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Maloney et al.: Florida's "Reasonable Beneficial" Water Use Standard: Have East a

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FLORIDA'S "REASONABLE BENEFICIAL" WATER USE STANDARD: HAVE EAST AND WEST MET?

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INTRODUCTION

Florida, a state blessed with an abundant natural supply of water, also suffers from extreme water conditions.[1] Years of flooding often precede years of drought. Within a single year, a rainy summer may be followed by a bone-dry fall. Furthermore, much of Florida's ample rainfall is lost through evapotranspiration or drainage to the sea.

During the 1950's, in response to the problems of droughts and water shortages, the Florida legislature began to examine possible methods for establishing a workable regulatory system for water use.[2] The initial legislative effort was the 1957 Florida Water Resources Act which established a statewide administrative agency to oversee the development of Florida's water resources.[3]

In 1972, a year of major environmental legislation in Florida, the Florida legislature made further changes in the system of water management through enactment of the 1972 Florida Water Resources Act (FWRA), Chapter 373 of the Florida Statutes.[4] Designed to provide comprehensive state regulation of Florida's water resources on a hydrologically sound basis through consideration of the interrelationship of all types of water resources in the hydrologic cycle,

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1. FLORIDA WATER RESOURCES STUDY COMMISSION, FLORIDA'S WATER RESOURCES, A REPORT TO THE GOVERNOR AND THE 1957 LEGISLATURE 17-30 (1956).

2. *Id.* at 14, 15.

3. 1957 Fla. Laws, ch. 57-380, at 855.

4. The legislation was based primarily on the MODEL WATER CODE developed by a group of water law experts at the Holland Law Center of the University of Florida.

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the FWRA provides, among other things, for establishment of a permit program for the consumptive use of water.[5]

Although the FWRA authorizes either the Department of Environmental Regulation (DER) or the governing board of the local water management district to administer the permit program,[6] DER has delegated responsibility for the permit program to the water management districts. Of the five water management districts in Florida, only the South Florida Water Management District and the Southwest Florida Water Management District have fully implemented permit programs. While the St. Johns Water Management District has a permit program in the initial stages, neither the Suwannee River Water Management District nor the Northwest Florida Water Management District have any form of permitting at the present time.[7]

The FWRA sets forth broad guidelines for establishing a permit program. The conditions that must be met to obtain a permit are as follows:

> (1) To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water:
> (a) Is a reasonable beneficial use as defined in s.373.019(5); and,
> (b) Will not interfere with any presently existing legal use of water; and,
> (c) Is consistent with the public interest.[8]

"Reasonable beneficial use" 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 consistent with the public interest."[9]

This article examines the meaning of "reasonable beneficial use" through analysis of the common law of both "reasonable use" and "beneficial use." A set of factors is developed to assist administrative agencies in establishing guidelines for determination of whether a proposed use satisfies the "reasonable beneficial" standard.[10]

THE COMMON LAW MEANING OF "REASONABLE USE"

Water law development in the states east of the Mississippi River, usually referred to as the riparian system, paralleled the development of English common law in relation to surface watercourses.[11]

Many eastern states initially adopted the English "natural flow"[12] doctrine

5. FLA. STAT. §§373.203-.249 (1977).

6. FLA. STAT. §373.219(1) (1977).

7. *See* 6 FLA. ADMIN. CODE 16-G (Northwest Florida Water Management District); 16-H (Suwannee River Water Management District); 16I-2 (St. Johns River Water Management District); 16J-2.07-2.16 (Southwest Florida Water Management District); 16K-2.01-2.16 (South Florida Water Management District) (1978).

8. FLA. STAT. §373.223(1) (1977).

9. FLA. STAT. §373.019(5) (1977).

10. *See* Fleming, *Water Allocation: The Reasonable and Beneficial Use Standards*, 53 FLA. B.J. 25 (1979).

11. *See* 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS 278-342 (1904).

12. "[E]very man has a right to have the advantage of a flow of water in his own land without diminution or alteration." Bealey v. Shaw, 6 East 208, 214, 102 Eng. Rep. 1266, 1269

of riparian rights. Under this doctrine, originally applied to streams, a riparian owner was entitled to have the stream flow through his land undiminished in quantity or quality.[13] This natural flow doctrine evolved into a standard of "reasonable use" under which some diminution in quantity or quality of the watercourse would be allowed if other riparians were not unreasonably harmed.[14] Each riparian's consumptive use of water was required to be reasonable in both its effect upon the rights and uses of the other riparian owners[15] and its effect upon the public interest.[16] In Connecticut, a lower riparian could be deemed injured by an unreasonable use even in the absence of any actual use by the lower riparian.[17]

Florida courts adopted the common law doctrine of reasonable use for consumption of water from surface water bodies. The Florida supreme court in 1896 stated:

> The right to the benefit and advantage of the water flowing past one owner's land is subject to the similar rights of all the proprietors on the banks of the stream to the *reasonable* enjoyment of a natural bounty, and it is therefore only for an unauthorized and *unreasonable use* of a common benefit that anyone has just cause to complain.[18]

The Florida court has also applied the reasonable use rule to consumptive use of ground water recognizing that the different physical states of water, *i.e.*, sur-

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(K.B. 1805). *See generally* Wright v. Howard, 1 Sim & Stu. 190, 57 Eng. Rep. 76 (Ch. 1823); Sury v. Pigot. Popham 166, 79 Eng. Rep. 1263 (K. B. 1625); Lauer, *The Common Law Background of the Riparian Doctrine*, 28 Mo. L. Rev. 60 (1963); Weston & Gray, *Legal Control of Consumptive Water Use by Pennsylvania Power Plants*, 80 Dick. L. Rev. 353, 365 (1976).

13. F. Maloney, S. Plager & F. Baldwin, Water Law and Administration §112.1 (1968) [hereinafter cited as Water Law].

14. "All that the law requires of the party, by or over whose land a stream passes, is, that he should use the water in a reasonable manner, and so as not to destroy or render useless, or materially diminish, or affect the application of the water by the proprietors below on the stream." 3 J. Kent, Commentaries 354 (1st ed. 1828); *see* Marquis, Freeman & Heath, Jr., *The Movement for New Water Rights Laws in the Tennessee Valley States*, 23 Tenn. L. Rev. 797, 807 (1955) (citing 2 H. Farnham, Waters and Water Rights §464 (1904)); 4 Restatement of Torts, ch. 41, topic 3 at 341-42 (1939); 1A Thompson, Real Property §260 (Grimes ed. 1964).

15. "The true test of the principle and extent of the use is whether it is to the injury of the other proprietors or not." Tampa Water Works Co. v. Cline, 37 Fla. 586, 596, 20 So. 780, 783 (1896) (quoting Story, J., in Tyler v. Wilkinson, 4 Manson 397, 24 F. Cas. 472 (C.C.D.R.I. 1827); Restatement (Second) of Torts §850A [hereinafter cited as Restatement (2d)]; 78 Am. Jur. 2d *Waters* §283 (1975); 93 C.J.S. *Waters* §11 (1956).

16. Dimmock v. City of New London, 157 Conn. 9, 17, 245 A.2d 569, 574 (1968).

17. *Id.* at 15, 245 A.2d at 572.

18. Tampa Waterworks Co. v. Cline, 37 Fla. 586, 596, 20 So. 780, 782 (1896) (emphasis added). In a later case, affirming an injunction against pumping from a lake for irrigation purposes where the lake was lowered to a level that damaged the interests of other riparians, the Florida court stated: "Except as to the supplying of natural wants, including the use of water for domestic purposes of home or farm, such as drinking, washing, cooking, or for stock of the proprietor, each riparian has the right to use the water in the lake for all lawful purposes, so long as his use of the water is not detrimental to the rights of other riparian owners." Taylor v. Tampa Coal Co., 46 So. 2d 392, 394 (Fla. 1950).

face, subterranean, and percolating waters, are interrelated parts of the hydrologic cycle.[19]

The Restatement (Second) of Torts[20] has identified nine factors which courts have taken into consideration in determining whether a use is a "reasonable use." These are: (1) the *purpose* of the respective uses; (2) the *suitability* of the uses to the water course or lake; (3) the *economic value* of the uses; (4) the *social value* of the uses; (5) the *extent and amount of the harm* caused; (6) the *practicality of avoiding the harm* caused; (7) the *practicality of adjusting the quantity* of the water used by each proprietor; (8) the *protection of existing values* of land, investments and enterprises; and, (9) the *burden of requiring the users* causing the harm to bear the loss.[21] An elaboration of how these factors have been treated is appropriate.

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19. Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979). The *Tequesta* opinion contains a lengthy discussion of the evolution of Florida water law.

20. The final draft of the RESTATEMENT (SECOND) OF TORTS has been approved and should be available early in 1979. Citations in this article refer to §850A of the final draft. Section 850A is substantially the same as §850B of Tentative Draft No. 17 of the RESTATEMENT (SECOND) OF TORTS, which is the draft currently available.

21. RESTATEMENT (2D), *supra* note 15, §805A. Professor Grimes of the Indianapolis Law School has suggested that the test for the "reasonableness" of a given use generally includes the requirements that:

(1) the purpose of the use must be lawful and beneficial to the user and suitable to the stream involved;
(2) the social utility of a proposed or existing use should be considered;
(3) use of the water must be made on riparian land (used by the riparian owner on land adjacent to the stream or lake);
(4) the quantity of water diverted to the exclusive use of the riparian user must be viewed in light of the total flow;
(5) the result of the use must not be to pollute the water so as to significantly harm lower riparian users; and
(6) the manner of flow must not be appreciably altered (retarded or accelerated).

Grimes' listing of reasonable use requirements, which does not purport to be comprehensive, is consistent with that of the RESTATEMENT (SECOND) OF TORTS. Both articulate the factors of purpose, suitability, social utility, quantity, harm and manner of use. The economic value factor of the RESTATEMENT (SECOND) OF TORTS is included in the social utility factor listed by Grimes. The RESTATEMENT (SECOND) OF TORTS offers a more detailed analysis and discussion of factors under the additional headings of priority and ability to bear the loss. The focus of Grimes' article on Arkansas law, as well as his emphasis on pollution and diversion as factors, may explain these differences. *See* Grimes, *Lex Aqual Arkansas*, 27 ARK. L. REV. 429, 442 (1973).

