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HERITAGE AND ENVIRONMENT RESOURCES OFFICE

July 30, 2020

Melissa Nasuti
Planning and Policy Division
Jacksonville District Corps of Engineers
701 San Marco Blvd.
Jacksonville, FL 32207

Re: Public Comments on the Supplemental Environmental Assessment and Proposed Finding of No Significant Impact for the 2020 Planned Deviation to LORS 2008

Dear Ms. Nasuti:

I write to you on behalf of the Seminole Tribe of Florida (Seminole Tribe) to provide public comment on the Draft Supplemental Environmental Assessment (Supplemental EA) and Proposed Finding of No Significant Impact (FONSI) that the U.S. Army Corps of Engineers (USACE) recently published. As you are aware, the Seminole Tribe relies on Lake Okeechobee for a significant amount of the water that it receives pursuant to the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida and the South Florida Water Management District (Compact). Last year, the USACE implemented a substantively similar deviation, citing its authority under the 2008 Lake Okeechobee Regulation Schedule (LORS 08) additional operational flexibility. The Seminole Tribe submitted written comments on that deviation expressing concerns about potential impacts it may cause to the water supply the Seminole Tribe receives pursuant to the Compact. The public comments also identified issues with the procedure the USACE used to implement the deviation as well as issues concerning a lack of legal authority for the action. Many of the issues then raised are still applicable now, thus we have attached

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a copy of the Tribe's previous comments to this correspondence for your consideration and inclusion in the record for the 2020 LORS 08 Planned Deviation (Planned Deviation). In addition, please accept the following comments that raise issues with the 2020 Planned Deviation that are either new or not sufficiently addressed by USACE after the last deviation.

The Seminole Tribe would like to note what appears to be a concerning lack of reflection on the events that transpired following the implementation of the 2019 Planned Deviation. As the Seminole Tribe and others pointed out in their public comments on the deviation, the banking concept the USACE relies on for the planned deviation is critically flawed in that it assumes the "account" will zero out over the course of any given year resulting in no net change in lake stage over any given year. Droughts can last for multiple years, so limiting the USACE's analysis to single water years provides no meaningful understanding of the potential effects of sustained drought conditions. 2019 provided a stark reminder of this fact, when south Florida did not receive sufficient rain during the wet season to offset the discharges the USACE made the previous year. This caused exceptionally dry conditions south of Lake Okeechobee in the early part of 2020 that led to fires in Everglades National Park and Big Cypress National Preserve, and it created dire water supply conditions across south Florida that led the South Florida Water Management District (SFWMD) to impose strict restrictions on landscape irrigation across south Florida. The only reason more severe restrictions were not imposed was because of an unusually early start to the wet season, two weeks earlier than normal. Yet the Supplemental EA does not reflect an acknowledgement of the previous year's near-miss much less an analysis of how the water management actions taken under the previous Planned Deviation contributed to the environmentally harmful and dangerous conditions experienced across south Florida at the beginning of 2020. The Seminole Tribe thinks this near-miss presents a nearly ideal opportunity to reflect on previous assumptions and management decisions and incorporate them into future planning decisions, such as this one, to avoid potentially catastrophic results.

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The Seminole Tribe supports efforts to abate the impacts of nutrient pollution and other forms of pollution in the Greater Everglades system and to Florida's estuaries. The Seminole Tribe has long advocated for and supported Everglades restoration efforts and understands the importance of protecting our nearshore waters from harmful algal blooms. The Seminole Tribe does not support, however, measures that merely shift a problem from one area or group of stakeholders to another. The Everglades are vast as is the C&SF Project, and they therefor affect many people in different ways. As people whose lives, culture, and history are integrally tied to the Everglades, the Seminole Tribe supports holistic measures that address root causes of the issues facing the Everglades, to ensure long-term improvement to the system. This Planned Deviation does not currently meet its stated objectives.

