Calendar No. 685

105TH CONGRESS, *2d Session* | SENATE | REPORT 105–361

TO DEEM THE ACTIVITIES OF THE MICCOSUKEE TRIBE ON THE TAMIAMI INDIAN RESERVATION TO BE CONSISTENT WITH THE PURPOSES OF THE EVERGLADES NATIONAL PARK, AND FOR OTHER PURPOSES

OCTOBER 2, 1998.—Ordered to be printed

Mr. CAMPBELL, from the Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 1419]

The Committee on Indian Affairs, to which was referred the bill (S. 1419) to deem the activities of the Miccosukee Tribe on the Tamiami Indian Reservation to be consistent with the purposes of the Everglades National Park, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 1419 is to enlarge the area within Everglades National Park (ENP or Park) which is treated as a reservation of the Miccosukee Indian tribe. As amended by the Committee, the bill will provide a detailed legislative framework for permanent tribal residence within the boundaries of Everglades National Park. The bill replaces the current framework, which provides the National Park Service with little guidance on how and when to review tribal decisions that might have an impact upon the Park.

BACKGROUND

Pursuant to a state law signed by Florida Governor Sidney J. Catts on May 9, 1917, the trustees of the Internal Improvement Board of the State of Florida transferred 99,200 acres in Monroe County to the "Board of Commissioners of State Institutions," Florida's cabinet, "for the perpetual use and benefit of the Florida Indi-

ans."[1] As one historian explains, "Little opposition had developed to the bill, for in a hearing before the Internal Improvements Board it was pointed out that, outside of hunting and fishing activities, the land had little value for the whites and that nobody had plans for its use except as a Seminole reservation."[2] This changed when plans began to be laid for the use of the lands as a national park.

In 1929, Congress directed the Secretary of Interior "to investigate and report to Congress as to the desirability and practicality of establishing a national park, to be known as the Tropic Everglades National Park, in the everglades of Dade, Monroe, and Collier Counties of the State of Florida, for the benefit and enjoyment of the people of the United States * * *."[3]

One December 3, 1930, Interior Secretary Ray Lyman Wilbur submitted the required report to Congress expressing his opinion that the establishment of a national park in the everglades is an idea of "outstanding merit." His report explained:

> [t]he area is of national and not merely local interest. The tropical-plant and animal life, the excellence of the fishing, and the bird life, which is remarkable both for the number of species and for the abundance of birds, evidences of prehistoric human occupation *and the present Seminole Indian [presence], are sufficient to give the area a national interest."*[4]

His report goes on to state:

> [t]here seems to be some question as to whether or not there is a specific reservation for the Seminole Indians within the [proposed park boundaries] and this will have to be further investigated locally.[5]

The Everglades National Park was established through the Act of May 30, 1934, 48 Stat. 816. The Act provides: "[when title to all the lands within the boundaries to be determined by the Secretary of Interior * * * in his report to Congress of December 3, 1930, * * * shall have been vested in the United States, said lands shall be, and are, established, dedicated, and set apart as a public park for the benefit and enjoyment of the people and shall be known as Everglades National Park[.]"

Section 3 of the Act provides that the development of the Park "shall be exercised under the direction of the Secretary of Interior by the National Park Service" with the following proviso: "[that nothing in sections 1 through 4 of this title shall be construed to lessen any existing rights of the Seminole Indians which are not in conflict with the purposes for which the [Park] is created."[6]

On the day the bill creating the Park was passed by the House of Representatives, this provision was discussed on the House floor with the Chairman of the Committee on Public Lands:

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[1] James W. Covington, "The Seminoles of Florida," p. 185 (1993).
[2] Id.
[3] Act of March 1, 1929, c. 446 (45 Stat. 1443).
[4] S. Rep. 73–50, 1st Sess., p. 12, (Letter of Ray Lyman Wilbur, Secretary of Interior, to President of the Senate, December 3, 1930) (emphasis supplied).
[5] Id. at 15.
[6] 16 U.S.C. § 410b.

> Mr. KVALE. I rise * * * to ask the chairman of the committee if he can give us any information regarding whether or not the Indian wards of the Government have been taken care of?
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> Mr. DEROUEN. Yes. It is proposed by the Park Service to place the Seminole Indians in the park to be used as guides and to be employed in other ways * * * it is proposed to leave them there and use them as guides throughout the park.
>
> Mr. KVALE. In other words, they will be permitted to remain relatively undisturbed in their own country and in their own homes?
>
> Mr. DEROUEN. Yes. Of course their actual reservation is outside the park; but we propose to bring them into the area, and it is the purpose of the Park Service to do so.[7]

Upon transferring state reservation lands known as the Monroe Indian Reservation to the federal government for inclusion within the Park, the State of Florida sought to mitigate the impact of the loss of those lands by designating 104,000 acres north of the Park in Broward and Palm Counties as a state Indian reservation. Everglades National Park was dedicated in 1947.

