SOUTH FLORIDA WATER MANAGEMENT DISTRICT V. MICCOSUKEE TRIBE OF INDIANS[*]

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Our homelands are critical to our cultural identity, and the fight for our homeland is always the core of whatever [we] do.[1]

Last Term, the Supreme Court decided whether, under the Clean Water Act ("CWA"),[2] the South Florida Water Management District must acquire National Pollution Discharge Elimination System ("NPDES") permits before backpumping polluted water into the greater Everglades ecosystem. This ecosystem, home to the plaintiff Miccosukee Tribe, is being seriously degraded by the pollution influx. While the decision was based on statutory interpretation, the ramifications of the case reach beyond semantics: the very survival of a tribal culture is at stake. Consequently, while the Supreme Court's decision in *South Florida Water Management District v. Miccosukee Tribe of Indians*[3] is a tentative victory for the Tribe and the environment, the Court missed a golden opportunity not only to reaffirm the spirit of the CWA, but to demonstrate this country's commitment to cultural pluralism and environmental justice.

BACKGROUND

The greater Everglades ecosystem stretches throughout central and southern Florida, from near Orlando to Florida Bay.[4] Water historically moved south slowly over the Everglades as a surface flow originating at Lake Okeechobee.[5] However, extensive drainage and canalization have divided the region into sub-basins, including Everglades National Park and three Water Conservation Areas ("WCAs").[6] These hydrologic modifications have reduced the connectivity of the wetlands, altered flow patterns, and increased phosphorus availability in the WCAs.[7]

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[1] Gail Small, Director of Native Action for the Northern Cheyenne, *Opening Remarks*, *in* AMERICAN INDIAN & ALASKAN NATIVE ENVIRONMENTAL JUSTICE ROUNDTABLE: FINAL REPORT 12, 13 (Environmental Biosciences Program at the Medical University of South Carolina, ed., 2001), *at* http://pico.library.musc.edu/np/TribalEJ.pdf.

[2] 33 U.S.C. §§ 1251–1367 (2000).

[3] 124 S. Ct. 1537 (2004).

[4] Daniel L. Childers et al., *Decadal Change in Vegetation and Soil Phosphorus Pattern across the Everglades Landscape*, 32 J. ENVTL. QUALITY 344, 346 (2003).

[5] *Id.*

[6] The Army Corps of Engineers has constructed over 2500 kilometers of canals and levees in this area. *Id. See also* Brief for Petitioner at 8, *S. Fla. Water Mgmt. Dist.* (No. 02-626), *available at* 2003 WL 22137015.

[7] Childers et al., *supra* note 4, at 346; *see also* Miccosukee Tribe of Indians of Fla. v.

Eutrophication, largely the result of agricultural, urban, and residential runoff containing high levels of phosphorus, has caused a rapid shift in floral and faunal communities.[8] One structure contributing to this eutrophication is the South Florida Water Management District's ("SFWMD")[9] S-9 pumping station ("S-9") located in Broward County.[10] This structure, completed in the 1950s, consists of three pipes that transfer up to 960 cubic feet of water per second from the C-11 canal ("C-11") into Water Conservation Area 3A ("WCA-3A") against the water's natural flow.[11] The water being pumped from C-11 contains higher levels of phosphorus and other pollutants than the receiving waters of WCA-3A,[12] and the areas in the immediate vicinity of S-9 have been severely degraded.[13]

The Miccosukee Tribe of Indians and Friends of the Everglades (together "Plaintiffs") filed a citizen suit in district court under the CWA, alleging that SFWMD violated the CWA by using S-9 to backpump[14] phosphorus-enriched water into WCA-3A without obtaining a NPDES permit.[15] The CWA seeks "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[16] and pronounces the "national goal that the discharge of pollutants into the navigable waters be eliminated."[17]

S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1366 (11th Cir. 2002).

[8] Eutrophication, or the process of nutrient enrichment, occurs when high levels of certain plant nutrients pollute the water. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 462 (1992). In this case, agricultural, urban, and residential activities have led to increased levels of phosphorus in runoff which finds its way into the Everglades ecosystem via drains and canals. Because the Everglades are naturally low in phosphorus, this nutrient loading changes which plants and animals can thrive in the area. *Miccosukee Tribe of Indians*, 124 S. Ct. at 1541.

