

## **“WHISKEY IS FOR DRINKING...”: RECENT WATER LAW DEVELOPMENTS IN FLORIDA**

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### A. INTRODUCTION

The past few years have seen a flurry of significant events carrying implications for the Florida's future in myriad ways that have been centered on water law and policy. From the Florida Bay to the Apalachicola River, issues dealing with water have with issues of development and growth, property rights, and agricultural policy to name a few. The Everglades system and its ongoing restoration has provided a number of high profile developments in its relation to the federal judiciary, at the same time prompting some meaningful legislative and executive activity. The issue of water allocation and use has likewise provided headlines and lobbyist lines as economic and regional interests contend for what some predict will end up a more privatized and prioritized resource in Florida and the eastern states in general, but which many others consistently assert should remain a public resource as it has long been recognized. The following article is meant to shed light on these developments and how they affect the regulation of water quantity and quality in Florida.

### B. WATER QUANTITY DEBATES: CONSUMPTIVE USERS, THE ENVIRONMENT, AND INTERREGIONAL CONFLICT

#### *1. The Council of 100 Brings Water Supply to the Fore*

On August 10, 2003, Craig Pittman wrote an article in the St. Petersburg Times entitled, “North has it, South wants it,” referring to the Florida Council of 100 water supply report that was about to be released, a report that allegedly recommended transferring surface water out of northern surface waters such as the Suwannee River to feed growth plans of South Florida developers and growth managers.<sup>1</sup> When the report was released on September 25, the

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1. Craig Pittman, *North has it, South wants it*, ST. PETERSBURG TIMES, August 10, 2003, at 1A. Pittman cited Lee Arnold, Chairman of the Council's Water Supply Task Force which conducted the research and contacted many experts on the issue, who said that 80 percent of the consumption was South of I-4 while 80 percent of the available supplies were north of I-4. Arnold singled out the Suwannee River region as a potential donor area and expressed that in return for their water, they could get money for schools. Pittman also cited a former Pinellas County Commissioner who, during the water wars between thirsty Pinellas

exact growth projections forecasted a 25 percent increase in population and concluded that from this projection, a 26.4 percent increase in billions of gallons of water per day would be needed to sate the demands of this population.<sup>2</sup> Areas south of I-4 were growing, claimed the Council, and Florida needed to find a way to supply the projected demand, which would overwhelmingly be concentrated in the South and Southwest Florida Water Management Districts, with a little less demand in the St Johns, but with almost no increase in demand for the Northwest Florida and Suwannee River Districts.<sup>3</sup> In addition, the demand of agricultural, domestic self supply, and industrial/commercial/electric users would stay about the same or be reduced while public supply and recreation would be increased in all five water management districts.<sup>4</sup>

The report had other, less explosive, recommendations like creating a state water supply commission, establishing a water data center and a science advisory committee, and encourage public-private partnerships, but in the days following Pittman's article speculation was rampant, and northern counties were already rushing to adopt resolutions opposing water transfers and expressing support for the "local sources first" policy that was written into the Florida Statutes in 1998.<sup>5</sup> That policy is written into Chapter 373 of the Florida statutes and requires a Water Management District or DEP to consider seven factors to be evaluated using district water supply assessments and regional water supply plans as the basis of their decisions where applicable.<sup>6</sup> Other county commissions in similarly threatened "water rich"

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County and water affluent Pasco County said "Keep the Suwannee River cold, because we're coming for it."

2. Improving Florida's Water Supply Management Structure: Ensuring and Sustaining Environmentally Sound Water Supplies and Resources to Meet Current and Future Needs, A Report of the Florida Council of 100, (September 2003). Available online at [www.fc100.org](http://www.fc100.org). [hereinafter *Report*].

3. *Id.* at 10

4. *Id.*

5. See, for example, Archana Pyati, *County Braces for a New Water War*, CITRUS TIMES, August 14, 2003, at pg. 1. Citrus County Commission members expressed disdain for any attempt to sell the *transportation* of water, (water cannot actually be sold in this manner) despite any benefits the County might receive. They also had worries that if the Council's water transfer recommendations were followed, that Citrus County's own prospects for development and growth would be jeopardized, turning developers away because of a depleted water supply.

