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FLORIDA WATER LAW AND ENVIRONMENTAL WATER SUPPLY FOR EVERGLADES RESTORATION

JOHN J. FUMERO*

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I. INTRODUCTION

This article provides a general overview of Florida's water law from its common law origin through the present day framework set forth in chapter 373 of the Florida Statutes.¹ It also surveys key provisions of the Water Resources Development Act of 2000² ("WRDA"), as well as state law, concerning the legal framework for environmental water supply assurances in support of Everglades restoration.

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1. FLA. STAT. ch. 373 (2002).

2. Pub. L. No. 106-541, Title VI, § 601.

II. FLORIDA WATER LAW 101

A. *Common Law*

Water law in the United States stems from two general common law doctrines, divided between eastern states and western states. Eastern states, with their more abundant water supply, have developed the riparian system of water use. Western states, with their less plentiful supply, have developed the prior appropriation system.

Florida's water law system initially evolved from the eastern states' riparian system. The strict riparian system established an exclusive right of riparians (persons owning land along the watercourse) to take and use water. The owner of the property was entitled to receive an unaltered flow of water across the land, without a decrease in quantity or quality. Florida adopted a modified riparian doctrine that employed a reasonable use rule.³ Under this doctrine, an upstream riparian owner could reduce or change the flow of a watercourse as long as they did not unreasonably interfere with another riparian owner's use.

The western states' prior appropriation system is often referred to as "first in time, first in right." This rule arose in the early 1800's during America's Gold Rush. Water was essential to the development of gold miner's claims. The prior appropriation system provided that once water was withdrawn from a stream and put to use, the right to continue that use was perfected and continued without interference from new arrivals. These water rights could be bought and sold and passed down from generation to generation.

B. *A Model Water Code*

Following several attempts by the Florida Legislature to address Florida's water issues, in 1971 *A Model Water Code*⁴ was drafted. The goal of the drafters was to create a comprehensive regulatory system that attempted to combine the best features of the riparian and prior appropriation systems, while at the same time avoiding their pitfalls.⁵ Primary objectives included more certainty in water rights, flexibility to adjust water uses when necessary to accommodate changes in circumstances, and the integration of planning and regulation for the protection of the quality and quantity of Florida's water resources to maximize their

3. Florida Water Resources Act of 1972, FLA. STAT. ch. 373 (1972).

4. MALONEY, AUSNESS & MORRIS, *A MODEL WATER CODE* (1972).

5. *Id.* at 156-195.

beneficial uses.⁶ Thus, the reasonable-beneficial use standard, the standard still used in Florida today, was introduced.

C. Florida Water Resources Act of 1972

The Florida Legislature adopted most of the water use provisions of *A Model Water Code* unchanged as the Florida Water Resources Act of 1972⁷, ("Act"). Basic premises of the Act include that:

1. east and west common law are blended;
2. ownership of land does not carry with it the ownership of or the right to use water; and
3. Florida's water is held in trust for the benefit of the people of the state.

The Act established an administrative structure for the regulation of water use through the issuance of permits and water shortage restrictions. The five water management districts have exclusive authority to issue these permits. The Act also included innovative planning provisions.

1. The Consumptive Use Permit System

Part II of chapter 373 sets forth the permitting system for consumptive uses of water. In order to perfect the right to use water, a permit must be obtained.⁸ Initially, all water uses existing as of the date of the Act, other than domestic uses, were required to obtain permits within two years of the Act's effective date or those uses would be considered abandoned.⁹

All applications for water use permits are reviewed under a three-pronged test.¹⁰ The first prong deals with the nature of the proposed use. The applicant must demonstrate that the use is "reasonable-beneficial."¹¹ This is defined as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and

6. *Id.*

7. *FLA. STAT. ch. 373 (1972).*

8. *FLA. STAT. § 373.219 (2002).*

9. *FLA. STAT. § 373.216 (2002).*

10. *FLA. STAT. § 373.223(1) (2002).*

11. *FLA. STAT. § 373.223(1)(a) (2002).*

consistent with the public interest."¹² This standard requires the prevention of waste or excessive uses of water. This standard can be implemented to require water conservation, urban demand management, and high-efficiency irrigation systems.