If the sentence defining "reasonable beneficial use" in FLA. STAT. §373.019 were broken up into its component parts the resulting list of factors, together with the remaining factors to be considered in FLA. STAT. §373.223(b) and (c), would bear a striking resemblance to the underlined key words in the RESTATEMENT (2D)'s list of factors. This resemblance is consistent with and lends further support to the conclusion that the legislature intended to employ the term "reasonable" use in its technical sense, pregnant with common law factors to guide the discretion of administrative agencies. Compare:

RESTATEMENT (SECOND)	FLA. STAT. §§373.019 & 373.223
Purpose	"purpose and manner"
Suitability	
Economic value	"economic and efficient utilization"
Social value	"consistent with the public interest"
Adjusting the quantity	"such quantity as is necessary"
Protection of existing values	"interference with existing uses"

1. *Purpose*

Whether a use is reasonable depends in part upon the purpose of that use. The Restatement (Second) of Torts notes: "A reasonable use must be one made for a beneficial purpose that fulfills a lawful need or desire of man."[22] Courts examining the purpose of a consumptive use have sometimes placed uses in the category of "natural" or "artificial." Natural uses have priority[23] and "encompass all those absolutely necessary for the existence of the riparian."[24] Natural uses include consumptive use for "domestic purposes of home or farm, such as drinking, washing, cooking."[25] Some courts also recognize stock watering as a natural use.[26] At common law, all of the water could be consumed for natural uses regardless of the effect on other lower riparian owners.[27] Adopting this natural use concept, the FWRA specifically exempts domestic use by individuals from the permitting program.[28]

All uses which are not natural uses are considered artificial uses and have no preferential status.[29] A wide variety of artificial uses, however, are potentially "reasonable" uses.[30] Use of water for the purpose of irrigation has been

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22. RESTATEMENT (2D), *supra* note 15, §850A, comment on clause (a).

23. "[A]ll (courts) expressly state the existence of the preference for domestic use." RESTATEMENT (2D), *supra* note 15, Associate Reporter's Note, §850A, comment c at 113; Evans v. Merriweather, 4 Scam. 492 (Ill. 1842); *accord*, C. DAVIS, H. COBLENTZ, & O. TITELBAUM, WATERS AND WATER RIGHTS, §614.2 at 78-79 (R.E.Clark ed. 1976) [hereinafter cited as DAVIS & COBLENTZ].

24. Thompson v. Enz, 379 Mich. 667, 688, 154 N.W.2d 473, 483 (1967).

25. Taylor v. Tampa Coal Co., 46 So. 2d 392, 394 (Fla. 1950).

26. *Id.*

27. Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448, 452 (1961) (citing 6A AMERICAN LAW OF PROPERTY §28.57 (1952)); DAVIS & COBLENTZ, *supra*, note 23, §614.2; 93 C.J.S. *Waters* §12 (1955).

28. FLA. STAT. §373.219(1) (1977).

29. The RESTATEMENT (SECOND) OF TORTS notes a split of authority concerning whether a large entity may claim the domestic preference, and cites as denying the preference to commercial or public entities: United States v. Fallbrook Pub. Util. Dist., 109 F. Supp. 28 (S.D. Cal. 1952) (military camp); Emporia v. Soden, 25 Kan. 410 (1881); Salem Mills Co. v. Lord, 42 Or. 82, 69 P. 1033 (1902) (penitentiary); Purcellville v. Potts, 179 Va. 514, 19 S.E.2d 700 (1942) (city). *But see* Canton v. Shock, 66 Ohio St. 19, 63 N.E. 600 (1902) (city); Filbert v. Dechert, 22 Pa. Super. Ct. 362 (1903) (insane asylum); RESTATEMENT (2D), *supra* note 15, §850A.

The split of authority has continued. Cases denying a domestic preference to large entities are: Kennebunk, Kennebunkport & Wells Water Dist. v. Maine Turnpike Auth., 145 Me. 35, 71 A.2d 520 (1950); Oklahoma Water Resources Bd. v. Central Okla. Master Conservancy Dist., 464 P.2d 748 (Okla. 1968) (prior appropriation state). *Contra*, Lingo v. City of Jacksonville, 253 Ark. 63, 522 S.W.2d 403 (1975) (groundwater); Lake Gibson Land Co. v. Lester, 102 So. 2d 833, 835 (Fla. 2d D.C.A. 1958) (quoting Harris v. Brooks, 225 Ark. 436, 283 S.W. 2d 129 (1955)); Thompson v. Enz, 379 Mich. 687, 689, 154 N.W. 2d 473, 484 (1967); Higday v. Nickolaus, 469 S.W. 2d 859 (Mo. App. 1971) (groundwater).

There is a noted trend toward de-emphasizing the distinction between natural and artificial uses and recognizing in riparian owners a common right in the water, with each owner entitled to make such natural or artificial use of the water as is reasonable under the circumstances with regard to the uses of the other riparian owners. WATER LAW, *supra* note 13, at 164-65.

30. *See* FLA. STAT. §373.119(2) (1977) which reads in part "recreational, commercial, industrial, agricultural, or other *reasonable* uses" (emphasis added). Although this phrase is

considered both reasonable and beneficial.[31] Other artificial but reasonable uses[32] include use of water for fishing, swimming, recreation,[33] and manufacturing.[34]

2. *Suitability*

Many courts have recognized the suitability of the watercourse as a factor in determining the reasonableness of the use. Suitability refers to the reasonableness of a use with respect to the size and character of a watercourse. Unreasonable uses may consume more water than the stream normally delivers or may impair recreational and environmental values. A new use may not be compatible with the preexisting pattern of uses.[35] Suitability was given controlling

found in a section of the statute concerning emergency orders, it may be read *in pari materia* with FLA. STAT. §373.019, .223 (1977). *See* Straughn v. K & K Land Management, Inc., 326 So. 2d 421, 423 (Fla. 1976).

31. Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955); Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950); Hoover v. Crane, 362 Mich. 36, 106 N.W.2d 563 (1960); Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960); Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964); RESTATEMENT (2D), *supra* note 15, §850A, comment c.

32. Water pollution interfering with the reasonable uses of lower riparian owners has been held unreasonable. *See, e.g.*, Stanton v. Trustees of St. Joseph's College, 254 A.2d 597 (Me. 1969). *But see* Borough of Westville v. Whitney Home Builders, 40 N.J. Super. 62, 122 A.2d 233 (Super. Ct. App. Div. 1956). Although the courts have considered pollution as a factor to be weighed in the determination of whether a use is "reasonable," it is important to note that Florida has a separate statutory scheme for the regulation of water pollution. *See* The Florida Air and Water Pollution Control Act, FLA. STAT. §§403.011-.261 (1977). In Florida, therefore, it may be appropriate to separate the pollution factor from other factors to be considered in water allocation. C. DAVIS & H. COBLENTZ, *supra* note 23, at 43-44.

In addition, diversion of water beyond the limits of the watershed, or beyond a riparian's land, has been held an unreasonable use. Grimes, *Lex Aquae Arkansas*, 27 ARK. L. REV. 429, 443-44 (1973). However, the FWRA specifically allows diversion when consistent with public interest. FLA. STAT. §373.223(2) (1972). Furthermore, statutory authorization for diversion of waters to nonoverlying lands has been held constitutional in other jurisdictions. *E.g.*, Williams v. City of Witchita, 190 Kan. 317, 374 P.2d 578 (1962).

33. Grimes, *supra* note 32, at 443 (citing Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955)).

34. *Id.* (citing Reynolds Metal Co. v. Ball, 217 Ark. 579, 232 S.W.2d 441 (1950)).

35. *See, e.g.*, Stamford Extract Mfg. Co. v. Stamford Rolling Mills Co., 101 Conn. 310, 125 A. 623 (1924) (upper riparian's use held reasonable where discharges after best available treatment neither substantially nor appreciably contaminated the water and where many other new factories and cities were possible sources of pollution); Hazard Powder Co. v. Sommersville Mfg. Co., 78 Conn. 171, 61 A. 519 (1905) (where upper riparian's water wheel installation found excellently arranged and adapted to size, capacity, and varying flows of the river and where the use was found to follow the custom of most uses on the river, use held reasonable); Davis v. Getchell, 50 Me. 602 (1862) (where volume of small stream in ordinary course was found insufficient for any practical use, detention for reasonable time to make water power useful and valuable held reasonable); Thompson v. Enz, 379 Mich. 667, 154 N.W. 2d 473 (1967); Red River Roller Mills v. Wright, 30 Minn. 249, 15 N.W. 167 (1883) (use found unreasonable where lower riparian injured and upper riparian failed to show the character of the stream, because what might be reasonable on one stream adapted and used for certain purposes might not be proper upon another stream of a different character used for different purposes); Davis v. Town of Harrisonburg, 116 Va. 864, 83 S.E. 401 (1914) (upper riparian's hydroelectric plant found adapted to the ordinary capacity of the stream; therefore, dentention

weight by the Florida supreme court when it considered the adequacy of a lake to furnish water for irrigation during the dry season and affirmed an injunction limiting withdrawals in order to prevent loss of recreational use.[36]

3. *Economic Values*

Whether a use is reasonable often hinges on its utility and value to the user, measured in economic terms.[37] Economic value may be evident in the productivity of the use of water in irrigation or manufacturing. Economic value may also arise from the recreational or scenic uses of water bodies.[38]

A Florida court has compared economic values in a case enjoining pollution of a lake.[39] Characterizing the lake as a valuable asset to the plaintiff developer, the court weighed the amount invested in the property against the cost to the defendant of discharging elsewhere.[40]

4. *Social Values*

Social values, or the public interest, have weighed heavily as a factor where considerations of public health and welfare were at stake. The adverse impact on public welfare of an otherwise reasonable private use may outweigh any economic benefit produced by the use. On the other hand, a use which benefits the public as well as the water user will have social value as well as private economic value.[41] Courts have held that the public good is advanced by such uses as salinity control, water supply or sewage disposal.[42] Note that the "public interest" has been explicitly incorporated into the definition of "reasonable beneficial use" in the FWRA.[43]

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of water for reasonable time during drought held reasonable); Timm v. Bear, 29 Wis. 254, 266 (1871) (upper riparian's interference with stream flow held unreasonable where his mills required 50% more than the ordinary supply of water in the stream); RESTATEMENT (2D), *supra* note 15, §850A, comment on clause (b).

36. Taylor v. Tampa Coal Co., 46 So. 2d 392, 393 (Fla. 1950).

37. RESTATEMENT (2D), *supra* note 15, §850A, comment on clause (c).

38. *Id. See, e.g.*, Taylor v. Tampa Coal Co., 46 So. 2d 392 (Fla. 1950) (irrigation versus recreational value); Higday v. Nickolaus, 469 S.W.2d 859 (Mo. App. 1971) (value of city's investment weighed); Borough of Westville v. Whitney Home Builders, 40 N.J. Super, 62, 122 A.2d 233 (Super. Ct. App. Div. 1956) (aesthetic impairment and recreational value versus developer's investment).

39. North Dade Water Co. v. Adken Land Co., 130 So. 2d 894 (Fla. 3d D.C.A. 1961).

40. *Id.*

41. RESTATEMENT (2D), *supra* note 15, §850A, comment on clause (d).

42. Lamb v. Dade Cty., 159 So. 2d 477, 479 (Fla. 3d D.C.A. 1964) (interference with salinity control system); Higday v. Nickolaus, 469 S.W.2d 859, 871 (Mo. App. 1971) (assurance of wholesome water supply to public). *See generally* Hart v. D'Agostini, 7 Mich. App. 319, 151 N.W.2d 826 (1967) (temporary interference with groundwater allowed where sanitary sewer trunk line benefitted the area); 42 A.L.R.3d 426 (1972) (propriety of injunctive relief against diversion of water by municipally incorporated public utility); Borough of Westville v. Whitney Home Builders, 40 N.J. Super. 62, 122 A.2d 233 (Super. Ct. App. Div. 1956) (public policy recognizing social importance of sewage disposal plants).

