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THE EAST BIG CYPRESS CASE, 1948-1987: ENVIRONMENTAL POLITICS, LAW, AND FLORIDA SEMINOLE TRIBAL SOVEREIGNTY

by HARRY A. KERSEY, JR.

CONGRESSIONAL enactment of the Seminole Indian Land Claims Settlement Act of 1987 paved the way for resolution of a thirty-nine-year political and legal conflict between the Seminole Indians and the state of Florida over control of one of the most environmentally sensitive regions in the state.[1] The area, known as the East Big Cypress Reservation, was a 28,000-acre tract lying in western Broward and Palm Beach counties, and it formed a rectangle measuring approximately six miles north to south and eight miles east to west. On the west, the tract abutted the federal Big Cypress Indian Reservation, which was acquired for the tribe in the 1890s, expanded by Executive Order in 1911, and named formally during the 1930s.[2] Approximately 16,000 acres of the East Big Cypress preserve was included within Water Conservation Area No. 3A, a sawgrass-covered vestige of the original Everglades flowage pattern which is controlled by the South Florida Water Management District. To the north were privately held agricultural lands, while to the south lay the 76,000-acre Miccosukee Indian Reservation.[3]

The Miccosukee Reservation and the Seminole East Big Cypress Reservation were created in 1917 by an act of the Florida Legislature which set aside 99,000 acres as a State Indian Reservation. However, the land originally designated for this reservation was located in Monroe County in what presently is the Everglades National Park. Accordingly, when the Congress es-

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1. Public Law 100-228, 101 *U. S. Statutes at Large* 1556.
2. Executive Order No. 1379, June 28, 1911; Harry A. Kersey, Jr., *The Florida Seminoles and the New Deal, 1933-1942* (Gainesville, 1989), 96.
3. Public Law 97-399, 96 *U. S. Statutes at Large* 2012.
4. Sections 285.01 and 205.02, *Florida Statutes Annotated* (1985).

tablished the park in 1934, it provided for relocation of the reservation.[5] In 1935 the state legislature authorized the exchange of the park lands for approximately equal acreage in Broward and Palm Beach counties. When the land transfers were approved the following year by the Florida Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund, the new reservation contained 104,800 acres, a net gain of approximately 5,000 acres for the Seminoles. The trustees conveyed the tract to the Board of Commissioners of State Institutions in 1937, and eventually the commissioners granted a flowage easement for flood control and water-management work within the reservation lands.[6]

In 1957 the Seminole Tribe of Florida was formally organized under provisions of the Indian Reorganization Act of 1934.[7] The Seminoles established a tribal government with a federally approved constitution and bylaws; they also launched a reservation-based business corporation chartered by the federal government. Theoretically, this authorized the Seminole Tribe to exercise virtually unlimited control over its reservation lands. Not all of the Florida Indians accepted membership in the Seminole Tribe, however, especially those families who refused to move to the reservations and who retained camps scattered throughout the lower Everglades. In 1962 the Miccosukee Tribe of Indians received federal recognition as a separate tribal entity. The Miccosukees are linked closely to the Seminoles through culture, kinship, and language, but they have retained a more traditional way of life. Because all of the Florida Indians previously had been considered Seminoles, the new Miccosukee tribe began without a land base. The three federal preserves existing in Florida at that time and the State Indian Reservation were assumed to belong to the Seminoles. Both tribes requested in 1965 that the legislature address the status of the State Indian Reservation. At that time the tract was divided. The Miccosukees received the lower 76,000 acres, and the Seminoles retained the

5. 48 *U. S. Statutes at Large* 816 (1934).
6. Section 285.06, *Florida Statutes Annotated.* The Board of Commissioners of State Institutions was established by Article IV, Sec. 17, of the 1885 Florida Constitution and abolished by Article XII, Sec. 1, of the 1968 Florida Constitution. All of its functions were transferred to the Department of General Services pursuant to Chapter 69-106, *Laws of Florida* (1969).
7. 48 *U. S. Statutes at Large* 984.

28,000 acres adjacent to their existing federal reservation.[8] Thereafter, the Seminole portion was referred to as the East Big Cypress Reservation to differentiate it from the adjacent tribal land held in federal trust status.

The legislation that divided the state reservation also permitted federalization of the East Big Cypress at such time as the tribes and the Bureau of Indian Affairs (BIA) deemed it appropriate. The state approved the transfer in 1974, but the land was not accepted by federal authorities. The Miccosukee Tribe almost immediately initiated litigation and negotiations to have its holdings federalized and also to gain control over a much larger area of land in south Florida. These efforts were partially successful and led to passage of the Florida Indian Land Claims Settlement Act of 1982– but at a price. The Miccosukees agreed to a prohibition within the limits of the reservation of commercial activities that were at variance with state laws. Although some business activities were allowed, the law proscribed the sale of tax-free cigarettes and the operation of bingo games, both of which had been lucrative for the Seminoles. Miccosukee leaders initially insisted that they had no interest in such activities and that they preferred to restore traditional values and lifestyle on their own land. Ultimately, the Miccosukee council, faced with increasing economic needs and declining income from federal sources, obtained additional land closer to Miami upon which to operate a bingo hall.

