

SEMINOLE TRIBE OF FLORIDA

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VIA EMAIL:

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Colonel Andrew Kelly

District Commander

United States Army Corps of Engineers

701 San Marco Boulevard

Jacksonville, Florida 32207

Re: **2019 LORS 08 Planned Deviation Draft EA and Proposed FONSI**

Dear Colonel Kelly:

Thank you for providing the Seminole Tribe of Florida ("Seminole Tribe") the opportunity to comment on the Draft Environmental Assessment ("Draft EA") and Proposed Finding of No Significant Impact ("Proposed FONSI") for the U.S. Army Corps of Engineers' ("Corps") Planned Deviation to the Water Control Plan For Lake Okeechobee and Everglades Agricultural Area ("Planned Deviation").

The Seminole Tribe's Brighton and Big Cypress Reservations currently receive water from Lake Okeechobee that the Tribe is entitled to under the Seminole Tribe's Water Rights Compact with the State of Florida and the South Florida Water Management District ("District"). Lake stage is critical to the Seminole Tribe's ability to receive this water, as the infrastructure the District uses to deliver the water to the Seminole Tribe's reservations cannot reliably function when the Lake stage drops below 11' NGVD. In addition, the Tribe's Hollywood Reservation and Coconut Creek Trust Land indirectly rely on the Lake for their water supply, and also have the potential to be harmed by low Lake stages. Access to water holds both practical and cultural significance to the Seminole Tribe, as it is a resource that is integral to preserving the Seminole Tribe's sovereignty, the conditions of its land, and its culture for present as well as future generations of Tribe members. Thus, changes to the Lake schedule that may increase the incidence of low Lake stages or that may otherwise affect Tribal access to water are of utmost concern to the Seminole Tribe. Thus, changes to the Lake schedule that may increase the incidence of low Lake stages are of utmost concern to the Seminole Tribe.

A change to the Lake schedule that reduces the reliability of the Seminole Tribe's entitlement water presents a problem not just for the Seminole Tribe, but also for the District. Under the "Agreement Between the South Florida Water Management District and the Seminole Tribe of Florida Providing for Water Quality, Water Supply and Flood Control Plans for the Big Cypress Seminole Indian Reservation and the Brighton Seminole Indian Reservation, Implementing Sections V.C. and VI.D of the Water Rights Compact" which was finalized in 1996 ("1996 Agreement"), the District has the obligation to mitigate losses to the Tribe's ability to receive water from Lake Okeechobee caused by changes in the Lake

"BUT I HAVE PROMISES TO KEEP & MILES TO GO BEFORE I SLEEP"



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schedule. In fact, the 1996 Agreement requires the District to study the potential impacts that any proposed changes to the Lake schedule would have before final agency action on the changes occurs. This obligation is distinct from the Corps' obligation to study any such effects under National Environmental Policy Act ("NEPA").

Based on tribal staff's review of the Draft EA and Proposed FONSI, the Seminole Tribe thinks that the Planned Deviation has the potential to significantly impact tribal rights and resources, including its access to Lake Okeechobee surface water. The Seminole Tribe does not think it is prudent to discharge water beyond what the 2008 Lake Okeechobee Regulation Schedule ("LORS 08") allows without substantial analysis. The assumption upon which the Corps' Draft EA rests, i.e., that nature will replenish the discharged water within a year, provides little assurance to the Seminole Tribe that its water resources will not be impacted by the Planned Deviation. Historical drought records prove that nature is not that reliable in delivering water when expected.

The Seminole Tribe also does not think that the relatively simple analysis of the risk to water supply the Corps provides in the Draft EA is sufficient to reliably evaluate the actual impact the Planned Deviation would have on water supply from the Lake. The Seminole Tribe therefore respectfully requests the Corps participate in formal consultation regarding the Planned Deviation and the Corps' analysis on its potential impacts to the Seminole Tribe's rights and resources prior to taking final agency action on the Planned Deviation.