43. FLA. STAT. §373.019(5) (1972).

5. *Extent of Harm*

Interference with a use may range from slight inconvenience to total destruction. Whether the interference is reasonable requires an examination of the value of the impeded use. If the harm suffered is insubstantial, a court could find the use to be reasonable.[44] Harm has been found to be substantial and unreasonable, however, where an upper proprietor attempts to reserve all of the water for his exclusive use.[45]

6. *Avoiding Harm*

To allow as many water uses as possible, courts have considered whether it is practical to avoid harm either by adjusting the manner of water use or by requiring use of another water source. Efficiency and cost of adjustment to each riparian are weighed in the balance. A use which is unnecessarily wasteful or inefficient has been declared unreasonable if a change in the method of use would have avoided the harm to other riparians without substantial reduction in profitableness. In contrast, an otherwise reasonable use would be allowed to continue where an adjustment would be prohibitively costly or would render the use impractical.[46]

7. *Adjusting the Quantity*

The practicality of adjusting the quantity of water used by each riparian has been another factor weighed by the courts. Where a riparian is using more water than is needed for his purpose, the entire use need not be deemed unreasonable. Rather, a reduced, reasonable quantity may be protected.[47] Similarly, courts have sometimes divided the available water among riparians

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44. RESTATEMENT (2D), *supra* note 15, §850A, comment on clause (e) (citing Gehlen v. Knorr, 101 Iowa 700, 70 N.W. 757 (1897); Elliot v. Fitchburg R.R. Co., 10 Cush. 191 (Mass. 1852); Hazard Powder Co. v. Sommersville Mfg. Co., 78 Conn. 171, 61 A. 519 (1905); Heise v. Schulz, 167 Kan. 34, 204 P.2d 706 (1949); Louisville v. Tway, 297 Ky. 565, 180 S.W.2d 278 (1944); Meyers v. Lafayette Club, 197 Minn. 241, 266 N.W. 861 (1936); Bollinger v. Henry, 375 S.W.2d 161 (Mo. 1964); Montelious v. Elsea, 11 Ohio St. 2d 57, 161 N.E.2d 675 (1959). *See also* Tampa Water Works Co. v. Cline, 37 Fla. 586, 20 So. 780 (1896); Lake Gibson Land Co. v. Lester, 102 So. 2d 833 (Fla. 2d D.C.A. 1958).

45. Scott v. Slaughter, 237 Ark. 394, 373 S.W.2d 577 (1964); Conobre v. Fritsch, 92 Ohio App. 520, 111 N.E.2d 38 (1952).

46. RESTATEMENT (2D), *supra* note 15, §850A, clause (f), comments h & i, (citing Thomas v. LaCotts, 222 Ark. 161, 257 S.W.2d 936 (1953)); Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P.2d 533 (1938); Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961) (underground stream); Hazard Powder Co. v. Sommersville Mfg. Co., 78 Conn. 171, 61 A. 519 (1905); Wilkes v. Perry, 92 Iowa 417, 60 N.W. 727 (1894); Crowley v. District Court, 108 Mont. 89, 88 P.2d 23 (1939); Warner Valley Stock Co. v. Lynch, 215 Or. 523, 336 P.2d 884 (1959).

More recent decisions weighing the practicality of avoiding the harm include: Scott v. Slaughter, 237 Ark. 394, 373 S.W.2d 577 (1964) (dam lowered two feet); Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967) (other sources were available); MacArtor v. Graylyn Crest III Swim Club, 41 Del. Ch. 26, 187 A.2d 417 (1963) (groundwater, adjusting method of use found impractical).

47. RESTATEMENT (2D), *supra* note 15, §850A, comment on clause (g).

according to their respective needs.[48] The question of adjusting the quantity between users may become critical in times of water shortage.[49]

8. *Protection of Existing Values*

According to traditional riparian doctrine, priority of use gives no superior rights in a stream.[50] Thus, priority is immaterial.[51] A few courts, however, have held unreasonable a new use which destroys the value of preexisting uses and investments in land and facilities. Protection of existing values is interrelated with consideration of the social and economic value of a use.[52]

9. *Burden of Loss (Compensation)*

The final factor requiring the harmful use to bear the burden of loss is grounded in public policy.[53] The United States Supreme Court has said that "later uses with superior economic resources should not be allowed to impose costs upon smaller water users that are beyond their economic capacity."[54] Allocation of the economic burden requires consideration of whether compensation should be paid by a new user when the decision to supplant an existing use is made. Again, the social and economic value factors are interwoven with the compensation factor. A new use has usually been viewed as unreasonable where it caused substantial, unavoidable harm to an existing, socially and economically valuable use and where the new user was able but unwilling to compensate for the harm.[55]

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48. *Id.*, clause (g), comment j. *See, e.g.*, Lingo v. City of Jacksonville, 253 Ark. 63, 522 S.W.2d 403 (1975) (groundwater); Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955); Half Moon Bay Land Co. v. Cowell, 173 Cal. 543, 160 P. 675 (1916); Wiggins v. Muscupiabe Land and Water Co., 113 Cal. 182, 45 P. 160 (1896); Harris v. Harrison, 93 Cal. 676, 29 P. 325 (1892); Collens v. New Canaan Water Co., 155 Conn. 477, 234 A.2d 825 (1967) (groundwater); Bliss v. Kennedy, 43 Ill. 67 (1867); Meng v. Coffey, 67 Neb. 500, 93 N.W. 713 (1903). Many of the cases cited are from prior appropriation states in the West because these states also recognize, or did recognize, the riparian doctrine of reasonable use.

49. See text accompanying notes 198-200 *infra* (discussing water shortage allocation policy).

50. DAVIS & COBLENTZ, *supra* note 23, §612 at 42 (citing Dumont v. Kellog, 29 Mich. 420, 18 Am. Rep. 102 (1874), and Bliss v. Kennedy, 43 Ill. 67 (1867)). *Accord*, 78 AM. JUR. 2d *Waters* §285 (1975).

51. RESTATEMENT (2D), *supra* note 15, §850A, clause (h), comment 1 (citing McCarter v. Hudson Cnty. Water Co., 70 N.J. Eq. 695, 65 A. 489 (Ch. 1906)).

52. *Id.* (citing Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900); Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129 (1955)). See text accompanying notes 27-43 *supra*.

Another commentator has stated flatly that where "different lawful and reasonable uses are inherently mutually exclusive, the prior in time will prevail. . . ." Grimes, *supra* note 32, at 444.

53. RESTATEMENT (2D), *supra* note 15, §850A, clause (1), comment m, (citing Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900)); State v. Michels Pipeline Constr. Inc., 63 Wis. 2d 278, 217 N.W.2d 339 (groundwater), *modified*, 63 Wis. 2d 278, 219 N.W.2d 308 (1974); MacArtor v. Graylyn Crest III. Swim Club, Inc., 41 Del. Ch. 26, 187 A.2d 417 (1963) (groundwater); United States v. 531.13 Acres of Land, 244 F. Supp. 895 (W.D.S.C. 1965) (compensation due for public taking of riparian right to use of river flow).

54. United States v. Gerlach Livestock Co., 339 U.S. 725 (1950).

55. RESTATEMENT (2D), *supra* note 15, §850A, clause (1), comment m (citing Furrer v. Talent Irrigation Dist., 258 Or. 494, 466 P.2d 605 (1970)).

Courts have been guided in their determination of the reasonableness of a use by one or more of the nine factors identified by the Restatement (Second) of Torts. These nine common-law factors can as readily guide administrative discretion in determining whether to grant a consumptive use permit. Identification of factors involved in making a determination of reasonableness of the use is not unique to the Restatement (Second) of Torts. Several state courts including the Florida supreme court have also enunciated factors to be weighed in determining whether a given use is reasonable.[56] The Restatement simply provides a more complete summary of the common-law factors which have guided the courts when determining whether a use is a "reasonable use."

The common law of reasonable use has been modified by statute is some eastern states. Three states have established water use permit systems which utilize the "beneficial use" standard.[57] Other states refer in their case law to "beneficial use" as a criterion for making a determination of reasonableness.[58] Because eastern jurisdictions have begun to adopt the beneficial use concept as a part of their system of water allocation, appreciation of the reasonable use doctrine requires some familiarity with "beneficial use" precepts.

THE WESTERN LAW OF BENEFICIAL USE

The water law of the western states developed in a different fashion from eastern water law. The western system of prior appropriation began with the early gold miners who "appropriated" water for their needs, often at gun

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56. The Florida supreme court, discussing the reasonableness of a use, said: "The reasonableness of a given use depends upon many variables such as: the reasonable demands of other users; the quantity of water available for use; the consideration of public policy." Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979).

The Michigan supreme court, in a case involving recreational use of a lake's surface, recently examined various statements of the common law of reasonable use, saying: "[I]n determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity and its application; the nature and size of the stream, and the several uses to which it is put, the extent of the injury to one proprietor and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use." Thompson v. Enz, 379 Mich. 667, 687, 154 N.W.2d 473, 484 (1967). The Michigan supreme court then remanded the case and instructed the trial court to keep in mind the following factors: "First, attention should be given to the watercourse and its attributes, including its size, character, and natural state. . . . Second, the trial court should examine the use itself as to its type, extent, necessity, effect on the quantity, quality and level of the water, and the purposes of the users. . . . Third, it is necessary to examine the proposed artificial use in relation to the consequential effects, including the benefits obtained and detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interests of the state, including fishing, navigation, and conservation." *Id.* at 688, 154 N.W.2d at 484. Michigan's statement of the factors of reasonable use is also consistent with the RESTATEMENT (SECOND) OF TORTS. Thompson v. Enz, 379 Mich. 667, 154 N.W.2d 473 (1967).

57. *See* IOWA CODE ANN. §455A.1-.2 (1971); KY. REV. STATS. §151.110, .120(1) (1976); MINN. STAT. ANN. §105.37(6) (1977).

58. *See, e.g.*, Harrell v. City of Conway, 224 Ark. 100, 102, 271 S.W.2d 924, 926 (1954); Clark v. Lindsay Light and Chem. Co., 405 Ill. 139, 141, 89 N.E.2d 900, 902 (1950), Poire v. Serra, 99 N.H. 154, 155, 106 A.2d 391, 392 (1954); Chain O'Lakes Protective Ass'n v. Moses, 53 Wis. 2d 579, 581, 193 N.W.2d 708, 710 (1972). *See also* Beuscher, *supra* note 27, at 448.

point.[59] As western law matured, these appropriations were recognized by the courts and riparian ownership was not considered a requisite of the right to make withdrawals.[60]

A fundamental principle of the water law of the western states is that the public waters must be used for a useful or beneficial purpose.[61] The statement that "beneficial use shall be the basis, the measure, and the limit of the right to the use of water" is found in constitutions,[62] statutes,[63] or court decisions[64] of every western state.

