UF UNIVERSITY of FLORIDA

Levin College of Law
Conservation Clinic

230 Bruton-Geer Hall
PO Box 117629
Gainesville, FL 32611-7629
352-273-0835
352-392-1457 Fax

DATE: 1.29.2007

MEMORANDUM

TO: Tom Ankersen, Director, UF Law Conservation Clinic
Thomas Ruppert, Conservation Law Fellow
FROM: Kate Dozark, J.D. candidate

RE: Nature and Status of Riparian Rights in Florida

I. INTRODUCTION

Legal rights to both consumptive and nonconsumptive use of water have been around for centuries. In fact, common law water rights are thought to have arisen from early Roman civil law.[1] According to the early civil law, things such as air, running water and natural light were members of a so-called "negative community;" that is, a community of things that could not be owned any more by one person than by another.[2] Put another way, members of the negative community were understood to be either *res communes*, things common to all, or *res nullius*, things owned by no one.[3] A body of running water, for example, as *res communes*, could not be considered the property of any one person in its natural state or condition.[4] This notion of a negative community eventually made its way into early English common law, with classic legal theorists such as Blackstone[5] and Bracton[6] eventually declaring it as the established law of England. Nineteenth century English cases repeatedly recognized the idea that running water could not be reduced to personal property, thus supporting both Blackstone and Bracton's prior assertions.[7]

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[1] A. DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES §3:3 (2006); SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES §2 (3d ed., rev. and enl. 1911).

[2] WIEL, *supra* note 1, §2.

[3] TARLOCK, *supra* note 1, §3:3.

[4] WIEL, *supra* note 1, §2.

[5] *Id.* §3.

[6] *Id.*; Samuel C. Wiel, *Running Waters*, 22 Harv. L. Rev. 190, 192 (1909).

[7] WIEL, *supra* note 1, §3; Wiel, *supra* note 6, at 197-98.

While running water, as *res communes*, is insusceptible of being reduced to private ownership, private citizens do have a right to its use and flow. Another civil law concept, the so-called "law of usufruct," provides a qualified right to the use of things that are considered part of the negative community.[8] Early civil-law authorities such as Puffendorff and Blackstone recognized this qualified right, asserting that while running water or air or light themselves were not susceptible to legal regulation, individual users of those resources could be regulated so as not to harm other users.[9] As before, English courts widely recognized the law of usufruct as an established legal concept.[10]

Civil law water rights concepts did not enter American courts until the late eighteenth and early nineteenth centuries, when disputes over water became prevalent due to the recent development of mill power.[11] Up to that point, water disputes had been resolved using remedies provided by the law of property.[12] Justice Story, appointed to the United States Supreme Court by James Madison in 1811, is often credited with the introduction of civil-law riparian doctrine into the American legal system. In his 1827 opinion in the case of *Tyler v. Wilkinson*,[13] Justice Story recognized that while a mill owner had no property right in the waters of a stream, he still had a right to use the water in its natural flow. American legal theorist Chancellor James Kent later drew from Justice Story's discussion of riparian rights in *Tyler* in a portion of his highly-respected treatise.[14] In light of Kent's influence on nineteenth century courts and lawyers, the concept of riparian rights had made its way into the common law of the American judiciary by the mid-nineteenth century.[15]

This paper addresses the current state of the law regarding the nonconsumptive water rights held by landowners whose lands abut Florida waterways. The body of law supporting riparian rights to consumptive uses of water involves a slightly different and somewhat complicated scheme of governmental regulation that deserves more thorough treatment than can be given within the scope of this paper. Thus, this paper's discussion of riparian rights will be limited to those associated with enjoyment of, rather than withdrawal from, water bodies and waterways in Florida. Part II discusses riparian rights as defined by the common law, identifying exactly who holds riparian rights, as well as which waters confer riparian rights on abutting landowners. Part II continues by addressing the specific rights held by riparian landowners, as well as the various limitations on these rights. Part II concludes by discussing a few of the legal remedies riparian rights-holders may have where they believe their riparian rights have been interfered with, either by the government or by other riparian landowners. Finally, Part III

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[8] WIEL, *supra* note 1, §15.

[9] *Id.*

[10] Wiel, *supra* note 6, at 200.

[11] TARLOCK, *supra* note 1, §3:4.

[12] *Id.*

[13] 24 F.Cas. 472 (C.C. D.R.I. 1827).

[14] TARLOCK, *supra* note 1, §3:7 (citing III Kent, Commentaries 353-55 (1st ed. 1828) and commenting that the relevant sections of the treatise remained unchanged through thirteen editions).

[15] Wiel, *supra* note 6, at 201 (citing Tyler v. Wilkinson, 24 F. Cas. 472 (C.C. D.R.I. 1827), Pixley v. Clark, 32 Barb. 268 (N.Y. Super. Ct. 1860), and Eddy v. Simpson, 3 Cal. 249 (Cal. 1853) as some of the earliest American decisions incorporating civil law riparian doctrine).

discusses riparian rights in the context of statutory law, and seeks to explain the implications and effects of potential conflicts with established common law riparian rights.

II. COMMON LAW RIPARIAN RIGHTS

Over the last 150 years, the courts have established a large body of law governing the rights inuring to riparian landowners. The following discussion attempts to delineate which landowners hold legally-recognized riparian rights, as well as to which waters these rights apply. This section also gives a brief overview of the specific rights held by riparian landowners, clarifies relevant limitations on these rights, and highlights a few legal remedies available to riparian landowners whose riparian rights have been encumbered or destroyed.

A. Requirement of Ownership of Riparian Land

Common law riparian rights are held only by those property owners who own "riparian land." Riparian land is generally considered land bordering upon, bounded by, or fronting upon, a body of water, such as a lake, river, stream or ocean.[16] Land must be in actual contact with the water, not merely in proximity to the water.[17] It is the ownership of the land abutting a watercourse that determines whether riparian rights attach, not the ownership of land underlying the waters.[18] Furthermore, the status of a riparian landowner, whether an individual, corporation, or governmental entity, does not generally affect the existence of riparian rights.[19]

B. "Public" Versus "Private" Waters

As discussed above, riparian landowners situated adjacent to watercourses and water bodies hold private riparian rights; however, such private rights are limited by the public right in the use of the surface of the water. Private riparian rights are limited by the public right in different ways, often depending on the ownership of the lands submerged beneath streams, lakes, rivers, and other water bodies. Thus, the distinction between "public" and "private" waters is an important one when it comes to defining the rights of adjacent riparian landowners.

1. "Public" Waters and the Concept of Navigability

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[16] While technically land abutting a lake or the ocean is termed "littoral" land, and land abutting streams and rivers is termed "riparian" land, the two terms have been used somewhat interchangeably by the courts. *See* Theresa Bixler Proctor, *Erosion of Riparian Rights Along Florida's Coast*, 20 J. Land Use & Envtl. L. 117, 121 (2004). For purposes of this paper, the term "riparian" will be used to describe both littoral and riparian land and associated rights.

[17] Illinois Central Railroad Co. v. State of Illinois, 146 U.S. 387 (1892).

[18] TARLOCK, *supra* note 1, §3:31; FRANK E. MALONEY, SHELDON J. PLAGER, & FLETCHER N. BALDWIN, JR., WATER LAW AND ADMINISTRATION 66 (1968). While the determination as to whether riparian rights attach in the first place is based on ownership of land abutting a water body, the determination of the *extent* of those rights may indeed be based on ownership of lands underlying the water body. See discussion *infra* section (B) (discussing "public" and "private" waters as conferring varying degrees of private and public riparian rights).

[19] TARLOCK, *supra* note 1, §3:32; Bowman v. Wathen, 42 U.S. (1 How.) 189 (1843).

The public has a right to use water in place for purposes of navigation and other uses where the water is considered a "navigable" water. Historically, the judicial definition of "navigable" waters has varied, depending on whether the establishment of navigability is sought for purposes of establishing title to lands submerged beneath the waters, or for purposes of governmental regulation.[20] In this section, the establishment of navigability for title purposes will be the main focus, while the importance of the test for navigability for regulatory purposes will be discussed in Section (D)(1), regarding the federal navigational servitude.

The United States Supreme Court established the test upon which the current navigability for title test is based in *The Daniel Ball*, [21] a case concerning a dispute over whether a Michigan river was a "navigable water" such that a steamer owner was required to obtain a commercial vessel license in order to travel over it. In finding that the river was indeed navigable, the Supreme Court held that "…rivers must be regarded as public navigable rivers in law which are navigable in fact."[22] Thus the "navigable-in-fact" test emerged, instructing that waters are navigable in fact when "they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[23] Subsequent cases have interpreted this test as applicable even where there is no interstate commerce nexus.[24]

The federal "navigable-in-fact" test has since been expanded and can presently be considered as requiring proof of five factual elements.[25] First, the water body must have the capacity to be used, but not necessarily actually be used, for navigation.[26] Second, the navigation must be "for commerce."[27] Third, the water body must meet the first two factual elements in its natural state.[28] Fourth, commercial navigation must be made by "customary

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[20] *See* WATERS AND WATER RIGHTS §30.01(d)(3) (Robert E. Beck ed. 1991) for a discussion of the varying tests for navigability in the federal courts.

[21] 77 U.S. 557 (1870).

[22] *Id.* at 563.

[23] *Id.* Note that while this case actually involved the issue of navigability for regulatory purposes, the navigable-in-fact test has since been used as the standard for determining navigability for title. MALONEY ET AL., *supra* note 18, at 687.

[24] *See* WATERS AND WATER RIGHTS, *supra* note 20, §30.01(d)(3)(A) (discussing Utah v. United States, 403 U.S. 9, 10 (1870)).

[25] MALONEY ET AL., *supra* note 18, at 688-690. Establishment of these elements is highly fact-dependent and can involve considerable amounts of evidence presented at trial. *See* Lykes Brothers Inc. v. United States Army Corps of Engineers, 821 F. Supp. 1457 (M.D. Fla. 1993), in which the District Court considered "voluminous testimony [and] enough exhibits to fill every wall of the courtroom," including historical records, official government surveys, aerial photographs, personal observations of residents and past military activities, as evidence of the non-navigability of Florida's Fisheating Creek.

[26] MALONEY ET AL., *supra* note 18, at 688-690.