The Indians residing within or near the everglades when the lands were transferred to the Park refused to move to the new state reservation as they had eschewed previous attempts to encourage their relocation to federal or other state reservations established for Seminole Indians within Florida. Instead, they remained within the Park or along the Tamiami Trail. In this manner, the Miccosukee tribe continued to exist as politically and culturally distinct from the larger Seminole Indian tribe.[8] (In 1957 the Seminole tribe adopted a constitution pursuant to the Indian Reorganization Act (IRA), the Act of June 8, 1934, c. 576, 48 Stat. 985).

With the assistance and encouragement of the Bureau of Indian Affairs, the tribe drafted an IRA constitution. On January 11, 1962, the Miccosukee Tribe's Constitution and Bylaws were certified by the Secretary of the Interior. Later that year, a permit was issued by the Department of Interior, which authorized the tribe's use of an area along the road frontage at the northern end of the Park. The permit area was 500 feet wide and five miles long containing 333 acres. The August 29, 1962, letter of transmittal states:

> this act[ion] is taken consonant with the Act of May 30, 1934, which provided for the establishment of Everglades National Park. The reference is especially to the section of that [A]ct which said that nothing should be done that would interfere with the existing rights of the Seminole [Miccosukee] Indians. The implication was that Congress wanted to give every consideration to the [Tribe]. This permit follows the intent of Congress.

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[7] Cong. Rec. May 24, 1934, p. 9509.

[8] For example, the Miccosukee Seminole Nation initially opposed the filing of a claim by the Seminole Tribe before the Indian Claims Commission. The Commission refused to dismiss the case and the Miccosukee tribe subsequently intervened several years after it was recognized in 1962.

In addition, providing a tribal land-base was an essential attribute of the federal policy of economic and political self-determination.[9] Administrative, housing, and educational facilities, along with a clinic, were constructed on the tribal land base. Indeed, even before the Indian Self-Determination and Education Assistance Act, P.L. 93–638, made such arrangements routine, the tribe contracted with the BIA to provide federal services to its members.

As amended, the permit's terms include the following provision: "Construction-No building or other structure shall be erected under this permit except upon prior approval of plans and specifications by the Director, National Park Service, and the premises and all appurtenances thereto shall be kept in a safe, sanitary, and sightly condition." The fifty year permit is scheduled to expire in 2014.

THE NEED FOR LEGISLATION

The tribe and the National Park Service have been able to reach accommodations and agreements on a number of issues; often with the participation of other Interior agencies such as the Bureau of Indian Affairs (BIA). Nevertheless, significant questions have been raised over whether continued reliance on the statute establishing the Park provides an adequate framework for addressing the issues raised by the tribe's presence within the Park.

Under present law, conflicts between the tribe and the Park Service may occur on a wide range of issues. For example, the Tribe testified that its applications to construct housing and other important community infrastructure needs have languished without Park Service action. Frustrated by this lack of progress, the tribe proceeded to apply for the necessary dredge and fill permit under § 404 of the Clean Water Act. The Park Service opposed this action, claiming that the tribe's ownership interest in the permit land was insufficient to allow them to obtain such a permit.[10]

The Interior Department points out that the delay in responding to tribal applications was due in part to the Park Service's need to respond to a contemporaneous natural resource crisis; Hurricane Andrew. The Park Service also points out the lack of analogous situations within other National Parks merely creates the appearance that their responses to the tribe are ad hoc. The Department has also expressed concern with the tremendous amount of resources, both federal and local, that are directed at improving the everglades ecosystem restoration. It argues that federal statutes make these restoration efforts its first priority.

Nonetheless, the assertion that the tribe's interest in the permit lands is legally insufficient to apply for a § 404 (dredge and fill) permit adds to the tribe's uncertainty about whether its residency in the Park might expire with the present permit in 2014. As the United States Court of Appeals explained, there are four critical

[9] In 1960, the federal government began to reconsider the policy of terminating the federal relationship with Indian tribes. In place of that policy, it began to develop the policy of tribal self-determination, which has been affirmed and expanded by each subsequent administration. See, e.g., Message of President Nixon to Congress Transmitting Recommendations for Indian Policy, H.R. Doc. No. 363, 91st Cong. 2nd Sess.

[10] The Everglades National Park: Hearings before the House Subcommittee on National Parks and Public Lands of the Committee on Resources, 105th Congress 1st sess., 105–65, p. 7 (Sept. 25, 1997).

elements necessary for tribal sovereignty: water rights, mineral rights, government jurisdiction, and land. *City of Albuquerque* v. *Browner*, 97 F.3d 415 (10th Cir. 1996). The present situation results in significant uncertainty with respect to the latter two elements. This is inconsistent with the federal policy of self-determination. It is also contrary to the principle that the tribe's rights would be accommodated within the Park.