The Seminole Tribe, too, sought to have its state reservation land placed in federal trust status as a protection against the vagaries of state politics. However, two problems stood in its way. First, federal authorities balked at considering such action as long as the state claimed control over 16,000 acres as a flowage easement within Water Conservation Area 3A. Secondly, the government would not take any action while the tribe and the state were litigating the status of the land. Accordingly, the federalization of the East Big Cypress Reservation was put on hold until these legal issues were resolved.

The question of legitimate control within the boundaries of the State Indian Reservation dated to 1948 when the Central and Southern Florida Flood Control District (FCD), forerunner of the South Florida Water Management District (WMD), began

8. Section 285.061, *Florida Statutes Annotated.*

to plan a massive drainage project for the region. In December 1948 the superintendent of the Seminole agency, Kenneth A. Marmon, outlined to the Commissioner of Indian Affairs actions taken to ascertain the impact on the Seminole reservations of a flood control program proposed by the United States Corps of Engineers. He then met with the district engineer, Colonel W. E. Teale, and his assistant, H. A. Scott, and they assured him that every effort would be made to comply with the recommendations as submitted by the Indian Service through the Secretary of the Interior.[9] Marmon wrote: "I indicated to both Colonel Teale and Mr. Scott, that our Indian Service was in favor of the proposal whereby flooding would be reduced on the reservation lands, including the State Indian Reservation. I especially called their attention to our protest to the proposed construction of the canal and dyke running north and south along the Collier-Broward county line, which, if constructed and carried out according to present plans . . . would deprive the Indians of the use of the State Indian Reservation. The present proposed program would flood 104,800 acres of some of the best grazing lands now being used during the winter months by the Big Cypress Agricultural and Livestock Enterprise. This flooding would also deprive the Seminoles of the hunting area."[10]

Although Marmon had represented effectively the Indian Service views and concerns to the Corps of Engineers, he apparently did not intend to carry the issue to the Seminole people. Early in 1950, he was notified that a new alignment had been selected for the canal which would place it three miles east of the Hendry-Broward county line.[11] Again, there was no mention

9. Francis P. Prucha, *The Great Father, Volume II* (Lincoln, NE, 1984), 1128-29. Prucha notes that because the mounting criticism of federal Indian policies during the 1920s was aimed primarily at "the Bureau," the agency was unofficially referred to as the Indian Service or Office of Indian Affairs in federal records. The Bureau of Indian Affairs was officially adopted as the name of the agency in 1947. Since some of the correspondence cited in this study was initiated during the transition period, the terms are used interchangeably.
10. Kenneth A. Marmon to Commissioner of Indian Affairs, December 28, 1948. Unless otherwise noted, copies of all correspondence, unpublished documents, and court records cited are located in the files of Hobbes, Straus, Dean & Wilder law offices, 1819 H Street, NW, Washington, DC. Some copies also are available at the Seminole Tribe of Florida, Hollywood, Florida.
11. R. W. Pearson to Marmon, February 16, 1950.

of consultation with the Indians nor their involvement in the final determination of the project. Evidently the Indian Service accepted the proposal by letter dated in March 1950, and the matter seemed settled as far as the Corps of Engineers was concerned.[12] Plans for the project were finalized, and in August the Board of Commissioners of State Institutions dedicated a flowage easement in the East Big Cypress to the FCD including "the right to permanently or intermittently flood" all or any part of the land.[13]

By 1953 Marmon's view on the location of Levee L-28 changed, and he solicited the support of various officials to have the Corps of Engineers revise the plans. The board of governors of the FCD was confounded by the change. Its secretary, W. Turner Wallis, responding to an inquiry on the matter from United States Senator Spessard L. Holland, wrote: "We are not able to understand . . . Mr. Marmon's present position. . . . The matter was long ago agreeably settled by the Corps of Engineers with the approval of Mr. Marmon's superior. . . . Mr. Marmon now wants to further realign the levee so as to establish it along the extreme east boundary of the Reservation some several miles east of the alignment that was amicably determined three years ago."[14]

Here, for the first time, a Seminole position was introduced into the decision-making process concerning the East Big Cypress. Wallis continued: "The resolution which Mr. Marmon had the Seminoles adopt on January 7, 1953 . . . does not appear to reflect the independent thinking, judgement or wishes of the Seminoles themselves. It speaks of the lands being 'diverted from the trust imposed in flagrant violation of the Acts creating this State Indian Reservation.' Such statements not only do not bespeak the truth, but might well serve to inflame a proud tribe that has long debated the advisability of concluding a treaty of peace with the Government. What motivates such action at this time when the matter has long been amicably settled, we have not yet been able to determine. Further . . . Mr. Marmon knows

12. W. Turner Wallis to Spessard Holland, January 30, 1953; H. W. Schull to George Smathers, January 27, 1953.
13. Broward County Deed Records, Book 704, p. 457.
14. Wallis to Holland, January 30, 1953.

that Levee L-28 is not even in the authorized first phase of the program, so that any actual threat of construction is years away."[15]

How Wallis could intimate that Marmon had coerced or somehow convinced the Seminoles to adopt this resolution and that the resolution did not truly represent the wishes of the Indian people is unclear. One implication, however, was that the Seminoles were easily duped and did not truly know their own minds in the matter. The letter at the very least impugns Marmon's integrity and, at worst, suggests a possible conflict of interest. That Marmon, himself an Indian, just might have reassessed the situation and brought his views to the attention of the Seminole leaders nowhere is considered.