[27] *Id.*

[28] *Id.*

modes of trade and travel on water."[29] Finally, the previous four elements must generally be applied to the water body at the time of statehood.[30]

The federal "navigability-in-fact" test preempts state law when the question is whether title to submerged lands was transferred to the states at statehood;[31] however, state law can govern navigability of waters whose title in the state has already been established.[32] In the late 19th and early 20th century, following the decision in *The Daniel Ball*, some states established tests for navigability that differed from that established by the Supreme Court. For example, both Minnesota and North Dakota determined navigability based on use by pleasure boats,[33] and Iowa determined that title to lake beds was in the state, regardless of navigability.[34] Further, several states initially adopted the so-called "recreational utility" test, which declared a water body navigable if it is suitable for public recreation, such as kayaking or canoeing.[35] Following decisions by federal courts holding that federal law controlled the question of whether waters were navigable at statehood, however, the states largely fell in line with the federal "navigability-in-fact" test.[36]

Florida has adopted the federal test of navigability, although never explicitly. For example, in *Odum v. Deltona Corporation*,[37] the Florida Supreme Court declared that "Florida's test for navigability is similar, if not identical, to the federal title test."[38] At least one scholar has highlighted some subtle differences between Florida's test and the federal test. Frank E. Maloney, in *Florida Water Law*, asserts that some Florida case law seems to suggest a willingness to stray from the limitation on commercial use of a water body. For example, in *Clement v. Watson*[39] and *Baker v. State*,[40] Maloney asserts, the Florida Supreme Court implicitly strayed from the strict commercial use element of the navigability inquiry and expanded the definition of navigability to include use for other "useful purposes."[41] Similarly, in *Lopez v.*

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[29] *Id.*

[30] However, the Court has been willing in the past to accept evidence of navigability at times other than at statehood to show a susceptibility of navigation at statehood. *Id.* at 689; *see also* Utah v. United States, 403 U.S. 9 (1971); United States v. Utah, 283 U.S. 64 (1931).

[31] TARLOCK, *supra* note 1, §8:12 (citing United States v. Oregon, 295 U.S. 1 (1935), United States v. Utah, 283 U.S. 64 (1931), and United States v. Holt State Bank, 270 U.S. 49 (1926) as the three cases establishing that the test for navigability for title purposes is a federal test).

[32] *Id.* §8:13.

[33] MALONEY ET AL., *supra* note 18, at 690.

[34] MALONEY ET AL., *supra* note 18, at 690.

[35] WATERS AND WATER RIGHTS, *supra* note 20, §6.02(f).

[36] MALONEY ET AL., *supra* note 18, at 692.

[37] 341 So. 2d 977 (Fla. 1977).

[38] *Id.* at 988.

[39] 58 So. 25 (Fla. 1912).

[40] 87 So. 2d 497 (Fla. 1956).

[41] MALONEY ET AL., *supra* note 18, at 698.

Smith,[42] evidence of pleasure boating was considered sufficient for establishing the navigability of a Florida river.[43]

2. Boundary Determinations for Lands Abutting "Public Waters"

Once it has been determined that a particular tract of land abutting "public" waters confers private riparian rights upon the owner, the extent of private ownership of land extending to, and often into, a "public" watercourse must also be determined. This determination is made differently according to whether the riparian land abuts a river or stream (creating a freshwater boundary) or a sea or ocean (creating a tidal boundary).

The federal rule for determining freshwater boundaries is that private ownership extends toward the water out to the "ordinary high water line" (OHWL).[44] According to the United States Supreme Court, in the case of *Howard v. Ingersoll*,[45] the OHWL is to be determined by "ascertaining where the presence and action of water are so common and usual…as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself."[46] The federal test has been adopted by all states for use in determining the OHWL of rivers, streams and lakes.[47]

Florida's version of the OHWL, as elucidated in *Tilden v. Smith*,[48] is virtually identical to the federal test. In *Tilden*, the Florida Supreme Court quoted with approval the precise language of the test set forth by the United States Supreme Court in *Howard v. Ingersoll*.[49] Thus, in Florida, the OHWL is determined by looking at the physical characteristics, such as vegetation and soil, associated with the boundary in question.[50] The *Tilden* court further elaborated on the meaning of the word "ordinary," by stating that "[i]t is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes…[it] is not the highest point to which the stream rises…."[51] One commentator has noted that the test requires a look at both the high water mark (the "look-for-a-mark" test) and the vegetation line (the "vegetation line" test).[52] As evidence of this "bifurcated" test, Florida

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[42] 145 So. 2d 509 (Fla. Dist. Ct. App. 1962).

[43] MALONEY ET AL., *supra* note 18, at 700.

[44] Howard v. Ingersoll, 54 U.S. (13 How.) 381 (1851).

[45] 54 U.S. (13 How.) 381 (1851).

[46] *Id.* at 427.

[47] TARLOCK, *supra* note 1, §3:36.

[48] 113 So. 708 (Fla. 1927).

[49] Interestingly, the court cited the Minnesota case of *Carpenter v. Hennepin County*, 58 N.W. 295 (Minn. 1894), which pulled the language for the test directly from *Howard v. Ingersoll*. MALONEY, *supra* note 18, at 711.

[50] For an in-depth discussion of OHWL determination methods in Florida, see Richard Hamann & Jeff Wade, *Ordinary High Water Line Determination: Legal Issues*, 42 Fla. L. Rev. 323 (1990).

[51] Tilden v. Smith, 113 So. 708, 712 (Fla. 1927).

[52] *See* Alan B. Fields, *Ownership and Use of Waterfront and Submerged Property*, *in* RPCT FL-CLE, FLORIDA REAL PROPERTY COMPLEX TRANSACTIONS §§8.19-8.31 (The Florida Bar ed. 2006)(discussing and critiquing the "bifurcated" *Tilden* test).

courts have declared that steep-banked shorelines are to be delineated using only the vegetation line; however, for flat-banked shorelines, the OHWL is to be delineated using the ordinary high water mark.[53]

Determining the OHWL of a freshwater stream or river must be done in accordance with the above-stated rules; however, determining the OHWL of a lake is complicated by the fact that lake levels tend more to fluctuate over time. As a consequence, courts have rejected rules routinely used to delineate freshwater and tidal boundaries in favor of case-by-case evaluations of historic lake levels,[54] meander lines,[55] and prescriptive rights.[56]

The federal rule for determination of tidal boundaries, as opposed to freshwater boundaries, has its roots in the English common law. England's Lord Hale, in the 17th century, posited that all land beneath tidal waters up the high water mark was owned by the King.[57] Lord Hale's theory was soon after adopted by English courts and the rule that tidal boundaries were to be set according to the ordinary high water mark was a firmly established part of English law by the end of the 17th century.[58]

The leading American federal case considering the English rule is *Borax Consolidated Ltd. v. City of Los Angeles*,[59] which concerned a dispute over ownership of upland property located adjacent to San Pedro Harbor. The United States Supreme Court, in upholding the English rule, adopted a mean high tide line standard, as was already in use by the United States Coast and Geodetic Survey.[60] According to the Court, the mean high tide line was to be determined by calculating the average height of all high waters in a particular place over a time period of 18.6 years.[61] It is important to note that while the Supreme Court used the *mean* high tide line methodology to calculate a tidal boundary, the Court considered the term to be equivalent to the common law concept of *ordinary* high tide.[62]

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[53] *Id.*§8.31; *see also* MacNamara v. Kissimmee River Valley Sportsman's Association, 648 So. 2d 155 (Fla. Dist. Ct. App. 1994).

[54] Idaho fixed the level of Lake Couer d'Alene at the water level of the lake at the time of statehood. Erickson v. State, 970 P.2d 1 (1998).

[55] The United States Supreme Court accepted a Special Master's Report recommending the Great Salt Lake's water level be set according to a meander line calculated by averaging water elevations for a ten-year period before statehood. Utah v. United States, 420 U.S. 304 (1975).

[56] A California court held that the level of Lake Tahoe was to be determined based on the five consecutive years of highest water since 1944, when the existing method of Lake level regulation was implemented. Thus, the public received a prescriptive right to 6228.75 feet, an artificially-created lake level. State of California v. Superior Court, 625 P.2d 256 (Cal. 1981).

[57] MALONEY ET AL., *supra* note 18, at 718-19; TARLOCK, *supra* note 1, §3:35.

[58] MALONEY ET AL., *supra* note 18, at 719; TARLOCK, *supra* note 1, §3:35 (further noting that the precise definition of the highwater mark was "left vague.").

[59] 296 U.S. 10 (1935).

[60] *Id.* at 26-27.

[61] *Id.* at 27.

[62] *See* MALONEY ET AL., *supra* note 18, at 722.

Not all states have followed the federal standard; in fact, some states have been more generous to private landowners and have set the tidal boundary at the low water mark.[63] In Florida, the supreme court initially rejected the federal mean high tide line test in favor of a test based on "…the limit reached by the daily ebb and flow of the tide, the usual tide, or the neap tide that happens between the full and change of the moon."[64] In 1974, however, the State passed legislation essentially codifying the mean high tide line rule, as set forth in *Borax*.[65] Thus, as commentators suggest,[66] the current state of the law in Florida appears to favor the federal mean high tide line test, defining tidal boundaries using the mean or ordinary high water mark, both legislatively[67] and judicially.[68]

3. Nature of "Private" Waters

In general, any waters that are not considered "public" waters may be considered "private" waters. This may include non-navigable waters and waters overlying submerged lands that have been conveyed, either by a state or federal entity, into private ownership.[69] American courts generally follow the common law rule that the land beneath a body of water not owned by the state is owned by the adjacent riparian landowners.[70]

Private ownership of submerged lands does not always negate the public right in the overlying waters, however. The states, armed with the ability to define the extent of the public rights within their borders,[71] have taken varying approaches to allowing the public right to exist in waters overlying privately-owned submerged lands. For example, Alabama and Colorado courts do not recognize a public right in any waters overlying privately-owned beds.[72] On the other hand, Minnesota courts recognize a myriad of public rights, such as sailing, rowing and

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[63] Currently, Massachusetts, Maine, Delaware, Pennsylvania and Virginia establish tidal boundaries according to the low water mark. *See* Pazolt v. Director of the Division of Marine Fisheries, 631 N.E. 2d 547 (Mass. 1994); Bell v. Town of Wells, 510 A.2d 509 (Me. 1986); State *ex rel*. Buckson v. Pennsylvania R.R., 228 A.2d 587 (Del. Super. Ct. 1967); Commonwealth *ex rel*. Hansel v. Y.M.C.A., 32 A. 121(Pa. 1895); Whealton & Wisher v. Doughty, 82 S.E. 94 (Va. 1914).

[64] Miller v. Bay-to-Gulf, Inc., 193 So. 425, 428 (Fla. 1940).

[65] *See* Fla. Stat. §177.27(14)(2006).

[66] Fields, *supra* note 52, §8.69; MALONEY ET AL., *supra* note 18, at 724-25.

[67] *See* FLA. CONST. art. X, §11; Fla. Stat. §177.27(15)(2006).

[68] MALONEY ET AL., *supra* note 18, at 725 (citing Trustees of the Internal Improvement Trust Fund v. Wetstone, 222 So. 2d 10 (Fla. 1969), City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974), St. Jude Harbors Inc. v. Keegan, 295 So. 2d 141 (Fla. Dist. Ct. App. 1974), and Trustees of the Internal Improvement Trust Fund v. Wakulla Silver Springs Co., 362 So. 2d 706 (Fla. Dist. Ct. App. 1978) as cases upholding the federal standard.).

