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IN THE SUPREME COURT
STATE OF FLORIDA

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IN RE:)
)
ADVISORY OPINION TO)
THE ATTORNEY GENERAL -) CASE NO: 83,301
SAVE OUR EVERGLADES)
)
)

INITIAL BRIEF OF RESPONDENT UNITED STATES SUGAR CORPORATION

Cass D. Vickers, Esquire
Florida Bar No. 158867
Robert S. Goldman, Esquire
Florida Bar No. 0229407
Messer, Vickers, Caparello, Madsen,
Lewis, Goldman & Metz, P.A.
Post Office Box 1876
Tallahassee, Florida 32302-1876
Telephone: (904)222-0720

Attorneys for United States Sugar Corporation

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STATEMENT OF THE CASE AND FACTS

By letter dated March 8, 1994, the Attorney General petitioned this Court for an advisory opinion concerning the Everglades Amendment, an initiative petition proposing an amendment to the Florida Constitution entitled "Save Our Everglades". The Attorney General's request was submitted pursuant to the requirements of Article IV, section 10, of the State Constitution and Florida Statutes section 16.061. The Court acts on such petitions to determine whether the initiative petition complies with the requirements of Article XI, section 3, of the Florida Constitution and Florida Statutes section 101.161. Pursuant to Article IV, section 10 and Article V, section 3 (b) (10) of the Florida Constitution, the Court entered an order permitting interested persons to file briefs and scheduling oral argument for May 2, 1994. This brief is submitted on behalf of the United States Sugar Corporation.

The initiative petition identified in this brief as the Everglades Amendment was submitted by the Florida Secretary of State to the Attorney General in accordance with the dictates of Florida Statutes section 15.21. A copy of the initiative petition is set forth in Appendix A to this brief. The proposed amendment fixes responsibility for damaging the "Everglades Ecosystem" on the "sugarcane industry". It would levy a "fee" on raw sugar processed from sugarcane grown in the Everglades Ecosystem. The fee would initially be imposed at one penny per pound but would increase annually with changes in the Consumer Price Index. It would be

assessed against each "first processor" of sugarcane. The levy would remain in effect for 25 years and would fund a trust controlled by five individuals appointed by the Governor. The trustees would expend the trust funds to

> recreate the historical ecological functions of the Everglades Ecosystem by restoring water quality, quantity, timing and distribution (including pollution clean up and control, exotic species removal and control, land acquisition, restoration and management, construction and operation of water storage and delivery systems, research and monitoring).

The Everglades Amendment describes the "Everglades Ecosystem" as "Lake Okeechobee, the historical Everglades watershed west, south and east of Lake Okeechobee, Florida Bay and the Florida Keys Coral Reef, **provided that** the Trustees may refine this definition". The proposed amendment provides that "[d]isputes arising under this Section shall be first brought to a hearing before the trustees, and thereafter according to generally-applicable law". Trustees would operate under rules and regulations of their own making, "subject to generally-applicable law". Implementing legislation is said to be unnecessary. Severability and effective date provisions are included.

The United States Sugar Corporation ("U.S. Sugar") was founded during the Great Depression on April 28, 1931 by Charles Stewart Mott. It was formed to acquire the assets of Southern Sugar Company, a pioneering effort to grow sugarcane in South Florida which had gone into receivership. The predecessor venture was the establishment of a cane breeding station at Canal Point on the southeastern shore of Lake Okeechobee by the U.S. Department of

Agriculture in 1920.

Based in Clewiston, Florida, U.S. Sugar is owned by employees, the Mott Children's Health Center, the Mott Foundation, and various other charities and private families. It is in the business of growing sugarcane, citrus and vegetables primarily on land lying within the Everglades Agricultural Area, a fertile band of farmland arcing southward from the shores of Lake Okeechobee. All U.S. Sugar's farming operations are located in Hendry, Glades and Palm Beach Counties. It is the country's largest producer of sugarcane and supplies roughly 13% of the winter leaf vegetables grown in the United States.

SUMMARY OF ARGUMENT

The Everglades Amendment is out of compliance both with the single subject limitation and the ballot title and summary requirements. Initiative petitions must be strictly scrutinized to assure that they contain but one subject. The Everglades Amendment embraces numerous disparate subjects. It would confer wide-ranging administrative powers on a panel of "citizen" Trustees. The result would be to interject this new body into an intricate set of executive functions which are now in place pursuant to numerous constitutional and statutory laws, and to do so without any effort to coordinate those effects. The Trustees' comprehensive jurisdiction would carve itself into a myriad of existing federal, State, regional and local programs concerned with the quality and distribution of water in South Florida, not only insofar as undeveloped and rural-use lands are concerned, but also impacting highly urbanized areas in Dade, Broward and Palm Beach Counties. The Trustees would be given powers of the purse, the right to define the area within which the sugar tax would apply, unfettered rulemaking authority, and other legislative powers. The imposition and administration of the sugar tax, and the Trustees' dispute resolution authority, would encroach existing judicial functions. The Everglades Amendment thus represents a substantial reallocation of government powers, from all three branches, in favor of a newly-created citizen panel. Joining diverse and multi-faceted proposals together under the appealing theme of "saving the Everglades", the electorate is asked to accept the many proposals as a package. The

single subject limitation proscribes such logrolling artifices in initiative petitions.

The many changes and curtailments in the extant constitutional scheme which the Everglades Amendment would make are not identified or described in the amendment or in the ballot summary. The ballot title and summary are transparently partisan and contentious, drafted for the purpose of motivating the electorate to support the proposed amendment, rather than for the purpose of fairly informing the voter of the effect which the proposed amendment would have on the current constitutional structure. The Court must condemn the initiative on this basis, as well as for its aggregation of multiple subjects under a broadly-conceived environmental theme.

ARGUMENT

1. The Everglades Amendment Violates the Single Subject Requirement of Article XI, Section 3

A. Standard of Review

Article XI, section 3 of the Florida Constitution allows the "revision or amendment of any portion or portions of this constitution by initiative . . . provided that, any such revision or amendment shall embrace but one subject and matter directly connected therewith". Prior to 1968, there was no initiative provision in the Florida Constitution. Article XVII of the 1885 Florida Constitution provided for amendments or revisions proposed by the Legislature and, if set in motion by the Legislature, for revision through a constitutional convention, but did not reserve to the people any power to propose amendments on their own initiative.

As originally approved in the 1968 election, Article XI, section 3 permitted "amendments to any section" of the Florida Constitution; it did not expressly embody a single subject limitation. Distinguishing an "amendment" from a "revision" and noting the limitation that only one "section" could be amended by initiative petition, the Court in Adams v. Gunter, 238 So. 2d 824 (Fla. 1970) removed from the ballot an initiative proposal to create a unicameral legislature. In 1972, House Joint Resolution 2835 was approved by the electorate, amending Article XI, section 3 to permit "revision or amendment of any portion or portions" of

the Florida Constitution, with the proviso that "any such revision or amendment shall embrace but one subject and matter directly connected therewith". While that change permits the amendment of more than one section by an initiative proposal, it preserves the Adams finding that the framers intended for initiative amendments to "relate to one subject". Id. at 831. The single subject constraint is a critical, deliberate, and purposeful limitation which the people have imposed on their fellow citizens' prerogative of placing proposed changes to the Florida Constitution on the ballot. No proposal could better reveal the need for the single subject limitation than the Everglades Amendment.

