

Big Cypress National Preserve
Public Law 93-440; 88 Stat. 1257

Transportation facilities.

Provided, That the Secretary shall consult and cooperate with the Secretary of Transportation to assure that necessary transportation facilities shall be located within existing or reasonably expanded rights-of-way and constructed within the reserve in a manner consistent with the purposes of this Act.

Hunting and fishing.
16 USC 698j.

Sec. 5. The Secretary shall permit hunting, fishing, and trapping on lands and waters under his jurisdiction within the preserve in accordance with the applicable laws of the United States and the State of Florida, except that he may designate zones where and periods when no hunting, fishing, trapping, or entry may be permitted for reasons of public safety, administration, floral and faunal protection and management, or public use and enjoyment. Except in emergencies, any regulations prescribing such restrictions relating to hunting, fishing, or trapping shall be put into effect only after consultation with the appropriate State agency having jurisdiction over hunting, fishing, and trapping activities. Notwithstanding this section or any other provision of this Act, members of the Miccosukee Tribe of Indians of Florida and members of the Seminole Tribe of Florida shall be permitted, subject to reasonable regulations established by the Secretary, to continue their usual and customary use and occupancy of Federal or federally acquired lands and waters within the preserve, including hunting, fishing, and trapping on a subsistence basis and traditional tribal ceremonies.

Miccosukee and Seminole Indian Tribes, land use, retention rights.

Visitor services, contracts.
16 USC 698k.

Sec. 6. Notwithstanding any other provision of law, before entering into any contract for the provision of revenue producing visitor services,



United States Department of the Interior
 OFFICE OF THE SOLICITOR
 Southeast Regional Office
 Richard B. Russell Federal Building
 75 Ted Turner Drive, S.W., Room 304
 Atlanta, Georgia 30303

NPS/SERO/BICY.SER.6005.MPS

MEMORANDUM

DATE: April 15, 2019

TO: Pedro Ramos, Superintendent, Everglades National Park

FROM: Shannon L. Goessling, Regional Solicitor - Southeast
 SHANNON GOESSLING

SUBJECT: Authority to condemn private lands in Big Cypress National Preserve to further U.S. Army Corps of Engineers-sponsored hydrologic restoration project

Digitally signed by SHANNON GOESSLING
 DN: cn=Shannon Goessling, o=NPS, ou=USDOC, email=shannon.guessling@nps.gov, c=US
 Date: 2019.05.15 14:23:03 -0400

**The DOI Solicitor's Opinion:
 The reason for Western
 Everglades Restoration
 Plan (WERP) Termination**

On February 11, 2019, the Assistant District Counsel for the U.S. Army Corps of Engineers (Corps) asked the Solicitor's Office to answer three questions related to the potential acquisition of private inholdings within Big Cypress National Preserve and Addition (BICY) as needed to implement the Western Everglades Restoration Project (WERP), an undertaking to restore the natural hydrology of portions of BICY. If modeling indicates that the project may cause water levels to rise so as to make occupancy of the inholdings impracticable, the South Florida Water Management District (SFWMD), as non-federal sponsor for the Corps, would acquire the inholdings and then donate them to the National Park Service (NPS). We conclude that SFWMD may acquire by condemnation, and then donate to NPS, inholdings that are unimproved. However, SFWMD may not condemn and then donate to NPS any inholdings that meet the definition of "improved" contained in BICY's establishing legislation, unless they are being used in a manner detrimental to the purposes of BICY. We concur with NPS's recommendation that the Corps and SFWMD suspend planning to acquire these inholdings until modeling shows that hydrologic restoration will affect them to a degree that acquisition is the only realistic alternative. Moreover, such planning must be carried out in consultation with NPS.

BACKGROUND

Since the establishment of the original Preserve in 1974 and the Addition in 1988, the United States has acquired thousands of properties for inclusion in BICY. Many private owners have chosen not to convey their properties to the United States, and these parcels remain as private inholdings within BICY. The enabling legislation for BICY, which describes the process by

DOI Solicitors Opinion
April 15, 2019

According to the Corps, the footprint of WERP would encompass 248 inholdings, 55 of which appear to be improved. Based on preliminary studies, the Corps believes that the inholdings that would be most affected by WERP are located in two areas: along the boundary of BICY and Water Conservation Area 3A, about 5 miles south of I-75 (called “the Sanctuary”), which is part of the Addition; and along the western portion of Tamiami Trail, which is part of the original Preserve.