[69] *But see infra* section (D)(3), regarding the persistence of the public right even after conveyance of state-owned submerged lands into private ownership.

[70] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(a)(3).

[71] See *infra* section II(D)(3), regarding public trust doctrine.

[72] WATERS AND WATER RIGHTS, *supra* note 20, §31.02(a)(citing Birmingham v. Lake, 10 So. 2d 24 (Ala. 1942) and People v. Emmert, 597 P.2d 1025 (Colo. 1979))

fishing, in waters overlying privately-owned submerged lands.[73] Still other jurisdictions take a middle ground, allowing public rights in "private" waters but limiting them to, for example, use for navigation.[74]

4. Boundary Determinations for Land Abutting "Private" Waters

Regardless of the variable public right to use "private" waters, boundary disputes still arise among private riparian landowners. When delineating riparian boundaries underneath non-navigable or privately-owned waters, American courts are generally most concerned with providing each riparian landowner reasonable access to the deepest part of the stream or lake, not necessarily with dividing submerged lands equally or proportionately.[75] Drawing lines of ownership on submerged lands presents courts with special problems, however, especially where the intent of a prior land grant is unclear.[76] As a general rule, courts have held that boundaries underneath non-navigable, privately-owned waters extend from the shore out to the "thread" of the stream.[77] The "thread" of the stream is typically considered the main navigational channel, where the water is deepest.[78] While this test, in many cases, works well for navigable waters, it does not work as well for non-navigable waters, especially for meandering streams and for irregularly shaped lakes. In Florida, and a few other states, courts have remedied this problem by holding that riparian rights over non-navigable, privately-owned waters extend to the geographic middle of the bed[79] unless the prior grantor expressly limited the boundaries to the banks of the water body.[80]

The tests described above work well for delineating boundaries of riparian landowners situated across a water body from each other, but different problems arise when landowners are situated adjacent to each other. Some courts simply continue the boundaries drawn on land out toward the thread of a stream or middle of a lake.[81] Other courts take a more technical approach and set the boundary out from the water's edge along lines perpendicular to the thread of the stream or center of the lake.[82]

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[73] *Id.* (citing Lamprey v. Metcalf, 53 N.W. 1139 (Minn. 1893)).

[74] *Id.* (citing Schulte v. Warren, 75 N.W. 783 (Ill. 1905) and other decisions from Michigan, Connecticut, Ohio, Maine, Tennessee, Massachusetts and Virginia).

[75] *Id.*

[76] *See* David Gibson, Allocation of Riparian Rights, http://www.floridadep.org/lands/surv_map/ripright.htm (last visited January 3, 2007) for a good overview of the techniques used in Florida.

[77] *Id.*

[78] *Id.*; United States v. Louisiana, 470 U.S. 93, 108 (1985).

[79] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(a)(3); Board of Trustees v. Walker Ranch Gen. Partnership, 496 So. 2d 153 (Fla. Dist. Ct. App. 1986).

[80] South Venice Corp. v. Casperson, 229 So. 2d 652 (Fla. Dist. Ct. App. 1969).

[81] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(a)(3).

[82] *Id.*

A critical limitation on the private ownership of lands beneath non-navigable waters, especially in Florida, is the fact that certain submerged and overflowed lands are owned by the state as a result of federal grant through a series of swamp and overflowed lands legislation.[83] Florida gained more than 20 million acres of swamp and overflowed lands from the federal government pursuant to the Swamp Lands Act of 1850.[84] The Trustees of the Internal Improvement Trust Fund were given title to the conveyed lands[85] and disposition or sale of the conveyed lands must be according to the purposes and objectives of the Swamp Lands Act.[86]

5. Special Case: Artificially-Created Waters

As a general rule, riparian rights do not attach to artificially created water bodies;[87] however, there is notable disagreement among state courts as to the application of this general rule.[88] Often this disagreement rests on whether or not the court finds that the complaining landowners have gained prescriptive rights to the artificial conditions. For example, a Minnesota court enjoined the removal of a dam where landowners on the shore of the artificially-created lake had built cabins and maintained them for the prescriptive period.[89] Thus, the dam owner was required to maintain the lake, and therefore respect the adjoining owners' riparian rights, by keeping the dam in place.[90] On the other hand, the Michigan Supreme Court, in *Goodrich v. McMillan*,[91] did not require a mill owner to rebuild a failed dam after cottages built adjacent to a lake artificially-created by the dam were flooded. The court noted that the cottage-owner had not acquired prescriptive rights to the artificial lake levels created by the dam because the mill owner, not they, had used the artificial conditions adversely.[92] Some states, such as Indiana, Michigan and Minnesota have now passed legislation to codify riparian rights in artificially-created lakes.[93] These so-called "lake level maintenance" statutes are highly variable in what types of water bodies are protected, as well as in who may institute an action pursuant to the statute.[94]

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[83] *Id.*

[84] 43 U.S.C. §§981-994 (2000); MALONEY ET AL., *supra* note 18, at 683.

[85] Fla. Stat. §253.01 (2006).

[86] Trustees of the Internal Improvement Trust Fund v. St. Johns Railway Co., 16 Fla. 531 (Fla. 1878).

[87] WATERS AND WATER RIGHTS, *supra* note 20, §6.02(e); Thompson v. Enz, 154 N.W.2d 473 (1967); United States v. 1,629.6 Acres of Land, More or Less, 503 F.2d 764 (3d Cir. 1974).

[88] TARLOCK, *supra* note 1, §3:25

[89] *Id.* §3:27; Kray v. Muggli, 86 N.W. 882 (Minn. 1901).

[90] *Kray*, 86 N.W. 882 (Minn. 1901).

[91] 187 N.W. 368 (Mich. 1922).

[92] *Id.* at 369. The court also specifically denounced the Minnesota Supreme Court's decision in *Kray*. *Id.* at 368.

[93] *See* Ind. Code § 14-26-4-1 (2006); Mich. Comp. Laws §324.30701 *et seq.* (2006); Minn. Stat. Ann. §103G.401 (2006).

[94] TARLOCK, *supra* note 1, §3:28.

While there is notably little case law in the area of artificially-created watercourses and bodies in Florida, the gist of the existing case law is that riparian rights in artificial water bodies probably will not be recognized. [95] Florida's Second District Court of Appeals was the first court in the state to squarely address the issue of riparian rights associated with artificial waterways. *Publix Supermarkets, Inc. v. Pearson*[96] involved several phosphate pits owned by Publix which had, over approximately15 years, become artificial lakes on which residences were built. When Publix ultimately sought to fill the pits, abutting homeowners asserted rights in keeping the lakes as they were.[97] The Second DCA, noting that there was "little or no case law in Florida or other jurisdictions" on the topic,[98] held that riparian rights did not attach to artificial water bodies as they did to naturally-occurring water bodies.[99] Without specifically articulating the relevant difference between natural and artificial water bodies, the court held that since the phosphate pits were owned solely by Publix, and the homeowners had not yet acquired prescriptive rights to the pits, Publix was free to fill them as it saw fit.[100]

The Florida Supreme Court was asked to determine the respective rights of two landowners in the waters overlying an artificially-created lake a few years later in *Anderson v. Bell*. In finding that one of the landowners did not hold rights to the surface of the lake beyond the waters overlying submerged lands owned by him, the court held that "the owner of property that lies adjacent to or beneath a *man-made*, *non-navigable* water body is not entitled to beneficial use of the surface waters of the entire water body by sole virtue of the fact that he/she owns contiguous lands."[101] The court noted that this was an established rule of the common law,[102] and cited investment-backed expectations as a reason for limiting private riparian rights in artificially-created water bodies.[103] Further, the court noted that adjacent landowners were in a position to bargain for riparian rights in man-made water bodies through operation of covenants and easements.[104]

Subsequent to the Florida Supreme Court's decision in *Anderson*, Florida's Third District Court of Appeals considered whether a landowner situated adjacent to an artificially-created navigable channel providing access to Palmer Lake was entitled to the unimpaired use of the channel.[105] The court found that neither the access channel nor Palmer Lake was navigable at the time of statehood, and, thus, the channel was not required to be open to the public.[106]

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[95] Anderson v. Bell, 433 So. 2d 1202 (Fla. 1983)

[96] 315 So. 2d 98 (Fla. Dist. Ct. App. 1975).

[97] *Id.* at 99.

[98] *Id.*

[99] *Id.* at 101.

[100] *Id.*

[101] *Bell*, 433 So. 2d at 1204.

[102] *Id.*

[103] *Id.* at 1205.

[104] *Id.* at 1206.

[105] Picciolo v. Jones, 534 So. 2d 875 (Fla. Dist. Ct. App. 1988).

[106] *Id.* at 877.

Relying substantially on the rule announced in *Anderson*, the court held that because the access channel was privately-owned, the owner was not required to allow access by the landowners abutting the channel.[107]

C. Specific Riparian Rights and the Nature of These Rights

In a general sense, riparian rights are considered real property rights;[108] however, it is commonly acknowledged that, due to the ambulatory nature of water, property rights in water are readily distinguishable from property rights in land or other natural resources.[109] Often, this distinction results in reference to nonconsumptive riparian rights as "qualified" rights. Thus, property rights in water are not exactly rights to *own* water, but are instead more likely rights to *use* water, so-called "usufructuary" rights.[110]

In Florida, the common law establishes that riparian rights are legally-protected property rights.[111] For example, in *Broward v. Mabry*,[112] the court held that the special rights of riparian landowners were "…property rights that…may not be taken with just compensation and due process or law."[113] Curiously, pursuant to state statute, riparian rights are decidedly "not of a proprietary nature" and "are not owned" by a riparian landowner.[114] At least one commentator has noted this marked inconsistency between Florida common law and statutory law, suggesting that the statute itself may constitute a taking of constitutionally-protected riparian rights,[115] though noting that the Florida courts have not yet addressed the issue.[116]

1. Right of Access

In most jurisdictions, riparian landowners hold an incidental right to access the navigable channel of navigable waters on which their property borders.[117] The right of access entails the

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[107] *Id.* at 878.

[108] TARLOCK, *supra* note 1, §3:9.

[109] *Id.* at §3:10.

[110] *Id.*; WATERS AND WATER RIGHTS, *supra* note 20, §4.01; MALONEY, PLAGER & BALDWIN, *supra* note 18, at 31-32.

[111] MALONEY, PLAGER & BALDWIN, *supra* note 18, at 31; Pounds v. Darling, 77 So. 666 (Fla. 1918); Thiesen v. Gulf, F. & A. Ry. Co., 78 So. 491 (Fla. 1917); Brickell v. Trammel, 82 So. 221 (Fla. 1919); Broward v. Mabry, 50 So. 826 (Fla. 1909).

[112] 50 So. 826 (Fla. 1909).

