 564 (1908). In *Winters*, the State of Montana alleged that state water law became applicable when Montana became a state, but the Supreme Court disagreed with that contention. *Id.* at 577.

90. *Id.* at 600.

91. 373 U.S. 546 (1963). This case is limited on its facts to water necessary for agricultural and related purposes, because this was the initial purpose of the reservations—to allow the Indians to pursue agricultural development.

92. *Id.* at 598-99.
that the United States intends to reserve unappropriated water to accomplish the purpose for which the reservation was created. In Florida, prior to the adoption of the Compact, chapter 285 of the Florida Statutes relating to Indian affairs made no mention of Indian water rights. However, by act dated July 20, 1956, the United States obligated itself to "conserve and develop Indian lands and resources" held in trust by the United States for the Seminole Tribe of Florida. However, the extent of the federal government's obligation under this statute was never defined, making the Seminole situation ripe for possible litigation.

Historically, however, the Winters doctrine has been applied primarily to Indian tribes in the western United States who have been and remain dependent on federal law for protection of their water resources. These western Indian tribes, in determining water rights, relied on the "government's promise, implicit in the establishment of reservations, to make [the reservations] liveable and to enable Indians to become self-sustaining."

In 1983, in the case of Arizona v. San Carlos Apache Tribe, the Supreme Court was asked to review another water rights dispute between a state and an Indian tribe, while the same issue was being litigated in state court. In its opinion, the Supreme Court reassessed its approach toward federal reserved water rights on Indian land and afforded the states a more deferential treatment of state water law. The Court began to interpret federal reserved water rights narrowly and, basing its opinion

95. 25 U.S.C.A. § 465 (West 1983). The section, titled "Acquisition of lands, water rights, or surface rights; title to lands; tax exemption," authorizes the Secretary of the Interior to acquire, among other things, water rights for lands held in trust by it.
96. F. Cohen, supra note 32, at 583.
97. Id. at 596. The federal government has not always lived up to its promise. In Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), one of the issues raised was whether representation of an Indian tribe by government attorneys in litigation in which other government attorneys represent opposing federal interests constitutes a conflict of interest. F. Cohen, supra note 32, at 597.
NOTES

on an interpretation of the McCarran Amendment,\(^9\) indicated that it might have been too generous in prior Indian water rights litigation.\(^{100}\) The Court stated in *San Carlos* that the statute allowed the United States a limited waiver of its sovereign immunity in order to be party to litigation in a state court, where the federal government was the trustee of reserved water rights for an Indian tribe. Therefore, the Court held that state courts have jurisdiction to determine Indian water rights and the federal courts should defer to state courts in this area.\(^{101}\)

Because the needs of Indian tribes are often in conflict with the needs of non-Indians, Justice Stevens expressed his concern for Indian water rights in his dissenting opinion in *San Carlos*, explaining that “[s]tates and their citizens may well be more antagonistic toward Indian reserved rights . . . because they provide few direct or indirect benefits to non-Indian residents.”\(^{102}\) Justice Stevens did not believe that it was Congress’ intent that the McCarran Amendment include adjudications over Indian water rights and stated further that “the Amendment is a waiver, not a command . . . it does not purport to diminish the United States’ right to litigation in a federal forum and it is totally silent on the subject of Indian tribes’ rights to litigate anywhere.”\(^{103}\) Despite Justice Stevens remarks, it appears unlikely, under *San Carlos*, that the federal government will take jurisdiction of an Indian water rights question if state court proceedings have begun or will begin in the near future.

99. 43 U.S.C.A. § 666 (West 1953), which states in relevant part:
Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the Owner of or is in the process of acquiring water rights by appropriation under State law . . . The United States when a party to any such suit shall (1) be deemed to have waived any right to plead that the State laws are inapplicable . . . .