The second prong requires the applicant to demonstrate that the use is consistent with the "public interest."¹³ Public interest criteria include, among other things, water resource protection, flood protection, and water quality protection.¹⁴ If two applicants for water use permits are competing for water, the application that best serves the public interest must be approved.¹⁵ Renewal of existing permits prevails over proposed water uses if both are competing and are equal with regard to public interest considerations.¹⁶

The third prong of the permit evaluation requires the applicant to assure that the use will not interfere with existing legal uses.¹⁷ Existing users are those that are authorized under a valid permit or are otherwise exempt.¹⁸

Water use permits are issued for fixed durations, depending upon the proposed use and resource considerations at the time of permitting.¹⁹ They must be renewed upon expiration to continue the use.²⁰ This maintains flexibility by allowing the water management districts to reexamine the use based upon changed conditions and consider and incorporate new rules or standards as appropriate.

12. *FLA. STAT. § 373.019(13) (2002).*

13. *FLA. STAT. § 373.223(1)(c) (2002).*

14. *See, e.g., FLA. ADMIN. CODE r. 40E-2.301 (2002).*

15. *FLA. STAT. § 373.233(1) (2002).*

16. *FLA. STAT. § 373.233(2) (2002).*

17. *FLA. STAT. § 373.223(1)(b) (2002).*

18. *FLA. STAT. § 373.226 (2002).*

19. *FLA. STAT. § 373.236 (2002).*

20. *FLA. STAT. § 373.239 (2002).*

2. Water Shortage Restrictions

Water management districts are authorized to restrict water use due to water shortage conditions.²¹ To implement this authorization, the water management districts have adopted Water Shortage Plans, which set forth the conditions that trigger a water shortage declaration.²² The purpose of a water shortage declaration is to prevent serious harm to the water resources and to minimize potential impacts to the public by equitably distributing available water for all users.

3. Planning

Since 1972, planning has been recognized as an important tool in managing Florida's water resources. A *Model Water Code* theorized that proper water resource allocation could best be accomplished within a statewide, coordinated planning framework.²³

The Act and subsequent revisions to the Act required the water management districts and the Florida Department of Environmental Protection to undertake various planning initiatives relative to the State's water resources, including, but not limited to, establishing minimum flows and levels and water supply planning.²⁴ Initiatives such as the Florida Water Plan²⁵, District water management plans²⁶ and regional water supply plans²⁷ are intended to be the primary planning vehicles.

Water management districts are required to develop regional water supply plans for planning regions where existing or reasonably anticipated water supply sources are determined to be inadequate to meet 20-year projected needs.²⁸ Water management districts have the primary responsibility for water resource development, while local governments, regional water supply authorities and private utilities have the primary responsibility for water supply development.²⁹

The appropriate management and diversification of water supply sources will provide sufficient water to meet the needs of each region. The Legislature's intent is to promote the availability

21. FLA. STAT. §§ 373.175, .246 (2002).

22. FLA. ADMIN. CODE r. 40A-21, 40C-21, 40D-21, 40E-21 (2002).

23. MALONEY, AUSNESS & MORRIS, *A MODEL WATER CODE* 103-104(1972).

24. See, e.g., § 373.042, .0361 (2002).

25. FLA. STAT. § 373.036(1) (2002).

26. FLA. STAT. § 373.036(2) (2002).

27. FLA. STAT. § 373.0361 (2002).

28. FLA. STAT. § 373.0361(2) (2002).

29. FLA. STAT. § 373.0831 (2002).

of sufficient water for all existing and future reasonable-beneficial uses and natural systems.³⁰ Implementation of the water supply plans can avert potential supply problems through proper water resource management.

4. *Minimum Flows and Levels*

The Act requires the water management districts to establish minimum flows and levels for surface waters and aquifers within their jurisdiction.³¹ The minimum flow is defined as the "...limit at which further withdrawals would be significantly harmful to the water resources or ecology of the area".³² The minimum level is defined as the "level . . . at which further withdrawals would be significantly harmful to the water resources of the area."³³ Water resources include environmental / fish and wildlife components. The water management districts are directed to use the best available information in establishing these levels.³⁴ Each water management district must also consider, and at its discretion may provide for, the protection of non-consumptive uses in the establishment of minimum flows and levels.³⁵

Minimum flows and levels provide a tool for planning and allocation of water resources by specifying the extent and limits of the availability of the State's surface and ground water. Minimum flows and levels are just a part of a comprehensive water resources management approach geared toward assuring the sustainability of the water resources. They must be considered in conjunction with all other resource protection responsibilities granted to the water management districts by law, including consumptive use permitting, water shortage management, and water reservations.

