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Miccosukee Tribe of Indians of Florida v. United States Army Corps of Engineers,
619 F.3d 1289 (11th Cir. 2010) (*Miccosukee I*)

and

Miccosukee Tribe of Indians of Florida v. United States,
619 F.3d 1286 (11th Cir. 2010) (*Miccosukee II*).

Jesse Froehling

ABSTRACT

In *Miccosukee I*, the U.S. Army Corps of Engineers wanted to build a bridge along the Tamiami Trail that would, in effect, flood part of the reservations of the Miccosukee Tribe of Indians of Florida. The Tribe sued the Corps alleging that the construction of the bridge would violate the National Environmental Policy Act and the Federal Advisory Committee Act. The Eleventh Circuit Court of Appeals held that it lacked subject matter jurisdiction to hear the case. The court concluded that a “notwithstanding” clause in a Congressional appropriations act overrode environmental procedural laws. After *Miccosukee I*, the tribe sued the U.S. Department of Transportation, alleging procedural violations in the construction of the bridge. Once again, the Eleventh Circuit held that it lacked subject matter jurisdiction to hear the case, because a similar “notwithstanding” clause deprived the court of the discretion to curb Congress’ intent.

I. INTRODUCTION

After a highway through the Florida Everglades proved detrimental to the surrounding environment, Congress required the U.S. Army Corps of Engineers (Corps) to build a mile-long bridge to improve water flow through an integral part of the Everglades.³⁹⁸ In *Miccosukee I*, the Miccosukee Tribe of Indians of Florida (the Tribe) filed suit against the Corps alleging violation

³⁹⁸ *Miccosukee Tribe of Indians of Fla. v. U.S. Army Corps of Engrs.*, 619 F.3d 1289 (11th Cir. 2010) (hereinafter *Miccosukee I*).

of numerous environmental procedural statutes.³⁹⁹ The Tribe worried, in essence, that construction of the bridge would allow the Everglades to flood its reservations.⁴⁰⁰ The Eleventh Circuit held that a general repealing clause in the language of the Omnibus Act of 2009 deprived the court of subject matter jurisdiction to hear the case.⁴⁰¹ In *Miccosukee II*, decided the same day, the Tribe alleged the U.S. Department of Transportation (DOT) violated transportation procedural statutes.⁴⁰² Following the same reasoning it outlined in *Miccosukee I*, the court again held that the Omnibus Act deprived it of subject matter jurisdiction to hear the case.

II. MICCOSUKEE I

A. Historical Background

The Miccosukee Tribe's ancestors may have arrived in the southeastern United States about 10,000 years ago⁴⁰³ – 5,000 years before geological shifts formed the Everglades.⁴⁰⁴ In 1962, Congress officially recognized the Tribe, and today, tribal members live on several reservations scattered throughout the vast Floridian swamp, which covers much of the state south of Orlando.⁴⁰⁵

Historically, water flowed from the Kissimmee River to Lake Okeechobee, then southwest to Florida Bay.⁴⁰⁶ Between the lake and the bay, the land slopes just three inches per mile, creating a thirty-mile wide river gradually flowing south, though in bad weather the flow is quite noticeable.⁴⁰⁷ In 1928, the river breached the Okeechobee levy and drowned more than

³⁹⁹ *Id.* at 1294.

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.* at 1303 (citing Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524 (2009)).

⁴⁰² *Miccosukee Tribe of Indians of Fla. v. U.S.*, 619 F.3d 1286, 1288 (11th Cir. 2010) (hereinafter *Miccosukee II*).

⁴⁰³ *Miccosukee I*, 619 F.3d at 1292 n. 2.

⁴⁰⁴ *Id.* at 1292.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

2,000 farm workers.⁴⁰⁸ Twenty years later, Congress passed the Flood Control Act, which authorized the control of flooding in the Everglades.⁴⁰⁹

The Tamiami Trail (the Trail) was the first highway to cross the Everglades.⁴¹⁰ Though Interstate 75 to the north now carries more vehicles than the Trail, the Trail remains a vital road and hurricane evacuation route.⁴¹¹ A portion of the Trail runs along the northern boundary of Everglades National Park; it dams water, restricting water flow into the Park and into the Shark River Slough, the main water corridor of the Everglades.⁴¹² The restricted water flow posed a significant environmental threat, causing “vast losses” of wading birds, fish, and native plants.⁴¹³

B. Procedural Background

Congress responded to environmental obligations in 1989 with the Everglades National Park Protection and Expansion Act⁴¹⁴ and again in 2000 with the Water Resources Development Act.⁴¹⁵ In 2008, the Corps concluded that the most “effective and economical” option for improving water flow was to replace a piece of the Trail with a bridge.⁴¹⁶ The same month the Corps issued its conclusion, the Tribe sued the Corps alleging violations of the National Environmental Policy Act (NEPA),⁴¹⁷ the Federal Advisory Committee Act (FACA),⁴¹⁸ and the Water Resources Development Act (WRDA).⁴¹⁹ The lawsuit alleged that the Corps failed to adhere to environmental laws during the planning phase, failed to prepare adequate

⁴⁰⁸ *Id.* at 1292-93.

