FINDING THE COMMON GROUND

THE EVERGLADES MEDIATION: REFRAMING THE POLITICS OF CONSENSUS

Robert M. Jones

"When you try to change any single thing, you find it hitched to everything else in the universe."

-John Muir, 1910

"There are no other Everglades in the World. They are, and always have been one of the unique regions of the earth, remote, never wholly known. They are unique also in the simplicity, the diversity, and the related harmony of the forms of life they enclose."

--Marjory Stoneman Douglas, 1947 The Everglades, River of Grass

"In truth, he didn’t much care for the Everglades; it was torpid, swampy, crawling with bugs. Once, campaigning at a Miccosukee tribal village, the congressman consented to an airboat ride as a sensational photo opportunity. The airboat ran out of fuel on the Shark River and the congressman spent two wretched hours picking blood-swollen mosquitoes out of his ears. ‘And I’ve seen prettier water, in a pig trough.’ he told his aide."

- Carl Hiaasen, 1994, Strip Tease

I. INTRODUCTION

The Everglades mediation and its outcome may seem, at first glance, to represent another stumble on the path towards achieving a regional consensus on the future of restoring the Everglades. Things are not always as they seem. To paraphrase John Muir, for every change over the past decade in the Florida Everglades brought about by negotiated solutions to problems of the moment, the lesson learned is that everything and everyone is hitched together within this complex ecosystem.

Water resource conflicts such as those surrounding the Everglades present special difficulties for decision-makers. These include: multiple stakeholders; different, sometimes unconnected regulatory and planning frameworks; short and longer term impacts; intergovernmental wrangling; and a blend of challenging policy, legal, scientific, engineering and fiscal issues all colored by a high degree of uncertainty. There is often great tension within parties and related interests over the manner in which policy makers, lawyers or scientists lead or follow in the pursuit of their interests. The struggle over the future of the Everglades ecosystem during the past decade has been bedeviled by these factors. These, in turn, have combined to render
traditional judicial and legislative decision-making often ineffective in managing the conflicts surrounding water resource decisions and in bringing forth solutions to those conflicts.

Over the past decade, the debates surrounding the efforts to restore the Everglades ecosystem have been taken up simultaneously in legal, political and technical forums. In which forum should stakeholders frame the key issues surrounding the restoration effort? What are the limits and constraints of each forum? What kinds of solutions can each forum offer? These considerations, which the stakeholders grappled with, also present a challenge to those trying to judge the success of dispute resolution interventions taking place within an ongoing political and economic conflict. In such a complex environment the achievement of a mediated agreement—the traditional touchstone for assessing dispute resolution success—rarely presents an adequate measure. This case suggests an additional measure which focuses on how whether the dispute resolution intervention enabled the parties to create new options for solving the problems met by reframing them as part of a larger, dynamic inter-related system involving political, economic and ecological forces.

By the Spring of 1991 Florida and the federal government had spent close to three years and $15 million in legal fees in pursuing and defending the Everglades lawsuit. The newly elected governor of Florida, Lawton Chiles, who had campaigned on settling the Everglades lawsuit, decided to go to court himself as a lawyer for the state, to ask the judge for a year's stay of the litigation to continue and conclude the settlement negotiations. The U.S. Attorney in Miami, Dexter Lehtinen who filed the lawsuit in 1988, opposed the delay telling the judge, "This lawsuit is not about permits. It is not about plans either... What we did was sue over the quality of the water." He lifted a glass of water, which he said had been taken from the Everglades over the weekend, asserting, "I haven't heard anything in court today saying that the water is any better than it was six months ago... Why won't they stand at this podium and say that the water is dirty?" At this point, Governor Chiles made an offer of surrender... "I want to surrender. I've brought my sword. I want to find out who I can give my sword to." Chiles offered to stipulate that the water was dirty, thus conceding a key point the state's lawyers had been resisting for nearly three years. The hearing ended with the judge granting a two-month stay for the parties to try to secure a negotiated settlement.

This moment of courtroom drama was designed to move the intergovernmental impasse away from the courts and towards policy and technical forums for possible resolution. However, it may also represent a capitulation by the state and federal policy makers to the legally formulated issues and to the logic and imperatives of the litigation process. In the aftermath of the
Governor’s surrender and embrace of a settlement process, the scientists advising the state and federal interests continued to experience frustration as they worked within legally imposed constraints in their efforts to formulate an agreement on the technical and scientific issues. The state and federal negotiators, who followed on the Governor’s surrender, only reached a settlement after the scientists advising both federal and state agencies reached a facilitated accord on the technical details. (John, 165).