Representative James Hansen, the Chairman of the House Subcommittee on National Parks and Public Lands of the Committee on Resources described the situation this way: "[u]nfortunately, the growth needs of the tribe and the mission of the Park Service have seemed to clash in recent years." He explained that he was "concerned that the Department [of Interior] is managing the Miccosukee Tribe through the Park Service. This is not an appropriate role for the Park Service. * * * Yet, the Park Service does have the mandate to protect the resources of the park." [11]

LEGISLATIVE HISTORY

S. 1419 was introduced on November 7, 1997 by Senator Connie Mack of Florida and referred to the Senate Committee on Indian Affairs (Committee).

A nearly identical measure, H.R. 3055, was introduced by Representative Alcee Hastings in the House of Representatives on November 13, 1997 and referred to the House Resources Committee and the House Transportation and Infrastructure Committee, where it was referred to the Subcommittee on Water Resources and the Environment.

On June 11, 1998, the House Resources Subcommittee on National Park and Public Lands held a subcommittee meeting. Subcommittee Chairman James V. Hansen of Utah offered an amendment in the nature of a substitute to H.R. 3055, which was adopted along with technical amendments and reported to the full Resources Committee with an amendment in the nature of a substitute. On July 22, 1998, H.R. 3055 was amended and reported to the House Resources Committee. On September 11, 1998, the Committee on Natural Resources reported the bill to the House of Representatives with amendments.

On July 8, 1998, the Senate Indian Affairs Committee held a legislative hearing to consider S. 1419. At the hearing, Edward B. Cohen, Deputy Solicitor for the Department of Interior testified on behalf of the Administration. Mr. Cohen testified in opposition to S. 1419. He indicated that the Department was negotiating with the tribe to produce a bill that addressed a number of issues that were not necessarily covered by S. 1419, as introduced. Mr. Cohen expressed hope that the Department would soon be able to support a compromise bill:

> I am pleased to report that the Tribe and the Department have been engaged in serious, detailed and constructive discussions to develop a legislative proposal which meets the Tribe's current and future needs while protecting the interests of Everglades National Park and the restoration of the South Florida ecosystem.

[11] Id. at 1.

The results of these discussions are incorporated in the amendment in the nature of a substitute offered by Senator Mack. On July 29, 1998, the Committee favorably reported this amendment in the nature of a substitute.

SUMMARY OF PROVISIONS

Findings and purposes

The Congressional Findings point out that the tribal population is growing "as have the needs and desires of the Tribe and its members for modern housing" and other facilities. The tribe has been an integral part of efforts to restore the everglades ecosystem. It has recognized that the expanded Permit areas is located in an area "critical to the protection and restoration of the Everglades." Therefore, both the findings and substantive provisions of the bill commit the tribes to these efforts.

The purposes of the bill are grounded in two important federal policies. The first is the federal policy of tribal self-determination, based upon a government-to-government relationship between Indian tribes and the federal government. The statute establishing the ENP preceded the enactment of the Indian Reorganization Act (IRA) of 1934,[12] which established the new federal policy of limiting federal domination of tribal decision-making. Thus, event though 16 U.S.C. § 410b seeks to preserve the tribe's rights, it is susceptible to criticism that it is neither grounded nor consistent with principles of tribal self-determination or a government-to-government relationship. S. 1419 seeks to eliminate these concerns because the framework it establishes was negotiated between the Tribe and Department. In addition, the Act seeks to encourage and facilitate further negotiated settlements.

The second purpose of the bill is to ensure that the existence of an enlarged Miccosukee Reserved Area does not interfere with efforts needed to support restoration of the ecosystem in South Florida.[13]

Tribal rights and authority on the Miccosukee Reserved Area

The bill terminates the special use permit issued to the Tribe by the Department of Interior. In place of the permit, the bill recognizes the tribe's presence within the Park, without compromising the objectives for creating the Park. Since intrusive federal management of tribal activities is incompatible with the federal policy of tribal self-determination, the bill addresses those matters where federal oversight is necessary to ensure that tribal actions do not threaten or create undo risks to the Park and leaves other matters within the exclusive purview of the tribe.

Perpetual use and occupancy

As discussed above, a permanent tribal land-base has been found to be essential to the federal policy of tribal self-determination. Al-

[12] Act of June 18, 1934, c. 576, 48 Stat. 985. Prior to the IRA, federal policy undermined tribal authority in a number of ways, including the allotment and diminishment of the tribal landbase. Recognizing the impact of that policy, the IRA sought to preserve and foster tribal authority by ending and reversing the diminishment of tribally owned lands.