Some states have a statutory definition for beneficial use. The laws of South Dakota read: "Beneficial use is any use of water that is reasonable and useful and beneficial to the appropriator, and at the same time is consistent with the interests of the public in the best utilization of water supplies."[65] The North Dakota statutory definition reads: "Beneficial use means a use of water for a purpose consistent with the best interests of people of the state."[66] The Texas legislature defined the term as "use of the amount of water which is economically necessary for a purpose authorized by this chapter, when reasonable intelligence and reasonable diligence are used in applying the water to that purpose."[67] In addition to the definition, the Texas Water Code contains a comprehensive statutory list of uses for which water may be appropriated: "(1) domestic and municipal uses, including water for sustaining human life and the life of domestic animals; (2) industrial uses, meaning processes designed to convert materials of a lower order of value into forms having greater usability and commercial value, including the development of power by means other than hydroelectric; (3) irrigation; (4) mining and recovery of minerals; (5) hydroelectric power; (6) navigation; (7) recreation and pleasure; (8) stock raising; (9) public parks; and (10) game preserves."[68]

59. *See* Hutchins, *Western Water Rights Doctrines and Their Development in Kansas*, 5 KAN. L. REV. 533, 537-40 (1957). While the concept of protecting the first users in perpetuity was developing out of the miners' customs during the California gold rush based on the frontier principle of "first come, first served," no such development occurred during the parallel gold rush in Australia. Governmental licenses, granted for water for mining purposes, were for a period of 15 years rather than in perpetuity. *See* Clark and Renard, *The Riparian Doctrine and Australian Legislation*, 7 MELB. U. L. REV. 475, 480-87 (1970).

60. Eight western states have never recognized riparian rights. These states are Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. The eleven states which do give legal status to riparian rights so that the doctrine co-exists with the system of prior appropriation are Alaska, California, Kansas, Mississippi, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Texas and Washington. F. TRELEASE, CASES AND MATERIALS ON WATER LAW 11 (2d ed. 1974).

61. 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 9 (1971).

62. N.M. CONST. art. 16, §3.

63. ARIZ. REV. STAT. ANN. §45-101(B) (1956); NEV. REV. STAT. §533.035 (1973); N.D. CENT. CODE §61-04-01.2 (1977); OKLA. STAT. ANN. §105.2(A) (1972); S. D. COMPILED LAWS ANN. §46-1-8 (1967); UTAH CODE ANN. §73-1-3 (1953); WYO. STAT. §41-2 (1957).

64. *E.g.*, *In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 82, 348 P.2d 679, 684 (1960).

65. S.D. COMPILED LAWS ANN. §46-1-6(6) (1967).

66. N.D. CENT. CODE §61-04-01.1 (1977).

67. TEX. WATER CODE ANN., tit. 2, §11.002(5) (Vernon 1977).

68. TEX. WATER CODE ANN., tit. 2, §11.023(a) (Vernon 1977).

Other states have also enacted statutory lists of beneficial uses. For instance, Montana law states: "Beneficial use means a use of water for the benefit of the appropriator, other persons, or the public, including, but not limited to, agricultural (including stock water), domestic, fish and wildlife, industrial, irrigation, mining, municipal power, and recreational uses."[69]

The Constitution of the State of Washington declares irrigation, mining, and manufacturing purposes to be public uses of water.[70] Uses of water for: "domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational and thermal power production purposes, and preservation of environmental and aesthetic values" also are treated as beneficial uses under Washington statutory law.[71]

Despite widespread use of the beneficial use concept, western courts have been reluctant to establish a judicial definition of the term.[72] Rather, there appears to be a consensus that the issue of beneficial use is not an issue of law, but an issue of fact.[73] Although no case law has been found which specifically enumerates guidelines for determining when a use will be deemed "beneficial," certain uses have been repeatedly approved by the western courts as belonging

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69. REV. CODE OF MONT., §89-867(2) (1973).

70. WASH. CONST. art. 21, §1.

71. WASH. REV. CODE ANN. §90.54.020 (1971).

72. The Supreme Court of Idaho, in determining that an appropriation for purposes of recreation and preservation of scenic views was a beneficial use, stated: "While it is well established in western water law that an appropriation of water must be made for a "beneficial use," nevertheless in Idaho at least the generic term "beneficial use" has never been judicially or statutorily defined. *Our research does not disclose any case in which any court has attempted to define the term 'beneficial use.'*" (Emphasis added). Department of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 443, 530 P.2d 924, 927 (1974).

73. The Colorado Supreme Court, noting that the term was not defined in the Colorado constitution, said: "[W]hat is beneficial use, after all, is a question of fact and depends upon the circumstances in each case." City and County of Denver v. Sheriff, 105 Colo. 193, 199, 96 P.2d 836, 842 (1939). Even where a court appears to define the term, the definition itself does not set forth actual standards by which to measure whether a use is beneficial. For example, the New Mexico supreme court said "beneficial use is determined . . . to be the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken." Erickson v. McLean, 62 N.M. 264, 269, 308 P.2d 983, 988 (1957). Thus, although beneficial use may have been defined, the definition is circular since it speaks in terms of "useful and beneficial purpose" without explaining what will be considered "useful and beneficial." In an examination of western water law completed over a half-century ago, Samuel C. Wiel, a noted author on water law, concluded that, as a rule, whether a water use was beneficial was a question "of fact, a very general one, depending on the attitude which the jury (or judge) as reasonable men, will take toward the evidence as a whole. And . . . it appears that the question of fact is whether the use is a reasonable use between the parties under the circumstances in each case according to the court's best idea of fairness to all." Wiel, *What is Beneficial Use of Water?*, 3 CAL. L. REV. 460, 474 (1915). Professor Wiel listed the factors which he felt that courts consider in determining a "beneficial use." These are: (1) whether the transmission allowance, *i.e.*, the extra amount of water required to get the amount needed by the appropriator from the water source to his land, is reasonable in degree; (2) whether the "duty of water" at the land is reasonably required; and (3) whether a change to a higher duty can be reasonably made with fairness to all parties.

in the "beneficial use" category.[74] These include irrigation,[75] flood control,[76] recreation and preservation of scenic views,[77] domestic use,[78] and drainage.[79]

The determination of "beneficial use" requires making two separate inquiries with respect to water use. The first, as discussed above, is the determination of whether the use is being made for a beneficial purpose. The second treats the manner in which the water is being used; courts considering this aspect of beneficial use evaluate the reasonableness of the appropriation[80] and the economy of the application of water.[81] As a result, beneficial use resembles reasonable use in many respects.

In most western states, reasonableness plays an important role in determining whether a use is beneficial. Professor Wiel noted in 1915 that there was a "tendency to resort to reasonableness in determining the allowances and restrictions surrounding 'beneficial use' [so that] the test between appropriators is becoming increasingly like the test at common law between riparian owners; namely 'reasonable use.' "[82]

Subsequent case law seems to confirm his statement. For example, the Utah Supreme Court upheld a trial court determination that:

> [A] prior appropriator does not have an unlimited right to the use of water, but is subject to a *reasonable* limitation of his right for the benefit of junior appropriators. That it is necessary and proper to limit prior appropriators to the volume of water *reasonably* required to raise crops under *reasonably* efficient methods of applying water to the land. That beneficial use is the basis and the measure and the limit to the use of water and water used in excess of the amount *reasonably* necessary to produce crops is not beneficially used.
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> We subscribe to the rule that the use of water must not only be beneficial to the lands of the appropriator, but it must also be *reason-*

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74. In contrast, some uses specifically have been declared non-beneficial. The Montana legislature established that the use of water for slurry to export coal from Montana would not be considered a beneficial use. REV. CODE OF MONT. §89-867(2) (1973).

The Utah Supreme Court stated that irrigation following a heavy rain is an example of a non-beneficial use. *In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 348 P.2d 679 (1960).

75. *E.g.*, Silver v. District Court, 105 Mont. 106, 69 P.2d 972 (1937).

76. *E.g.*, Meridian, Ltd. v. City and County of San Francisco, 13 Cal. 2d 424, 90 P.2d 537 (1939).

77. *E.g.*, Department of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

78. *E.g.*, Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943).

79. *E.g.*, Evans v. City of Seattle, 182 Wash. 450, 47 P.2d 984 (1935).

80. *E.g.*, State Water Resources Control Bd. v. Forni, 126 Cal. Rptr. 851, 54 Cal. App. 3d 743 (1976).

81. *E.g.*, Allen v. Petrick, 69 Mont. 373, 222 P. 451 (1924).

82. Wiel, *supra* note 73, at 475. Professor Wells Hutchins commented in his treatise on the water law of the western states that the term "reasonable" has been adopted by the courts as a qualification of the appropriator's right to use water for a beneficial purpose. W.A. HUTCHINS, *supra* note 61, at 499. Hutchins concluded that an appropriator's right to a quantity of water was to be measured by his "reasonable, economic, beneficial use, without unreasonable or unnecessary waste. . . ." *Id.* at 503.

able in relation to the *reasonable* requirements of subsequent appropriators. . . .[83]

In a later decision the Utah court continued its endorsement of reasonableness by calling for "the balancing of individual rights in relationship to each other in a reasonable way under the circumstances which will best serve the overall objective" of the highest possible development and the most continuous beneficial use.[84] The court determined that all users are required to utilize reasonable and efficient means in taking water from underground supplies.[85]

New Mexico also considers reasonableness in its examination of beneficial use. In *State ex rel. Erickson v. McLean,*[86] the state sought to prevent the defendant from leaving his irrigation well running from October to April, thus turning his land into a marsh. The New Mexico supreme court granted the injunction, saying that the use made of the water must not only be beneficial to the appropriator's land, but must be reasonable as well. The court continued that "[w]hatever right one has [to the use of water] . . . is subject to that established principle that his use shall not be injurious to the rights of others, or of the general public."[87]

The courts of Oregon have adopted a similar philosophy. The Oregon Supreme Court, in determining the validity of an appropriation said, "[t]he use must not only be beneficial to the lands of the appropriator, but it must also be *reasonable in relation to the reasonable requirement of subsequent appropriators.*"[88] In an earlier case, the court, in allocating water rights associated with the Deschutes River, concluded that the use of water to generate power for lifting irrigation water was not only beneficial but reasonable as well.[89] At the same time, however, the court ruled that the use of water during the irrigation period to flush debris out of a dam area was improper. The court said one is entitled to use water only in such quantities and at such times as may be reasonably necessary for some useful purpose.[90] Since the debris could be flushed at some other time of year, it was held unreasonable to allow such a use when other uses were more critical.

The other, and obviously interrelated, consideration used to determine beneficial use has been efficiency. Courts have uniformly held that an extravagant or wasteful application of water is not a beneficial use.[91] Some states have placed a statutory ban on the waste of water.[92] Waste of water is not con-

83. *In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 348 P.2d 679, 682 (1960) (emphasis added).

84. Wayman v. Murray City Corp., 23 Utah 2d 97, 102, 458 P.2d 861, 864 (1969) (emphasis added).

85. *Id.* at 102, 458 P.2d at 865.

86. 62 N.M. 264, 308 P.2d 983 (1957).

87. *Id.* at 273, 308 P.2d at 989.