### CHRONOLOGY OF KEY EVENTS IN THE EVERGLADES MEDIATION

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>1906</td>
<td>Formation of the Everglades Drainage District</td>
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<td>1947</td>
<td>Creation of Everglades National Park</td>
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<td>1948</td>
<td>Congress approves the Central and Southern Florida Project for flood control and other purposes.</td>
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<td>1960s</td>
<td>Growth of the sugar industry in the Everglades Agricultural Area following the Revolution in Cuba.</td>
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<td>1968</td>
<td>Proposed new jet airport in the Everglades sparks the creation of the Everglades Coalition of environmental organizations to lobby against and for the creation of the Big Cypress National Preserve</td>
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<td>1972</td>
<td>Congress guarantees minimum flows of water into Everglades National Park</td>
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<td>1983</td>
<td>East Everglades Mediation- Farmers &amp; South Florida Water Management District</td>
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<td>1984</td>
<td>Kissimmee River Mediation- Ranchers, Dairy Farmers, state &amp; local government, South Florida Water Management District</td>
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<td>1986</td>
<td>Seminole Indian facilitated Water Compact, Federal, state and water management District</td>
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<td>1987</td>
<td>Passage of the Florida Surface Water Improvement and Management Act</td>
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<td>1988</td>
<td><strong>Filing of the federal Everglades lawsuit</strong>, U.S. v. the South Florida Water Management District, Florida Audubon Society intervenes followed by other environmental organizations, the City of Belle Glade and agricultural interests.</td>
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<td>1989</td>
<td>Big Cypress Mediation- U.S. Fish and Wildlife Service &amp; Florida Game and Fresh Water Fish Commission</td>
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<td>1990</td>
<td>Republican Governor Martinez fails to secure a settlement. Lawton Chiles, democrat, elected Governor. Chiles promises to settle lawsuit within six months.</td>
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<td>1991</td>
<td>Governor Chiles appears in federal court and “surrenders.” Facilitated negotiations follow with federal and state scientists addressing water quality and settlement between federal and state governments reached based on the technical agreement by scientists.</td>
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<td>1992</td>
<td>Implementation of settlement falters as Agricultural interests contest state rules. Federal and state interests decide to mediate and select Gerald Comick of Seattle as mediator.</td>
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<td>1993</td>
<td><strong>Everglades Mediation gets underway.</strong> Mediator, after assessment, focuses on developing consensus on disputed technical issues leading to technical agreement in April and to agreement on principles in July, announced by Secretary of Interior, Bruce Babbitt. Intensive negotiations on details follow, but fall short of settlement. Impasse declared in December.</td>
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<td>1994</td>
<td>Florida legislature passes the <strong>Everglades Forever Act</strong> in May, 1994 based largely on the framework negotiated through the mediation. Governor appoints the <strong>Commission for a Sustainable South Florida</strong> with all stakeholders represented to continue the dialogue and seek consensus on the future of the Everglades and the South Florida region.</td>
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<td>1995</td>
<td>In October, the Commission reaches consensus on its initial report that posits the Everglades system, on its current course, is unsustainable and sets forth 112 specific recommendations for achieving sustainability.</td>
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<td>1996</td>
<td>The Commission continues to monitor the implementation of its report and reaches consensus on conceptual plan recommendations to Secretary Babbitt on the Congressionally mandated Army Corp of Engineers restudy of the Everglades water conveyance system.</td>
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<tr>
<td>1997</td>
<td>The Commission reached consensus on recommendations to Secretary Babbitt on how to spend $200 million in newly appropriated Farm Bill funds.</td>
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This settlement between the state and federal regulators turned out to be partial and served to set the stage for further conflicts. Interest groups who had not been invited to the settlement table, now filed lawsuits and administrative appeals as the governments began to move to implement the legal accord. Even the technical scientific body that the Court appointed under the terms of the settlement, operated in a dysfunctional adversarial manner using majority voting and review procedures established by the court and attorneys in the settlement agreement.

The Everglades litigation initiated in 1988 spawned over 36 separate lawsuits, administrative proceedings as well as related settlement agreements and state and federal legislation. This lawsuit and its progeny provide an exceedingly complex and challenging context for applying and assessing environmental and intergovernmental dispute resolution.
II. THE EVERGLADES--THE LAST 100 YEARS

The freshwater wetlands of the Everglades in the late 19th century extended 130 miles from Lake Okeechobee to Florida Bay and covered about 4,000 square miles. In 1890 there were about 30,000 people in South Florida. By 1950 this had grown to nearly one million. As a result of devastating floods in the late 1940s, the federal government undertook the Central and South Florida Flood Control Project, the largest public works project in U.S. history up to that time. The drainage and flood control protection afforded by this project opened additional areas in Southeast Florida to agriculture and development and the regional population soared to over 5.2 million by 1990, representing 40% of Florida's total current population. A conservative demographic projection suggests that the region's population will grow to over 8 million by 2010. (CSSF Interim Report). The project also partitioned the historic Everglades so that by 1990: 32% were areas designated for water management; 20% in preserve areas including Everglades National Park; 27% in agriculture; 12% in urban use; and 9% in drained undeveloped areas.