Proposing amendments to the Florida Constitution has become commonplace. As the Court noted last year in Advisory Opinion--Limited Marine Net Fishing, 620 So. 2d 997, 1000 n. 2 (Fla. 1993) (for convenience "Net Fishing"), the Florida Constitution was amended 41 times between 1968 and 1984, and 37 of 44 amendments proposed between 1980 and the date of that opinion were adopted. As of March 11, 1994, another 24 proposed amendments, all by initiative petition, were on file with the Secretary of State and were being circulated for signature. They reflect a wide range of interests, from decriminalizing the possession and sale of controlled substances to rewriting Article V to permit non-lawyers to offer legal services and serve as judges. The trend bodes ill for any notion of the Florida Constitution as an enduring or abiding document setting forth the State's organic law. But the single subject limitation is a gate through which such initiative

measures must pass and the Court is called upon to be ever more vigilant as the gatekeeper.

In his dissenting opinion in Weber v. Smathers, 338 So. 2d 819 (Fla. 1976), Justice Roberts credited the late Justice Terrell with having proclaimed that "[i]t is hard to amend the Constitution and it ought to be hard". That is so because the "legal principles in the state constitution inherently command a higher status than any other legal rules in our society". Net Fishing, 620 So. 2d at 999, (McDonald, J., concurring). They should therefore be principles capable of "transcending time and changing political mores", imparting "stability in the law and [reflecting] society's consensus on general, fundamental values". Id.

In Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984) (for convenience "Fine"), the Court set the standard for determining single subject compliance, saying that "strict compliance" would be required. It also articulated the policy reasons for so interpreting Article XI, section 3: the Florida Constitution "is the basic document that controls our governmental functions" and the initiative method entails no "filtering legislative process", no public hearing or debate in the drafting of the proposed amendment. Id. at 988-89. The initiative process is therefore intentionally the "most restrictive and most difficult" method of amending the Florida Constitution. Evans V. Firestone, 457 So. 2d 1351, 1358 (Fla. 1984) (McDonald, J., concurring) (for convenience "Evans"). Accordingly, this Court insists that initiative proposals be "strictly scrutinized" for compliance with the single

subject imperative. Fine, 448 So. 2d 984, 995 (Fla. 1984) (McDonald, J., concurring). Failing to do so would invite "precipitous and spasmodic changes" in the Florida Constitution of the very kind which this Court has previously condemned. Adams v. Gunter, 238 So. 2d at 832.

B. The Everglades Amendment Affects More Than One Existing Function of Government

The Court has explained the single subject limitation of Article XI, section 3 in various formulations. In Fine, the Court held that the initiative provision allows proposals for "singular changes in the functions of our governmental structure". Fine, 448 So. 2d at 988. Noting that of the several methods for amending the Florida Constitution, only the initiative method is constrained by the single subject limitation, the Court interpreted Article XI, section 3 as mandating "that the electorate's attention be directed to a change regarding one specific subject of government to protect against multiple precipitous changes in our state constitution". Id.

As the Court said in Evans, "where a proposed amendment changes more than one government function, it is clearly multi-subject". Evans, 457 So. 2d at 1354. In the Fine case, the revenue cap proposal under consideration was found to affect several legislative functions, namely the power to raise revenue for general governmental operations, the collection of user fees for government-provided services and facilities, and the funding of

capital improvements with revenue bonds. Fine, 448 So. 2d at 984. In the Evans case, the amendment was stricken because it affected both legislative and judicial functions. Evans 457 So. 2d at 1354. The proposed limitation on recovery of non-economic damages, for example, was found to constitute the exercise of a legislative function and the proposed codification of the summary judgment rule was held to embody a judicial function. The Everglades Amendment suffers from the same constitutional deficiency of affecting more than one existing government function.

The Everglades Amendment would affect all three branches of Florida government. It would effectively create a fourth branch of government, the Everglades Trustees, imbued with executive, legislative and judicial powers. The proposal to create such a super-branch is a drastic departure from the extant constitutional structure of government in this State. Multiple governmental functions would be conveyed to this body from those now reposed in various executive agencies, the Legislature, and the Courts. It must therefore be removed from the ballot pursuant to the single subject limitation.

The suggested placement of the proposed amendment is telling in and of itself. The Everglades Trustees are not made part of the executive (Article IV), legislative (Article III) or judicial (Article V) branches. Instead the proposal would create this body within Article X of the Florida Constitution, the article that contains "Miscellaneous" provisions such as those pertaining to the State census, definitions and rules of construction. The framers

of the Everglades Amendment clearly intended for the Trustee panel to be organizationally independent of the existing three branches.

C. The Proposed Amendment Affects Executive Functions

The Trustees are given various executive powers. They are to "administer" the trust, expending funds with the objective of restoring water quality and quantity in the Everglades to those conditions which obtained at some earlier, unspecified "historical" date. They are entrusted with the responsibility for making trust fund expenditures in "pollution clean up and control" efforts. That will impose upon the Trustees the duty of identifying the offending pollutants and the sources of pollution and of taking corrective measures or of requiring remediation by third parties. Being empowered to address water "quantity, timing and distribution" issues will involve the Trustees in decisions concerning the hydroperiod effects of the Central and Southern Florida Flood Control Project and in irrigation and discharge matters now under the aegis of other executive agencies. They are told to attend to "exotic species removal and control", a duty which will require at a minimum prioritizing those species of flora, and perhaps fauna, with which to concern themselves, which to eradicate and which merely to bring into manageable numbers, and in what areas within the "Everglades Ecosystem" those control and eradication efforts are to take place from time to time.

The Everglades Amendment would authorize this citizen panel to expend trust funds in acquiring lands (for which purpose they will

need to make "public purpose" determinations), and in the "management, construction and operation of water storage and delivery systems". Thus they will be building and operating stormwater treatment areas, canals, pumping stations and other facilities with State funds. In addition, they could be altering or reconfiguring road systems in the name of reestablishing sheet flow and recreating historical water distribution within the Everglades area. Since water is supplied to urban populations in Dade and Broward Counties from well-fields in the Everglades watershed, the Trustees' actions in diverting water to or from the Everglades could directly affect the availability of water for consumptive and other uses in those urbanized areas. And the Trustees are granted constitutional authority to engage in "research and monitoring". The "monitoring" and "pollution control" functions clearly confer regulatory powers on the Trustees. Finally, they are given rulemaking authority.

The many duties and responsibilities described above are plainly executive or administrative in nature. Without trying to catalog their individual functions, suffice it to say that, at present, various other executive agencies, State, federal and regional, have jurisdiction and duties with respect to water quality and supply, pollution clean up and control, construction of water systems, and the other amendment-prescribed functions within the affected area. They include, but are not limited to, the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, the Fish and Wildlife Service, the National Parks Service, the

South Florida Water Management District, the Trustees of the Internal Improvement Trust Fund, the Florida Department of Environmental Protection, the Department of Agriculture and Consumer Services, the Department of Community Affairs, the Game and Fresh Water Fish Commission, the Florida Land and Water Adjudicatory Commission, and the Lake Okeechobee Technical Advisory Council. While the coordination of their respective efforts and jurisdiction with that of the Everglades Amendment Trustees is not evident, it is clear that this panel would be engaged in numerous executive functions of the kind those existing agencies perform.