[113] *Id.* at 830.

[114] Fla. Stat. §253.141(1) (2006).

[115] Discussed in greater detail *infra* at section E (1).

[116] Proctor, *supra* note 16, at 134. Proctor also notes that the courts have yet to decide the true implication of this statutory provision.

[117] United States v. River Rouge Improvement Company, 269 U.S. 411 (1926); Freed v. Miami Beach Pier Corporation, 112 So. 841 (Fla. 1927).

right of ingress to, and egress from, riparian land.[118] The right of access is a private right held only by riparian landowners,[119] and is considered to be a concrete property right which cannot be taken without just compensation.[120]

The leading case in Florida is *Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers Association*,[121] in which White's River was using Ferry Pass' shoreline to conduct business, and, in the process, obstructing Ferry Pass' ability to access the water.[122] The court held that while Ferry Pass did not have the right to completely exclude White's River from the shoreline, Ferry Pass could obtain partial relief on the basis that its access to the water was completely obstructed.[123] In so holding, the court recognized and approved riparian landowners' common law right of access to the water from their land for navigation and other lawful purposes.[124] The extent to which access can be limited by activities taking place on adjacent water subject to riparian rights remains unclear, however.

2. Right to Wharf Out

The right to wharf out includes the right to construct and maintain a wharf, such as a pier, dock, or landing in order to effectively facilitate exercise of the riparian right of access.[125] At common law, wharves must be reasonably located, and can extend only so far as to reach the nearest point of navigable water.[126] Further, wharves must not unreasonably obstruct the public's ability to navigate.[127] These restrictions on the right to wharf out are generally effectuated by laws requiring anyone desiring to wharf out to obtain a permit from either a federal, state or local entity, depending on the particular water body's jurisdictional status.[128] Thus, the right to wharf out is not an absolute right, but rather is subject to public interests in navigation.

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[118] WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(1).

[119] Ferry Pass Inspectors' & Shippers' Association v. White's River Inspectors' & Shippers' Association, 48 So. 643 (Fla. 1909).

[120] United States v. River Rouge Improvement Company, 269 U.S. 411 (1926).

[121] 48 So. 642 (Fla. 1909).

[122] *Id.* at 644.

[123] *Id.* at 646.

[124] *Id.* at 644-45.

[125] WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(2); *Ex parte* Easton, 95 U.S. 68 (1877); Atlee v. Paket Co., 88 U.S. 389 (1874); Dutton v. Strong, 66 U.S. 23 (1861).

[126] TARLOCK, *supra* note 1, §3:74; State of New Jersey v. State of Deleware, 291 U.S. 361 (1934); U.S. v. River Rouge Improvement Co., 269 U.S. 411 (1926); People of State of Illinois *ex rel* Hunt v. Illinois Cent. R. Co., 184 U.S. 77 (1902).

[127] WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(2); Shively v. Bowlby, 152 U.S. 1 (1894).

[128] For example, 33 U.S.C. §§403, 591, and 1344 (2000), require all wharves built in federal navigable waters be permitted by the United States Army Corps of Engineers, pursuant to the Rivers and Harbors Act and the Clean Water Act. WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(2).

In Florida, the right to wharf out into navigable waters is subject to extensive public control, such that it has become a true "qualified right."[129] While riparians owning land adjacent to navigable waters have the right to construct wharves in order to facilitate access to navigable waters, this right is subject to State approval.[130] Thus, the State of Florida's power to grant "reasonable and limited rights" to riparian landowners to construct wharves has been recognized.[131] The reasonableness of the right to wharf out depends heavily on the extent to which the circumstances demand wharfing out.[132] Thus, riparian landowners situated adjacent to navigable waters have a right to wharf out that is qualified by the superior rights of the public to navigate. Riparians wishing to wharf out into non-navigable waters may generally do so without permission from the State, but wharves must not interfere with the riparian rights of adjacent riparian landowners.[133]

3. Right to Unobstructed View

The right to an unobstructed view has not yet been discussed by the federal courts; however some states, including Florida, consider an unobstructed view a legally protected riparian right.[134] While the Florida courts have never squarely addressed the issue of whether the right to an unobstructed view has been abrogated, the courts have repeatedly recognized in dicta the fact that the right does exist at common law.[135] In fact, one court noted that construction of a levee on Lake Okeechobee by a governmental entity that obstructed the view of the Lake by adjacent riparian landowners constituted a taking of property rights for which just compensation was due.[136]

4. Right to Use of Surface

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[129] Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973).

[130] Freed v. Miami Beach Pier Corporation, 112 So. 841, 844-45 (Fla. 1927); Williams v. Guthrie, 137 So. 682 (Fla. 1931).

[131] State v. Gerbing, 47 So. 353 (Fla. 1908).

[132] Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 634 (Fla. Dist. Ct. App. 1997); Sarasota County Anglers Club, Inc. v. Burns, 193 So. 2d 691 (Fla. Dist. Ct. App. 1967).

[133] Clement v. Watson, 58 So. 25 (Fla. 1912); Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).

[134] Mississippi (Treuting v. Bridge & Park Comm'n, 199 So. 2d 627 (Miss. 1967)); California (City of Los Angeles v. Aitken, 52 P.2d 585 (Cal. 1935)); Michigan (Winiecke v. Sheurer, 141 N.W. 2d 717 (Mich. 1966)); Washington (*In re* Deadman Creek, 694 P.2d 1071 (Wash. 1975)).

[135] Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957); Thiesen v. Gulf, Fla. & Ala. Ry. Co., 78 So. 491 (Fla. 1919); Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209 (Fla. Dist. Ct. App. 1973); Freed v. Miami Beach Pier Corp., 112 So. 841 (Fla. 1927).

[136] Padgett v. Central and Southern Florida Flood Control District, 178 So. 2d 900 (Fla. Dist. Ct. App. 1965).

Riparian landowners have the right to use the surface of navigable waters for boating, fishing and swimming.[137] With regard to navigable waters and underlying publicly-owned submerged lands, this right is generally not an exclusively private right, but, instead, is a right held in common with the public.[138] In a few instances, however, courts have allowed riparian landowners to assert special rights to surface water use, regardless of the public right. For example, Maryland and Virginia courts have granted priority rights to riparians to set up duck blinds on state-owned submerged lands.[139] Likewise, in many states, riparians have been granted rights to extract sand and gravel from publicly-owned streambeds.[140]

The riparian right to surface use of water overlying privately-owned beds is necessarily governed by separate rules, since the public right will often not apply. There are two different rules governing these situations, each of which has been adopted by various jurisdictions. The common law rule limits each riparian's surface use to that overlying the owned portion of the bed of a lake or stream.[141] The civil law rule, on the other hand, dictates that the surface of a privately-owned water body is to be used in common with all adjacent landowners.[142] In Florida, courts generally follow the civil law rule;[143] however, Florida courts have been reluctant to extend the rule to artificially-created water bodies such as lakes formed from old mining pits[144] or from dam installation.[145]

5. Right to Accretion and Reliction (But Not to Avulsion)

As water bodies shift and change over time, so do the boundaries that border on them. These boundary changes can result in a legally protected right of riparian landowners to claim title to additional riparian land, as a result of natural processes termed "accretion" and "reliction." Accretion occurs when, "gradually and imperceptibly," silt, sand or sediment is deposited along a shoreline so as to reveal dry land where land was once covered by water.[146] The process of reliction, while yielding the same result, instead involves the gradual uncovering of submerged land by a slow recession of water.[147] The opposite of both accretion and reliction

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[137] WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(3); TARLOCK, *supra* note 1, §3:81.

[138] WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(3); *see also infra* section (D)(3), pertaining to the public trust doctrine.

[139] WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(3); Department of Natural Resources v. Adams, 377 A.2d 500 (Md. 1977); Avery v. Beale, 80 S.E. 2d 584 (Va. 1954).

[140] WATERS AND WATER RIGHTS, *supra* note 20, §6.01(a)(3) n. 182.

[141] Many eastern states follow this common law rule. TARLOCK, *supra* note 1, §3:82.

[142] The civil rule has been adopted in Midwestern and Eastern states in which recreation is a large contributer to the economy. *Id.*

[143] Duval v. Thomas, 114 So. 2d 791 (Fla. 1959).

[144] Publix Supermarkets, Inc. v. Peterson, 315 So. 2d 98 (Fla. Dist. Ct. App. 1975).

[145] Anderson v. Bell, 433 So. 2d 1202 (Fla. 1983).

[146] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(b)(2) (citing St. Clair County v. Lovingston, 90 U.S. 46, 68-69 (1874) and Nebraska v. Iowa, 143 U.S. 359 (1892)).

[147] *Id.* (citing Jefferis v. East Omaha Land Co., 134 U.S. 178 (1890)).

is erosion, which is the gradual wearing away of land by water.[148] Just as riparian landowners can gain title to accreted or relicted land, they can lose title to land worn away by erosion.[149]

The key to claiming title to riparian land gained by accretion and reliction lies in the perceived gradualness of the exposure of new dry land. The Supreme Court, in *St. Clair County v. Lovingston*,[150] held that dry land is exposed "gradually and imperceptibly," such that a riparian may claim title to accreted land, where, "though the witnesses may see from time to time that progress has been made, they [can] not perceive it while the process [is] going on."[151] Riparians may not, however, claim title to land where there is a "sudden and perceptible" change in a particular shoreline, a process termed "avulsion."[152] Avulsion can be seen where a river suddenly changes course[153] or where a hurricane impacts coastal tidelands.[154]

The common law rules of accretion and reliction generally apply equally whether accreted or relicted land is a result of natural processes or is caused by actions of a third party, such as shoreline preservation projects[155] or other public improvements. Deliberate inducement of accretions or relictions, as opposed to those occurring incidental to projects undertaken for other reasons, however, has been frowned upon by both federal and state courts.[156] Furthermore, California courts routinely reject riparian title claims to artificially accreted or relicted lands if state-owned lands would transfer to private landowners.[157]

Several policies have been set forth over the years in support of the common law rules of accretion and reliction. The primary rationale has been to assure that riparian landowners are able to retain riparian rights over time.[158] This rationale, in turn, supports the notion that riparian landowners deserve to have expectations of riparian rights protected.[159] Another policy advanced by courts is the efficiency theory, which holds that accreted land should be placed in

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[148] *Id.* (citing Arkansas v. Tennessee, 246 U.S. 158 (1918)).

[149] *Id.*

[150] 90 U.S. (23 Wall.) 46 (1874).

[151] *Id.* at 68.

[152] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(b)(2) (citing Philadelphia Co. v. Stimson, 223 U.S. 605, 614 (1971)).

[153] Nebraska v. Iowa, 143 U.S. 359 (1892).

[154] Windsor Resort Inc. v. Mayor and City Council of Ocean City, 526 A.2d 102 (Md. App. 1987); Grant v. South Carolina Coastal Council, 461 S.E.2d 388 (S.C. 1995).