During the last 100 years, the focus of governmental policies have moved from draining the Everglades for agricultural purposes at the turn of the century, to flood control in the 1920’s, to maintaining water supply and flood control in the rapidly urbanizing region in the 1950s, to the more recent focus on reducing pollutants and maintaining water flow control into Everglades National Park. Under these policies, the Everglades has been channeled, diked and drained into compartments that interrupt the historic flow of water through this ecosystem. While significant portions of the Everglades have been placed in public ownership over the past 50 years, including Everglades National Park, nearly half of the original Everglades has been drained for agriculture and development. Roughly one quarter of the system has been turned into sugar cane and vegetable farms while another quarter has become urbanized. In addition, a canal system moves water off the land as quickly as possible and discharges substantial fresh water to the Atlantic Ocean. The marsh areas north of the Everglades National Park have been dissected into shallow diked impoundment areas that impede the natural flow. (Blake, 1980, pp. 100-20)

Managing this vast resource currently is a myriad of federal, state, regional and local public agencies each involved in decision making and planning for water resource issues in South Florida. This includes 16 county governments, 122 cities, two tribal governments, a regional water management District, numerous special water supply Districts, five regional planning councils, five major state environmental planning and regulatory agencies and eleven federal agency managers. These governments and agencies have different missions, mandates and political jurisdictions.
In 1995 there were approximately 200 plans addressing the storage, treatment, distribution and conservation of water in South Florida. These plans feature different planning time frames, anywhere from five to 55 years, and they provide minimal formal mechanisms for ensuring consistency and coordination between and among these plans and programs. (CSSF Final Report, 1995)

III. THE 1980S: MEDIATING SPECIFIC CONFLICTS IN THE EVERGLADES

The use of mediation in 1993 to try to resolve the various and systemic conflicts in the Everglades actually followed 10 years of successful mediation efforts by state and regional water managers on different issues and in different parts of the Everglades system. Up to the 1980s the environmental problems presented by the flood control and water supply system built during the 1950s, if addressed at all, were dealt with as technical water management issues by a small group of water managers, policy makers and private sector agricultural interests. Starting in the early 1980s in the midst of a growing environmental movement and scientific community, the problem was reframed as a regional water management challenge involving water quality, water supply and flood control issues. These issues often pit local, regional and state, federal governments and agricultural and environmental interests in political and policy conflicts. In 1982, in response to these emerging conflicts, then Governor Bob Graham established the Save Our Everglades initiative to enhance intergovernmental coordination in efforts to deal with the Everglades more systematically. While it developed a record of coordination and communication, it did not function as an effective forum for consensus building and conflict resolution among public agencies and private interests on Everglades issues.

Regional, state and federal governments played key roles in convening various collaborative dispute resolution efforts to address some of the emerging, but highly complex problems in the Everglades. These problems represented a difficult mix of technical and scientific water management matters along with political, policy and economic decision making which together had direct impacts on the region’s quality of life.

On the southern end of the Everglades, in the early 1980’s private parties and government agencies experienced a series of conflicts over water management in the East Everglades. In 1983 the Everglades National Park superintendent urgently requested a change in the water release schedule in an area in the East Everglades called the Northeast Shark Slough to help restore the ecological quality of the Park. The U.S. Army Corp of Engineers and the South Florida Water Management District and other state agencies were asked to support the request.
The requested releases would have required the opening of the water control gate which provided flood control for East Everglades farmers and homeowners. The gate had been kept closed in accordance with standards established by the Corps. However, in 1983 Congress authorized the opening of the gate on an experimental basis and provided funds for possible payments for any homeowners or farmers who were adversely affected.

The farmers and homeowners in the East Everglades joined in filing a lawsuit against the South Florida Water Management District and the U.S. Army Corps of Engineers to keep the gate closed. The District proposed and the parties agreed to a facilitated settlement process to explore ways to resolve the dispute. The parties produced an agreement that allowed the environmental restoration program to proceed with a jointly designed and monitored process for testing the impacts of releases. Based on the initial testing and assessment the parties agreed to a two-year test from 1985-1987.

The 1984 Kissimmee River mediation focused on the other end of the system-- the headlands to the Everglades system. Along the Kissimmee River was more irrigated pasture land than acres for vegetables or sugar. This region had been transformed by the Army Corps of Engineers' flood control efforts during the 1950's when canals and drainage ditches were dug making possible the development of large cattle ranches and dairies. Thousands of acres were reclaimed for ranching and investments were made in artificial grasses for better livestock forage. However, these artificial grasses needed increased irrigation and fertilizer to thrive, and the increased pollution from cattle wastes draining off into streams and lakes in the region, including Lake Okeechobee, began to present serious environmental problems by the early 1980s.

In 1984 amidst growing controversy over plans to protect the lower Kissimmee River and Taylor Creek drainage basins at the headlands of the Everglades system, Governor Bob Graham appointed a negotiating committee of 33 members comprised of representatives of local government, regional, state and federal agencies, agricultural and ranching, business and environmental interests. This was the preliminary step under a Florida statute for designating environmentally "critical areas." If the negotiating committee failed to reach consensus on a plan of action to protect the lower Kissimmee, the statute provided for extraordinary state regulatory powers to intervene and address the problem.

The Governor appointed Timer Powers, a respected civic leader, businessman and member of the Water Management District governing board, to chair the Kissimmee River Resource Planning and Management Committee. The Committee's charge was to review land
use problems, analyze existing plans and programs and recommend improved plans for land use, water quality, land acquisition and economic development in an area covering parts of five different counties. Powers retained environmental mediator Patricia Bidol to assist the committee in designing and facilitating a negotiation process to produce a consensus plan to protect the lower Kissimmee River and Taylor Creek drainage basins. During the course of the 15 months of negotiations, the committee reached agreement on modifications of agricultural regulations for the study area including more than 30 action goals and implementation actions for land acquisition, water quality, land use and economic development.