In its powers over water supply, for example, this body is interjected into relations between the Seminole Indian Tribe, the U.S. Bureau of Indian Affairs and the State. In connection with the settlement of various Native American land claims, those three parties have entered a compact assuring water use and supply rights to the Seminoles. That compact has the backing of both State and federal law. § 285.165, Fla. Stat. (1993); P. L. 100-228, 25 U.S.C. 1772. Measures which the Everglades Trustees implement could well implicate the distribution and supply of water to tribal reservation lands and other Everglades areas where the Seminoles have been granted fishing and recreational use rights.

The Everglades Amendment would not change just one existing executive function but a number of them, an effect proscribed by the Fine decision. Existing agency powers would have to accommodate the constitutionally-conferred powers of these Trustees. Insofar as land acquisitions are concerned, for example,

the Conservation and Recreation Lands (CARL) program, which Florida Statutes section 253.023 establishes, would have to yield to the Trustees' decisions concerning land purchases for the benefit of the Everglades, Lake Okeechobee, Florida Bay or the Florida Keys Coral Reef. That consequence follows despite the fact that another group of constitutional officers--the Governor and the Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund--makes CARL land acquisition decisions. Their opportunities to make such decisions within the Everglades Ecosystem are certainly curtailed by the establishment of a citizen panel with specific authority to make purchases within this part of South Florida. As should be apparent from the foregoing, the Everglades Trustees' sweeping jurisdiction puts them into potential conflicts with sundry land use planning decisions, including, but not limited to, transportation systems and flood control. And their jurisdiction would extend to urban areas within Dade and Broward Counties. Similar observations can be made of the South Florida Water Management District, which is at present bound by Florida Statutes section 373.4592 to develop and implement a Surface Water Improvement and Management (SWIM) plan for the Everglades. In short, numerous existing executive functions would have to yield or otherwise be modified in order to permit the Everglades Trustees to perform their proposed constitutional duties.

D. The Everglades Amendment Affects Legislative Functions

Even if but one change were made to current executive branch

functions, the Everglades Amendment would nonetheless transgress the single subject limitation since it also imbues the Trustees with legislative powers. Conveying both executive and legislative powers is just the sort of dual-subject violation which the Court enjoined in the Evans case. At least three legislative functions would change with the approval of this amendment--powers over the purse, the power to prescribe the area within which the sugar tax would apply, and control of substantive rules.

The Everglades Amendment would entrust State funds to the Trustees on terms which have no parallel in the existing constitutional structure of Florida government. The penny per pound sugar tax would impose taxes of more than $35 million per year. The amendment would automatically direct the money to the trust, supplanting a prerogative which is ordinarily left with the Legislature. While the amendment refers to the proceeds of the sugar tax as being "appropriated" by the Legislature, that characterization is inaccurate. An "appropriation" is defined by section 216.011(1)(b), Florida Statutes to mean "a legal authorization to make expenditures for specific purposes within the amounts authorized in the appropriations act". An "appropriations act", in turn, is defined to mean "the authorization of the Legislature . . . for the expenditure of amounts of money by an agency, the judicial branch, and the legislative branch for stated purposes . . . ". § 216.011(1)(c), Fla. Stat. (1993).

In the case of the Everglades Amendment, the Legislature will not be "authorizing" the expenditure of $35 million per year by the

Trustees. The Florida Constitution would "authorize" the expenditure of these monies, not the Legislature. The Constitution would in fact **mandate** the expenditure by the Trustees of all the revenue generated by the sugar tax, whether $35 million, $50 million, or some other sum, in each of the next 25 years, regardless of any change in circumstances, including the possibility that the expenditure of those amounts becomes unnecessary, and regardless of any desire on the part of the Florida Legislature to use some of those State funds for other purposes. The Legislature cannot fairly said to be "appropriating" an amount which it is constitutionally bound to give over to the Trustees; the Legislature has no prerogative to commit even a dollar less to that body.

Furthermore, the Everglades Amendment appears to preclude the Legislature from attaching any conditions to the "appropriation", i.e. allocating the total "appropriation" among specific line-item expenditures rather simply making a lump-sum "appropriation". The amendment states that the funds collected from the levy of the sugar tax "shall be . . . deposited into the Trust". It further states that the "sole purpose of the Trust is to expend funds" toward the stated ends. The ballot summary and the amendment itself both provide that the Trust Fund is to be "controlled" by the citizen Trustees. The funds are "appropriated . . . to the Trustees to be expended" for trust purposes.

The Trustees "control" of Trust Funds clearly implies discretion on their part in deciding how the revenues are to be

spent. The requirement that they be possessed of "experience in environmental protection" is presumably intended to insure that the Trustees will be able to make those expenditure decisions. In "controlling" the Trust Funds, they will be called upon to divide available revenues among the various trust purposes. They would decide, for example, how much of the total to commit to curing existing water pollution problems, how much to spend removing maleleuca or non-indigenous wildlife, and how much to spend to alter hydroperiod through the purchase of parcels for construction of stormwater distribution systems. The statement to the electorate that the Trustees will "control" the Trust Fund negates any inference that they will merely preside over expenditures specifically prescribed by the Legislature. It should be noted in this regard that just as the initiative at issue in Fine would have affected not only revenue for general government operations, but also the imposition of user fees and the issuance of revenue bonds, so too the Everglades Amendment would entrust to the citizen panel that it creates the expenditure of State funds for general operating purposes (e.g., rulemaking and regulatory functions), as well as land acquisition and fixed capital outlay (construction and operation of water storage and delivery systems).

It should also be said that the Everglades Amendment would impinge the Governor's constitutional duties as the State's chief fiscal officer. Article IV, section 1(a) of the Florida Constitution makes the Governor "responsible for the planning and budgeting for the state". To the extent that a constitutionally-

mandatory tax is created and the expenditure of the resulting revenue is pre-committed for the ensuing 25 years, the Governor is effectively removed from this portion of State budget-making. Moreover, the time-honored balance of power inherent in the gubernatorial veto, which in the case of the general appropriations bill extends to specific appropriations pursuant to Article III, section 8(a) of the Florida Constitution, is suspended by the Everglades Amendment. Insofar as the contemplated sugar tax revenues are concerned, the Governor may not use his veto power for the otherwise proper purpose of reallocating State tax collections to other uses. That is true even if the Everglades Amendment is read to permit the Legislature to allocate the total revenue yield among specific expenditures--the Trustees will receive the same total "appropriation" regardless whether, or how many times, the Governor attempts to invoke his veto power. The argument is not, of course, that the Everglades Amendment **violates** other provisions of the Florida Constitution, but rather that it affects existing gubernatorial powers, creating an exception to his traditional veto prerogative. This is just one of the numerous impacts on existing government functions which causes it to run afoul of the single subject limitation.

The proposed amendment would also depart the current constitutional scheme by giving the Trustees other legislative powers. First, their mission is to "recreate the historical ecological functions of the Everglades Ecosystem". In order to do so, the Trustees will find it necessary to establish some specific

historical reference point. Since the amendment disavows the need for implementing legislation, it is the clear design of the proposal to leave that decision, along with sundry others of equal import, to the Trustees. Deciding whether to restore the Everglades to their condition as of the moment of Statehood in 1845, their condition as of the date when the Everglades National Park was created, their condition prior to the urbanization of Dade, Broward and Palm Beach Counties, or as of some other date will dictate the restoration effort to be undertaken. That is plainly a law-making decision since it will set the parameters for the entire effort.