88. Tudor v. Jaca, 178 Or. 126, 164 P.2d 680 (1945) (emphasis added).

89. *In re* Water Rights of Deschutes River and Tributaries, 134 Or. 623, 286 P. 563 (1930).

90. *Id.* at 666, 286 P.2d at 577.

91. *See, e.g., id.*; Wayman v. Murray City Corp., 23 Utah 2d 97, 458 P.2d 861 (1969).

92. *E.g.,* S.D. COMP. LAWS ANN. §46-1-4 (1967) ("such right does not and shall not extend to waste. . .").

sidered a reasonable use in an arid state. Thus, although a use may be economical for an appropriator, when such use deprives another person of water *and* there is a less wasteful method which could be utilized, the law requires that water be used in a way that is reasonable and does not harm the rights of others.[93]

In summary, analysis of western water law reveals consistency among the western states with regard to the consideration of certain factors in determining the validity of an appropriation. These factors could give rise to a definition of beneficial use as the use of water for a purpose which: (1) benefits the land of the appropriator;[94] (2) benefits society as a whole;[95] (3) is reasonable with respect to the rights of other appropriators;[96] (4) is reasonable with respect to the rights of the public;[97] (5) is economical;[98] and, (6) is efficient.[99]

THE BACKGROUND OF THE REASONABLE BENEFICIAL USE STANDARD

As shown in the discussion above, much of the law pertaining to beneficial use superimposes, by either statute or court decision, a reasonableness requirement on beneficial use. Similarly, the beneficial use criterion has been added to the reasonable use doctrine by courts and legislatures. There are several instances where the actual phrase "reasonable beneficial use" appears. Significantly, both California and the Model Water Code have adopted the term.[100]

California Water Law

California is one of two states which have judicially recognized the term "reasonable beneficial" as applied to water use.[101] The California constitution

93. Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1912); Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957); Tudor v. Jaca, 178 Or. 126, 164 P.2d 680 (1945).

94. *In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 348 P.2d 679 (1960); Tudor v. Jaca, 178 Or. 126, 104 P.2d 680 (1945); Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957).

95. Basey v. Gallagher, 87 U.S. (20 Wall.) 670 (1875); WASH. REV. CODE ANN. §90.54.020(2) (1971).

96. *In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 348 P.2d 679 (1960); Tudor v. Jaca, 178 Or. 126, 164 P.2d 680 (1945).

97. Basey v. Gallagher, 87 U.S. (20 Wall.) 670 (1875); Schodde v. Twin Falls Land & Water Co., 224 U.S. 107 (1912).

98. Wayman v. Murray City Corp., 23 Utah 2d 97, 458 P.2d 861 (1969); *In re* Water Rights of Escalante Valley Drainage Area, 10 Utah 2d 77, 348 P.2d 679 (1960).

99. Erickson v. McLean, 62 N.M. 264, 308 P.2d 983 (1957); Worley v. United States Borax & Chemical Corp., 78 N.M. 112, 428 P.2d 651 (1967); *In re* Water Rights of Deschutes River & Tributaries, 134 Or. 623, 286 P. 563 (1930); Fairfield Irrigation Co. v. Cooperative Security Corp., 18 Utah 2d 93, 416 P.2d 641 (1966).

100. CAL. CONST. art. 10, §2; F. MALONEY, R. AUSNESS & J. MORRIS, A MODEL WATER CODE §1.03(4) at 4 (1972). The term, "reasonable beneficial use" is also used sometimes in applying the western doctrine of correlative rights in ground water. *See*, Farmers Investment Co. v. Bettway, 113 Ariz. 520, 558 P.2d 14 (1976); Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173 (1953); Undlin v. City of Surrey, 262 N.W.2d 742 (N.D. 1978); Volkmann v. City of Crosby, 120 N.W.2d 18 (N.D. 1963); State v. Ponten, 77 Wash. 2d 463, P.2d 150 (1969).

101. The other is South Dakota, which has enacted a statutory provision identical to article 10, section 5 of the California constitution. It reads: "The conservation of such water

provides that: "the conservation of [the water resources of the State] is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."[102]

In 1933, the California Supreme Court, while deciding the respective rights of riparian landowners and appropriators on the same stream, discussed the concept of reasonable and beneficial use of water, saying:

> [W]hat is a useful and beneficial purpose and what is an unreasonable use is a judicial question depending on the facts in each case. Likewise, what is a reasonable or unreasonable use of water is a judicial question to be determined in the first instance by the trial court. There would seem to be no more difficulty in ascertaining what is a reasonable use of water than there is in determining probable cause, reasonable doubt, reasonable diligence, preponderance of evidence, a rate that is just and reasonable, public convenience and necessity, and numerous other problems which in their nature are not subject to precise definition but which tribunals exercising judicial functions must determine.[103]

The California court was called upon in a later case to determine the quantity of water required for reasonable beneficial use.[104] The court first considered how to determine a reasonable quantity, then concluded that as long as there was no unnecessary waste, the user need not employ the best known diversion methods but only those methods in general use in his locality.[105] The court then analyzed "beneficial use" and reiterated its previous opinion that "what is a beneficial use, of course, depends upon the facts and circumstances of each case."[106] The court noted further that whether a use was reasonable beneficial depended on the type of need and the amount of water available for all needs. Changed conditions, meanwhile, could change a use from reasonable beneficial to wasteful.[107]

In a more recent case, the California Supreme Court, deciding that the use of water for replenishing rocks and gravel on the plaintiff's land was not a reasonable use, said that "beneficial use" and "reasonable use" were not

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is to be exercised with a view to the *reasonable and beneficial* use thereof in the interest of the people and for the public welfare. The right to water . . . shall be limited to such water as shall be *reasonably* required for the *beneficial* use to be served. . . ." (emphasis added). S.D. COMP. LAWS §46-1-4 (1967). South Dakota then defined "beneficial use" as "any use of water that is *reasonable and useful and beneficial* to the appropriator, and at the same time is consistent with the interests of the public in the best utilization of water supplies" (emphasis added). S.D. COMP. LAWS §46-1-6 (1967). South Dakota case law interpreting these provisions speaks of making a "reasonable beneficial use of water." Belle Fourche Irrigation Dist. v. Smiley, 176 N.W. 2d 239 (S.D. 1970). Thus, although the statute reads in terms of reasonable *and* beneficial use, South Dakota courts have shortened the expression simply to "reasonable beneficial" use in the same manner as the California court.

102. CAL. CONST. art. 10, §2 (formerly art. 14, §3).

103. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

104. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935).

105. *Id.* at 547, 45 P.2d at 972.

106. *Id.* at 567, 45 P.2d at 1007.

107. *Id.*

synonymous under the California constitution.[108] The court held that it was not enough to show that a use was beneficial if it could not also be shown to be reasonable.[109] It is significant, however, that the court examined beneficial use strictly from the aspect of purpose rather than adopting the view of other western states which evaluate the reasonableness of the method of use as a part of the beneficial use analysis.

From these cases, it appears that in California a use must be considered beneficial before it qualifies for a permit. In addition, the use must be deemed reasonable. Because reasonableness is a question of fact to be determined from the circumstances of each case,[110] it is impossible to specify in advance what uses are reasonable within the broad confines of a statute. However, when reasonableness becomes an issue, the California courts feel qualified to make such a determination.

The Model Water Code

"Reasonable beneficial use" is defined by the Model Water Code[111] as: "The use of water in such a quantity as is necessary for economic and efficient utilization, for a purpose and in a manner which is both reasonable and consistent with the public interest."[112] The commentary to the Code states that the term "reasonable beneficial use" is a term of art that should not be confused with either the "beneficial use" standard of prior appropriation water law or the "reasonable use" term of riparian water law.[113] The authors of the Code intended the term to include a standard of reasonable use which embraced the rights of the general public as well as the rights of riparians and to require efficient economic use of water regardless of the sufficiency of available water.[114]

In a further discussion of the "reasonable beneficial use" standard, the authors of the Code explained that the term was intended to combine the best features of the rules of both reasonable and beneficial use.[115] Thus, the term was said to require first that the quantity of water used be efficient, and second that the purpose of the use be reasonable in relation to other uses.[116] The standard would not require that a valid use be the most economical use but would require that the method of use be economically efficient.[117] Coupled with

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108. Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 60 Cal. Rptr. 377, 429 P.2d 889 (1967).

109. *Id. See also,* State Water Resources Control Bd. v. Forni, 54 Cal. App. 3d 743, 126 Cal. Rptr. 851 (1st Dist. 1976) (the use of river water for frost protection of a vineyard was held unreasonable because of insufficient amount of water available to all users).

110. Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5 (1933).

111. F. MALONEY, R. AUSNESS & J. MORRIS, A MODEL WATER CODE (1972) (hereinafter cited as MODEL WATER CODE). The legislative committee which drafted the Act had the MODEL WATER CODE available and adopted large parts verbatim or with minor changes.

112. *Id.* §1.03(4) at 4.

113. *Id.* §1.03, commentary at 86-87.

114. *Id.*

115. *Id.* at 171.

116. *Id.*

117. *Id.* For example, drip irrigation might be the most economically efficient method for watering a given crop. Therefore, a permit could be issued for the needed amount of water

this requirement is the related requirement that the method for diverting the water be reasonable and consistent with the public interest.[118]

Professor Trelease, an authority on western water law, has analyzed the concept of "reasonable beneficial use" by examining the reasonableness of beneficial use.[119] He concluded that courts adopting the "reasonable beneficial use" approach have assessed "the economic relativity of specific uses and the comparative benefits to be realized from different, competing uses."[120] Professor Trelease has since referred to the "reasonable beneficial" standard of the Model Water Code as a new concept.[121] However, courts have already been asked, and have been able to determine whether a use is reasonable beneficial.[122] Therefore, the standard is not without precedent, even though Florida is apparently the first state to adopt it explicitly.

COMPARISON OF REASONABLE USE, BENEFICIAL USE AND REASONABLE BENEFICIAL USE

Reasonable Use and Beneficial Use

The "reasonable use" and "beneficial use" standards of water law are generally viewed as different standards, primarily because "reasonable use" relates to the riparian doctrine and "beneficial use" to the doctrine of prior appropriation.[123] Although the water allocation principle differs in each system, the respective standards have coalesced over the years because the western states have added a requirement of reasonableness to the beneficial use inquiry and the eastern states have attached the element of beneficial purpose to the reasonable use standard. The following examination of the factors included in each standard will show that the major difference between the two standards depends upon whether the water user owns the land adjacent to the water supply.[124]

The preceding analysis of the standards of reasonable use and beneficial use revealed several factors often used in determining whether a given use of water is allowable.[125] Factors for determination of whether a use is reasonable include the purpose of the use, the suitability of the use to the water course, the economic value of the use, the social value of the use, the extent and amount of the harm caused by the use, the practicality of avoiding the harm by adjusting

even though some other crop needing the same amount of water might bring a greater income. The decision on economic value would be left to the farmer so long as his method of use was not uneconomical.

118. *Id.* at 171-72.

119. Trelease, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 WYO. L.J. 1 (1957).

120. *Id.* at 19.