6. Fla. Stat. §373.223(3). In order to pass the local sources first legislation, concessions in the form of statutory exemptions had to be made to satisfy legislators in an area of the Northwest Florida Water Management District and water bottlers in other areas of the state. This is what State Senator Nancy Argenziano stated in a letter to the editor of the St. Petersburg Times. See Nancy Argenziano, Letter Writer Misreads Local Water Statutes, ST. PETERSBURG TIMES Letters to the Editor, October 10, 2003.

regions made similar gestures, perhaps indicating a stronger sense of alarm than that conveyed by the typical North Florida local campaign stand against outside meddling with County water supply, but the extent of public outrage over long distance water transfers had implications beyond local politics.

Public outrage seemed more apt a description for the response of North Floridians in the autumn of 2003. In late November of 2003, for example, over a thousand people tried to gain entrance into the Chiefland High School auditorium to express their outrage to the Florida Senate Natural Resources Committee, who held a public meeting there over the Report. Those who could not fit into the auditorium were led into the gymnasium, where the stands and floor were also filled with people who watched the meeting on television.<sup>7</sup> Senate President Jim King said three days before the report's release that "this is as close as North vs. South you're going to get since the Civil War."<sup>8</sup> Four days later he tempered his outlook, saying he had "some initial concerns" about taking water from one part of the state to another, but wanted a full discussion.<sup>9</sup> At the same time, however, Council of 100 members themselves began to back down from the idea of north south water transfers, with Charlie Ohlinger, the Council's executive director, claiming "we're not proposing stealing any water from the Suwannee River... we're just trying to get the conversation started."<sup>10</sup> Even in Southeast Florida, where the Council's water transfer recommendations might have seemed palatable, citizens and County commissions rejected the idea, with many in the region claiming that the state had a growth problem and not a water problem.<sup>11</sup>

Criticism from the environmental community was quickly forthcoming, as leading environmental advocates framed the report as a wish list for the development community. Eric Draper, conservation director for Audubon of Florida, said that the Council was "creating and inventing" the problem of a needed water supply increase of 26.4 percent, while David Guest of Earthjustice stated that "they inflated the numbers tremendously in an effort to try to

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7. Amy Wimmer Schwarb, *Plan to Transfer Water Meets Sea of Protest*, St Petersburg Times, November 21, 2003, online at [www.sptimes.com](http://www.sptimes.com).

8. Robert P. King, *Battle Lines Form over Water Law Rewrite*, PALM BCH. POST, September 22, 2003, at page 1A.

9. Craig Pittman, *Developers Tout Water Plan as Environmental Protection*, ST PETERSBURG TIMES, September 26, 2003, at page 5B.

10. *Id.* King at note 8.

11. Tal Abbady, *South Florida Opposes State Water Plan; Problem is Growth, Local Environmentalists and Residents Tell Senators*, SUN SENTINEL PALM BEACH EDITION, October 15, 2003, at page 3B; *See also* Robert P. King, *Lawmakers, Residents Reject Idea of Creating Statewide Water*, PALM BCH. POST, October 15, 2003, at page 8C.

demonstrate alternate sources of water aren't adequate."<sup>12</sup> Indeed, this criticism was repeated against the Council' report when Lee Arnold, Eric Draper, and former Southwest Florida Water Management District Executive Director Sonny Vergara sat on the water supply panel of the 10th Public Interest Environmental Conference, (PIEC) in February of 2004.<sup>13</sup> Lee Arnold did not back down from the Council's numbers, but by this time it was apparent that the idea of transferring water from North to South was out of the question for the moment, and Arnold downplayed that particular recommendation.<sup>14</sup>

At the same time, other groups had spoken out on Florida's water problems by releasing official reports. One of which, the Florida Water Coalition, included Earthjustice and Florida Audubon, David Guest's and Eric Draper's organizations respectively. The Coalition's report stressed the need for a water policy that supported the environment and did not promote growth.<sup>15</sup> A central idea to this policy proposal was that of establishing reservations for water bodies which would go beyond the minimum flows and levels by affirmatively setting aside water for the environment.<sup>16</sup> This process is ongoing; with some claiming that minimum flows and levels are adequate and others insisting that reservations are necessary to protecting the resource. Nonetheless, the panelists at the water supply panel of the 10th PIEC suggested that despite growing pressures on water resources in Florida, reservations are likely to grow in number and in popularity as a means of protecting and restoring water bodies.<sup>17</sup>