⁴⁰⁹ *Id.* at 1293.

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.*

⁴¹³ *Id.*

⁴¹⁴ *Id.* (citing 16 U.S.C. § 410r-5 (2006)).

⁴¹⁵ *Id.* (citing 33 U.S.C. § 2201).

⁴¹⁶ *Id.* at 1294.

⁴¹⁷ *Id.* (citing 42 U.S.C. § 4321).

⁴¹⁸ *Id.* (citing 5 U.S.C. Appendix 2).

⁴¹⁹ *Id.* (citing Pub. L. No. 106-541, § 601, 114 Stat. 2572, 2680 (2000)).

environmental impact statements, and that the increased water levels would flood tribal lands.⁴²⁰ The Tribe sought judicial review under the Administrative Procedures Act (APA)⁴²¹ and requested an injunction to halt construction of the bridge.⁴²²

In September 2008, Congress passed an appropriations act containing a section that required the Corps to immediately implement the bridge option.⁴²³ A month later, the Tribe filed a second lawsuit against the Corps and the U.S. Fish and Wildlife Service (FWS) alleging violations of the Endangered Species Act.⁴²⁴ The Tribe alleged that the FWS's biological opinion did not adequately address the threat to the endangered snail kite and wood stork species.⁴²⁵ Like in the prior NEPA case, the Tribe sought an injunction blocking the construction of the bridge.⁴²⁶ Meanwhile, the Corps moved to dismiss the NEPA case, citing the 2008 Appropriations Act that required it to begin construction immediately.⁴²⁷ The court sided with the Tribe and held the Act lacked the specificity required to exempt the Corps from NEPA.⁴²⁸ Shortly thereafter, the court issued the Tribe's requested injunction.⁴²⁹

In March 2009, Congress passed the Omnibus Appropriations Act of 2009, which included essentially the same language as its predecessor, but added the clause, "notwithstanding any other provisions of law."⁴³⁰ The clause proved to be the language on which the court made its decision; when the Corps filed a motion to dismiss, the court granted it, holding that the

⁴²⁰ *Id.*

⁴²¹ *Id.* (citing 5 U.S.C. § 500).

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.* (citing 16 U.S.C. § 1531).

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.* at 1294-95.

⁴²⁸ *Id.* at 1295.

⁴²⁹ *Id.*

⁴³⁰ *Id.*

Omnibus Act was an “explicit exemption” from NEPA and FACA.⁴³¹ The Corps filed a copy of the judgment with the court evaluating the Tribe’s ESA allegations, and that court, using the same reasoning, also dismissed the Tribe’s claim.⁴³² The Tribe appealed the following day.⁴³³

C. Analysis

The court sought to determine “whether the Omnibus Act modifie[d] NEPA, FACA, and ESA for purposes of the Tribe’s lawsuits and thereby deprived federal courts of subject matter jurisdiction to hear the Tribe’s claims.”⁴³⁴ Appropriations acts, the court stated, may effectively repeal older statutes through explicit repeals, general repealing clauses, and implied repeals.⁴³⁵ An explicit repeal identifies outright the statute it is repealing.⁴³⁶ In the absence of an explicit repeal, a general repealing clause, such as “notwithstanding any other federal law,” may be sufficient.⁴³⁷ Lastly, an implied repeal focuses on Congressional intent; while the new statute does not identify the statute being repealed, the Legislature’s intent to repeal may be inferred where a new statute conflicts with an earlier statute.⁴³⁸

The Tribe argued the Omnibus Act was neither an explicit repeal, because Congress failed to articulate any statute it was repealing, nor an implied repeal, because the Corps failed to demonstrate the necessary Congressional intent.⁴³⁹ The Corps countered that the “notwithstanding” clause plainly indicated Congress’ intent to override preexisting environmental statutes.⁴⁴⁰ The court held that the “notwithstanding” clause was a general

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ *Id.* at 1296.

⁴³⁵ *Id.*

⁴³⁶ *Id.* (citing *1A Sutherland Statutes and Statutory Construction* § 23:7 (7th ed. 2010)).

⁴³⁷ *Id.* at 1297.

⁴³⁸ *Id.* at 1299.

⁴³⁹ *Id.* at 1296.