About the same time *San Carlos* was decided, the Supreme Court decided *Nevada v. United States*, 463 U.S. 110 (1983), in which it held the Pyramid Lake Paiute Tribe could not enlarge its reserved water rights (which the tribe said were not sufficient to fulfill the purpose of their reservation). The Court based its decision on the fact that the Tribe was barred by res judicata. (The Tribe was successful in obtaining its reserved water rights in *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) and was barred from litigating the issue again.) Florio, *Water Rights: Enforcing the Federal Indian Trust After Nevada v. United States*, 13 *Am. Indian L. Rev.* 79 (1987).
103. *Id.* at 573.
No lawsuit has been litigated in Florida by an Indian tribe based on the Winters doctrine. Because of the Supreme Court's recent deferral of water rights litigation to the state courts, the Seminole Tribe chose to negotiate its water rights. The Tribe was also persuaded to negotiate due to the nature of Florida water law. Florida water law is unique for two reasons. Florida is the only eastern state that has fully adopted a permit system for water research management and has abolished private riparian rights. Prior to implementation of the permit system, water was not an issue for the Tribe since sufficient water was available for the reservations. However, when the state put the permitting system in place in 1972, the needs of the reservations were not taken into account by the water permitting districts. Since the question of who controlled water on Tribal lands in Florida had never been litigated, the Tribe was uncertain as to whether the Winters doctrine applied, and, if so, how far it would go.

The Florida Indian (Seminole) Land Claims Settlement

To reach a settlement which would be mutually advantageous, the Seminole Tribe agreed to relinquish ownership of 14,470 acres of land to the State of Florida in exchange for compensation and in-kind technical assistance. Acceptance of the Settlement resolved the pending lawsuit, which challenged the actions of the Board of Trustees of the Internal Improvement Fund in granting an easement over the Seminole state reservation to the Management District, as well as the subsequent damage caused by the flooding.

The Settlement governs acreage on several of the Tribe's reservations. The 14,470 acres, transferred to the state pursuant

104. Telephone interview with Jim Shore, Seminole Tribal Counsel (Mar. 23, 1989).
105. Senate Hearings, supra note 3, at 22 (testimony of Frank Ryan, Deputy to the Assistant Secretary of Indian Affairs, Department of the Interior). The water management districts have general authority, through chapter 373 of the Florida Statutes, to protect, through the permitting procedures, the water resources within its jurisdiction. Regulatory Agencies, 1975 Ann. Rep. Att'y Gen. (Fla.) 23 (1975) (No. 075-16).
106. Id.
108. Id. § 373.016(3). Although the Department of Environmental Regulation has supervisory powers over the districts, it was the legislature's intent that the department delegate its water management powers to the water management districts. Florida WATER LAW, supra note 12, at 208.
110. Senate Hearings, supra note 3, at 40.
to the settlement, are located within the water conservation area of the partially-flooded East Big Cypress Reservation in western Broward County.111 The State of Florida, in conjunction with the Settlement, conveyed an easement across the Big Cypress Reservation allowing the Tribe full access rights to the land for hunting, fishing, and trapping.112

The Tribe sold a portion of the East Big Cypress Reservation located in Palm Beach County to the State of Florida. The portion sold is not subject to the easement but is a critical portion of the Rotenberger Tract and the “Save Our Everglades” restoration program located within the Everglades Agricultural Area.113 The restoration program will attempt to restore the fragile ecosystem of the Everglades, as well as provide resource management to the area.114 In furtherance of this project, the State of Florida and the Tribe both wished to preserve this area and leave it undeveloped and, therefore, the Settlement states that this land is to be maintained “in its natural state in perpetuity.”115

The Tribe received $7.5 million in return for not asserting its claim to the five-million-acre reservation granted to the Seminoles in 1839,116 and waiving all other claims to Florida lands, including those based on the alleged grant of license in 1960.117 This exchange extinguished any unresolved land claims which, if the pending lawsuit were to continue, would cloud many Florida land titles.118 Of the sums paid to the Tribe, $7 million was paid by the State of Florida, and the other $500,000 was paid by the Management District in the form of “in-kind technical services for waste development on the West Big Cypress

