OVERCOMING WILLIAMSON COUNTY'S TROUBLING STATE PROCEDURES RULE: HOW THE ENGLAND RESERVATION, ISSUE PRECLUSION EXCEPTIONS, AND THE INADEQUACY EXCEPTION OPEN THE FEDERAL COURTHOUSE DOOR TO RIPE TAKINGS CLAIMS

J. DAVID BREEMER*

Table of Contents

* Staff Attorney, Pacific Legal Foundation. J.D., William S. Richardson School of Law, University of Hawaii, 2001; M.A., University of California, Davis, 1992; B.A., University of California, Santa Barbara, 1990. This article was prepared while the author was a fellow in Pacific Legal Foundation's Program for Judicial Awareness. A previous version of this paper was presented during the Tenth Annual Advanced ALI-ABA Course of Study, *Inverse Condemnation and Related Governmental Liability*, held in Chicago, Illinois, September 26-28, 2002.

I. INTRODUCTION

In the 1985 case of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[1] the United States Supreme Court held that a property owner must satisfy two procedural requirements before invoking federal jurisdiction over a claim that local or state regulatory action has effected a taking of private property in violation of the Fifth Amendment to the United States Constitution. The landowner must first establish that a final decision has been made with respect to the allowable use of property in question.[2] Second, the takings claimant must show that she has utilized state procedures for obtaining just compensation for an alleged taking of property prior to filing suit in federal court.[3] A takings claim is "ripe" for federal adjudication only when both of these steps are completed, and compensation is either denied, or is shown to be unavailable under state processes.[4]

As commentators have long noted, the ripeness prongs established in *Williamson County* create powerful barriers to landowners seeking to have their takings claims heard on the merits in federal court.[5] When combined with preclusion doctrines,[6] the state procedures requirement is particularly pernicious.[7] In

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1. 473 U.S. 172 (1985).
2. *Id.* at 186.
3. *Id.* at 194-95.
4. *Id.* at 186.
5. *See, e.g.*, Stephen E. Abraham, Williamson County *Fifteen Years Later: When is a Takings Claim (Ever) Ripe*?, 36 REAL PROP. PROB. & TR. J. 101, 104 (2001) ("*Williamson County* is regarded as posing formidable hurdles because of its two-part ripeness requirement, finality and compensation, that ultimately may block takings claims."); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 102 (2000) ("In *Williamson County*, … the Court expanded on the doctrine of ripeness in regulatory takings cases transforming the ripeness doctrine from a minor anomaly into a procedural monster."); Max Kidalov & Richard Seamon, *The Missing Pieces of the Debate Over Federal Property Rights Litigation*, 27 HASTINGS CONST. L.Q. 1, 5 (1999) ("The U.S. Supreme Court has developed rules that make it almost impossible for federal courts to remedy violations of the Just Compensation Clause by local land-use agencies."); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings*, 11 J. LAND USE & ENVTL. L. 37, 37 (1995) [hereinafter *Ripeness and Forum Selection*] (noting that *Lucas* and *Dolan* "have only a modest effect on the … ripeness [requirements] and [on] forum selection [imposed by *Williamson County*], which remain formidable hurdles in land use litigation.").
6. The applicable preclusion doctrines include res judicata, otherwise known as "claim preclusion," and collateral estoppel, often called "issue preclusion." This Article will use the terms "claim" and "issue" preclusion. Claim preclusion prevents litigation of any claim that was or could have been litigated in an earlier action involving the same parties. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d129, 1307-08 (11th Cir. 1992). Issue preclusion prevents litigation of any issue that was actually litigated in a prior action. *See* RESTATEMENT (SECOND) OF JUDGMENTS 27 (1982).
7. For a general discussion of the effect of the combination of the state procedures requirement and the doctrines of res judicata and collateral estoppel, see Berger, *supra* note 5; Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State*

many cases, it has been applied to close the federal courthouse door to attempts to vindicate federal rights under the Takings Clause,[8] a situation that cannot be reconciled with the Court's opinion in *Williamson County* or with the well-established role of federal courts in enforcing federal constitutional law.

Still, despite intense pleas for reform from commentators on all sides of the takings issue,[9] federal courts have so far failed to provide a coherent solution to the injustices wrought by the state procedures requirement. The Supreme Court, while softening the final decision requirement in the recent case of *Palazzolo v. Rhode Island*,[10] has failed to elaborate on the meaning of the state procedures prong and how it relates to doctrines of preclusion.

This article examines this important and unique ripeness requirement and criticizes its adoption by the Court and application in the lower courts. Part II reviews the facts and litigation in *Williamson County*. Part III looks closely at the purported foundations of the state procedures requirement and concludes that it is doctrinally unsound as a rule required by the text of the Takings Clause, or as either a ripeness or exhaustion standard. This section also reviews the interpretation of the requirement in federal courts and illustrates the fundamental unfairness, and

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Compensation Requirement and Principles of Res Judicata, 24 URB. LAW. 479, 483 (1992).

8. *See, e.g.,* Berger, *supra* note 5, at 102 ("When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it."); Kidalov & Seamon, *supra* note 5, at 10-11 ("The district-court route [for litigating a takings claim] may prove fruitless,…because litigation of the taking claim there ordinarily will be barred by the doctrines of issue or claim preclusion…."); Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 ECOLOGY L. Q. 1, 18 (1999) ("The combination of *Williamson County* and § 1738 [mandating application of the doctrines of preclusion], therefore, effectively precludes adjudication of federal takings claims in federal court.").

9. *See generally* Michael M. Berger & Gideon Kanner, *The Need for Takings Law Reform: A View from the Trenches — A Response to* Taking Stock of the Takings Debate, 38 SANTA CLARA L. REV. 837, 874-75 (1998); Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988); John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"?: A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999) (arguing that Congress should pass legislation easing the rules for jurisdiction of takings claims); Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, 42 LAND USE L. & ZONING DIG. 3 (1990) (arguing federal takings questions should be resolved in federal courts); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far the Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994).

10. 533 U.S. 606 (2001); *see also* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 739 (1997) (concluding that where an agency lacks discretion over a landowner's right to use land, "no occasion exists for applying *Williamson County's* requirement that a landowner take steps to obtain a final decision about the use that will be permitted on a particular parcel.").

error, of applications of the rule that allow claim and issue preclusion to relegate properly ripened claims to the state courts. Part IV explores several generally applicable exceptions to the state procedures requirement that are consistent with *Williamson County* and that should allow many as-applied takings claimants to raise their federal constitutional claims in federal court.

II. THE ORIGINS OF THE STATE PROCEDURES REQUIREMENT

A. Facts and Lower Court Rulings in Williamson County

At the center of the decision in *Williamson County* is a residential cluster subdivision located outside Nashville, Tennessee.[11] In 1973, the Williamson County Regional Planning Commission approved a preliminary plat for development of Temple Hills Country Club Estates (Temple Hills), a subdivision covering 676 acres, 260 of which were reserved for open space purposes, including a golf course positioned in the center of the development.[12] Around the golf course, on the steeper acreage, were to be 736 houses[13] ("later reduced to 688 because of a subsequent condemnation of 18.5 acres for the Natchez Trace Parkway").[14] On the plat, lot lines were drawn for only 469 of these residences. It was understood that the Commission would decide on the specific placement of the remaining units as the development proceeded.[15]

Between 1973 and 1979, the landowner encountered few problems developing the property, and managing to build and sell 212 houses,[16] and spending between three and five million dollars improving the golf course and other infrastructure.[17] Although the county enacted more restrictive zoning and subdivision ordinances during the same period,[18] it refrained from applying them to the property. This policy was premised on an informal understanding, a clause in the subdivision regulations that appeared to keep the development within the 1973 zoning scheme, and the fact that the county legislature conferred nonconforming zoning status on the

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11. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 176-77 (1985); Gus Bauman, Hamilton Bank – *Supreme Court Says: Don't Make a Federal Case Out of Zoning Compensation*, 8 ZONING & PLAN. L. REP. 137, 138 (1985).

12. *Williamson County*, 473 U.S. at 177.

13. *Id.*

14. Bauman, *supra* note 11, at 138.

15. *Williamson County*, 473 U.S. at 177.

16. Hamilton Bank of Johnson County v. Williamson County Reg'l Planning Comm'n, 729 F.2d 402, 406 n.5 (6th Cir. 1984), *rev'd and remanded*, 473 U.S. 172 (1985).

17. Respondent's Brief at 7, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) (No. 84-4) [hereinafter Respondent's Brief]; Bauman, *supra* note 11, at 138.

18. *Williamson County*, 473 U.S. at 178.

property.[19] However, in 1979, the Commission suddenly decided that all plats would be reviewed under existing regulations.[20] (Trial testimony suggested that the county executive, for political reasons, had ordered that county officials hinder the approval or re-approval of development in order to prevent more people from moving into the county.)[21] Thus, in 1980, "the Commission asked the developer to submit a revised preliminary plat before it sought final approval."[22] Relying on the latest zoning regulations, the Commission subsequently found the plat inadequate because it was inconsistent with lowered density requirements and limitations on lots placed on slopes in excess of twenty-five percent, among other reasons.[23]

Based on a belief that the 1980 plat should have been reviewed under earlier zoning regulations, the developer appealed to the County Board of Zoning Appeals.[24] Though the Board ultimately agreed, it was too late for the developer. The developer went bankrupt and Hamilton Bank, which had been in on the project from the start, acquired the remaining undeveloped tract of 258 acres through foreclosure.[25] After working with the planning staff, the Bank submitted two revised preliminary plats, the 1973 plat that had been approved several times, and a plat for the 258-acre parcel with lots indicated for the final 476 units.[26] The Board of Zoning Appeals' decision notwithstanding, the Commission applied the 1979 zoning regulations and concluded that all of the plats were inadequate under the more restrictive land use scheme.[27] In the end, the Bank was granted permission to develop sixty-seven more units on the property, a decision that foreclosed any possibility of economic gain from the development, and, in fact, was likely to result in a one million loss on the entire project.[28]

The Bank subsequently inquired about another appeal to the Board of Zoning Appeals, but was told by the county attorney that such action would be futile.[29] It therefore initiated a suit under 42 U.S.C. § 1983 in federal district court, alleging, among other things,

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19. *Id.*; *see also* Respondent's Brief, *supra* note 17, at 7-8.
20. *Williamson County*, 473 U.S. at 178-79.
21. Respondent's Brief, *supra* note 17, at 8 n.5.
22. *Williamson County*, 473 U.S. at 179.
23. *Id.* at 179-80.
24. *Id.* at 180.
25. *Id.* at 181.
26. *Id.*
27. *Id.* at 181-82. The Commission cited problems with density, slope grades, road grades, the length of two cul-de-sacs, a perceived lack of adequate fire protection, disrepair of the main access road, and insufficient road frontage for the lots. *Id.* at 181.
28. *Id.* at 182.
29. Respondent's Brief, *supra* note 17, at 9.

that the County had deprived it of its rights under the Takings Clause of the Fifth Amendment to the United States Constitution.[30] After a three-week trial, a jury found that state law prevented the Commission from applying post-1973 regulations to the Temple Hills development.[31] It then awarded $350,000 in just compensation for the temporary taking of the Bank's land during the period between the 1980 plat rejection and the jury's finding that the county's actions were illegal.[32] However, the trial judge granted the county a judgment notwithstanding the verdict on the takings issue, reasoning that the Bank "was unable to derive economic benefit from its property on a temporary basis only, and … such a temporary deprivation, as a matter of law, cannot constitute a taking."[33] On appeal, the Sixth Circuit relied on Justice Brennan's dissenting opinion in *San Diego Gas & Electric v. San Diego*,[34] in concluding that "[t]he jury was correctly instructed on the question of damages under the theory of a temporary taking."[35] It therefore reinstated the $350,000 compensatory award, prompting the Commission to turn to the United States Supreme Court.[36]

B. The Supreme Court Opinion

The Supreme Court has often pointed out the folly of addressing questions that were not presented, briefed, or addressed by the courts below. Yet this is precisely what it did in *Williamson County*.[37] On certiorari, the only issue before the Court was "whether Federal, State, and local Governments must pay money damages to a landowner whose property allegedly has been 'taken' temporarily by the application of government regulations."[38] Accordingly, the attorneys general of no fewer than nineteen states and territories, together with the National Association of Counties, the City of New York, and the City of St. Petersburg, Florida, joined

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30. *Williamson County*, 473 U.S. at 182, 182 n.4.

31. *Id.* at 182-83. The jury also found that the Bank was not denied procedural due process, and the judge ruled for the Commission on the substantive due process and equal protection claims. *Id.* at 182 n.4.

32. *Id.* at 183.

33. *Id.*

34. 450 U.S. 621, 636 (1981).

35. *Id.*

36. Hamilton Bank of Johnson City v. Williamson County Reg'l Planning Comm'n, 729 F. 2d 402, 408-09 (1984).

37. Bauman, *supra* note 11, 138.

38. *Williamson County*, 473 U.S. at 185. The Commission argued that Justice Brennan's four-justice dissenting opinion in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 636 (1981), which, when coupled with Justice Rehnquist's concurring *San Diego* opinion, suggested that just compensation is required for temporary deprivations of all use of property, should not be followed as the Court's holding. *See generally*, Bauman, *supra* note 11, at 138.

the petitioner in urging the Court to reverse the judgment rendered in favor of the property owner "on the ground that a temporary regulatory interference with an investor's profit expectation does not constitute a ' … or, alternatively, on the ground that even if [it does],… the Just Compensation Clause does not require money damages as recompense."[39] On the other side, four professional and public-interest organizations filed amicus curiae briefs urging the Court to affirm the temporary takings judgment so as to establish that regulation that effectively wipes out a property's value is a taking for public use, requiring money damages under the Just Compensation Clause.[40] These were the identical constitutional arguments put to the Court in *Agins v. City of Tiburon*[41] and *San Diego Gas & Electric.*

Only the United States Solicitor General advanced the unique argument that *Williamson County* raised, the issue of a premature compensation claim.[42] "Quietly distancing itself from what it had asserted in its *amicus* briefs filed in *Agins* and *San Diego*, the government in its Hamilton Bank brief never argued that a regulation cannot be a taking,"[43] but rather, that *Hodel v. Virginia Surface Mining & Reclamation Association*,[44] required a party to exhaust administrative remedies and to seek judicial review before pursuing just compensation for a taking.[45] At oral argument, the Solicitor General briefly explained:

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39. *Williamson County*, 473 U.S. at 174-75.

40. *Id.* at 174.

41. 447 U.S. 255 (1980).

42. Bauman, *supra* note 11, at 140. In his discussion Bauman notes that:

> The government's strategy was to maintain that the taking issue was not ripe for decision in this instance, thereby sidestepping discussion of what many in the land use field anticipated after the three *San Diego* opinions and other recent High Court takings opinions — that the Court would rule as Brennan had suggested if it ever confronted the compensation issue directly.

Id. On the other hand:

> [t]he question of whether the Bank's attempt to secure compensation was premature was injected into the appeal by the United States Solicitor General who filed an amicus brief in support of the Commission's effort to reverse the decision of the Sixth Circuit. [In fact], [m]uch of the Solicitor General's brief was devoted to the argument that the litigation was premature.

R. Marlin Smith, *The* Hamilton Bank *Decision: Regulatory Inverse Condemnation Claims Encounter Some New Obstacles*, 29 WASH. U. J. URB. & CONTEMP. L. 3, 8 (1985).

43. Bauman, *supra* note 11, at 140.

44. 452 U.S. 264 (1981).

45. *Williamson County*, 473 U.S. at 186; *see* Brief of Amicus Curiae United States, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, at 12, 473 U.S. 172 (1984) (No. 84-4).

> As an initial matter, as we point out in our brief, it doesn't appear that Respondents have ever alleged or proven that any taking that occurred in this case was without just compensation, because they haven't shown that a compensation remedy would be unavailable under state law. To ignore this *essential element of a Fifth Amendment claim* would be in effect to convert the Federal District Courts into claims courts for the states by permitting them to entertain inverse condemnations in any case, even though the state might also provide an inverse condemnation remedy.[46]

Although the Solicitor General seemed less than sure about this argument when pressed by the Court,[47] the Court's opinion clearly adopted and applied the essence of the proposed rule.

Writing for the majority, Justice Blackmun initially declared that a takings claim is premature unless the "government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[48] This "final decision" requirement rested, he explained, on the fact that courts cannot determine whether the application of land use regulations to a claimant's property have gone "too far"[49]

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46. Transcript of Oral Argument, Williamson County Reg'l Planning Comm'n, et al., v. Hamilton Bank of Johnson City, at *17-18, 1985 U.S. TRANS LEXIS 76 (emphasis added). The Solicitor General did not indicate how the state judicial exhaustion requirement, which had never before been enunciated by the Supreme Court, had become an "essential element" of a takings claim, but no one on the Court questioned him on this point. *Id.*

47. Surprisingly, when addressing the merits of the Bank's takings claim, the Solicitor General stated that "the submission of the United States in this case does not relate to the without just compensation aspect of the cause of action…." *Id.* at *18. When pressed for clarification about the applicability of its state exhaustion argument, the Solicitor General refused to say whether Hamilton Bank should have been required to pursue its remedies in state court:

> QUESTION: Mr. Kneedler, do you take the position that a property owner would have to follow judicial review remedies as well for it to ripen into a taking?
> MR. KNEEDLER: I think that would depend on the particular statutory scheme. I think under the federal system Congress could prescribe that APA review would have to be sought for the denial of a permit, and that's particularly so where the agency was not authorized to engage in conduct that would constitute a taking.
> QUESTION: Well, do you think that's true in this case?
> MR. KNEEDLER: I think that's less clear. I think it tends to blend in with the question of whether there should be abstention on the state law question of whether the commission had properly applied state law.

Id. at *25-26.

48. Williamson County, 473 U.S. at 186.

49. In the seminal regulatory takings case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S.

and caused a taking without a concrete idea of just what the government will and will not permit.[50] Observing that the Board of Zoning Appeals was empowered to grant variances with respect to at least five of the eight objections that the Commission raised to the proposed subdivision, and that the Bank had failed to apply for these variances, Blackmun reasoned that it was unclear whether the Commission would refuse to permit either the development that was sought by the Bank or any other economically viable use of the property. Consequently, the Bank's claim was unripe due to a failure to comply with the final decision requirement.[51]

Though the Court could have stopped at this point, Justice Blackmun drew from the Solicitor General's argument to posit a second reason why the Bank's taking claim was not yet ripe for review. Blackmun observed that a taking of private property is unconstitutional only when it occurs *without just compensation*.[52] Citing to the *Regional Rail Reorganization Act Cases*,[53] and *Ruckelshaus v. Monsanto Co.*,[54] cases where the Court denied injunctive relief for a taking because the claimants did not seek compensation in the Court of Federal Claims, Blackmun read this portion of the Takings Clause to mean that there can be no takings violation when an adequate post-deprivation remedy exists.[55] More

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393, 415 (1922), the Court declared that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking." (emphasis added).

50. *See Williamson County,* 473 U.S. at 190-91.

51. *See id.* at 194. The Court explained:

> We need not pass upon the merits of petitioners' arguments, for even if viewed as a question of due process, respondent's claim is premature. Viewing a regulation that "goes too far" as an invalid exercise of the police power, rather than as a "taking" for which just compensation must be paid, does not resolve the difficult problem of how to define "too far," that is, how to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession. As we have noted, resolution of that question depends, in significant part, upon an analysis of the effect the Commission's application of the zoning ordinance and subdivision regulations had on the value of respondent's property and investment-backed profit expectations. That effect cannot be measured until a final decision is made as to how the regulations will be applied to respondent's property.

Id. at 199-200.

Earlier, the Court suggested that the final decision requirement was necessary to determine if "respondent [property owner] will be denied all reasonable beneficial use of its property." *Id.* at 194. This language foreshadows the decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992), which said that a taking automatically occurs where a regulation effects a denial of all economically beneficial use.

52. *Williamson County*, 473 U.S. at 194-95, n.13.

53. 419 U.S. 102 (1974).

54. 467 U.S. 986 (1984).