[13] See, e.g., P.L. 104–303, the Water Resources Development Act of 1996, § 528, the Everglades and South Florida Ecosystem Restoration Project.

though the Act creating the Park explicitly preserved preexisting tribal rights, the tribe still waited for almost thirty years before its right to reside in the Park was ratified through the issuance of a permit. Furthermore, the specter of additional conditions being added to the permit, its cancellation, or expiration are contrary to the principles of self-determination.

Consistent with the federal policy of tribal self-determination, the bill specifically addresses the nature of tribal and federal authority within the MRA. As part of treating the MRA as a federal reservation, subsection 5(c) applies the "Indian country" designation to these lands. This designation is intended to avoid any confusion or litigation over the unique nature of the MRA. As the Supreme Court has explained, the existence or absence of an Indian reservation, as such, is not a talisman for determining whether land comes within the statutory definition of Indian country. "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States" [14]

In 1961, the State of Florida accepted civil and criminal jurisdiction over Indian lands pursuant to P.L. 83–280.[15] In 1983, the United States Court of Appeals for the 11th Circuit ruled that Florida's assumption of jurisdiction could not include the Park:

> The Federal statute [P.L. 280] provides that a state may acquire jurisdiction over Indian affairs to the extent that it has jurisdiction over offenses committed elsewhere in the state. But, because the Everglades National Park remains in the exclusive jurisdiction of the federal government, Florida has not and cannot extend its jurisdiction to cover Indian lands located within the Park.[16]

This would seem to make any reference to P.L. 280 in the bill superfluous. Nevertheless, the objective of this bill is to seek to address as many potential issues as possible. Thus, this section makes it clear that Congress does not intend that P.L. 280 will apply within the MRA.

Although the definition of Indian Country at 18 U.S.C. § 1151 is concerned with the scope of criminal jurisdiction, it is commonly employed by courts and Congress in the context of civil jurisdiction as well. By treating the MRA as "Indian Country" it is intended that the tribe will exercise the same jurisdiction over those entering the reservation, either Indian or non-Indian, member of nonmember, that any other tribe would exercise in an analogous situation within Indian country. In addition, the Committee does not intend to place the tribe or its members at any disadvantage with respect to rights or services that they would possess if the MRA was formally held in trust for the tribe by the United States on behalf of the tribe.

The first sentence of section 5(d) accomplishes a similar result. Even where the United States possesses exclusive jurisdiction over

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[14] *Oklahoma Tax Commission* v. *Sac and Fox Nation,* 504 U.S. 114, 123 (1993).

[15] In 1968 Congress amended P.L. 83–280 to require tribal consent, preventing states from unilaterally obtaining "P.L. 280" jurisdiction. P.L. 90–284, 82 Stat. 79 (1968).

[16] *United States* v. *Daye,* 696 F.2d 1305, 1307 (11th Cir. 1983).

an area,[17] the United States has indicated willingness, in some circumstances, to share concurrent jurisdiction with states. To the extent that the United States has or will share jurisdiction within the Park, neither the United States or the State of Florida have any intent to do so with respect to tribal lands. For example, the Florida statute that authorizes state assumption of concurrent jurisdiction over federal lands, provides that the state will not accept concurrent jurisdiction over tribal lands without the tribe's consent.[18] The Indian Civil Rights Act of 1968 also requires tribal consent before P.L. 280 is applied to a tribe's reservation. Thus, both federal and state law preserve federal jurisdiction over the entire MRA. This should not be construed, however, to discourage the three sovereigns from working to obviate any questions that may arise by entering into cooperative agreements. This is especially encouraged with respect to law enforcement matters. Indeed, the Committee notes that section 8(g) specifically preserves authority to enter into cooperative agreements.

Preservation of other rights

As discussed throughout this report, the organic act establishing the Everglades National Park explicitly recognizes the historic, cultural, and religious significance of the Park to the Native People of Florida. Other acts of Congress have included similar explicit references to these ties between the Miccosukee and Seminole Tribes and the flora, fauna, land, and water of the everglades region.[19] This provision is included to make it clear that the bill does not compromise any of these rights.

Protection of Everglades National Park

As discussed above, the tribe's presence within the Park is by no means incompatible with the purposes for establishing the Park. By acting in a manner consistent with the provisions of the bill, the land dedicated to the tribe's use within the Park can be treated as a reservation, and remain a part of the Park, consistent with, and fulfilling Congress' objective in establishing the Park in 1934. However, some parts of the MRA were formerly designated as part of the Marjorie Stoneman Douglas Wilderness Area. Obviously, it will not be possible for these lands to be treated as both a wilderness area and as part of the MRA. As a result, this legislation should be construed to release the area designated as the MRA from wilderness status.

Section 6(a)(2) provides that the Tribe shall be responsible for compliance with all applicable laws, except as specifically exempted by the Act. This provision is broad to ensure protection of Park. It is not the Committee's intent, however, to make any additional laws applicable (or conversely inapplicable) to the tribe, except as provided in the bill.