Secondly, the Trustees are to address not only existing water quality problems ("pollution clean up"), but future pollution problems as well, the latter under the rubric of "pollution control". In expending funds to "control" pollution in the future, the Trustees may be correcting contaminations which are not even arguably related to the growing of sugarcane, for example, water quality problems originating from urban development. In any event, they will, in identifying the causes and cures for such water pollution, be engaged in a traditionally legislative function. The discharge of these responsibilities will be an exception to the current constitutional configuration wherein Article II, section 7 commits such functions to the Legislature, directing that "[a]dequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise". The statement in the Everglades Amendment that "implementing

legislation is not required" but that "other measures" may be enacted to protect or restore the Everglades clearly signifies the intention, as to this Trust Fund, that the Trustees are in control. The Legislature is left to supplement this program, but is displaced to the extent the Trustees' administration of the Fund addresses the issues.

Thirdly, the Trustees are permitted to "refine" the definition of the "Everglades Ecosystem". The sugar tax is imposed upon sugar processed from sugarcane grown in the "Everglades Ecosystem". The tax is thus applicable only with respect to sugar derived from cane growing within the boundaries of the Everglades Ecosystem. Cane grown outside those boundaries, no matter how close, would not result in any tax.

Where, then, is the "Everglades Ecosystem"? It is defined, initially, to include the "historical Everglades watershed west, south and east of Lake Okeechobee, Florida Bay and the Florida Keys Coral Reef". Again, the reference to an "historical" watershed commits legislative discretion to the Trustees in locating that line on the ground; they are not merely performing a clerical or administrative function in identifying a boundary line which has been previously established by law. This is to be contrasted with the "Everglades Protection Area", specifically defined in Florida Statutes section 373.4592(2)(c) to mean "Water Conservation Areas 1, 2A, 2B, 3A and 3B, the Arthur R. Marshall Loxahatchee National Wildlife Refuge, and the Everglades National Park". Nor is this Respondent aware of any extant legislative definitions locating

"Florida Bay" or the "Florida Keys Coral Reef". Even if there were, the privilege of the Trustees to "refine" the definition of the "Everglades Ecosystem" empowers them to say where the sugar tax shall apply and where it shall be inapplicable. Apart from such other issues as may inhere in a State tax that applies in some parts of the State but not in others, the prerogative of specifying the geographical reach of the tax is plainly legislative in nature.

Finally, the Everglades Amendment gives the Trustees unchecked, independent rulemaking authority unlike that enjoyed by other executive agencies. Normally, agencies are authorized to adopt rules only pursuant to "specific legal authority", i.e. "general law". § 120.54(1), Fla. Stat. (1993). The Everglades Trustees are specifically empowered to "adopt their own operating rules and regulations, subject to generally-applicable law". The employment of the phrase "generally-applicable law", coupled with the statements that the Trustees are to "control" the Trust Fund and that "implementing legislation is not required", must be considered intentional. It signifies an intention to relieve the Trustees' expenditure and rulemaking powers from legislative oversight. Their rules are not made subject to "general law", a phrase used repeatedly in the Florida Constitution. If that were the case, the **substantive** aspects of the Trustees' rules would be dependent upon underlying legislation for their validity, as is the case with other agencies. The Everglades Amendment is written, instead, to suggest that only the **procedures** which they follow in adopting rules and regulations are governed by the Legislature.

"General law" could dictate to the Trustees substantive legislative decisions concerning issues otherwise within the ambit of their offices. An enactment might require that certain land management practices be employed, for example, with the Trustees given some enforcement duties. "Generally-applicable law" could not, conceptually, deal with such substantive issues but could only address itself to matters of procedure and that is apparently the precise intent of the language in question. If it is, the proof of legislative powers being reposed in the Trustees could not be more emphatic. If that is not the intent, the Everglades Amendment lacks the "well-defined scope" and precision of expression necessary to permit the electorate to understand what change they are being asked to make in their Constitution. See Fine, 448 So. 2d at 994 (McDonald, J., concurring).

Justice Kogan points out, in his concurring opinion in Advisory Opinion--Restricts Laws Related to Discrimination, 19 Fla. L. Weekly S109 (March 3, 1994) (Kogan, J., concurring),(for convenience "Discrimination"), that a proposed amendment calling for the abolition of the Legislature could not survive single subject analysis. The balance of power which the Constitution preserves would be upset; fundamental government relationships would be changed. If the Legislature cannot be abolished outright, neither can it be eradicated on a piecemeal basis through the creation of citizen panels which are given sweeping legislative powers, powers to increase revenues by redefining the geographical limits of a tax, to expend the resulting State monies free of the

customary checks and constraints, and to make laws in the guise of rulemaking. The one change is as offensive to the single subject limitation as the other, and only slightly more subtle that Justice Kogan's hypothetical.

E. Judicial Functions Are Affected by the Proposed Amendment

Among the effects of the Everglades Amendment is its involvement of the electorate in dispensing justice, thus affecting existing functions of the third branch of government. As is well known to this Court, litigation is pending concerning the condition of the Everglades. Two actions have been instituted which are of special relevance to the initiative petition now before this Court. The first is the federal appeal, pending in the Eleventh Circuit Court of Appeals, United States v. South Florida Water Management District, Case Nos. 92-4314 and 92-4831, (11th Cir. filed Sept. 4, 1992). The case has been fully briefed and was argued to the appellate court in October 1993. It is now awaiting the court's ruling.

That proceeding is an appeal of U.S. District Judge Hoeveler's order of February 24, 1992, approving the Settlement Agreement between the United States, the South Florida Water Management District and the Florida Department of Environmental Regulation in the seminal Everglades case, United States of America v. South Florida Water Management District, Case No. 88-1886-CIV-HOEVELER, (S.D. Fla. Feb. 24, 1992). The United States sued as owner of the Everglades National Park and Loxahatchee National Wildlife Refuge,

alleging the State's failure to prevent discharge of nutrient-rich waters from agricultural activities into Everglades waters. The State counterclaimed, asserting that activities of the United States (the Central and Southern Flood Control Project) were also causing the pollution of the subject waters. The Settlement Agreement essentially calls on the State to implement the Marjorie Stoneman Douglas Act. See § 373.4592, Fla. Stat. (1991). That act, in turn, requires implementation of a SWIM plan for the Everglades Protection Area. Judge Hoeveler's order specifically recognized the existence of disputed issues of fact, including where to fix any responsibility for pollution, and pointed the parties to APA proceedings pursuant to Florida Statutes Chapter 120 for the purpose of resolving those disputed factual issues.

Those APA proceedings are now pending before the Division of Administrative Hearings, challenging the Water Management District's SWIM plan, see e.g., Sugar Cane Grower's Coop. v. SFWMD, Case No. 92-3038 (DOAH filed May 18, 1992), and challenging DEP's planned issuance of permits to the Water Management District for construction of structures discharging into the Everglades Protection Area, see e.g., Florida Sugar Cane League v. Florida DER, Case No. 92-006797 (DOAH filed Nov. 12, 1992). The cases present such issues as whether phosphorous runoff from the Everglades Agricultural Area is adversely affecting Everglades water quality and the role of hydroperiod alterations caused by the Corps of Engineers' Central and Southern Flood Control Project, urbanization, fire, disturbances, water management, frost, nuisance

species and other factors. The SWIM plan embodies all of the factual issues currently in dispute concerning the alleged effect of activities within the EAA on the Everglades Protection Area. There is thus pending in those proceedings the ultimate assertion underlying the initiative petition--that the "sugarcane industry polluted the Everglades".