In addition, the Seminole Tribe submits the following comments for the Corps' consideration. Please note, the Seminole Tribe may have additional comments to submit after consultation:

Trust Responsibility and Water Supply

- The federal trust responsibility requires the Corps to ensure that the Planned Deviation does not abrogate or impinge upon the Seminole Tribe's rights, including those secured under the Water Rights Compact.
- The Draft EA does not reflect whether the District has performed the studies required under the 1996 Agreement. If the Corps takes action before the District can perform the requisite studies, it would constitute an abrogation of the Seminole Tribe's rights.
- The Draft EA does not provide sufficient information for the Seminole Tribe to determine the potential impacts the Planned Deviation may have on the surface water supplies the Seminole Tribe receives from Lake Okeechobee. The Draft EA's description of the Harmful Algae Bloom ("HAB") Operational Strategy as well as the analysis of the potential effects on water supply, other authorized purposes of the C&SF Project, and tribal resources is vague and lacks sufficient detail to evaluate the Corps' conclusions, including that the HAB Operational Strategy will have "no effect" on the Seminole Tribe's water rights. Based on what the Draft EA outlines, however, the Seminole Tribe cannot conclude that the Planned Deviation will have no significant impact



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on its resources. Just the opposite, the Seminole Tribe thinks it highly likely that the Planned Deviation will expose Brighton and Big Cypress Reservations, at the very least, to significantly greater risk of surface water supply shortages.

Corps' Lacks Authority for this Planned Deviation

- The Corps cites the Water Resources Development Act of 1992, Pub. L. No. 102-580, 106 Stat. 4797 (1992) ("WRDA 1992"), as the authority for the Lake Okeechobee Regulation Schedule Study. The Corps completed the study authorized by WRDA 1992 in 2007, and it resulted in the current interim lake schedule. WRDA 1992 provides no authority for additional studies or changes to the Lake schedule. The Corps cites no other authority for the Planned Deviation which deviates significantly from the schedule that resulted from the WRDA 1992 authorization.
- Congress has not authorized the Corps to manage Lake Okeechobee based on the anticipation or presence of HABs. The Planned Deviation subordinates congressionally authorized project purposes, such as water supply and navigation, to an unauthorized purpose. The Planned Deviation is therefore not consistent with federal and state law nor the Corps regulations.
- Corps regulations require formal deviations for temporary changes to a water control plan. The Proposed EA states that the Planned Deviation may be extended indefinitely until LORS 08 is replaced with a new water control plan. This amounts to a permanent change in LORS 08 and thus requires the Corps to conduct more extensive analysis and solicit more significant public input in accordance with NEPA and the Corps' regulations. Treating what amounts to a permanent change in LORS 08 as a temporary deviation threatens decades of water planning built on LORS 08 without the required analysis of the effects the change will have.

Water Banking

- Seminole Tribe disagrees that Water Banking as described in Draft EA would have a net zero effect on Lake Stages.
- There is no guarantee that rains will offset Corps discharges over any given period of time, much less within the same water year.
- The Corps ignores the timing of water releases, in favor of an approach that treats releases as fungible so long as there is no net increase or decrease within a given water year. The Corps cannot reasonably conclude that this approach will result in no significant impact to water supply (or any other authorized purpose). If it could, then LORS 08 Parts A and B could be replaced with a simple table of average annual stages.
- LORS 08 lowered Lake Okeechobee and exposed the Seminole Tribe to increased risk of water shortage. This deviation will allow the Corps to lower Lake stages even more, exposing the Seminole Tribe's water supply to even more risk.



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Definitions

- It is unclear under what conditions the Corps will conclude that a HAB is anticipated. Without clear parameters for such decision making, HAB conditions could last indefinitely, and the Planned Deviation will vest unbridled, arbitrary discretion in the Corps to make discharges.
- The Planned Deviation lacks specificity regarding what constitutes a “significant risk to water supply” for purposes of withholding HAB releases.

The Seminole Tribe looks forward to working with the Corps to ensure that Lake Okeechobee remains a reliable source of water for the Tribe as the Water Rights Compact Requires while meeting other authorized purposes and minimizing risks to human health and the environment.

Sho Na Bish,

Marcellus W. Osceola Jr., Chairman
Seminole Tribe of Florida

- c. Melissa Nasuti, United States Army Corps of Engineers
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