111. Id. at 43.
112. Id. at 71 (page 11 of the Settlement).
113. Id. at 16 (statement of Sen. Chiles). The acquisition of this land allows the Management District to restore historic flows to an area known as the Rotenberger Tract. Id. at 53.
114. Id. at 26.
115. House Report, supra note 66, at 3. If the State of Florida allows the area to be developed, the Tribe has an option to reacquire the property in order to keep it in its natural state. Telephone interview with Jim Shore, Seminole Tribal Counsel (May 9, 1989).
116. Senate Hearings, supra note 3, at 69 (page 9 of the Settlement). See also supra note 38.
117. With one exception—there is now pending a claim by the Tribe for unauthorized widening of State Road 441, which runs across the Hollywood reservation. Senate Hearings, supra note 3, at 62. The claim was still pending as of May 9, 1989. Telephone interview with Jim Shore, Seminole Tribal Counsel (May 9, 1989).
and Brighton Reservations, and to assist the tribe in developing an agricultural base."\textsuperscript{119}

The remainder of the East Big Cypress Reservation, which encompasses three sections subject to the flowage easement, was subsequently conveyed to the United States to be held in trust for the Tribe as part of its reservations.\textsuperscript{120} In exchange, the Management District released any rights it held under the disputed easement to these three sections, which were not required for conservation purposes.\textsuperscript{121} Under trust principles, the United States has a fiduciary obligation to protect the land held in trust from federal and state actions which may endanger Indian rights.\textsuperscript{122} This is beneficial to the Tribe because the federal government is more knowledgeable about the general needs of the Indians and, historically, has been more fair in its dealings with various tribes throughout the country than the states.\textsuperscript{123} Therefore, it is arguably in the Tribe's best interest that the federal government, rather than the State of Florida, hold these lands in trust for the Tribe.\textsuperscript{124}

Other concessions made by the Tribe were the release of any claims against the State of Florida or Management District for damage caused to the land or any natural resources due to the inaction of the State of Florida or the Management District in "regulating the use, flow, management, or storage of water, including the construction of canals and levees, at any time prior to the effective date" of the Settlement.\textsuperscript{125} In addition, the pending litigation relating to these claims was dismissed.\textsuperscript{126}

Since the United States has a fiduciary responsibility to protect tribal resources, it was in Congress' best interest to ratify the

\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Senate Hearings, supra note 3, at 76 (page 16 of the Settlement).
\textsuperscript{122} G. HALL, THE FEDERAL INDIAN TRUST RELATIONSHIP 34 (1979). The issue of trust relationship between the federal government and an Indian Tribe was first decided by the U.S. Supreme Court in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
\textsuperscript{123} Telephone interview with Jim Shore, Seminole Tribal Counsel (May 9, 1989). This is not to suggest that the federal government has always or even generally acted fairly toward Indian tribes. See F. COHEN, supra note 32; Florio, supra note 101.
\textsuperscript{125} Senate Hearings, supra note 3, at 70 (page 10 of the Settlement).
\textsuperscript{126} Id. at 1.
bill127 which approved the Settlement. If it did not, the federal government would have been obligated to pay for the continuing litigation.128 Although the United States may alienate most federal land and water rights, Indian land and water rights are private rights held in trust by the United States for the benefit of the Indian tribes.129 Therefore, Congress presumably ratified the bill approving the Settlement to protect the Seminole Tribe's resources and interests.

The State of Florida, upon receiving the 14,720 acres within the East Big Cypress Reservation, conveyed to the Trustees of the Internal Improvement Trust Fund fee simple title to the water conservation area. Then, a perpetual easement was transferred to the Management District, allowing the Management District sufficient rights to construct levees and canals and to operate and maintain the federally authorized water conservation area.130 The Trustees of the Internal Improvement Fund executed a dedication deed,131 as authorized under chapter 285 of the Florida Statutes,132 conveying the property to the United States in trust as a reservation for the Tribe. The United States, under its trust obligations, now holds legal title to the property, but full equitable title vests in the Tribe.133 The remaining portion of the East Big Cypress Reservation is subject to federal restrictions,134 as well as state legislation authorizing the implementation of a water rights compact.135