[9] Through this system of levees, canals, and water impoundment areas, SFWMD manages the Central & Southern Florida Flood Control Project. *See Miccosukee Tribe of Indians of Fla.*, 280 F.3d at 1366.

[10] *See* Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., Nos. 98-6056-CIV & 98-6057-CIV, 1999 WL 33494862, at *1 (S.D. Fla. Sept. 30, 1999).

[11] The C-11 Canal was dug to drain part of the C-11 Basin, which historically—along with the 915 square miles encompassing WCA-3A—was part of the Everglades. *See Miccosukee Tribe of Indians of Fla.*, 280 F.3d at 1366; *see also* Brief for Petitioner, *supra* note 6, at 9. S-9 pumps water from the C-11 Canal through two levees (L-37 and L-33) into WCA-3A. The water being pumped is higher in phosphorus than the water in WCA-3A, and but for S-9, would flow east into tidal waters rather than into WCA-3A. *See Miccosukee Tribe of Indians of Fla.*, 280 F.3d at 1366; Brief for Petitioner, *supra* note 6, at 10; *see also Miccosukee Tribe of Indians of Fla.*, 1999 WL 33494862, at *1.

[12] Brief for Respondent Miccosukee Tribe of Indians of Florida at 7, *S. Fla. Water Mgmt. Dist.* (No. 02-626), *available at* 2003 WL 22766719. [hereinafter Brief for Respondent] ("The C-11 Canal collects polluted stormwater runoff from urban, suburban, residential, commercial and agricultural nonpoint sources in the C-11 Basin.").

[13] *Id.*

[14] The backpumping is significant because it is the but-for cause of the introduction of polluted water into WCA-3A. The canal and levee system have altered the water flow such that C-11 Basin water would not flow west without the pumping action of S-9. *See Miccosukee Tribe of Indians of Fla.*, 280 F.3d at 1366.

[15] *Id.*; *Miccosukee Tribe of Indians of Fla.*, 1999 WL 33494862, at *1; *see also* 33 U.S.C. § 1342(a) (2000).

[16] Brief for Respondent, *supra* note 12, at 2 (citing 33 U.S.C. § 1251(a) (2000)).

[17] *Id.*

Under the CWA, a NPDES permit is required before an entity may legally discharge pollutants from a point source into navigable waters.[18] Since SFWMD is discharging polluted water from a point source (the S-9 pump) into navigable waters, plaintiffs alleged that a NPDES permit is required.

All parties agreed that (1) C-11 Canal and WCA-3A are navigable waters,[19] (2) water pumped into WCA-3A by S-9 contains pollutants,[20] and (3) the S-9 pump station and its pipes are point sources.[21] The primary dispute then centered on "whether the pumping of the already polluted water constitutes an *addition* of pollutants to navigable waters *from* a point source."[22] The district court granted plaintiffs' motion for summary judgment, holding that since S-9 is a point source transferring polluted water from C-11 to WCA-3 against the natural flow of the water, a NPDES permit is required.[23] It further enjoined SFWMD from operating S-9 until a NPDES permit was obtained.[24]

SFWMD appealed, and the Eleventh Circuit vacated the injunction due to practical necessity.[25] However, it affirmed the district court's ruling that a NPDES permit was required under the CWA.[26] Specifically, the Eleventh Circuit concluded that the relevant water body under the CWA is the receiving body, here WCA-3A.[27] It next reasoned that an addition from a point source occurs if the point source is the cause-in-fact of the release of pollutants into navigable waters.[28] Since S-9 changes the natural flow of a polluted body of water and pumps it into another, separate body of water

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[18] *See* 33 U.S.C. §§ 1311, 1342 (2000). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2000). A "point source" is "any discernible, confined and discrete conveyance, including but not limited to any pipe . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2000).

[19] Brief for Petitioner, *supra* note 6, at 10.

[20] In its brief the SFWMD conceded that "the water in the C-11 Canal that is pumped by the S-9 may contain pollutants originating from upstream agricultural, residential, and other land uses." *Id.* at 11.