- i. **The Supplemental Environmental Assessment does not address how the USACE will fulfill its Trust Responsibilities, including consultation, under the Planned Deviation.**

The Federal Trust Doctrine requires the USACE to consult with the Seminole Tribe in a way that is, among other things, open, timely, and meaningful when the USACE may take action that may significantly affect tribal resources, tribal rights, or Indian lands. Appendix A to the Supplemental EA states, "when initializing HAB operations, the Corps will engage with federal and state agencies to develop a unique plan on timing and quantity of the advanced releases to be made under [the Planned Deviation]" Appendix A to 2020 LORS Planned Deviation Supp. EA at A-3. These advanced releases have the potential to significantly impact water the Seminole Tribe receives from Lake Okeechobee pursuant to the Water Rights Compact. Given that each time the USACE initiates HAB operations it will develop a unique plan, the USACE must consult with the Seminole Tribe prior to initiating any such operation. Yet, the Supplemental EA does not address how the USACE will fulfill its trust responsibilities, including its obligation to consult with the Tribe. The Seminole Tribe would like to know how such consultation will occur.

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The Planned Deviation will not protect Seminole Tribe Water Rights

The Supplemental EA recognizes that the Seminole Tribe has federally protected water entitlement rights to water in Lake Okeechobee, but states that the Planned Deviation is “anticipated to have no effect on the Water Rights Compact as HAB operations would have a net zero effect on lake stage.” 2020 LORS Planned Deviation Supp. EA at 4-17. The Supplemental EA and Planned Deviation make no guarantees that the USACE actions will result in a net zero impact on lake stage. Yet, even if they did, such assurances do little to address the Seminole Tribe’s concerns that the Planned Deviation will impact its water supplies. Water deliveries from Lake Okeechobee are not temporally fungible, the timing of the deliveries matters. It does a cattle rancher no good to deliver him water in November if he needs it in May. Moreover, as explained below, the Modeling Analysis of the Lake Okeechobee Service Area (LOSA), inadequate as it is, shows the Planned Deviation will cause a significant impact to LOSA water supply performance, despite the “triggers” the Planned Deviation incorporates “to anticipate water supply risks.” 2020 LORS Planned Deviation Supp. EA at 4-17. The Federal Trust Responsibility requires USACE 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. A more detailed analysis is needed for the Seminole Tribe to be able to assess the extent of the potential impacts to its water supply the Planned Deviation will cause, so that the Seminole Tribe may be sufficiently informed to make the best decision it can to protect its rights.

ii. The Planned Deviation contravenes the USACE’s authority to manage Lake Okeechobee.

The Supplemental EA cites additional authority for the Planned Deviation that was not included in the 2019 Planned Deviation, House Document 369, 90th Congress, Second Session (H.D. 369), which was incorporated in the Flood Control Act of 1968, Public Law 90-483. The Supplemental EA acknowledges that USACE lacks “general authority to implement pollution control measures for the C&SF Project,” but states that

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“it can incorporate operational methods to minimize nutrients and their effects on fish and wildlife to the maximum practicable extent.”

The passage USACE cites for this authority ignores the context and primary purpose of H.D. 369, improving water supply for south Florida. H.B. 639, 90th Congress 2d Session at 13. The plan authorized by H.D. 369 was predicated on “increased conservation and utilization of the available surface water supplies. The essential elements of plan consist of storing and diverting, to the maximum extent practicable, waters which otherwise would be lost to the sea.” Lake Okeechobee was the key to the plan, which “reduced wastages of water by storing it in Lake Okeechobee, the most effective storage area, and by backpumping excess runoff of the lower east coast area, which now goes to the sea, into the water conservation areas for later beneficial use.” H.B. 369, 90th Congress 2d Session at 87. Thus, the USACE’s authority to make operational changes to address the effects of nutrients must necessarily be constrained by the primary focus of H.B. 369, i.e., storing and diverting water for water supply that would otherwise be lost to sea to the maximum extent practicable.