If the federal trial court consent decree based on the Settlement Agreement is overturned, a de novo trial in which all factual issues would be heard would be in order. If the consent decree is upheld, those factual disputes will be decided in the pending administrative proceedings and subject to judicial review pursuant to Florida Statutes section 120.68. In either event, the disputed factual issues are clearly the subject of pending proceedings wherein extensive scientific, technical and other expert testimony and evidence will be adduced. Further, the findings of fact which are made in those proceedings will either be made by a court of law or will be subject to judicial review in customary fashion.

The Everglades Amendment would preempt those, or any other, judicial or administrative proceedings. It would establish an allegation, a litigant's position in pending cases, as a constitutional "fact". Invited to do so by a ballot summary that is argumentative, rather than descriptive of a proposed change to the Florida Constitution, the electorate would be asked to condemn the sugar cane industry as the guilty party--and, on that unestablished predicate, to make it pay restitution in the form of

a billion dollar tax. If the amendment were adopted, the litigation would become unnecessary since the entire cost of cleaning up the Everglades would have been assessed in the voting booth to sugar processors.

Voters are asked to assign blame without the benefit of the evidence the pending proceedings will consider. The intention of the framers of the Everglades Amendment is not in the least disguised--to circumvent judicial processes in which the relevant facts can be found on an evidentiary basis and to substitute instead a lynch-mob approach under the auspices of an initiative petition to amend the Florida Constitution. There can be little doubt that this effort would have the effect of truncating the role of the courts in this dispute.

It should be said here that the Everglades Amendment would affect judicial functions even if there were no pending litigation. That is so because the proposal has the electorate adjudicating the sugar industry guilty of profiting from the pollution of the Everglades and then assessing both damages and penalties against sugar processors. The sugar tax has both a damages element, in the form of restitution for past pollution, and a penalty element, in the form of exactions which will be used to "control" future pollution. To compel sugar processors to pay for pollution which has not yet occurred, and which may be entirely the doing of other parties, is to impose penalties. That is to say, the proposal would exact a payment from them as punishment for past conduct but beyond any damages they have allegedly caused. See e.g., Sun Coast

Int'l v. DBR, 596 So. 2d 1118, 1120-21 (Fla. 1st DCA 1992) (defining and distinguishing "restitution" and "penalty").

The point is that in adjudicating responsibility for damages done, requiring that restitution be made, and imposing punishment, the Everglades Amendment would have the electorate engaged in judicial functions, even if there were no lawsuits underway. The Due Process clause of the United States Constitution, Article V and Article XIV, Section 1, requires a hearing before an impartial tribunal before property interests are taken, an opportunity be heard "at a meaningful time and in a meaningful manner". Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 902, 47 L.Ed. 2d 18,-- (1976). While no inflexible set of procedural protections is required, they must "insure that [the parties entitled to be heard] are given a meaningful opportunity to present their case". Id. at 909. In Mathews, the procedures for terminating Social Security disability benefits were upheld in part because the claimant had a right to an evidentiary hearing following the initial termination of benefits and to judicial review of the final agency decision.

The argument, for purposes of this proceeding, is not that the Everglades Amendment collides with the guarantees of Due Process, but that the electorate would be engaged in an inherently judicial function since it would be adjudicating substantial property rights which can only be taken by affording a hearing and judicial review. The electorate would be substituted for the trial court or administrative agency and the electorate's decision would be final and unreviewable.

Were that not enough, the proposed amendment would preclude resort to the courts (or any other body) without first bringing all "disputes arising under this Section . . . to a hearing before the Trustees". At first blush, this appears to be a simple exhaustion of administrative remedies requirement. But that doctrine is of judicial origin; it is a rule of self-restraint, which the courts employ to allow agency action to become final. Odham v. Foremost Dairies, Inc. 128 So. 2d 586, 593 (Fla. 1961).

Two observations are in order. First, this arrangement goes far beyond any conventional exhaustion requirement. It is axiomatic that disputes arising under a provision of the Florida Constitution will be inherently constitutional. They may, and most often will, present questions requiring an interpretation of the amendment itself. For example, if the Trustees were to direct, in the name of recreating historical Everglades functions, that a given discharge be discontinued, whether by Broward County, a farm, or by a Water Management District, the dispute, including such issues therein as require an interpretation of the Everglades Amendment, must first proceed to hearing before the very body that has instituted the action in question. The amendment specifies no procedures or rules for the Trustees to follow in conducting such a hearing, nor does it impose any deadlines for issuing its decision. By its terms, the amendment would prohibit the Article V courts from using their writs authority to enjoin Trustee action or to bring the dispute into a judicial forum until such time as the Trustees have released the dispute to the courts. The effect

on judicial prerogatives, indeed constitutional responsibilities, is dramatic.

Even if the Everglades Amendment could be said simply to constitutionalize an exhaustion of administrative remedies rule, it would represent an effect on judicial functions that, with its other consequences, would cause it to be multi-subject. The elevation of such a judicial doctrine to constitutional status is in the same posture as was the inclusion of the summary judgment rule in the proposed amendment the Evans Court removed from the ballot. There can be no serious doubt that judicial functions are touched by the Everglades Amendment. When those effects are cumulated with the changes that would be wrought in executive and legislative functions, the Court is left with no option but to strike the Everglades Amendment as too broadly ambitious in its recasting of the government structure the Florida Constitution now prescribes.

F. The Proposed Amendment Does Not Identify Other Constitutional Provisions That are Affected

The Court has held that the single subject limitation requires that an initiative amendment "identify the articles or sections of the constitution substantially affected". Fine, 448 So. 2d 989, 993. That requirement is intended to assure that the public is apprised of the change to the Florida Constitution being proposed and to avoid putting the Court in the position of having to determine how it fits into the existing document and what portions

of the State Constitution are being changed. Id. The Court would have nothing to consult in doing so other than the ballot summary and the proposed amendment. Accordingly, the initiative proposal must be clear on its face as to the specific constitutional changes being made. Concurring in the Fine opinion and in that point, Justice McDonald observed that "if an amendment is specific and well-defined in its scope, there is no problem in ascertaining what it supersedes". Id. at 994. He goes on to say that "the lack of specific amendments to specific sections and articles of the constitution would create chaos as to which parts of that document have or have not been affected and in what manner". Id. at 995. Justice Kogan's concurring opinion in Discrimination, addresses the point saying that the initiative there under review "tries to do too much and reflects draftsmanship that has not adequately considered all the collateral effects, which could seriously disrupt other important aspects of Florida government and law". Discrimination, 19 Fla. L. Weekly at S111 (Kogan, J., concurring).

So too does the Everglades Amendment affect numerous provisions of the Florida Constitution without in any way identifying those other articles and sections. The proposal describes itself only as adding a new section to Article X, that portion of the Florida Constitution embodying "Miscellaneous" provisions. No other constitutional provision is mentioned, implying that no other articles or sections are affected.

The preceding discussion, treating the numerous existing government functions which the amendment touches, attests to some

of the many articles and sections implicated by the Everglades Amendment. They include the following.

