UNITED STATES District COURT
SOUTHERN District OF FLORIDA
MIAMI DIVISION

Case No. 02-80309-CIV-CMA

FRIENDS OF THE EVERGLADES, FLORIDA WILDLIFE FEDERATION, INC, and FISHERMEN AGAINST DESTRUCTION OF THE ENVIRONMENT, INC.,
Plaintiffs,

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, a Florida municipality,

Intervenor-Plaintiff,

vs.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Defendants.

U.S. SUGAR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, and UNITED STATES ARMY CORPS OF ENGINEERS,

Intervenor-Defendants.

MIAMI, FLORIDA

APRIL 6, 2006

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE CECILIA M. ALTONAGA,
UNITED STATES District JUDGE

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. . . . CLOSING STATEMENT BY MR. GUEST:

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Another reason we ended up coming to trial here was the appearance of the western amici who said that applying an NPDES permit requirement would have catastrophic consequences in the west, using one as their example, the Colorado Big Thompson Project, and what the District says is when they convey water from one place to another, that they are always allocating for beneficial use. They are allocating when they backpump into Lake Okeechobee when there is too much water in the canals, and they even say when they are backpumping for flood control there and they're releasing for flood control into the St. Lucie Estuary and the Atlantic Ocean, well, that's an allocation for flood control.

Well, "allocation" means you are giving the right to

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consume water to a specific person for a specific purpose from a specific source for a specific time, and I can tell you, from the evidence, that the folks in the St. Lucie Estuary do not conceive of themselves as having a water allocation for their use. They would much rather the District keep that dirty lake water to themselves. It is not an allocation to the Atlantic and Gulf. It's simple disposal in the same way that it's simple disposal for the District to backpump water into the lake through pumps S-2, 3 and 4.

How you could examine the allocation problem is to look at Florida Statutes, § 373 part 2 governs this matter, which is consumptive use permitting. It's governed by 373.223, and that has the elements that I just described, the four parts, a person, a source, a purpose and a time limit. That's Florida Statutes. That indicates in spades that the District can't possibly be allocating when they pump all the time.

Now, the District says that everything is water supply. In fact, we have very clear evidence of water supply. There is, or at least has been, water supply backpumping as recently as 2001.

When did they do it? Under the terms of the 1983 permit with the DEP. Then it was the DER. Under the terms of that permit, they are allowed to backpump outside the constraints of the Interim Action Plan and outside the constraints of the permit if there are emergencies. They have

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to justify the emergency seven days a head, and that's

Plaintiffs' Exhibit 114, the 1983 permit, page 8, that has that provision in it. The Interim Action Plan is Plaintiffs' Exhibit 113.

Herb Zebuth explained this, how that permit worked and why it was put there, and his explanation was that the District could deviate from the terms of the IAP, the Interim Action Plan, which requires the water to go south if at all possible. That's the IAP principle, south if at all possible. They are allowed to deviate from that only if they justify the need to do water supply backpumping into the lake by formally declaring an emergency. That testimony is at transcript volume 4, pages 104 to 105, 110 and 112, transcript 5, pages 179 and 180.

So, water supply and backpumping is clearly, explicitly differentiated by the District and if further proof were needed, you still have more in that when the District sought authority to do water supply backpumping and obtained it from the state DEP in 2001, they were required to do an after-action report, admitted in evidence as Exhibit Number 29, Plaintiff's 29, and in the after-action report the District even said "Well, we don't have to report on all the adverse effects of all of the backpumping we did the summer of 2001 because some of that was flood control and not all of it was water supply."

The District in its own document and its own

permitting structure differentiates black and white between water supply and flood control backpumping and cannot come to this Court and say everything is water supply.

To the extent that there is a § 101(g) defense at all, that defense applies only to that narrow, that narrow water supply backpumping. The testimony by Tom Mac Vicar, and I believe Tommy Strowd, too, was that this is a rare event that happens about once every 10 years. So, only in this narrow, on those narrow events, does 101(g) apply at all.

What we have is really three pieces that offer the Court insight into how to weigh the 101(g) argument. The first is the language in the PUD 1 case by Justice O'Connor and dealing with a dispute between a private party and -- private parties -- over application of the Clean Water Act for minimum flows. What the Court did was explain the 101(g) amendment which was referred to as the Wallop amendment, and actually quoted in the text of the opinion, the purpose of the intent of 101(g) which was the Wallop amendment.

I submit when the Supreme Court quotes and explains the amendment, that becomes what the Court thinks it means, and

this is what they said: They said -- there were three elements quoted in there.

One is that incidental effects on allocations were not barred under 101(g).

Two, that the incidental effects that the Clean Water

Act impacts, the regulatory impacts, have to be prompted by legitimate and necessary water quality concerns and, three, is they can't be used to subvert water allocations.

Well, I submit, Your Honor, on this record, one could hardly get a clearer example of a time when the Clean Water Act issues are prompted by legitimate water quality concerns.

The water that they are pouring into the lake when they do water supply backpumping is creating toxic by-products and a public health threat to the consumers of water around the lake. What could be more legitimate than that? It's squarely within the purpose of the Clean Water Act, and you can see plainly from what we're doing, we are not trying to ace the District or ace some user out of their water allocation. We're not trying to subvert any water allocation of any sort.

So, that's what -- and I think that same language sort of has a repetition and resonance when you look at the S-9 decision. There is sort of a repetition of that in Justice O'Connor's S-9 decision, saying maybe this is necessary to protect water quality.