The Seminole resolution noted that, if the plan was implemented, more than half of their lands suitable for grazing cattle during the dry seasons and for hunting during the balance of the year would soon become part of a huge reservoir for surplus waters. Such an action, they held, would result in great loss to the Seminole people and was a flagrant violation of the laws creating the State Indian Reservation. The document concluded: "[W]e, the Tribal Trustees, and we the Cattle Trustees, of the Seminole Indians of Florida, in meeting assembled, protest in all earnestness the discrimination against our people in the preparation of the said Flood Control Project and . . . we call upon . . . the Secretary of the Interior of our Federal Government and the Board of Commissioners of State Institutions of our State Government, to use their every effort to bring about such revisions of the plans for said Project as will move that section of the Levee known as L-28, which as now proposed would run through the State Indian Reservation from north to south, easterly to become the eastern boundary of the said Reservation."[16]

Although Marmon or some other non-Seminole likely drafted the resolution, one element among the reservation-dwelling Seminoles, speaking through the only organizational structure available to them, vigorously had opposed an apparently illegal intrusion into the State Indian Reservation. No federally recognized Seminole tribal government existed at that time, al-

15. Ibid.
16. Bureau of Indian Affairs, Seminole Tribe, "History of Involvement with the Central and South Florida Project," prepared by Leland Black, February 4, 1976 (typescript).

though the Cattle Trustees selected by the people at Brighton and Big Cypress Reservations had functioned since 1939. The Tribal Trustees likely originated during the late 1940s, for, in 1950, Marmon reported to the Commissioner of Indian Affairs: "[W]e now operate through *TRUSTEES* elected by members of the two large reservations. The Brighton Reservation comprised of Cow Creeks is represented by three trustees . . . also the Big Cypress Reservation Seminoles comprised of Miccosukees. The Seminole Tribe Trustees . . . are elected as follows: One each by Brighton and Big Cypress Reservation of the Agency. The Seminole Tribe Trustees serve a term of two years."[17]

Marmon dealt with the trustees in a limited governmental capacity as legitimate representatives of the Seminole people concerning tribal business matters. One elderly Seminole recalls this effort to organize a tribal governing body: "Superintendent, who was about to retire tried to help us, by dealing with people who really didn't have the authority to speak for the whole tribe but [he] had to deal with someone. He formed the Business Committee on all three reservations, by appointing them himself."[18] Perhaps because of their function the Tribal Trustees also were called the Business Committee by many Seminoles. Furthermore, other groups claiming to speak for the tribe appear in federal documents from this period. In 1955 a delegation identifying itself as the "Board of Directors of the Seminole Tribe" presented testimony before the joint Senate-House Committees on Indian Affairs.[19] The existence of several groups with various names underscores the difficulty in identifying the true locus of Seminole political power during the late pre-organizational period.

Prior to the formation of the Seminole Tribe of Florida in 1957, several ad hoc organizations, constituted primarily of non-

17. Marmon to Commissioner of Indian Affairs, February 8, 1950. This appears as Exhibit 23 in the Indian Law Resource Center's "Report to Congress: Seminole Land Rights in Florida and the award of the Indian Claims Commission," May 9, 1978. See: United States Senate Select Committee on Indian Affairs, Ninety-fifth Congress, *Hearings on S. 2000 and S. 2188, Distribution of Seminole Judgment Funds* (Washington, 1978), 209.
18. Seminole Tribe of Florida, Inc., *Seminole Tribe of Florida 20th Anniversary of Tribal Organization, 1957-1977, Saturday, August 20, 1977* (Hollywood, FL, 1977), 20.
19. United States Congress, House. Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, Eighty-fourth Congress, *Hearings Pursuant to H. Res. 30, April 6 and 7, 1955* (Washington, 1955), 5-6.

Indian membership, ostensibly represented the interests of the Florida Indians. The Seminole Indian Association (SIA), which could trace its founding to 1914 but effectively had been reorganized in 1933 to provide assistance to Seminoles throughout the Great Depression, was the most active.[20] The association, through its president, Robert D. Mitchell of Orlando, and executive secretary, Bertram Scott of Winter Haven, was involved in the controversy over Levee L-28. In November 1954 the SIA brought together in Orlando some twenty-five persons representing all of the major governmental agencies involved with the project, as well as six Seminole Indians, to consider the alignment of Level L-28 and its effects on the Indians and the state reservation. Oscar D. Rawls, assistant chief of the Planning and Reports Branch, Corps of Engineers, later reported: "I was called upon to explain why the present alinement was chosen and any reasons why it should not be moved to the eastern edge near the reservation. I explained that originally the alinement had been along the County line, knowing that some refinement would be necessary in later studies. At a later date, field reconnaissance and office studies, with maps and aerial photographs, were made. . . . It was found that the edge of the Everglades virtually bisected the State Reservation from north to south. East of the line was the level sawgrass of the Everglades; West of the line was the sloping soils with maiden cane growth. The former was worthless as cattle feed; the latter quite good and water tolerant. [United States Soil Conservation Service] maps showed that this was the line of demarcation between worthless soils good only for conservation purposes on the east, and valuable soil suitable for agricultural use on the west. Thus the choice of alinement was primarily dictated by soil characteristics. There were engineering reasons why eastward realinement would be undesirable. . . . The plan of presentation was persuasive and factual rather than controversial in any way."[21]