55. *See Williamson County*, 473 U.S. at 194-95.

specifically, the Just Compensation Clause precluded a federal takings claim if the claimant has successfully utilized the state's "reasonable and adequate provision for obtaining compensation."[56] This line of thinking led directly to the rule that a federal claimant must first seek compensation through an adequate state process before filing for a taking in federal court.[57] After observing that the newly-minted state procedures rule followed in the tradition of *Parratt v. Taylor*,[58] a case holding that a post-deprivation process is an adequate procedural due process remedy,[59] the Court applied the requirement against the Bank and dismissed its claims without ever reaching the temporary takings issue upon which certiorari was granted.[60]

III. THE SHAKY BASIS FOR THE STATE PROCEDURES RULE AND ITS EVEN MORE TROUBLING APPLICATION IN THE FEDERAL COURTS

Following the Court's decision in *Williamson County*, lower federal courts eagerly applied the state procedures rule to send takings cases to the state courts.[61] However, as discussed more fully below, upon the claimants later return, the same courts refused to invoke federal jurisdiction under *Williamson County*.[62] Many courts and commentators have questioned this outcome,[63] but few have stopped to consider in any depth the legitimacy of the core of the problem — the state procedures rule. This may have been understandable immediately following the Court's decision, since it

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56. *Id.* at 195.

57. *See id.*

58. 451 U.S. 527 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

59. *See Williamson County*, 473 U.S. at 195.

60. *See id.* at 199-200. The Court applied the state procedures rule against the Bank because it had not taken advantage of an inverse condemnation procedure available under Tennessee law prior to asserting its federal takings claim, nor shown that the procedure was "unavailable or inadequate." *Id.* at 196-97.

61. *See* Kovacs, *supra* note 8, at 10 n.49 (listing cases). A few courts have also applied the state procedures requirement in land use cases that implicate other constitutional protections. *See generally*, Abraham, *supra* note 5, at 111-25 (discussing the application of *Williamson County* to substantive and procedural due process claims and equal protection claims). For criticism of the application of the state procedures rule to due process and equal protection claims in the land use context, see Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights,* 29 CAL.W. L. REV. 1, 44-47 (1992).

62. *See infra* Section III C.

63. *See, e.g.,* Blaesser, *supra* note 9; Joel Block, *Takings Claims: Are the Federal Courts Truly Open?*, 8 MO. ENVTL. L. & POL'Y REV. 74, 82-83 (2001) (discussing a Second Circuit case that illustrates the "injustice" the of intersection of preclusion doctrines and *Williamson County*'s state procedures requirement); Delaney & Desiderio, *supra* note 9; Overstreet, *supra* note 9.

suggested that utilization of state procedures was simply a temporary hurdle for federal review. But the subsequent pernicious application of the state procedures rule in lower federal courts has negated this consolation and placed the second *Williamson County* ripeness requirement in an unexpected position of tremendous importance. In this context, it is worth returning to the purported foundations for the state procedures requirement.

A. Critical Flaw: The Just Compensation Clause Requires a Post-Deprivation Remedy

1. The Traditional Understanding of the Just Compensation Clause

The heart of the state procedures requirement is the assumption that the Just Compensation Clause merely acts as a remedial provision that affords a takings claimant a right to post-taking damages. Once this proposition is accepted, it is a relatively easy step to the conclusion that a takings violation occurs only after the claimant unsuccessfully seek damages. But there are strong reasons to doubt these initial premises.[64] To begin, the text of the Takings Clause does not require such an interpretation; the mandate that there shall be no taking "without just compensation" is more easily read to mean that compensation must accompany the taking, than it is to mean that the claimant shall have the opportunity to ask for the compensation remedy in a post-taking court action.[65] After all, it is the first interpretation, and not the second (*Williamson County* rule), that is in accord with the orthodox understanding of the timing of a constitutional violation:

> [A]ssuming that you have sought to make use of your land and have been told no, then, from the moment you receive that denial, you have been deprived of your right to compensation. The result is in concept no different from the policeman bopping

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64. *See* Peter A. Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, in TAKINGS SIDES ON TAKINGS ISSUES, 471, 473-74 (Thomas E. Roberts, ed. 2002) ("This underlying premise [that the government has not acted illegally until you ask for compensation and then it is denied] is, of course, untrue."); *Ripeness and Forum Selection*, 11 J. LAND USE & ENVTL. L. 37, 72 (1995) ("The language of the Fifth Amendment does not dictate this [state procedures] rule.").

65. *See* Buchsbaum, *supra* note 64, at 473; Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 113 (1999) ("Just compensation clauses were framed as limitations – 'private property shall not be taken for public use without just compensation' – rather than as remedial grants – 'whenever the state takes property, it will have an obligation to pay just compensation.'").

> you over the head. After he is done, and assuming he is not repeating the attack, then the only issue is compensation for the violation of your right not to have your body attacked by an official. Yet, you do not have to ask for money before suing.
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> The same should be true, one would think, where the government tells you you can't do something to or with your land; at that point the right to compensation should vest, just as your right to equal protection of the laws would vest where the denial of use is discriminatory, or your right to substantive due process of law would vest if the denial were arbitrary and capricious.[66]

Historically, federal and state courts adhered to this common sense construction by applying the "just compensation" requirement as a necessary condition for exercises of eminent domain, rather than as a post-deprivation damages remedy.[67] During the century following the ratification of the Bill of Rights and parallel state provisions, courts held that compensation must be provided at the time of the act, usually engaged in pursuant to statutory authority, alleged to be a taking.[68] If legislative authorization for the taking did not make compensation available as a practical matter, the act was considered void.[69] In many cases, the aggrieved property owner

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66. Buchsbaum, *supra* note 64, at 473.

67. *See* Brauneis, *supra* note 65, at 60 ("The truth, however, is that for most of the nineteenth century, just compensation clauses were *generally* understood not to create remedial duties, but to impose legislative disabilities.") (emphasis added).

68. *See, e.g.,* Scott v. City of Toledo, 36 F. 385, 401-02 (C.C.N.D. Ohio Cir. 1888) (stating that the city may "appropriate complainants' property to the purpose of a public street … *upon making or providing* just compensation") (emphasis added); United States v. Oregon Ry. & Nav. Co., 16 F. 524, 530 (C.C.D. Or. 1883) ("It has been held to be sufficient if adequate provision for compensation is contained in the act."); *see also* Baring v. Erdman, 2 F. Cas. 784, 791 (C.C.E.D. Pa. 1834) (No. 981). In *Baring*, the court stated:

> If the complaint of this bill was the want of any provision for compensation [in the legislative act], or of its actual payment before taking actual possession of the premises, or applying the water to public use, and the prayer had been to order a suspension of all proceeding till it had been done, there might have been strong grounds for our interference; the obligation upon the state to make compensation is undoubtedly co-extensive with their power to take … private property.

Id.; Baltimore & O.R. Co. v. Van Ness, 2 F. Cas. 574, 576 (C.C. D.C. 1835) (No. 830) ("Upon making just compensation, to be ascertained by a jury, we cannot say that the provisions of the act, which authorize the condemnation of land . . . are void, as being unconstitutional."); Eaton v. B. C. & M. R.R. Aiken, 51 N.H. 504, 510 (N.H. 1872) (stating that the legislature did not have power to statutorily authorize taking by the railroad without also authorizing just compensation).

69. *See* Brauneis, *supra* note 65, at 60-61. Brauneis explains:

then had a right to claim damages sustained as a result of its operation.[70]

The rule, implied in some early cases, that compensation must be paid in *advance* of the taking[71] did give way to the understanding that all that is necessary is a "reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed."[72] But even under this formulation, the constitutionality of a taking hinged upon whether the legislative authorization ensured just compensation at the time of the taking.[73] If not, the

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> An antebellum court did not ask whether a legislatively authorized act amounted to a taking of private property, and enter a judgment for just compensation if it did. Rather, the court asked whether the act purportedly authorized by the legislation amounted to a taking, and if so, whether the legislation itself provided for just compensation. If not, the legislation was void: the legislature had exceeded its competence, which the Constitution limited to the authorization of 'takings-with-just compensation.' Although the qualification in that limitation happened to involve the payment of money, the legal effect of exceeding the limitation was, in theory, no different than exceeding a constitutional limitation incorporating a non-monetary qualification, such as the Fourth Amendment's limitation of warrants to those that were 'issued … upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

70. *See, e.g.*, Thacher v. Dartmouth Bridge Co., 35 Mass. 501, 502 (Mass. 1836).

> [S]upposing that the act could be so construed, as to confer a power on the corporation to take private property for public use, without providing for an equitable assessment, and for the payment of an adequate indemnity, the act would, in this respect, be in contravention of the constitution of this Commonwealth, and in this respect void.… The consequence would be, that the party damaged would be remitted to his [damages] remedy at common law.

Id.; *see also* 2 PHILIP NICHOLS, THE LAW OF EMINENT DOMAIN 1276-77 (2d ed. 1917). It has also been stated that:

> If the plaintiff's [takings] argument prevailed, the court declared the legislation void, and the defendant's justification failed. Once the defendant was stripped of his justification, the plaintiff could recover the retrospective damages normally allowed under his common law action, and could obtain prospective relief by means of an action of ejectment or a suit in equity seeking an injunction.

Brauneis, *supra* note 65, at 65.

71. *See*, *e.g*, Postal Tel. Cable Co. v. S. Ry. Co., 89 F. 190, 191 (C.C.W.D. N.C. 1898) ("No act of congress can give the right of taking private property for public purposes without first paying just compensation."); *see also* The Md. & Wash. Ry. Co. v. Hiller, 8 App. D.C. 289, 294 (C.C.D.C. 1896) ("It is said by a learned author that, 'as an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation before entry upon his property.'").

72. Cherokee Nation v. S. Kan. Ry. Co., 135 U.S. 641, 659 (1890); *cf. The Md. & Wash. Ry. Co.*, 8 App. D.C. at 294 ("We think that interpretation [requiring compensation in advance] is the true one … with a probable exception in the case of the Federal and State governments, in whose favor the certainty of payment from the public revenues is considered.").

73. Id.

government lacked the power to interfere with private property as intended.

It was only at the end of the nineteenth century that federal courts began to view a post-taking compensation suit as a "reasonable provision" for obtaining just compensation from the federal government.[74] Passage of the Tucker Act, which allowed for monetary claims against the United States in the newly-created Court of Claims, was a major catalyst in the theoretical reorientation of the Just Compensation Clause.[75] After its enactment, courts began to refuse to enjoin an act that effected a taking without providing a means of compensation; instead, the aggrieved property owner was expected to go to the Court of Claims in an effort to obtain prospective compensation.[76] *Hurley v. Kincaid,*[77] a case in which a landowner alleged that a taking arose from a federal flood control act, accurately describes the still-applicable framework:

> If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. The compensation which he may obtain in such a proceeding will be the same as that which he

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74. *See* Dashiell v. Grosvenor, 66 F. 334, 337 (4th Cir. 1895) (noting that plaintiffs alleging patent infringement "can recover just compensation for such use and infringement from the government by suit in the court of claims"); *In re* Rugheimer, 36 F. 369, 372 (E.D.S.C. 1888).

> In the act of 1888 congress has empowered certain public officials … to put in operation the right of eminent domain. It requires this right to be exercised by judicial proceedings in the district or circuit courts of the United States. These courts, in directing and conducting these proceedings, mindful of their constitutional obligations, must see to it that the process of condemnation be not awarded unless full compensation be provided. The act of 1888 must be read *in pari materia* with the constitution. The term 'condemnation,' used in that act, must be construed to mean condemnation with just compensation. The machinery of the courts is employed to ascertain and secure such compensation. In my opinion the act is not in conflict with the constitution.

Id.

75. The Tucker Act grants jurisdiction to the Court of Federal Claims to adjudicate "any claim against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491(a)(1) (2002); *see also* 28 U.S.C. § 1346 (a)(2) (2002) (granting the district courts concurrent jurisdiction over such claims "not exceeding $10,000 in amount"). It is this jurisdictional grant that authorizes the Court of Federal Claims to hear and determine monetary claims against the United States for just compensation. *See, e.g.,* United States v. Causby, 328 U.S. 256, 267 (1946) ("If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine.").

76. *See Dashiell*, 66 F. at 337.

77. 285 U.S. 95 (1932).

> might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainants' own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law.[78]

The judicial conception of just compensation exemplified in *Hurley* did not, however, immediately spill over into cases where the takings claim targeted a state or local action, rather than the federal government. While a few nineteenth century state courts flirted with the idea that the Just Compensation Clause is a remedial provision granting a distinct cause of action,[79] they exhibited great uncertainty in this regard[80] and failed to convince other contemporary courts to abandon the conception of the Clause as a provision conditioning the government's power.[81] Accordingly,

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78. *Id.* at 104 (citations omitted).

79. *See, e.g.,* City of Elgin v. Eaton, 83 Ill. 535, 536 (Ill. 1876) ("The right to recover damages was given by the constitution; and inasmuch as the city failed to have them assessed as they might have been under the Eminent Domain Law, then in force, the action will lie for their recovery."); Johnson v. City of Parkersburg, 16 W. Va. 402, 425 (W. Va. 1880). Other cases considered just compensation clauses to provide a right to damages and not an injunction only when the claim arose under a state takings clause that prohibited "damages" as well as takings of private property. *See* Moore v. City of Atlanta, 70 Ga. 611, 614-15 (Ga. 1883) (denying request for injunction to halt street improvement that damaged abutting property, but stating that owner could "recover damages for such injury to his freehold … measured by the decrease in the actual value of his property"); Stetson v. Chi. & Evanston R.R. Co., 75 Ill. 74, 78 (Ill. 1874) ("What [consequential] injury, if any, he has sustained, may be compensated by damages recoverable by an action at law."). In light of these and other similar cases, Professor Brauneis argues that the states' 19th Century rush to include damages provisions in traditional takings clauses paved the way for courts to re-conceptualize the phrase "without just compensation" as a remedial, rather than a power-limiting, provision. *See* Brauneis, *supra* note 65, at 115-35.

80. *See, e.g., City of Elgin*, 83 Ill. at 536-38 (suggesting that Illinois' just compensation clause authorized a damages suit, but also stating that: "'[t]he failure to have the damages ascertained, if there were any, and provide the means to pay the same, was an omission of duty …").

81. *See* Cribbs v. Benedict, 44 S.W. 707, 709 (Ark. 1897) ("If it be conceded that compensation … is not provided in the act, that fact would not render it void, but only ineffectual to take the land in *invitum*."); Minn. v. Chicago, Milwaukee & St. Paul Ry. Co., 31 N.W. 365, 366 (Minn. 1887) ("So far as the section [of a legislative act] requires railroad companies to let other persons into possession of any portion of their land without the compensation required by the constitution, it is invalid."); *In re* App. for Drainage of Lands between Lower Chatham and Little Falls, 35 N.J.L. 497 (N.J. 1872) (stating that just compensation is satisfied where act authorizing taking provided for means to deduce and

many early twentieth century courts continued to operate under the understanding that a landowner was entitled to an injunction (or an order of ejectment) and retrospective damages when a state legislature acted to take property without ensuring that just compensation was available.[82] Indeed, this view controlled at the time of the High Court's decision in *Pennsylvania Coal Co. v. Mahon*,[83] which initiated the modern regulatory takings doctrine.[84]

In more modern times, state courts adhered to power-conditioning view of the "just compensation" requirement by holding invalidation the exclusive regulatory takings remedy.[85] Under this

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disburse compensation).

82. *See* City of Birmingham v. Ala. Home Bldg. & Loan Ass'n, 165 So. 817, 818-19 (Ala. 1936) ("Our Constitution requires just compensation to be paid before the taking," but if this right is waived, "suit for just compensation may be brought in equity, and, if necessary to obtain just compensation, injunctive relief [to halt taking without compensation] may be had."); Hays v. Ingham-Burnett Lumber Co., 116 So. 689, 693 (Ala. 1928) (quoting favorably an earlier case for proposition that "[j]ust compensation for the land at the time of its taking, paid before or concurrently with its appropriation, was the right of the appellant"); McCandless v. City of Los Angeles, 4 P.2d 139, 140-41 (Cal. 1931) ("In proper cases injunction relief should be granted until damages were paid where the public improvement substantially interfered with the right of access to land."); Peirce v. City of Bangor, 74 A. 1039, 1044 (Me. 1909).

> A full compliance with the method of giving just compensation prescribed by statute must be regarded as a condition precedent to the right of a municipality to assert legal ownership. It should be noticed upon this phase of the case that it is not incumbent upon the private owner to begin any kind of a proceeding to obtain just compensation. It is the bounden duty of the taker to make it before he can acquire title.

Id.; *see also* Hendershott v. Rogers, 211 N.W. 905, 906 (Mich. 1927) (noting the state just compensation clause had been amended in 1908 to provide that no taking shall occur unless "just compensation therefor … [is] first made or secured in such manner as shall be prescribed by law."); Bragg v. Yeargin, 238 S.W. 78 (Tenn. 1922) (holding an act taking private property for a school invalid because it did not include an adequate provision for just compensation); Decker v. State, 62 P.2d 35, 37 (Wash. 1936) (noting the property owner had two remedies when the state acted to take property without providing compensation, "[o]ne to enjoin, and the other to permit the work to go on and claim damages").

83. 260 U.S. 393 (1922).

84. *Id.* at 413 ("The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has *gone beyond its constitutional power*" [in enacting a law that takes property without proving compensation.]) (emphasis added); *see also* Agins v. City of Tiburon, 598 P.2d 25, 29 (1979). In *Agins*, the court stated that:

> It is clear both from context and from the disposition in *Mahon*, however, that the term 'taking' was used solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain. The high court set aside the injunctive relief which had been granted by the Pennsylvania courts and declared void the exercise of police power which had limited the company's right to mine its land.

Id.

85. *See* Davis v. Pima County, 121 Ariz. 343, 345 (Ariz. Ct. App. 1978), *overruled by* Corrigan v. City of Scottsdale, 149 Ariz. 538 (1986); *Agins*, 598 P.2d at 28-29; HFH, Ltd. v. Superior Court, 15 Cal. 3d 508 (1975); Mountain Med., Inc. v. City of Colo. Springs, 43 Colo.

now-defunct[86] invalidation rule, a takings violation occurred when it was clear that there was no compensation *at the time* of the excessive governmental action; it was this absence that called for the remedy of invalidation. As one prominent commentator explained at the height of the invalidation construct:

> Not only is an actual physical appropriation, under an attempted exercise of the police power, in practical effect an exercise of the power of eminent domain, but if regulative legislation is so unreasonable or arbitrary as virtually to deprive a person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain. Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary [italics omitted]. *It is invalid as an exercise of the power of eminent domain since no provision is made for compensation.*[87]

One result of this view was that a claimant against the state could initiate his takings suit in any appropriate state *or* federal court once the state had indicated its intent to unreasonably restrict private property without making any attempt to provide just compensation.[88]

App. 391, 393-94 (1979); Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614, 615 (Fla. 4th DCA 1973). *See also* Eck v. City of Bismarck, 283 N.W. 2d 193, 198-200 (N.D. 1979).

86. The United States Supreme Court rejected invalidation as the proper regulatory takings remedy two years after *Williamson County* in *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987). There, the Court held that the Constitution requires compensation for a regulatory taking, regardless of whether it is permanent or temporary. *Id.* at 321.

87. *Agins*, 598 P.2d 25, 28 (quoting 1 NICHOLS, EMINENT DOMAIN, § 1.4291 (3d rev. ed. 1978)) (italics added by the court).

88. *See* Berger, *supra* note 56, at 194, n.18 (listing pre-*Williamson County* takings cases prosecuted in federal courts). The Supreme Court has affirmed the basic principle underlying the traditional formulation – that the need for compensation arises at the same time of the taking – on many occasions and in many different ways. *See, e.g.,* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1991) (Brennan, J., dissenting) (stating that the government's duty to pay just compensation is triggered "[a]s soon as private property has been taken."); United States v. Dow, 357 U.S. 17, 22 (1958) (stating that the event of a taking "gives rise to the claim for compensation"); Soriano v. United States, 352 U.S. 270, 275 (1957) (notng that the claim for just compensation "accrued at the time of the taking.); United States v. Dickinson, 331 U.S. 745,751 (1947) (noting that "an obligation to pay for the land then arose"); Danforth v. United States, 308 U.S. 271, 284 (1939) (noting that "compensation is due at the time of taking."). Indeed, as early as 1913, the Supreme Court essentially rejected the notion, later adopted in *Williamson County*, that a state's actions may be attacked in federal court as a taking only after the state courts have had a chance to strike it down. See *Home Telephone and Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 295-96 (1913).