The Planned Deviation, however, inverts this relationship. The stated purpose of the Planned Deviation is to “reduce the risk of exacerbating potential health concerns associated with algal blooms in Lake Okeechobee, the St. Lucie, and Caloosahatchee estuaries, while not impacting other project purposes.” Supplemental EA at 1-2. As an initial note, that stated purpose is not related to “minimizing nutrients and their effects on fish and wildlife.” More importantly, the Supplemental EA provides no substantive evidence that the Planned Deviation will actually reduce the risks of concerns associated with HABs. As the Modeling Analysis explains, “[t]he biggest benefit overall is the increased flexibility to hold back releases when algal blooms are at highest risk of forming, created by making releases earlier in the year.” Appendix B to 2020 LORS Planned Deviation Supp. EA at 35. Yet the Supplemental EA provides no evidence that holding back releases creates a net reduction in the impacts of HABs. This flexibility *might* reduce impacts to the northern estuary communities, by withholding some small percent of discharges when HABs are present in Lake Okeechobee, but that does not make the

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bloom disappear or shield Lake Okeechobee and the surrounding area from the potential impacts the bloom may cause. Thus, at best the USACE is essentially playing a shell game with HAB impacts, swapping impacts to the northern estuaries with impacts to Lake Okeechobee and the surrounding area, while proposing no action that will actually address this serious issue.

While the Supplemental EA does not substantiate any net water quality benefits, as the next section explains in greater detail, it does show a significant reduction in water supply performance in Lake Okeechobee. This is an inversion of the USACE authority, the sacrifice of a primary purpose of Lake Okeechobee for unsubstantiated water quality benefits. Thus, the USACE lacks authority for the Planned Deviation.

iii. The Planned Deviation will have a significant impact on Lake Okeechobee's water supply performance and requires an Environmental Impact Statement.

In response to comments received on the 2019 Planned Deviation, the USACE performed modeling analysis to evaluate potential effects of the 2020 Planned Deviation. This analysis compares five hypothetical operational scenarios that were programmed to test the Proposed Deviation's performance relative to a baseline scenario, LORS 08. Thus, the Modeling Analysis provides a relative comparison between these hypothetical operational regimes and LORS 08.

This analysis is insufficient in the context of a Planned Deviation to LORS 08. LORS 08 was intended to be an interim schedule that was required to respond to high levels in Lake Okeechobee that caused integrity issues and concerns for Herbert Hoover Dike, to high volume releases to the estuaries, and impacts to Lake Okeechobee littoral zones. LORS 08 Supp. Env. Impact Stmt. at iv. To address those needs, the USACE replaced the existing schedule, Water Supply and Environmental schedule (WSE), with LORS 08, which made a trade-off to reduce the incidence of high Lake-stage events by significantly lowering the Lake, increasing the frequency of low-stage events thereby reducing water-supply performance. LORS 08 Supp. Env. Impact Stmt. at iii. Thus, since

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the USACE is not proposing a new schedule, but rather amending LORS 08, the USACE should analyze the impacts to Lake Okeechobee's authorized purposes cumulatively in the context of the plan it is amending, i.e., as the impacts relative to WSE caused by LORS 08 and this Planned Deviation. See *Florida Wildlife Federation v. U.S. Army Corps of Engineers*, 401 F. Supp.2d 1298, 1333 (S.D. FL 2005)(holding EA deficient in part because USACE failed to consider the cumulative impacts of proposed development).

The Planned Deviation Will Significantly Impact Water Supply Performance Even Considered in Isolation

The USACE's analysis shows that by itself the Planned Deviation will substantially impact water supply performance on Lake Okeechobee. USACE Modeling Analysis analyzed impacts to the LOSA, which includes water supply to both Brighton and Big Cypress Reservations. The USACE analysis used two performance metrics to evaluate potential water supply impacts to LOSA:

- 1) The frequency and duration of LOSA water shortages expressed as the number of months and years of cutbacks, and
- 2) The volume of cutbacks during the 10 worst drought years in the period of record.

Appendix B to 2020 LORS Planned Deviation Supp. EA at 23. The USACE analysis of the frequency and duration of LOSA water shortages show decreased performance under all modeling scenarios. The three worst performing scenarios all registered three additional "cutback months" (defined as months with more than 7 days of cutbacks, is greater than or equal to 18,000 ac-ft, and greater than or equal to 10% of demand), which amounts to about a 6% increase in such months when compared to LORS 08. The analysis also showed that under three scenarios there would be at least one additional year that experienced such a cutback, a 5% increase over LORS 08. Moreover, the LOSA analysis showed similar increases in the average volume of cutbacks experienced in the ten worst drought years. The worst performing scenario had 5% greater cutback than LORS 08. Appendix B to 2020 LORS Planned Deviation Supp. EA at 27, Figure 14.