The agricultural community has also been a consistently visible stakeholder in water quantity issues, with the Department of Agriculture and Consumer Services, (DACS) Office of Agricultural Water Policy, (OAWP) releasing a report in June of 2003 detailing the contribution of agriculture to the state's water resources and outlining its policy positions on the issues.<sup>18</sup> In its report, the OAWP stressed the value of agricultural land for its functions of recharge

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12. Neil Johnson and Allison North Jones, *Water Recommendations Flow to Governor*, TAMPA TRIB., September 26, 2003, at page 4.

13. Eric Draper, Remarks at the UF College of Law's 10th Annual Public Interest Environmental Conference Water Supply Panel (February 20, 2004). *Hereinafter* Water Supply Panel.

14. Lee Arnold, Remarks at the Water Supply Panel.

15. Water Policy for Protecting Nature, not Growth, A Report of the Florida Water Coalition. Available online at [www.fladefenders.org/WaterCoalitionPositionPaper.pdf](http://www.fladefenders.org/WaterCoalitionPositionPaper.pdf)

16. *Id.* at 9-11.

17. Sonny Vergara, Remarks at Water Supply Panel, *supra* at note 13.

18. Florida's Agricultural Water Policy: Ensuring Resource Availability, A Report of the Florida Department of Agriculture and Consumer Services Office of Agricultural Water Policy, (June 2003). Available online at [www.floridaagwaterpolicy.com](http://www.floridaagwaterpolicy.com).

maintenance and floodwater storage,<sup>19</sup> with 52% of Florida's 35 million acres covered by mostly non impervious agricultural land.<sup>20</sup> This is extremely important when considering how these essential hydrologic functions are to contribute to a sustainable water supply in Florida if development is to occur mostly on agricultural land. For this reason, local and state governments should be aware of the need for urban infill and community redevelopment, with the focus on agricultural lands being preservation of both the land and the economic viability of maintaining agricultural operations.

In conclusion, intra-state water supply and development are issues that will dominate in the 21st Century as decades of growth and consumption have set a trajectory for Florida that it may be hard to escape, considering the relative importance of real estate development to the state's economy. Luckily, however, Florida also has an active and organized environmental community advocating for natural systems while agriculture also remains a dominant force in state politics. At the same time, other industries such as nature tourism and aquaculture may come to more prominence as the battles over water wage. In the end, the most viable alternatives might look something like what the water management districts are now undertaking with the identification of alternative supply projects such as surface water instead of groundwater and desalinization,<sup>21</sup> providing water that may be more expensive for development than the Council of 100's proposed sources, but which become the compromise between building moratoria on the one hand and long distance north to south water transfers on the other.

## 2. *Water for the Everglades*

Indeed, Chapter 373 of the Florida Statutes allows the DEP and Water Management Districts to establish reservations for certain water bodies.<sup>22</sup> Reservations for the Everglades have been the source of much contention with different stakeholders wrangling over exactly how they are to be implemented without running afoul of an additional requirement in the relevant 373 provision that existing "legal uses" be protected so long as not contrary to the public interest.<sup>23</sup> Another wrinkle arises when the state law and federal law are combined, as the \$8 billion Comprehensive Everglades Restoration Project, (CERP)<sup>24</sup> whose cost was supposed

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19. *Id.* at pp. 4-6.

20. *Id.* at p. 4.