To accomplish the goals set out in the Settlement, the Tribe also agreed to give up a portion of its tribal lands. This was a difficult decision for the Tribe, because the Seminoles have

130. Senate Hearings, supra note 3, at 73 (page 13 of the Settlement).
131. A dedication deed is an appropriation of land or an easement by the owner for the use of the public and which is accepted for use by or on behalf of the public. BLACK'S LAW DICTIONARY 371 (5th ed. 1979).
133. Hall, supra note 122, at 85. The United States is held to the "highest standard of care and good faith consistent with the principles of common law trust" when dealing with trust resources. Id. (quoting recommendations of the American Indian Policy Review Commission relating to the United States Indian Trust Relationship).
134. 16 U.S.C. § 698(f) (Supp. IV 1974) (under the subheading "Big Cypress National Reserve").
always been opposed to reducing the size of their reservations.\textsuperscript{136} As previously noted, the Tribe was granted a five-million-acre reservation in 1839,\textsuperscript{137} which has been severely diminished by the Settlement. However, the acquisition of funds in return for the land will allow the Tribe to purchase other lands.\textsuperscript{138} The ability to acquire more land, together with a definitive statement regarding water rights and the settlement of the pending litigation, were sufficient to induce the Tribe to enter into the Settlement and the Compact.\textsuperscript{139} Of utmost importance was the fact that if the Tribe did not acquire definitive rights to sufficient water for its reservations, the Tribe would have been unable to develop the land, and, without sufficient water, the land would have been unproductive.

\textit{The Tripartite Water Compact Among the State of Florida, The Seminole Indian Tribe, and the Water Management District}

The purpose of the Compact is to:

\begin{quote}
Create a comprehensive and effective system of regulation applicable to the Seminole federal Reservations and Tribal trust lands that protect the Tribe's water rights and development potential and is in harmony with ... the State system ... would provide for the protection of surface and ground water ... prevent adverse environmental impacts ... and [provides] a procedural mechanism for resolving conflicts ... .\textsuperscript{140}
\end{quote}

The resulting Compact determines the nature and extent of water rights among the Tribe, the State of Florida, and the Management District. One of the major issues resolved by the Compact pertains to placing the Tribe in a position to bargain with the State of Florida on a "government to government basis."\textsuperscript{141} This means that the Tribe agrees to adhere to sub-

\begin{itemize}
\item \textsuperscript{136} \textit{Senate Hearings, supra} note 3, at 48 (statement of James Billie, Chairman, Seminole Tribe).
\item \textsuperscript{137} \textit{Id.} at 62. \textit{See also} supra note 38.
\item \textsuperscript{138} \textit{Senate Hearings, supra} note 3, at 48 (statement of James Billie, Chairman, Seminole Tribe).
\item \textsuperscript{139} \textit{Id.} at 24-25 (testimony of Jim Shore, Seminole Tribal Counsel).
\item \textsuperscript{140} \textit{Id.} at 88 (page 2 of the Compact, which is printed in the appendix to the hearings).
\item \textsuperscript{141} \textit{Id.} at 48-49 (testimony of James Billie, Chairman, Seminole Tribe).
\end{itemize}
stantive provisions of state water law, but the Federal District Court remains the forum in which disputes are litigated, just as the federal courts would be a proper forum for a dispute between two states.

Under the Compact, the Tribe is allowed consumptive use of the water without obtaining permits from the Management District, but must follow the "essential aspect of Florida surface and ground water management . . . ." However, Seminole water rights are different from those water rights offered to other Florida citizens, since Seminole rights are perpetual in nature and "not subject to renewal by state authority."

The Parties' Rights and Obligations Under the Compact

The Compact is "intended to prescribe and protect the Tribe's rights to the use of water." The Compact allots to the Tribe its fair share of water and allows the Tribe input regarding water use on lands surrounding the reservations since misuse of water on adjacent lands can significantly impact reservation water. The Tribe is required to give reasonable assurances to the Management District that its planned use will not cause, among other things, inland movement of saline water which would interfere with or reduce the amount of acceptable potable water, or adversely impact any wetlands both on and off the reservations.