In 1978 the Seminole Tribe of Florida filed suit in federal court against the South Florida Water Management District and the State claiming the state had granted flowage easements over their tribal lands in the Everglades without compensation or necessary Congressional approval. The suit also included historic claims to much of the land in Florida reflecting a century old dispute over land claims. The Seminole Tribe, with almost 2,000 members, resented the fact that drainage system work on or affecting their lands had been done for years by the District without consulting the Tribe. In 1985 the Tribe announced it would oppose a District request to the U.S. Army Corp of Engineers for approval of a reclamation project. The settlement of tribal water rights claims was key to then Governor Graham's new "Save Our Everglades" program and to Everglades restoration. The Water Management District Board, fresh from its successes in mediating the Kissimmee River and East Everglades cases with the leadership and active facilitation role of its board members, made it a formal District policy that it would resort to litigation only as a very last resort. In 1985, the Board formally invited the Tribe to negotiate with the District and the state to resolve their differences. In an unusual response, the Tribe accepted but requested the Board agreed to appoint board member Timer Powers to serve as a facilitator in the efforts to reach an accord.

The negotiations moved slowly, initially focusing on the scope of tribal water rights and the state's authority to regulate water use and management on reservation and trust lands. The Seminole's goals included preservation of the tribal land, their customs and traditions and they negotiated over water supply, the quality of hunting and fishing and needed economic opportunities for tribal members. In 1987, the parties reached a written settlement in the form of a water rights compact which was later approved by Congress and which, for the first time, established the tribe's water rights within the framework of Florida's water management system. The tribe agreed to the provisions of the state water use and management system but received special provisions which left it free of direct administration by the state's agencies. The District
agreed to provide in-kind services to help the tribe develop its own water management systems to become more efficient in farming, water supply and land development.

These modest successes however did not prepare the District and others to withstand the legal assault and political firestorm unleashed by the filing of the Federal Everglades lawsuit in 1988.

IV. RESOLVING SYSTEM-WIDE EVERGLADES CONFLICTS- THE LAWSUIT AND THE MEDIATION.

A. Setting the Stage: The Federal Everglades Lawsuit

In 1988, the U.S. Attorney in Miami filed suit against the state of Florida alleging its failure to enforce state water quality standards resulting in negative impacts on the federally held park land in the Everglades. Over the next five years, this lawsuit spawned over 36 separate lawsuits, administrative challenges and state and federal legislation. It also severely tested the reputation the Water Management District had developed earlier in the 1980's using mediation and collaborative approaches for resolving water resource conflicts.

The suit claimed state agencies failed to prevent the discharge of nutrient polluted water into Everglades National Park from agricultural activities in the Everglades Agricultural Area, the 700,000 acre basin between Lake Okeechobee and the Water Conservation Areas north of the Park. The complaint asked the federal court to mandate that the Water Management District and the state Department of Environmental Protection enforce all applicable water quality standards; that they be enjoined from delivering polluted water to the Park and the Loxahatchee National Wildlife Refuge, and that they be enjoined from operating un-permitted structures (e.g. canals, water control structures and pumps) that were alleged to be causing or contributing to the pollution. A key part of this cause of action also sought a translation of the state water quality narrative standards into numeric limits.

In early 1991, after almost three years of intensive pretrial discovery and motion practice, and following a gubernatorial election where the Everglades dispute figured prominently as a campaign issue for the incoming governor Lawton Chiles, the state agency defendants requested from the federal judge a 60-day stay of the proceedings to facilitate settlement negotiations. In May, 1991 Governor Lawton Chiles personally appeared in court arguing for a further stay for settlement discussions and designated the Lt. Governor, Buddy MacKay as the key
administration leader in the settlement effort. Timer Powers, the former governing board member and facilitator for the Kissimmee and Seminole Water cases, was brought back to the Water Management District as assistant Executive Director to focus on facilitating the settlement of the federal Everglades litigation which was having a debilitating effect on both staff and policy makers for the District and the state. It was also draining the parties of over $15 million in legal costs with the pre-trial discovery process not yet completed.

In early 1991, Powers introduced the Lt. Governor to the Florida Conflict Resolution Consortium, a new statewide office of mediation on whose Advisory Council he served. Powers suggested the Consortium might assist in facilitating a solution among the scientists developing a "technical settlement" and in crafting a process to follow any settlement of the federal-state lawsuit that could enable a broader range of stakeholders to come to a table to discuss building consensus on the implementation of any settlement. In Spring, 1991, at an impasse in settlement discussions among the state and federal scientists on the technical issues raised by the Everglades litigation, Powers asked the Consortium staff to facilitate the discussions among the scientists.

When the Consortium facilitators entered there had already been 15 day-long meetings of the state/federal technical group. The scientists, constrained by directives from their lawyers not to share the basis for their computer models on the key issue of acceptable phosphorous levels, were in a state of high frustration. Over the course of seven days of meetings in a period of four weeks, the technical group reached a preliminary consensus on a technical draft agreement. This draft was poured over by the federal and state attorneys and delivered back after two weeks to the scientists with many changes. The scientists nearly broke off discussions after recriminations of bad faith based on the new draft document that the lawyers for both sides had returned to them. However the facilitators, with the assistance of Timer Powers working behind the scenes with the policy leaders and lawyers, restarted the effort with an agreement on groundrules for the involvement of legal counsel, and brought about agreement on the technical basis for a settlement after three more days of negotiations.