⁴⁴⁰ *Id.* at 1295-96.

repealing clause that overrode the controlling environmental statutes upon which the Tribe had rested its claims.⁴⁴¹

Firstly, the phrase “shall . . . construct or cause to be constructed” in the notwithstanding clause spoke directly to any law regulating construction of the bridge.⁴⁴² Secondly, the Omnibus Act contained an immediacy clause — “immediately and without further delay”— which indicated Congress wanted the bridge built *instantly*.⁴⁴³ Lastly, the word “shall,” directing that “the Corps *shall* build the bridge,” denied the Corps any discretion in the matter.⁴⁴⁴ Reasoning that procedural statutes do not apply when an agency lacks discretion to act, the court concluded Congress’ command to build the bridge precluded the applicability of NEPA, FACA, and the ESA.⁴⁴⁵ The court also found that by mandating the bridge’s construction, Congress transformed an administrative decision into a legislative decision, barring the Tribe from seeking judicial review of the agency action.⁴⁴⁶ Accordingly, the court affirmed the district court and held the Omnibus Act deprived it of subject matter jurisdiction to decide the case.⁴⁴⁷

III. MICCOSUKEE II

A. Procedural Background

After the Tribe lost *Miccossukee I*, it brought a separate action, alleging in Counts I and II that the DOT violated its statutory procedures and the APA.⁴⁴⁸ Specifically, the Tribe alleged that the DOT failed to conduct a mandatory review of the bridge’s impact on federal parkland before transferring a Highway Easement Deed to the Florida Department of Transportation as

⁴⁴¹ *Id.* at 1300.

⁴⁴² *Id.*

⁴⁴³ *Id.* at 1301.

⁴⁴⁴ *Id.* at 1302.

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

⁴⁴⁷ *Id.* at 1302.

⁴⁴⁸ *Miccossukee II*, 619 F.3d at 1287 (citing 49 U.S.C. § 303(c)).

required by Section 4(f) of the relevant DOT’s statutory procedures.⁴⁴⁹ The Tribe also alleged in Count III that in making the transfer, the DOT exceeded its statutory authority to use federal land “reasonably necessary for the right-of-way of any highway,” because the Highway Easement Deed was not for highway purposes.⁴⁵⁰ Lastly, the Tribe alleged in Count IV that the transfer of the Highway Easement Deed violated the Everglades National Park Protection and Expansion Act because it reduced the acreage of the park and violated the Tribe’s substantive due process rights to use the land where the bridge would be constructed.⁴⁵¹ Again, the Tribe sought declaratory and injunctive relief to halt construction.⁴⁵²

The district court dismissed the Tribe’s procedural claims for lack of subject matter jurisdiction and held that the bridge’s construction did not violate the Tribe’s due process rights or the Everglades National Park Protection and Expansion Act.⁴⁵³ Once again, the Tribe appealed.⁴⁵⁴

B. Analysis

The court returned to the “notwithstanding” clause it relied upon in *Miccosukee I* to dismiss the Tribe’s claims against the DOT.⁴⁵⁵ Reasoning the verb “construct” is, if anything, even closer than the connection with laws regulating the environmental implications of agency action, the court held the Omnibus Act’s “notwithstanding” clause deprived the DOT of discretion and the court of subject matter jurisdiction.⁴⁵⁶ Specifically, the court determined:

This repeal precludes any possibility that a federal court may entertain an action seeking to delay or review that project, whether that review occurs under the laws governing the U.S. DOT, the APA, or other statutory authority. The delay

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.* (citing 23 U.S.C. § 317).

⁴⁵¹ *Id.*

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* at 1287-88.

⁴⁵⁵ *Id.* at 1288.

⁴⁵⁶ *Id.*

inherent in any review of administrative action poses a direct conflict to Congress' clear statutory command that the Corps build the bridge 'immediately and without further delay.'⁴⁵⁷

This conclusion compelled the court to hold that it lacked subject matter jurisdiction regarding the Tribe's allegations of procedural violations under Counts I and II.⁴⁵⁸ Likewise, the court required the district court to dismiss Counts III and IV for lack of subject matter jurisdiction.⁴⁵⁹ Regarding the alleged substantive due process violation, the court held that the Tribe "failed to sufficiently plead deprivation of any non-statutory right in a way that would invoke the jurisdiction of the district court," and therefore it did not have jurisdiction.⁴⁶⁰

IV. CONCLUSION

Miccossukee I and *II* present an ironic dichotomy. Elevating the Omnibus Act above agency-based environmental regulation may likely preserve the Tribe's age-old aboriginal environment at the expense of flooding its reservations. Regardless of the Tribe's plight, perhaps the most troubling aspect of this case is the holding that Congress may override environmental mainstays such as NEPA and the ESA with a simple clause inserted deep in the pages of an appropriations bill. However, the court's reasoning is sound because precedent clearly indicates that Congress may, and in fact did, place the necessity of the bridge above its negative environmental impact. Congress may not interfere with judicial proceedings, but the consequences of the Omnibus Act prohibited the tribe's appeal from going forward. And if that is to change, it must fall to Congress, once again, to craft a law that provides the Tribe with subject matter jurisdiction to bring its appeal.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.* at 1288 n. 3.