121. Trelease, *The Model Water Code, The Wise Administrator and the Goddam Bureaucrat*, 14 NAT. RES. J. 207, 210 (1974).

122. See text accompanying notes 100-118 *supra*.

123. *See generally* Trelease, *supra* note 119.

124. *See generally* Fleming, *supra* note 10.

125. See text accompanying notes 21-55 *supra* for reasonable use factors, and notes 94-99 for beneficial use factors.

the use or the method of use, the practicality of adjusting the quantity of the water used, the protection of existing values of land, investments and enterprises, and the burden of requiring the users who caused the harm to bear the loss.[126] On the other hand, the factors involved in determination of whether a use is beneficial include the purpose of the use, the benefit of the use to the appropriator and society, the reasonableness with respect to the rights of other appropriators and the general public, the efficiency or economy of the method of use, and the prevention of waste.[127]

Comparison of the standards shows substantial correlation. Each standard examines the purpose of the use; generally uses for domestic purposes, irrigation, recreation, manufacturing, stock watering (to a limited extent) and power production (in some cases) are approved in both systems of water law.[128]

Suitability of the use to the watercourse is most directly related to the riparian reasonable use standard because of the concern with rights of other riparians. This factor could be superimposed on the western law by legislation such as the National Wild and Scenic Rivers Act,[129] which, for example, could prevent use of a particular river for power production through a congressional determination of unsuitability. Suitability of the watercourse could also be considered in examining the social value factor, because uses which have a deleterious effect on a waterbody often affect the rights of the public. Western water law, however, has not usually considered public interests such as scenic beauty or recreation without specific legislation.[130] Some western states have enacted statutes which encourage water use for recreational or scenic purposes either by reserving such waters from appropriation or by authorizing appropriation by a state agency for such purposes.[131]

Similarly, the inquiry into the economic value under "reasonable use" overlaps with the inquiry into both the benefit of the use to the appropriator and society and the efficiency or economy of the method of use under "beneficial use." Moreover, the two "reasonable use" factors of extent of harm and practicality of avoiding harm parallel the "beneficial use" factor of reasonableness with respect to the rights of other appropriators and the general public. The difference is that whereas the riparian doctrine looks to injury to other riparians,[132] the doctrine of prior appropriation is seldom concerned with riparian rights.[133] Rather, prior appropriation addresses injury to rights of

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126. See text accompanying notes 10-55 *supra*.

127. See text accompanying notes 94-99 *supra*.

128. See text accompanying notes 25-34 & 61-79 *supra*.

129. 16 U.S.C. §§1271-1287 (1970).

130. Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (C.C.D. Colo. 1910), *rev'd on other grounds*, 205 F. 123 (8th Cir. 1913).

131. OR. REV. STAT. §§538-.110-.300 (1953); IDAHO CODE §§67-4301, 4304 (1948).

132. WATER LAW, *supra* note 13, §21.

133. But Nebraska, for example, requires that an appropriation cannot harm a riparian's interest in use of water unless the utility of the appropriation outweighs the gravity of the harm. Wasserburger v. Coffee, 180 Neb. 149, 141 N.W. 2d 738, 745-46, *modified on other grounds*, 10 Neb. 569, 144 N.W. 2d 209 (1966). California also examines rights of both riparians and prior appropriators. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935).

senior users.[134] Furthermore, examination of the public interest overlies each water law system. "Reasonable use" examines the social value of the use while the "beneficial use" standard speaks both of the benefit of the use to society and the reasonableness with respect to the rights of the public. Finally, prevention of waste, a major factor under "beneficial use," is somewhat paralleled in the reasonable use standard by the practicality of adjusting the quantity of water used, although waste will be permitted in the riparian system if no other riparian complains.

Clearly, however, differences exist. The "reasonable use" standard looks to the protection of existing values of land, investments and enterprises. In contrast, this factor is not examined in "beneficial use" jurisdictions because the very nature of prior appropriation law is such that these values are protected in perpetuity. In addition, the final factor of "reasonable use," that of the burden of requiring the user causing the harm to bear the loss, is not specifically examined under the "beneficial use" standard. Harm can only be caused to a right which has been invaded, and a person desiring to make an appropriation has no such right under western law unless unappropriated water is available.[135]

The preceding comparison provides a list of factors common to both the reasonable and beneficial use tests. These factors are: (1) the purpose of the use; (2) its economic value; (3) its social value; (4) the extent and amount of harm caused to one having a prior right to use the water; (5) the practicality of avoiding harm; (6) the practicality of adjusting the quantity; and, (7) protection of existing values. A determination that a use is both reasonable and beneficial would involve, at a minimum, examination of these seven factors. Inclusion of the two remaining reasonable use factors of suitability and compensation would ensure that the water use met all criteria of both standards.

Comparison with Reasonable Beneficial Use

The factors common to both "reasonable use" and "beneficial use" parallel the elements of California's "reasonable beneficial use" analysis. A factor in California's inquiry, type of need,[136] includes considerations of both purpose and social value. Availability of water for all needs, also part of the California standard, entails an examination of the extent and amount of harm caused to one having a prior right to use water, the practicality of avoiding the harm, and the practicality of adjusting the quantity. California does not, however, stress protection of existing values. Instead, the court has indicated that changed conditions can change a use from reasonable beneficial to wasteful.[137]

According to the authors of the Model Water Code, the "reasonable beneficial" standard was intended to incorporate the "best features of both reasonable use and beneficial use."[138] An examination of those "best" features is there-

134. WATER LAW, *supra* note 13, §65.

135. This concept now applies in Florida under the FWRA. *See* Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979).

136. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 45 P.2d 972, 1007 (1935).

137. *Id.*

138. MODEL WATER CODE, *supra* note 111, at 171.

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fore appropriate. One of the important aspects of the reasonable use doctrine is its flexibility. A riparian can initiate a new use or expand an existing one in light of changing conditions of water use and supply[139] and no riparian has an unqualified right to the use of a specific quantity of water. Uses may be changed so long as the change is reasonable.[140]

On the other hand, the western appropriation system provides legal certainty: water users know that their right is established in perpetuity absent proof of waste.[141] That certainty exists, however, at the expense of other, perhaps preferable, appropriations. Moreover, a senior appropriator is discouraged from using new efficient techniques which might free water for others. Meanwhile, junior appropriators are penalized during water shortages because water is apportioned on the basis of priority rather than equity.[142]

These differences are inherent features of the eastern and western water use systems rather than characteristics of the "reasonable" and "beneficial" standards. As discussed above,[143] the two standards contain almost the same factors. In fact, the only factors which are not common are the reasonable use factors of suitability and burden of loss (compensation). These two factors are more closely related to the riparian system than to the reasonable use standard. Historically, the determination of unsuitability of the use to the watercourse involved the rights of other riparians rather than public interest in preserving water quality or quantity. The right to compensation is related to the flexibility of the riparian system which allows introduction of new uses in place of older, less valuable uses.[144]

Determination of Reasonable Beneficial Use Factors

Determination of what is a "reasonable beneficial use" should include, at a minimum, consideration of the factors common to both the "reasonable use" and "beneficial use" standards. These factors include the purpose of the use as well as its economic and social value. Over the years, courts have used these common factors which require balancing the harm that the use will cause to other water users against the ability of users to find some means to avoid the harm in order to achieve a viable and socially valuable water use system. Presumably, these factors represent some of the best features of both reasonable use and beneficial use. In addition, it now appears that the "reasonable use" factor of suitability, although not common to both systems, is being adopted either legislatively or administratively by some western states.[145] Although the

139. WATER LAW, *supra* note 13, §60.

140. *Id.* §64.

141. *Id.* §65.

142. *Id.*

143. See text accompanying notes 123-135 *supra.*

144. RESTATEMENT (2D), *supra* note 15, §850A, comment on clause (i).

145. *See, e.g.,* Department of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974). *See also,* OR. REV. STAT. §§538-.110-.300 (1953). *But see,* Cascade Town Co. v. Empire Water & Power Co., 181 F. 1011 (C.C.D. Colo. 1910), *rev'd on other grounds,* 205 F. 123 (8th Cir. 1913) (although recreation was a beneficial use, preservation of a beautiful waterfall was not statutorily authorized and therefore not possible).

public interest aspect of suitability to the watercourse might be included as a component of the social value factor, the suitability factor is clearly one of the best features of the reasonable use standard and should therefore be considered part of the "reasonable beneficial" standard. Whether compensation, the ninth "reasonable use" factor, is one of the "best" features of the reasonable use system, and thus part of the "reasonable beneficial use "standard, would normally be a matter for legislative determination.[146]

A standard of "reasonable beneficial use" which incorporates the "best features of both reasonable use and beneficial use" would thus be a standard which required an examination of the purpose of the use, its economic value, its value to society including consideration of possible harm to society through harm to the water body, and a balancing of any harm caused by the use against methods currently available to reduce or eliminate that harm. The standard should reflect an increased emphasis on the rights of the public over the traditional rights of riparian proprietors. It should also emphasize flexibility toward changed conditions. Implementation of such a standard should result in an improved system of water use and allocation.

APPLICATION OF REASONABLE BENEFICIAL USE IN FLORIDA

Validity of the Standard

The initial issue in testing the validity of a standard is whether it is an illegal delegation of legislative power. When a legislature initiates a new regulatory program, the statute should contain guidelines to restrict the appropriate administrative agency's discretion in implementing the program. Otherwise, the legislative body may be charged with not providing adequate standards or sufficient guidelines in its delegation of regulatory power to an administrative agency. The Florida Constitution[147] restricts wholesale delegation of powers by one branch of government to another.[148] Furthermore, the Florida supreme court has formulated a general test for ascertaining whether a legislative delegation of authority sufficiently restricts administrative discretion:

> The Legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law, complete in itself, designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regu-

146. Chapter 373 of the Florida Statutes makes no provision for compensation when a new use supplants an existing use. However, the FWRA does not automatically cut off all existing uses but allows existing users to apply for permits when a permit system is imposed by a water management district and provides that such permits must be granted if the use is reasonable beneficial. FLA. STAT. §373.226 (1977). This provision was approved by the Florida supreme court. Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979). In addition, users seeking renewal of a permit receive a preference. FLA. STAT. §373.233(2) (1977).