2. Monsanto and Parrat: Questionable Precedential Basis for the State Procedures Rule

The *Williamson County* Court relied on two cases to depart from the traditional, power-limiting understanding of the Just Compensation Clause and its logical enforcement in federal courts.[89] Most importantly, the Court analogized to the 1984 case of *Ruckelshaus v. Monsanto Co.*[90] In *Monsanto*, a chemical company sought injunctive and declaratory relief in alleging that the government's disclosure of trade secrets provided in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) amounted to an unconstitutional taking.[91] After determining that some of the disclosures did in fact take *Monsanto*'s property, the Court considered whether such a determination afforded a basis for granting the particular relief sought. The Court concluded that "[*e*]*quitable relief* is not available to enjoin an alleged taking of private property for a public use … when a suit for compensation can be brought against the sovereign subsequent to the taking."[92] It held that a takings plaintiff may not pursue injunctive relief against the United States in a district court (at least not until after it has sought just compensation in the Court of Claims).[93]

In *Williamson County*, the Court relied on *Monsanto* for the following critical conclusions:

> If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking. Thus we have held that taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act. Similarly, if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation.[94]

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89. *See, e.g.,* Ruckelshaus v. Monsonto Co., 467 U.S. 986 (1984); Parratt v. Taylor, 451 U.S. 527 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

90. 467 U.S. at 1016-20.

91. *Id*. at 998-99 (alleging that "all of the challenged provisions effected a 'taking' of property without just compensation, in violation of the Fifth Amendment").

92. *Id.* at 1016 (emphasis added); *see also id.* at 1017-19 (concluding that such a suit could indeed be brought pursuant to the Tucker Act).

93. *See id.* at 1016-20.

94. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S.

It is difficult to see how this line of thinking comes from *Monsanto*.[95] That decision simply fails to address claims for money damages for a completed taking, let alone declare them "premature" until after the property owner has sued under the Tucker Act. And unlike the Bank's claim, *Monsanto*'s claim for injunctive relief was not just unripe; it was unavailable. For *Monsanto* to support the state procedures rule, it would have to have held that a Tucker Act suit in the Court of Federal Claims is a *prerequisite* to asserting a *monetary* claim against the government for just compensation for a taking of property. But this it does not do. On the contrary, the decision confirms that a Tucker Act suit *is* the assertion of a claim for just compensation: "whatever taking may occur is one for a public use, and a Tucker Act remedy is available to provide Monsanto with just compensation."[96]

Monsanto made clear that a federal takings claimant must seek compensation in the Claims Court before challenging the validity of the underlying action, regardless of whether the claim is based on a regulatory or physical interference with property. As a result, *Williamson County*'s analogy to Monsanto logically suggests that the Court viewed state courts as a local Claims Court for the federal courts. The reasoning is simple: just as a claimant against the federal government must go to the Claims Court before litigating up the federal judicial ladder, so must a claimant against a local or state government go to a state court before raising a takings claim in a federal court.[97] Ironically, this reasoning avoids turning federal courts into claims courts for the states at the price of placing federal district courts in the dubious position of courts of error for "lower" state tribunals, at least when it comes to takings claims.[98]

172, 194-95 (1985) (citations omitted) (alterations in original).

95. *See generally* Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction, Rooker-Feldman, and Res Judicata*, 31 ELR 10,353, 10,356 (2001) [hereinafter *Procedural Implications of* Williamson County].

96. *Ruckelshaus*, 467 U.S. at 1020.

97. *Cf. Procedural Implications of* Williamson County, *supra* note 96, at 10,356 (noting that *Williamson County's* ripeness rule was derived from cases where the Court said that "property owners could bring [the takings] suit [in the Court of Federal Claims] under the Tucker Act").

98. The implicit suggestion that federal courts have a supervisory role over state compensation decisions runs head on with the *Rooker-Feldman* abstention doctrine.

> Rooker-Feldman precludes a federal action if the relief requested in the federal action would effectively reverse the state decision or void its ruling…. If the relief requested in the federal action requires determining that the state court's decision is wrong or would void the state court's ruling, then the issues are inextricably intertwined and the district court has no subject matter jurisdiction to hear the suit.

Gulla v. North Stabane Township, 146 F.3d 168, 171 (3d Cir. 1998). Although *Williamson*

The *Williamson County* Court followed its creative reading of *Monsanto* with another implausible analogy; this time to the 1981 due process case of *Parratt v. Taylor*.[99] In *Parratt*, the Supreme Court determined that a prisoner's complaint, alleging that prison officials negligently lost a hobby kit, constituted an actionable "deprivation" of property under 42 U.S.C. Section 1983.[100] But *Parratt* also concluded that there was no constitutional due process violation until the plaintiff sought the adequate post-deprivation remedy provided by Nebraska's tort claims statute.[101] The *Williamson County* Court forced the resulting proposition: that a "state's action is not complete [in the sense of causing a constitutional injury] unless or until the state fails to provide an adequate postdeprivation remedy for the property loss,"[102] upon the takings framework, thus providing support for its Claims Court-type prerequisite at the state level.[103]

The Court's analogy to *Parratt* may be even more flawed than its refuge in *Monsanto*. To start, it is generally recognized that the *Parratt* decision wrongly substituted a procedural due process analysis for what was in reality a substantive due process claim.[104]

County makes no mention of *Rooker-Feldman*, and seems to preclude its application by mandating that state-litigated taking claims are ripe for federal review, several courts have relied on the doctrine to bar taking claims fully litigated in the state court system. *See, e.g.,* Adams Outdoor Advertising v. City of E. Lansing, 2001 U.S. Dist. LEXIS 5549 (Apr. 16, 2001) (granting summary judgment). Thus, the Court's suggestion that state courts are like claims courts for the federal judiciary ironically tempts federal courts to use the *Rooker-Feldman* doctrine to negate the ultimate purpose of this suggestion: the limitation of federal review to taking claims that the state has refused to compensate.

99. 451 U.S. 527 (1981).

100. *Id.* at 544.

101. *Id.* at 543.

102. Hudson v. Palmer, 468 U.S. 517, 532 n.12 (1984) (citation omitted).

103. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985).

104. *See* Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 100 (1984).

> The Court's characterization of *Parratt* as a procedural due process case is erroneous. The essence of the constitutional deprivation in the context of procedural due process is the loss of a protected interest absent adequate procedure. It is incorrect to suggest that the end result of a negligent loss of a prisoner's property is rendered legitimate and appropriate – like revocation of welfare benefits – by the provision of proper procedures.

Id.; *see also* Frederic S. Schwartz, *The Post Deprivation Remedy of* Parratt v. Taylor *and Its Application to Cases of Land Use Regulation*, 21 GA. L. REV. 601, 605 n.19 (1987).

> It is not at all clear … that one can sensibly discuss procedural due process when the deprivation was caused by negligent conduct. First, even though procedural due process may have been satisfied in *Parratt* by postdeprivation process, surely substantive due process could not have been, because there cannot be a legitimate reason for negligently losing a prisoner's property.

More important, however, is that *Parratt* rested on "a random and unauthorized act by a state employee."[105] This circumstance made provision of a pre-deprivation hearing "impossible or impracticable" and led to the conclusion that resort to a state's post-deprivation remedial process was sufficient and necessary.[106]

An important consequence of the "random act" predicate is that *Parratt* has no applicability to situations "in which the deprivation of property is effected pursuant to an established state policy or procedure, [since here] *the state could provide predeprivation process*."[107] Because a taking of private property is always affected pursuant to an established policy or procedure – a truly random and unauthorized act by a government employee is a tort and not a taking – one would expect the "random act" exception to preclude application of *Parratt*'s post-deprivation process rule in the takings arena.[108] But the *Williamson County* Court did not see it this way, reasoning that the exception is inapplicable to the Just Compensation Clause, unlike the Due Process Clause, because the Just Compensation Clause has never required, and is not served by, "pretaking process or compensation."[109] The Court elaborated:

> Under the Due Process Clause, on the other hand, the Court has recognized that predeprivation process is of 'obvious value in reaching an accurate decision,' that the 'only meaningful opportunity to invoke the

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Id.

105. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-36 (1982); *Parratt*, 451 U.S. at 541.

106. *Williamson County*, 473 U.S. at 195.

107. *Williamson County,* 473 U.S. at 195 n.14 (emphasis added); *see also* Evers v. Custer County, 745 F.2d 1196, 1202 n.6 (9th Cir. 1984) ("*Parratt* . . . does not apply to cases in which the deprivation of property is effected pursuant to a state procedure and the government is therefore in a position to provide for predeprivation process."). *See* Schwartz, *supra* note 104, at 650-55. Schwartz explains:

> The postdeprivation remedy doctrine of *Parratt* provides that there is no violation of procedural due process when the failure to give process before the deprivation is due to the impracticality of doing so, as long as a postdeprivation remedy is given. In *Parratt* and *Hudson*, predeprivation process was impractical because the deprivation was unpredictable. Why courts in the land-use cases ignore that simple concept and instead rely on the subordinate notion of 'established state procedure,' which the Supreme Court viewed as a reliable indicator of predictability, is something of a mystery. The importance of an 'established state procedure' is justified when a state government employee effects the deprivation, as in *Parratt* and *Hudson*, or when an employee of a local government does so. But that criterion serves no purpose when a local government is the actor, as in almost all land-use cases.

108. *See* LaSalle Nat'l Bank v. Lake County, 579 F. Supp. 8, 10-11 (N.D. Ill. 1984) (rejecting a postdeprivation remedy defense to government's refusal provide sewer service to prospective developers because of "established policy" exception).

109. *Williamson County*, 473 U.S. at 195 n.14.

> discretion of the decisionmaker is likely to be before the [deprivation] takes effect,' and that predeprivation process may serve the purpose of making an individual feel that the government has dealt with him fairly. Thus, despite the [established policy exception], *Parratt*'s reasoning applies here by analogy because of the special nature of the Just Compensation Clause.[110]

This attempt to avoid the otherwise applicable *Parratt* exception is unacceptable on almost every level. Like *Parratt* itself, the rationalization implies that a substantive property deprivation is "a function of the point in time at which the state can reasonably provide corrective process[,]"[111]when in fact it depends on the arbitrary or otherwise illegal nature of the deprivation itself, not the procedural means by which it is effected.[112] Moreover, the Court's justification fails on its own terms. As we have seen, courts have

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110. *Id*. (citation omitted) (alteration in original).

111. Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 989 (1986).

112. *See* Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987), *overruled by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999) (stating that a substantive "constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action"). Additionally, in *Augustine v. Doe*, it is stated that:

> when a plaintiff alleges that state action has violated an independent substantive right, he asserts that the action itself is unconstitutional. If so, his rights are violated no matter what process precedes, accompanies or follows the unconstitutional action. The availability of notice and a hearing is therefore irrelevant; *Parratt*'s concern with the feasability of predeprivation process has no place in this context.

740 F.2d 322, 326 (5th Cir. 1984). Further, Professor Redish aptly illustrates the folly in concluding that procedure determines substance:

> If one were to accept Justice Rehnquist's assumption [in *Parratt*] that a constitutional defect in the conduct of state officers may be cured by the provision of a state compensatory tort remedy, even the most egregious and intentional violation of constitutional rights by state officers could be transformed into a 'procedural' due process case. Take for example the unjustified police disruption of a political rally and the beating of demonstrators solely because of distaste for the political views expressed. While the officers' conduct may be thought to violate the First Amendment, it is only through the Fourteenth Amendment's due process clause that such state action gives rise to a constitutional violation. However, if the violation of First Amendment rights could be compensated subsequently by state tort remedies, no constitutional violation would have taken place. Once the Court extends the concept of 'procedural' due process to include the provision of state compensatory 'procedures' for conduct that reaches unconstitutional results, no state action can logically be deemed to violate the due process clause unless and until available state tort remedies have been pursued.

Redish, *supra* note 104, at 101.

interpreted the Just Compensation Clause to require pre-taking compensation.[113] And with its final decision requirement, *Williamson County* mandates pre-taking process as an essential element of a claim for just compensation.[114] While this process is required to ripen a claim, it also serves many of the same fairness concerns that the Court identifies with procedural due process.[115]

In any case, as a practical matter, the typical takings claim arises, unlike the deprivation in *Parratt*, only after extensive pre-deprivation process involving the application of an established land use policy. A planning commission or rent board conducts full, formal hearings resulting in formal findings and a decision (arguably) depriving a property owner of a protected property interest and (definitely) making no provision for compensation. Applying *Parratt* under these circumstances forces takings claimants to go through both a pre-deprivation *and* post-deprivation process prior to raising their substantive federal constitutional violation in federal court.[116]

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113. *See*, *e.g*, Postal Tel. Cable Co. v. S. Ry. Co., 89 F. 190, 191 (C.C.W.D. N.C. 1898) ("No act of congress can give the right of taking private property for public purposes without first paying just compensation."); *see also* The Md. & Wash. Ry. Co. v. Hiller, 8 App. D.C. 289, 294 (C.C.D.C. 1896) ("It is said by a learned author that, 'as an original question, it seems clear that the proper interpretation of the Constitution requires that the owner should receive his just compensation before entry upon his property.'").

114. *See Williamson County*, 473 U.S. at 186-90 (explaining that the case lacked a final decision, and thus ripeness, because while Hamilton Bank submitted a development plan in accordance with regulations, it "did not seek variances from either the Board or the Commission"). *Williamson County* relied heavily on *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, which even more clearly shows how the final decision requirement mandates elaborate predeprivation process:

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance . . . or a waiver from the surface mining restrictions [in the Act]. If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution.

452 U.S. at 264, 297 (1981).

115. *Williamson County*, 473 U.S. at 172 n.14. As in the due process context, this process is valuable for ensuring that the decision maker understands the effects and potential constitutional consequences of its action and thus for making a fair and wise decision. It also provides the "only meaningful opportunity [for the property owner] to invoke the discretion of the decisionmaker" and to feel as if she has a role in a decision effecting here private property rights. *Id.* (quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985)). A post-taking suit for compensation is concerned only with whether the government's decision triggers a damages remedy, not with whether the decision is valid, and therefore does not serve these concerns as well as the final decision process.

116. *Cf.* Tompkins v. Vill. of Tinley Park, 566 F.Supp. 70 (N.D. Ill. 1983) (holding *Parratt* inapplicable to a takings claim because plaintiff was asserting a "*substantive* constitutional

There is absolutely nothing in *Parratt* or due process doctrine generally that requires such contortions. When predeprivation process is available, the plaintiff is normally *barred* from bringing a procedural due process complaint.[117] Completion of an available predeprivation process converts any remaining complaint into a *substantive* constitutional claim.[118] Like availability of pre-deprivation process, the substantive nature of a claim precludes application of a *Parratt*-typepost-deprivation remedial solution.[119]

Therefore, *Parratt* simply should not apply in the context of a takings claim or any other substantive claim.[120]. Nevertheless, it is from a dubious application of *Parratt* and *Monsanto* that the *Williamson County* Court created the rule that takings claimants must resort to state compensation procedures before suing in federal court. Though the *Williamson County* Court cast the state

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guarantee: the right not to have her property seized with the active participation of the government and without just compensation") (emphasis in original).

117. *See* Lee v. W. Reserve Psychiatric Habilitation Ctr. 747 F.2d 1062 (6th Cir. 1984) (dismissing procedural due process claim due to adequacy of utilized predeprivation process); Toteff v. Vill. of Oxford, 562 F. Supp. 989, 995 (E.D. Mich. 1983) (dismissing plaintiff's procedural due process claim in part because plaintiff was provided with predeprivation notice and hearings); *see also* Oberlander v. Perales, 1983 WL 29, *936 (S.D.N.Y. Dec. 2, 1983) (dismissing due process action because predeprivation process was available).

118. Augustine v. Doe, 740 F.2d 322, 326 (5th Cir. 1984) ("When a plaintiff alleges that state action has violated an independent substantive right, he asserts that the action itself is unconstitutional. If so, his rights are violated no matter what process precedes, accompanies, or follows the unconstitutional action.").

119. Courts have consistently held that *Parratt* cannot be extended to substantive due process claims. *See, e.g.,* Gaut v. Sunn, 792 F.2d 874, 876 (9th Cir. 1986), *opinion recalled by* 810 F.2d 923 (9th Cir. 1987); Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986); Williams v. City of St. Louis, 783 F.2d 114, 118 (8th Cir. 1986); Mann v. City of Tuscon , 782 F.2d 790, 792 (9th Cir. 1986); *Augustine*, 740 F.2d 322. Decisions to the contrary simply misconstrue *Parratt*, and more fundamentally, the distinction between substantive and procedural due process. *See generally* Schwartz, *supra* note 105, at 642-50. Indeed, in *Parratt*, Justice Rehnquist implied that the postdeprivation analysis would not apply to cases involving violations of the first eight amendments to the Constitution. *Parratt*, 451 U.S. at 536. Justice Powell's concurring opinion similarly noted that the *Parratt* Court "fails altogether to discuss the possibility that the kind of state action alleged here constitutes a violation of the substantive guarantees of the Due Process Clause." *Id.* at 553 (Powell, J., concurring). Later, the Court more explicitly excluded substantive due process claims from *Parratt*'s reach. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990); *see generally*, Rosalie Berger Levison, *Due Process Challenges to Government Actions: The Meaning of* Parratt *and* Hudson, 18 URB. LAW. 189, 206 (1986).

120. Smith v. City of Fontana, 818 F.2d 1411, 1415 (9th Cir. 1987), *overruled on other grounds by* Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999). The court explained:

> It was stated that such actions violated the substantive protections of the Constitution and *lie outside the scope of Parratt* because the constitutional violation is complete at the moment the action or deprivation occurs, rather than at the time the state fails to provide requisite procedural safeguards surrounding the action. Hence, *Parratt is inapplicable to alleged violations of one of the substantive provisions of the Bill of Rights. Id.* (emphasis added).

procedures rule as a ripeness requirement, rather than as a procedural due process rule, this characterization does not supply the legitimacy that cannot be found in its reliance on Monsanto and Parratt.[121]

B. The State Procedures Requirement as a Manifestation of Ripeness

Generally speaking, ripeness is a jurisdictional doctrine that permits a court to dismiss a variety of claims that are considered inappropriate for review upon their initial presentation. Dismissal due to lack of ripeness typically occurs in disputes that involve "uncertain and contingent future events that may not occur as anticipated, or indeed may not occur at all."[122] Thus, a central premise of the ripeness doctrine is that a case may become ready for adjudication at a later time even though it is premature upon initial presentation.

The sources of the ripeness doctrine are Article III of the United States Constitution, which limits the exercise of judicial power to "cases" or "controversies," and prudential concerns about federal jurisdiction.[123] The constitutional source causes courts to invoke the doctrine when a dispute has not yet generated an injury or other facts significant enough to create a live controversy, thus avoiding entanglement in an "abstract disagreement" that cannot satisfy the requirements of Article III.[124] Yet, even if the plaintiffs demonstrate a sufficiently concrete injury, non-constitutional

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121. *Williamson County*, 473 U.S. at 194 ("A second reason the taking claim is not yet *ripe* is that respondent did not seek compensation through the procedures the State has provided for doing so.") (emphasis added); *see* Gregory M. Stein, *Regulatory Takings & Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 22 (1995) ("The state compensation portion of [*Williamson County*] finds no parallel in the ripeness cases from other areas of law.").

122. CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3532 (2d ed. 1984); *see* Stein, *supra* note 121, at 11-14. Ripeness is similar to other justiciability doctrines, such as those relating to standing and mootness, that prevent courts from intervening in hypothetical disputes. However, in ripeness cases, the focus is on the need for court action rather than upon the interest of the party bringing the action, as in standing or upon the sense that the need for adjudication has already passed as in mootness. *See* Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C. Cir. 1997).

123. There is debate among courts and commentators as to whether the ripeness doctrine is grounded in the case or controversy requirement of Article III or is better characterized as a prudential limitation on federal jurisdiction. *See* Taylor Inv., Ltd. v. Upper Darby Township, 983 F.2d 1285, 1289-90 & n.6 (3d Cir. 1993) (citing cases); Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153 (1987) (emphasizing prudential nature of ripeness and protesting attempts by Burger Court to constitutionalize the doctrine).

124. Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), *abrogated by* 430 U.S. 99 (overruling recognized). As Professor Nichol explains, "[t]he 'basic rationale' of the ripeness requirement is 'to prevent courts, through the avoidance of premature adjudication, from entangling themselves in abstract disagreements' with other organs of government." Nichol, *supra* note 123, at 161 (quoting *Abbott Labs.*, 387 U.S. at 148).

prudential concerns may trigger application of ripeness. These concerns most often involve the desire to preserve judicial economy,[125] to ensure the development of a factual record adequate to decide the case,[126] and to promote "the salutary objective of ensuring that only those individuals who cannot resolve their disputes without judicial intervention wind up in court."[127] Occasionally, federalism[128] and the importance of the substantive constitutional right under scrutiny, compared to other constitutional rights, may inform the application of ripeness.[129]

In *Abbott Laboratories v. Gardner*,[130] the Supreme Court instructed courts considering application of ripeness "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration."[131] The two prongs of this test roughly track the constitutional and prudential foundations of the ripeness doctrine. The "fitness of the issues" consideration requires courts to weigh "the difficulty and sensitivity of the issues presented, and … the need for further factual

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125. *Abbott Labs.*, 387 U.S. at 148. For the efficiency aspects of the ripeness doctrine, see WRIGHT ET AL., *supra* note 122, § 3532.3; Stein, *supra* note 121, at 11.

126. *See Navegar*, 103 F.3d at 998; WRIGHT ET AL., *supra* note 122, § 3532.3; Nichol, *supra* note 123, at 177-78.

127. Madsen v. Boise State Univ., 976 F.2d 1219, 1221 (9th Cir. 1992); *see also* Hendrix v. Poonai, 662 F.2d 719, 722 (11th Cir. 1981) ("Furnishing such guidance prior to the making of the decision, however, is the role of counsel, not of the courts."). One writer has commented:

> As to the parties themselves, courts should not undertake the role of helpful counselors, since refusal to decide may itself be a healthy spur to inventive private or public planning that alters the course of possible conduct so as to achieve the desired ends in less troubling or more desirable fashion.

WRIGHT ET. AL., *supra* note 122, § 3532.1.

128. *See* WRIGHT ET AL., *supra* note 122, § 3532.1 ("Concern for the relationships between federal courts and state institutions may weigh in the ripeness balance"); Nichol, *supra* note 123, at 178 & n.154 (citing Toilet Goods Assn. v. Gardner, 387 U.S. 158, 200 (1967) (Fortas, J., concurring and dissenting)).

129. *See* Nichol, *supra* note 123, at 170 (noting that a court "hones and adjusts its exercise of substantive [judicial] review" by applying a more burdensome ripeness requirement to less important statutory or constitutional causes of action); *see also id.* at 167 (stating that "the 'court actually does make a decision on the merits when it purports to choose the context in which the decision will be made'") (quoting G. Joseph Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L REV. 1443, 1522 (1971)); *cf.* WRIGHT, ET AL., *supra* note 122, § 3532.3 (suggesting that because ripeness analysis "may be complicated . . . by the fact that some rights are more jealously protected than others," courts employ a lower ripeness threshold for claims implicating First Amendment rights, interests in privacy, and statutory rights "affected with particular public interests," such as those in patent litigation). Although Professor Nichol seems to recognize the awkwardness of using what is supposed to be a justiciability doctrine for substantive review, he does not "argue that this use of the doctrine is illegitimate." Nichol, *supra* note 123, at 169.

130. 387 U.S. 136 (1967).

131. *Id.* at 149; *see also Thomas*, 473 U.S. at 581; *Navegar*, 103 F.3d at 998; Armstrong World Indus. Inc. v. Adams, 961 F.2d 405, 411 (3d Cir. 1992).

development to aid decision."[132] Purely legal issues, final agency actions, and cases that will not benefit from further delay are deemed fit for review and typically satisfy the requirements of Article III.[133] On the other hand, courts gauge the necessity of deciding the case or "hardship to the parties" by the risk and severity of injury that may result from a refusal to exercise jurisdiction.[134] In this way, the hardship determination limits and focuses the court's reliance on prudential concerns when it considers the postponement of judicial review.[135]

1. The State Procedures Requirement and Constitutional Standards of Ripeness

Where there has been final land use decision, a takings claim should be fit for review within the meaning of Article III ripeness because no further factual development is required to resolve the dispute. Regardless of whether the state has provided just compensation, the final decision causes sufficient injury to the landowner's interests to satisfy standing[136] and traditional case or controversy requirements:[137]

> If the claimant challenges an actual government appropriation of the claimant's property, the injury occurs when the appropriation occurs, regardless whether the claimant later receives just compensation for the taking. Similarly, if the claimant challenges a regulatory restriction on the use of property, the injury occurs as soon as the

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132. WRIGHT ET. AL., *supra* note 122, § 3532.1, at 115.

133. *See Thomas*, 473 U.S. at 581; Action Alliance of Senior Citizens v. Heckler, 789 F.2d 931, 940 (D.C. Cir. 1986).

134. *See* WRIGHT ET. AL., *supra* note 122, § 3532.1, at 115.

135. *See Abbott Labs.*, 387 U.S. at 149; *see also* David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492, 501 (1996). Mendel notes:

> Courts may not consider the institutional benefits of postponing judicial review in isolation from the actual harm that may be suffered by the complainant. *Id.* To the extent a court considers the *type* of alleged injury in assessing the hardship to the parties of withholding judicial review, the two prudential policies outlined above — one relating to the court's view of the underlying cause of action, and one relating to role of the court as a decisionmaker [sic] — merge.

Id. at n.34.

136. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1012 (1992) (noting that regulation of property owner's land is sufficient to satisfy Article III standing requirements).

137. *See* Andrus v. Allard, 444 U.S. 51, 64, n.21 (1979) (observing that "[b]ecause the regulation [the owners] challenge restricts their ability to dispose of their property, [the owners] have a personal, concrete, live interest in the controversy").

> restriction takes effect, regardless of later compensation. In each situation, the claimant suffers an 'invasion of a legally protected interest' in the use of his or her property. As the Court noted in *First English*, 'Though … an illegitimate taking might not occur until the government refuses to pay, the interference that effects a taking might begin much earlier.' In short, it is the taking, rather than the denial of just compensation, that inflicts the hardship — *i.e.*, the injury in fact — required by Article III, even though the taking itself [arguably] does not violate the Constitution.[138]

The claimant will continue to suffer the injury caused by the taking if the federal court withholds review, reinforcing the sense that there is a live case or controversy. Moreover, as the earlier review of the traditional view of the Just Compensation Clause suggests,[139] the fact that this injury will occur without just compensation should render the issues purely legal and the case ready for resolution; the only controversy is whether the action has gone so far as to cause a taking of property.[140] This is undoubtedly a difficult determination, but it is not so for lack of Article III certainty.

2. Is the State Procedures Requirement a Prudential Rule?

Some commentators have suggested that the state procedures requirement is really a prudential ripeness rule in the guise of a constitutional rule.[141] There is no evidence of this in the *Williamson County* opinion. However, in *Suitum v. Tahoe Regional Planning Agency*,[142] the Court suggested in dicta that both of *Williamson County's* ripeness rules were "prudential."[143]

One can imagine that the state procedures rule serves several prudential concerns, chief among them being conservation of federal

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138. Kidalov & Seamon, *supra* note 5, at 29.

139. *See supra* notes 64-68 and accompanying text.

140. *See* Buchsbaum, *supra* note 64, at 478 ("The constitutional violation, even if cast as failure to provide compensation, exists and is ongoing upon application of the regulation and the refusal by a responsible officer to pay.").

141. Kidalov & Seamon, *supra* note 5, at 56 ("The [*Williamson County*] exhaustion requirement is not dictated by Article III. It is, instead, a rule of prudence that, like the prudential rules of justiciability associated with Article III, conserves federal-court resources.").

142. 520 U.S. 725, 734 (1997).

143. *Id*.

judicial resources.[144] It is possible, for instance, that the state procedures requirement reflects an unstated balancing of this concern with the hardship consideration that accompanies application of the prudential ripeness doctrine. As some commentators suggest, the requirement might reflect the sense that there is only enough 'hardship' to overcome the federal judiciary's need to conserve judicial resources when state compensation has been denied.[145] The problem with this conception is that it amounts to a declaration that there is no Article III "injury" standing until compensation is denied, a notion that cannot stand up to scrutiny[146] Moreover, it misconstrues the balancing that leads to application of prudential ripeness; the question is not whether that action is justified by a perceived lack of injury (standing) arising from the underlying complaint, it is whether invocation of ripeness to decline adjudicating a claim would result in additional or continuing hardship on the parties.[147]

The standard *Abbot Laboratories* test for applying prudential ripeness confirms that the typical takings claim is not normally subject to that doctrine Following a final land use decision, the issues in a takings case are purely legal, revolving around whether a taking has actually occurred.[148] They are therefore fit for review. This alone may be enough to override prudential judicial efficiency concerns.[149] However, the traditional "hardship" prong, which requires a plaintiff to show that "the challenged action creates a 'direct and immediate' dilemma for the parties"[150] will also militate

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144. Kidalov & Seamon, *supra* note 5, at 55.

145. *Id.* at 28 ("Before exhaustion … the property owner has not suffered a 'hardship' forbidden by the Constitution.").

146. *See supra* notes 134-38 and accompanying text.

147. *See* Robert C. Power, *Help is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. ILL. L. REV. 547, 610 (1987). Mr. Power states that:

> The hardship aspect necessarily involves balancing. Unless the plaintiff is injured in some respect by the agency's action, he or she has no standing and the court has no need to consider ripeness. Once the standing threshold is crossed, the hardship of denying review is not a simple 'yes or no' question, but is necessarily a question of 'how much' hardship will result.

Id.

148. *See* Buchsbaum, *supra* note 64, at 473.

149. *See Ernst & Young*, 45 F.3d at 530, 535 ("There may be some sort of sliding scale under which, say, a very powerful exhibition of immediate hardship might compensate for questionable fitness … or vice versa."); Laurence H. Tribe, American Constitutional Law section 3-10, at 80 (2d ed. 1987). *But see* Cedars-Sinai Medical Ctr. v. Watkins, 11 F.3d 1573, 1581 (Fed. Cir. 1993) (stating that a plaintiff must meet both prongs of ripeness test).

150. W.R. Grace & Co. v. EPA, 959 F.2d 360, 364 (1st Cir. 1992) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 152-53 (1967), *abrogated by* 430 U.S. 99 (overruling recognized); Lujan v. National Wildlife Fed'n, 110 S. Ct. 3177, 3190).

against applying prudential ripeness to taking claims.[151] This is because, takings cases, federal delay creates a significant "dilemma" in prolonging costly and disruptive property restrictions throughout the course of potentially duplicative state litigation.[152] This form of hardship weighs against applying the prudential ripeness doctrine.[153] Consequently, the state procedures rule is as tenuously linked to prudential ripeness as it is to Article III ripeness.[154]

The rule is, however, strikingly similar to the exhaustion of state remedies doctrine.[155] Like the state procedures requirement, the exhaustion doctrine requires plaintiffs to resort to "administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate."[156] However, the similarities end when one recognizes that a plaintiff is normally not required to satisfy any exhaustion rule before bringing a constitutional claim under section 1983.[157] Only two allegations are necessary for such a claim: that a person has denied the plaintiff a federal right and that the violation was accomplished under color of state law.[158] These allegations suffice because the purposes of section 1983 are to "override certain kinds of state laws,

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151. *See* Kassouni, *supra* note 61, at 6-7.

152. *See* Berger, *supra* note 5, at 103 ("Ripeness rules are used as an offensive weapon to delay litigation, increase both fiscal and emotional costs to the property owner, and convince potential plaintiffs that they should not even try to 'fight city hall.'"); Stein, *supra* note 121, at 98 (noting that government has an incentive to use ripeness to cause a litigation delay because delay will often result in a functional defeat the plaintiff's claim).

153. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 744 (1997), ("To the extent that *Abbott Laboratories* is in any sense instructive … it cuts directly against the agency: Suitum is just as definitively barred from taking any affirmative steps to develop her land as the drug companies [in *Abbott Labs*.] were bound to take affirmative step[sic] to change their labels"); Pacific Gas & Electric Co. v. State Energy Resources Commission, 461 U.S. 190, 201 (1983) (finding sufficient hardship to avoid ripeness where the a moratorium on construction interfered with significant planning expenditures); *see also Abbott Labs.*, 387 U.S. at 154 (stating that the case is ripe in part because "the regulation … requires [the plaintiff] to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions").

154. On the other hand, there is some agreement that *Williamson County*'s first ripeness prong, the "final decision" requirement, is a prudential rule. Mendel, *supra* note 135, at 504-05 ("Commentators accurately describe the creation of this [finality] requirement as motivated by prudential concerns.").

155. Redish, *supra* note 104 , at 101 (noting that application of *Parratt* to a substantive constitutional claim "distorts the concept of procedural due process into a thinly-veiled creation of a state judicial exhaustion requirement").

156. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985). For a discussion of the exhaustion and ripeness doctrines, and their similarities, see Power, *supra* note 147.

157. *See* MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 346 (1986); Patsy v. Florida Board of Regents, 457 U.S. 496, 501 (1982); McNeese v. Board of Educ., 373 U.S. 668, 671-76 (1963).

158. Gomez v. Toledo, 446 U.S. 635, 640 (1980).

to provide a remedy where state law was inadequate, 'to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice,' and *to provide a remedy supplementary to any remedy the state might have*."[159] In short, a section 1983 claim is an independent remedy and must be litigated on the merits notwithstanding the availability of any state remedies: "[t]hese [section 1983] causes of action … exist independent of any other legal or administrative relief that may be available as a matter of federal or state law. *They are judicially enforceable in the first instance*."[160]

Yet, according to the *Williamson County* Court, the state procedures/exhaustion prerequisite applies to 1983 takings claimants because "no constitutional violation occurs until just compensation has been denied."[161] This premise is certainly true on its face, but it begs the question of when and where a court is to look in determining whether just compensation "has been denied." It is only because the Court recasts the Just Compensation Clause as a post-deprivation remedy, rather than as a precondition of governmental decision-making, that it can say that exhaustion of state compensation procedures is required by the clause's terms. As we have seen, this is a highly questionable foundational proposition.[162]

C. How Federal Courts Have Turned the State Procedures Rule into a Complete Jurisdictional Bar

Despite its doctrinal inconsistencies, the state procedures rule seems to ensure federal review for those takings claimants that can afford to continue litigation following a failed state court action. However theoretically erroneous, , the Court's description of the state procedures rule as a means to "ripen" a claim plainly suggests that the Court intended the rule to cause some delay in federal jurisdiction.[163] Unfortunately, following *Williamson County*, many federal courts have converted the state procedures rule into a

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159. McNeese v. Bd. of Educ., 373 U.S. 668, 671-72 (1963) (quoting Monroe v. Pape, 365 U.S. 167, 174 (1961)) (emphasis added).

160. Felder v. Casey, 487 U.S. 131, 148 (1988) (quoting Burnett v. Grattan, 468 U.S. 42, 50 (1984)) (emphasis added).

161. *Williamson County*, 473 U.S. at 194, n.13. For judicial criticism of the state procedures rule as an insupportable exhaustion rule, see L & J Corp. v. City of Dallas, 1998 U.S. Dist. LEXIS 8934, at *8-14 (N.D. Tex. June 8, 1998).

162. *See supra,* Section II A (1).

163. *See* Nichol, *supra* note 123, at 169 ("The ripeness formula at least suggests that the legal shortcoming is one of timing or factual development. It implies to the shunned litigant that she may eventually have a cognizable claim.").

permanent jurisdictional bar by applying state rules of claim[164] and issue preclusion.[165] *Wilkinson v. Pitkin County*,[166] a case out of the Tenth Circuit, aptly illustrates how preclusion doctrines intersect with the state procedures rule to relegate takings claims to the state court system.

In *Wilkinson*, a landowner sought to engage in limited multi-unit development of 184 acres of land that were originally patented as 29 separate mining claims in the 1890's.[167] To avoid having to compete with other prospective developers for a finite number of available "building rights," the owner submitted his applications under a special subdivision procedure that exempted "low impact" developments from the lottery process.[168] The county rejected the original development applications, but subsequently permitted the landowner to submit scaled back plans that contemplated a single residence on 71 acres and three units on the remaining 113 acres, a proposal designed to fall squarely within the low impact regulations.[169] This too was rejected, prompting the owner to file suit in Colorado state court alleging, among other things, that the County had engaged in a regulatory taking.[170]

Following the state courts' denial of just compensation, the landowner asserted his takings claims in federal court in accordance with *Williamson County*.[171] Soon after, the district court held that the claims were barred on grounds of claim and issue preclusion due to the prior state court proceedings.[172] On appeal to the Tenth Circuit, the court recognized that "it is difficult to reconcile the ripeness requirement of *Williamson* [sic] with the laws of res judicata and collateral estoppel,"[173] but nevertheless rejected the argument that *Williamson County* [sic] was an exception to those laws:

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164. *See infra* notes 166-81 and accompanying text. The similarity of claims is usually determined upon comparison of the parties, facts and issues in the first action with those in the second proceeding, although the factors may vary slightly from state to state.

165. Federal application of state preclusion doctrines arises from the Full Faith and Credit Act. *See* Allen v. McCurry, 449 U.S. 90, 105 (1980) (holding that the Full Faith and Credit Act requires federal courts to apply preclusion rules to 1983 actions that could have been raised in state court action).

166. 142 F. 3d 1319 (1998) [hereinafter *Wilkinson II*].

167. *See* Wilkinson v. Pitkin County, 872 P.2d 1269, 1272 (Co. Ct. App. 1993).

168. *Id*. at 1272-73.

169. *Id*. at 1272.

170. *Id*. at 1272-73.

171. *See Wilkinson II*, 142 F. 3d at 1321.

172. *See id*. at 1320.

173. *Id*. at 1325, n.4.