Mostly Indian Camps

NPS is familiar with WERP and knows of the Corps’ interest in having its questions answered. However, NPS also believes that it is premature to explore land acquisition, especially through condemnation, too deeply, creating public concern and political complications, until modeling data indicate that acquisition of the inholding is necessary to implement WERP. In contrast, the Corps believes that without knowing whether acquisition is an option, it would not be prudent to undertake modeling, which is expensive. Although NPS believes it already knows the answers to the Corps’ questions, it is willing for the Solicitor’s Office to respond to the Corps, but in doing so restate the need to be cautious in making the answers public.

Cats out of the bag!

DOI Solicitors Opinion

April 15, 2019

Based on these authorities, we answer questions 1 and 2 as follows:

1. Assuming that SFWMD has independent authority to acquire private property in BICY, including by condemnation,³ nothing in BICY's enabling legislation prohibits NPS from

³ We read the proviso in 16 U.S.C. § 698f(c), that lands owned or acquired by the State of Florida in BICY "may be acquired only by donation," as a limit on the United States' authority to acquire land from the State of Florida, and

"Blue Print" for Condemnation of Private Lands inside BCNP

then receiving unimproved property from SFWMD by donation. Because the United States may acquire unimproved property by a variety of means, including condemnation, no concern would arise that the United States would be letting a third party (i.e., SFWMD) acquire property by a method that the United States itself may not use.

2. Again assuming that SFWMD has independent authority to acquire private property in BICY for its own purposes through condemnation, there is no reason to think that that authority would not include improved property. However, we see a problem with NPS then receiving the improved property by donation from SFWMD. Even if each stage of the transaction is within each agency's legal authority, the transaction as a whole would amount to NPS acquiring improved property in BICY through condemnation, and unless the property had lost its exemption or was subject to a detrimental use (see below), would violate the spirit of the enabling legislation.⁴ NPS should not accept such properties.

However, even if an inholding is currently exempted from acquisition as "improved," NPS could still condemn it, or acquire it after SFWMD had condemned it, if it was no longer covered by the exemption. This could arise in two ways:

1. The inholding is no longer considered "improved."
2. The inholding is used, or threatened with use, in a way detrimental to the purposes of BICY.

This is exactly what happened to the Miccosukee Tribe during the Picayune Strand Restoration Project. 805 acres of Tribal land was stolen from the Miccosukee Tribe by condemnation!



United States Department of the Interior

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Regional Solicitor's Office for Interior Regions 2, 4, & 1
Richard B. Russell Federal Building
75 Ted Turner Drive, S.W., Room 301
Atlanta, Georgia 30302

NPS SERO/BCNY.6003.AMPS

October 9, 2019

Jeanine Bennett, Esquire
General Counsel, In-House
Miccosukee Tribe of Indians of Florida
Tallahassee Station
P.O. Box 440021
Miami, Florida 33144-0021

SUBJECT: April 15, 2019 Memorandum from Shannon L. Grossling to Pedro Ramos:
"Authority to condemn private lands in Big Cypress National Preserve to
further U.S. Army Corps of Engineers-sponsored hydrologic restoration
project"

Dear Ms. Bennett:

Regarding the referenced Solicitor's Opinion, this is to clarify that it did not specifically address how the exercise of land acquisition authority under Big Cypress National Preserve's enabling legislation during the Western Everglades Restoration Project would affect Tribal interests (including land owned by individual Tribal members). That was not within the scope of the request to our office for a legal opinion.

Sincerely,

Michael Stevens
Michael Stevens
Attorney-Advisor

cc: Pedro Ramos, Superintendent, Everglades National Park
Shannon Grossling, Regional Solicitor, Office of the Solicitor
Annette Larnawsky, Attorney-Advisor, Office of the Solicitor

DOI EXPLANATION:
STILL NO
ACKNOWLEDGEMENT OF
TRIBAL RIGHTS
TO "USUAL AND
CUSTOMARY USE AND
OCCUPANCY" INSIDE BCNP





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NPS/SERO/BICY.SER.6003.MPS

MEMORANDUM

DATE: April 15, 2019

TO: Pedro Ramos, Superintendent, Everglades National Park

FROM: Shannon L. Goessling, Regional Solicitor - Southeast **SHANNON GOESSLING**

SUBJECT: Authority to condemn private lands in Big Cypress National Preserve to further U.S. Army Corps of Engineers-sponsored hydrologic restoration project

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SHANNON GOESSLING
Date: 2019.04.15 14:23:13
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On February 11, 2019, the Assistant District Counsel for the U.S. Army Corps of Engineers (Corps) asked the Solicitor's Office to answer three questions related to the potential acquisition of private inholdings within Big Cypress National Preserve and Addition (BICY) as needed to implement the Western Everglades Restoration Project (WERP), an undertaking to restore the natural hydrology of portions of BICY. If modeling indicates that the project may cause water levels to rise so as to make occupancy of the inholdings impracticable, the South Florida Water Management District (SFWMD), as non-federal sponsor for the Corps, would acquire the inholdings and then donate them to the National Park Service (NPS). We conclude that SFWMD may acquire by condemnation, and then donate to NPS, inholdings that are unimproved. However, SFWMD may not condemn and then donate to NPS any inholdings that meet the definition of "improved" contained in BICY's establishing legislation, unless they are being used in a manner detrimental to the purposes of BICY. We concur with NPS's recommendation that the Corps and SFWMD suspend planning to acquire these inholdings until modeling shows that hydrologic restoration will affect them to a degree that acquisition is the only realistic alternative. Moreover, such planning must be carried out in consultation with NPS.