5. *Water Reservations*

Water management districts are required to set aside water from allocation in water use permits for the protection of fish and wildlife or public health or safety.³⁶ Such reservations of water may be seasonally based.³⁷ Any such reservations can be revised from time to time in light of changed conditions.³⁸ Existing legal uses are

30. *FLA. STAT. § 373.0831(2)(a) (2002).*

31. *FLA. STAT. § 373.042 (2002).*

32. *FLA. STAT. § 373.042(1)(a) (2002).*

33. *FLA. STAT. § 373.042(1)(b) (2002).*

34. *FLA. STAT. § 373.042(1)(b) (2002).*

35. *FLA. STAT. § 373.042(1)(b) (2002).*

36. *FLA. STAT. § 373.223(4) (2002).*

37. *Id.*

38. *Id.*

required to be protected so long as they are not contrary to the public interest.³⁹

D. Florida Water Law Summary

1. As noted above, Florida water law, through chapter 373, Florida Statutes provides a number of legal mechanisms to quantify and protect specified environmental water supply needs. They include:

- Minimum flows and levels.⁴⁰
- Reservation of water for environmental purposes.⁴¹
- Permit requirements and conditions to prevent harm to the water resources.⁴²
- Permit rights are not property rights; the evolving public interests in environmental restoration and protection can be implemented when permits are renewed.⁴³

2. Florida water law equitably manages the resource during droughts.

- Water shortage plans equitably divide available water during drought conditions between use classes.⁴⁴
- Provides advance notice to users of risk of cutbacks during droughts.⁴⁵

3. Florida water law requires the efficient use of water and the protection of existing water rights.

- The reasonable-beneficial test for permit issuance requires users to conserve the water resource thereby extending the supply for other users and the environment.⁴⁶

4. Florida water law provides water users with "certainty" that their supply will be available when they need to use it.

- Existing users are protected from interference caused by subsequent users.⁴⁷

39. *Id.*

40. *Id.*

41. *FLA. STAT. § 373.223(4) (2002).*

42. *FLA. STAT. § 373.223 (2002).*

43. *FLA. STAT. § 373.239 (2002).*

44. *FLA. STAT. §§ 373.175, 373.246 (2002).*

45. *Id.*

46. *FLA. STAT. § 373.223(1) (2002).*

47. *FLA. STAT. § 373.223(1)(b) (2002).*

- When permitted, a user receives an allocation to a water right sufficient to meet that user's demands, even in a fairly serious drought event.

5. Florida water law requires planning to identify water supply shortfalls and, if necessary, construction of alternative water supply projects to assure adequate supply for both humans and the environment.⁴⁸

III. ENVIRONMENTAL WATER SUPPLY ASSURANCES

Although legal mechanisms for environmental water supply have existed in state law for many years, not until completion of the Comprehensive Everglades Restoration Plan ("CERP") has the state been in the position to effectively utilize these tools for the South Florida ecosystem. The more serious and regional effects of drainage of freshwater supplies from the natural systems could not be addressed without a federal and state partnership, due to the federal involvement of constructing and managing regional water resources in the Central and Southern Florida ("C&SF") Project.⁴⁹ The inclusive scientific and public process for development of the CERP has provided the State with a unique opportunity to implement the existing state law to protect and provide for environmental water supplies for Everglades Restoration.

Florida water law is designed to allow for changing direction in public interest and resource conditions, through a flexible system of water allocation. This unique approach is possible because in Florida there is no property right in water.⁵⁰ Rights to use water are only obtained through permit. Permits expire periodically to reallocate water for resource protection and other public interest factors, such as Everglades Restoration. Under Florida law, only those water quantities designated for consumptive use from the regional system will be made available through permit allocations. The following identifies some of the tools that Florida will be utilizing to protect environmental water supplies for Everglades Restoration, including CERP implementation.

48. *FLA. STAT. § 373.0831 (2002)*.

49. The Central and Southern Florida (C&SF) Project is a multi-purpose project which was first authorized in 1948 in the Flood Control Act of June 30, 1948, Pub. L. No. 88-858. This act authorized the first phase of the "Comprehensive Report on Central and Southern Florida for Flood Control and Other Purposes" as set forth in H.D. 643, 80th Congress, 2d Session (1949) to provide flood control, water control, water supply, and other services to the area that stretches from Orlando to Florida Bay.

50. *See, e.g., Jupiter Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663 (Fla. 1979), *cert. denied*, 444 U. S. 965 (1979).