> We conclude the *Williamson* ripeness requirement is insufficient to preclude application of res judicata and collateral estoppel principles in this case. As in [another case], the facts set forth in the state court actions are the same facts necessary for a determination of the federal claims. Also . . . plaintiffs asserted federal claims in the state court proceedings, which were fully adjudicated, (or they could have done so), and the Colorado rules against claim splitting required them to do so.[174]

The court therefore held that the landowner's takings claims were extinguished under Colorado's version of claim preclusion.[175]

The Sixth and Third Circuits have also strictly applied preclusion doctrines to destroy federal takings claims ostensibly ripened under *Williamson County*. In *Rainey Brothers Construction, Inc. v. Memphis & Shelby County Board of Adjust-ment*, for instance, a construction company sued the city in state court after it suddenly revoked building permits and changed the elevation requirements applicable to a partially completed apartment development.[176] As a result of the city's actions, the company was required to dismantle foundations and other preliminary improvements at its own expense.[177] The trial court concluded that such treatment violated constitutional norms, but refused to award any compensation on the erroneous ground that the state tort claims act shielded the local government from monetary damages arising out of constitutional violations.[178]

After its appeals failed, *Rainey Brothers* renewed its claims in federal district court in accordance with *Williamson County*. As in *Wilkinson*, the major issue was whether the court should refrain from applying the doctrines of claim and issue preclusion because *Williamson County* forced the company to raise its claims first in state court.[179] Noting that several other courts have found that "the interaction between *Williamson County* and the Full Faith and Credit Act requires that a plaintiff landowner assert his federal claims in the state courts,"[180] the court concluded that there was no

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174. *Id.* at 1324.
175. *Id.* at 1325.
176. *See* Rainey Bros. Constr. Co., Inc. v. Memphis & Shelby County Bd. of Adjustment, 967 F.Supp. 989, 1000-01 (W.D. Tenn. 1997).
177. *Id.* at 1001.
178. *Id.* at 1006.
179. *Id.* at 1003-06.
180. *Id.* at 1004 (citing Peduto v. City of North Wildwood, 878 F.2d 725 (3d Cir. 1989) & Palomar Mobile Home Park v. City of San Marcos, 989 F.2d 362, 364-65 (9th Cir. 1993)).

reason to ignore Tennessee preclusion principles. It therefore dismissed the suit on preclusion grounds, a decision later upheld by the Sixth Circuit.[181]

Thus, cases like *Wilkinson* and *Rainey*[182] have converted the state procedures requirement into a procedural snare that swallows the careful takings claimant as well as the unwary. Whether the landowner goes to federal court first or faithfully raises his claim in state court in accordance with *Williamson County*, in the end he will most likely discover that his action is completely precluded from federal review.[183] It is impossible to reconcile this outcome with the opinion in *Williamson County*.[184] Every statement in that decision about the need to resort to a state compensation procedure indicates that the Court was articulating a hurdle, rather than a bar, to federal review.[185] The Court's general decision to portray the state procedures requirement as a means to "mature" a federal claim especially reinforces this conclusion.[186]

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181. *Id*.

182. *See Peduto*, 878 F.2d 725; *Palomar Mobile Home Park*, 989 F.2d 362.

183. *See generally* Fields v. Sarosota Manatee Airport Authority, 953 F.2d 1299, 1302-03 (11th Cir. 1992). The *Fields* court explained:

> On the one hand, *Williamson County* requires potential federal court plaintiffs to pursue any available state court remedies that might lead to just compensation before bringing suit in federal court under section 1983 for claims arising under the Fourteenth and Fifth Amendments for the taking of property without just compensation. Citing *Williamson County*, 473 U.S.194 (1985). On the other hand, if a litigant brings a takings claim under the relevant state procedure, he runs the risk of being barred from returning to federal court; most state courts recognize res judicata and collateral estoppel doctrines that would require a state court litigant to raise his federal law claims with the state claims, on the pain of merger and bar of such federal claims in any attempted future proceeding. Thus, when a would-be federal court litigant ventures to state court to exhaust any potential avenues of obtaining compensation, in order to establish that a taking "without just compensation" has actually occurred as required by *Williamson County*, he finds himself forced to raise the federal law takings claim even though he would prefer to reserve the federal claim for resolution in a section 1983 suit brought in federal court.

Id. (citation omitted).

184. *See* DANIEL MANDELKER ET. AL., FEDERAL LAND USE LAW § 4A-23 (1999) ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.").

185. *See*, *e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194, n.13 (1985) ("A property owner [must] utilize procedures for obtaining compensation *before* bringing a [section] 1983 action.") (emphasis added).

186. *See* Berger, *supra* note 6, at 104. Berger notes that:

> The Court's analytical discussion begins with the announced conclusion that 'respondent's claim is *premature*.' Notably the Court chose to use the term '*premature*,' rather than 'moribund;' the Court did not say there was no valid claim. To an English-speaking person, prematurity necessarily means that something is yet to be done to make the matter mature, or jurisprudentially ripe.

Nor can one justify the ultimate result — relegation of takings claims to state courts — as an insignificant anomaly. Federal courts and federal civil rights law were established for the purpose of providing constitutional claimants with a judicial forum free from local politics and biases.[187] In the takings context, too:

> Federal judges tend to have broader outlooks than local judges constrained by ethos and electorate of their communities. The fact that there are apt to be more competing interests in their districts also makes them more disposed to vindicate the exercises of property rights that do not benefit immediate neighbors.[188]

But, under the strict interpretation of the state procedures rule and preclusion doctrines, one class of constitutional claimant – those seeking to maintain the value of their property or to put it to some productive use – must plead their case before state court judges more predisposed to favor the local "public interest" over the individual. A long term result of the relegation of federal takings claims to the state system is that "state courts then get to define the contours of federal law and are *de facto* free to trump the federal courts' interpretation of federal law,"[189] a possibility that is utterly inconsistent with the Supreme Court's interpretation of the role of federal and state courts in the constitutional system.[190]

Id.

187. Monroe v. Pape, 365 U.S. 167, 180-83 (1961). Here, the Court states that:

> one reason [that Section 1983] was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of . . . the Fourteenth Amendment might be denied by state agencies.

Id. at 180.

188. Steven J. Eagle, Regulatory Takings, § 13-5(d), at 1069 (2d ed. 2001).

189. Berger, *supra* note 5 at 128. The decisions of the California Supreme Court in the takings context provide a prime example of how the state procedures rule allows state courts to define federal takings law in a manner that seems inconsistent with the rules originally articulated in federal courts. *See* infra, Section III C. The United States Supreme Court does not accept enough cases each year to plausibly suggest that review by that Court is sufficient to maintain federal control over federal takings law. *See* Kevin H. Smith, *Certiorari and the Supreme Court Agenda: An Empirical Analysis*, 54 OKLA. L. REV. 727, 729 (2001)*; see also Statistical Recap of Supreme Court's Workload During Last Three Terms*, 68 U.S. L.WK. 3069 (1999) (noting that in the October 1998 term, the Court granted certiorari in approximately 1.7% of the cases brought before it).

190. *See* Felder v. Casey, 487 U.S. 131, 144 (1988) ("Congress … surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action.").

IV. SOLVING THE STATE PROCEDURES PROBLEM

In light of the weak theoretical basis for the state procedures requirement, and its unfair consequences, the Supreme Court should reconsider the requirement's role in the takings framework at the first opportunity. However, while direct intervention by the High Court may be necessary[191] to significantly modify or overturn the requirement, it is not required to reconstruct it as a limited jurisdictional hurdle. Lower federal courts can return the state procedures rule to its intended role by recognizing several exceptions that allow federal takings claimants to avoid claim and issue preclusion or the state procedures rule altogether.[192]

A. The "England" Reservation Exception

The 1964 decision of *England v. Louisiana State Board of Medical Examiners*,[193] supplies the most promising method for ensuring that a takings claimant will eventually have the opportunity to litigate in federal court. In *England*, the Supreme Court held that a plaintiff may reserve the right to litigate a constitutional claim in federal court when involuntarily forced to litigate first in state court. Although there is some question as to the scope of *England*, the predicate for allowing reservation of claims in that case is also present in the takings context. Therefore, takings claimants should be able to invoke *England* to prevent claim preclusion from barring a federal action.

1. A Brief Review of England

In *England*, the state of Louisiana applied a state law to deny several would-be chiropractors a license to practice medicine.[194] This action prompted the chiropractors to challenge the law in federal district court on due process grounds.[195] Upon reviewing the

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191. Although legislation intended to repeal the state procedures requirement was introduced to Congress in 1997, it is questionable whether that body may take such a step. *Compare* Kovacs, *supra* note 8, at n.48 ("Since *Williamson County* is based upon the Supreme Court's interpretation of the text of the Fifth Amendment rather than prudential considerations, it is beyond Congress' authority to override that decision….") with Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 171-74 (1997) (discussing the historical basis for Congress' authority to interpret the Constitution and judicial deference thereto).

192. Other exceptions may apply in particular circumstances, such as when the parties are jurisdictionally diverse, when the plaintiff has meritorious non-taking federal claims and can raise a supplemental state law takings claim, or when the complaint raises a facial takings claim. *See generally*, *Procedural Implications of* Williamson County, *supra* note 97.

193. 375 U.S. 411 (1964).

194. *Id.* at 412-13.

195. *Id.* at 413.

complaint, the Court invoked *Pullman* abstention, deciding that it would be injudicious to consider the constitutional claim until state courts had a chance to definitively resolve the issue of whether the statute applied to the chiropractors.[196] After the state courts held that the statute was indeed properly applied, the chiropractors attempted to reassert their Fourteenth Amendment claims in federal court. The district court held that their claims were barred because the chiropractors' due process concerns were raised and litigated in the prior state court proceedings.[197]

On certiorari, the United States Supreme Court reversed, concluding that the lower court had erroneously refused to exercise jurisdiction. The Court initially declared that a later federal action is precluded when "a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there…."[198] However, acknowledging that one of its previous decision seemed to require federal claims to be raised in an initial state court, the Court declared that a plaintiff may ensure the involuntary nature of his state court litigation, and thus preserve federal claims for federal review, by making an express, on the record, reservation to resolution of the federal claims in state court.[199] In the case at hand, the Court refused to apply the new rule against the chiropractors, sending the case back to federal court for review of their constitutional claims.[200]

196. *Id.*
197. *Id.* at 414.
198. *Id.* at 419.
199. *Id.* at 428.
200. *Id.* at 420.

2. Using England to Ripen Federal Takings Claims

The *England* reservation provides a vehicle for federal takings claimants to truly "ripen" a claim for federal review in accordance with Williamson County. To utilize the *England* reservation for this purpose, a would-be federal takings claimant must still seek compensation from the state as an initial matter. But, in so doing, the claimant may expressly reserve his federal claims, while asserting the required claim for compensation under state law.[201]

The reservation avoids later application of claim preclusion on the ground that the claimant "could have" raised the federal claim in state court.[202] Seeking compensation under state law allows the claimant to comply with the state procedures requirement while avoiding an application of claim preclusion on the ground that the claimant *actually* litigated the federal claims. A purely state law-based compensation claim satisfies *Williamson County* because that case does *not* hold that claimants must raise any federal, takings claim in state court to ripen a federal suit.[203] It simply requires

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201. Front Royal & Warren County Indus. Park v. Town of Front Royal, 135 F.3d 275, 283 (4th Cir. 1998) ("It would thus be meet [sic] for the district court to advise the parties [claiming a taking] that they may wish to make an *England*-type reservation of their right to return to federal court, if need be, when they first appear in state court.") (emphasis added); Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299, 1309, n.10 (11th Cir. 1992) ("If a state court litigant with a takings clause claim has any wish to preserve access to a federal forum, then he must make a … reservation at the time he files his state law claims…").

202. *See* supra, note 7.

203. *See Front Royal*, 135 F.3d at 283 ("*Williamson County* does not require that the federal takings claim actually be litigated in state court."); Dodd v. Hood River County, 59 F.3d 852, 859 (9th Cir. 1995) [hereinafter *Dodd I*] ("The [*Williamson County*] Court made no reference to the pursuit of the Fifth Amendment claim in state court."); Popp v. City of Aurora, 2000 U.S. Dist. LEXIS 7160, at * 9-10 (N.D. Ill. 2000) ("*Williamson* held only that a plaintiff claiming a taking must exhaust state court just compensation remedies before bringing his federal claim, not that the state court's resolution of that issue is the final word, barring any federal claim."). *But see Procedural Implications of* Williamson County, *supra,* note 97 (arguing that *Williamson County* requires a takings claimant to raise a Fifth Amendment cause of action when resorting to the mandatory state compensation procedure). Professor Roberts asserts that "[t]he state controls the [compensation] process and may additionally provide its own substantive protection, but the just compensation" claim, as *First English* says, 'is grounded in the Fifth Amendment.'" *Id.* at 10,355. In his view, "it is beside the point" that "the state may have its own similar constitutional guarantee and may have a statutory cause of action, as well…. *Id.* at n.27. It is not clear why this is so. While it is "*unnecessary*" for a claimant to rely on state law to establish a denial of just compensation, the more important question is whether it is *sufficient* for meeting the requirements of *Williamson County*. Here, it is important to remember that the point of the state procedures requirement is to establish that the state will not provide fair money damages for an action effecting private property. The cause of action is of importance only to the extent that it is useful for establishing that the state will or will not compensate the landowner; pertinent state causes of action are very much to the point when it comes to determining what the landowner must do in state court to create a federal takings claim. *See Dodd I*, 59 F.3d at 860 ("The compensation element [required by *Williamson County*] is satisfied if remedies under state law have been pursued.").

claimants to establish that the state will not provide just compensation for a particular action effecting private property.[204] As long as the state has a constitutional or statutory provision that grants a compensation remedy for damage to or confiscation of private property, a claim arising solely under such a provision will serve the purposes of the state procedures requirement and allow the claimant to avoid litigating any federal takings claims in state court.[205] When combined with a timely reservation, this framework allows the claimant to avoid all aspects of the claim preclusion trap.

In many cases, it would be wise for the plaintiff making an *England* reservation to file a takings suit in federal court, prior to or at the same time as the state suit, along with a motion asking the federal court to abstain (under *Pullman*) from reviewing the case pending resolution of the state action.[206] Though not without its

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It is true that *Williamson County* can be read to completely preclude a federal cause of action in state court until after the state has denied compensation under state law. *Williamson County*, 473 U.S. at 172 ("If a state provides an adequate procedure for seeking just compensation, the property owner *cannot claim a violation of the Just Compensation Clause* until it has used the procedure and been denied just compensation.") (emphasis added). This view would resolve the claim preclusion problem since that doctrine is only relevant to claims that *could* have been raised in a prior proceeding. But this is an unreasonable position since it contradicts the thrust of *First English*, which requires that state courts recognize a compensation remedy for a federal takings violation, and eviscerates the well-established role of state courts in hearing federal constitutional cases, something the Court surely did not intend. *See Fields*, 953 F.2d at 1307 ("The real [*Williamson County*] question is not whether the state courts are unable to enforce the takings clause – *they most assuredly are* – rather the question is whether the citizens of this country are to be barred from ever [sic] vindicating a federal constitutional right through the *federal court* system.") (emphasis added); Guetersloh v. State of Texas, 930 S.W. 2d 284, 288 (Tex. Ct. App. 1996) (rejecting argument that claimant could not bring federal takings claim with state law claim in state court because "state courts clearly have jurisdiction to resolve takings claims based on federal law.") Therefore, given *Williamson County*'s emphasis on utilization of a state remedial "procedure," rather than any particular action or provision, the most reasonable answer to the cause of action debate is that a takings claimant may raise *any* state or federal cause of action as long as it will trigger the state compensation procedure.

204. *See Fields*, 953 F.2d at 1305 (noting that for purposes of federal jurisdiction, "a takings clause claim is not ripe until the litigant has exhausted any potential means of obtaining compensation from the state….").

205. *See* Macri v. King County, 126 F.3d 1125, 1130 (9th Cir. 1997) (stating that the "failure of plaintiff to raise federal takings claim in state" proceeding does not bar subsequent federal action); *Dodd I*, 59 F.3d at 860 ("Under the teachings of *Williamson County* and decisions of this court in the context of ripeness, the compensation element is satisfied if remedies available under state law have been pursued.").

206. *See*, *e.g,* Ganz v. City of Belvedere, 739 F. Supp. 507, 509 (N.D. Ca. 1990) (explaining that plaintiff could retain federal jurisdiction of section 1983 takings claims by filing first in federal court, securing *Pullman* abstention, raising state claims in state court and making an *England* reservation). Additionally, it was stated in *Hallco Texas, Inc. v. McMullen County* that:

> [a] claimant may reserve his federal claims for litigation in federal court by following a three-step procedure: (1) the litigant first files in federal court; (2) the federal court abstains and stays the federal proceedings until the state courts resolve all state-law questions; and (3) the litigant

own pitfalls,[207] this tactic may fit the claim more squarely within the *England* facts and avoid statute of limitations problems. It may also minimize the danger of the federal court wrongly invoking *Younger* abstention,[208] which would result in dismissal of the case with prejudice.[209] Assuming the state court accepts the reservation,[210] and no federal claims are actually litigated, the claimant should be permitted to revive the federal takings suit after the state court denies compensation without offending the doctrine of claim preclusion.[211]

> informs the state courts of his intention to return, if necessary, to federal court on his federal constitutional questions after the state-court proceedings are concluded.

2002 Tex. App. LEXIS 8175, at *9 (November 20, 2002).

207. *See* Berger, *supra* note 5, at 114-15 (noting that asking for *Pullman* abstention after first filing a takings complaint in federal court "flaunts *Williamson County* [state procedures rule] risking an angry reaction from a district court judge, and an order of dismissal rather than abstention").

208. *Younger* abstention precludes federal judicial interference in certain ongoing state actions. Younger v. Harris, 401 U.S. 37, 43 (1971).

209. Although the *Younger* abstention is *generally* limited to cases where a criminal *defendant* in state court attempts to file a complaint in federal court, a few misguided decisions have applied it to prevent a state court takings plaintiff from filing a federal complaint. *See*, *e.g.*, Columbia Basin Apt. Assoc. v. City of Pasco, 268 F.3d 791 (9th Cir. 2001) (suggesting filing of state court takings complaint will trigger *Younger* at the federal level); Mission Oaks Mobile Home Park v. City of Hollister, 989 F.2d 359 (9th Cir. 1993). Under this rule, federal litigation of a takings claim is impossible once the state case begins. This application of *Younger* cannot be reconciled with *Williamson County* and has, therefore, been subsequently and repeatedly rejected by the Ninth Circuit. *See* Montclair Parkowners Assoc. v. City of Montclair, 264 F.3d 829, 831 (9th Cir. 2001) (holding that the *Younger* abstention is not applicable to federal takings claim where claimant filed first in federal court and reserved federal claims in subsequent state court complaint); Green v. City of Tucson, 255 F.3d 1086, 1097 (9th Cir. 2001) (en banc) (stating that the *Younger* abstention is appropriate only "when the relief sought in federal court would in some manner directly 'interfere' with ongoing state judicial proceedings" and "such interference is not present merely because a plaintiff chooses to instigate parallel affirmative litigation in both state and federal court") (citations omitted); *see also* Berger, *supra* note 5, at 114-15.

210. *See*, *e.g., Dodd I*, 59 F.3d at 862; *see also* Pascoag Reservoir & Dam, L.L.C. v. Rhode Island, 217 F. Supp. 2d 206, 213 (D.R.I. 2002) ("Claim preclusion does not apply when a court reserves a party's right to maintain a second action, as happens when a court dismisses a claim without prejudice.").

211. *See Montclair Parkowners Assoc.*, 264 F.3d at 831, n.1; Saboff v. St. John's River Water Management Dist., 200 F.3d 1356 (11th Cir. 2000); Greenspring Raquet Club v. Baltimore County, 2000 U.S. App. LEXIS 2720, at *11, n.1 (4th Cir. 2000) (recognizing reservation of federal claims approach effective to avoid claim preclusion); Macri v. King County, 126 F.3d 1125, 1130, 1130 n.6 (9th Cir. 1997); United Parcel Serv., Inc. v. California Public Util. Comm'n, 77 F.3d 1178, 1185-87 (9th Cir. 1996); Fields v. Sarasota Manatee Airport Authority, 953 F.2d 1299 (11th Cir. 1992); *Dodd I*, 59 F.3d at 862-63; *Ganz*, 739 F. Supp at 509; see *also W.J.F. Realty*, 2002 U.S. Dist. LEXIS 16820 at *22-24; Popp v. City of Aurora, 2000 U.S. Dist. LEXIS 7160 at * 9 (N.D. Ill. 2000) (noting that, in allowing claimants' federal claims to proceed, the plaintiffs "expressly reserved in the state court their right to bring an independent federal claim, and it appears that the City's request to strike this reservation was denied by the state court"); *Wilkinson II*, 142 F.3d at 1324 (refusing to decide if a reservation exception was available in the Tenth Circuit, and if so "what must be done to

The fact that the *England* reservation arose from a case involving an initial grant of federal jurisdiction does not undermine its applicability to takings cases, which may not arise in the same manner.[212] The *England* reservation was a response to the murky relationship between *England's* stated rule – that voluntary litigation of a federal claim in state court precludes later federal jurisdiction – and the Court's earlier decision in *Government Employees v. Windsor*.[213] *Windsor* had been interpreted to *require* plaintiffs to argue their federal claims in state courts when also asserting related state law claims. If such a reading was correct, many plaintiffs would be forced to litigate their federal claims in state court, an action that might later be viewed as a voluntary election of the state forum and, thus, a waiver of federal review.[214]

To resolve the dilemma posed by *Windsor*, the *England* Court interpreted that case to mean only that plaintiffs must inform state courts of the nature of their federal claims, not actually litigate them. ".[215] Still, the Court recognized that the line between raising federal claims for review on the merits or for background information (and thus, the line between having the claims decided in state court voluntarily or involuntarily) would often be unclear.[216] The Court turned to federal claim reservation to enable federal courts to quickly and clearly determine whether a plaintiff had raised federal claims in state court on a voluntary basis or strictly for compliance with Windsor. A reserving litigant's "right to return to [federal court] … will in all events be preserved" precisely because in these circumstances it is clear that the plaintiff *did not*

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reserve such a claim," but citing cases supporting the *England* approach); Bass v. City of Dallas, 1998 U.S. Dist. LEXIS 11263 at *11 (N.D. Tex. 1998) ("Texas courts have recognized a procedure whereby a party can reserve the right to have this federal [takings] claim litigated in federal court.") Guetersloh v. State of Texas, 930 S.W. 2d 284, 289-90 (Ct. App. Tex 1996) (holding that plaintiff "could, with the exercise of diligence, have preserved his right to return to federal court to litigate his federal law-claim" with an *England* reservation).