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[17] U.S. Constitution, art. 1, sec. 8, cl. 17.

[18] Laws of the State of Florida, Chapter 86–67, June 5, 1986, codified at Florida Statutes Annotated § 6.075.

[19] See, e.g., P.L. 93–440, Big Cypress National Preserve-Establishment. "The Miccosukee and Seminole Indians have traditionally used much of this area for hunting, fishing and ceremonial purposes. They are to be permitted to continue such usual and customary uses * * *." S. Rep. 93–1128 (Aug. 22, 1974).

Prevention of degradation

Because of the importance of water quality to efforts to restore, preserve, and protect the Everglades, the bill sets out how this objective will be met. The tribe is not to further degrade the quality of water entering the MRA and released into other parts of the Park if the water fails to meet water quality standards as set by the State of Florida and approved by the Federal government under the Clean Water Act, 33 U.S.C. § 1251 et seq. The tribe is not, however, responsible for improving the water quality of such water.

With respect to water entering the MRA which meets applicable water quality standards, the tribe shall not cause the water to fail to comply with applicable water quality standards.

Similarly, to the extent that a condition, activity, or structure within the MRA significantly disrupts the flow of surface or groundwater that would otherwise flow, either directly or indirectly, into other parts of the park, the tribe must prevent or abate the impediment.

Exotic plants and animals

The bill addresses a specific concern within the Southern Florida Ecosystem, which is not related to any activities of the tribe, but which is critical for all of those, like the tribe, that are concerned with the health of the Ecosystem. Exotic species have caused significant degradation within the Everglades. Efforts to address harmful invasion species are a significant element of preservation and restoration efforts.[20]

Public access

The Supreme Court has characterized a tribe's right to exclude or condition access to its lands as "*Merrion* v. *Jicarilla Apache Tribe,* 455 U.S. 130, 141 (1982). The bill recognizes and preserves this important component of tribal sovereignty, and makes it clear that the tribe itself has a concomitant responsibility not to impede public access to Park areas outside of the MRA, and to and from the Big Cypress National Park. This should not be construed to require the tribe to allow access to the MRA by non-tribal members, except to those federal employees, agents, officers, and officials who are carrying-out responsibilities under this Act. This point is underscored in section 8(b) of the bill.

Preventing significant cumulative impact

By stressing that the tribe is to prevent and abate significant *cumulative* environmental impacts, the bill accomplishes two objectives. First, it allows all tribal activities on lands owned and/or controlled by the tribe to be taken into account when assessing their impact. Second, it indicates a strong desire that the Tribe and other interested parties, including the Park Service, work together to identify the full range of activities planned or being considered by a tribe and their cumulative impact. The act requires the tribe to establish a specific set of procedures to implement this process.

[20] Strange Invaders Known as Exotics, Foreign Animals and Plants Tend to be Little More Than Imported Environmental Nightmares, The Tampa Tribune, Bay Life, August 12, 1998.

These procedures balance the tribe's sovereignty with the need to protect the unique and delicate everglades ecosystem. under the bill, within 12 months the tribe must establish a process that ensures that the public receives notice and the opportunity to comment on major tribal actions within the MRA if those actions may contribute to a significant cumulative adverse impacts on the everglades ecosystem.

The procedures established by the tribe must include a means for providing timely written notice to the Secretary and consideration of any comments by the Secretary. This requirement incorporates the philosophy of the National Environmental Policy Act, (NEPA) which imposes a planning, disclosure, comment, and response process, in place of specific substantive requirements, to prevent and mitigate adverse environmental impacts. Through this process, the tribe should identify and evaluate both direct and indirect potential impacts from the full scope of all segments of the construction and related infrastructure. By establishing a comprehensive site development plan, for example, the tribe could evaluate cumulative impacts of its planned development, thereby enabling the tribe, the Secretary, and the public to gain an overall understanding of all development and its entire potential cumulative impact within having to review any project or element independent of any other or on a piecemeal basis. Obviously, a major federal action will still require NEPA review by the appropriate federal agency.

The Committee believes that the process established by the bill balances the tribe's right to manage its own affairs while recognizing that the MRA remains a part of the Park, even though it is treated as a reservation. The Miccosukee tribe has consistently worked to preserve the everglades ecosystem. With this background and commitment, the Committee believes that the most effective way to achieve the environmental objectives of this bill is to ensure that the tribe creates a process that allows it to be informed of the potential impact of its activities on the rare, fragile, and interdependent Park ecosystem. In this respect, notice to the Secretary and consideration of his comments is critical. The Secretary has a substantial body of information and expertise at his disposal in considering and analyzing the impact of activities on the everglades ecosystem.