21. See [www.sjrwmd.com/programs/watersupply.html](http://www.sjrwmd.com/programs/watersupply.html).

22. Fla. Stat. §373.223(4)

23. *Id.*

24. See [www.evergladesplan.org](http://www.evergladesplan.org).

to be split even by the state and federal government, is also governed by both state law and federal law, specifically the Water Resources Development Act of 2000, (WRDA 2000) on the federal side, which requires reservations to be established before any federal funding for the project can be received.<sup>25</sup>

While Florida has to reserve water for the environment under state law to receive federal funding, it also must abide by WRDA 2000's "savings clause," which is similar to the protection of "existing legal uses" under Chapter 373.<sup>26</sup> Under this provision the federal and state CERP administrators are prohibited from eliminating or transferring any "existing legal source" of water until a source of water supply of comparable quantity and quality as that available on the date of enactment of WRDA 2000 is available to replace the water to be lost as a result of implementation of the Plan.<sup>27</sup> The combination of these similar state and federal law provisions has given rise to not a small amount of confusion over what the difference is between "existing legal uses" and "existing legal sources". At a CERP panel during the 9th Annual PIEC in 2003, the then General Counsel of the South Florida Water Management District explained that "sources" in federal law was a broader term than "uses" in state law.<sup>28</sup> From this viewpoint, it can be understood that "uses" denotes an actually permitted supply of water whereas "sources" refers to the collective supply of permittable water available in the system at the time of WRDA 2000's enactment.

Despite Florida's failure as of the start of 2005 to establish a rule for the reservation of water to the Everglades, the state has still received some \$200 million from the federal government for CERP projects, but this is still a paltry sum compared to the \$1 billion kicked in by the state so far.<sup>29</sup> Perhaps as a partial result of the as yet un-adopted Everglades reservations rule, there were a number of federal projects that by 2004 were being neglected under federal oversight. In October of 2004, Governor Jeb Bush announced the "Acceler8" program, which includes a \$1.5 billion bond program to fund the completion of eight of these priority CERP projects

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

26. Pub. L. No. 106-541, Title VI, §601(h)(5).

27. *Id.*

28. John Fumero, former General Counsel of the South Florida Water Management District, Remarks at the UF College of Law's 9th Annual Public Interest Environmental Conference CERP Panel (February 28, 2003). *See also* John Fumero, *Florida Water Law and Environmental Water Supply for Everglades Restoration*, 18 J. LAND USE & ENVTL. LAW 379 (2003)

29. *Everglades: Fla. stuck with more than its share of restoration bill, enviros say*, GREENWIRE, January 14, 2005.

whose federal funding is lacking.<sup>30</sup> In effect, the state has stepped into the shoes of the federal government for these projects, and it has not been without criticism, for example some have called to attention the fact that funding for the \$1.2 billion Indian River Lagoon restoration is now lacking and that this was supposed to be an initial step in what will be a decades long process of Everglades restoration.<sup>31</sup> Meanwhile, other issues such as water quality and growth management are necessarily ancillary to the problem of how to allocate sufficient quantities of water to the system.

### 3. *The Apalachicola Chattahoochee Flint River Basin*

The conflict between Florida, Georgia, and Alabama over how water quantity should be regulated has been going on for years, but nonetheless represents a growing trend towards a situation more commonly seen in the west, where water scarcity necessitates a more careful analysis of how the resource is to be apportioned among competing states, and conflict is more endemic to the landscape. The west also has seen majority of costly court battles ending in allocation by equitable apportionment in the Supreme Court.<sup>32</sup> The failed compact between Florida, Georgia, and Alabama over the Apalachicola-Chattahoochee-Flint (ACF) River System has recently reminded the eastern states that resorting to the original jurisdiction of the Supreme Court over water is possible anywhere that water scarcity is a problem.

Clashes over the Potomac between Virginia and Maryland, who recently invoked the Court's original jurisdiction, have been ongoing since the 17th Century, when two conflicting royal charters and a royal patent all granted the entire River to two Virginia grantees and one Maryland grantee.<sup>33</sup> The issue was a subject of both states' constitutional conventions in 1776, and in 1785 they went to Mount Vernon to have George Washington arbitrate their dispute.<sup>34</sup> Connecticut and Massachusetts contended in the Supreme Court in 1931 over the latter's right to use the waters of the Swift River to provide water for the Boston area,<sup>35</sup> and in that same year New

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30. *Id.*

31. *From Saving Everglades to Subsidizing Growth*, PALM BCH. POST, Editorial Section, November 26, 2004, at 14A

32. See, for example *Kansas v. Colorado*, 206 U.S. 46; *Wyoming v. Colorado*, 259 U.S. 419 (1922), later modified by *Wyoming v. Colorado*, 260 U.S. 1 (1922) and vacated in *Wyoming v. Colorado*, 353 U.S. 953 (1957); See also: *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Arizona v. California*, 373 U.S. 546 (1963); *Texas v. New Mexico*, 462 U.S. 554 (1983); *Colorado v. New Mexico*, 467 U.S. 310, 324 (1984).