212. *See, e.g.*, Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194, n.13 (1985) ("A property owner [must] utilize procedures for obtaining compensation *before* bringing a [section] 1983 action") (emphasis added). *But see* Peduto v. City of North Wildwood, 878 F.2d 725, 729, n.5 (3d Cir. 1989) ("As plaintiffs here invoked the jurisdiction of the state court in the first instance, the application of *England* has no relevance here…."); Fuller Co. v. Ramon I, Gil, Inc., 782 F.2d 306, 312 (1st Cir. 1986) ("In order to make an *England* reservation, a litigant must establish its right to have its federal claims adjudicated in a federal forum by properly invoking the jurisdiction of the federal court in the first instance"). *See generally* 17A CHARLES ALAN WRIGHT, ARTHUR MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 4243, at 7 (2d ed. Supp 2002) ("The *England* procedure strictly speaking is only applicable if a case was begun in federal court.").

213. 353 U.S. 364.

214. *See England*, 375 U.S. at 420-21.

215. *Id.* at 420.

216. *Id.* at 420-21.

intend to have her federal claims resolved in a state court.[217] In short, the core of the reservation approach is the involuntariness of state court litigation, not the specific procedural basis that forced the plaintiffs into the state court proceeding.[218]

The Court's subsequent opinion in *Migra v. Warren City School Disrict Board of Education* confirms that the *England* reservation hinges on the involuntary nature of state court litigation.[219] In *Migra*, the question was simply whether preclusion doctrines barred a federal suit where the plaintiff initially sued on state law claims in state court and where state law required merger of any federal claims with the state claims.[220] Abstention was not an issue. The Court held that preclusion rules prevented the subsequent federal court proceeding, but only because the litigant had proceeded *voluntarily* to state court.[221] Accordingly, it carefully limited its holding to similar cases of voluntarily state court litigation and referred to *England* in emphasizing that the situation would be different where federal claims are raised in state court involuntarily.[222]

In light of the rationale underlying the *England* reservation, the approach should be applicable in any case where a federal constitutional claimant is forced to involuntarily litigate federal claims in state courts. This includes modern takings litigation, for as a practical matter, the intersection of the state procedures requirement and claim preclusion doctrines force takings claimants to raise federal claims in state court just as surely as the intersection of *Pullman* and *Windsor*.[223] Finally, as a federal district court recently explained:

> [I]t defies logic and common sense to say that all federal Constitutional issues (save taking ones) which are coupled with significant State court questions which are not automatically precluded as unripe, may be preserved by a reservation for a return visit to a federal court, but so-coupled federal taking claims may not because they (unlike the

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217. *Id.*

218. *See*, *e.g.*, Schuster v. Martin, 861 F.2d 1369, 1373-74 (5th Cir. 1988); Jennings v. Caddo Parish Sch. Bd., 531 F.2d 1331, 1332 (5th Cir. 1976).

219. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 85 n.7 (1984).

220. *Id*. at 77.

221. *Id.* at 84-85.

222. *Id.* at 85 n.7.

223. *See* Guetersloh v. State, 930 S.W. 2d 284, 290 (Tex. App. 1996), *cert. denied*, 522 U.S. 1110 (1998) (noting that a takings plaintiff was "involuntarily in state court, because he was fulfilling the *Williamson County* requirements").

> others) are precluded from being brought in the first instance in a federal court. The reason for this court-made distinction … just makes no sense.[224]

For these reasons, a takings litigant who prefers federal jurisdiction should be permitted to reserve federal claims in an initial state court proceeding[225] and to raise them later in federal court.[226] This result, not the application of claim preclusion, effectuates the intent of *Williamson County*.[227]

3. The Problem of Issue Preclusion

It is important to recognize that a proper *England* reservation does not prevent a federal court from relying on issue preclusion to refuse adjudicating a takings claim[228] and cannot guarantee federal jurisdiction for this reason. The Ninth Circuit's decision in *Dodd v. Hood River County* illustrates the interplay between a reserved federal takings claim and issue preclusion.[229] *Dodd* involved 40 acres of land in an Oregon Forest Use zone, upon which the Dodds intended to construct a single dwelling.[230] After initially indicating that the property was suitable for the desired residence, the County adopted an ordinance that prohibited all dwellings in the Forest Zone unless necessary to forest use.[231] When the Dodds applied for the necessary building permits, the County relied on the new zoning ordinance to deny the requested residential use.[232]

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224. W.J.F. Realty Corp. v. Town of Southhampton, 220 F. Supp. 2d 140, 148 n.5 (E.D.N.Y. 2002).

225. *See* Fields v. Sarasota Manatee Airport Auth., 953 F. 2d 1299 (Fla. 1992).

226. *See supra* notes 201-16.

227. *See* Berger, *supra* note 5, 121 ("The Supreme Court could hardly have intended the ripeness rules to become a trap for federal litigants.") (quoting DANIEL MANDELKER, ET. AL., FEDERAL LAND USE LAW 4A-23 (1998)). *England*'s consistency with the intent of *Williamson County* should overcome any remaining uncertainty about the scope of the reservation approach. It should be remembered that the state procedures requirement itself is characterized by great doctrinal uncertainty, and its current role in state takings cases is the result of a questionable interpretation of *Williamson County*. The extrapolation needed to create the current state procedures doctrine is far more questionable than that required to condition that doctrine with the *England* reservation, particularly since an analogy in favor of extending *England* to the takings context is consistent with the traditional rule allowing takings claimants access (at least at some point) to the federal courts, while the former runs counter to decades of precedent and effectively transfers primary responsibility for enforcing an important federal right to the state courts.

228. Palomar Mobile Home Park Ass'n v. San Marcos, 989 F.2d 362, 365 (Cal. 1993) (discussing issue preclusion rules); *see generally* Madeline J. Meacham, *The* Williamson *Trap*, 32 URB. LAW. 239, 250 (2000).

229. *Dodd I*, 59 F.3d 852, 852 (9th Cir. 1995).

230. *Id.* at 855.

231. *Id.* at 856.

232. *Id.*

After exhausting all available administrative remedies, the Dodds filed a takings claim in state court, challenging the County's actions primarily as an impermissible denial of all economic use of property.[233] In so doing, they relied only upon the Oregon Constitution's takings provision, and expressly reserved their federal claims for later adjudication in federal court.[234] Honoring the reservation, the state courts considered only the Dodds' state claims, which were ultimately rejected by the Oregon Supreme Court.[235] Yet, even before the state high court reached its decision, the Dodds brought a federal takings suit in federal district court.[236] This court promptly dismissed the claims on ripeness grounds in light of the lack of a final decision from the Oregon Supreme Court.[237]

When the state law claims were finally decided against the Dodds, the Ninth Circuit addressed the issue of whether the federal claims were still unripe due to the Dodds' failure to raise the federal claims in the state proceedings. Reviewing *Williamson County*, the court declared:

> Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.[238]

The court held that, in light of the state courts' consent to the Dodds' reservation of the federal claims, their failure to obtain just compensation in state courts under state law was sufficient to satisfy the state procedures requirement articulated in Williamson.[239] While implicitly affirming the viability of the *England* reservation, *Dodd I* also thrust issue preclusion forward as a potential hindrance to meaningful use of the reservation technique, remanding the case to the district court for a

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233. *See* Dodd v. Hood River County, 136 F.3d 1219, 1223-24 (9th Cir. 1998), *cert. denied*, 525 U.S. 923 (1998) [hereinafter *Dodd II*].
234. *See Dodd I*, 59 F.3d at 857.
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.* at 860-61.
239. *Id.* at 862.

determination of whether collateral estoppel barred the Dodds' federal claims.[240]

In *Dodd II,* the Ninth Circuit returned to the issue after the district court held that the Dodds' federal suit was indeed barred because of the similarity of the adjudicated state takings claims and the asserted federal claims.[241] Explicitly noting that the Dodds' reservation was irrelevant to the propriety of issue preclusion,[242] the court upheld the lower court's application of issue preclusion to that portion of the Dodds' federal claim that rested on the allegation that they had been denied all economic use of their property since a sufficiently identical issue was considered and rejected by the Oregon courts.[243] On the other hand, the court concluded that the portion of the Dodds' federal claim premised on a denial of less than all use of property was not barred by issue preclusion because Oregon takings standards, upon which the state litigation proceeded, did not recognize such a claim.[244]

B. Methods to Avoid Issue Preclusion

Dodd II shows that issue preclusion will not apply to render an *England* reservation meaningless as long as state takings law fails to incorporate one of the takings tests articulated under the Fifth Amendment to the United States Constitution. There are, however, additional avenues for avoiding issue preclusion at least with respect to the legal issues significant to resolving takings claims. [245]

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240. *Id.* at 863.

241. *See Dodd II*, 136 F.3d at 1224.

242. The *Dodd II* court stated:

> Nor does the Dodds' previous reservation of this federal takings claim under the doctrine of England…. prevent operation of the issue preclusion doctrine. Because the Dodds were effectively able to reserve their claim for federal court…, the reservation doctrine does not enable them to avoid preclusion of issues actually litigated …

Id. at 1227.

243. *Id.* at 1225.

244. *See also* Evans v. Washington County, No. CV-99-1356-ST, 1999 U.S. Dist. LEXIS 20036, at *14-15 (D. Or. Dec. 10, 1999) (explaining that state and federal takings claims are "identical except that the United States Constitution allows aggrieved citizens to recover for 'investment-backed expectations,' whereas the analysis under the Oregon Constitution does not take those expectations into consideration").

245. The doctrine of issue preclusion generally bars relitigation of both factual and legal issues. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). For a general discussion on the interplay between issue preclusion and the state procedures doctrine, see Trail Enters Inc. v. City of Houston, 907 F. Supp. 250, 251-52 (S.D. Tex. 1995). It is more difficult to avoid application of factual issue preclusion. *See Dodd II*, 136 F.3d at 1225 (holding that the issue of whether a regulatory action denied the property owners all economic use of

One method derives from the observation that, under federal law, a landowner can state a valid takings claim under many different theories, each of which is a *separate legal issue* for purposes of issue preclusion.[246] For instance, as the Supreme Court's recent decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning* Agency[247] reaffirms, a landowner challenging application of a regulation restricting property use can claim the action causes a taking by (1) requiring the owner to "sacrifice *all* economically beneficial uses … that is, to leave his property economically idle";[248] (2) failing to meet *Penn Central*'s multi-factor test, in particular, by interfering with the owner's "distinct investment-backed expectations;"[249] or by (3) failing to "substantially advance legitimate state interests,"[250] which may or may not include an

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their property was precluded). *But see* Cumberland Farms, Inc. v. Town of Groton, 808 A. 2d 1107, 1115-16 n.14 (Conn. 2002) (allowing litigation of factual issues relevant to a takings claim despite prior judicial consideration of such issues in a separate action because "none of the factual issues raised by the plaintiff in its inverse condemnation claim actually was litigated and decided in the administrative appeal…").

246. The determination of whether the second proceeding involves the same issue(s) as the first will depend on whether the issue involves facts different from those central in the first proceeding or the application of a different rule law. *See Dodd II*, 136 F.3d at 1225 ("Under Oregon law, issues are not identical for preclusion when 'the underlying facts relevant to the determination of [the issue] are not the same.'"); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982). The elements of a federal takings claim are different rules of law that require different facts for proper application. For example, the facts necessary to show that a regulation is a taking because it does not substantially advance a legitimate state interest, as applied to a particular piece of property, will often be different from those necessary to satisfy the distinct rule of law that a taking may occur due to adverse economic impact or frustration of investment-backed expectations.

247. 535 U.S. 302 (2002). For in depth treatment of the *Tahoe-Sierra* decision, see J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1 (2002).

248. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (emphasis in original); *see also Tahoe-Sierra*, 535 U.S. at 1491 ("The categorical rule that we applied in *Lucas* states that compensation is required when a regulation deprives an owner of 'all economically beneficial uses' of his land.").

249. Penn. Cent. Transp. Co. v. New York, 438 U.S. 104, 105 (1978); *see* Palazzolo v. Rhode Island, 533 U.S. 606, 616 (remanding case involving denial of less than all beneficial use for "*Penn Central* analysis"); *Tahoe-Sierra*, 535 U.S. 1485 ("If petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis."). "The *Penn Central* analysis involves 'a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.'" *Id.* at 1475 n.10. (citation omitted). For an extended discussion of the nature of the "investment-backed expectations" prong, see R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in regulatory Takings Law*?, 9 N.Y.U. ENVTL L.J. 449 (2001).

250. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating that a regulation causes a taking when it "does not substantially advance legitimate state interests . . . *or* denies an *owner economically viable use of his land*.") (citations omitted) (emphasis added); *see also Tahoe-Sierra*, 535 U.S. at 1485 (noting that the landowners challenging building moratoria

allegation of (4) a lack of good faith on the part of the government during the permitting/regulatory process.[251] When the government asks for property in return for development permission, the landowner may also assert that the demands cause a taking because they are not "roughly proportional" to the impact of the development.[252] As a result, a state court's general conclusion that there is no taking should not bar federal takings litigation unless the state court fully considered the state equivalent, if there is one, of each raised federal takings theory or issue.[253]

Therefore, as *Dodd II* indicates, the total lack of "investment-backed expectations," (or any other federal theory) in state law means that the state decision does not preclude later federal adjudication of the claim, at least under the absent theory or issue.[254] However, even if state law *does* recognize an analog to each federal takings theory or issue, issue preclusion does not bar further litigation of these issues unless they are *actually* resolved in the state action and such determination is *essential* to the final judgment.[255] In this regard, it is important to recognize that state courts often render a generalized judgment of no taking that appears to flow from consideration of a single takings theory. In

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that prevented all use of property also could have "argued that the moratoria did not substantially advance a legitimate state interest").

251. *See*, *e.g.*, *Tahoe-Sierra*, 535 U.S. at 1485 (citing *Del Monte Dunes* in suggesting that the landowners could have challenged regulation on a bad faith theory); Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999).

252. Dolan v. Tigard, 512 U.S. 374, 391 (1994) (stating that the government must make "some sort of individualized determination" that an exaction of property is "related both in nature and extent to the impact of the proposed development."); *see generally* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here*, 59 WASH. & LEE L. REV. 373 (2002).

253. *See* Avenal v. Louisiana, 757 So. 2d 1, 10-11 (Ct. App. 2000) (noting that "the question central to our [issue preclusion] analysis of this case is whether the standard for a taking is the same under Louisiana law as it is under federal law . . ." and that issue preclusion would be inappropriate if the law asserted in connection with the second takings proceeding was broader than that applicable to the first takings claim); W.J.F. Realty Corp. v. Town of Southhampton, 220 F. Supp. 2d 140, 149 (E.D.N.Y. 2002) (holding issue preclusion did not bar litigation of federal takings claim in federal court, despite earlier state law litigation, in part because the state court opinion "contains no analysis under federal taking law articulated in [*Penn Central*] which delineated factors for a regulatory taking when a regulation … does not eliminate all economically beneficial use").

254. *See Dodd II*, 136 F.3d at 1227-28; RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. j (1982) ("The appropriate question, then, is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment.").

255. *See* RESTATEMENT (SECOND) OF JUDGMENTS §27 cmt. e (1982) ("A judgment is not conclusive in a subsequent action as to issues which *might have been but were not* litigated and determined in the prior action.") (emphasis added); New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1089-90 & n.6 (11th Cir. 1996) (holding the takings claim was not barred by issue preclusion in part because state court's discussion of economically viable uses not necessary to judgment and discussion failed to explain "what is an economically viable use for takings purposes"); W.J.F. Realty Corp., 220 F. Supp. 2d at 148.

such a case, the federal court should open the door for litigation of all of the federal issues not necessary to this judgment.[256]

Issue preclusion also does not apply where "[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the [legal] issue in the initial action than in the subsequent action…."[257] This is clearly illustrated in the takings context by *W.J.F. Realty v. Town of South Hampton*.[258] There, a potential residential developer litigated a takings claims against the town in state court, alleging the claim only under state law and reserving its federal claim under *England*.[259] Upon losing in state court, W.J.F. Realty raised the federal claim in federal district court, and the town moved to dismiss on grounds of claim and issue preclusion.[260] The court rejected the preclusion argument. Concluding that the *England* reservation preserved the federal claim,[261] it then held that issue preclusion was no bar, in part because the state court did not apply the federal takings factors set out in Penn Central[262] and in part because New York requires takings claimants to prove their claim "beyond a reasonable doubt," a different and heavier burden of persuasion than that which applies to federal takings claims.[263]

W.J.F. Realty shows that even when a state court fully applies the equivalent of federal takings tests, its legal conclusions under these tests are not preclusive if they result from a level of scrutiny more deferential to the government than that which controls in federal courts.[264] Significantly, the United States Supreme Court has repeatedly indicated that federal takings claims are reviewed under a heightened level of scrutiny[265] and proven by a

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256. *See, e.g., New Port Largo*, 95 F.3d at 1090 n.6 ("[A] federal court will not confer preclusive effect on a state court order where it is unclear what the state court actually decided."); Pascoag Reservoir & Dam, L.L.C. v. Rhode Island, 217 F. Supp. 2d 206, 214 (D.R.I. 2002) (refusing to apply issue preclusion because "statements made by the Rhode Island Supreme Court about the takings claim … are not part of a final judgment and are not essential to that Court's judgment"); W.J.F. Realty, 220 F. Supp. 2d at 148.

257. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28 (4) (1982).

258. 220 F. Supp. 2d 140 (E.D.N.Y. 2002).

259. *Id.* at 141.

260. *Id.* at 141-42.

261. *Id.* at 146-149.

262. *Id.* at 149.

263. *Id.* at 150.

264. *See also* Triomphe Investors v. City of Northwood, 49 F.3d 198, 202 (6th Cir. 1995) (observing that the state court's review of a zoning decision under Ohio law was broader than that required for a federal substantive due process claim and therefore collateral estoppel did not apply).

265. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nolan v. California Coastal Comm'n, 483 U.S. 825 (1987); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (explaining that a regulation "effects a taking if [it] . . . does not *substantially advance* legitimate state interests").

preponderance of evidence.[266] On the other hand, as *W.J.F. Realty* shows, many state courts continue to apply a standard of review and persuasion that is much more deferential to the government.[267] These differences should overcome issue preclusion both because they trigger the "burden of persuasion" exception and because they preclude takings claimants from having a "full and fair" opportunity to litigate their federal takings claims in state court. Thus, while issue preclusion may often depend on the specifics of state law, in many cases, the traditionally higher standard of review in the federal courts should provide a basis for federal jurisdiction and for avoiding the potentially thorny problem of collateral estoppel.[268]

C. The Inadequacy Exception and a Case Study of California Takings Law

In some instances, state takings law may diverge so significantly from the letter and intent of federal takings precedent that pursuing a state claim must be considered futile as a means to vindicate the just compensation remedy. If so, the plaintiff may be able to avoid the state compensation procedures rule altogether under the auspices of *Williamson County's* exception for "inadequate" state procedures.[269] The *Williamson County* Court conditioned the state procedures requirement upon both the availability *and* adequacy of the state's process. Since "the mere existence of some compensation mechanism does not necessarily render those procedures adequate,"[270] the inadequacy condition remains independent of the question of availability.[271] In requiring

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266. *See* City of Monterey v. Del Monte Dunes Ltd., 526 U.S. 687, 722-23 (1999) (affirming jury decision finding a taking based upon preponderance of evidence standard).