[155] California v. United States, 457 U.S. 273 (1982); United States v. Keenan, 753 F.2d 681 (5th Cir. 1985); Kissenger v. Adams, 466 So. 2d 1250 (Fla. Dist. Ct. App. 1985).

[156] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(b)(2) (citing New Jersey v. New York, 523 U.S. 767 (1998); California v. United States, 457 U.S. 273 (1982), Alexander Hamilton Life Ins. Co. v. Virgin Islands, 757 F.2d 534 (3d Cir. 1985), Board of Trustees v. Sand Key Assoc., 512 So. 2d 934 (Fla. 1987), Brundage v. Knox, 117 N.E. 117 (Ill. 1917), and Reid v. State, 373 So. 2d 1071 (Ala. 1979) for this proposition).

[157] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(b)(2) (citing Carpenter v. City of Santa Monica, 147 P.2d 964 (Cal. 1944)).

[158] WATERS AND WATER RIGHTS, *supra* note 20, §6.03(b)(2).

[159] *Id.*

the hands of the person who has the easiest access.[160] Furthermore, the compensation theory holds that a landowner who runs the risk of erosion deserves to claim the benefits of accretion.[161] Other policies set forth by courts include *de minimus noncurat lex*, an ancient maxim declaring that the law should not be concerned with mere trifles, and the law of accession, where an owner of a thing automatically owns the "offspring" of that thing.[162]

The rules of accretion and reliction exist in both federal and state common law; however, because federal and state common law in this area have been known to differ, it is important to know which law applies. In general, accretions and relictions of riparian land are governed by the law of the state in which they occurred.[163] This is due primarily to the transfer of federal ownership of submerged lands to the states, upon admission to the Union, under the equal footing doctrine.[164] State law may be displaced by federal law, however, where federal rights of navigation and commerce are impaired.[165] Federal law applies to changes in water bodies on land owned by the federal government. Thus, federal law will determine rights to accretion and reliction of tidal lands owned by the federal government. Federal law also applies to disputes between states over water bodies that form state boundaries.

Florida routinely recognizes the common law rules of accretion and reliction, as applied to riparian landowners on lakes, streams and the ocean.[166] The Florida tests for gradualness to distinguish between accretion and avulsion are identical to the federal tests,[167] and land is presumed to have been accreted, rather than as a result of avulsion.[168] Furthermore, accreted lands are equitably apportioned among affected riparian owners.[169]

Florida recognizes the generally-accepted rule that the law will recognize both artificial and natural accretions and relictions.[170] For example, in *Board of Trustees v. Sand Key Associates, Ltd.*,[171] the Florida Supreme Court considered whether accretions caused by public improvement projects could be claimed by affected riparian landowners. In holding that the riparian landowners could indeed claim such "artificial" accretions, the court noted that the common law made no distinction between artificial and natural accretions so long as the

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[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] City of St. Louis v. Rutz, 138 U.S. 226 (1891).

[164] *See infra* section II(D)(3).

[165] *See infra* section II(D)(1).

[166] State v. Florida National Properties, Inc., 338 So. 2d 13 (Fla. 1976).

[167] Board of Trustees v. Sand Key Associates, Ltd., 512 So. 2d 934 (Fla. 1987); Ford v. Turner, 142 So. 2d 335 (Fla. Dist. Ct. App. 1962).

[168] Schulz v. City of Dania, 156 So. 2d 520 (Fla. Dist. Ct. App. 1963).

[169] Lake Conway Shores Homeowners Ass'n, Inc. v. Driscoll, 476 So. 2d 1306 (Fla. Dist. Ct. App. 1985).

[170] Board of Trustees v. Sand Key Associates, Ltd., 512 So. 2d 934 (Fla. 1987).

[171] 512 So. 2d 934 (Fla. 1987).

landowner did not participate in the improvements which created the accretions in the first place.[172]

D. Limitations on the Exercise of Riparian Rights

1. Federal Control

The federal government has traditionally asserted jurisdiction over the nation's waters through constitutional powers such as the Property Clause,[173] General Welfare Clause,[174] the War Power,[175] Treaty Power,[176] Admiralty Power[177] and, most notably for our purposes, the Commerce Clause.[178] The Commerce Clause was first associated with federal jurisdiction over waterways in the case of *Gibbons v. Ogden*,[179] in which the Supreme Court declared that the Commerce Clause "comprehends navigation, within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with 'commerce with foreign nations, or among the several states, or with the Indian tribes.'"[180] In cases following *Gibbons*, the Supreme Court initially focused on navigability as a prerequisite for proper assertion of regulatory power under the Commerce Clause. This focus was slowly eroded, however, as the Supreme Court began to recognize that the full scope of the Commerce Clause could be used to assert regulatory

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[172] *Id.* at 938.

[173] U.S. CONST. art. IV, §3, cl. 2 ("Congress shall have Power to dispose of and make all needful rules and Regulations respecting the Territory or other Property belonging to the United States…."). *See also* Ashwander v. Tennessee, 297 U.S. 288 (1936); United States v. San Francisco, 310 U.S. 16 (1940). As well, many cases arising under the Property Clause have focused on issues of the federal government's reserved water rights. Arizona v. California, 373 U.S. 546 (1963); Alaska v. Babbitt, 72 F.3d 698 (9th Cir. 1995); United States v. New Mexico, 438 U.S. 696 (1978).

[174] U.S. CONST. art. I, §8, cl. 1 (Congress may tax "to pay the Debts and provide for the common Defence and general Welfare of the United States); *see also* United States v. Gerlach Livestock Co., 339 U.S. 725 (1950); Arizona v. California, 373 U.S. 546, 587 (1963).

[175] U.S. CONST. art. I, §8, cls. 1, 11 (Congress has the power to "provide for the common Defence" and to "declare War"); *see also* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 326 (1936).

[176] U.S. CONST. art. VI, cl. 2 (Treaties are the "supreme law of the land."); *see also* Sanitary District v. United States, 266 U.S. 405 (1925); Hudspeth Cty. Conservation & Reclamation District v. Robbins, 213 F.2d 425, 429 (5th Cir. 1954).

[177] U.S. CONST. art. III, §2, cl. 1 (Article III judicial powers extend "to all Cases of admiralty and maritime Jurisdiction."). The navigability test for proper application of the Admiralty Power is narrower than that used for assertion of federal power under the Commerce Clause. *In re* Garnett, 141 U.S. 1, 12 (1891); Alford v. Appalachian Power Co., 951 F.2d 30 (4th Cir. 1991); In re three Buoys Houseboat Vacations U.S.A., 921 F.2d 775 (8th Cir. 1990).

[178] U.S. CONST. art. I, §8, cl. 3 ("The Congress shall have the power…to regulate Commerce with foreign Nations, and among the several States.").

[179] 22 U.S. (9 Wheat.) 1 (1824).

[180] *Id.* at 197.

jurisdiction over the nation's waters, regardless of navigability.[181] In fact, in 1940, the Court noted that "[i]n our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation."[182] The Court again stressed this point in the 1979 case of *Kaiser Aetna v. United States*,[183] asserting that "[r]eference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce."[184]

Today, most questions of federal jurisdiction over waterways under the Commerce Clause arise in the context of environmental protection[185] and hydroelectric power production.[186] As the case law currently stands, the federal government's power under the Commerce Clause to regulate national waterways, often termed the "navigation power," allows the United States to assert regulatory power over waterways that were once navigable, but which are no longer navigable, as well as waterways that have never been navigable but may become so as a result of "reasonable improvements."[187] Thus, regardless of the current navigability of a waterway, both the state and private riparian landowners must be mindful of the over-riding power of the federal government to control waters for commerce purposes.[188]

While the federal government may regulate waterways pursuant to the broad authority of the Commerce Clause, in some instances, the government may be required to pay compensation for any loss resulting from the exercise of this power. The government is generally immune from paying compensation, however, for damage to, or loss of, property where it has properly imposed a so-called "navigational servitude."[189] In general, the navigational servitude applies to all waters that meet the federal test for navigability-in-fact, and extends to beds and banks beneath navigable waters up to the high water mark.[190] The servitude may also extend to the beds and banks of non-navigable tributaries of a navigable river, but only if the improvements

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[181] At least two scholars have noted the transition of the Court from the narrow "navigability" view to a more expansive "full Commerce Clause" view of federal regulation of waters of the United States. See TARLOCK, *supra* note 1, §9:8; WATERS AND WATER RIGHTS, *supra* note 20, §35.02.

[182] United States v. Appalachian Electric Power Company, 311 U.S. 377 (1940).

[183] 444 U.S. 164 (1979).

[184] *Id.* at 173.

[185] The authoritative federal law with regard to regulation of waterways is the Clean Water Act of 1972, 33 U.S.C. §1251 et seq (2000).

[186] Federal jurisdiction over hydroelectric power projects is governed by the Federal Power Act, 16 U.S.C. §791 et seq. (2000).

[187] TARLOCK, *supra* note 1, §9:8 (citing Rochester Gas & Electric Corp. v. FPC, 344 F.2d 594, 596 (2d Cir. 1965) and United States v. Alameda Gateway Ltd., 213 F.3d 1161 (9th Cir. 2000)).

[188] United States v. Rands, 389 U.S. 121 (1967); Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239 (1954).

[189] U.S. v. Chicago M., St. P. & P.R. Co., 312 U.S. 592 (1941); Boone v. U.S., 944 F.2d 1489 (9th Cir. 1991).

[190] Boone v. United States, 944 F.2d 1289 (9th Cir. 1991); United Texas Transmission Co. v. U.S. Army Corps of Engineers, 7 F.3d 436 (5th Cir. 1993); Palm Beach Isles Associates v. U.S., 208 F.3d 1374 (Fed. Cir. 2000); WATERS AND WATER RIGHTS, *supra* note 20, §35.02(c)(1); TARLOCK, *supra* note 1, §9:17.

are conducted for the purposes of improving navigability of the adjacent navigable waters.[191] Furthermore, the servitude may apply to changes in the flow of non-navigable tributaries,[192] as tributaries can often be affected by improvements conducted on connected navigable waterways. Finally, formerly non-navigable water bodies that have been made navigable by private interests are not automatically subject to the federal navigation servitude.[193]

One of the leading Supreme Court cases on the application of the federal navigational servitude is *Kaiser-Aetna v. United States*.[194] In *Kaiser-Aetna*, the Court considered whether a formerly privately-owned lagoon, which had since been connected to navigable waters by the owners and converted to a marina, had, as a result, become subject to federal regulatory and navigational control. The Government asserted that the marina, as a navigable water body, was subject to federal regulatory power and, as well, was required to be open to the public for navigational purposes.[195] The Court agreed with the Government that the marina was subject to broad federal regulatory control under the Commerce Clause, and could legally be opened to the public in furtherance of the purposes of the navigational servitude.[196] The Court also held, however, that despite prior case law indicating that the Government should be shielded from compensating riparian landowners from damages resulting from activities conducted in furtherance of the servitude, "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause…."[197] Thus, while the Government had the power to impose the servitude on the marina, the Government was required to heed the requirements of the Takings Clause and pay just compensation to the marina-owners for property "taken" in the process of requiring public access.[198]

2. State Control Through Police Powers

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[191] In United States v. Cress, 243 U.S. 316 (1917), the Court held that the federal government must compensate landowners situated on a non-navigable stream for damages to privately owned land after a dam was placed on an adjacent navigable waterway; however, some commentators suggest that the Court's subsequent opinion in United States v. Grand River Dam Authority, 363 U.S. 229 (1960) (holding damages to the bed of a non-navigable tributary for purposes of improving navigation in adjacent navigable waterway were non-compensable) dichotomizes the test as follows: if the beds of a non-navigable tributary are damaged due to improvements taking place on a connected navigable waterway, the federal government must compensate; however, if the damages are caused by improvements conducted on the beds of non-navigable waterways in order to improve navigation of a connected waterway, then no compensation is due. WATERS AND WATER RIGHTS, *supra* note 20, §35.02(c)(1).