Testimony of BIA soil and cattle experts supported Rawls's argument, and that apparently won the support of the SIA lead-

20. Harry A. Kersey, Jr., "Private Societies and the Maintenance of Seminole Tribal Integrity, 1899-1957," *Florida Historical Quarterly* 56 (January 1978), 297-316.
21. Oscar D. Rawls, "Meeting with Seminole Indian Association, Orlando, Fla., 24 November 54," November 29, 1954.

ers. As for the Seminoles, Rawls noted: "The Indians present spoke English poorly and apparently understood it in the same manner. They were not empowered to make individual decisions, having to refer all action back to their tribal council. They stated certain platitudes such as: Land once given to the Indians should not be taken from them; that they had voted against having the alinements run through their reservation and wanted it moved to the eastern boundary; they said that their council would never change in this attitude. They apparently object to the trespassing of white men, including surveyors."[22] To avoid such resentments in the future, it was suggested that Marmon be informed of intrusions into Indian land and that he explain to the Indians the purpose of the surveys.

Interestingly, Rawls detected some ambivalence in Marmon's position. "Mr. Marmon, evidently in favor of the present alinement all along, appears to be unable to persuade the tribal council that this is best for them, since they look with misgivings on most actions of the white man. Mssrs. Mitchell, Scott, and Marmon and all other Indian representatives are fully persuaded of the desirability of the present alinement and state that they will take this to the tribal council for full explanation and persuasion. They expressed confidence in the success of the outcome. Mr. Turner Wallis believes that the meeting was quite successful and will result in the acceptance of the present alinement."[23] As an inducement, all parties reportedly agreed that the Seminoles could continue their previous uses of all the conservation area lands, including the grazing of cattle during the dry season.

Marmon and others eventually persuaded the Seminole element that was most directly impacted to change its position and accept the new L-28 alignment.[24] Marmon informed Wallis early in 1955, "I am pleased to transmit herewith a copy of the original resolution signed by the leaders of the Big Cypress Reservation, Hendry County, Florida, approving the present proposed location of Levee L-28, approximately three miles east of the Hendry-

22. Ibid.
23. Ibid.
24. Interview with Robert Mitchell by the author, July 13, 1985. Mitchell, a long-time confidant and friend of the Seminole and Miccosukee people, confirmed that the Indians were not happy with the WMD intrusion into their lands but reluctantly accepted the compromise location of the L-28 three miles east of the western boundary of the reservation.

Broward County line."[25] The resolution, dated November 30, 1954, stated: "A meeting of all adults living on this reservation was called by Frank Billie, acting as tribal trustee, to discuss the proposed Flood Control Project . . . on the State Reservation. A total of 96 residents attended. It was decided that the Flood Control Project could be built on the State Reservation land. The decision was approved by a show of hands. This approves the present proposed location of L-28 (levee). The undersigned are authorized by the Seminole Indians living on the Big Cypress Reservation to represent their interests in this matter."[26] The document was signed by Frank Billie and Morgan Smith, trustees; Henry Cypress, representative; and Jimmie Osceola, secretary. The state of Florida later contended that this document constituted Seminole consent to the granting of a flowage easement in the East Big Cypress. However, a question remained as to whether the actions of a group from the Big Cypress Reservation was legally binding on the entire Seminole Tribe since the group did not constitute a tribal government as defined by the Indian Reorganization Act.

Despite Seminole concerns about the alignment of Levee L-28, the project was completed by the Corps of Engineers in 1965. The controversial work roughly bisected the preserve. Canals and levees were constructed through the tract for approximately eleven miles. These varied in width from 600 to 750 feet and covered an area of 900 acres. The western 12,000 acres of Seminole land ostensibly was "recovered" and made usable for agricultural purposes, primarily cattle grazing. The 16,000 acres lying eastward of the Levee L-28 remained in a wild state as part of the water impoundment area.

During the 1970s the Seminole Tribe of Florida, headed by aggressive leaders and encouraged by the new national emphasis on Indian self-determination, moved to regain control of its land in the East Big Cypress. In 1974 a civil action was brought in the Broward County circuit court.[27] However, because of the nature of the case it soon was moved to the United States District

25. Marmon to Wallis, January 19, 1955.
26. Ibid.
27. *Seminole Tribe of Indians of Florida v. State of Florida et al.* Complaint, case no. 78-4430, Circuit Court of the Seventeenth Judicial Circuit, Broward County, Florida, 1974.

Court for the Southern District of Florida.[28] The lawsuit was prepared with assistance from the Native American Rights Fund and was supported in part by a grant from the Ford Foundation. Tribal attorney Stephen H. Whilden argued that the action was "to establish the rights of the Seminole Tribe of Indians of the State of Florida in 16,000 acres of reservation land in the State of Florida, which are lands subject to the protection of the Indian Non-Intercourse Act [and state law]."[29]

This action began thirteen years of litigation and negotiation between the Seminole Tribe, the state of Florida, and the WMD. The Seminoles outlined three causes for action. First, the reservation land in the East Big Cypress was subject to the protection of Article VI, Clause 2, of the United States Constitution, as well as the 1790 Indian Non-Intercourse Act. The United States never had consented to, or approved of, any dedication of these lands to another party, and thus the Seminoles retained title and right of possession to the land. Second, the dedication of the land and construction upon and use of it by the state and its agencies constituted a taking of Indian land for public purposes without payment of just compensation in violation of Article 10, Section 6, of the Florida Constitution. And third, the state and its agencies, as trustees for the reservation lands, had breached their fiduciary duties to the Seminoles by converting the property to their own use and profit. Specifically, the state had reserved and retained income from mineral leases on the East Big Cypress that should have gone to the Seminoles.