267. *See*, *e.g.,* Landgate, Inc. v. California Coastal Comm'n, 953 P.2d 1188, 1198-99 (Cal. 1998) (holding that a substantial evidence standard, not heightened scrutiny or de novo review, applies to challenges to land use permit denials in California); *see also* Breneric Assoc. v. City of Del Mar, 81 Cal. Rptr. 2d 324, 330 (Cal. Ct. App. 1998).

268. *But see* Peduto v. City of North Wildwood, 878 F.2d 725, 729 (3d Cir. 1989).

269. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 195 (1985) ("If the government has provided an *adequate* process for obtaining compensation, and if resort to that process 'yields just compensation,' then the property owner 'has no claim against the Government' for a taking.'") (emphasis added); *id.* at 196-97 ("Respondent has not shown that the inverse condemnation procedure is *unavailable or inadequate*….") (italics added).

270. Samaad v. City of Dallas, 940 F.2d 925, 934 (5th Cir. 1991) ("There is merit to the [*Williamson County*] Court's implicit conclusion that the mere existence of *some* compensation mechanism does not necessarily render those procedures adequate.").

271. *Williamson County*, 473 U.S. at 195 ("If a state provides an *adequate* procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause [in the federal courts] until it has used the procedure and been denied just compensation.") (emphasis added); *id.* (explaining that the Constitution is "satisfied by a reasonable and adequate provision for obtaining compensation…."); Daniels v. Area Plan Comm'n, 306 F.3d 445, 456 (7th Cir. 2002) (stressing that "a plaintiff may be excused from the

states to make a compensation remedy available without addressing the method of effectuating the remedy, *First English* did nothing to undermine the viability of the conceptually distinct inadequacy exception.[272]

1. A General Rule for the Inadequacy Exception

The difficult question is when the inadequacy exception should apply. Several courts have indicated that it is relevant where there is a high degree of certainty that state courts will refuse to award just compensation[273] and that it definitely applies where the takings claim is on all fours with previous state decisions that deny compensation.[274] A logical generalization from these decisions is

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exhaustion requirement if he demonstrates that 'the inverse condemnation procedure is unavailable or inadequate' and considering whether "Indiana's inverse condemnation procedure while 'available' is nevertheless inadequate'"); *Samaad*, 940 F.2d at 934.

272. *Procedural Implications of* Williamson County, *supra* note 97, at 10,355 ("[I]f the state does not provide a remedy *or* uses unfair procedures, an action lies in federal court.") (emphasis added).

273. *See* Rolf v. City of San Antonio, 77 F.3d 823, 826 (5th Cir. 1996); *Samaad*, 940 F.2d at 934 (citing cases reviewing inadequacy issue and stating "[T]hese cases indicate that 'inadequate' procedures are those that *almost certainly* will not justly compensate the claimant."); Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 463 (7th Cir. 1988) (stating that a compensation suit is ripe if it is apparent "the state does not intend to pay compensation"); Belvedere Military Corp. v. County of Palm Beach, 845 F. Supp. 877, 879 (S.D. Fla. 1994); Munoz Arill v. Maiz, 992 F. Supp. 112, 121 (D. P.R. 1998) (refusing to dismiss takings claim because state remedies were uncertain).

274. *See* Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991) (holding a challenge to rent control ordinance was ripe because state law did not recognize that such an ordinance may cause a taking); Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987) (holding a takings claim arising from zoning was ripe because Florida law did not recognize a claim for confiscatory zoning);Pascoag Reservoir & Dam, L.L.C. v. Rhode Island, 217 F. Supp. 2d 206, 216-17 (D.R.I. 2002) (applying inadequacy exception to hear takings claim because the state supreme court has "intimated" that the "owner has no cognizable takings claim"); Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068 (M.D.N.C. 1992), *aff'd*, 19 F.3d 11 (4th Cir.), *cert. denied*, 513 U.S. 928 (1994) (holding a challenge to a billboard amortization ordinance was ripe because state courts had already rejected compensation in identical circumstances). *But see* Rockler v. Minneapolis Cmnty. Dev. Agency, 866 F. Supp. 415, 417-18 (D. Minn. 1994).

A separate line of decisions seems to hold that the inadequacy exception allows avoidance of state compensation procedures when there is no pecuniary loss or where it is clear that the state procedures are not designed to address the loss. *See Daniels*, 306 F.3d at 456; Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F. 3d 996 (5th Cir. 1996). These cases conclude that, in limited circumstances, the claimant can immediately seek an injunction in federal court. This result raises several troubling issues. Most important, for purposes of this paper, is the problem of reconciling federal equitable relief with the Supreme Court's declarations that compensatory relief (which must be sought from the state) is *the* constitutionally mandated remedy for a taking. *See* First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 314 (1987) ("[The Fifth Amendment] is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking") (emphasis in original). The Court has an opportunity to resolve the apparent tension in *Washington Legal Foundation v. Legal Foundation of Washington*, a pending

that the exception should at least apply where the claimant shows, through an analysis of state law and judicial outcomes, that a resort to state procedures is highly likely to be futile;[275] i.e., where courts construct takings law to virtually foreclose vindication of a particular takings claim and where it is empirically clear that the state process rarely, if ever, results in an award of damages. This proposition sets a relatively high bar for inadequacy, while recognizing that the exception exists after *First English*.

The inadequacy exception supported here takes account of the fact that none of the Court's decisions address the procedural means by which a state is to offer the required compensation remedy[276] and that such means can be readily utilized to make an "available" compensation remedy meaningless. A state might burden an action in inverse condemnation with short statute of limitations, standards of evidence that are deferential to the government, and unique and costly exhaustion requirements. California, for instance, has accomplished all this and more by requiring a takings claimant to sue in administrative mandamus or for declaratory relief before seeking just compensation.[277] As the following discussion illustrates, this procedural hurdle has been applied to frustrate almost all claims for compensation.

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takings cases that raises the issue of when, if ever, injunctive relief may be sought for a taking.

275. *Coniston Corp*., 844 F.2d at 463 (noting that federal jurisdiction is appropriate if it is "apparent that the state does not intend to pay compensation"); Austin v. City of Honolulu, 840 F.2d 678, 680 (9th Cir. 1988) (noting that the claimant bears the burden of proving state procedures inadequate); *cf*. Maria L Marcus, *Wanted: A Federal Standard for Evaluating the Adequate State Forum*, 50 MD. L. REV. 131, 207-08 (1991) (arguing that a federal civil rights "plaintiff would be entitled to a federal forum if he could demonstrate that [his] claims would probably not be considered by state tribunals.… [He would bear] the burden of proving by a preponderance of the evidence that [the] procedure is too uncertain to be adequate.").

276. *See* Rossco Holdings, Inc. v. Cal. Coastal Comm'n, 260 Cal. Rptr. 736, 743 (Cal. 1989) ("*First English* … did not address the *procedural means* by which a [state] claim for inverse condemnation is asserted.").

277. *See generally* Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 PEPP. L. REV. 99 (1994).

2. Regulatory Takings in California: Procedural Barriers, Invalidation and Remedial Inadequacy

In *Hensler v. City of Glendale*,[278] the California Supreme Court held that an as-applied takings claimant must seek to have a regulatory action invalidated by way of administrative mandamus,[279] while the claimant raising a facial regulatory takings claim must seek the same relief by way of an action for declaratory relief, before asking for compensation.[280] In mandating these hurdles, *Hensler* required the as-applied takings claimants to satisfy onerous pleading and evidentiary rules, including a 90 day (or shorter) statute of limitations, with judicial review substantially limited to the administrative record (as developed by the agency) under a substantial evidence standard,[281] none of which normally apply to inverse condemnation.[282] Unprecedented outside California,[283] the requirement that a takings claimant defer a

278. 876 P.2d 1043 (1994).

279. Administrative mandamus is solely designed to "attack, review, set aside, void or annul" adjudicatory decision of state of local agencies. CAL. CIV. PROC. CODE § 1094.5 (West 1980 Supp. 2003); *see also* Youngblood v. Board of Supervisors, 586 P.2d 556, 559 n.2 (Cal. 1974).

280. *Hensler*, 876 P.2d at 1051; *see* CAL. CIV. PROC. CODE § 1094.5 (f) (West 1980 Supp 2003) ("The court [in an administrative mandate proceeding] shall enter judgment either commanding respondent to *set aside* the [administrative] order or decision, or denying the writ.") (emphasis added).

281. Under the substantial evidence standard, the agency's decision will be invalidated as an abuse of discretion only if its findings are not supported by "substantial evidence in light of the whole record," and where all doubts are resolved in favor of the agency's decision. *See* Topanga Ass'n for a Scenic Cmty. v. County of Los Angeles, 522 P.2d 12, 14 (Cal. 1974); Paoli v. California Coastal Comm'n. 223 Cal. Rptr. 792, 795 (Cal. Ct. App. 1986).

282. A proceeding in administrative mandamus must be brought within a maximum of 90 days. The time limit is reduced to 60 days if the challenge is directed at the California Coastal Commission. CAL. PUB. RES. CODE § 30801 (West 2002). In both a petition for administrative mandamus and an action seeking declaratory, invalidation is sought under the abuse of discretion standard. *See* CAL. CIV. PROC. CODE § 1094.5 (b) (West 1980 Supp 2003); 3 WITKIN, CALIFORNIA PROCEDURE § 18 (1954); C.J.L. Construction, Inc. v. Universal Plumbing, 22 Cal. Rptr. 2d 360, 364 (Cal. Ct. App. 1993). The same standard applies in a due process case. *See*, *e.g.*, Kensington Univ. v. Council for Private Postsecondary and Vocational Educ., 62 Cal. Rptr. 2d 582, 592 n.4 (Cal. Ct. App. 1997). On the other hand, a five-year statute of limitations applies to actions in inverse condemnation. And "questions of abusing discretion, exceeding jurisdiction and complying with state law do not arise … because they have been perceived as irrelevant to the inquiry of whether compensation is due." Browne, *supra* note 277, at 106-07.

283. *See* Brown, *supra* note 277, at 125 ("The [California Supreme Court's] Hensler opinion was [unclear] on why injured property owners should be forced to seek an invalidation remedy … when *legitimacy* of the regulation may be conceded by the owner form the outset … Until now, it has not been suggested that a writ of administrative mandamus is required to remedy *permissible* governmental actions."); *cf.* Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1518 (11th Cir. 1987) (noting that in Florida, "a separate action in inverse condemnation for an uncompensated, although valid, permit decision amounting to a taking, will lie"); *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009, 1019 (1992) Lucas "did not take issue with the validity of the Act," but only argued (successfully) that application of the valid

compensation claim until he has sought to have the offending regulation invalidated[284] amounts to a rule that takings plaintiffs must pursue a *due process* remedy before raising a claim for just compensation.[285]

In 1997, California's high court revealed that the state's due process "prerequisite" is actually a *substitute* for just compensation that shields the government from any damages for a taking. The court made this clear by holding that a takings claimant, who succeeded in having a challenged regulation invalidated as unconstitutionally confiscatory, had *no right* to seek compensation through inverse condemnation for the regulation's effective period.[286] The court candidly explained: "a remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking*."[287] Because takings claimants must seek the due process remedy of invalidation in a mandamus or declaratory relief action, and because this relief necessarily precludes compensation, compensation for a permanent taking appears to be barred as a matter of law in California.[288]

Act to his land would cause a taking if it denied all economically beneficial use of property.

284. *Hensler,* 876 P.2d at 1061. Incredibly, if the plaintiff fails to obtain a judgment in a mandamus proceeding, the administrative decision may be res judicata, and the takings claim deemed waived. Mola Dev. Corp. v. City of Seal Beach, 67 Cal. Rptr. 2d 103, 107 (Cal. Ct. App. 1997); Briggs v. City of Rolling Hills Estates, 47 Cal. Rptr. 29, 32-33 (Cal. Ct. App. 1995). This rule can apply even if the administrative decision was reached without affording the aggrieved property owner a chance to subpeona or cross-examine witnesses and even if the owner raises federal rights under section 1983. *See Mola*, 67 Ca. Rptr. 2d. at 107-09.

285. Invalidation or recision of a governmental decision is universally recognized as a due process remedy. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 197 (1985).

286. Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 867 (Cal. 1997). *See also* Santa Monica Beach, Ltd. v. Superior Court, 968 P. 2d 993, 1000-04 (Cal. 1998) (converting a takings challenge to a rent control law into a due process claim); *id.* at 1036 (Chin, J., dissenting) ("The [Santa Monica] majority … inappropriately conflates takings jurisprudence with due process jurisprudence…."). *Id.*at 1014 (Baxter, J., dissenting) ("[T]he majority address [sic] the wrong question and give [sic] the wrong answer. The takings clause has different and more stringent criteria than those applied under the majority's attempt to morph the deferential due process rational basis test into a takings clause test."); Tensor Group v. City of Glendale, 17 Cal. Rptr. 2d 639, 640-42 (Cal. Ct. App. 1993) (stating that a finding of invalidity precludes damages if no damages introduced during proceeding to determine validity).

287. *Kavanau*, 941 P.2d at 867. Several appellate court decisions have also inexplicably indicated that permanent takings damages simply are not available in California for similar reasons. In particular, in *Mola Development Corp. v. City of Seal Beach*, 67 Ca. Rptr. 2d 103, 107-08 (Cal. Ct. App. 1997), the court suggested in dicta that a claimant can only seek takings damages after having a regulation judicially invalidated. If this were the rule, the claimant would be limited to compensation for the time the invalid regulation was in effect; *i.e.*, for a temporary taking. But the California Supreme Court later appeared to close even this potential avenue for compensation, holding in *Landgate Inc. v. California Coastal Commission* that the period in which an invalidated regulation is judicially challenged is a non-compensable "normal delay." 953 P.2d 1188, 1197 (Cal. 1998).

288. The only exception (in theory) would be where the government persists in the

California's preclusive remedial framework extends even to per se and temporary regulatory takings. In *Landgate v. California Coastal Commission.*,[289] the Coastal Commission issued a final decision which had the effect of denying a property owner all beneficial use of a residential lot. The owner initiated a mandamus action as required and, almost two years later, was rewarded with a trial court decision invalidating the Commission's actions and allowing the plaintiff to go forward with residential construction. Then, when the owner sought compensation for the two year denial of all beneficial use of property, the trial court granted $156,000 for the temporary taking.[290]

Faced with the prospect of actually having to subject a governmental entity to the discipline of the Just Compensation Clause, the California Supreme Court chose to set aside the damages award, ruling that *Landgate*'s sole remedy was invalidation of the Coastal Commission's initial decision. Any hardship flowing from the Commission's actions and the resulting period of litigation were simply a normal "development delay," which could "be imposed on the developer rather than the general taxpayer without violating the United States Constitution."[291]

Therefore, *First English*'s command, that states provide a damages remedy for a taking, has not taken hold in California.[292] The numbers clearly illustrate: since the 1987 decision in *First English*, only *one* California state court decision has awarded monetary damages in compliance with the "self-executing" nature

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application of its regulations after a court declared them invalid.

289. 953 P.2d 1188, 1197 (Cal. 1998).

290. *Id.* at 1193.

291. *Id.* at 1197. For a similar decision at the California appellate court level, see Buckley v. California Coastal Comm'n, 80 Cal. Rptr. 2d 562 (Cal. Ct. App. 1998).

292. Some state courts are surprisingly candid about their disdain for federal takings precedent. *See* Gilbert v. State of California, 266 Cal. Rptr. 891 (Cal. Ct. App. 1990). There, the court agreed to consider federal takings precedent as "*persuasive*" authority. *Id.* at 902-03. In the same case, the trial court made this remarkable statement:

> [T]he United States Supreme Court has made some rather startling pronouncement[s] in this field of law that may cause our courts to rethink our courts to rethink that [compensation is not a constitutionally available remedy for property owners denied use of their land]…. [However] we should be reminded [that] a *trial court is to enforce the law of the state of California.*

Gilbert v. State, No. 636481-0, slip. op. at 4 (Alameda Sup. Ct. June 28, 1988), *aff'd*, 266 Cal. Rptr. 891 (Cal. Ct. App. 1990) (emphasis added), *cited in* Michael M. Berger, *Silence at the Court: the Curious Absence of Regulatory Takings Cases from California Supreme Court Jurisprudence*, 26 LOY. L.A. L. REV. 1133, 1141 n.38. *See also* Bullock v. City of San Francisco, 271 Cal. Rptr. 44 (Cal. Ct. App. 1990). In *Bullock*, a California appellate court limited its analysis of a takings claim to the following statement: "In California there is an extensive body of precedent rejecting such claims and displaying a *generally* tolerant attitude to municipal ordinances in this area." *Id.* at 53 (emphasis added).

of the Just Compensation Clause.[293] The only real difference between the law now and the law in place before *First English* is that today's takings claimant cannot pursue a claim in federal court.

Williamson County rejected the Solicitor General's argument that a mandamus petition is required to achieve a final decision, but when imposed as a compensation "prerequisite" under the state procedures ripeness prong, the same requirement has made California's "available" just compensation remedy non-existent as a practical and theoretical matter. Ironically, the state Supreme Court sometimes seems to recognize the unfairness of its procedural scheme, but refuses to jettison it or rein it in.[294] It is precisely when states retain unfair procedural devices, and then engage in a systematic and empirically verifiable watering down of takings law, to the extent that compensatory relief simply does not happen, that the inadequacy exception should provide for immediate federal jurisdiction.[295]

V. CONCLUSION

It is clear to observers on both sides of the takings issue that the state procedures requirement is a deceptive and unjust

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293. *See* Ali v. City of Los Angeles, 91 Cal. Rptr. 2d 458 (Cal. Ct. App. 1999). Unfortunately, the compensation award granted in Ali must be considered the result of a peculiar set of facts and circumstances. In the case, a landowner challenged the city's refusal to grant a demolition permit that would facilitate reconstruction of a hotel destroyed by fire. In a mandamus proceeding, the trial court held that the denial was invalid under state law. In a simultaneous proceeding, another trial court held that the developer was entitled to damages for the temporary denial of all use of property affected by the permit denial. On appeal, the city did "not even acknowledge [the trial court's] findings [that the permit denial prevented all beneficial use of property] and [made] no attempt to satisfy its burden as an appellant to demonstrate that there is *no substantial evidence* to support those findings." *Id.* at 463. The court therefore accepted as "an established fact" that the city's actions prevented the landowner from making any economically beneficial use of land. It then took great pains to distinguish Landgate, holding that just compensation was proper only because the permit was denied for no other reason than to delay development and was therefore arbitrary. *Id.* at 464-65. Amazingly, the California Supreme Court denied review, for the first time allowing a compensation decision going the landowner's way to stand.

294. *See* Hensler v. City of Glendate, 876 P. 2d 1043, 1052 (Cal. 1994) (noting that "in many cases, administrative mandate proceedings are *not* an adequate forum in which to try a takings claim," but then claiming that any deficiency was remedied by the landowner's ability to join an inverse condemnation proceeding with the mandamus action) (emphasis added).