The agreement that emerged from these discussions on the technical issues set the framework for the court-approved settlement of the federal lawsuit in February, 1992. In summary, the settlement provided a stipulation that nutrient pollution posed a serious threat for the Everglades National Park and the Loxahatchee Refuge. It set forth a cleanup program establishing interim and long-term phosphorus limits for the Park and the Refuge with the interim limits to be achieved by July, 1997 and long term limits by July, 2002 and included remedial
regulatory programs featuring "Best Management Practices" designed to achieve phosphorous reduction levels for farms in the Everglades Agricultural Area. The agreement called for the unprecedented construction of new water storage facilities through the construction of artificial wetlands. A project of this size had never been tried anywhere in the world before and the parties agreed to establish a research and monitoring program to track compliance and monitor response of the ecosystem and develop numbers for the water quality standard for nutrients.

The settlement process took its toll on the negotiators and their agencies: "The two and half year of costly litigation left a legacy of bitterness and disillusionment. As one top water management District executive said, 'The litigation was very painful for us. We were used to being the good guys, and it told us we were not...'. The most poignant statement was made by Timer Powers. He learned during the settlement negotiation that he had incurable throat cancer. Sometimes he equated the cancer in his throat with the bitterness felt by those who did not have a chance to speak their mind during the negotiation. If people do not have a chance to say their piece, he said, this exclusion will eventually be lethal to the settlement and to the District itself." (John 1994: 172)

The Best Management practices regulation for phosphorous and other pollutants were adopted by the District Governing Board with little controversy and without appeal by agricultural or environmental interests. However, the plan for the expensive artificial wetlands were another matter entirely, prompting a spate of appeals and litigation. Even if the District were able to defeat legal challenges to the proposed plan, other litigation loomed as the District would be forced to condemn private lands to build the artificial wetlands and assess farmers for the cost of building the wetlands after determining how much phosphorus each farm was contributing-- a technically challenging exercise and an invitation to more litigation. As Lt. Governor Buddy MacKay later stated:

"When someone says we can beat you in court, the first instinct is to get ready to fight. But after four or five months, we came down to earth. It became clear that the industry could tie us up in court for five to ten years and postpone the day when we got started on cleaning up the Everglades." (John 1994: 175)

B. The Everglades Mediation

"The Everglades will be the prototype that proves across this country that we have the capacity to deal with these issues....We're all going to be coming back to the Everglades as the test case for all park systems, for all state, for the entire country."

- Bruce Babbitt, Secretary, U.S. Department of Interior, 1992
A year later, in late 1992, various stakeholders who were not allowed direct participation in the 1991 Everglades lawsuit settlement negotiations including agricultural, tribal and environmental interests, were now suing the state and federal government challenging the settlement process and its outcomes and pursuing administrative appeals of the District's adoption of a key state plan (the Everglades Surface Water Improvement Management Plan, known as the "SWIM plan").

Scientists representing federal and state governmental and private interests, were locked in adversarial stances as they participated on a technical committee formed under the settlement agreement. The Committee was charged to look broadly at the science needed to implement the settlement, including translating the water quality standards into a numeric standards. In November, 1992, the District organized a half-day public meeting of representatives of state agencies, the U.S. Department of Justice and other federal agencies, environmental organizations and the sugar industry. The discussion was civil but did not get far beyond a statement of different positions. This meeting convinced the District and others that the parties needed a professional mediator, who could help orchestrate a series of less public conversations leading to negotiations and a reframing of the issues. The state and federal governments contacted the Florida Conflict Resolution Consortium for assistance in selecting an acceptable mediator. The parties interviewed several mediators and selected Gerald Cormick of Seattle, Washington, an environmental mediator credited with having conducted the first environmental mediation in 1974 at the behest of then Governor Evans on the Snoqualimie River dam project in Washington state. (John 1994: 175)

Cormick conducted a series of initial assessment meetings and caucuses with different parties in December 1992 and January 1993. He then proposed organizing a technical group and a policy group similar to the 1991 settlement negotiations. However, these would be more open with the active participation of industry, the state, the District, federal officials, environmentalists, tribes and any local governments that were interested. In the first several months, the technical group met far more often than the policy group and the mediator "spent hours shuttling between the participants and engaging in long conversations over the phone. The atmosphere was much more open that it had been in 1991. For example, there were no lawyers to keep scientist from sharing their ideas about the effects of phosphorus on wetlands." (John 1994: 176-77)
With the mediator's assistance, the technical group was able to develop consensus on a plan which "addressed far more than the polluted waters passing through pumps at the southern edge of the Everglades Agricultural Area, which had been the focus of the U.S. Attorney's lawsuit. The plan attempted to help native Americans, improve the hydroperiod, and reduce unwanted discharges of fresh water into saline estuaries. As well as helping the Everglades, the plan even offered some relief to Florida Bay, the portion of the Gulf of Mexico just south of the Everglades... by making a little more fresh water available." (John 1994: 177)