In order to conform to the requirements of the Compact, the Tribe has adopted a Tribal Water Code (the Code) which is


143. Senate Hearings, supra note 3, at 42. The regulation of water in Florida is based on the Model Water Code (F. Maloney, R. Ausness & J. Morris, A MODEL WATER CODE (1972)), which mandates a permit system for withdrawals of water for consumptive use. The Florida Resources Act authorizes the system rather than requiring it (FLa. STAT. § 373.216 (1979)). FLORIDA WATER LAW, supra note 12, at 234.

144. Senate Hearing, supra note 3, at 42.
145. Id. at 100 (page 14 of the Compact).
146. Id. "Wetlands" is described in the Compact as follows:
Areas that are inundated by surface or groundwater with a frequency sufficient to support, and under normal circumstances do or would support a prevalence of vegetative or aquatic life that require saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, wet prairies, river overflows, mud flats and natural ponds.

Id. at 92 (page 6 of the Compact).
consistent with the terms of the Compact.\textsuperscript{147} The Code regulates compliance by any persons, Indian or non-Indian, conducting activities on the reservations.\textsuperscript{148} Similarly, the Management District prepared an Evaluation Criteria Manual (the Manual) which required approval by the Tribe and the State of Florida. The Manual contains specific technical and procedural criteria with regard to consumptive water use.\textsuperscript{149} The purpose of the Manual and the Code are to resolve any ambiguities which might arise in the Compact. However, neither the Manual nor the Code can be used to modify or alter any of the provisions of the Compact.\textsuperscript{150}

The standards adopted in the Code are even more restrictive than the standards adopted in the Manual because the Tribe's agricultural development depends on using its limited resources cautiously. The Tribe is painfully aware that to ensure the viability of the reservations, water must be used advantageously. Therefore, to further regulate water consumption on the reservations, the Tribe formed its own Water Resource Management Department.\textsuperscript{151} This Department consists of a three-member commission and works in a manner similar to that of the Management District. Anyone, Indian or non-Indian, who wishes to use reservation water must apply to the commission for a permit. The commission reviews the request and decides whether or not to issue the permit.\textsuperscript{152} Additionally, the Tribe is entitled to a preference to groundwater resources to enable it to pursue its plans to expand its agricultural base. The Tribe can assert the preference as long as the use will not cause drastic changes or adverse impact\textsuperscript{153} to the aquifer system,\textsuperscript{154} which supplies drinking water to much of South Florida, and as long as the Tribe is not exporting the water for use outside the reservation.\textsuperscript{155}

Prior to commencing work under the Compact, the Tribe submits a "work plan"\textsuperscript{156} to the Management District. This

\textsuperscript{147} Id. at 92 (page 6 of the Compact).
\textsuperscript{148} Id.
\textsuperscript{149} Id. at 91 (page 5 of the Compact).
\textsuperscript{150} Id. at 98 (page 12 of the Compact).
\textsuperscript{151} Craig Tepper is the director of the Water Resource Management Department. Telephone interview with Jim Shore, Seminole Tribal Counsel (Mar. 23, 1989).
\textsuperscript{152} Id.
\textsuperscript{153} What constitutes an adverse impact is to be defined in the Manual.
\textsuperscript{154} Water is contained in natural, giant reservoirs called aquifers consisting of thick layers of limestone, which store water in periods of excessive rainfall and gradually release the water during dry spells. 1985-1986 HANDBOOK, supra note 8, at 478.
\textsuperscript{155} Senate Hearings, supra note 3, at 106 (page 20 of the Compact).
\textsuperscript{156} Id. at 114 (page 28 of the Compact).
procedure affords notice to any interested party, who will have an opportunity to voice disapproval. Also, by reviewing a work plan, the Management District can assess what equipment the Tribe requires to implement the plan.\textsuperscript{157}