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The Modeling Analysis does not represent the full spectrum of Impacts to water supply performance because it was constrained in ways the Planned Deviation is not.

When the USACE performed the Modeling Analysis that is included in Appendix B to the Supplemental EA, it included restrictions called “credit limits” in the model that limited the total amount of advance releases that could be made under any scenario modeled. Similar operational restrictions do not appear in the Planned Deviation, however. The Planned Deviation would require the USACE to set a credit limit each year prior to taking any action, but it does not limit the limit to what USACE modeled for this analysis. See Appendix B to 2020 LORS Planned Deviation Supp. EA at 4. Moreover, it is not clear that the limits chosen for the model, 120,000 ac-ft, 200,000 ac-ft, and 400,000 ac-ft, correspond with any physical or procedural constraints that will so limit USACE operation of Lake Okeechobee under the Planned Deviation in real life. Thus, there is little certainty that the Modeling Analysis portrays anywhere close to the full range of potential impacts the Planned Deviation could cause. Despite this, the Supplemental EA states that Appendix B shows the “potential range of effects on Lake stage,” and concludes based on the Appendix B analysis that generally the “deviation performs similarly to [LORS 08] with negligible to minor effects overall” to Lake stage.

The Modeling Analysis describes these impacts to water supply performance as minor, but a 5% reduction in water supply performance is hardly minor. This is especially true considering the artificial constraints placed on the Modeling Analysis mean the potential impacts to water supply performance that the Planned Deviation may cause are likely greater than 5%. Moreover, the proper context for the analysis of the impacts of the Planned Deviation to LOSA water supply performance should include a comparison of the total decrease in water supply performance caused by both LORS 08 and the Planned Deviation relative to WSE. Since LORS 08 decreased water supply performance relative to WSE, the actually water supply impacts are

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much greater still, and certainly qualify as significant. It certainly does not meet the objective to not impact other project purposes.

iv. The Supplemental EA provides no substantive evidence that increased flexibility will achieve the stated purpose of the Planned Deviation.

The USACE's stated purpose for this Planned Deviation is to "reduce the risk of exacerbating potential health concerns associated with algal blooms in Lake Okeechobee, the St. Lucie and Caloosahatchee estuaries while not impacting other project purposes." 2020 LORS Planned Deviation Supp. EA at 1-2. In addition, it lists its goals and objectives as:

1. Ensure public health and safety;
2. Manage Lake Okeechobee at optimal lake levels to allow recovery of the lake's environment and natural resources;
3. Reduce high regulatory releases to the estuaries; and
4. Continue to meet congressionally authorized project purposes including, flood control, water supply, navigation, fish and wildlife enhancement, and recreation.

2020 LORS Planned Deviation Supp. EA at 1-14. To accomplish these goals and objectives, the USACE proposes a Planned Deviation that "would allow for greater flexibility with water management decisions while balancing congressionally authorized project purposes. 2020 LORS Planned Deviation Supp. EA at 1-14.

Essentially, the Planned Deviation provides this flexibility by allowing the USACE to make advance discharges to the coastal estuaries and to the south from Lake Okeechobee at greater volumes than LORS 08 currently allows in an attempt to be able to withhold discharges to the estuaries later in the season when HABs may be present in either Lake Okeechobee, the coastal estuaries, or in the canals that connect the two. See Appx. A

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2020 LORS Planned Deviation Supp. EA at A-1 and 2. The USACE links these operations to the following potential benefits:

1. They could reduce the potential health concerns associated with HABs, (2020 LORS Planned Deviation Supp. EA at 1-2);
2. They could benefit ecological conditions in the estuaries for the overall environment, (2020 LORS Planned Deviation Supp. EA at 1-3);
3. Decreasing HAB occurrence in Lake Okeechobee by reducing the incidence of periods of extended high lake stages, (2020 LORS Planned Deviation Supp. EA at 1-8)
4. By maintaining Lake Okeechobee within the ecological stage envelope, which helps to promote submerged aquatic vegetation that reduces incidence of HABs, (2020 LORS Planned Deviation Supp. EA at 1-8); and
5. By maintaining Lake Okeechobee at lower stages or reducing the duration of high-stage conditions during peak algal bloom months, the potential for littoral-zone algal blooms and then seed pelagic-zone blooms is reduced, (2020 LORS Planned Deviation Supp. EA at 1-8).