After several more rounds of mediated negotiations in Florida and Washington with top Interior Department officials, the executives of U.S. Sugar and Flo-Sun and Lt. Governor Buddy MacKay, Secretary Babbittt appeared at a press conference in July, 1993 to announce an agreement on a "statement of principles." This statement provided that the sugar industry agreed to withdraw its lawsuits after a 90 day period during which the settlement details would be worked out. The industry agreed to pay up to $322 million over twenty years to help build a larger system of wetlands than had been called for in the 1991 settlement agreement. Secretary Babbittt stated at the press conference that, "The River of Grass has been given a new lease on life. This is a tremendous step toward the restoration of a unique and beautiful ecosystem. We have chosen to spend money where it is needed most, in the Everglades, not the courtroom. With this action we expect to head off what could have been another decade of litigation." (John 1994: 181). However some environmental interests were unhappy with the agreement. One environmental leader suggested, "The secretary of the Interior has a legal responsibility to prevent degradation of Everglades national park, but this is very different from his responsibility to make balanced management decisions for the Bureau of Land Management or national forest lands, where it is his job to reconcile conflicting uses. Bruce decided to be a mediator, and that was the fatal flaw. " (John, 1994: 182-3)

Intensive mediation sessions over the Fall of 1993, principally with lawyers representing sugar, environmental and federal and state governmental interests, failed to produce agreement on the details. The July statement of principles was 15 pages long. The negotiating text by December at the time of impasse included over 700 pages of detailed attempts to develop the legal framework for the final settlement. In December 1993, the mediator and the parties jointly agreed to conclude the mediation effort without a final agreement on the details among the various stakeholder interests.

However, the mediation process did help to reframe the issues in dispute by focusing on the broader ecosystem. Indeed, the concepts and options developed and discussed in the
mediation were incorporated several months later into the Everglades Forever Act of 1994, passed by the Florida legislature in May, 1994. The law resolved some key issues and provided a new framework for addressing many of the key contested technical, policy and financial issues that had been at the heart of the mediation.

C. A Policy Dialogue on Creating a Sustainable South Florida

In March of 1994 during the legislative debate that produced the passage by the Florida legislature of the "Everglades Forever Act of 1994," the Governor created, by executive order, the Commission for a Sustainable South Florida. The Governor hoped through the Commission to assure that a healthy Everglades ecosystem could coexist and be mutually supportive of a sustainable South Florida economy. The Governor appointed Richard Pettigrew, former Speaker of the Florida House of Representatives and an environmental lawyer based in Miami to chair the Commission. Its 42 members represented a much wider array of private and public agency stakeholders than had been involved in the Everglades litigation. The Commission's charge was to develop consensus on actions necessary for Everglades ecosystem restoration, urban redevelopment and for building a strong economy and healthy communities in the region and report initially to the Governor in Fall of 1995.

The Commission retained the Florida Conflict Resolution Consortium a neutral state office created by the Legislature to assist to help design and facilitate its deliberations. For 18 months the Commission educated itself and debated issues in plenary and in committees seeking consensus on many issues including those taken up in the Everglades mediation. The Commission's consensus report included a finding that on its present course, the Everglades and South Florida eco-system was unsustainable and its 110 recommendations addressed how to create a more sustainable system covering a wide array of issues including:

- Restoring key ecosystems including the Everglades to provide adequate supplies of clean, safe water for the natural, human and economic systems;
- Achieving a more clean, health environment by prevent and reversing pollution in South Florida's air, land and water, plants and animals;
- Limiting urban sprawl by establishing urban development boundaries to protect environmental resources and encourage urban redesign and redevelopment supported by good public transportation;
- Protecting wildlife and natural areas by providing for sufficient open space and providing natural and recreational areas for public use;
• Creating quality communities and jobs by providing life-long education and training to ensure a better educated and higher paid workforce while improving quality of life through better health care, housing, safety and cultural programs

• Enhancing intergovernmental coordination and partnerships through the continuation of the Commission and the creation of both an Everglades Charter involving federal, state, regional, local and tribal governments focused on Everglades restoration and an Everglades Partnership of private and public institutions which would promote cooperation in scientific research, management, information sharing and policy making.

The Commission submitted its interim consensus report to the Governor in October, 1995. The Governor asked that it continue to function as a “liaison among a variety of stakeholders, including all entities involved with planning and regulation in South Florida. The Commission, in its report, suggested it could “play an important role in shaping South Florida’s future by forging a stakeholder’s vision and guiding critical resource management issues.” In submitting the consensus report to the Governor, Chairman Pettigrew noted:

“...The Initial Report reaffirms the value of the consensus process which is essential for further Commission involvement in Everglades restoration and urban redevelopment activities. The assistance of the Florida Conflict Resolution Consortium was invaluable. The consensus building process proved successful largely because of the dedicated attendance of the Commission members. The process has established an unprecedented sense of reciprocal trust and common commitment among the Commission members. This in turn lays the foundation for continued efforts toward finding ways to restore the ecosystem while maintaining a healthy economy and quality communities....