33. *Virginia v. Maryland*, 540 U.S. 56, 60-63 (2003).

34. *Id.*

35. *Connecticut v. Massachusetts*, 282 U.S. 660 (1931).

York battled New Jersey and Pennsylvania before the Court over its use of the Delaware River.<sup>36</sup> Thus, water conflict is not new to the east, albeit not as ubiquitous as in the west. Whether other regions within the eastern riparian states will see such interstate conflict is yet to be seen.

Tri-state conflict over the waters of the ACF system has its origins in the Army Corps of Engineers' construction of the Buford Dam and Lake Lanier north of Atlanta, which was part of a congressionally approved development project for the ACF basin, completed in 1958.<sup>37</sup> One of the Corps' purposes for operating the dam is to provide municipal and industrial water for Atlanta, and in 1972 they began to conduct a congressionally approved study of water supply alternatives in response to pressure from the city.<sup>38</sup> In 1989, after three major droughts and no finding of sufficient alternatives, the Corps issued a draft Post-Authorization Change report recommending the reallocation of 20 percent of the Buford project's hydropower storage to supply, intending to slake Atlanta until 2010.<sup>39</sup> This prompted Alabama to sue the Corps in 1990, claiming the agency was favoring Georgia over other states in the basin.<sup>40</sup> Florida and Georgia were soon to intervene, along with a host of smaller organizations, but the parties agreed to attempt settlement in late 1990.<sup>41</sup> In 1992 the parties agreed to conduct a three year study of water resources in the basin which would be used to guide future negotiations.<sup>42</sup> The resulting *Comprehensive Water Resource Study* covers four main subjects: water resource demands, water resource availability, flood and drought management strategies, and coordination mechanisms.<sup>43</sup>

As the study was being conducted, the states entered into the ACF Compact to agree on an allocation of water between the three states.<sup>44</sup> The ACF Basin Commission was created by the compact to set up a formula for allocation, and any decision or action by its members, which included the governors of the three states and a non-voting federal member, required a unanimous vote, a major flaw in the compact according to commentators.<sup>45</sup> The deadline for

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36. *New Jersey v. New York*, 283 U.S. 336 (1931).

37. Roy R. Carriker, *Water Wars: Water Allocation Law & the Apalachicola-Chattahoochee-Flint River Basin*, Univ. of Fla. Coop. Extension Serv., Doc. FE 208 (2000). Available online at [edis.ifas.ufl.edu/BODY\\_FE208](http://edis.ifas.ufl.edu/BODY_FE208).

38. *Id.*

39. *Id.*

40. *Ala. v. Corps of Engineers*, CV90-BE-1331-E (filed June 28, 1990).

41. Carriker, *supra* note 37.

42. *Id.*

43. *Id.*

44. *Apalachicola-Chattahoochee-Flint River Basin Compact*, Pub. L. No. 105-104, (1997).

45. See Josh Clemons, *Interstate Water Disputes: A Roadmap for States*, 12

the allocation formula was December 31, 1998, but a number of extensions were provided, and the last deadline of August 31, 2003 was not extended, ending the compact. Florida refused to agree to an allocation formula that only gave minimum flows for the Apalachicola River, whose fresh water flows into the Apalachicola Bay and creates a delicate balance of nutrients and salinity that is needed for aquaculture in the bay, which accounts for ninety percent of the state's \$70 million a year oyster industry.<sup>46</sup> Alabama's concerns in the dispute include higher hydropower costs, reduced pollution dilution, and the possibility of being unable to attract industry to the state.<sup>47</sup> Georgia's interest, as already stated, is in water supply for growing Atlanta, and it claims that it can do what it wished with waters under its sovereign authority.<sup>48</sup>