[192] United States v. Grand River Dam Authority, 363 U.S. 229 (1960); Conservation Council of N.C. v. Froehlke, 435 F. Supp. 775 (M.D.N.C. 1977).

[193] Kaiser Aetna v. United States, 444 U.S. 164 (1979)(holding that conversion of a private non-navigable lagoon to a private navigable marina by landowners did not subject landowners to navigational servitude and the government must pay compensation if it wanted to require public access).

[194] 444 U.S. 164 (1979).

[195] *Id.* at 170.

[196] *Id.* at 174.

[197] *Id.* at 172.

[198] *Id.* at 180.

The so-called "police power" is the power of the states to impose reasonable restrictions on individual rights in order to provide for the greater health, safety and welfare of the people.[199] The power is specifically reserved for the states in Tenth Amendment of the United States Constitution;[200] however, courts have noted that the power existed long before the Constitution was written, as an inherent power of any sovereign.[201] The state police power is generally vested in the state legislature,[202] and the legislature may exercise the power only to the extent that regulations are reasonably related to the promotion of public health, safety and welfare.[203] States may, and often do, delegate police power authority to local governments.[204]

While the state's power to regulate its citizens for the good of all is fairly broad, the state may not unreasonably infringe upon state and federal constitutional guarantees, nor may it regulate in derogation of federal law.[205] Thus, the constitutional right to acquire and own property, including property acquired and owned by way of the exercise of riparian rights, can fall prey to the common good.[206] In Florida, police powers can legitimately be used to limit property both as to kind, quantity or place,[207] and consideration of financial loss or "vested rights" will generally not outweigh the necessity for exercise of the police power.[208]

3. State Control by Application of Public Trust Doctrine

States may assert control over waterways within their borders by virtue of state sovereign ownership of certain submerged lands and tidelands. The fact of this ownership was first theorized by the Supreme Court in an 1842 case, in which the Court declared, "[f]or when the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters and soil under them for their own common use…."[209] Thus, each state existing at the time of the Revolution obtained absolute rights to navigable waters within state borders, as well as the beds underlying those waters. All other waters ceded to the United States that were not already in state ownership were to be held

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[199] Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991); Burnsed v. Seaboard Coastline R. Co., 290 So. 2d 13 (Fla. 1974); McInerney v. Ervin, 46 So. 2d 458 (Fla. 1950).

[200] U.S. CONST. amend. I. ("[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[201] Nebbia v. People of New York, 291 U.S. 502 (1934); McInerney v. Ervin, 46 So. 2d 458 (Fla. 1950).

[202] State v. Duval County, 79 So. 692 (Fla. 1918).

[203] Clason v. State of Indiana, 306 U.S. 439 (1939); State v. Orange County, 748 So. 2d 945 (Fla. 1999).

[204] *See infra* discussion at section II(D)(4).

[205] Panhandle Eastern Pipe Line Co. v. State Highway Commission of Kansas, 294 U.S. 613 (1935); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Eccles v. Stone, 183 So. 628 (Fla. 1938); Blitch v. City of Ocala, 195 So. 406 (Fla. 1940).

[206] Hodel v. Irving, 481 U.S. 704 (1987); Sharrow v. Dania 83 So. 2d 274 (Fla. 1955); Harris v. Martin Regency, Ltd., 576 So. 2d 1294 (Fla. 1991).

[207] Hav-A-Tampa Cigar Co. v. Johnson, 5 So. 2d 433 (Fla. 1941).

[208] Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950).

[209] Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842).

in trust for future states, such that those states could enter the Union on "equal footing" with existing states.[210]

Once the states acquired ownership of tidelands and land submerged beneath navigable waters, the Court was charged with the task of delineating those waters that were navigable, such that they passed to the states, and which were not, such that they remained in federal or private ownership. The federal navigability for title test, often attributed to the Court's decision in *The Daniel Ball*, states that navigable waters are waters which must be "used, or…susceptible of being used , in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."[211] The test is a backward-looking test, requiring proof that the above test was satisfied *at the time of statehood*.[212] Further, there is no requirement that the "highway for commerce" be for purposes of transacting interstate commerce; a waterway used only for the carriage of local commodities within the state may still be considered a state-owned navigable waterway.[213] In addition, the list of pursuits which constitute "commerce" has, over the years, grown to include driving logs to market,[214] movement of cattle,[215] and recreation.[216]

While the states received absolute ownership of submerged lands, the states were not given an absolute right to dispose of them as they pleased. The Court, in *Martin v. Waddell*, cautioned the states that newly-acquired submerged lands were to be "held as a public trust for the benefit of the whole community."[217] Likewise, the Court subsequently declared, in the 1894 case of *Shively v. Bowlby*, that state-owned submerged lands were burdened with a trust for "the benefit of the nation."[218] The modern version of the public trust doctrine was elucidated in *Illinois Central Railroad v. Illinois*.[219] In *Illinois Central*, the Supreme Court considered a contested state grant of submerged lands to a railroad company for purposes of building a new railroad line traversing Lake Michigan. In voiding the grant, the Court explicitly recognized that the state's title to submerged lands was "a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing freed from obstruction or interference with private parties."[220]

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[210] Pollard v. Hagan, 44 U.S. 212 (1845).

[211] The Daniel Ball, 77 U.S. 557, 563 (1870). Note that this test applies only to submerged lands. State-owned tidelands are delineated using a test enunciated in *Phillips Petroleum Corp. v. Mississippi*, 484 U.S. 469 (1988) (holding that tidelands were state owned where they were subject to the ebb and flow of the tide).

[212] Utah v. United States, 403 U.S. 9 (1971).

[213] *Id.*

[214] Oregon v. Riverfront Protection Association, 672 F.2d 792 (9th Cir. 1982).

[215] Utah v. United States, 403 U.S. 9 (1971).

[216] Alaska v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989).

[217] Martin v. Waddell, 41 U.S. 367, 413 (1842).

[218] Shively v. Bowlby, 152 U.S. 1, 57 (1894).

[219] 146 U.S. 387 (1892).

[220] Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892).

Commerce, navigation, fishing and swimming have long been considered the traditional purposes of the public trust;[221] however, other trust purposes have since been recognized. For example, most states currently recognize general recreational uses of water to be within the purposes of the public trust.[222] Further, increasing environmental concerns have led many states to recognize habitat preservation as a valid trust purpose.[223] Finally, preservation of scenic beauty has been recognized in at least three states.[224]

Just as the idea of state sovereignty submerged lands is based in federal law, so too is the public trust doctrine. Thus, once states claimed title to state submerged lands pursuant to the equal footing doctrine, they were free to shape public trust doctrine law as they wished.[225] Florida's early case law firmly established that the State held navigable waters and lands submerged beneath those waters in trust for the citizens of the state.[226] For example, it was held in *State v. Gerbing*, that Florida's sovereignty submerged lands, as well as the navigable waters overlying them, "are held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use of all the people of the state[]…for purposes of navigation, commerce, fishing and other useful purposes…."[227] In 1968, the public trust doctrine was incorporated into the state constitution, and, as it exists today, states, "[t]he title to lands underneath navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people."[228]

While the Court in *Illinois Central* did not allow a state-owned submerged lands grant to be transferred to a private entity, the Court did not go so far as to hold that state-owned submerged lands could never be alienated.[229] In fact, the Court clearly authorized alienation of public trust property where the property is "used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and water remaining."[230] Most state courts, including Florida, have followed suit and permitted alienation of state public trust property under certain circumstances.[231]

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[221] NATIONAL PUBLIC TRUST STUDY, PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 130 (1990).

[222] *Id.* at 133 n. 39.

[223] *Id.*

[224] Id., n. 48.

[225] WATERS AND WATER RIGHTS, *supra* note 20, §30.02(b). Most states have reinforced the fiduciary obligation imposed by the doctrine; however, a few states have disregarded it. *Id.*

[226] City of West Palm Beach v. Board of Trustees, 713 So. 2d 1060 (Fla. Dist. Ct. App. 1990), *decision approved*, 746 So. 2d 1085 (Fla. 1999).

[227] State v. Gerbing, 47 So. 353, 355 (Fla. 1908).

[228] FLA. CONST. art. X, §11.

[229] WATERS AND WATER RIGHTS, *supra* note 20, §30.02(d); TARLOCK, *supra* note 1, §8:22.

[230] Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892).

[231] TARLOCK, *supra* note 1, §8:22. For example, the Massachusetts Supreme Court, in *Boston Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356 (Mass. 1979), held that a state submerged lands grant to private developer was valid, provided that the grantee continue to observe public trust interests. *Id.*

In Florida, the same constitutional provision that observes the public trust doctrine also delineates when public trust property may be alienated. Article X, section 11 of the Florida Constitution, originally added in 1968 and amended in 1970, states, "[s]ale of [submerged lands] may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest." The power of disposition of state submerged lands is vested in the Board of Trustees of the Internal Improvement Trust Fund.[232] Section 253.12, Florida Statutes, authorizes the Board of Trustees to sell or convey state submerged lands, "upon such prices, terms, and conditions as it sees fit," only when it is determined that the sale or conveyance will not interfere with the public interest.[233] Further, upon sale or conveyance, the State may have a continuing duty, through appropriate police power regulation, to assure that the public trust, as related to the lands sold or conveyed, is preserved.[234]

4. Local Government Control Through Local Police Powers

Just as the state has the power to impose reasonable regulations on its citizens for the general health, safety and welfare of the people, so too do local governments; however, local governments can only enact police power regulations to the extent the authority to enact them has been delegated by the state. The state may delegate powers to counties through the state constitution, in the case of charter counties,[235] or may limit local government power to that set

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[232] Fla. Stat. §253.12(1) (2006).