A separate provision in the Compact allows the Tribe to object to permits requested by third parties if the Tribe believes that approval of such permits would significantly impact or interfere with the terms of the Compact.\textsuperscript{158} Normally, the Tribal Council controls acts which occur on the reservations. However, through Tribal Council resolution, the Tribe can request the Management District to enter a reservation "for the purpose of enforcing the provisions of the Compact against persons other than the Tribe conducting activities on Reservation or other Tribal Lands . . . ."\textsuperscript{159}

Furthermore, rights are afforded to third parties who may be substantially affected by any actions taken by the Tribe or the Management District which are in violation of the Compact, Tribal Code, Manual, or work plan. Adversely affected third parties have the right to challenge the validity of such actions by filing a written complaint with the Management District Clerk alleging the violations.\textsuperscript{160} Therefore, if the Tribe or Management District substantially impairs a third party's water rights under the Compact, or acts in a manner which is not in harmony with the environment, that person is not without a means to redress the alleged wrong through proper administrative procedures.

**Procedural Remedies**

The 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 . . . . Jurisdiction regarding any controversy arising under the Settlement Agreement or compact or private agreement between the tribe and any third party entered into under the authority of the compact is hereby vested in the United States District Court for the southern district of Florida.\textsuperscript{161}

\textsuperscript{157} Id.

\textsuperscript{158} Id. at 115 (page 29 of the Compact). The Tribe must object by written notice to the Management District within the time frames to be set out in the Manual. The Tribe must exhaust all administrative remedies before resorting to any court action.

\textsuperscript{159} Id.

\textsuperscript{160} Id. at 116 (page 30 of the Compact). The Management District must then conduct an investigation. Any party may request a hearing on the complaint.

This language authorizes the Federal courts to retain jurisdiction over the Compact. This is of utmost importance to the Tribe. Because the treatment of the Seminoles in Florida has varied with the philosophy of each state administration, the Tribe would rather remain subject to the jurisdiction of the Federal court system to ensure consistency in administration.162

Although the Seminole Tribe must adhere to state substantive law with regard to water use, it is not subject to Florida’s administrative control.163 If the Tribe chooses to proceed with a work plan, the State of Florida may not prevent the Tribe from proceeding but, after exhausting all administrative remedies, must seek redress in the federal district court.164 In this way, the Tribe, by application of federal law, will not have to compromise its sovereign status165 and will retain the benefit of federal protection. The Tribe “in its sovereign status would never subject itself to State law willingly.”166 This unwillingness is not unfounded. As noted above, when a controversy existed between a state and a tribe in the past, the tribe was not always dealt with on an impartial basis. This lack of impartiality exists because an Indian tribe’s rights may at times conflict with its non-Indian neighbor’s rights. In fact, during the period between 1949 and the early 1970s, the Supreme Court “reserved or vacated” sixteen decisions of “state courts that were adverse to Indian property or sovereign interests ... .”167 It is, therefore,

162. Telephone interview with Jim Shore, Seminole Tribal Counsel (May 19, 1989).
163. Senate Hearings, supra note 3, at 44.
164. Id. The Tribe also has the option of requesting assistance from the federal district court when an impasse has been reached.
165. Indian tribes have been recognized as being separate, independent, political entities and are entitled and qualified to exercise powers of self-government based on original tribal sovereignty and not due to a delegation of powers. F. Cohen, supra note 32, at 232. See also Dale, Tribal Court Civil Jurisdiction Over Reservations-Based Claims: The Long Walk to the Courthouse, 66 Or. L. Rev. 753 (1987).
166. Senate Hearings, supra note 3, at 43 (testimony of Frank Ryan, Deputy to the Assistant Secretary of Indian Affairs, Department of the Interior). The Supreme Court first interpreted the issue of Indian sovereign immunity in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and its companion case decided one year later, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). The Court held that the Cherokees were a distinct political society ... capable of managing its own affairs and governing itself ... . “Cherokee, 30 U.S. (5 Pet.) at 17.

imperative to the Tribe that any dispute between the Tribe and the State of Florida be litigated in the federal court system.