BACKGROUND

Since the establishment of the original Preserve in 1974 and the Addition in 1988, the United States has acquired thousands of properties for inclusion in BICY. Many private owners have chosen not to convey their properties to the United States, and these parcels remain as private inholdings within BICY. The enabling legislation for BICY, which describes the process by

which NPS may acquire land, describes circumstances under which an improved inholding may be exempt from acquisition unless by consent of the owner.

According to the Corps, the footprint of WERP would encompass 248 inholdings, 55 of which appear to be improved. Based on preliminary studies, the Corps believes that the inholdings that would be most affected by WERP are located in two areas: along the boundary of BICY and Water Conservation Area 3A, about 5 miles south of I-75 (called “the Sanctuary”), which is part of the Addition; and along the western portion of Tamiami Trail, which is part of the original Preserve.

NPS is familiar with WERP and knows of the Corps’ interest in having its questions answered. However, NPS also believes that it is premature to explore land acquisition, especially through condemnation, too deeply, creating public concern and political complications, until modeling data indicate that acquisition of the inholding is necessary to implement WERP. In contrast, the Corps believes that without knowing whether acquisition is an option, it would not be prudent to undertake modeling, which is expensive. Although NPS believes it already knows the answers to the Corps’ questions, it is willing for the Solicitor’s Office to respond to the Corps, but in doing so restate the need to be cautious in making the answers public.

QUESTIONS PRESENTED

1. May SFWMD acquire by condemnation¹ unimproved, privately owned inholdings within BICY, and would NPS accept their reconveyance to the United States?
2. May SFWMD acquire by condemnation improved, privately owned inholdings within BICY, and would NPS accept their reconveyance?²
3. Is there an existing level of service of flood protection in BICY, especially for improved properties?

ANALYSIS

As a starting point, question 3 is one of fact, not of law. NPS advises that there is no “level of service” for flood protection in BICY. No private inholdings (improved or otherwise) receive any more flood protection than the rest of BICY, i.e., none.

As to questions 1 and 2, the legislation establishing BICY provides, in pertinent part:

¹ We do not question either SFWMD’s authority to acquire private inholdings from willing sellers or NPS’s authority to accept conveyance of such properties from SFWMD.

² The Corps also asked whether, if NPS could accept from SFWMD conveyance of these inholdings by donation, NPS must reimburse SFWMD for 80% of the acquisition costs for those inholdings in the Addition under the cost-share provisions of 16 U.S.C. §698f(d). We conclude that this section applies to land acquisition in the aggregate, and not individual tracts. Following a 21,000-acre donation in 2011, NPS and the State of Florida agreed that land acquisition in the Addition was “substantially complete” for the purposes of §698f(d), and cost-share calculations could be concluded. A final cost-share amount was calculated and is being paid to the State. Any individual inholdings subsequently donated by the State would not fall under this cost-share provision.

In order to ensure the preservation, conservation, and protection of the natural, scenic, hydrologic, floral and faunal, and recreational values of the Big Cypress Watershed . . . , and to provide for the enhancement thereof, [BICY] is hereby established.

Pub. L. 93-440, § 1(a), Oct. 11, 1974, 88 Stat. 1258, codified at 16 U.S.C. § 698f(1)(a)(emphasis added).

The Secretary [of the Interior] is authorized to acquire by donation, purchase with donated or appropriated funds, transfer from any other federal agency, or exchange, any lands . . . or interests therein which are located within the boundaries of [BICY]. No improved property, as defined [herein], shall be acquired without the consent of the owner unless the Secretary, in his judgment, determines that such property is subject to, or threatened with, uses which are, or would be, detrimental to the purposes of [BICY].

