Defend Liberty
Pursuit Justice



# Water Resources Committee Newsletter

## THE ROLE OF RIPARIAN RIGHTS IN ECOLOGICAL RESTORATION

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### Introduction

Environmental decisions involving water quantity and quality affect us all.After all, water in lakes, streams, and aquifers is a resource that many users must share for a multitude of purposes.And water is a substance necessary to life itself.Although some insist that the centuries-old principles of water law (such as those protective of riparian, littoral, and appropriative rights) cannot co-exist with the current demands of environmental protection and ecological restoration, a closer examination of that notion suggests that the opposite may be true.Traditional water law is compatible with protection of the environment, and protecting water rights in streams and rivers can even be an instrument for ecological protection and restoration.

Although ecosystem restoration is in a sense a newcomer to the process that is just now defining its place in this complicated legal scheme, concepts as diverse as federal reserved rights, traditional tribal rights (e.g., fishing and hunting), and federal or state rights to water to benefit wildlife, wetlands, forests, and fisheries—rights which, like those for irrigation, industrial, or domestic use—are protected by traditional water rights law

The law's effort to accommodate riparian landowners and multiple conflicting interests in flowing water goes back at least to ancient Rome, where riparian owners held recognized water rights created either by actual use or by transfer from a water rights holder DIG. 43.20.3 & 43.12.2, ROMAN WATER LAW 37, 108 (E. Ware trans., 1905). English common law further developed the tradition of protecting riparian rights and exported the riparian rights doctrine to other common law countries. Under this doctrine, all landowners adjacent to a river were entitled to reasonable use of the flowing water as an appurtenance to their land so long as they did not impair the parallel rights of downstream owners. *Attwood v. Llay Main Collieries, Ltd.*, Ch. 444, at 458 (1926). Legal jurist and scholar Justice Kent, in his commentaries on early American law, noted that the consumptive use of the riparian owner must be reasonable and that the stream must be left undiminished for the benefit of downstream riparian owners. 3KENT, COMMENTARIES ON AMERICAN LAW 440 (1829).

Two cases now in active litigation directly examine the role of riparian rights protection in the context of ecological restoration, and both, coincidentally arise out of Florida, *Stop the Beach Renourishment* (now before the U.S. Supreme Court) and *Mildenberger* (St. Lucie River case) (now before the U.S. Court of Appeals for the Federal Circuit). Fundamental to both cases (though in different ways) is Florida's classical formulation of a broad riparian right that includes not only undiminished flows and reasonable upstream use, but also rights to water access, to accretion and avulsion, and even to water free of pollution:

> Among the common-law rights of those who own land bordering on navigable waters apart from rights of alluvion and deliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper or lower riparian owners or others, the right to have the water kept free from pollution, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that specially injures the riparian owner in the use of his propertythe right to use the water in common with the public for navigation, fishing, and other purposes in which the public has an interest.

*Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n,* 48 So. 643, 644–45 (Fla. 1902).

Decisions in both of these cases will be key to determining if riparian rights protection will continue to play a role in achieving environmental objectives.

### Stop the Beach Renourishment v. Florida Department of Environmental Protection

The first of these riparian cases, *Stop the Beach Renourishment v. Florida Department of Environmental Protection*, 998 So. 2d 1102 (Fla. 2008), *cert. granted*, (U.S. June 15, 2009) (No. 08-1151), is a suit by beachfront owners in the city of Destin and in Walton County, Florida, to halt a beach renourishment project that would create a new public beach, as much as 75 feet wide, between their property and the ocean. Claiming that immediate adjacency to the water is the essence of riparian (or more properly littoral when the ocean or a lake is the water body) rights, they assert that the interposition of a dry, public beach between their property and the water is a taking of their riparian (littoral) right. The riparian rights holders thus ultimately seek to preserve the natural conditions.