147. FLA. CONST. art. II, §3 provides: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

148. Cross Key Waterways v. Askew, 351 So. 2d 1062, 1066 (Fla. 1st D.C.A. 1977), *aff'd*, No. 52, 251 (Fla., filed Nov. 22, 1978).

lations for the complete operation and enforcement of the law within its expressed general purpose.[149]

Florida courts applying this test must bear in mind the presumption of validity accorded all legislative enactments.[150] The existence of some administrative discretion will not per se invalidate a statute.[151] In the past, courts have considered whether the limitation had a fixed and definite meaning in connection with the subject matter.[152] Florida courts have ruled in addition that the test should be tempered by consideration of the controlling policies and the practical context of the problem as well as the need for flexibility.[153] Finally, courts have determined that the procedural safeguards provided by the Administrative Procedure Act and the availability of judicial review should also be weighed in determining the constitutionality of delegated authority.[154]

The key words of limitation in the Florida Water Resources Act's consumptive use permit section are those that require the applicant to establish that his proposed use is a "reasonable beneficial use."[155] The FWRA defines "reasonable beneficial use" as "[t]he 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 consistent with the public interest."[156]

Because the 1972 Florida Water Resources Act was based largely upon the Model Water Code, the Code and its accompanying commentary should provide evidence of the underlying intent of the Florida legislature when it established the "reasonable beneficial" standard for consumptive water use in the state.[157]

The Code's commentary indicates that the phrase "reasonable beneficial use," adopted by the authors of the Model Water Code as "an attempt to combine the best features of the reasonable use and beneficial use rules,"[158] ought to be interpreted in light of the long history of judicial determination of water uses in each system. The terms "reasonable use" and "beneficial use" are legal phrases which have been clothed with common law meaning over the years by the courts of various states. Each term serves as a legal shorthand for

149. Conner v. Joe Hatton, Inc., 216 So. 2d 209, 211 (Fla. 1968) (quoting State v. Atlantic Coast Line Ry. Co., 56 Fla. 617, 636-37, 47 So. 969, 976 (1908)). *See* Martin, *The Delegation Issue in Administrative Law — Florida v. Federal*, 52 FLA. B.J. 35 (1979).

150. Department of Legal Affairs v. Rogers, 329 So. 2d 257, 263 (Fla. 1976); Sarasota County v. Barg, 302 So. 2d 737, 741 (Fla. 1974).

151. Conner v. Joe Hatton, Inc., 216 So. 2d 209, 211 (Fla. 1968).

152. *Id.* at 212-13.

153. Department of Citrus v. Griffin, 239 So. 2d 577, 580 (Fla. 1970); Conner v. Joe Hatton, Inc., 216 So. 2d 209, 212 (Fla. 1968).

154. Albrecht v. Department of Environmental Regulation, 353 So. 2d 883, 886 (Fla. 1st D.C.A. 1978).

155. FLA. STAT. §373.019(5) (1972).

156. *Id.*

157. It has been held proper for a court to look to the comments of the drafters when seeking to ascertain the intent of the legislature. Sheffield — Briggs Steel Products, Inc. v. Ace Concrete Service Co., 63 So. 2d 924, 926 (Fla. 1953) (using the notes of National Commissioners on Uniform State Law *re*: the Model Mechanic's Lien Act). *See also* Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, [1966] WIS. L.R. 597.

158. MODEL WATER CODE, *supra* note 111, at 171.

the factors articulated and weighed by the courts in determining the legality of a use. Having served as guidelines for the courts, they can as readily serve as guidelines to limit the discretion of administrative agencies.

The definition of "reasonable beneficial use" in the FWRA clearly can be seen to encompass most of the factors common to "reasonable" and "beneficial use." Determination of whether a use complies with the definition would necessarily involve examination of its purpose. The economic value factor would be considered in determining economic and efficient utilization. The public interest component of the statute relates to the social value factor. The extent and amount of harm caused to one having a prior right to use water is basically covered by the phrase "reasonable and consistent with the public interest." The factors of avoiding harm, adjusting the quantity, and protecting existing uses, are also included in the phrase "in a manner which is . . . reasonable." The suitability factor is present because of the statutory emphasis on public interest.

A well recognized canon of statutory construction requires that legal terms used in a statute are to be given their technical meaning unless the contrary plainly appears to have been intended by the legislature.[159] "Thus statutes which employ special or technical words or phrases well enough known to enable those expected to use them to correctly apply them, or statutes which use words with a well settled common law meaning, will generally be sustained against a charge of vagueness."[160] When the Florida legislature adopted the technical words "reasonable beneficial use," words with well developed common law meanings, its presumable intent was to rely on the technical common law meaning of these terms to guide and constitutionally limit administrative determination of whether a use is "reasonable beneficial."

A recent Florida case, *Village of Tequesta v. Jupiter Inlet Corp.*,[161] involved the FWRA. Although the court was not specifically asked to determine the validity of the reasonable beneficial standard of water use, the standard was clearly considered when, in the discussion of Florida law prior to adoption of the FWRA, the court said: "[E]ven then, the use was bounded by the perimeters of reasonable and beneficial use."[162] Furthermore, the court specifically held that: "The Water Resources Act now controls the use of water and replaces the ad hoc judicial determination in water management districts where consumptive use permitting is in force."[163] The court has clearly recognized the need for and ability of administrative agencies to make water allocation decisions without judicial approval of each decision. It would follow that the court recog-

159. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION, §47.30 at 152 (4th ed. 1972); Davis v. Strople, 39 So. 2d 468, 471 (Fla. 1949) (Barns, J., concurring) (quoting 50 AM. JUR. 2d. *Statutes*, §278 (1948)); Williams v. Dickenson, 28 Fla. 90, 99, 9 So. 847, 849 (1891); 73 AM. JUR. 2d. *Statutes* §165 (1974).

160. Department of Legal Affairs v. Rogers, 329 So. 2d 257, 264 (Fla. 1976) (citing Winters v. New York, 333 U.S. 507, 515 n.4 (1948); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)).

161. Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979).

162. *Id.*

163. *Id.*

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nized that administrative articulation of standards based on the FWRA was both possible and proper.

Establishing Guidelines for Implementation of the FWRA

Although the factors considered by courts in making a general determination as to whether uses are reasonable or beneficial are contained in chapter 373, it is important that the agency administering the consumptive use permit program provide clear guidelines for making decisions in specific cases. The Florida supreme court has elsewhere recognized that standards for the guidance of administrative discretion can be supplied by "common usage or by reference to the purposes of the Act."[164] The specific purposes sought to be achieved by the Florida Water Resources Act are enumerated. They express legislative intent to realize the full beneficial use of the waters of the state; to provide for management of water resources; to promote conservation, development, and proper utilization of surface waters; to preserve natural resources, fish, and wildlife; to promote recreational development, protect public lands, promote navigability; and to otherwise promote the health, safety, and general welfare of the people of the state.[165]

The Supreme Court of Florida has recognized that in some areas of regulation it is impractical for the legislature to enact specific standards for the exercise of administrative discretion.[166] The determination of whether a particular use is a "reasonable beneficial use" falls into this category. Each permit decision will present different combinations of factors to be weighed with respect to the distinct water source characteristics of Florida's many lakes and watercourses, and varying riparian and public interests with respect to a particular location. The question of whether, under all the facts and circumstances, a proposed use in a particular location is reasonable beneficial, does not interfere with existing legal uses, and is in the public interest, can best be determined by a board which convenes frequently, building up a reservoir of expertise in the area it regulates.

The Florida supreme court has also said that "the very conditions which may operate to make direct legislative control impractical or ineffective may also, for the same reasons, make the drafting of detailed or specific legislation impractical or undesirable."[167] The legislature specifically recognized the need for flexibility in the application of the FWRA.[168] It chose to restrict its delegation of authority by directing the DER and water management districts to weigh the common law factors of reasonable beneficial use, as well as existing uses and the public interest, in its exercise of reviewable discretion.

164. Department of Legal Affairs v. Rogers, 329 So. 2d 257, 268 n.4 (Fla. 1976) (England, J., concurring) (quoting Conner v. Joe Hatten, Inc., 216 So. 2d 209, 213 (Fla. 1968)); State, Dept. of Citrus v. Griffin, 239 So. 2d 577, 581 (Fla. 1970).

165. FLA. STAT. §373.016 (1977).

166. Albrecht v. Department of Environmental Regulation, 353 So. 2d 883, 886 (Fla. 1st D.C.A. 1978). This was in effect reiterated by the Florida supreme court when it said the FWRA has replaced judicial determination of water use rights. Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979).

167. State, Dept. of Citrus v. Griffin, 239 So. 2d 577, 581 (Fla. 1970).

168. FLA. STAT. §373.016(3) (1977).

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Finally, availability and use of the Administrative Procedure Act, chapter 120 of the Florida Statutes, to refine statutory policy statements by the adoption of rules has tipped the balance in other contexts to uphold legislative delegations of authority.[169] By providing for the refinement of policy by rulemaking,[170] the legislature has authorized the DER and water management districts to flesh out Florida's declaration of water resources policy by administrative action. Furthermore, the exercise of administrative discretion by DER and the water management districts through rulemaking and by granting or denying consumptive use permits is subject to direct judicial review.[171] Florida courts have recognized that such direct judicial review will serve to further ensure "that discretion will be exercised responsibly and fairly."[172]

Recommended Guidelines Based on Reasonable Beneficial Use Factors

Administrative regulations establishing guidelines for consumptive use permitting in Florida should be consistent with the factors developed from the analysis of the "reasonable" and "beneficial use" standards. These factors include: (1) the purpose of the use; (2) its economic value; (3) its social value, including the suitability of the watercourse; (4) the extent and amount of harm caused by the use; and (5) the practicality of avoiding the harm through adjusting the quantity needed or the method used.

Purpose

Guidelines might contain a list of uses which may be considered "reasonable beneficial" for permitting purposes. The water codes of many western states contain a list of uses or purposes which are deemed beneficial.[173] The FWRA does not include a section which specifically enumerates the uses to be considered reasonable beneficial for permits. However, Florida Statutes, section 373.036, which directs the Department of Environmental Regulation to study the water resources of the state and formulate a state water use plan, does delineate water uses which are to be considered in the state water use plan to attain maximum reasonable beneficial use of water. The uses include: protection and procreation of fish and wildlife; irrigation; mining; power development; domestic, municipal and industrial uses; and all other related uses including drainage, reclamation, flood-plain or flood-hazard area zoning, and

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169. *See, e.g.*, Department of Legal Affairs v. Rogers, 329 So. 2d 257, 269 (Fla. 1976); Albrecht v. Department of Environmental Regulation, 353 So. 2d 883, 886-87 (Fla. 1st D.C.A. 1978).

170. *See, e.g.*, FLA. STAT. §§373.026, .043, .044, .126, .171, .175 (1977).

171. FLA. STAT. §373.133 (1977). In addition, water management district rules are subject to review by the Governor and the Cabinet.

172. FLA. STAT. §373.114 (1977); Albrecht v. Department of Environmental Regulation, 353 So. 2d 883, 887 (Fla. 1st D.C.A. 1978).

173. *See, e.g.*, TEX. WATER CODE ANN. §11.023(b) (Vernon 1977); WASH. REV. CODE ANN. §90.54.020 (1971).

selection of reservoir sites.[174] These uses have all been termed "beneficial uses" either statutorily or judicially by other states.[175]

The fact that Florida's statutory list of uses does not appear in the sections of the Act dealing with consumptive use permits does not mean that the list is not applicable to permits as well as to the state water use plan. Indeed, the Florida law of statutory construction clearly mandates that a statute be construed in its entirety rather than by examination of each separate provision.[176] The Florida supreme court has stated that all parts of a chapter must be harmonized so as to give effect to the whole legislative scheme of enactment.[177]

The section of the Florida Water Resources Act that directs the Department of Environmental Regulation to prepare a state water use plan which will attain maximum reasonable beneficial use of water for the purposes enumerated above[178] should not stand by itself. In order that the purpose of the legislature be given effect, the uses considered to be appropriate under the water use plan should similarly be considered appropriate for a permit program.