The Seminoles asked the court to declare that they were the owners free and clear of the 16,000 acres and that the state had no right, title, or interest in the property or, as an alternative, to award just compensation, including interest, for the wrongful taking of the land. They also requested the court to order the state to provide the tribe with an accurate accounting for East Big Cypress for the period December 23, 1936, to March 19, 1974. Thirdly, damages were demanded for the wrongful receipt and retention of income by the state, as well as other reasonable and proper relief including interests, costs, and attorneys' fees.

28. *Seminole Tribe of Indians of Florida v. State of Florida et al.*, Complaint, case no. 78-6116-Civ-NCR, United States District Court for the Southern District of Florida (cited hereafter as SDF), March 17, 1978.
29. Amended Complaint, case no. 78-6116-Civ-NCR, SDF, July 11, 1978.

The state's defense rested primarily on a claim to immunity from suit under the Eleventh Amendment of the United States Constitution, which prohibits suit in federal courts against a state by citizens of another state or a foreign nation.[30] If the Seminole Tribe was held to be a separate sovereign nation, then the case would be moved from the federal court back to the state court. The Seminole case hinged on whether, at the time of the 1950 deed conveyance, the East Big Cypress was Seminole tribal land within the meaning of the Non-Intercourse Act. If it was, even though the state held legal title to the East Big Cypress, the tribe's right to full beneficial use of the land was unlimited. Furthermore, the tribe argued that the federal government had not consented to dedication of the land to the WMD. Although the Non-Intercourse Act argument was the tribe's strongest position, it temporarily was put aside in hopes of reaching a negotiated settlement with the state and WMD.

Despite acrimony between the attorneys representing the state and the Seminoles, negotiations were pursued from 1980 to 1983. They proved, however, to be of no avail. One point of contention was the tribe's decision to grow sugar cane in Conservation Area 3A, where the WMD held sugar production to be an incompatible use of the land. The Seminoles also clashed with the state as to who held jurisdiction on Indian lands in Florida. The tribe wanted to police the land without interference; the state insisted that it retain civil and criminal jurisdiction on the state reservation area. The "Save Our Everglades" program promoted by Governor Robert Graham as part of his environmental protection project to restore Florida wetlands also became entangled with the Indian negotiations. Pursuant to the program, Seminole lands in Palm Beach County (known as the Rotenberger Tract) were to be used to reestablish a natural sheet flowage of

30. In 1976 the Indian Claims Commission awarded the Seminole people of Florida and Oklahoma compensation for lands taken from them in the 1820s and 1830s. However, the Florida Seminoles had raised the issue of a possible new claim to some 5,000,000 acres of land in south Florida. This was based primarily on a presidential order of 1839 setting aside a tract for Indians– the result of the so-called Macomb Treaty during the Second Seminole War. Although the "Macomb Claim" never was formally filed, the threat of such action played a significant role in subsequent negotiations over the East Big Cypress Reservation. *Seminole Indians of the State of Florida and the Seminole Nation of Oklahoma v. The United States,* 38 Ind. Cl. Comm. 62 (1976), docket nos. 73 and 151 consolidated.

water into the conservation area and, eventually, to Everglades National Park. A state-initiated land exchange proposal by which some 14,000 acres of land east of the L-28 canal would be swapped for an equal amount of land outside the reservation boundaries was almost accepted by the Seminoles, but it foundered on the state's inability to devise a value-for-value exchange mechanism. Thus, after almost eight years of litigation and negotiation the issue remained stalemated.

On March 30, 1984, the state moved to dismiss the Seminole suit with prejudice on jurisdictional, as well as substantive, grounds.[31] The WMD filed a similar motion. However, by the early 1980s several landmark Indian rights cases were before the United States Supreme Court which would have great bearing on the Seminole suit; therefore, the attorneys representing the tribe sought to stay proceedings pending the outcome of those cases. Federal Judge Norman C. Rottenger, Jr., issued the appropriate order in May 1984.[32]

Shortly after Judge Rottenger's action, the Supreme Court strengthened the Seminole position by finding that tribal lands could not be conveyed under the Non-Intercourse Act. The court's 1985 decision in *County of Oneida, New York, et al. v. Oneida Indian Nation (Oneida II)* affirmed an award to the Oneida tribe based on 1795 violations of its federal rights by the state of New York.[33] The court also held, in a related case, for the Oneidas who had sued the state of New York for unlawfully obtaining possession of their large aboriginal territory in violation of the 1790 Non-Intercourse Act.[34]

In April 1985 tribe attorneys filed a memorandum opposing the defendants' motion to dismiss. Drawing on the recent Supreme Court precedents, they argued that there was no "relevant legal basis" for holding that Indian claims against the state were barred by the Eleventh Amendment and that the Seminoles, like the Oneidas, had a valid claim under the Non-Intercourse Act.