Is the Compact Working?

The Compact is working so well that water resource managers from other states are calling the Management District to find out how the agreements were reached, what basic concepts are contained in the Compact, and whether the relationship among the State of Florida, the Tribe, and the Management District is amiable. The plan has become a "model for other states and tribes seeking to settle longstanding disputes over water rights." For example, the Miccosukee Tribe, which shares a portion of the Big Cypress state reservation with the Seminoles and has its own reservation in Dade County, Florida, is preparing to negotiate a similar compact with the State of Florida for the Tribe's Tamiami Reservation. Once a groundwater study is completed, the Miccosukee Tribe, the State of Florida, and the Management District plan to proceed with negotiations for their own water compact.

At present, the Management District, the Seminole Tribe and their respective attorneys are meeting approximately every four weeks to prepare acceptable work plans. The biggest project is located at the Brighton Reservation near Lake Okeechobee in south central Florida. The Tribe recently presented a plan to augment the present water supply at Brighton to facilitate planting citrus groves and raising cattle. The Compact guarantees the Tribe 15% of the water running from Lake Okeechobee into the Indian Prairie Basin. The water from the basin will allow the Tribe to pursue their agricultural endeavors even in the event of a dry season. The Tribe has also been promised a comparable percentage of water for its Big Cypress Reserva-

169. Id.
171. In the meantime, the Miccosukee Tribe and the Management District are meeting sporadically as needed and the Management District is assisting the Tribe in the measurement and maintenance of water levees on the reservation. Telephone interview with Woody Van Voorhees, Office of Resources Management, South Florida Water Management District (Mar. 13, 1989).
172. Id.
173. Senate Hearings, supra note 3, at 111 (Compact at 25).
174. Id. at 42.
tion. This is more water than the Tribe has had since the implementation of the permit system.

To assure that the Tribe received the percentage of water promised in the Compact, the Management District determined what constituted 15% of the water in the basin and then installed a pump, which pumped the water from the lake onto the reservation. Additionally, to avoid flooding problems, proper drainage will be made available through the use of new culverts, which are being constructed at the present time.

The Work Plan for the Brighton Reservation, along with the plans for the other reservations, were approved unanimously by the Management District in early March 1989. The Brighton Reservation Work Plan allows the Management District to assess how the Tribe is utilizing its water supply and adapt it to the Management District’s overall program. Although landowners surrounding the Brighton Reservation expressed some concern to the Tribe that their citrus groves would not receive sufficient water, the Tribe was quick to act. Specifically, the Tribe entered into an agreement allowing the citrus grove owners to use water pumps on their common boundaries. Presently, all parties are cooperating with the terms of the Compact and hope that the Compact will continue to “work.”

Of some concern is the fact that although the Tribe dealt swiftly and fairly with its neighbors in the citrus grove situation, there may be instances where quick action is impossible. Other third persons who may be affected by the Compact include landowners whose property is adjacent to the reservations, the Florida Department of Environmental Regulation, the Florida Department of Natural Resources, the Florida Department of Community Affairs, and the Florida Game and Freshwater Commission. The Tribe has many “neighbors” to accommodate

175. Id.
177. This took a year to determine. The Management District planned to begin building a pump in September 1989. In the meantime, other non-Indian user permits had to be fulfilled. A plus for the State of Florida was locating illegal users (those without permits) in the process of surveying the needs of the Tribe. Telephone interview with Woody Van Voorhees, Office of Resources Management, South Florida Water Management District (Mar. 13, 1989).
178. Historic Accord, supra note 168.
179. Telephone interview with Jim Shore, Seminole Tribal Counsel (May 9, 1989).
180. Id.
181. Senate Hearings, supra note 3, at 91 (page 5 of the Compact).
and there may be times when swift and/or simple solutions are impossible.