The next venue for the dispute is most likely to be the Supreme Court, as the other alternative besides negotiations and compacts is congressional apportionment, which has only been done twice and is avoided by Congress because of the regional nature of the disputes.<sup>49</sup> Going by other cases where the Supreme Court exercises original jurisdiction to engage in equitable apportionment, a Special Master will likely be appointed to make factual findings based on complicated scientific data, and those findings will then be used by each side to argue its position.<sup>50</sup> The Court will likely use its other equitable apportionment cases as a guide, particularly the ones involving eastern states. Florida and Alabama will have to prove by clear and convincing evidence that they have suffered injury from Georgia's water withdrawals, and will face the more daunting task of proving future industry, the weight of which will depend on the Special Master's findings.<sup>51</sup> The court will consider economic, social and environmental factors, and Florida also may argue that withdrawals will violate other federal laws including the Endangered Species Act and the Clean Water Act.<sup>52</sup> It has been said that Florida's biggest challenge in the dispute will be in proving up the importance of its aquaculture industry relative to Georgia's need to supply water for growth in Atlanta. Florida State University law

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SOUTHEASTERN ENVTL. L.J. 115, 139 (2004).

46. Dustin S. Stephenson, *The Tri-State Compact: Falling Water and Fading Opportunities*, 16 18 J. LAND USE & ENVTL. LAW 83 (2000).

47. Clemens, *supra* note 45, at 136.

48. *Id.*

49. *Id.*

50. C. Hansel Watt, IV, *Who Gets the Hooch?: Florida, Georgia, and Alabama Battle for Water from the Apalachicola-Chattahoochee-Flint River Basin*, 55 Mercer L. Rev. 1453, 1483-1485 (2004).

51. *Id.*

52. *Id.*

professor and water law expert J.B. Ruhl has recently described Florida as “an epicenter of the eastern version of water wars,”<sup>53</sup> and argues that the fight over the ACF basin signifies a movement east for western water conflict.<sup>54</sup> As he also points out, Georgia’s economic interest should be balanced against the ecological injuries of Florida and Alabama, and those injuries eventually compound into economic injury.<sup>55</sup> In the end, it seems that Florida will have to be on the side of sound ecological management in order to advocate its position effectively in what will be a very unique equitable apportionment.

### C. WATER QUALITY AND THE EVERGLADES

The Everglades has seen a flurry of activity concerning water quantity in connection with restoration, and these issues are not easily separated from water quality issues. At the same time, the Everglades presents a unique situation legally and administratively as it requires coordination and concurrency among the local, state, and federal governments as well as the Seminole and Miccosukee Indian Tribes. It can be seen how this situation would bring complications, but added to the mix is the panoply of stakeholders, including environmentalists, sugar growers, builders, the water works industry, and others, including the governmental interests named above. Between the Tribes, the different federal and state agencies, and the stakeholders, the Everglades and its continuing restoration is a virtual maelstrom of judicial and legislative activity.

#### 1. *Judge Hoeveler, the Everglades Forever Act, the Removal, and the Result*

In 1988, Judge William Hoeveler got his judicial hands wet in the Everglades when then acting U.S. Attorney Dexter Lehtinen sued the South Florida Water Management District and the

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53. J.B. Ruhl *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. Land Use & Envtl. Law 47 (2003). Professor Ruhl describes the ACF conflict a “classic interstate water allocation fight between urban, agricultural, and rural areas of several states,” *Id.* at 48. He also predicts that an equitable apportionment by the Supreme Court is likely, but that it would be unique in it possibly being the first major interstate apportionment case they have heard in the “age of mature statutory environmental law.” *Id.* at 48-49. Professor Ruhl also argues that Florida’s interest in natural stream flows

54. *Id.* at 47-48.

55. *Id.* at 53. Ruhl presents evidence to show that the economic value of the Apalachicola River and its floodplain basin are equal or greater to that of Lake Lanier’s recreational economy. The total economic value of the River and its basin is \$5 billion in terms of recreation and other ecosystem services such as healthy estuaries, flood control, and nutrient regulation. *Id.* See also Gregory W. Garrett, *The Economic Value of the Apalachicola River and Bay* (Jan. 6, 2003) (unpublished masters degree paper).