[21] Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1367 (11th Cir. 2002).

[22] *Id.*(emphasis in original).

[23] Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., Nos. 98-6056-CIV & 98-6057-CIV, 1999 WL 33494862, at *1, *7 (S.D. Fla. Sept. 30, 1999).

[24] *Id.*

[25] "From the record before us, we cannot conclude that the district court's injunction could ever be properly enforced. . . . The flooding of western Broward County and the resulting displacement of the residents there do far outweigh the continued addition of low levels of phosphorus to WCA-3A without an NPDES permit." *Miccosukee Tribe of Indians of Fla.*, 280 F.3d at 1370–71. It should be noted that "[t]he Miccosukee Tribe brought suit against the South Florida Water Management District here simply to enforce a valid permitting scheme." Brief *Amici Curiae* of the National Tribal Environmental Council and the National Congress of American Indians in Support of Respondents at 6, S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537 (2004) (No. 02-626) [hereinafter Brief of NTEC and NCAI], *available at* 2003 WL 23189937.

[26] *See Miccosukee Tribe of Indians of Fla.*, 280 F.3d at 1371.

[27] *Id.* at 1368.

[28] *Id.*

to which it would not otherwise have intermingled, S-9 is the cause-in-fact of a discharge of pollutants.[29] Thus, a NPDES permit is required.[30]

The Eleventh Circuit denied SFWMD's motion for a rehearing and rehearing en banc. SFWMD filed a petition for certiorari on October 21, 2002, and the petition was granted on June 27, 2003.[31] In its brief on writ of certiorari, SFWMD focused on semantics. It argued that in order for there to be an "addition" of pollutants "from" a point source, the point source itself must introduce those pollutants from the outside world.[32] Since S-9 does not add pollutants into the water it pumps, SFWMD contended that there is no "addition of any pollutant" requiring a NPDES permit. SFWMD further emphasized that Congress took care to distinguish between "pollutants"[33] and "pollution."[34] Since S-9 is not the "source" of *pollutants*, diversion of already polluted water does not add a pollutant but rather merely causes *pollution*.[35]

SFWMD also argued that since the Everglades used to be one connected system, whose "waters [still] intermingle," C-11 and S-9 cannot be considered separate water bodies.[36] Since they are one and the same, like soup being ladled back into its pot, no "addition" of a pollutant can conceivably occur.[37] To hold point source operators responsible for pre-existing pollutants would require "[an] expansive . . . interpretation of the NPDES program [that] would have disastrous consequences, putting countless water control structures around the country . . . out of compliance with the CWA."[38]

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[29] *Id.*

[30] *Id.*

[31] Brief for Petitioner, *supra* note 6, at 1.

[32] *Id.* at 26–27. "Read together, the terms 'addition,' 'from' and 'point *source*' most naturally mean that a 'discharge' occurs when the pollutant originates from the point source, not when pollutants originating elsewhere are merely passed through." *Id.* (emphasis in original).

[33] CWA defines the term "pollutant" to include "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste." 33 U.S.C. § 1362(6) (2000).

[34] CWA defines the term "pollution" to mean "man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." 33 U.S.C. § 1362(19) (2000).

[35] Brief for Petitioner, *supra* note 6, at 27.

[36] *Id.* at 6.

[37] *Id.* at 22–23, 46–49 (citing Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481, 492 (2d Cir. 2001)).

[38] Brief for Petitioner, *supra* note 6, at 23.

> Since NPDES prohibits the addition of "*any*" pollutant, not only those that exceed water quality standards, the transfer of *any* water becomes a discharge under the Eleventh Circuit's interpretation. A "movement" becomes an "addition" and "navigable waters" become "pollutants." The "navigable waters" are treated on par with industrial and municipal waste. Every federal, state, regional, and local agency charged with managing a State's waters is subject to NPDES every time it determines the public interest is served by moving them, necessitating hundreds of thousands of additional NPDES permits across the country.