[233] Fla. Stat. §253.12(2)(a)(2006). Note that this statutory section applies only to submerged lands sold or conveyed after passage of the law in 1917. Fla. Stat. §253.12(1)(2006)(stating that the provision applies to all state-owned submerged lands "[e]xcept submerged lands heretofore conveyed by deed or statute"). It is also important to note, however, that the common law as it existed prior to 1917 would probably still have required disposition of state submerged lands subject to the public trust. *See* State v. Gerbing, 47 So. 353 (Fla. 1908)("A state may make limited disposition of portions of [submerged] lands, or of the use thereof, in the interest of the public welfare, where the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired"); Merrill-Stevens Co. v. Durkee, 57 So. 428 (Fla. 1912)("…the state may grant reasonable and limited rights and privileges to individuals in the use of lands under navigable waters in the state; but such privileges should not unreasonably impair the rights of the whole people of the state in the use of the waters or the lands thereunder for the purposes implied by law"); Broward v. Mabry, 50 So. 826 (Fla. 1909); State v. Black River Phosphate Co., 13 So. 640 (Fla. 1893).

[234] In *Broward v. Mabry*, 50 So. 826 (Fla. 1909), the Court declared that "[t]he trust in which the title to lands under navigable waters is held is governmental in its nature and cannot be wholly alienated by the states…the states may by appropriate means grant to individuals the title to limited portions of lands under navigable waters…but not so as to divert them from their proper uses for the public welfare…." Further, in *State v. Gerbing*, 47 So. 353 (Fla. 1908), the Court asserted that "[t]he states cannot abdicate general control over [submerged lands] and the waters thereon, since that abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them for the public good."

[235] Charter counties derive sovereign powers through Article VIII, §1 of the Florida Constitution, which authorizes the adoption of county charters by general or special law. *See* Lowe v. Broward County, 766 So. 2d 1199 (Fla. Dist. Ct. App. 2000). Charter counties have broad home-rule power and may enact any ordinance not inconsistent with state law or the state and Federal Constitutions. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983).

out by general or special law.[236] Similarly, municipalities have powers of self-government to the extent granted by the state.[237] Pursuant to the Municipal Home Rule Powers Act,[238] municipalities may exercise any power for municipal purposes, except as expressly prohibited by law.[239] Thus, municipalities may exercise powers related to the conduct of municipal government, the exercise of municipal functions, or the provision of a municipal service.[240]

The police powers of local governments are limited in a similar manner to those of the state. Local government police power regulations may not impose undue burdens on certain private interests,[241] and must observe the liberties and guarantees of both the state and Federal Constitutions.[242] Furthermore, local government police power regulations may not arbitrarily interfere with or destroy private property rights,[243] such as those held by riparian landowners.[244] In sum, local governments may properly regulate navigable waters in the interest of public health, safety and welfare, subject to state powers and duties under the public trust doctrine and police power, as well as the federal navigational servitude and regulation based on the Commerce Clause.

E. Legal Remedies

Riparian landowners, in some instances, are entitled to seek redress in the courts for interference with legally-protected riparian rights. It is a generally-accepted rule, however, that private riparian owners may not individually file suit for interference with riparian rights held in common with the public unless they can prove special injury different from that suffered by the public.[245] Thus, interference with navigation on public waters will ordinarily not be considered an individually compensable damage, since damages inuring to the individual will probably also inure to the general public.[246] For example, individual users of an intercoastal waterway were not allowed to bring an action against the State of Florida, alleging that a proposed bridge over

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[236] Non-charter counties have the power of self-government to the extent that power is provided by general or special law. *See* Jones v. Chiles, 654 So. 2d 96 (Fla. Dist. Ct. App. 1994).

[237] FLA. CONST. art. VIII, §2(b). Municipalities may be granted charters by special act of the legislature, in which all legislative authority of the municipality is contained.

[238] Fla. Stat. §§166.11-166.411 (2006).

[239] Fla. Stat. §166.021(1) (2006).

[240] City of Ormond Beach v. County of Volusia, 535 So. 2d 302 (Fla. Dist. Ct. App. 1988).

[241] Ellison v. City of Fort Lauderdale, 175 So. 2d 198 (Fla. 1965).

[242] Gustafson v. City of Ocala, 53 So. 2d 658 (Fla. 1951).

[243] Ellison v. City of Fort Lauderdale, 175 So. 2d 198 (Fla. 1965).

[244] *See* City of Miami Beach v. Hogan, 63 So. 2d 493 (Fla. 1953).

[245] Hamilton v. Vicksburg, S. & P. R.Co., 119 U.S. 280 (1886); Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643 (Fla. 1909).

[246] Bertram v. State Road Department, 118 So. 2d 674 (Fla. Dist. Ct. App. 1960).

the waterway would obstruct navigation, because the users were not able to demonstrate that they sustained an injury different from that suffered by the general public.[247]

On the other hand, interference with a private right of access generally constitutes special injury such that private action may be maintained.[248] In such cases, a private landowner may obtain damages[249] or a court-ordered injunction against further interference with private riparian rights.[250] What follows is a discussion of two of the most common theories under which riparian rights, public and private, have been protected by the courts.

1. Takings

According to the Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, private property shall not be "taken for public use, without just compensation." The government may impose a taking which requires the payment of compensation through actual physical occupation of property[251] or through overly-burdensome regulation of property.[252] The latter category of takings, collectively termed "regulatory takings," can further be broken down into those regulations that impose permanent physical invasions,[253] and those that completely deprive a landowner of *all* economically viable use of his property.[254] Both of the above situations constitute takings for which compensation must be paid; however, any alleged taking that does not fit into one of the above categories may still require governmental compensation if it passes a three-part balancing test, involving judicial inquiry into (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with the property owner's investment-backed expectations; and (3) the character of the governmental action involved.[255]

Since riparian rights are generally considered legally-protected property rights, they too cannot be taken without the payment of just compensation.[256] For example, the federal courts have frequently held that construction of public works, such as roads and parks, on submerged

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[247] *Id.*

[248] Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 48 So. 643 (Fla. 1909).

[249] Philadelphia, W. & B. R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co., 64 U.S. (23 How.) 209 (1859).

[250] Florio v. State ex rel, Epperson, 119 So. 2d 305 (Fla. Dist. Ct. App. 1960). Note that in Florida, such private claims may be barred by the doctrines of laches or estoppel. *See* Freed v. Miami Beach Pier Corporation, 112 So. 841 (Fla. 1927).

[251] United States v. Pewee Coal Co., 341 U.S. 114 (1951).

[252] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[253] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 415 (1982).

[254] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). A subsequent Supreme Court case clarified that even a 95% diminution in property value may not qualify as a loss of all economically viable use of land. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

[255] Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

[256] U.S. v. Gerlach Live Stock Co., 339 U.S. 725 (1950); Yates v. City of Milwaukee, 77 U.S. 497 (1870).

lands so as to separate riparian land from adjacent waters, is a taking of the riparian right of access for which compensation must be paid.[257] Such interferences with riparian rights will not always result in compensable takings, however, especially where the governmental action is in furtherance of the superior rights of the public to navigation.[258]

In addition to the mandates of the Federal Constitution and accompanying law, the Florida courts are also bound by Florida Constitution, Article X, section 6, which states that "[n]o private property shall be taken except for a public purpose and with full compensation….." Thus, in Florida, compensation must be paid where the government either physically appropriates private property, or regulates private property to such an extent that the owners are deprived of its economically-viable use.[259] Further, in regulatory takings cases, Florida courts generally consider such factors as whether the regulation precludes all economically viable use of property and the extent to which the regulation encroaches upon reasonable investment-backed expectations.[260]

Just as in the federal system, the Florida courts have recognized that riparian rights are property rights which cannot be taken without just compensation,[261] but have almost exclusively considered this doctrine in cases involving physical takings, as opposed to regulatory takings. [262] For example, in *Kendry v. State Road Department*,[263] riparian landowners maintained a viable takings claim where the state's filling of submerged lands for purposes of a highway widening caused the riparian landowners' property to be frequently flooded. Similarly, in *Worth v. City of West Palm Beach*,[264] the city's construction of a public road which traversed a riparian landowner's land such that the land was cut off from the adjacent waters constituted a taking of private property for which compensation must be paid. Furthermore, in *Lee County v. Kiesel*,[265] a bridge built by the county which substantially interfered with the view of adjacent riparian landowners constituted a compensable taking.

In 1995, the Florida Legislature adopted the Bert J. Harris, Jr. Private Property Rights Protection Act.[266] The Act creates a new cause of action, separate from general takings claims, for citizens whose private property is unfairly burdened by new state or local government regulation. Pursuant to the Act, claimants are entitled to relief if they can show that they have

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[257] Davenport & N.W. Ry. Co. v. Renwick, 102 U.S. 180 (1880); Barney v. City of Keokuk, 94 U.S. 324 (1876); Yates v. City of Milwaukee, 77 U.S. 497 (1870).

[258] *See supra* section II(D)(1).

[259] Joint Ventures, Inc. v. Department of Transportation, 563 So. 2d 622, 624 (Fla. 1990).

[260] Florida Game and Fresh Water Fish Commission v. Flotilla, Inc., 636 So. 2d 761 (Fla. Dist. Ct. App. 1994).

[261] Thiesen v. Gulf, F. & A. Ry. Co., 78 So. 491 (Fla. 1917); Brickell v. Trammell, 82 So. 221 (Fla. 1919); Broward v. Mabry, 50 So. 826 (1909).

[262] See Proctor, *supra* note 16, at 148 ("…the court has never decided a case involving the regulatory taking of riparian rights.").

[263] 213 So. 2d 23 (Fla. Dist. Ct. App. 1968).

[264] 132 So. 689 (Fla. 1931).

[265] 705 So. 2d 1013 (Fla. Dist. Ct. App. 1998).

[266] Fla. Stat. §70.001 (2006).

been "inordinately burdened" by government regulation.[267] A claimant has been inordinately burdened where: (1) the claimant is permanently prevented from obtaining reasonable, investment-backed expectations for existing uses of the property, or a vested right in specific uses of the property; or (2) the claimant is left with existing or vested uses that are unreasonable, such that the claimant must bear a permanent and disproportionate burden of providing for the public good.[268] Once a claim has been filed under the Act, the claimant and governmental entity responsible for the burdensome regulation enter into a mandatory settlement procedure in which the governmental entity produces a settlement offer and ripeness decision, and the claimant may either accept the offer or appeal the offer in circuit court.[269]

2. Nuisance

In general, a nuisance is an invasion of another person's interest in the reasonable use and enjoyment of her property.[270] The degree of injury, the continuousness of the invasive action, and the location and surroundings of the activity are all factors which inform courts in deciding whether a given activity is a nuisance. The intent of the actor has no effect on whether an activity is a nuisance and the degree of the injury will be judged based upon the effect of the nuisance on "ordinary persons with a reasonable disposition in good health and possessing the average and normal sensibilities."[271] Harmful invasions can be caused by activities occurring on another person's property or by the mere presence of certain structures, business enterprises, or environmental hazards in the vicinity. Thus, for example, garbage disposal facilities may be considered nuisances.[272]

Nuisances can be either in law or in fact. A nuisance in law, or nuisance *per se*, is an activity or structure that, in and of itself, is a nuisance regardless of surroundings or the care under which it is conducted.[273] Any other nuisance that is not necessarily a nuisance *per se*, but which could become so under the attendant circumstances, is a nuisance in fact.[274] Nuisances can also be either private or public, or both. Private nuisance are limited in scope to those affecting only private rights and producing damages that can be redressed by private action.[275] A public nuisance, in contrast, is that which causes annoyance or harm to the public generally and can usually only be redressed by action of the proper governmental official.[276]

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[267] Fla. Stat. §70.001(2) (2006).