Article I, section 21, assuring access to the courts is affected. The Everglades Amendment would deny the sugar industry an opportunity to establish in a court of law that it did not pollute the Everglades and should not be made to pay for water clean up, restoration of water supply and future pollution control programs.

Article II, section 3, requiring a separation of powers among three branches of government would be substantially affected. The Trustees are not under the control of the Executive branch. No provision is made for recalling or removing the Trustees and they are identified as "citizen trustees" rather than as public officers or employees. The Trustees have powers over a portion of the State purse. They are not subject to legislative oversight in their promulgation of substantive rules. And they have the constitutional prerogative of resolving all disputes under the section which brings them into existence, at least in the first instance. The Everglades Amendment would combine, in a group of "citizens", executive, legislative and judicial powers.

Article II, section 7 is affected insofar as the Everglades Amendment commits to the Trustees lawmaking powers for the abatement of water pollution in South Florida. The existing article and section now entrust the Legislature with those responsibilities. This brief has already detailed the effects on Article III, section 1, which vests all legislative power in the

Florida Senate and House of Representatives. And the exception which it would make to the Governor's veto power, embodied in Article III, section 8 has likewise been described.

Further, the Everglades Amendment creates an exception from the trust fund constraints of Article III, section (19)(f) of the Florida Constitution which was adopted by the electorate in November 1992. Paragraph (1) thereof prohibits the creation of any trust fund "by law without a three-fifths (3/5) vote of the membership of each house of the legislature in a separate bill for that purpose only". Paragraph (2) provides, among other things, that "State trust funds created after the effective date of this subsection shall terminate not more than four years after the effective date of the act authorizing the creation of the trust fund". Paragraph (3) states, in pertinent part, that "trust funds authorized by this Constitution are not subject to the requirements set forth in paragraph (2) of this subsection".

Paragraph (3) thus leaves "trust funds authorized by this Constitution" subject to paragraph (1), with the result that they must be created by a legislative enactment, in a separate bill having no other purpose, by a three-fifths vote of both chambers. The Everglades Amendment would immediately create a trust fund on a basis that would be an exception to that existing constitutional rule.

Previous portions of this brief have described the effects the proposed amendment would have on the Governor's veto power and on his duties, under Article IV, section 1, as chief budget officer

for the State. If the amendment is interpreted to permit the Trustees to remove and control exotic **wildlife** species, as well as exotic **plant** species (it says merely "exotic species"), Article IV, section 9, giving the Game and Fresh Water Fish Commission powers over "wild animal life and fresh water aquatic life" would also be affected. Their powers may interdict those of the Commission, in any event, if water quality and quantity measures are implemented by the Trustees that impact fishes and other fresh water aquatic life. As on the subject of executive and legislative powers, the proposed amendment's effect on the vesting of judicial powers in the Article V courts has been stated above. If the consent decree in the federal litigation is upheld, the court's orders and the decisions of the Everglades Trustees could quickly find themselves on a collision course. These are the very sort of potentials to "seriously disrupt other important aspects of Florida government and law" with which Justice Kogan was concerned in the Discrimination decision. 19 Fla. L. Weekly, at S111.

Although the Everglades Amendment clearly entails matters of "Finance and Taxation", the subject of Article VII, no reference is made to any section of that article in the amendment or ballot summary. Article VII, section 1(c) prohibits the drawing of any money from the State treasury "except in pursuance of an appropriation made by law". The reference to an "appropriation" signifies a legislative decision committing an amount determined by the Legislature to a particular program or service. The irrevocable pre-commitment of all revenue produced by the sugar tax

to the Trustees is not an "appropriation" within the meaning of Article VII, section (1)(c).

Finally, there is an effect on Article X, section 11, Sovereignty lands. The Everglades Amendment authorizes the Trustees to acquire lands; the amendment does not say that the State is authorized to acquire lands, but that the "citizen trustees" may do so. There is no indication that the lands they acquire are to be titled in the Board of Trustees of the Internal Improvement Trust Fund as sovereignty lands pursuant to Article X, section 11.

This initiative measure may affect other constitutional articles and sections as well. Like the Discrimination proposal, however, it is so broadly and ineptly drafted that the Court is left to speculate on the provisions it would amend and to say, without benefit of any legislative-like record, how it would coordinate with the existing Constitution. The policy underlying the single subject limitation is the proposition that maintaining the Florida Constitution as an integrated, harmonious document requires initiative petition proposals to restrict themselves to a single change in the functions of government as they are presently allocated by the Constitution, and then to say explicitly what provisions of the Constitution are affected so that the singular change made is apparent to the electorate and the Court. The Everglades Amendment is grossly out of compliance with this policy.

G. The Voter Is Asked to Vote Yes or No to Interlocked Questions

The prevention of logrolling is a concomitant concern of the single subject limitation. As the Court put it in Fine, 448 So. 2d at 988,

> "an initiative proposal with multiple subjects, in which the public has had no representative interest in drafting, places voters with different views on the subjects contained in the proposal in the position of having to choose which subject they feel most strongly about".

The aggregation of provisions that are not invariably and necessarily connected is an attempt "to attract the support of diverse groups to assure [the measure's] passage". Id. In the Discrimination decision, 19 Fla. L. Weekly at S110, the Court applied this principle, finding the proposed amendment objectionable because "the voter is essentially being asked to give one "yes" or "no" answer to a proposal that actually asks ten questions".

The same is true of the Everglades Amendment. For example, a voter may want to support the improvement of water quality in the Everglades but have no interest in seeing money spent on removing exotic species in the lower Florida Keys Coral Reef. A voter may be inclined to support a trust fund for water quality and supply improvement but believe that the duration of the fund and the level of funding from year to year should be left with the Legislature so as to allow responses to changing conditions. Or, considering the electorate's recent expression of disapproval over the proliferation of trust funds, the voter may support a tax but oppose the creation of any trust fund at all.

A voter may support a tax for environmental purposes, but

oppose taxing only one industry. The voter is asked to respond with a single "yes" or "no" to creating a "citizen" trustee panel with extensive powers, forced to accept those which he or she opposes, for example, the initial power to resolve disputes arising under the new constitutional provision or the land acquisition authority, in order to secure a body with powers the voter believes it should have, for example to engage in water quality research. There is no "logical or natural oneness of purpose" in funding Everglades restoration efforts, on the one hand, and creating a tribunal with dispute resolution powers, on the other.

A voter could easily find his or her wishes with respect to the amendment divided by the portion which allows the Trustees to define the "Everglades Ecosystem"; even if all else about the amendment were acceptable, that prerogative alone might be offensive, but the voter would be put to the choice of accepting or rejecting the proposal in its entirety. It is for precisely the purpose of avoiding having the voter put to the task of balancing conflicting concerns that Article XI, section 3 limits initiative proposals to a single subject. Failing to insist on strict adherence to that rule would allow an "interest group . . . to sweeten the pot by obscuring a divisive issue behind separate matters about which there is widespread agreement." Advisory Opinion to the Attorney General--Limited Political Terms in Certain Elective Offices, 592 So. 2d 225, 232 (Fla. 1991) (Kogan, J., concurring in part and dissenting in part).

2. The Ballot Title and Summary for the Everglades Amendment are Misleading

In addition to reviewing initiative proposals for compliance with the single subject limitation, the Court also determines whether the ballot title and summary comply with the requirements of Florida Statutes section 101.161. That statutes dictates that the "substance of such amendment . . . shall be printed in **clear and unambiguous** language on the ballot . . .". Id. [Emphasis added]. The substance of the amendment "shall be an explanatory statement . . . of the chief purpose of the measure" and the title is to "consist of a caption . . . by which the measure is commonly referred to or spoken of". Id.