Finally, SFWMD referred to Congress's "serious" consideration of federalism concerns under the CWA.[39] It argued that "[t]he plain import of Congress's carefully chosen words limiting the scope of the NPDES program"[40] is an indication of its assigning regulation of water pumping activities to the state.[41] SFWMD pointed to Section 304(f) of the CWA[42] for the proposition that changes in the movement or flow of navigable waters resulting from levees or channels are *nonpoint* sources of pollution not requiring NPDES permits.[43]

In its reply brief, the Miccosukee Tribe argued that the definitions of terms and phrases in the CWA support the Eleventh Circuit's ruling that SFWMD is in violation of the Act.[44] While the terms "addition" and "from" are not defined under the CWA,[45] the Tribe argued that "[b]ackpumping pollutants into the Everglades Protection Area which would not otherwise appear there, is an 'addition' under any common, or technical, meaning of the word."[46] The Tribe also argued that the word "from" indicates a means of conveyance, not a means of creation, and the term "point source" refers not "to the place where the pollutant was created; [but rather] the proximate source from which the pollutant is introduced to the destination water body."[47] Thus, in the spirit of an Act whose goal is the elimination of pollutant discharge into navigable waters, SFWMD must obtain a NPDES permit before backpumping polluted water into the Everglades Protection Area.[48]

Id. at 38–39.

[39] The Act outlines two types of water quality controls: effluent limitations promulgated by the Environmental Protection Agency ("EPA"), and water quality controls promulgated by the states. NPDES permits are the primary means of enforcing the water quality controls. *See* Brief for Respondent, *supra* note 12, at 2 (citing Arkansas v. Oklahoma, 503 U.S. 91, 101 (1992)); *see also* Brief for Petitioner, *supra* note 6, at 3.

[40] Brief for Petitioner, *supra* note 6, at 20.

[41] *Id.* at 2.

[42] Section 304(f) provides:

> The [EPA] Administrator, after consultation with appropriate Federal and State agencies . . . , shall issue . . . (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—. . . (F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels . . . .

33 U.S.C. § 1314(f) (2000).

[43] Brief for Petitioner, *supra* note 6, at 3, 30. At the same time, SFWMD conceded that S-9 is a *point* source. Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., 280 F.3d 1364, 1367 (11th Cir. 2002).

[44] *See generally* Brief for Respondent, *supra* note 12.

[45] *Id.* at 17–18.

[46] *Id.* at 12.

[47] *Id.* at 18, 20.

[48] The biologically unique Everglades Protection Area includes Everglades National Park, WCA-3A, a World Heritage Site, and a 1.5 million-acre International Biosphere Preserve. *Id.* at 6, 16.

The Tribe also argued that the federal government's "singular waters" theory—that all U.S. navigable waters should be viewed as an undifferentiated whole for management purposes—is completely contrary to Congressional intent:

> It is beyond dispute that within the vast and varied jurisdictional waters of the United States, the constituents and the quality of the waters can have extreme differences; and the pollutants contained in one navigable water body should not be used as a license to convey those pollutants to another.[49]

The Supreme Court broke its discussion of the *Miccosukee* case down into three separate arguments, corresponding to arguments made by SFWMD and the federal government as *amicus*.[50] The Court first addressed the precise question on which it granted certiorari: namely, whether a point source must itself introduce pollutants from the outside world in order to fall under the NPDES permitting scheme.[51] The Court flatly rejected the argument advanced by SFWMD that a NPDES permit is required only when the point source is itself the origin of the pollutants.[52] As noted by the Court, a "point source" is defined as a conveyance:[53] "That definition makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to navigable waters."[54]

Next, the Court discussed the "unitary waters" argument advanced primarily by the federal government.[55] Under the government's theory, *all* waters of the United States would be viewed unitarily for purposes of NPDES permitting. Thus, discharges of water from any U.S. water body into any other U.S. water body would not require a NPDES permit no matter the quality disparity between the water bodies.[56] The Court noted that such an interpretation is not a foregone conclusion and may indeed conflict with certain current NPDES regulations.[57] Since neither SFWMD nor the government raised the issue before the Court of Appeals in its brief respect-

[49] Brief for Respondent, *supra* note 12, at 30–32.

[50] S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 124 S. Ct. 1537, 1542 (2004).