...The unanimous adoption of the initial report does not reflect the often contentious discussion and deliberations that led to its adoption, but its content does represent months of difficult negotiations that were needed to find means of resolution. The Commission broke new ground in consensus-building as diametrically opposed stakeholders gradually realigned their positions to reach sustainable solutions."

The Commission continues to provide guidance in the implementation of the report's recommendations as well as build stakeholder consensus on input into Congressionally mandated restoration programs including efforts to restudy and the entire South and Central Florida water system. (Jones, pp5-7)

V. COLLABORATIVE DISPUTE RESOLUTION IN THE EVERGLADES-CONFLICTS IN SEARCH OF FORUMS AND A SYSTEM

The various conflict resolution interventions over the past decade in the Everglades have helped in small and large ways to establish the value and illustrate the limits of collaboration, consensus-building, and conflict resolution among stakeholders in this complex ecosystem and region. Three interrelated concepts are worth exploring in assessing the Everglades mediation and other related dispute resolution interventions:
• The short term failures or partial resolutions are best understood as part of a long-term and successful reframing by stakeholders with each intervention of the problems and solutions in a broader environmental, economic and social system in South Florida.

• The impact that legal, technical and policy forums, perspectives and players have had on the framing of issues and search for solutions; and

• The key role of facilitative leaders who served as champions of the process of dialogue, collaboration and conflict resolution.

A. Defining Dispute Resolution Success in a System

The successful dispute resolution efforts convened by the South Florida Water Management District during 1980's in the Kissimmee River, East Everglades and with the Seminole Tribe did not prepare them for the scale and stakes involved in the intergovernmental lawsuit filed against the state of Florida in 1988 by the Federal Government. The mediation interventions in the Everglades during 1980s worked to resolve matters within apparently discrete parts of the larger system. These "successful" efforts failed to connect their solutions to the broader eco-system because of inadequate political, legal and scientific frameworks.

In the East Everglades and Kissimmee River cases, the dispute resolution efforts did identify issues affecting the broader system but these were not within their control or jurisdiction to address and resolve. In essence, these negotiations sought to resolve the problems presented but in that process they contributed to the growing understanding among stakeholders of the important and critical links with broader restoration efforts and challenges within this vast ecosystem.

Defining success for dispute resolution interventions in a complex system is a challenge because both successful and unsuccessful conflict resolution and consensus building efforts which are often reactive, narrow and ad hoc, can help bring about a more systematic understanding of how to build consensus and take collective actions in the future. For each dispute resolution intervention in the Everglades, there were immediate assessments by the parties and others of its success or failure. However, different longer term measures that acknowledge the importance of sequence and timing of consensus building and of creating a shared understanding of the broader system may be appropriate.
Some observers of recent efforts directed at consensus building among stakeholders have suggested that the metaphor of natural and social systems as complex adaptive systems offers some criteria for “good” consensus building:

...A good consensus process is one which permits a community to be adaptive and to develop a way of function so that it will become more sophisticated, responsive and efficient in meeting social, intellectual and political needs. A good consensus process is therefore one which builds networks and feedback systems, which allows for adaptation to new information and environmental or internal change, and which is self-organizing and evolutionary. A good process is one where learning or even transformation occurs and where the effects continue to reverberate over time.” ((Innes & Booher, 6)

Seen in this light, the mediation effort might be judged along the lines of how well it ended stalemate and opened lines of communication among stakeholders, how well it grounded the debate in validated technical information, how well it set forth a vision for restoring the Everglades and how innovative and feasible were the results of the process. The area of evaluation of these complex cases is one which needs greater attention and creativity by researchers, practitioners and stakeholders in the future.

B. Competing Technical, Legal and Policy Contexts and Perspectives

The Everglades mediation highlights how each different decision making context, found in most complex environmental disputes, define the possibilities and the players (both decision makers and experts) and present constraints and challenges for solutions to emerge within that context. The legal context traditionally presents courts and judges as decision makers who apply a set of standards based on law and precedent which are typically external to the concerns of those in the dispute. Attorneys are “experts” trained to be advocates and practitioners within the rules and protocols of the legal process. In the policy context, at the senior levels, policy makers are decision makers who give effect to polices established by elected officials and who operate to advance the overall interest of the public agency they represent. Policy experts are those managers who utilize the resources and people to pursue agencies' organizational goals. The technical context is the domain of the scientific and technical experts whose expertise is related to their knowledge and skills in applying a variety of disciplines—from natural sciences to behavioral sciences, from engineering to computer sciences. Technical decision making is never independent of policy or legal considerations, but in an idealized setting would be driven by scientific method and the search for consensus on the "truth."

A key task of the mediator in this complex setting is to help manage the timing of the shifts from one context to another so that the process can move towards resolution and to keep the
parties and their experts engaged in the reframing that ensues at these critical junctures. At the outset of the Everglades mediation, the mediator with the parties and their attorneys’ agreement, moved with the parties to reframe the issues from the legal context to the policy context in order to look at a broader array of issues and the commitments, trade-offs and resources that would be needed to achieve an overall resolution. In essence the question became what could realistically be done to save the Everglades if the parties were starting with a “clean sheet of paper.”