Under a 1970 statute, the Florida legislature created a regime under which beach conditions would not be governed by nature but would instead be dictated by an arbitrary, fixed line in the sand, which the state dubbed the "erosion control line." Brief for petitioner at 22, *Stop the Beach Renourishment v. Florida Dept. of Envtl. Prot.*, No. 08-1151 (U.S. March 13, 2009). Under that statute, the state could rebuild eroded beaches without the permission of the littoral rights holders, the landowners; in return, the state guaranteed the landowners access over the new beach area to get to the water.

Over the objections of the landowners, an administrative law judge found that the permit for the restoration project did not violate the petitioners' "riparian rights of accretion" and that in Florida there was no littoral right to contact with the water. Brief for respondent at 28, *Stop the Beach Renourishment v. Florida Dept. of Envtl. Prot.*, No. 08-1151 (U.S. Sept. 28, 2009). A Florida appellate court reversed, finding that the act had resulted in a taking of the petitioners "constitutionally protected riparian rights" to accretions and to contact with the water. *Id.* at 28.

But the Florida Supreme Court held that the only littoral rights that beachfront property owners, like the petitioners, enjoyed were: "(1) the right to have access to the water, (2) the right to reasonably use the water, (3) the right to accretion and reliction, and (4) the right to the unobstructed view of the water." *Id.* at 30–31 (internal quotation marks omitted). The court found that a common law right of contact with the water does not exist independently of the right to access. *Id.* at 30–31.

The landowners petitioned the U.S. Supreme Court, claiming that the Florida court had, by denying them a common law littoral right of contact with the water, effected a taking prohibited by the Fifth and Fourteenth Amendments of the U.S. Constitution. Brief for petitioner, *supra*, at i. They argued that the Florida court's holding constituted a judicial taking because, before the Florida Supreme Court's decision, owners of beachfront property possessed "the right to future accretion or reliction; [the] right to have property remain in contact with the [water]; [the] right to an unobstructed view; and [the] right to exclusive access over the upland portion of their property to the water," while after the Florida Supreme Court's decision, they had none of these rights. *Id.* at 32.

Florida claimed that the landowners had lost nothing, because the Florida Supreme Court had found that the littoral right of contact and the right to future accretion did not exist. The property owners had all the same rights within their fixed parcels landward of the erosion control line. The state also claimed that "the Act prohibits uses that would injure an upland owner and his business and property or the 'person, business, or property' of a lessee of the upland property." Brief for the respondent, *supra*, at 12. Therefore, there could be no taking found in the claimed deprivation of a property right that did not exist.

On June 15, 2009, the Supreme Court granted certiorari and held oral argument on December 2, 2009. The Court's decision is pending.

## The St. Lucie River Case

A case just decided in the U.S. Court of Federal Claims, *Mildenberger v. United States*, No. 06-760, slip op. (Fed. Cl. Jan. 29, 2010), pits riparian home owners adjacent to Florida's St. Lucie River against the U.S. Army Corps of Engineers, which, in operating the South Florida Project, releases billions of gallons of highly polluted, nonsaline water into the St. Lucie River and estuary. The St. Lucie, one of the most ecologically diverse estuaries on earth, was home to more than 4,000 species as recently as 1994*Id.* at 3. In their summary judgment brief, the home owners asserted:

> The U.S. Army Corps of Engineers systematically discharges non-saline, polluted waters of Lake Okeechobee into the St. Lucie River and Estuary through a canal (C-44) that artificially connects the Lake and the St. Lucie. But for the Canal, Lake Okeechobee and the St. Lucie River and Estuary are not connected. The Corps' discharges from Lake Okeechobee are especially harmful, not only because of the pollutants in the water, but because the discharges occur out-of-sync with the natural wet and dry seasons. These releases are also not correlated with large storms. The cumulative effect of these discharges has destroyed the St. Lucie's water quality, as well as its bird, fish, shellfish, sea grass, and other marine populations. As a result, the Riparian Owners can no longer swim, fish, and enjoy wildlife viewing on the St. Lucie River, rights that are recognized and protected under Florida law as riparian property rights. Although the community has tried to restore the River and Estuary, the ecological damage will continue to occur unless the Corps changes its practices of sending Lake Okeechobee water to the St. Lucie. As a result, the Riparian Owners' rights have been physically and permanently taken.