Department of Environmental Regulation, (DER) now the Department of Environmental Protection, alleging violations of state water quality standards generally and phosphorous standards specifically in the Everglades National Park and Loxahatchee National Wildlife Refuge.<sup>56</sup> By 1991, a settlement was reached between the SFWMD, the DER, and the Department of Justice which was approved by Hoeveler and adopted as a consent decree.<sup>57</sup> The settlement eventually led to the passage of the Everglades Forever Act (EFA) in 1994 by the Florida legislature.<sup>58</sup> The EFA set the framework for implementation of Everglades restoration, and included the entire Everglades in its purview, not just the Everglades National Park and Loxahatchee National Wildlife Refuge, which were the subject of the original suit.<sup>59</sup>

The Act also authorized projects and funding for restoration with an original deadline of 2006, but in May of 2003 an amendment to the EFA was fast tracked through the Florida legislature by sugar interests that pushed the deadline for Everglades restoration up to 2016.<sup>60</sup> The bill was lambasted by U.S. Representative Clay Shaw, who asserted that the move would “cost Florida billions of dollars” in federal funding for the 8.4 billion CERP program.<sup>61</sup> Judge Hoeveler also criticized the bill publicly and scheduled a hearing on the issue at which the Miccosukee Tribe alleged that passage of the bill would destroy the EFA’s goal of compliance with lower pollution standards by 2006.<sup>62</sup> Dexter Lehtinen, who brought the first Everglades suit in 1988 as U.S. Attorney General, was and is now advocating the tribe’s position in Everglades cleanup. Judge Hoeveler, however, was taken off the case in September 2003 after a concerted effort by the sugar industry to have him removed.<sup>63</sup> In spite of what many considered to be a huge setback for the Everglades, however, his removal did not have the results that the sugar industry presumably wanted. His successor, Judge Federico Moreno, ruled in favor of the Miccosukee Tribe by appointing a Special Master to resolve technical disputes, which is in accordance

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56. *U.S. v. South Florida Water Management District*, Case No. 88-1886 CIV-HOEVELER (S.D. Fla. 1988)

57. *U.S. v. South Florida Water Management District*, 847 F. Supp. 1567 (S.D. Fla. 1992).

58. Fla. Stat. 373.4592

59. Keith Rizzardi, *Alligators and Litigators: A Recent History of Everglades Regulation and Litigation*, 75 Fla. Bar J. 18 (2001).

60. Fla. Stat. 373.4592.

61. Linda Kleindienst, Neil Santoriello, and Mark Hollis, *\$4 Billion for 'Glades in Jeopardy: Shaw Sounds Alarm on State Bill*, SUN SENTINEL, April 24, 2003, at page 1A.

62. *Id.*

63. Scott McCabe and Robert P. King, *Judge Backs Tribe, Will Name Overseer on Everglades*, PALM BEACH POST, October 30, 2003, at page 2A.

with what Hoeveler himself would have done.<sup>64</sup> Also, while the EFA amendment saga was playing out, the environmentalists secured a victory in the legislature with the passage of a 10 parts per billion phosphorous standard in the Everglades,<sup>65</sup> although commentators have expressed reservations over whether the passage of the standard will actually lower phosphorous levels.<sup>66</sup>

## 2. *South Florida Water Management District v. Miccosukee Tribe of Indians*

On March of 2004, the Supreme Court reached a decision on one issue in *South Florida Water Management District v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004), but remanded on another issue.<sup>67</sup> The case arose out of the segmented environment of South Florida and carries implications for a number of policy and legal issues, such as the interpretation of the word "point source" in the Clean Water Act and the future of water management policy for the state agencies. More importantly, however, the case deals with cultural survival and livelihood of the Miccosukee people, who live in the Everglades and depend on its ecological health for their own well being. Recent commentators have framed the case as a social and environmental justice question that was unfortunately neglected by the Supreme Court.<sup>68</sup>

The Miccosukee reservation lies on the west side of a major north-south running levee which separates their land and the surrounding Everglades from the immense urban development of Southeast Florida which encompasses most of Dade, Broward, and Palm Beach Counties. On the Miccosukee side of the levee are the Water Conservation Areas, (WCA's) which are state owned lands and remnants of the original Everglades, maintained by SFWMD for the purposes of conserving fresh water from running out to the ocean and protecting wetland habitat.<sup>69</sup> On the east side of the

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64. *Id.*

65. Fla. Stat. 373.4592(4)(e)(2).

66. Robert Malinoski, *The Phosphorous Standard and Everglades Restoration: Will this Standard Lower Phosphorous in the Everglade or is the Proposed Standard a Hollow Promise?* 12 U. MIAMI BUS. L. REV. 35 (2004).