Yet shortly after discussing these potential benefits, the USACE includes a number of disclaimers that undermine the significance of the causal link between Lake Okeechobee operations and many of these potential benefits, especially the reduction in the incidence of HAB on Lake Okeechobee. For instance, USACE states, “[r]etaining water in Lake Okeechobee or releasing water from Lake Okeechobee has no known short-term impact to HAB conditions in Lake Okeechobee.” 2020 LORS Planned Deviation Supp. EA at 1-9. The Supplemental EA also notes that USACE does not control the main factors controlling bloom conditions in Lake Okeechobee, i.e., sunlight, nutrient loads, wind conditions, temperature, and still/stagnant/stratified water conditions. 2020 LORS Planned Deviation Supp. EA at 1-9. To that end, the Supplemental EA states further, “the water releases the Corps is able to make from the federally managed structures in the short term and governed by LORS 2008 are small relative to the volume/extent of Lake Okeechobee and are not able to disrupt stratification conditions in Lake Okeechobee

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except in close proximity to the [outlet] structures.” Given these statements, how does the USACE expect this Planned Deviation to achieve bullet points 3 and 5 above? Has USACE quantified the decrease in HAB occurrence in Lake Okeechobee that will be achieved by this increased flexibility?

The Supplemental EA also includes a disclaimer regarding the potential impacts that the Planned Deviation may have on the incidence of HABs in the estuaries. It states, “in general, Lake Okeechobee freshwater releases can lower salinities in the estuaries which provide a larger habitat area for the fresh water algal blooms and contribute additional nutrients that promote blue green algae blooms in the estuaries.” 2020 LORS Planned Deviation Supp. EA at 1-9. The modeling analysis provided in Appendix B to the Supplemental EA includes two metrics that measure effects to the northern estuaries. These metrics show an improvement in salinity conditions in the estuaries, but they do not provide any information as to how the Planned Deviation would reduce health concerns associated with discharges to the estuaries, or whether the Planned Deviation would provide a net reduction in the amount of HABs sent from Lake Okeechobee to the northern estuaries. Did the USACE analyze potential impacts that may be caused by increased habitat area for fresh water algal blooms caused by changes in salinities and/or nutrient loads caused by the Planned Deviation?

Bullet point 4 describes a reduction in the incidence of HABs in Lake Okeechobee caused by maintaining the lake stage within the ecological stage envelope for a greater period of time. USACE included modeling analysis that evaluated how well the Planned Deviation achieved this benefit relative to LORS 08 under five hypothetical scenarios. Appendix B to 2020 LORS Planned Deviation Supp. EA at 19. The USACE used the RECOVER Lake Okeechobee stage envelope standard score for its analysis, which measures the number of times the lake stage departs from within the upper and lower bounds of the ecological stage envelope. Appendix B to 2020 LORS Planned Deviation Supp. EA at 19. Two of the scenarios performed exactly the same as LORS 08, while the other three performed

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slightly worse than LORS 08.¹ Similarly, four of the scenarios performed exactly the same as LORS 08 regarding the total percentage of time spent in the ecological envelope, while one performed worse, spending less time overall in the target envelope. Appendix B to 2020 LORS Planned Deviation Supp. EA at 19. Thus it does not appear that the Planned Deviation will reduce HAB occurrence on Lake Okeechobee by allowing the USACE to keep the Lake stage within the ecological target for a greater period of time over LORS 08.