Brief for plaintiff, *John R. Mildenberger v. United States,* No. 06-760 (Fed. Cl. 2009).

The government, in response, argued that Florida law does not include the riparian right to water free of pollution, that the government has a superior right in the navigational servitude that allows these discharges, and that in any event the discharges have happened for so long that the statute of limitations has run on the home owners' claims. On January 29, 2010, the Court of Federal Claims dismissed the suit on statute of limitations grounds and also accepted the government's arguments regarding the navigational servitude and the lack of a riparian right to unpolluted water *Mildenberger*, No. 06-760, slip op., at 73. Recognizing that the case involved issues of first impression, the trial court immediately entered judgment so the home owners could appeal and underscored the environmental imperative of the case: "The St. Lucie River is, by all accounts, a national treasure. The long-term environmental consequences of defendant's massive discharges into the river are tragic, and the court takes note of plaintiffs' tireless efforts to reverse that damage."*Id.* (citation omitted).

The home owners filed their appeal on February 12, 2010. Their opening brief in the Federal Circuit is due on April 20, 2010.

## State Law Supports a Direct Relationship between the Protection of Riparian Rights and Water Quality Protection

Both of these cases reflect the broader context in which numerous states recognize the direct linkage between riparian rights and protection of the ecosystem or water quality. For instance, in many states, the rights to boat, fish, and enjoy pollution-free water are recognized either under the reasonable use doctrine or explicitly in case law or statutes. Courts in a few states have expanded these recreational rights to include the right to fish or boat in pollution-free waters or to access the water

Justice Story summarized the common law rights of a riparian owner in 1827:

> Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread

> of the stream, or, as it is commonly expressed, *usque ad filum aquae*. In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial, whether the party be a proprietor above or below, in the course of the river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above.

*Tyler v. Wilkinson*, 24 F. Cas. 472, 474 (C.C.D.R.I.1827).

Today, a number of states follow a mixed scheme of common law and regulation in determining what rights are available to riparian landowners. As the Connecticut Supreme Court stated in 2001, most eastern states

> follow the reasonable use theory. Under this doctrine every riparian owner has an equal right to make a reasonable use of the water. A reasonable use is any use that does not inflict substantial harm or unreasonable injury on other riparian owners. Thus a landowner's right to use water is limited only by the harm he might cause downstream owners.

*City of Waterbury v. Town of Washington*, 800 A.2d 1102, 1150 n.45 (Conn. 2001) (citations and internal quotation marks omitted).

In Virginia, courts have recognized the following riparian rights:

> (1) The right to be and remain a riparian proprietor and to enjoy the natural advantage thereby conferred upon the land by its adjacency to the water; (2) the right of access to the water, including a right of way to and from the navigable part; (3) the right to build a pier or wharf out to navigable water, subject to any regulations of the state; (4) the right to accretion or alluvium; and (5) the right to make a reasonable use of the water as it flows past or leaves the land.

*Taylor v. Commonwealth*, 102 Va. 759, 773, 47 S.E. 875, 880–81 (1904).

The Virginia Supreme Court has further suggested that

> [t]he well settled general rule on this point is that each riparian proprietor has *ex jure naturae* an equal right to the reasonable use of the water running in a natural course through or by his land for every useful purpose to which it can be applied, whether domestic, agricultural or manufacturing, provided it continues to run, after such use, as it is wont to do, *without material diminution* or alteration and *without pollution* . . .

*Town of Purcellville*, 19 S.E.2d 700, 702–03 (Va. 1942) (quoting Minor, REAL PROPERTY § 55, at 76 (2d ed. 1928)).