Economic Value

Economic value is the second factor which should be considered in the guidelines for consumptive use permitting. Formulation of the state water plan requires consideration of both the maximum economic development of water resources consistent with other uses[179] and the prevention of uneconomical uses of water resources.[180] Because it is clear that the legislature intended economic value to be a factor in water use, an applicant for a permit should be required to show that his use will be efficient and non-wasteful.

Social Value

The social value factor includes considerations of public health and welfare.[181] Professor Trelease suggests that this factor be implemented through a preference system for water allocation.[182] Although preference systems are established in some states by statute,[183] the states which have preference systems do not agree as to the order in which uses are to be preferred.[184] The FWRA does not specifically set preferences among various uses. However, the Department of Environmental Regulation is authorized, in connection with the state water use plan, to designate, as preferred uses for an area, those uses

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174. FLA. STAT. §373.036 (1977).
175. See text accompanying notes 68-79 *supra*.
176. Florida Jai Alai, Inc. v. Lake Howell Water & Reclamation Dist., 274 So. 2d 522 (Fla. 1973).
177. Wilensky v. Fields, 267 So. 2d 1 (Fla. 1972).
178. FLA. STAT. §373.036 (1977).
179. FLA. STAT. §373.036(2)(b) (1977).
180. FLA. STAT. §373.036(2)(e) (1977).
181. See text accompanying notes 55-56 *supra*.
182. Trelease, *supra* note 119, at 20.
183. *E.g.*, TEXAS WATER CODE ANN. §5.024 (Vernon 1972).
184. Trelease, *supra* note 119, at 18.

which would enhance or improve water resources in that area.[185] In addition, the permitting agency is authorized to decide between competing applications for an inadequate water supply on the basis of public interest.[186] Each of these provisions implies some ordering of preferences. Guidelines for preferences in permitting in Florida could specify types of uses that will enhance or improve water resources. Additional uses might then be ranked according to their importance to public health and welfare.[187] Varying local needs may dictate that preference systems be area-specific. Some areas, for example, have a high priority for mining uses, while others would rank irrigation at the top of their list. Thus, although some recommendation of preferences could be made at the state level, delegation of rulemaking to the water management districts may be appropriate in this area.

Another consideration in the social value area is the factor of watercourse suitability. The FWRA provides for the establishment of minimum flow for surface watercourses and of minimum surface water levels to prevent ecological harm through further withdrawals.[188] If these determinations are made carefully, the suitability of the watercourse to the use will be ensured.

The social value factor deals with the public interest. This interest is reflected in the strong environmental emphasis which permeates the FWRA.[189] The statutory emphasis on preservation of environmental values should be incorporated into any guidelines developed with respect to a permit program to prevent possible inadvertent omission of environmental considerations.

Harm Caused and Ability to Avoid Harm

The three factors of extent and amount of harm caused to others, practicality of avoiding harm, and practicality of adjusting quantity, do not apply to issuance of the initial permits if water supplies are adequate. However, when water supplies are low, these factors should be considered with regard to applications for a permit for an existing use under Florida Statute section 373.226, applications for renewal of a permit under Florida Statute section 373.349(3), or even applications for an initial permit. One method of applying these factors in water short areas would be to issue short-term permits until the permitting agency builds up experience. In this manner, quantities could be adjusted more often, ensuring that an early permit holder was not preventing water use by others because of over-allocation.

Protection of Existing Values

The final factor, protection of existing values, is pertinent both when a

185. FLA. STAT. §373.036(9) (1977).

186. FLA. STAT. §373.233(1) (1977).

187. Domestic use of water, considered to have highest preference in the western states, is exempted from permitting by FLA. STAT. §373.219(1) (1977).

188. FLA. STAT. §373.042 (1977).

189. *See* FLA. STAT. §373.016 (1977) (policy to preserve natural resources); FLA. STAT. §373.036 (1977) (development of state water use plan); FLA. STAT. §373.042 (1977) (establishment of minimum flows and levels); FLA. STAT. §373.223(3) (1977) (reservation of water to protect fish and wildlife); FLA. STAT. §373.246(7) (1977) (water emergency).

permit is sought for an existing use and when application is made for permit renewal.[190] This factor was intended to protect riparian rights under the eastern system and rights of a prior appropriator under the western system. Although the Florida legislature did not establish the western system of appropriation in perpetuity,[191] it clearly terminated the traditional riparian water use right.[192] The Florida supreme court discussed this termination in *Tequesta*, pointing out that the statute provided all holders of an exercised common-law water use right a two-year period in which to convert it into a permit water right.[193] Although the *Tequesta* case dealt only with ground water, the court made no distinction between ground and surface water when it said "The Florida Water Resources Act makes no provision for the continuation of an *unexercised* common-law right to use water."[194]

The factor of protection of existing values is therefore relevant in Florida in only two instances. The first is for those water management districts which have not yet implemented consumptive use permits. In those cases, common-law water rights still apparently apply and are protected by the FWRA upon permit implementation by the statutory termination procedure. The second is protection of the values established by the granting of a permit. The FWRA specifies that where two applicants are competing for an inadequate water supply, preference shall be given to a renewal application if it serves the public interest as well as the competing initial application.[195] Further protection could be afforded existing values by extending the duration of permits to the 20-year maximum. Whether such a regulation is proper depends on the weight given to this final factor. Apparently, the legislature did not consider such protection of overriding importance or presumably, greater efforts would have been made to preserve riparian rights or to lengthen the statutory permit time. However, because the flexible permit duration given to the administering agency by the legislature provides a time period in which to correct errors, no rigid guidelines should be approved for this factor.

In summary, any allocation of water under the "reasonable beneficial" standard of water use should be made within guidelines based on the above factors. Water use in Florida no longer requires ownership of riparian land. In fact, there is no statutory requirement that land ownership or dominion over land be a factor in the permitting process.[196] Therefore, permit programs should not be based solely on ownership or control of land unless it can be shown that such a requirement satisfies one of the factors such as social value (public interest) or economic value.[197]

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190. FLA. STAT. §§373.226-.239(3) (1977).

191. Duration of permits is for a maximum of 20 years. FLA. STAT. §373.236(1) (1977).

192. *See* FLA. STAT. §373.226(1) (1977).

193. Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979).

194. *Id.*

195. FLA. STAT. §373.233(2) (1977).

196. *See* FLA. STAT. §§373.219, .223 (1977). Indeed, the Florida supreme court approved the statutory termination of a land owner's right to use the underlying ground water. Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979).

197. The Southwest Florida Water Management District (SWFWMD) currently bases its consumptive use permit program on a "water crop" theory. 6 FLA. ADMIN. CODE 16J-2.11(3)

As stated by the California court, a use that may be reasonable beneficial in a time of water surplus may not be reasonable beneficial in a time of water shortage.[198] Because Florida is subject to periodic droughts, creation of the water shortage plans provided for in Florida Statute section 373.246 should be a priority for the water management districts.[199] The agencies should utilize the "reasonable beneficial" analysis to decide priorities for allocation of water during emergency.

Two of the five water management districts currently have some form of water shortage plan.[200] Development of such plans should not be delayed until a shortage arises, since advance planning will undoubtedly be more sound than decisions made under the pressure of impending or existing crises. The DER should issue guidelines calling for the prompt establishment of water shortage plans. These plans should be developed on the district level to allow participation by interested parties and consideration of site-specific factors.

CONCLUSION

"Reasonable beneficial use," adopted by the legislature in the Florida Water Resources Act of 1972, is a term which may be new to the statute books but which has a well developed meaning in water law. The term is found in the case law of both California and South Dakota. In Florida, the supreme court has recognized the term as controlling water use prior to adoption of the FWRA.[201]

In addition to case law, the Model Water Code and its commentary can be used as a guide in interpreting the legislative intent in enacting the "reasonable beneficial use" standard. Because the Code sought to combine the best features

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(1978). The water crop, defined as the amount of evaporation and plant transpiration, is established as 365,000 gallons per year per acre. "Issuance of a permit will be denied if the amount of water consumptively used will exceed the water crop of lands owned, leased or otherwise controlled by the applicant." *Id.*

The water crop approach to permitting ties the size of the allocation to the amount of land used. This determination appears arbitrary. It is certainly possible that a permit applicant could satisfy all of the factors which determine a "reasonable beneficial" use and still be denied a permit because his land ownership or use was not extensive enough to allow the needed amount of water.

The water crop theory was examined by a Florida court when the city of St. Petersburg sought to show that rule 16J-2.11(3) was promulgated in derogation of the stated policy of chapter 373 of maximum use of water resources. Because the city had not shown that it needed more water than was authorized by SWFWMD, the court refused to rule on the question. City of St. Petersburg v. Southwest Florida Water Management Dist., 355 So. 2d 796 (Fla. 2d D.C.A. 1977).

198. Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist., 3 Cal. 2d 489, 45 P.2d 972 (1935).

199. *See, e.g., Rules of Central and Southern Florida Flood Control District, Chapter 16CA with Commentary*, 6 FLA. ADMIN. CODE 16CA-2.12, - 2.15 (adopted December 14, 1973).

200. *See* 6 FLA. ADMIN. CODE 16 I-2.51-2.54 (1978) (St. Johns River Water Management District water shortage plan); *Id.* Chapter 16 K-2.12, - 2.15 (South Florida Water Management District plan). The Southwest Florida Water Management District has rules dealing with water shortages but no plan. 6 FLA. ADMIN. CODE 16 J-2.20, - 2.24 (1978).

201. Village of Tequesta v. Jupiter Inlet Corp., — So. 2d — (Fla. 1979).

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of eastern and western water law, an analysis of each system is useful. This analysis provides a set of factors used by courts in determining the validity of a proposed water use under each system.

Examination of the factors shows a substantial overlap. In fact, the two systems only differ in two major respects. First, the eastern system protects the rights of riparian landowners while western law protects the rights of water users according to seniority of use. The second difference lies in the stability of the water consumption rights; riparian uses are subject to adjustment in favor of other riparians while appropriative rights are perpetual unless waste is proven.

The similarities between the two water law systems include examination of the purpose of the use, its economic and social values, and a balancing of the harm caused by the use with the ability to avoid the harm. Although both systems were originally quite different, through the years "beneficial use" has taken on "reasonableness" factors and "reasonable use" has acquired "beneficial" overtones.

The provisions of the FWRA have been shown to be in harmony with the factors common to the two systems of water law. When implementing the FWRA through regulations or development of the state water use plan, the Department of Environmental Regulation and the water management districts should develop guidelines in light of the common factors to ensure that administrative actions will also harmonize with legal precedents.

In its enactment of the Florida Water Resources Act of 1972, the Florida legislature took a progressive and innovative step toward handling the state's consumptive use problems. The Florida supreme court has placed its stamp of approval on the statute. The administrative agencies must now advance the purposes of the FWRA with a program which will not only withstand legal challenge, but which will assure that Florida's precious water resources are used in a manner which is reasonable, beneficial, and consistent with the public interest.

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