Regarding the benefits to the ecological conditions within the northern estuaries, the USACE's modeling does appear to show some benefits will accrue based on its analysis of the five scenarios it modeled. Yet, as the USACE points out, the intent of the planned deviation is to create flexibility for the USACE to hold back releases from Lake Okeechobee to the estuaries, not to improve salinity performance in the estuaries. Appendix B to 2020 LORS Planned Deviation Supp. EA at 29. As mentioned above and in the Supplemental EA, changes in salinity in the estuaries may foster favorable conditions for increasing HABs. Moreover, USACE's analysis shows that at least a portion of these benefits are achieved by allowing the C-44 to back flow into Lake Okeechobee more frequently than under LORS 08. Therefore, it appears that the USACE needs to provide further analysis to show how these improved estuarine conditions will reduce the risk of exacerbating potential health concerns associated with algal blooms in Lake Okeechobee, the St. Lucie and Caloosahatchee estuaries.

The Supplemental EA Modeling Analysis states that the biggest benefit from the Planned Deviation is the increased flexibility to hold back releases when algal blooms are at highest risk of forming, created by making releases earlier in the year." Appendix B to 2020 LORS Planned Deviation Supp. EA at 35. Yet, it provides little evidence that that is the case or that quantifies the benefit in any way. The Supplemental EA does not provide an estimate or any other quantification of the net reduction in HABs that this increased

¹ The 200K and 400K scenario both performed worse on the departures below the envelope, but both performed slightly better than LORS 08 regarding departures above the envelope.

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flexibility will allow it to realize. Nor does it provide any other significant evidence that shows the increased flexibility will achieve the stated purpose of the Planned Deviation, to reduce the risk of exacerbating potential health concerns associated with algal blooms in Lake Okeechobee, the St. Lucie and Caloosahatchee estuaries while not impacting other project purposes. Seminole technical staff and Tribal members have long believed in restoration for Lake Okeechobee and the Everglades. This can only be accomplished by returning Lake operations to one that mimics historic conditions. As you are aware, historically, water from Lake Okeechobee predominately went south, very little to the east and some flows to the west. To reflect historical operations future operational plans should reflect on this historical regime, by maintaining Lake levels and directing more timely releases to south.

v. Conclusion

The Seminole Tribe is still concerned with the Planned Deviation despite the additional modeling USACE has done in response to comments it received on the 2019 Planned Deviation. These concerns relate to the USACE's ability to fulfil its Trust Responsibilities to the Seminole Tribe and provide meaningful consultation and protect the Seminole Tribe's water rights. The impacts to LOSA water supply shown in the Modeling Analysis are significant, and are only made more so in light of the fact that the modeling included artificial constraints that are not reflected in the actual Planned Deviation. Moreover, the Supplemental EA's analysis does not show any quantifiable benefit that addresses the stated purpose for the Planned Deviation, mitigating the risks posed by HABs. In light of these considerations, the action the USACE now proposes is significant and requires a more detailed analysis than what has been provided for in the Supplemental EA. Rather than preparing a completely separate Environmental Impact Statement, the operations the USACE wants to implement would be well-suited for consideration in the Lake Okeechobee System Operating Manual planning study that would look at the broad range of alternatives available, which is still in the early stages. Due to the long-term implications that could occur with any of these actions on Lake

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A PLACE TO LEARN. A PLACE TO REMEMBER.



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Preservation Officer,
Dr. Paul N. Backhouse

Tribal Historic Preservation
Office Director
Ms. Anne Mullins

Director of the Ah-Tah-Thi-Ki Museum
Ms. Kate Macuen

Director of the Environmental
Resources Management Department
Mr. Kevin Cunniff

"THE LAND I WAS UPON I LOVED; MY BODY IS MADE OF ITS SANDS. COACOCHEE."

H.E.R.O.

HERITAGE AND ENVIRONMENT RESOURCES OFFICE

Okeechobee, the Greater Everglades and the estuaries, we recommend that we work together to provide a comprehensive solution that benefits all of Florida.

Thank you for your consideration.

Sincerely,



Paul N. Backhouse, Ph.D. RPA
Senior Director, Heritage and Environment
Resources Office
Tribal Historic Preservation Officer
Seminole Tribe of Florida

CC: Cynthia G. (Cindy) Thomas, Army Corps Tribal Liaison
Marcellus Osceola, Chairman, Seminole Tribe of Florida
Jim Shore, Esquire, General Counsel, Seminole Tribe of Florida
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