31. "Memorandum Of Law In Support Of Motion To Dismiss Of State Of Florida, Florida Board Of Commissioners Of State Institutions, Florida Board Of Trustees Of The Internal Improvement Trust Fund, And Florida Department Of Natural Resources, Division Of State Lands," case no. 78-6116-Civ-NCR, SDF, March 30, 1984.
32. Stay Order, case no. 78-6116-Civ-NCR, SDF, May 30, 1984.
33. 53 *United States Law Week* 4225, March 4, 1985.
34. *Oneida Indian Nation of New York v. State of New York,* 691 F. 2d 1070 (2d Cir. 1982).

Seminole attorneys contended that the language of the modern act had been construed broadly to cover not only consensual transactions with Indian tribes, such as the attempted purchase considered in *Oneida II*, but also unilateral transactions designed to accomplish divestiture or alienation of tribal title. Therefore, they urged, "the inescapable meaning of this statutory scheme requires that the Nonintercourse Act be applied."[35] Lastly, they insisted that the court held jurisdiction over the plaintiffs related state law claims, since both the federal and state claims arose out of a common nucleus of operative facts.

The focus of the action then shifted from establishing Seminole rights under federal law to an attack based on Florida state law. The tribe moved for a partial summary judgment on the state's occupation and control over approximately 16,000 acres of land in the East Big Cypress Reservation.[36] The state countered, asserting that before the court could consider judgment on the state-law-taking issue, it first must find that it (the court) had jurisdiction to hear the claim and that the reservations contained in the 1937 deed were invalid. A federal court's assumption of jurisdiction, the state argued, precluded judgment for the plaintiff. Judge Rottenger withheld any decision, and the case again was deadlocked. A second round of negotiations then ensued.[37]

The case now took an important turn as the state split with the WMD over the East Big Cypress.[38] The state, as trustee for the Seminoles and as the party holding title to the state reservation, threatened to file a cross claim against the WMD alleging that the agency had exceeded its authority for the use of Indian lands. Further, it contended that the WMD was limited to the

35. "Plaintiffs Memorandum In Opposition To Defendant's Motions To Dismiss," case no. 78-6116-Civ, SDF, April 5, 1985, 5.
36. "Plaintiffs Memorandum Of Law In Support Of Motion For Partial Summary Judgment," case no. 78-6116-Civ-NCR, SDF, April 4, 1985, 19-20.
37. Gay M. Biery-Hamilton, *Draft Study of the 1987 Seminole Settlement* (typescript, 1989). This document, prepared for the South Florida Water Management District, presents a chronology and thorough analysis of the negotiation process. The general outline of events and conclusions in the study reportedly were verified through interviews with the Seminole and WMD negotiators. The author has replicated a number of those interviews.
38. Interview with Jerry C. Straus by author, November 1, 1990. Straus contends that the split between the state and WMD eventually opened the way for a settlement by allowing the tribe to negotiate with the parties separately.

terms of the 1950 dedication which conveyed rights for a flowage easement and an easement to construct and maintain canals, levees, and associated water control structures, and the district had no authority to require the tribe to apply for permits to make any other use of these lands such as cattle grazing. The state demanded that the WMD acknowledge that it had a flowage easement only, provide grazing access to the conservation area, and pay a fee for the rights they sought on the land in Conservation Area 3A.

In response, the WMD denied owing any money and insisted that cattle grazing or other agricultural use within the conservation area would require water management systems contrary to the purposes of their project. According to the WMD argument, such use would impede the sheet flow of water and the purification of surface waters before they entered the ground and surface water systems. The district conceded that the Seminoles could use the conservation area as "natural range," but it would not allow planting grasses or digging drainage ditches. Nevertheless, the state held that the WMD could not deny the tribe access to the property in question. The district also questioned why the state was choosing to represent the Seminoles who had their own counsel and claimed that this conflict would damage the interests of both parties. It denied that it had flooded the land or denied Indian access for grazing purposes. The WMD warned that the entire easement might be invalidated if the state pursued its argument that the district's interest in Indian lands was in violation of the Non-Intercourse Act.

The necessity of a judicial determination of the validity of the 1937 deed reservations, the subsequent 1950 easement, and any violation of the Non-Intercourse Act appeared necessary. The tribe wanted the issue decided by a federal court; the state and WMD insisted that it be determined in a state court. In the fall of 1985 a partial legal compromise was reached to avoid the state's cross claim against the WMD. The two parties then filed a document with the court which purported to clarify remaining tribal rights and access to the land.

The Seminoles responded to this agreement by threatening to block implementation of the Modified Hendry County Plan. This was a $20,000,000 project for flood control and drainage which the WMD was about to initiate after years of planning and heavy expenditure of funds. The plan was of paramount

concern to agricultural interests in south Florida. It would drain potential citrus lands to the west of the existing WMD drainage system and impound the excess water in Conservation Area 3A. Seminole lands were crucial to its implementation. Much of the project was to be constructed on the Big Cypress reservation in Hendry County and would bring additional runoff into the disputed conservation area site. The tribe had protested against the plan since the 1970s, but the district had moved ahead with construction. Unaccountably, though, the WMD had neglected to notify the Seminoles about public hearings on the matter as they had done with other area landowners. Therefore, the tribe requested a public hearing on the project, and all parties understood that tribal objections could block progress indefinitely. This action brought the WMD and the state to the negotiating table. Seminole general counsel Jim Shore recalled it as "the first time that we got their attention."[39]