A. *Water Reservations Concerning CERP*

Water reservations are used to set aside water for the protection of fish and wildlife, including restoration of the Everglades ecosystem.⁵¹ Specific water quantities in the C&SF Project may be set aside from allocation by reservations, consistent with the natural system performance of the CERP.⁵² Operational protocol may be identified for the purpose of making deliveries associated with water reservations.⁵³ Water reservations for the natural system may periodically be increased to reflect the increased water supplies made available through CERP implementation.⁵⁴ Deviations from the rainfall driven deliveries to the natural system may occur after a public hearing and specific order by the governing board during extreme water shortages.⁵⁵ This flexibility will allow the water management district to send water supplies to environmental areas that most need additional supplies.

As consumptive use permits in South Florida expire, they will be reviewed by the South Florida Water Management District ("District") for consistency with the CERP water reservation rules. Permit allocations may be capped or diverted, based on the reservation, so that none of the natural system water will be taken away from CERP projects.⁵⁶ Permit allocations from the regional system may have long term durations, with a maximum of 20 years, only to the extent that the District determines that such water will not be needed for Everglades Restoration under CERP.⁵⁷ These determinations should be made based on reservation rules.

B. *Summary of Mechanisms in Federal and State Law to Ensure Protection of Environmental Water Supplies*

There are a number of unprecedented legal processes, agreements, regulations and mandates relating to quantifying and protecting environmental water supply for Everglades restoration. They include, pursuant to WRDA, execution of an agreement between the Florida Governor and the President. The agreement

51. FLA. STAT. §§ 373.223(4), 373.470 (2002).

52. FLA. STAT. § 373.470(3) (2002).

53. FLA. STAT. § 373.223(4) (2002).

54. *Id.*

55. See SOUTH FLORIDA WATER MANAGEMENT DISTRICT, DRAFT RESERVATION OF WATER FOR THE ENVIRONMENT AND ASSURANCES FOR EXISTING LEGAL SOURCES CONSISTENT WITH FEDERAL AND STATE LAW (June 25, 2002) at <http://www.sfwmd.gov/org/wsd/waterreservations/index.html>

56. *Id.*

57. FLA. STAT. § 373.236 (2002).

prohibits the State from allocating water that is made available from a CERP project for environmental purposes, prior to the time water reservations are adopted; includes third party enforcement mechanism.⁵⁸

A detailed project development and scientific analysis is accomplished through Project Implementation Reports. Project Implementation Reports will identify up front how much water will be reserved for environmental restoration and the appropriate timing and distribution of environmental water.⁵⁹ Adoption of water reservations before any federal funds are released for construction of a CERP project is yet another safeguard required by WRDA.⁶⁰

In addition, development of detailed operation manuals for projects that include how water supplies will be delivered and distributed for environmental purposes consistent with water reservations is mandated.⁶¹

Pursuant to state law, the District, as local sponsor⁶², is required to participate in the development of Restudy project components to ensure that the component meets all legal responsibilities under chapter 373, Florida Statutes for water supply, water quality, flood protection, threatened and endangered species and other water or natural resources.⁶³

Additionally, identification of water for environmental purposes to receive state funds for construction is required.⁶⁴ Also required is the adoption of water reservations based on state project authorizations.⁶⁵

Development, funding and implementation of regional water supply plans to meet demands of both human and environmental water demands are mandated.⁶⁶ Issuance of consumptive use permits that cause harm to the water resources is prohibited. Permits expire periodically in order to reallocate water to implement water reservations.⁶⁷ The adoption of minimum flows and levels is required to prevent significant harm to water

58. *Pub. L. No. 106-541, Title VI, § 601(h)(2).*

59. *Pub. L. No. 106-541, Title VI, § 601(h)(4)(A).*

60. *Pub. L. No. 106-541, Title VI, § 601(h)(4)(B).*

61. *Pub. L. No. 106-541, Title VI, § 601(h)(4)(C).*

62. *FLA. STAT. § 373.1501(4) (2002).*

63. *FLA. STAT. § 373.026(8)(b) (2002).*

64. *Id.*

65. *FLA. STAT. § 373.470(3)(c) (2002).*

66. *FLA. STAT. § 373.0361 (2002).*

67. *FLA. STAT. § 373.223 (2002).*

resources, and recovery and prevention strategies to achieve minimum flows and levels are required.⁶⁸

IV. CONCLUSION

The CERP has presented unprecedented policy, scientific and legal challenges. Florida water law provides a comprehensive framework necessary to meet the state and federal law mandates relative to CERP and the protection of environmental water supplies.

68. *FLA. STAT. § 373.042 (2002)*.