The Court has said that the ballot title and summary must "be fair and advise the voter sufficiently to enable him to intelligently cast his ballot". Hill v. Milander, 72 So. 2d 796, 798 (Fla. 1954); accord Askew v. Firestone, 421 So. 2d 151, 155 (Fla. 1982). It "need not explain every detail or ramification of the proposed amendment". Carroll v. Firestone, 497 So. 2d 1204, 1206 (Fla. 1986). The ballot summary must, however, be "accurate and informative"; it must "clearly communicate what the electorate is being asked to vote upon", without requiring the voter to infer meanings and consequences which are not described in the summary. Smith v. American Airlines, 606 So. 2d 618, 621 (Fla. 1992).

The ballot proposal must impart the "true meaning and ramifications" of the proposed amendment, lest it "fly under false colors". Askew v. Firestone, 421 So. 2d at 156. It must be

explanatory, identifying the legal effect; accordingly, a ballot containing the entire amendment but no explanations of its effects would be defective. Wadhams v. Board of County Comm'rs, 567 So. 2d 414 (Fla. 1990). The summary must be "clearly understandable". Discrimination, 19 Fla. L. Weekly at S110. It must not be ambiguous as to the effects the proposed amendment would have, misleading the voters by omitting adequately to communicate those effects. Askew v. Firestone, 421 So. 2d at 158; Limited Political Terms, 592 So. 2d at 228.

Toward that end, the ballot summary must "specify exactly what [is] being changed" so as to avoid confusing voters. Florida Leagues of Cities v. Smith, 607 So. 2d 397, 399, (Fla. 1992). If it leaves "undisclosed collateral effects", the ballot summary is defective. Discrimination, 19 Fla. L. Weekly at S111. The same is true if it "conceals a conflict with an existing provision". Limited Political Terms, 592 So. 2d 228.

The ballot title and summary are no place for "hotly contested assertions", "subjective evaluations" or the manifestation of "political motivations". Evans, 457 So. 2d 1351, 1355 (Fla. 1984). Those are matters to be "propounded outside the voting booth". Id.

The initiative petition presents a threshold issue in its inclusion of a preamble (paragraph (a) of the petition). The preamble reads as follows:

> The people of Florida believe that protecting the Everglades Ecosystem helps assure clean water and a healthy economy for future generations. The sugarcane industry in the Everglades Ecosystem has profited while damaging the Everglades with pollution and by altering water supply. Therefore, the sugarcane industry should

> help pay to clean up the pollution and to restore clean water. To that end, the people hereby establish a Trust, controlled by Florida citizens, dedicated to restoring the Everglades Ecosystem, and funded initially by a fee on raw sugar from sugarcane grown in the Everglades Ecosystem.

Article V, section 10 of the Florida Constitution directs this Court to render its opinion as to the "validity of any initiative **petition** circulated pursuant to Section 3 of Article XI". [Emphasis added]. Florida Statutes section 100.371(3) requires that the political committee sponsoring an initiative amendment "submit the **text of the proposed amendment** to the Secretary of State, with the form on which signatures will be affixed". [Emphasis added]. Florida Statutes section 101.171 requires that the Secretary of State have the "amendment" printed and copies distributed to supervisors of elections so that the text of the amendment can be "conspicuously posted at each precinct upon the day of the election". The ballot title and summary appear on the ballot pursuant to Florida Statutes section 101.161. Florida Statutes sections 102.031(3)(c) and (d) prohibit political committees from soliciting voters within 50 feet of the entrance to any polling place on the day of the election, defining "solicitation" to include the distribution of "any political or campaign material, leaflet or handout".

Taken collectively, this system calls for these steps: registering a proposed amendment, securing signatures from the public on an approved petition form, preparing a ballot title and summary, having the validity of the petition adjudged in advance by this Court, posting the text of the proposed amendment at the

polling place, and prohibiting campaign activities in the polling place. This scheme makes no provision for collecting signatures on a petition which includes **more than** the ballot title and summary and the text of the amendment itself.

It is unclear whether the preamble to the Everglades Amendment is intended for inclusion in the Florida Constitution since it is not drawn as an amendment to any article or section thereof. And it is unclear whether it would be included. In Limited Political Terms, the initiative petition included prefatory inducements which were not drawn as part of the amendment, subsequently adopted, to Article VI, section 4 of the Florida Constitution. Limited Political Terms, 592 So. 2d at 226. The Respondent recognizes that this may be taken as prior approval by this Court of the practice, but submits that the question was not addressed by the advisory opinion there issued. If the preamble is not a part of the proposal amendment, it should not have been included in the petition and identified as part of the amendment text. The petition should be declared invalid on that basis. The preamble is political rhetoric in its purest form. It is nothing more or less than an unabashed campaign exhortation to punish the "sugarcane industry" for allegedly damaging the Everglades and committing the political crime of "profiting". The preamble would drape the Everglades Amendment in the flag of a "healthy economy for future generations".

The law does not contemplate the inducement of petition signatures through the inclusion of campaign material in the

petition whose form the State has approved. The Court is left to speculate how many signatures would have been gathered had the petition contained only that which the statute allows, a ballot title, a ballot summary and the text of the proposed amendment. Nor does it contemplate the voter being confronted at the polling place with partisan proclamations running in the disguise of being a part of the text of the proposed amendment. To allow this would be to do serious damage to the integrity of the election process which the constitutional and statutory scheme for initiative petitions have in mind.

If, on the other hand, the preamble is intended for inclusion as part of the Florida Constitution, the question must be what it amends. Where is it to be located? Paragraph (b) makes clear that it is not part of new section 16 of Article X. And it certainly has no place with any other article or section, nor as a new stand-alone article. The fact that neither the person asked to sign the petition, the Court, nor the voter can be sure what the text of the proposed amendment is, makes the confusion of the electorate a certainty.

Finally, it must be said that this particular preamble is particularly insidious because of its misleading character. It would surely be stricken if it were the ballot summary which it attempts to supplement. Taking quantum leaps from the measure itself, it speaks grandiosely of restoring a "healthy economy", playing to the public's concerns with the faltering State and national economy, as if this amendment were the panacea. It

attempts to invoke familial sentiments with the promise of better things for "future generations". It promises clean water in abundant supply with no assurance of delivery and no accountability for failure. It indicts the sugarcane industry and then commands that the industry should "help pay" to restore clean water when in fact the proposed tax would have the effect of laying the entire financial responsibility for water quality and quantity in South Florida at one industry's doorstep. The people are urged to support this effort as an example of "citizens" themselves taking charge of the problem and taking "control" of the funds which will be spent to take corrective action. And it hints that other revenues will later be committed to the Trust, saying that the sugar tax is the mechanism for funding it "initially". The preamble may be good, effective and timely campaign material, but it has no place in the document which embodies the abiding, organic law of this State nor in any petition whose purpose is to amend that document.