Water quality standards

The bill balances the need to protect the water quality within the Park, with the recognition of tribal authority in the field of environmental protection in general, and water quality protection in particular. See, e.g. 33 U.S.C. § 1377(e). The tribe is to adopt and comply with water quality standards within the MRA that are at least as protective as those established by the State of Florida for the everglades and approved under the Clean Water Act by the Federal government. Nothing in this bill is intended to be construed to limit the tribe's authority to establish on-reservation water quality standards, in the same manner as other Indian tribes. Any water quality standards established by the tribe for the MRA may not be more restrictive than the standards it may establish for contiguous reservation lands that are not within the Park.

Natural easements

A provision in the bill ensures that the tribe is not authorized by this Act to engage in activities within the natural easement areas established by the Act that are inherently incompatible with their status as natural easements. This provision does not divest the Department of Interior of any authority it may have to engage in or approve activities within the Park, including the easements.

Height restriction

This provision is an example of how the bill replaces ad hoc decision-making with specific standards. Thus, instead of forcing the tribe and the Park Service to negotiate about what constitutes a reasonable height for facilities in light of the tribe's needs and the purposes for creating the Park, the bill establishes a general standard, with specific exceptions. Nonetheless, it is not the Committee's intent to impose an immutable standard that would leave the tribe and the Department without any capacity to accommodate needs and circumstances that can not be anticipated at this time. Thus, the bill allows the Secretary to grant a waiver if it is found that the needs of the tribe outweigh the adverse effect on the Park.

Gaming

In general, the Interior Department has indicated that it would not support legislation that includes a blanket waiver of an Indian tribe's right to conduct gaming operations in accordance with the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. Similarly, the Committee has taken no action to proscribe a specific tribe's right to engage in class II or class III gaming. However, in this particular case, the MRA remains part of the Park. Also, the Committee notes that Congress has already addressed the unique circumstances concerning the Miccosukee Indian tribe. Section 2719(b)(3) of title 25 provides an exception to the IGRA's general prohibition on use of trust lands acquired after October 17, 1988 for gaming purposes. This exception applies solely to the Miccosukee Indian tribe. During the 99th Congress, a nearly identical provision was included in a bill regulating Indian gaming. The Committee explained the need for this provision in a report accompanying that bill. "The Miccosukee Tribe is unique in that its current trust lands are located within the Everglades National Wildlife Refuge and thus possibility for economic development within the boundaries of the Reservation are extremely limited."[21]

Aviation

The bill places a constraint on commercial aviation to or from the MRA. It is not intended to prohibit non-commercial aviation activities, including such uses as resource management or law enforcement.

Visual quality

Section 6(c)(3) provides that in the planning, use and development of the MRA by the Tribe, it shall consider the quality of the visual experience from the Shark River Valley visitors use area.

[21] S. Rep. 99–483 (Sept. 26, 1986).

The Shark River Valley visitor use area is one of the most important and strategic portions of the Park for visitors to experience the uniqueness of the area. The Everglades environment and its wildlife are interpreted in this area probably better than anywhere else in the Park. Development here has remained relatively simple and primitive.

There is presently a 15 mile, 2 hour tram tour through the Everglades interior. National Park Rangers or experienced tram drivers interpret the Park, its wildlife, vegetation and unique ecology. Midway through the tour, the tram makes a rest stop at Shark Valley Tower, a 50 foot observation tower from which the visitor may view the vastness and grandeur of the wilderness. Forty percent of the visitors to Everglades National Park stop at the Shark Valley area. The tour and tower provide the elderly and disabled, in particular, an opportunity to experience the Park in a way not provided anywhere else.

While this legislation anticipates additional tribal development in the MRA, it is the Committee's expectation that the Tribe will be respectful of, and preserve, the striking vistas of Shark Valley. The Tribe must be careful not to interfere with the visitor's experience as a result of the Tribe's development, especially with respect to billboards or other commercial advertisements in this area. Billboard and other commercial advertisements should not be visible from the Shark Valley visitor center, the tram, and to the greatest extent possible the observation tower.

Easements and ranger station

The MRA is located in a critical environmental area for the Everglades National Park. The establishment of specified natural easements ensures that the Tribe's perpetual occupancy within the MRA does not place the entire MRA beyond the Park Service's capacity to preserve and restore the Everglades. Thus, the natural easements and the specified water control structures remain available for the Park Service to accomplish the hydrological or any other environmental objectives of the Park. This is generally addressed in section 8(e) of the bill.

Consistent with these factors, if MRA lands (excluding the "natural easements") are necessary for water quality objectives, the bill ensures that the lands within the MRA can be made available to the Department. The bill places constraints on the availability of this authority. (Section 8(e)(2)) This authority is only to be utilized if alternative measures to achieve the same purposes are found to be impractical.

The map referenced in section 4(3) of the bill depicts the natural easements established under section 6(d)(1), the ranger station referenced in section 6(d)(3), and the water control structures referenced in section 6(d)(4). With respect to the natural easements and water control structures, the tribe may not construct, develop, or improve in these areas. The extent of the Ranger Station is also limited as identified on the map.