The district already was seeking a resolution of the East Big Cypress impasse. In February 1986, $3,000,000 had become available to settle the Seminole suit, but the state and the WMD could not agree on how much each agency would pay, and the offer was withdrawn. The case was headed back to court, and the tribe still was threatening to thwart the Modified Hendry County Plan. At that juncture, though, the district decided to negotiate directly with the Seminoles. A member of the district's board of managers, Timer Powers, stepped forward and took a leading role in resolving the issues. Powers had been working with the Seminoles for several months and had gained their respect. He contacted tribal counsel and requested a meeting. Tribal attorneys were suspicious of the WMD and expected more delaying tactics, but they accepted the offer.[40] Shore especially was skeptical but maintained that the tribe had wanted to negotiate all along because it was the realistic thing to do.

The first meeting was held in February 1986 and began with emotionally charged exchanges between tribal chairman James Billie and the district's executive director, John Wodraska. Timer Powers quickly assumed the role of facilitator, however, and implored both sides to seek common ground; Jerry Straus, one

39. Interview with Jim Shore by author, November 20, 1990. Shore is a member of the Seminole Tribe of Florida and the tribe's general counsel.
40. Ibid.

of the tribe's lawyers, played a similar role on the Seminole side of the table. The first question considered was whether the WMD would pay for the six sections of Indian land in Palm Beach County that was considered integral to the governor's "Save Our Everglades" scheme. Wodraska said yes, but Chairman Billie was reluctant to commit the tribe to selling land without approval of the tribal council. The point also was made that under a permitting system, both the district and the Seminoles could use lands that were not wetlands. Both the tribe and the WMD thus expressed interest in protecting environmentally sensitive land. In addition, the negotiators began to develop a rapport, and the stage was set for positive meetings in the future.

Throughout 1986 the WMD and the Seminole tribe continued to negotiate as to the Modified Hendry County Plan, and the district decided that an operable weir, rather than a fixed facility, would be constructed to control water flow. The district would not, however, divulge the operating plan for the project. Tribal leaders' concerns about maintaining a sufficient flow of water to their lands in times of drought also continued, and they requested a public hearing. Then, in July, the Seminoles outlined the terms of a settlement to Timer Powers.[41] The tribe offered to settle the federal suit, as well as the land claim based upon the 1839 Executive Order (Macomb Claim), for the sum of $6,800,000. Once again state negotiators balked, but the WMD leadership was more sympathetic. Wodraska informed Florida's attorney general, Jim Smith, that the six sections of the Rotenberger Tract could not be acquired without a monetary settlement for the Indians and that the Modified Hendry County Plan likely would remain stalled indefinitely. The attorney general, who was running for governor, saw political advantage in inheriting the popular "Save Our Everglades" program and in gaining support from agricultural interests. The governor also was pushing for a settlement before the end of his term and while funds were available. And so, the attorney general ended his resistance.

On September 5, 1986, a final agreement was entered into at Tallahassee. Governor Graham facilitated the process by providing his conference rooms prior to a scheduled meeting of the state cabinet. Approximately forty people including Wodraska, Powers, and representatives of other state agencies met in one

41. Jim Shore to Timer Powers, July 29, 1986.

room, while the Seminole contingent including Chairman Billie and the tribe's attorneys conferred in another. After hours of indirect, but intense, negotiating a deal was struck. It called for $7,000,000 in compensation for past projects in Water Conservation Area 3A and for purchase of Indian land. Specifically, the agreement provided: (1) the lawsuit would be dismissed with prejudice; (2) the Seminoles would receive $4,500,000 for the fee-simple title and easement in 14,720 acres of their land in Conservation Area 3A, and the WMD would release its easement in three sections of Indian land lying west of Levee L-28 and contribute $500,000 of in-kind services toward the development of Seminole lands lying west of Levee L-28 or at the Brighton Reservation; (3) the tribe would sell its six sections in Palm Beach County north of Conservation Area 3A (the Rotenberger Tract) to the state for $2,000,000; (4) the tribe would waive any aboriginal right that it had to 5,000,000 acres of land in Florida based on the presidential order of 1839 (Macomb Claim); (5) the Seminole tribe would formally withdraw its opposition to the Modified Hendry County Plan; (6) perhaps most significantly, a Water Rights Compact the details of which were to be finalized later assured the tribe's right to withdraw as much water on a per-acre basis as the highest priority users in the district, in return for which the Seminoles agreed to be bound by the substantive requirements of a regulatory system concerning water use, surface water management, and other environmental requirements; and (7) at such time as all parties were bound by such a regulatory system, the state would transfer remaining lands within the state reservation to the United States to be held in trust for the tribe.[42] It was further stipulated that the transferred lands never would be used for bingo or tax-free cigarette sales by the tribe. Three days later, according to a news report, "Gov. Bob Graham and the Cabinet granted conceptual approval to what Graham called a 'historic' agreement reached by the state, the tribe and the South Florida Water management district."[43]

All parties seemed pleased with the agreement. John Wodraska insisted: "This will be a great savings for the taxpayers of Florida. It is critical to important components of the Save Our

42. Jim Shore and Jerry C. Straus, "The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987" (publication forthcoming in *The Journal of Environmental Law).*

43. *Palm Beach Post,* October 8, 1986.