[51] In his dissent, Justice Scalia said he would affirm the Eleventh Circuit's opinion. He agreed with the majority that "a point source is not exempt from the NPDES permit requirement merely because it does not itself add pollutants to the water it pumps." He dissented from the Court's decision to remand and its invitation to consider the "unitary waters" theory since neither of those actions were taken in response to the question presented. *Id.* at 1542–43, 1547.

[52] *Id.* at 1543.

[53] *Id.*

[54] *S. Fla. Water Mgmt. Dist.*, 124 S. Ct. at 1543; *see also* 33 U.S.C. § 1362(14) (2000).

[55] *See S. Fla. Water Mgmt. Dist.*, 124 S. Ct. at 1543.

[56] *Id.*

[57] *Id.* at 1544.

ing the petition for certiorari, the Court ultimately declined to resolve the issue.[58] However, it invited the parties to take up the issue on remand.[59]

The Court vacated the Eleventh Circuit's judgment and remanded with respect to a third argument: whether the C-11 canal and WCA-3A are hydrologically connected.[60] SFWMD contended throughout the proceedings that C-11 and WCA-3A are part of a single, hydrologically connected water body.[61] The district court and Eleventh Circuit, however, both rested their decisions on a determination that C-11 and WCA-3A are two discrete water bodies.[62] The Supreme Court again declined to decide whether the district and circuit courts' test for assessing connectivity is adequate, but held that summary judgment was inappropriate because the factual issue of whether the water bodies are hydrologically connected remained unresolved.[63]

ANALYSIS

As is evident from the Court's decision, *Miccosukee* is on its face a case of statutory interpretation. The implications of this decision, however, should not be viewed so narrowly. The pollution regulation procedure required under *Miccosukee* should not be disentangled from the ultimate impacts of that pollution regulation scheme on the Miccosukee and other tribes who may be confronted with similar externalities in the future. Of course, environmental justice considerations will not change the statutory meaning of the CWA. However, by neglecting even to mention the environmental justice repercussions in its *Miccosukee* opinion, the Supreme Court missed an exceptional opportunity to demonstrate a commitment to environmental justice and cultural pluralism.

The *Miccosukee* case is a stark example of a situation where a state government is doing exactly what environmental justice deplores: it is dumping polluted water into an area for the benefit of the majority at the expense of a minority. Indian tribes, like many low-income and minority communities, often disproportionately suffer the adverse impacts of environmental pollution, including "impacts on the natural or physical environment and interrelated social, cultural and economic effects."[64] These impacts are particularly acute in tribal contexts because protection of tribal

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[58] SFWMD took this position in its reply brief on the merits. *Id.* at 1545.

[59] *Id.*

[60] *S. Fla. Water Mgmt. Dist.*, 124 S. Ct. at 1547.

[61] *Id.* at 1545.

[62] *Id.* at 1540.

[63] *Id.* at 1546–47.

[64] COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 8 (1997), *at* http://ceq.eh.doe.gov/nepa/regs/ej/justice.pdf. The Council on Environmental Quality (CEQ) regulations further define effects and impacts as including "ecological . . . , aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8 (2003).

resources is often critical to a tribe's cultural survival.[65] However, when confronting non-Indian entities who are contributing to environmental problems on tribal lands, tribes "come to the table with 'palpable and endemic disadvantage' stemming from a long history of discrimination, exclusion, and deliberate attempts to destroy their cultural and political communities."[66] Numerous efforts[67] have been made by government agencies to alleviate this disparity through attention to environmental justice ("EJ").[68] The Supreme Court easily could have demonstrated its commitment to environmental justice by simply mentioning or discussing the impacts of phosphorus pollution on tribal interests. Instead, it ignored the issue completely.

EJ is of particular importance to Indians because land is central to tribal identity, cultural practices, and religious beliefs.[69] Since tribes rely heavily on ecosystem integrity for cultural survival, "equal protection from ecological burdens"[70] is crucial to Indians' survival as distinct and sover-

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[65] Brief of NTEC and NCAI, *supra* note 25, at 13.