Implementation process

There is evidence to support the tribe's claim that its status as a permitee places it in an inherently subordinate position in its

dealings with the Department of Interior. This is incompatible with the federal policy of fostering government-to-government relationships between tribes and the federal government.

The bill seeks to resolve the potential areas of disagreement that are known at this juncture. By eliminating the specter that the tribe's presence occurs at the sufferance of the Department, the Committee believes that it has established a better framework for the government-to-government resolution of any further disagreements that may occur. Although the Committee hopes that disagreements may be resolved through either reference to the explicit terms of this bill or through informal discussions, the Committee has found that explicit procedures for nonbinding dispute resolution may also be part of a framework for resolving the legitimate conflicts that arise between governments with overlapping jurisdictional authority. By providing for such a process, the Committee does not intend to prevent the tribe or the Department from seeking recourse to other dispute resolution processes.

Applicability of this bill

The Committee notes that the bill is the product of a significant amount of effort by the Department, especially the Park Service. By approving this bill, the Committee does not imply that all conflicts between Indian tribes and federal land management agencies are amenable to such resolution. For that reason, the Committee does not intend that the terms of the bill will create any interest or privileges in any other situations.

Federal permits

This provision ensures that the objectives of this bill are incorporated into the responsibilities of any federal agency considering a permit for construction or other activities on the MRA. This is particularly true of any § 404 permit from the Army Corps of Engineers.

Parties held harmless

This provision is included to ensure that Indian tribes and the United States do not become vicariously liable for each others actions or inactions as a result of this act. The exception with respect to the Indian Self-Determination and Education Assistance Act (ISDEA) is concerned with the policy of supplementing or displacing liability insurance with Federal Tort Claims Act coverage when a tribe contracts to provide services under the ISDEA. (*See, e.g.,* P.L. 101–512, Title III, § 314.) It is not the Committee's intent with this provision, or any other part of the bill, to place the tribe in a different position from any other tribe with respect to the ISDEA.

Enforcement

The bill creates rights and interests in both the tribe and the United States with respect to the MRA. Although the bill provides mechanisms to resolve disputes between the United States and the tribe, it is possible that recourse to federal court will be necessary to vindicate either tribal or federal rights and interests established by this bill. Section 8(i)(2) does not provide an independent waiver of the Federal Government's existing sovereign immunity and the

tribe would need to rely on some other statute for such a waiver. At a minimum, section 8(i) ensures that otherwise justifiable claims will not be dismissed for failure to state a claim upon which relief may be granted.

Litigation between the tribe and the Park could arise as a result of a number of matters and in various postures. For example, the United States could sue to enforce provisions of the bill, the tribe could challenge a federal decision or agency ruling, or a case or controversy could involve a dispute over the interpretation of a provision. In reporting this measure, it is the Committee's expectation that the bill will reduce the number of areas where litigation may occur. With respect to matters addressed by the bill, the provisions were drafted to provide clear guidance to both the tribe and the United States, especially the Park Service, for how the tribal presence within the Park is to be accommodated with other concerns. The Committee expects that the well-founded rights defined by this bill and in other federal laws referenced herein will be an important consideration in the Department of Interior's administration of public resources. The Committee notes that this is consistent with long-recognized principles of federal Indian law. And the federal government's general trust obligation to tribal governments.

CONCLUSIONS

The Committee finds that the approach taken in the legislation is more consistent with federal policy than the permit approach. Within the constraints imposed by the bill and other federal laws, the tribe shall govern its own affairs within the MRA as if the land were a federal Indian reservation. The constraints imposed by the bill will preserve the Everglades ecosystem and the nature of the Park without interfering with the tribe's ability to govern itself, thereby accomplishing Congress' goal when it established Everglades National Park.

COMMITTEE RECOMMENDATION AND TABULATION OF VOTE

In an open business session on July 28, 1998, the Committee on Indian Affairs, by voice vote, adopted an amendment in the nature of a substitute and ordered the bill, as amended, reported to the Senate, with the recommendation that the Senate pass S. 1419 as reported.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

Section 1 cites the short title of the bill as the "Miccosukee Reserved Area Act."

Section 2. Findings

Section 2 provides Congressional findings.

Section 3. Purposes

Section 3 describes the bill's purposes.

Section 4. Definitions

Definitions are provided for the following terms: "Everglades," "Federal Agency," "Miccosukee Reserved Area," "Park," "Permit," "Secretary," "South Florida Ecosystem," "Special Use Permit Area," "Tribe," "Tribal," and "Tribal Chairman."