Further, under the Land Claims Settlement Agreement the Tribe received funds with which it plans to purchase property in the future. The Compact fails to state expressly whether after-acquired lands will fall under the Compact. Specifically, the Compact deems itself the sole source of regulation of water use on "Reservation and Tribal Trust lands." This language does not make it absolutely clear that the Compact applies to after-acquired property.

Another source of possible friction is the fact that the Tribe is not required to reduce its water pressure during times of water shortage on systems serving the Big Cypress and Brighton reservations. When Florida is faced with an unusual drought and other landowners are forced to ration water supplies, the needs of non-Indians will conflict with the needs of the Tribe. These are valid concerns which are not fully addressed in the Compact.

Finally, a more general question of significant interest concerns who controls the resolution of environmental problems which occur after a tribe obtains control over water use on its reservations. For example, the EPA is currently in the process of preparing a regulation which will afford tribal governments the same treatment afforded a state under the Clean Water Act. In order to be given the opportunity to be treated as a state, a tribe must submit an application indicating: (1) it has a governing body, (2) the governing body has authority to exercise a water quality program, (3) the governing body is capable of being administered, and (4) the tribe is a federally recognized tribe. Once this regulation has been adopted, the qualifying tribes will be in a position to have some control over the water resources on their reservations and will bargain with the federal government in the same manner as a state under existing regulations. With the implementation of the Compact, the Semi-

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182. Id. at 94 (page 8 of the Compact).
183. Id. at 96 (page 10 of the Compact).
185. Telephone interview with David Moon, Quality Water Standards Division, U.S. Environmental Protection Agency (EPA) (Mar. 13, 1989). Mr. Moon was in the process of drafting the proposed standard which the EPA expected to have adopted by April 1990.
186. Under 33 U.S.C. § 1251(g) (1987), federal agencies work with state and local agencies in order to develop solutions to "prevent, reduce and eliminate pollution in concert with programs for managing water resources." These steps are evidence that
nole Tribe not only quantifies its water rights, but will also be afforded an opportunity to regulate its own environmental quality controls under the new legislation.

**Conclusion**

On November 5, 1987, in his prepared statement for the Senate Hearings before the Select Committee on Indians Affairs, Seminole Tribal Chairman James Billie stated: "The beginnings have been good, but centuries of mistrust and difficulty cannot be erased overnight. We are prepared to do all that is necessary to protect our rights. But we are also prepared to pursue a course of conciliation and cooperation with hope and present expectation that it will produce a greater good for all." 187

Antagonism has existed for centuries between the states and Indian tribes, and water has been a major source of conflict. Water is, after all, vital to Indian tribes' economic survival because agriculture is the chief economic activity on many reservations. Indians have an established moral as well as reserved right to adequate quantities of water. Because federal agency action and litigation take an inordinate amount of time, and because water rights issues are often of immediate concern, involving the possibility of irreparable ecological harm, it is up to the individual states and tribes to resolve competing interests and negotiate water rights which will be fair to both Indians and non-Indians alike. Hopefully, the Settlement and its incorporated Compact will herald the way for future water rights compacts between other states and tribes.

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the federal government intends to treat Indian tribal lands with the consideration they deserve. Unfortunately, implementation of any regulations by the federal government is very time-consuming. For example, the EPA-proposed regulation to be added to the Clean Water Act is a step in the right direction, but will not become effective until mid-1990. Telephone interview with David Moon, Quality Water Standards Division, EPA (Mar. 13, 1989).

In addition, Congress recently addressed the issue of Native American lands in relation to environmental statutes and passed a regulation in the Superfund Amendments and Reauthorization Act of 1986 directing the government to notify tribal governments when hazardous substances are released on their lands. Section 126 of the amendments states that the "governing body of an Indian tribe shall be afforded substantially the same treatment as a state" under several sections of CERCLA. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 126, 100 Stat. 1613, 1706. See also Allen, *Who Should Control Hazardous Waste on Native American Lands?*, 14 Ecology L.Q. 115 (1987).

187. *Senate Hearings, supra* note 3, at 50.