In 2003, the Virginia Supreme Court overturned a determination by the State Water Control Board that riparian landholders lacked standing to challenge the grant of a permit to Hanover County to discharge over ten million gallons of treated wastewater per day into the Pamunkey River. *State Water Control Bd. v. Crutchfield*, 578 S.E.2d 762 (Va. 2003). Noting that the one of the plaintiffs had "stated that operation of the discharge facility and pipeline system will cause him to abandon or decrease the frequency of his recreational activities in the river," the court found that this was enough to give the plaintiffs a property interest sufficient for standing under Article III of the U.S. Constitution. *Id.* at 764–65. "Riparian owners have the right to make reasonable use of the water flowing past their land, and they have a right to enjoy the recreational and aesthetic advantages that are conferred on such land adjoining a watercourse." *Id.* at 765.

In Michigan, an appellate court in *Anglers of the AuSable, Inc. v. Department of Environmental Quality* stated that "all the riparian proprietors have an equal or common right to use the water but each must exercise his rights in a reasonable manner and to a reasonable extent, so as not to interfere unnecessarily with the corresponding rights of others." *Anglers of the AuSable, Inc. v. Dep't of Envtl. Quality*, 770 N.W.2d 359, 374–75 (Mich. Ct.App. 2009) (citations and internal quotation marks omitted). The appellate court further noted in that case that the proposed use of the water system by the energy company "would result as a consequence of Merit Energy's use: increased sedimentation, phosphorus levels, and erosion into Lynn Lake; significant flooding along Kolke Creek; aesthetic and economic impairment of Kolke Creek; overall drop in water quality and increase in turbidity; and harm to aquatic life." *Id.* The Michigan appellate court thus held that the plaintiffs, riparian landholders and fishing organization, had asserted an injury in fact because the energy company's "use of the water system would necessarily interfere with plaintiffs' use, thereby affecting their riparian rights. Indeed, our Supreme Court has long held that any use that materially . . . adulterates the water may impair riparian rights for the ordinary purposes of life." *Id.*

In 1938, the supreme court of North Carolina found that, while it was required to remand the case to a jury defendant's operation of a hydroelectric dam and subsequent changes in water flows were probably "taking or appropriating the property of the plaintiff without compensation." *Dunlap v. Carolina Power & Light Co.*, 195 S.E. 43, 49 (N.C. 1938).Among the effects the downstream riparian plaintiff complained of were

> that great channels have been cut across his lands in which pools of stagnant water form and cause mosquitoes and other insects and vermin to breed . . . deprives him of the pleasure and profit in the pursuit of fishing and the other ordinary uses of said water and results in material damage to the banks of the stream which are a part of his property . . .

*Id.* at 44. In remanding this case to the trial level, the North Carolina Supreme Court stated that a "riparian proprietor has a right to make all the use he can of the stream so long as he does not pollute it or . . . or does not use the same in such an unreasonable manner as to materially damage or destroy the rights of other riparian owners." *Id.* at 47.

In Mississippi, riparian and littoral rights stem from both common law and statutes, and may be described as "rights to reasonable use, subject to the State's interest in the lands." *Bayview Land, Ltd. v. Mississippi*, 950 So. 2d 966, 988 (Miss. 2006). According to the Mississippi Supreme Court, operating a gaming boat on a river constitutes a "reasonable use" riparian right. *Id.* That court has also pointed to several statues that list riparian rights *Id.* The rights included in those statutes are: (1) "[t]he sole right of planting, cultivating in racks or other structures, and gathering oysters and erecting bathhouses and other structures in front of any land bordering on the Gulf of Mexico or Mississippi Sound or waters tributary thereto" (Miss. CodeAnn. § 49-15-9 (West 2009))[;] (2) "the construction and maintenance of piers, boathouses and similar structures [if they] are constructed on pilings that permit a reasonably unobstructed ebb and flow of the tide[;]" and (3) the right to "reasonably alter the wetland at the end of his pier in order to allow docking of his vessels." Miss. Code Ann. § 49-27-7 (West 2009).