[66] Sarah Krakoff, *Tribal Sovereignty and Environmental Justice*, *in* JUSTICE AND NATURAL RESOURCES 161, 162 (Kathryn M. Mutz et al. eds., 2002).

[67] For example, EPA made environmental justice one of its highest priorities over a decade ago, and EPA Administrator Christine Todd Whitman reaffirmed this commitment in 2001. *See* United States Environmental Protection Agency, Office of Environmental Justice, *Environmental Justice: 1996 Annual Report, Working Toward Solutions*, at Appendix III; Memorandum from Christine Todd Whitman, EPA Administrator, to Assistant Administrators, General Counsel, Inspector General, Chief Financial Officer, Associate Administrators, Regional Administrators, and Office Directors (Aug. 9, 2001), *at* http://www.epa.gov/compliance/resources/policies/ej/admin_ej_commit_letter_081401.pdf. Also, in 1994, President Clinton issued an Executive Order requiring each federal agency to "make achieving environmental justice part of its mission," and specifically applied this mandate to Native Americans. Exec. Order No. 12,898, 3 C.F.R. 859 (1994), *reprinted in* 42 U.S.C. § 4321 (2000).

[68] While no universally accepted definition of environmental justice exists, EPA defines it as

> [t]he fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS 7–8 (1998), *at* http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf.

[69] Dean B. Suagee, *NEPA in Indian Country*, in JUSTICE AND NATURAL RESOURCES, *supra* note 68, at 225; Small, *supra* note 1, at 12 ("Indian tribes connect to their land not only on economic and emotional levels, but also on the level of culture, religion, and sovereignty. Environmental degradation may, for example, affect land that is sacred to tribes, or pose a threat to the entire territory in which the tribe operates."); Brief of NTEC and NCAI, *supra* note 25, at 13 (citing Judith Royster, *Native American Law, in* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 157–58 (Michael B. Gerrard ed., 1999)).

[70] William J. Dunaway, *Eco-Justice and the Military in Indian Country: The Synergy Between Environmental Justice and the Federal Trust Doctrine*, 49 NAVAL L. REV. 160, 163

eign peoples.[71] Tribal land is not fungible, and the loss of the Everglades will affect the identity and destiny of the Miccosukee Tribe.[72] The Miccosukee Tribe has a perpetual lease to a large part of WCA-3A, and relies upon the integrity of the Everglades ecosystem to support its religion, culture, and economic survival.[73] Specifically, the Tribe engages in numerous activities central to its continued existence as a sovereign nation within the Everglades ecosystem: religious planting and harvesting activities on tree islands; hunting, fishing, and gathering; and providing recreational opportunities and guided tours for visitors to the region.[74]

Despite the uncontested importance of environmental integrity to tribal identity, all too often tribal lands are seen as sacrifice zones for pollution.[75] The resulting ecological crises—like the one in the Everglades—persist because of a "view that a large portion of the human species is dispensable."[76] A brief recognition and discussion of the relevant EJ issues by the Supreme Court in its *Miccosukee* decision could have gone a long way in remedying environmental injustices suffered by Indian tribes. Lower courts often accord commanding and even rule-like power to Supreme Court dicta.[77] EJ considerations should in no way have directly impacted the Court's interpretation of the CWA. Yet, the Court could have done much to further the goal of EJ by simply mentioning the repercussions of the permitting scheme, thus demonstrating its support for the Tribe's efforts to control and regulate the environmental quality of its homeland.[78]

Even though it does not contest the importance of the Everglades to the Tribe, SFWMD continues to discharge pollutants into the ecosystem:

> Petitioner is collecting, conveying, and disposing of mixed waters to the benefit of the C-11 Basin, not for the benefit of the Everglades, and in doing so it is intentionally discarding the pollut-

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(2002) (citing United Church of Christ Commission for Racial Justice, *Proceedings of the First National People of Color Environmental Leadership Summit* at xiii (1991)).

[71] Krakoff, *supra* note 66, at 162.

[72] Brief of NTEC and NCAI, *supra* note 25, at 13 (citing Royster, *supra* note 69, at 157–58). As noted by the lower court, the cultural and economic survival of the Tribe depends on the continued ecological integrity of the Everglades. *See* Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist., Nos. 98-06056-CV-WDF & 98-06057-CV-WDR, 1999 WL 33494862, at *1 (S.D. Fla. Sept. 30, 1999).