Through the course of the mediation the focus shifted back and forth among the policy, technical and legal contexts. From the policy to the technical on matters of science, back to the policy on matters of responsibility and equity, to the legal context on to develop legal documents to seek to resolve the 30 or more court and administrative actions and back to the policy context for legislative action to reframe and make moot the legal barriers. Each of these shifts required attention to managing the interpersonal dynamics and professional roles and to facilitating the changing role of experts and expertise. The situation was aptly illustrated by the following picture: the 12 page document produced in July which set forth the agreements on technical and policy matters as contrasted with the 500 pages of documents trying to resolve the legal arguments before the courts and reflecting the increasingly polarized disagreement among the parties. This led to a joint agreement to conclude the mediation and the recognition by the parties that the issues needed to be redefined and reframed in a policy context. The parties agreed this was best accomplished by moving forward to the Florida legislature to produce a legislative package.

In a complex case such as the Everglades mediation there are not good and bad players in terms of policymakers, lawyers, engineers. One context and the experts and decision makers working within that context, is not superior to any other context. Instead, the Everglades mediation helps to clarify the importance of the context selection that parties make implicitly or explicitly and that mediators help to facilitate. For the selection of the context at a given point in the dispute defines choices and strategies available to the participants. A conscious consideration of the context and the appropriate timing of when to focus on one context or another in a dispute can be a key part of bringing forth agreement and solutions.

C. Facilitative Leadership in the Everglades
"This highly respected civic leader [Timer Powers] worked with great patience and at substantial personal cost to rebuild channels of communication and personal relationships that the lawsuit had damaged or destroyed, and to end the litigation."  —Dewitt John

The story of the conflicts surrounding the Everglades is also a story of the striking role of facilitative leaders - as both conveners, mediators and problem solvers. Both Timer Powers and Kathy Shea Abrams as Governing Board members of the Water Management District lent their leadership and problem solving skills directly to conflicts in the East Everglades, Kissimmee River and Seminole Indian water issues. The Lt. Governor and Governor also played key roles of convening, supporting and providing leadership for the mediation process and the subsequent Commission for a Sustainable South Florida.

Indeed, in recognition of the key role leadership plays in supporting collaborative efforts, the Florida Conflict Resolution Consortium established a dispute resolution leadership award in 1991 named after Timer Powers. The 1996 recipient of the award was Richard Pettigrew for his leadership and work in forging a consensus among stakeholders on the Governor's Commission for a Sustainable South Florida. The use of mediation and consensus building during the 1980's and 1990's was due in large part to leadership at the highest levels of the state and federal governments who saw the wisdom and value of using collaborative approaches to the many problems and challenges that beset those involved in the Everglades issues.

VI. CONCLUSION

"If the Everglades ecosystem is to be restored, the politics of restoration will probably be a consensual politics of investment rather than an adversarial politics of regulation."

—Dewitt John

In retrospect there is a pathway towards collaborative problem solving that required both successes and failures in dispute resolution efforts. A major legislative mandate that attempted to solve the water quality problems in the Everglades, the "Marjory Stoneman Douglas Everglades Protection Act," followed in mid-1991 by an intergovernmental lawsuit settlement between state and federal governments which focused narrowly on pollutants and water quality in Everglades National Park. This agreement, in turn, led to new litigation with those stakeholders not at the settlement table and a year later to a broader mediation effort with additional stakeholders and a broader set of issues. The mediation, while developing agreement on a "technical plan" and a "statement of principles", failed to produce a final agreement on the details among the parties.
However, it did set the framework for an agreement among key stakeholders to emerge on new state legislation, "The Everglades Forever Act of 1994."

After the 1991 litigation settlement between the state and federal governments Governor Chiles did not move to create a forum for consensus building among the stakeholders not part of the settlement negotiations. However, in 1994 he moved quickly to create a forum for an even broader group of stakeholders to review a new framework for sustainability in the Everglades system and the south Florida region.

While the Everglades litigation involved a narrow legal question of whether the water management District should obtain a permit for pumps on the southern edge of the Everglades Agricultural Area, the broader question was one of public investment of scarce resources to achieve both environmental and economic goals:

The central theme of the [Everglades] lawsuit is how politics...change as the problems facing endangered ecosystems are identified and governments respond. There are several steps in this process, beginning with identifying the threats to an ecosystem and bringing them to public notice. Next agencies must agree that they are responsible for contributing to a solution, and then specific measures must be designed and implemented. The story of the Everglades suggests that as these changes take place, politics moves from the regime of confrontation, federal leadership and...regulation, toward a more collaborative, state-centered regime that makes extensive use of non-regulatory tools. (John, 192).

In some ways the dispute resolution interventions in the Everglades during the 1980s were about the politics of identifying the problem and the 1990s were about the politics of solving it. The water policy debate has moved from a narrow regulatory issue that sparked the 1988 litigation to broader proposals dealing with the public works and flow of water through the system. These ideas were developed through the difficult process of the Everglades mediation and set forth in subsequent state legislation. The Commission for a Sustainable South Florida, made possible by the earlier interventions, now serves as a stakeholder forum focusing its efforts on supporting the "consensual politics of investment."

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