Pub. L. 93-440, § 1(c), Oct. 11, 1974, 88 Stat. 1258, as amended by Pub. L. 100-301, § 4(b), Apr. 29, 1988, 102 Stat. 444, codified at 16 U.S.C. § 698f(c). “Improved property” means:

- (1) a detached, one family dwelling, construction of which was begun before November 23, 1971 with respect to the preserve and January 1, 1986 with respect to the Addition, which is used for noncommercial residential purposes, together with not to exceed three acres of land on which the dwelling is situated and such additional lands as the Secretary deems reasonably necessary for access thereto, such land being in the same ownership as the dwelling, and together with any structures accessory to the dwelling which are situated on such lands and
- (2) any other building, construction of which was begun before November 23, 1971 with respect to the preserve and January 1, 1986 with respect to the Addition, which was constructed and is used in accordance with all applicable State and local laws and ordinances, together with as much of the land on which the building is situated, such land being in the same ownership as the building, as the Secretary shall designate to be reasonably necessary for the continued enjoyment and use of the building in the same manner and to the same extent as existed [on those dates] together with any structures accessory to the dwelling which are situated on the lands so designated. In making such designation the Secretary shall take into account the manner of use in which the building, accessory structures, and lands were customarily enjoyed prior to [those dates].

Pub. L. 93-440, § 3(b), Oct. 11, 1974, 88 Stat. 1259, as amended by Pub. L. 100-301, § 4(f), Apr. 29, 1988, 102 Stat. 445, codified at 16 U.S.C. § 698h(b).

Based on these authorities, we answer questions 1 and 2 as follows:

1. Assuming that SFWMD has independent authority to acquire private property in BICY, including by condemnation,³ nothing in BICY’s enabling legislation prohibits NPS from

³ We read the proviso in 16 U.S.C. § 698f(c), that lands owned or acquired by the State of Florida in BICY “may be acquired only by donation,” as a limit on the United States’ authority to acquire land from the State of Florida, and

then receiving unimproved property from SFWMD by donation. Because the United States may acquire unimproved property by a variety of means, including condemnation, no concern would arise that the United States would be letting a third party (i.e., SFWMD) acquire property by a method that the United States itself may not use.

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However, even if an inholding is currently exempted from acquisition as "improved," NPS could still condemn it, or acquire it after SFWMD had condemned it, if it was no longer covered by the exemption. This could arise in two ways:

1. The inholding is no longer considered "improved."
2. The inholding is used, or threatened with use, in a way detrimental to the purposes of BICY.

BICY's 1991 Land Management Plan (LPP) contains guidance for when an inholding meets the definitions of improved under § 698f(c), and when its use is detrimental to the purposes of BICY. It clarifies what constitutes a "detached one family dwelling" under § 698f(c)(i) or "any other building" under § 698f(c)(ii), LPP at 15-16; requires that qualifying buildings must have been constructed and used in accordance with all applicable state and local laws and ordinances, even if the applicable entity has not enforced them, *id.* at 17; and lists activities on improved inholdings that are considered both inappropriate ("detrimental to the purposes of BICY") and appropriate. *Id.* at 17-18. Although the LPP places the burden on the landowner to prove that the property meets the definitions of "improved property," *id.* at 17, it also includes a "good neighbor" policy, meaning that NPS will not revoke an exemption and act to acquire the inholding at the first instance of a violation, but will encourage corrective action. *Id.* at 19.

CONCLUSION

NPS may acquire by condemnation, directly or indirectly, unimproved inholdings for inclusion in BICY. NPS may not acquire improved inholdings in this way, unless they no longer meet the criteria for exemption. NPS's criteria for determining how such an exemption can be lost are clear, and indicate that significant changes to the current condition of the inholding on the part of the landowner are necessary for the property to no longer qualify for the exemption.⁵ Should

not on the State of Florida's authority to first acquire the land. Any land acquisition by the State would have to be pursuant to its own statutory authority.

⁴ Even if title remained in the State of Florida, because the SFWMD would have acquired it in its capacity as nonfederal sponsor for the Corps (a Federal agency), the transaction could still be perceived as an attempt to evade the restrictions of the enabling legislation. However, that would be a problem for the Corps, and not NPS.

⁵ Although enhancement of hydrologic resources is a purpose of BICY, we do not think that a change to the property by someone other than the landowner for the purpose of enhancing hydrologic resources (such as implementing

SFWMD determine, based on its assessment, that WERP might affect improved properties to an extent inconsistent with continued occupation, it should coordinate with NPS to determine whether any of those properties no longer qualify as exempt based on such changes.

cc: Chris Abbett, Associate Regional Director, Southeast Regional Office (SERO)
Thomas Kelly, Chief Realty Operations, Land Resources Program Office, SERO
Karen Cucurullo, Superintendent, BICY
Laura Perdices, Deputy Superintendent, BICY
Robert Johnson, Research Director, Everglades National Park

WERP), which would be inconsistent with the owner's current use of the property, could cause that current use to be "detrimental to the purposes of BICY." We do not think that NPS could declare a use that was historically appropriate to be "detrimental" just because the overall management of BICY changed.