[73] *See Miccosukee Tribe of Indians of Fla.*, 1999 WL 33494862, at *1.

[74] *Id.*

[75] Gary C. Bryner, *Assessing Claims of Environmental Justice: Conceptual Frameworks, in* JUSTICE AND NATURAL RESOURCES, *supra* note 66, at 31, 35.

[76] *Id.* at 52.

[77] As noted by one commentator, "[a] quotable string of words . . . has its own legs." Michael B. W. Sinclair, *II. Legal Education: What is the "R" in "IRAC"?*, 46 N.Y.L. SCH. L. REV. 457, 490–91 (2002-2003).

[78] Krakoff, *supra* note 66, at 163.

> ants into lands where the Tribe lives and works, impairing Tribal uses in order to protect the developments in the west.[79]

As a result, the Tribe bears a disproportionate burden of the adverse impacts of these pollutants. And SFWMD is permitted to discharge such pollutants without undergoing any federal permitting procedure. As the situation currently stands, the Miccosukee Tribe is powerless to do anything to halt the degradation of its homeland.[80] State regulation alone is clearly unsatisfactory in protecting tribal interests, and the state acting alone is unlikely to make any change to its *modus operandi* that would raise its costs.[81] To re-equilibrate the balance of governmental powers, protect tribal interests, and achieve environmental justice, it is imperative that the Tribe be able to rely on the NPDES permitting scheme.[82]

As noted by the National Tribal Environmental Council and National Congress of American Indians[83] in their brief of *amici curiae*, NPDES is the preferred method for balancing competing sovereign interests.[84] As a sovereign entity, the Miccosukee Tribe deserves to have its interests considered when decisions are being made by another sovereign entity (the State of Florida) that will affect its rights and cultural survival.[85] The NPDES permitting scheme, which provides some semblance of federal oversight to the permitting process, is better suited to promoting EJ than the status quo. The federal government, under a fiduciary duty to the Tribe, is in a better position than the state to care for the legally protected homeland of the Miccosukee Tribe.[86] The NPDES permitting process will require the state to account for the adverse impact S-9 is having upon the Miccosukee Tribe.

Further, implementation of the NPDES permitting scheme would level the playing field given the Tribe's "treatment as states" ("TAS") status

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[79] Brief for Respondent, *supra* note 12, at 35 n.16.

[80] Brief of NTEC and NCAI, *supra* note 25, at 7.

[81] *Id.*

[82] *Id.* at 2.

[83] The Miccosukee Tribe is one of 108 member tribes of the National Environmental Tribal Council, a membership organization whose mission is to "enhance each tribe's ability to protect, preserve, and promote the wise management of air, land and water for the benefit of current and future generations." *See* National Tribal Environmental Council, http://www.ntec.org/background.html (last visited Apr. 26, 2004). The National Congress of American Indians, the country's oldest and largest tribal governmental organization (with 250 member tribes), is a forum for consensus-based policy development among tribal governments. It seeks to "inform the public and the federal government on tribal self-government, treaty rights, and a broad range of federal policy issues affecting tribal governments." *See* National Congress of American Indians, *at* http://www.ncai.org (last visited Apr. 26, 2004).

[84] Brief of NTEC and NCAI, *supra* note 25, at 6. Indian tribes are sovereign nations; specifically, they are domestic dependent nations. Cherokee Nation v. Georgia, 30 U.S. (5 Pet. 1), 26 (1831). That is, they are separate political entities, but "certain aspects of their sovereignty have been divested by implication." Suagee, *supra* note 69, at 227.

[85] Brief of NTEC and NCAI, *supra* note 25, at 6.