Wisconsin law grants riparian landholders rights that are

> [W]ell defined and, though subject to regulation, include the right to use the shoreline and have access to the waters, the right to reasonable use of the waters for domestic, agricultural and recreational purposes, and the right to construct a pier or similar structure in aid of navigation. A riparian owner is entitled to exclusive possession to the extent necessary to reach navigable water and to have reasonable access for bathing and swimming.

*ABKA Ltd. P'ship v. Dep't of Natural Res.*, 648 N.W.2d 854 (Wis. 2002).

## Florida Law

Over the years, Florida courts and legislatures have defined riparian rights to either include the rights to boat, fish, and swim, and the right to pollution-free water. The Florida statute governing riparian rights provides:

> Riparian rights are those 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*. Such rights are not of a proprietary nature. They are rights inuring to the owner of the riparian land but are not owned by him or her They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.

Fla. Stat. Ann. § 253.141 (West 2009) (emphasis added).

In *Ferry Pass Inspectors' and Shippers' Association v. White's River Inspectors and Shippers*, the Florida Supreme Court noted that there is "an additional right for upland property owners adjacent to a navigable waterway [to] . . . have 'water kept free from pollution.'" 48 So. 643, 644–45 (Fla. 1909).

And in 1919, in*Brickell v. Trammell*, the Florida Supreme Court held that the riparian right also includes the right to water free from pollution:

> At common law those who own land extending to ordinary high-water mark of navigable waters are riparian holders, who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of the waters opposite their holdings; among them being the right of access from the water to the riparian land and such other rights as are allowed by law

82 So. 221 (Fla. 1919) (citations omitted).

## Conclusion

*Stop the Beach Renourishment* and *Mildenberger* (St. Lucie River case) are excellent opportunities for courts to underscore the importance of riparian rights protection in ecosystem restoration.A decision in*Stop the Beach Renourishment* is expected this summer and a decision in*Mildenberger* is expected by 2011. A decision protective of riparian rights would be consistent generally with the body of law that has developed as a complex web of interlocking principles aimed at accommodating interests as diverse as navigation, agriculture, heavy industry recreation, domestic use, fisheries, and wetlands—to name only a few—reflected in environmental law generally and the common and statutory law regarding riparian rights in many states.

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# NEVADA SUPREME COURT DETERMINES STATE ENGINEER VIOLATED STATUTORY DUTY BY NOT RULING WITHIN ONE YEAR ON APPLICATIONS TO APPROPRIATE WATER, IRRESPECTIVE OF 2003 LEGISLATIVE AMENDMENT: *GREAT BASIN WATER NETWORK V. STATE ENGINEER*

**Severin A. Carlson**

## I. Introduction

Pursuant to NRS 533.370(2), as it existed in 1989, the Nevada Division ofWater Resources, Office of the State Engineer (state engineer) was required to approve or reject each water appropriation application within one year after the final protest date. The state engineer could postpone taking action beyond one year if he obtained a written authorization from the applicant and protestants or if there was an ongoing water supply study or court actionNRS 533.370(2)(a). In 2003, the Nevada legislature amended NRS 533.370, allowing the state engineer to postpone action if the purpose for which the application is made is municipal use. NRS 533.370(2)(b) (2003).

## II. Background

### *A. The Parties*

The respondent state engineer is charged with administering the state of Nevada's water law, including but not limited to reviewing, approving, and rejecting applications to appropriate water within the state.

The respondent, Southern NevadaWater Authority (SNWA), is a cooperative agency created in 1991 to address southern Nevada's unique water needs on a regional basis. SNWA acquired from the LasVegas Valley Water District (LVVWD) the rights to approximately 146 applications filed with the state engineer in 1989 to appropriate public water from groundwater sources throughout the state of Nevada. The applications sought to appropriate nearly 800,000 acre-feet per year, a substantial sum of water which the state engineer referred to as the largest interbasin appropriation and transfer of water ever requested in