We turn now from the preamble to the ballot title and summary. They violate the principles articulated by this Court's decisions in virtually every particular. It is evident that they transgress the edict for fairly describing a proposed change to the Florida Constitution. They are neither fair nor descriptive. Like the preamble, the ballot tile and summary reflect "hotly debated" issues, "subjective evaluations" and "political motivations" of the kind condemned in Evans, 457 So. 2d at 1355. As should be clear from the earlier description of the pending Everglades litigation,

whether the sugarcane industry polluted the Everglades has not been established by any court or agency. The petition's claim is, in the light most favorable to its sponsors, an editorial assertion--it does not in any manner describe the proposed change to Article X. Instead, it tells the voter more than "the legal effect of the amendment", something it may not lawfully do. Id.

Without reiterating the points, the title and summary are also prohibited campaign material rather than an "accurate and informative" statement to the electorate of the proposed amendment and its legal effect. Titling the proposal "Save Our Everglades" is good partisan sloganeering, but poor constitutional work. As Justice Overton's concurring opinion said in Evans, it "may meet advertising criteria for the marketing of a product, but it cannot be tolerated for constitutional ballot language". Id. at 1356. Other states have condemned the employment of catch phrases and resort to partisan coloring in the title and summary. See e.g., Arkansas Women's Political Caucus v. Riviere, 677 S.W. 2d 846 (Ark. 1984), Say v. Baker, 322 P. 2d 317, 320 (Colo. 1958). The Court's approval of the Everglades Amendment would invite the engineering of ballot titles and summaries for maximum political punch, irrespective whether they were descriptive of the ensuing proposal's legal effect.

Conveying the proposed amendment's consequences for the extant constitutional scheme would become secondary to styling titles and summaries in highly charged, politically current syntax. Proposals to "Save Our Unborn Children", "Assure Universal Health Care",

"Eliminate Wasteful Government Spending", and "Dump Crooked Politicians", with similarly colorful and appealing summaries would all pass constitutional muster. Certainly, that would take initiative petitions in a direction the law forecloses.

The ballot summary is misleading for reasons other than its political content. It speaks with too little precision to be said fairly to describe the proposed amendment. The summary says the trust will be used to restore the "Everglades" while the amendment would use those funds for the "Everglades Ecosystem". Voters may assume that the "Everglades" is the area within Everglades National Park. There is nothing in the summary to make them think that the Florida Keys or Florida Bay are part of the Everglades. It is anything but "clear and unambiguous" in this respect.

In speaking of the sugar tax, the summary refers to the "Everglades Ecosystem". The voter is given the mistaken impression that this is a geographically identified area. The summary misleads by failing to inform the elector that the Trustees will decide on the boundaries of the Everglades Ecosystem. This critical aspect of the amendment cannot be gleaned from the summary and so it fails to be fairly "explanatory" or "accurate".

It misleads the voter by omitting to describe the numerous changes the amendment would effect with respect to the current powers of the Legislature, the Governor and various executive agencies in making and enforcing water quality and related laws, rules and regulations in South Florida and in making expenditure decisions concerning the same. In its zeal to appeal, the voter is

invited to believe that this effort will be insulated from the taint of government bureaucracy by the characterizing contention that "**citizen** trustees will control the Trust". [Emphasis added]. The summary does not even hint that the Trustees will have dispute resolution powers, much less that they will be involved in construing the Constitution of the State of Florida and making initial decisions as to their own jurisdiction and powers.

The sugar tax is referred to as a "fee", with obvious sleight-of-hand design. Calling it a tax would be politically incorrect and fatally out of vogue. Attracting support for taxes of any kind has become increasingly difficult, and the framers of the Everglades Amendment did not wish to swim against that tide. Yet it is not fairly described as a fee. This Court has recognized that levies denominated "fees" may in fact be taxes. Coy v. Birth-Related Neurol. Injury Comp. Plan, 595 So. 2d 943 (Fla. 1992), cert. denied sub nom., McGibony v. Florida Birth-Related Neurol. Injury Comp. Plan, -- U.S. --, 113 S. Ct. 194, 121 L. Ed. 2 137, (1992). In that case the Court found that an annual "fee" assessed against physicians to support a care plan for neurological injuries sustained at birth was in fact a tax. It defined a tax as "an enforced pecuniary burden laid on individuals or property to support government". Id. at 945. (citing State ex rel. Clark v. Henderson, 137 Fla. 666, 188 So. 351 (1939)). Fees, in the form of special assessments and user fees, are in general charges to those who specially or individually benefit from the provision of a particular government service or facility. See, Comment,

State-Enforced Fees for Special Benefits Conferred: Taxes or User Fees?, 45 FLA. L. REV. 325 (1993), 45 Fla. L. Rev. 325 (1993)(citing cases). The sugar levy would be a State-collected imposition used to carry out a program of statewide import. The clean up and restoration of Everglades water would not be undertaken for the special benefit of the "sugarcane industry". In fact, the levy could more accurately be called punishment or penalty, but that phraseology by the drafters would have admitted its unlawful nature under the federal proscription against bills of attainder found in Article I, section 10 of the United States Constitution.

In sum, the ballot title and summary fail to satisfy the requirements of Florida Statutes section 101.161. They contain propaganda, rather than an objective description of a proposed constitutional amendment. The summary fails to disclose the many changes the proposed amendment would effect on the current constitutional fabric. It probably could not be written, within the 75-word limit, to do so; that is a problem inherent in multi-subject proposals and the reason they fail on both single subject and title/summary grounds. It is drafted not to **inform** the voter as to the proposed constitutional change, but to **persuade** the voter to pull the "yes" lever. The use of the ballot title and summary for that purpose is inappropriate and must be disapproved by this Court.

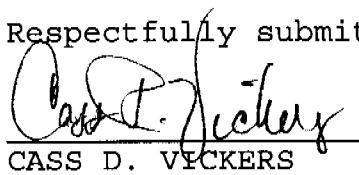
CONCLUSION

It is not the purpose of these proceedings to judge the wisdom or attractiveness of initiative proposals, but to determine whether a discrete proposal for amending the Florida Constitution has been put forward and whether the changes which that amendment would bring are fairly explained to the electorate.

The broad ambitions reflected by the amendment lead it into multiple and disparate subjects. It would interject a citizen panel into an array of existing government programs whose purposes, missions and jurisdictions would be substantially affected--with consequences nowhere described in the initiative proposal. None of the three branches of government would see its existing functions unaffected by this amendment.

The ballot title and summary are replete with political rhetoric. They fail to convey to the voter an objective explication of the legal effects which the Everglades Amendment would have. It misleads the electorate both with its promises and contentions, with its mischaracterization of the sugar tax, with ambiguous references to the "Everglades" and the "Everglades Ecosystem" and with its omissions to describe the awesome regulatory, lawmaking and adjudicatory powers of the Trustees. The Everglades Amendment is plainly at odds with the governing imperatives and should be removed from the ballot.

Respectfully submitted,



CASS D. VICKERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above foregoing has been furnished by U.S. Mail delivery, to **George Barley,** 1919 Espanola Drive, Orlando, Florida 32804, KENNETH R. HART, ESQUIRE, and R. STAN PEELER, ESQUIRE, 227 South Calhoun Street, Post Office Box 391, Tallahassee, Florida 32302-0391, this the 31st day of March, 1994.

CASS D. VICKERS, ESQUIRE
Florida Bar No. 158867
MESSER, VICKERS, CAPARELLO,
MADSEN, LEWIS, GOLDMAN & METZ, P.A.
Post Office Box 1876
Tallahassee, Florida 32302-1876
(904) 222-0720