[86] *Id.* at 7.

under the Clean Water Act.[87] Pursuant to its TAS authority, the Miccosukee Tribe set water quality standards for specified tribal waters;[88] these standards must be adhered to by members and nonmembers alike.[89] The Tribe would, in addition, have the authority to issue NPDES permits under section 402 *but only if* the Court were to determine that NPDES permits were appropriate in these circumstances.[90] If the Tribe's water quality standards proved more stringent than state standards, the Environmental Protection Agency ("EPA") would then have the authority to revise the state's NPDES permits[91] to comply with the tribal standards.[92] Implementation of the NPDES permitting scheme is thus an environmentally just way of solving the Miccosukee Tribe's problem: it strengthens the power of the tribal government and enhances its control over the tribal environment.[93] What's more, it "provides tribes with the means and incentives to address this problem themselves, without being dependent upon the . . . wavering, and often unwilling, commitments of states."[94] By merely recognizing and mentioning the importance of the NPDES permitting scheme to intergovernmental relations involving the Miccosukee Tribe, the Court could have furthered this country's pursuit of EJ.

It is disingenuous to discount the EJ ramifications of the *Miccosukee* case. In bringing this situation to the fore, the Miccosukee Tribe did not demand the removal or destruction of the canal infrastructure at all costs; rather, it sought only the meaningful consideration of its concerns under

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[87] The Miccosukee Tribe is recognized as a "State" for CWA purposes. *Id.* at 11. *See generally* 33 U.S.C. § 1377(e) (2000).

[88] *See* Miccosukee Environmental Protection Code Subtitle B: Water Quality Standards for Surface Waters of the Miccosukee Tribe of Indians of Florida, *at* http://www.epa.gov/ost/standards/wqslibrary/tribes/fl_4_miccosukee.pdf; State and Tribal Water Quality Standards: Notice of EPA Approvals and Announcement of EPA Internet Repository, 66 Fed. Reg. 29951 (June 4, 2001) (listing Miccosukee Water Quality Standards as approved by EPA).

[89] Krakoff, *supra* note 66, at 164–65. *See also* Montana v. EPA, 137 F.3d 1135 (9th Cir. 1998) (upholding Salish and Kootenai tribes' TAS designation and tribal regulation of water resources even as to non-Indian owners of federal land within reservation).

[90] Brief of NTEC and NCAI, *supra* note 25, at 2–3.

[91] In general, if a NPDES permit is issued by the federal government, compliance with a downstream user's more stringent water quality standards is mandatory. If the NPDES permit is issued by a state (i.e., if the state has primary authority to administer the NPDES permit program), the state must consider more stringent water quality standards set by a downstream state or tribe. If, after such consideration, a state rejects that user's more stringent water quality standards, the downstream user can ask EPA to veto the state's NPDES permit. *See* Judith V. Royster, *Environmental Federalism and the Third Sovereign: Limits on State Authority to Regulate Water Quality in Indian Country*, WATER RESOURCES UPDATE, Autumn 1996, at 17–18, 20, *at* http://www.ucowr.siu/edu/updates/pdf/V105_A4.pdf.

[92] 33 U.S.C. § 1377(e) (2000) (giving EPA authority to issue NPDES permits in compliance with tribal water quality standards); *see also* 33 U.S.C. §§ 1341–1342 (2000). *See generally* Albequerque v. Browner, 97 F.3d 415 (10th Cir. 1996) (upholding EPA's approval of Isleta Pueblo tribe's stringent water quality standards and their application of off-reservation entities).

[93] Krakoff, *supra* note 66, at 177.

[94] *Id.*

existing environmental law.[95] Recognition of the applicability of the NPDES permitting scheme in these circumstances is, in effect, a recognition of and respect for the Miccosukee Tribe's culture. It is a recognition that it is unacceptable for a state to degrade the Tribe's homeland without any accountability.[96] It is an acknowledgement that federal, state, and tribal governments must work together in concert to cultivate cultural respect and to achieve true EJ.

It is a shame that despite the Tribe's apparent victory, *South Florida Water Management District v. Miccosukee Tribe of Indians* still represents a lost opportunity from an EJ perspective. The dearth of discussion about *Miccosukee*'s prominent EJ implications in the Supreme Court's opinion illustrates an ongoing problem: despite a professed commitment to achieving EJ, the government in practice continues to ignore this issue.

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[95] Brief of NTEC and NCAI, *supra* note 25, at 6.
[96] *Id.* at 13–14.