Section 5. Tribal rights and authority on the Miccosukee Reserved Area

Section 5(a) terminates the February 1, 1973 permit issued to the Miccosukee Indian tribe and any amendments to that permit and expands the lands treated as the Miccosukee Reserved Area (MRA), which will be treated as though it were a federal Indian reservation;

(b) Establishes that the tribe shall have the right to perpetual use of the MRA;

(c) The MRA shall be considered "Indian country," as that term is employed at 18 U.S.C. § 1151;

(d) The bill does not effect exclusive federal legislative jurisdiction in the MRA; nor shall P.L. 280 apply to the MRA;

(e) The bill does not affect other rights the tribe possesses.

Section 6. Protection of Everglades National Park

(a)(1) Establishing that the MRA remains a part of the Park.

(2) The tribe is responsible for complying with applicable laws.

(3) The tribe is to prevent, abate, and not be the source of significant degradation of surface or groundwater, not be the source of the significant propagation of exotic plants and animals; not prohibit public access to non-MRA parts of the everglades; establish water quality standards as protective as those approved standards of the State of Florida; nor is the tribe to engage in activities within the natural easements.

(b) The tribe may only construct structures above the height restrictions based upon explicit exceptions or a waiver granted by the Secretary.

(c) The tribe may not engage in class II or III gaming (as those terms are defined in the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq.) or commercial aviation within the MRA. The tribe is to consider the impact on visitors to the Shark Valley visitor use area in developing the MRA.

(d) Establishes natural easements that may be used for hydrological and other environmental objectives; and preserves the area presently used as the ranger station.

Section 7. Implementation process

(a) Encouragement for the tribe and the Secretary to establish a process for implementing the act;

(b) Authorizing the federal mediation and assessment service to assist in reaching agreements between the tribe and the Secretary;

(c) Provides that such nonbinding dispute resolution is not to exceed 60 days unless the Secretary and the tribe agree to an extension;

(d) Provides that participation in mediation does not prejudice either parties ability to access other means for resolving a dispute.

Section 8. Miscellaneous

(a) This bill does not create any right or interest in any other circumstance concerning federal public lands;

(b) Federal officers may access the MRA to ensure compliance with the bill and as if it were an Indian reservation;

(c) Federal permits shall only be granted after consultation with the Secretary, and no permit shall be issued that would be inconsistent with the bill's provisions;

(d) Volunteer programs involving the tribe may be established in cooperation with the tribe;

(e) Federal authority to preserve and protect the South Florida ecosystem is preserved; and the MRA lands may be used, under specified circumstances, to achieve these objectives;

(f) Holds the parties harmless with respect to liability;

(g) Preserves authority to enter into cooperative agreements;

(h) Holds parties harmless with respect to water rights;

(i) Authorizes actions by either the tribe or the United States to enforce the provisions of the bill.

COST AND BUDGETARY CONSIDERATION

The cost estimate for S. 1419, as amended, as calculated by the Congressional Budget Office, is set forth below:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, August 20, 1998.

Hon. BEN NIGHTHORSE CAMPBELL,
Chairman, Committee on Indian Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1419, the Miccosukee Reserved Area Act.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Deborah Reis.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill, Director).

Enclosure.

S. 1419—Miccosukee Reserved Area Act

S. 1419 would clarify the rights of the Miccosukee tribe of Indians to occupy and use land within the boundaries of the Everglades National Park. The bill would give the tribe the exclusive right to use and develop an area of the park to be known as the Miccosukee Reserved Area (MRA) and would terminate the special use permit that currently governs the tribe's use of this area. The tribe would be responsible for complying with environmental and other laws, certain development restrictions, commercial restrictions, such as a prohibition against gaming on MRA lands, and other conditions established by the bill.

CBO estimates enacting S. 1419 would have no effect on the federal budget. The bill would restate an agreement between the federal government and the Miccosukee Indian Tribe. It also would

provide for compensation to the Miccosukee for water restoration projects in the Florida Everglades. Because both the projects and compensation are authorized under existing law, the bill would have no budgetary impact. S. 1419 would not affect direct spending or receipts; therefore, pay-as-you-go procedures would not apply. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

On August 17, 1998, CBO prepared a cost estimate for H.R. 3055, the Miccosukee Reserved Area Act, as ordered reported by the House Committee on Resources on July 22, 1998. The House and Senate bills are similar, and the estimates are identical.

The CBO staff contact is Deborah Reis. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

REULATORY IMPACT STATEMENT

Paragraph 11(b) of XXVI of the Standing Rules of the Senate requires that each report accompanying a bill to evaluate the regulatory paperwork impact that would be incurred in carrying out the bill. The Committee believes that S. 1419 will have minimal regulatory or paperwork impact.

EXECUTIVE COMMUNICATIONS

The Committee has received no official communications from the Administration on the provisions of the bill.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXXVI of the Standing Rules of the Senate, the Committee notes that the bill will not make any changes in existing law.

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