[268] Fla. Stat. §70.001(3)(e) (2006).

[269] Fla. Stat. §70.001(4)-(5) (2006).

[270] Mehlenbacher v. Akzo Nobel Salt, Inc., 216 F.3d 291 (2d Cir. 1000); Florida East Coast Properties, Inc. v. Metropolitan Dade County, 572 F.2d 1108 (5th Cir. 1978); Jones v. Trawick, 75 So. 2d 785 (Fla. 1954).

[271] Beckman v. Marshall, 85 So. 2d 552, 555 (Fla. 1956).

[272] State *ex. rel* Knight v. City of Miami, 53 So. 2d 636 (Fla. 1951).

[273] Miller v. Cudahy Co., 592 F. Supp. 976 (D. Kan. 1984).

[274] Barlett v. Moats, 162 So. 477 (Fla. 1935).

[275] Prior v. White, 180 So. 347 (Fla. 1938).

[276] Flo-Sun, Inc. v. Kirk, 783 So. 2d 1029 (Fla. 2001); Jacobs v. City of Jacksonville, 762 F. Supp. 327 (M.D. Fla. 1991); Prior v. White, 180 So. 347 (Fla. 1938).

As applied to riparian rights, nuisance claims generally arise in the context of the right to wharf out. As a general matter, wharves are not considered nuisances *per se* because they are valuable to navigation and commerce.[277] As such, wharves erected pursuant to governmental authorization are presumed beneficial to commerce and riparian landowners, as well as the public, generally have no right to object based on nuisance principles.[278] Wharves may become nuisances in fact, however, by means of improper upkeep or obstruction of navigation.[279] Wharves and bridges held to have obstructed navigation channels are most often deemed public nuisances, due to the fact that the right to navigation is a right held by the public generally. In at least one Florida case, however, a plaintiff alleged sufficient special injury, caused by state-authorized construction of islands in a navigation channel, to support a claim for private nuisance.[280] Further, a Florida riparian owner successfully launched a private nuisance claim against neighboring riparian owners whose placement of fill and subsequent failure to bulkhead interfered with rights in privately-owned submerged lands.[281]

III. STATUTORY RIPARIAN RIGHTS

Recent population growth and resulting water scarcity issues have prompted states to pass legislation that alters or limits common law riparian rights.[282] In Florida, there are several statutory provisions dealing with riparian rights. For example, Florida Statutes, §253.141(1) defines riparian rights as "those [rights] incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law." This law was originally enacted for tax law purposes, and, as a result, much of the initial judicial commentary pertaining to the provision denied its application beyond the realm of tax assessment.[283] In 1985, however, the current §253.141(1) was, for unknown reasons,[284] transferred to the portion of the Florida Statutes dealing with public lands and property.[285] Until mid-2006, there had been little discussion among Florida courts as to what effect the statute had on common law riparian rights.[286]

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[277] Gieger v. Filor, 8 Fla. 325, 332-33 (Fla. 1859).

[278] Sullivan v. Moreno, 19 Fla. 200 (Fla. 1882); Freed v. Miami Beach Pier Corporation, 112 So. 841 (Fla. 1927).

[279] *Id.*

[280] Deering v. Martin, 116 So. 54 (Fla. 1928).

[281] Hanna v. Martin, 37 So. 2d 579 (Fla. 1948).

[282] TARLOCK, *supra* note 1, §3:89.

[283] Proctor, *supra* note 16, at 132; Feller v. Eau Gallie Yacht Basin, Inc., 397 So. 2d 1155, 1157 (Fla. Dist. Ct. App. 1981)(noting that the provision "…merely attempts to define [riparian rights] for tax purposes."); Belvedere Development Corporation v. Department of Transportation, 476 So. 2d 649, 653 (Fla. Dist. Ct. App. 1985) (observing that "[n]o case has ever held [the riparian rights provision] applicable as property law to riparian rights.").

[284] Proctor, *supra* note 16, at 131-32.

[285] *Id.*

[286] *Id.* at 134.

Whether the state can constitutionally limit riparian rights, has been the subject of some discussion in the Florida courts. For example, in *Save Our Beaches, Inc. v. Florida Department of Environmental Protection*,[287] the First District Court of Appeals discussed the applicability of §253.141(1) to a case involving the rights of private riparian owners to accretions created by beach preservation activities conducted by the State. While the court noted that "[w]hatever differences may exist between this statute and common law, they do not affect the analysis of the issues in the case before us," the court went on to conclude that the phrase "…and such others as may be or have been defined by law" indicated that the statute was not intended to completely displace common law riparian rights.[288] The court went on to advise that the Legislature "explicitly recognizes in §161.201 that common law riparian rights continue to exist."[289] Florida Statutes, §161.201, as part of the Beach and Shore Preservation Act,[290] provides that any upland owner affected by the Act "shall…continue to be entitled to all common-law riparian rights…including but not limited to rights of ingress, egress, view, boating, bathing, and fishing."

In general, the Beach and Shore Preservation Act is the means by which the State regulates coastal areas in Florida. The Act's primary method of regulation is through the establishment of coastal construction control lines along Florida's beaches. Pursuant to Florida Statute §161.053(1)(a), the State is authorized to set construction control lines where necessary to protect the beach-dune system from damage due to fluctuations in storm surge, waves and other weather conditions.[291] Once a construction control line has been set,[292] "no person, firm, corporation or governmental agency shall construct any structure whatsoever seaward thereof; make any excavation, remove any beach material, or otherwise alter existing ground elevations…."[293] Certain activities, such as construction of a single-family dwelling, maintenance and repair of existing structures, and continued construction of structures that were already under construction prior to the establishment of the construction control line are exempt from the requirements of §161.053.[294] Establishment of coastal construction lines, in this respect, limits the riparian right to wharf-out; however, as discussed in Part II(C)(2), the right to wharf-out has already been limited in the common law by the federal navigational servitude, as well as the state's police power authority.

In addition to the regulation of coastal construction, the State may also, pursuant to the Beach and Shore Preservation Act, establish so-called "erosion control lines" for the purpose of

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[287] 2006 WL 1112700 (Apr. 28, 2006), *rev. granted* 937 So. 2d 1029 (2006).

[288] Id. at *8.

[289] *Id.*

[290] Fla. Stat. §§161.011-161.45 (2006).

[291] Fla. Stat. §161.053(1)(a) (2006). This so-called "100-year storm surge" line is to be based on competent scientific evidence indicating where damage is most likely to occur. *See also* Kenneth E. Spahn, *The Beach and Shore Preservation Act: Regulating Coastal Construction in Florida*, 24 Stet. L. R. 353, 362-63 (1995).

[292] Construction control lines are established only after public hearing and subsequent adoption by Florida Department of Environmental Protection rule. Fla. Stat. §161.053(2)(a) (2006).

[293] Fla. Stat. §161.053(2)(a)(2006).

[294] Fla. Stat. §§161.053(6)(c), (12) & (13). *See also* Fields, *supra* note 52, §8.81; Spahn, *supra* note 291, at 368-73.

conducting beach preservation and renourishment activities.[295] Pursuant to Florida Statute §161.141, "title to all lands seaward of the erosion control line shall be deemed to be vested in the state by right of its sovereignty." Further, prior to the First District Court of Appeals decision in *Save Our Beaches*, once an erosion control line had been established, upland riparian property owners were no longer entitled to accretions and relictions that may have resulted from the beach renourishment project.[296] The *Save Our Beaches* case declared this particular provision unconstitutional as applied insofar as it effected a taking of the affected upland landowners' riparian rights without just compensation. In so holding, the court declared, "Florida's law is clear that riparian rights cannot be severed from riparian uplands absent an agreement with the riparian owner, not even by the power of eminent domain."[297]

Another major provision of the Florida Statutes affecting riparian rights is §253.77, concerning the placement of structures on state-owned submerged lands. By law, no person is allowed to "commence any excavation, construction, or other activity involving the use of sovereign or other lands of the state" without first obtaining a permit.[298] Obtaining a permit from the State is only the first step in the process, however. Local governments may also have their own regulations and permit requirements.[299]

IV. CONCLUSION

The state of the law with respect to riparian rights in nonconsumptive water uses appears fairly well-established. Only landowners who own riparian land acquire private riparian rights, and these rights may be exercised in different ways, depending on whether land abuts "public" or "private" waters. Private riparian rights consist of the rights of access, unobstructed view, surface use, accretion and reliction, as well as the right to wharf out. The federal navigational servitude, state and local police powers, and the rights of the public, as protected by the public trust doctrine, serve as notable limitations on the exercise of private riparian rights. Despite these limitations, however, private riparian landowners do have some redress for injury to riparian rights due to the actions of governmental entities as well as neighboring riparian land owners.

One issue left to be resolved in the arena of riparian rights is whether nonconsumptive riparian rights are constitutionally-protected property rights, such that state legislation that changes the definition of riparian rights in derogation of the common law is unconstitutional. This issue may soon be considered by the Florida Supreme Court in the case of *Florida Department of Environmental Protection v. Save Our Beaches, Inc.*,[300] discussed in Part III.

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[295] Fla. Stat. §161.141(2006)("…prior to construction of such a beach restoration project, the board of trustees must establish the line of mean high water for the area to be restored….").

[296] Fla. Stat. §161.191(2006), *declared unconstitutional by* Save Our Beaches, Inc. v. Florida Department of Environmental Protection, 2006 WL 1112700 (2006), *rev. granted* 937 So. 2d 1029 (2006).

[297] Save Our Beaches, Inc. v. Florida Department of Environmental Protection, 2006 WL 1112700 (2006) at *10.

[298] Fla. Stat. §253.77(1) (2006).

[299] Proctor, *supra* note 16, at 146.

[300] 937 So. 2d 1099 (Fla. 2006).

Regardless of how the court rules, riparian rights to nonconsumptive water uses are firmly established in both the common law and statutory law in Florida, and will continue to be legally-protected, although perhaps to varying extents, for the foreseeable future.