Everglades program."[44] Powers commented: "[It] will last into centuries to come. It has the potential to do that."[45] Only Shore expressed reluctance. "The tribe," he stated, "does not like giving up its land base, no matter how big or small. The $7 million sounds good, but the tribe would rather keep all the land that it has. Money comes last."[46]

The months immediately following approval of the agreement were spent in considering how the money was going to be obtained and informing federal agencies about the impending water rights compact. Although some objections were raised within the Bureau of Indian Affairs and Department of the Interior, they ultimately concurred. In November the Seminole Tribal Council unanimously approved the general terms and conditions of the settlement. However, Tribal Council Resolution C-01-88, adopted August 4, 1987, actually ended the tribe's claims against the state of Florida and the South Florida Water Management District.

After approval of the agreement, the creation of a Water Rights Compact between the Seminole Tribe and the district became the next matter of concern. In February 1987 a major stumbling block appeared when Lykes Brothers, Inc., a large Florida agribusiness conglomerate with land holdings adjacent to the Brighton Reservation, became involved in the negotiations. The company challenged the compact under the assumption that the Seminoles were receiving special water rights that might threaten the firm's interests, and it unsuccessfully pushed for legislation that would have wrecked the carefully crafted agreement. Actually, Lykes Brothers had little choice but to negotiate. They had little chance of killing the Seminole settlement bill then moving through the legislature because other agricultural interests, primarily the powerful Land Council, wanted the Modified Hendry County Plan approved. Also, it soon became clear that the Seminoles would come under the same water management system as other landowners. Following three months of negotiations, in May 1987, an arrangement was reached with all parties, including adjacent landowners such as Lykes Brothers

44. *Fort Lauderdale Sun-Sentinel,* September 11, 1986.
45. *Palm Beach Post,* October *6,* 1986.
46. Ibid.

and the United States Sugar Corporation.[47] The Florida Legislature also acted, and on July 4 Governor Bob Martinez signed the Seminole settlement bill into law.[48] A "settlement agreement" was filed with the United States District Court for the Southern District of Florida in October.[49] Only congressional action remained before the agreement with its water rights compact became a reality.

United States Senators Bob Graham and Lawton Chiles introduced in the Senate legislation entitled "Seminole Land Claims Settlement Act of 1987" (S. 1684); a companion measure was sponsored in the House of Representatives by Congressman Tom Lewis. Hearings were held before the House Committee on Interior and Insular Affairs and the Senate Select Committee on Indian Affairs. In December a group of independent Seminoles who were not affiliated with either the Seminole or Miccosukee tribes objected to the compact fearing that it might jeopardize the aboriginal title which they claimed as Seminoles. This issue, however, was settled by a slight alteration in the wording. The legislation passed the Congress and was signed into law by President Ronald R. Reagan on December 31, 1987.[50]

Seminole Chairman Billie earlier had noted to the Senate Select Committee on Indian Affairs: "We hope this settlement . . . truly will signal the beginning of a better relationship that will allow us and our neighbors to live in peace while we proceed to develop our reservations. We know that we must develop our lands and use their resources to make them economically and socially viable homelands for our people. It is too soon to tell whether the new relationship with the State and Water District called for by this settlement will in fact materialize. 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

47. "Water Rights Compact Among The Seminole Tribe of Florida, The State of Florida, And The South Florida Water Management District," reproduced in *Seminole Water Claims Settlement Act; Hearings on S. 1684 before the Senate Select Committee on Indian Affairs, November 5, 1987.* 100th Cong., 1st sess. (Washington, DC, 1988), 83-122.
48. Chapter 87-292, *Laws of Florida* (1987).
49. Settlement Agreement, case no. 78-6116-Civ-NCR, SDF, October 29, 1987. The federal district court issued its approval order on July 21, 1988.
50. Public Law 100-288, 101 *U. S. Statutes at Large* 1556.

pursue a course of conciliation and cooperation with hope and present expectation that it will produce a greater good for all."[51]

The agreement hammered out by the Seminole Tribal Council, Governor Graham, the state cabinet, the legislature, and the South Florida Water Management District– and ultimately approved by the Congress– appears to be one of those rare instances in which all parties to a dispute came away to some degree winners, while the public interest was also served. The state gained control over vital wetlands and could move forward with its extensive plans for water management and flood control, while assuring an unrestricted flow of water to the Everglades National Park. The public will benefit from a stable environmental policy in the region. The settlement guaranteed the South Florida Water Management District control over a major source of fresh water for coastal population and an end to jurisdictional disputes over the use of Water Conservation Area 3A. The Seminole tribe gained $7,000,000 in compensation for lands already taken by the state and for their acreage in Palm Beach County, plus a WMD commitment through the Water Rights Compact to provide sufficient water flow and flood control systems on their agricultural lands at the Brighton and Big Cypress Reservations. Also, the way was opened to place the remaining Seminole lands under the protection of federal trust status. In return the tribe dropped the federal court suit, renounced its aboriginal rights to 5,000,000 acres of land in Florida under the Macomb Claim, and allowed the Modified Hendry County Plan to become a reality. However, perhaps most importantly from an Indian perspective, the principal of Seminole tribal sovereignty within its own lands once again had been tested and conclusively reaffirmed.

51. *Hearings on S. I684,* 50.