67. *South Florida Water Management District v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

68. See Casey Tappin Delaney, *Everglades, Dirty Water, and the Miccosukee Tribe: Will the Supreme Court Say Enough is Enough?* 28 AM. INDIAN L. REV. 349 (2003); Kristin Carden, *Case Comment: U.S. Supreme Court Environmental Case, October 2003 Term: South Florida Water Management District v. Miccosukee Tribe of Indians*, 28 HARV. ENVTL. L. REV. 549 (2004). Carden frames the issue in terms of environmental justice, pointing out that the case represents a fundamental problem of a majority population benefiting from disposal of waste water at the expense of a minority population. *Id.* at 555.

69. 124 S. Ct. at 1540.

levee, the SFWMD manages the Central and South Florida Project, which encompasses a series of canals and impoundments whose purpose is flood control. Ironically enough, the original goal was to divert water out to the ocean to achieve the goal of flood control.<sup>70</sup>

As part of its management of the canals of western Broward County, SFWMD operates pump station S-9, which pumps excess water out of the C-11 canal when its water reaches above a set level.<sup>71</sup> The water is pumped across the levees and into WCA-3, and the canal water is of a different chemical composition than that of WCA-3 as it collects runoff from agricultural activities and urban runoff.<sup>72</sup> Of particular concern in the case are C-11's elevated levels of phosphorous, which causes growth of algae and foreign plants to the Everglades via WCA-3, which has lower phosphorous levels.<sup>73</sup>

The tribe's allegations were (1) that the pump was a "point source" requiring a National Pollutant Discharge Elimination System (NPDES) permit under Section 402 of the Clean Water Act<sup>74</sup> and (2) that C-11 and WCA-3 were separate water bodies for the purposes of the Act.<sup>75</sup> The court accepted the tribe's first argument, and held that the S-9 pump station was a "point source."<sup>76</sup> On the second issue, however, the Court remanded for further development of the record.<sup>77</sup> The SFWMD and its *Amici Curiae* argued that the two water bodies were not distinct, presenting before the Court a theory of "unitary waters" whereby point source discharges as set out in Section 402 did not apply to discharges within the same water body.<sup>78</sup> The issue of whether C-11 and WCA-3 are indeed distinct water bodies will be decided on remand, and if answered in the affirmative, will put an extra regulatory burden on the SFWMD, as it will have to get NPDES permits for every pump station it operates in the same manner. Ultimately, when the economic and social factors are weighed, the actual and potential cultural, social, and economic injury to the historically disadvantaged Miccosukee Tribe ought to outweigh the extra regulatory burden on the Corps. In the larger picture, this issue is just as prescient in the environmental justice arena as it is in the water regulation arena.

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70. Everglades Digital Library, Online at [everglades.fiu.edu/library](http://everglades.fiu.edu/library)

71. 124 S. Ct. at 1540.

72. *Id.* at 1541.

73. *Id.*

74. 33 U.S.C. §1362

75. 124 S. Ct. 1542.

76. *Id.* at 1543

77. *Id.* at 1547.

78. *Id.* at 1543-47.

## D. CONCLUSION

The last few years in Florida have brought new eastern life to the old western adage, "Whiskey is for drinking and water is for fighting," as regions, states, and cultures clash over an increasingly scarce resource. The conflicts are broad in scope now, affecting the state's growth, environment, and economy. The sustainable future of Florida depends on the availability of a sufficient quantity and quality of water, and that availability in turn depends on how different regional interests and stakeholder groups can come together and reach decisions that benefit the state environmentally, economically, and socially. These issues are now making it necessary for governmental entities from the federal down to the local level to pay closer attention to water resources, plan for their future use, and provide for the ecological health of entire systems, from the Everglades up to the Apalachicola Bay. In time, human infrastructure and capital may be able to transform the errors of the past into hope for the future.