295. *See* San Remo Hotel v. City of San Francisco, 145 F.3d 1095, 1102 (9th Cir. 1998) (recognizing that a takings claimant would not have to "resort to the California state courts" under an *Agins* regime because "it would have been futile"); Kruse v. Village of Chagrin Falls, 74 F.3d 694, 700 (6th Cir. 1996) (holding that Ohio's writ of mandamus procedure was not adequate for the purposes of seeking just compensation because it attempts "to obtain wholly equitable relief for an injury already afflicted"); Corn v. City of Lauderdale Lakes, 816 F.2d 1514, 1517-19 (11th Cir. 1987) (reviewing Florida law and concluding that it did not provide an adequate procedure for compensation for "injuries sustained as a result of an unreasonable zoning ordinance later declared invalid.").

procedural rule, one that tricks landowners into filing in state court on the belief that this will prepare their claim for federal review only to eviscerate the federal claims for the very same reason.[296] What is apparently less clear, but nonetheless true, is that the state procedures requirement itself, and its application in federal courts, rests on extremely precarious foundations. The Court rests the requirement on ripeness concerns, and claims that it emanates specifically from the nature of the Just Compensation Clause, but in fact, the requirement has little in common with either of these concepts. It is simply a unique procedural hurdle for one class of constitutional claimant. Unfortunately, federal courts have even failed to apply the rule as constructed - as a *temporary* bar to federal jurisdiction - by strictly adhering to the doctrines of claim and issue preclusion.

Established jurisdictional doctrines provide several immediate solutions to the courts' distortion of *Williamson County* and its forcible relegation of federal takings claimants to the state court system. First, *Williamson County* carved out a blanket exception to the state procedures rule when the relevant state procedure is inadequate. This exception remains viable and should apply in states, like California, that design procedures so that takings damages are a virtual impossibility. Second, the Supreme Court and many federal courts now recognize that a plaintiff with a federal claim cannot be forced to involuntarily litigate that claim in state courts when his preferred forum is the federal court. The Court has provided, and lower courts have adopted, the *England* reservation as a means for plaintiffs to preserve their federal claims for federal review.

The takings plaintiff that carefully registers a reservation of federal claims at the state court level and endures the state court process should be permitted to raise the federal takings claims in the federal court without offending the doctrine of claim preclusion. Issue preclusion remains problematic, but it is not as large a barrier as some have suggested.[297] It applies to totally preclude the

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296. *See Ripeness and Forum Selection, supra* note 6, at 71 (explaining that, while he is not opposed in principle to the state procedures requirement or its preclusive effect, "one understandable reaction to the prong two requirement of *Hamilton Bank* is that it perpetrates a fraud or hoax on landowners. The courts say, 'Your suit is not ripe until you seek compensation from the state courts,' but when the landowner does these things, the court says 'Ha, ha, now it is too late.'").

297. *See* Meacham, *supra* note 228, at 251 (arguing that issue preclusion is virtually insurmountable because most state takings law is coextensive with federal takings law). This position ignores the differences in burden and scrutiny between federal and state law and that a state court's neglect of federal elements is ground for avoiding preclusion of those issues. *See supra* notes 244-63 and accompanying text.

reserved federal claims only if (1) state law recognizes all federal takings standards, which is likely in most, but not all, states, [298] and (2) the state court considers those standards and the claim as a whole under standards of proof and scrutiny equivalent to federal levels, a much less certain eventuality. In any other circumstance, issue preclusion fades and the takings claimant will finally have her day in federal court in accordance with the established role of the federal judiciary. The post-*Williamson County* Court has made clear that the Takings Clause is not a "poor relation" in the constitutional hierarchy;[299] its time for federal courts to treat takings claimants accordingly when considering issues of jurisdiction.

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298. For instance, like Oregon, it appears that Virginia and Louisiana takings laws do not recognize a regulatory taking where less than all use of property, and the owner's investment-backed expectations, are destroyed.

> Property is considered taken for [state] constitutional purposes if the government's action deprives the property of all economic use. As we have previously discussed, the [county's actions] did not eliminate all economic uses of [the property]. Therefore, the County's action did not constitute a taking of Omni's property under [Article I, section 11 of the state constitution].

Bd. of Supervisors of Prince William County v. Omni Homes, Inc. 481 S.E.2d 460, 467 (Va. 1997).

See also Mayhew v. Town of Sunnyvale, 964 S.W.2d 922, 935 (Tex. 1998) (stating that where less than all use of property is destroyed, the court considers "the economic impact of the regulation and the extent to which the regulation interferes with distinct investment-backed expectations"); Avenal v. Louisiana, 757 So. 2d 1, 12 (Ct. App. 2000) ("The 'distinct investment-backed expectations' of *Penn Central* [citation omitted] is irrelevant to the question of whether a taking has occurred under Louisiana law.") While in Texas, it is unclear whether the "character of the governmental action" takings test is a part of state takings law.

299. *See Dolan*, 512 U.S. at 392.

"BOTTLING UP" OUR NATURAL RESOURCES: THE FIGHT OVER BOTTLED WATER EXTRACTION IN THE UNITED STATES

TARA BOLDT-VAN ROOY*

Table of Contents

I. INTRODUCTION

Only 1% of the existing water resources on the entire planet can be used for human consumption. The remaining 99% of the existing water resources consist of 97% saltwater and 2% ice caps.[1] These figures become even more critical when it is estimated that the world's population recently exceeded 6 billion people, and 7% of those people lack the daily water resources needed to merely survive.[2] In fact, the World Health Organization asserts that "the lack of drinking water is the leading cause of mortality in the world today."[3] Water is also necessary for the survival of plants, animals, and most industries, especially the agricultural industry. Therefore, the availability of water for drinking and irrigation is the top priority of many local and world leaders. Leaders recognize that the limited fresh water supply must be maintained to satisfy the thirsts of those living today and those to come in future generations.

Recent concerns about the contamination of municipal tap water and the popularity of the fitness-focused lifestyle have lead to an explosion in the sales of purified bottled water throughout the world. While bottled water used to be the beverage of only the wealthy, it is now today's drink of choice of both the health-conscious and average consumer. In the United States alone, consumers drank five billion gallons of bottled water in 2001.[4] This is about the same amount of water that falls in two hours from the American Falls at Niagra Falls.[5] With the boom in the bottled water industry, bottlers are looking for new sources from which to pump their product. This has sparked a debate over the amount of

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* J.D., The Florida State University College of Law (May 2003). B.A., The University of Wisconsin-Madison, 1999. The author wishes to thank her husband, Joseph Van Rooy, for his support throughout this project and law school.

1. Bottled Water Web, *Facts*, *at* http://www.bottledwaterweb.com/indus.html (last visited Feb. 25, 2003).

2. Christopher Scott Maravilla, *The Canadian Bulk Water Moratorium and its Implications for NAFTA*, CURRENTS: INT'L TRADE L.J., Summer 2001, at 29.

3. Nestlé Waters, *Leaving a Legacy of Healthy Water for the Future*, *at* http://www.nestle-water.com/english/d-1-a_une_ressource.asp (last visited Feb. 25, 2003).

4. Anne Christiansen Bullers, *Bottled Water: Better Than The Tap?*, FDA CONSUMER MAG., July-Aug. 2002, *at* http://www.fda.gov/fdac/features/2002/402_h2o.html (last visited Feb. 25, 2003).

5. *Id.*

water that can legally be withdrawn from local bodies of water and sold across the country.[6]

The issue presented by this Note is whether states need to develop stricter laws to protect the quantity of their fresh water resources from the expansion of the bottled water industry. While regulation currently exists on the federal level as to the quality of bottled water, it is up to the states to place regulations on the *quantity* of water that can be extracted from the fresh water resources within their boundaries. States must be concerned with the maintenance of their local water supplies in order to sustain their population, their industry, their farms, their recreational areas, and their natural environment. However, state restrictions on pumping quantities of bottled water conflict with private property owners' rights to use their property as they see fit, including the use of those natural resources, like water, found on or under their property. Private landowners and third party vendors of bottled water argue that their pumping does not adversely affect the water supply or the environment. They also claim that they would halt water extractions if there were adverse effects because they too have an interest in the persistence of the water source.

This Note explores the expansion of the bottled water industry in the United States, the effects of the industry on fresh water resources and their environments, and the legal battles to control the location and the amount of water collected by bottlers. With a recent boom in the demand for purified bottled water, the bottlers are searching for new untapped water sources in states such as Wisconsin, Michigan, Florida, and Texas. However, private citizen activist groups oppose the draining of their water sources by the bottlers, and they fear for the depletion or the contamination of their local water sources and the environment. Citizen activist groups are now pushing legislators to create stricter water protection laws, while bottled water companies continue to tempt local community leaders with tax dollars and new jobs for the area with their bottling facilities. In Crystal Springs, Florida, a legal battle emerged against a proposed increase in the amount of water that Zephyrhills, a Nestlé subsidiary, may collect from a spring feeding the Hillsborough River and, ultimately, the City of Tampa.

Part II examines the background of the bottled water industry and the history of regulations on bottled water in the United States. Sales in the bottled water industry have exploded since the 1990s.

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6. *See generally* MAUDE BARLOW & TONY CLARKE, BLUE GOLD: THE FIGHT TO STOP THE CORPORATE THEFT OF THE WORLD'S WATER (2002); ROBERT GLENNON, WATER FOLLIES: GROUNDWATER PUMPING AND THE FATE OF AMERICA'S FRESH WATERS (2002).

In 1990, bottlers sold $2.7 billion to thirsty consumers,[7] while in 2001, sales rose to $6.5 billion, according to the Beverage Marketing Corporation of New York.[8] The average consumer in the United States in 2001 also drank five times the amount of bottled water as he or she did in 1984.[9] The leading bottler of water in the world is Nestlé,[10] but soft drink manufacturers, like Pepsi and Coca-Cola, have also tapped into the booming market with their own brands of bottled water.[11] Most bottlers sell water pumped from springs and wells; however, one-quarter of bottlers simply resell purified water from municipal water systems.[12]

Bottled water is regulated by the U.S. Food and Drug Administration (FDA) as a food product.[13] Bottlers must therefore comply with the FDA's requirements on quality, labeling, and manufacturing practices. Bottlers must also comply with state restrictions on the collection of water and standards for bottled water, as well as trade industry regulations, like the Model Code of the International Bottled Water Association (IBWA). While regulation on the quality of bottled water has been adequately implemented as the market for water has expanded, regulations on the quantity that can be withdrawn from fresh water sources has not.

Part III explores the potential for environmental damage as a result of pumping large quantities of water from limited fresh water resources. Because of the tremendous market for bottled water, bottlers are looking for untapped resources from which to pump their product. Bottlers may seek out private landowners who will then seek a permit from local authorities to pump water from the ground to be transported to the bottling plant. Local citizens have become concerned with the large amount of water being removed from the local aquifer, and they fear for the persistence of their water supply and for the maintenance of the often pristine

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7. Francis X. Donnelly, *Bottled Water Fight Grows*, DET. NEWS, May 20, 2001, *at* http://www.detnews.com/2001/business/0105/20/b01-226110.htm (last visited Feb. 25, 2003).

8. R.J. DeLuke, *Bottled Water Market Growing in Leaps and Bounds,* WATER TECH. MAG., July 2002, *at* http://www.watertechonline.com/article.asp?indexid=6632855 (last visited Feb. 25, 2003).

9. *See id.*; Victor Lambert, *Bottled Water: New Trends, New Rules,* FDA CONSUMER, June 1993, at 9.

10. *See* Catherine Ferrier, *Bottled Water: Understanding a Social Phenomenon*, Apr. 2001, at 11, *at* http://archive.panda.org/livingwaters/pubs/bottled_water.pdf (last visited Feb. 25, 2003).

11. *See* Catherine Golub, *Liquid Assets: Is Bottled Water Really Better Than What's on Tap?*, ENVTL. NUTRITION, Sept. 2001, at 1.

12. *See* Natural Resources Defense Council, *Bottled Water: Pure Drink or Pure Hype?, at* http://www.nrdc.org/water/drinking/nbw.asp (last visited Feb. 25, 2003).

13. *See* Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-397 (2000).

environments. There is also concern for plant and animal species that thrive on the fresh water source and for the effects of the millions of tons of plastic that are used in the bottling of water. Therefore, the regulations on the quantity of water that can be extracted from fresh water resources must also reflect the environmental problems created by the extraction process.

Part IV examines the recent legal and statutory challenges to the expansion of the bottled water industry across the nation. Bottlers faced prominent legal challenges in Michigan, Texas, and Wisconsin, over their plans to establish pumping facilities on local water sources. In Michigan, three Native American tribes filed a lawsuit in federal court to prevent the extraction of water from the Great Lakes Basin.[14] In Texas, a landowner filed suit against a bottler after his well dried up soon after the bottler began to pump water from a nearby property.[15] Legislators in Texas have also responded to concerns over the extraction of water from their already depleted resources.[16] In Wisconsin, a Native American tribe and two citizen activist groups waged legal battles against a bottler proposing to drill two large wells from which to pump large quantities of water each day.[17] Finally, in Canada, a moratorium on bulk extraction and exportation of bottled water from its plentiful resources has halted the plans of U.S. and Canadian bottlers.[18] Until states can enact stricter legislation on the bulk extraction of water for bottling, the industry will continue to face challenges from local citizens, and the bottler is likely to succeed under the current lax regulations.

Part V explains a specific legal challenge in Crystal Springs, Florida, over the rights to extract water from a natural spring which supplies water to the City of Tampa. A private landowner, Robert Thomas, owns the springs, which were once a popular recreation area for local families and visitors to the area. Thomas contracted with Zephyrhills, a subsidiary of Nestlé, in 1989 to pump water from the springs, and later closed the springs to the public.[19] This angered local citizens and sparked concern for the well levels in the area and for the water from the springs which feeds into the

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14. Joan Lowy, *Water Wars Pit Bottlers vs. Residents*, GRAND RAPIDS PRESS, Mar. 31, 2002, at A1, *available at* 2002 WL 4769952.

15. *See generally* Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75 (Tex. 1999).

16. *See* Act of June 1, 1997, ch. 1010, 1997 Tex. Gen. Laws 3610, *available at* http://www.capitol.state.tx.us/tlo/75R/billtext/SB00001F.HTM (last visited Feb. 25, 2003).

17. *Ho-Chunk Sue DNR Over Perrier Drilling*, MILWAUKEE J. SENTINEL, Oct. 21, 2000, *at* http://www.jsonline.com/news/state/oct00/stabrfs21102000a.asp (last visited Feb. 25, 2003).

18. *See* Maravilla, *supra* note 2.

19. Save our Springs, Inc., *Crystal Springs History*, *at* http://www.saveourspringsinc.org/history.htm (last visited Feb. 25, 2003).

Hillsborough River and, ultimately, to the City of Tampa. When Thomas sought to increase his pumping limit in 1997, the local residents mounted a campaign against him.[20] In the end, Florida's regulations on water extractions, implemented by the local water district, were able to prevent the harms to the river and the threatened water supply.

Finally, part VI examines the possible options for state legislatures to consider when they act to preserve and protect the public and private water sources within their borders. I propose that states re-classify ground water resources within their borders as public resources, rather than commodities that can be bought and sold with no consequences to the state's water supply and environment. States should also restrict bulk extractions of water by developing stricter permitting requirements and enforcement agencies, and by providing relief to those adversely affected by commercial bulk water extractions. In addition, states should adapt water quantity regulations to consider the cumulative effects of bulk water extraction, encourage bottlers to explore desalinization processes to transform salt water into drinking water, and require consumers to pay for some of the costs created by the high demand for bottled water.

II. THE BOTTLED WATER INDUSTRY AND THE REGULATION OF THE INDUSTRY IN THE UNITED STATES

In the last two decades, the bottled water industry has grown beyond the expectations of consumers and those in the beverage industry itself. Today, consumers in all segments of the population drink water on a daily basis for many different reasons. As a result, sales figures are expected to continue to rise, and bottlers must expand their searches to new fresh water sources from which to extract their product.

In addition, the legal and environmental concerns based on the bulk extraction of fresh water resources are the result of laws which only regulate the quality of bottled water, rather than the *quantity* of water that is actually removed from the natural resources. While bottled water has historically been placed within the bounds of state authority, federal laws preempt all individual state laws when bottled water is sold across state lines or is imported into the United States.[21]

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20. *See* Susan M. Green, *Smell of Dead Fish Punctuates Water Pumping Debate*, TAMPA TRIB., Apr. 15, 1997, at 4.

21. TECHNOLOGY OF BOTTLED WATER 53, 55 (Dorothy A.G. Senior & Philip R. Ashurst eds., 1998).

A. Sales of Bottled Water

Sales of bottled water have reached astounding figures in the last decade. The industry estimates suggest that sales of bottled water have tripled in the past ten years.[22] Both sales and consumption of bottled water by the general public have surprised the leaders in the beverage marketplace. In 2001 alone, more than 5.4 billion gallons of bottled water were sold to and consumed by the American public.[23] Estimates also suggest that by 2004 bottled water will surpass milk and coffee to take its place as the second largest beverage sold after soft drinks.[24] In fact, by 2005, sales of bottled water are expected to exceed 7.2 billion gallons.[25]

1. Amount of Bottled Water Consumed Versus the Cost of Production

The enormous sales figures from the bottled water industry also suggest great profits for leading sellers. Production costs of bottled water are estimated to be "as little as $.0125 … [to] $.06 per gallon … [t]hough it often sells for just over a dollar a bottle," sized far smaller than a gallon.[26] Commentators on the boom of the bottled water industry proclaim that bottled water costs several times that of a gallon of gasoline, or almost $8 per gallon.[27] "It is more expensive than milk, per fluid ounce, and about the same as coffee, soft drinks, and most fruit juices."[28] In comparison to the price of municipal tap water, a report by the Natural Resources Defense Council (NRDC) stated that consumers spend "from 240 to over 10,000 times more per gallon for bottled water."[29]

2. Who Isn't Buying Bottled Water

In 1984, the level of annual per capita consumption of bottled water in the United States was only four gallons.[30] In 1991, that level rose to 9.3 gallons,[31] and by 2001, the level of annual per capita

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22. *Is Bottled Water Better?*, ENV'T, May 2001, at 4.
23. DeLuke, *supra* note 8.
24. *See* Lowy, *supra* note 14; Lisa Turner, *Toxins on Top? Why Bottles and Purifiers Really Hold Water,* BETTER NUTRITION, Dec. 2001, at 48.
25. *As Bottled Water Sales Rise, So Does Opposition to Plants,* WATER TECH. MAG., Mar. 2002, *at* http://www.waternet.com/news.asp?mode=4&n_ID=30517 (last visited Feb. 25, 2003).
26. *See* Jerry Gabriel, *Water for Sale: Why are We Paying Four Times What We Pay for Gasoline for Something That's Practically Free?,* HUM. ECOLOGY, Dec. 2001, at 8.
27. *Id.*
28. *Id.*
29. Natural Resources Defense Council, *supra* note 12.
30. Lambert, *supra* note 9, at 9.
31. DeLuke, *supra* note 8.

consumption rose dramatically to reach 18.2 gallons.[32] Bottled water consumption is also increasing among all segments of the population, not simply the health-conscious portion. Today, almost fifty percent of Americans drink bottled water on an average day.[33] Consumers in California alone drink one-quarter of the bottled water supply sold in the United States.[34] The main reason for the population's choice of bottled water over tap water is taste, followed by a belief that bottled water is cleaner and healthier than tap water.[35] Many consumers of bottled water are concerned about the safety and quality of municipal water sources after recent health scares such as that in Milwaukee, Wisconsin, in 1993.[36] Other reasons for preferring bottled water over tap water include the fact that it is a "calorie-free, caffeine-free, and alcohol-free" alternative beverage, that it is sold in easy single serving containers,[37] and that it makes a "certain fashion statement" about the consumer.[38]

3. The Sources of Bottled Water and the Bottlers Themselves

The source of 75% of bottled water sold in the United States today is a protected spring source or a well. The remaining 25% of water sold in bottles is collected from municipal tap water systems and purified.[39] Soft drink giant Pepsi holds the title as the number-one seller of bottled water at retail stores with its line of purified municipal tap water, Aquafina.[40] Its rival, Coca-Cola, also sells purified municipal tap water under its brand, Dasani.[41] Over 700 different brands of bottled water appeared on the shelves of stores in the United States in 1992.[42] The top sellers of bottled water in the American marketplace include Nestlé/Perrier Group of America, Danone Waters of North America, Pepsi, and Coca-Cola.[43] Nestlé/Perrier Group of America dominates in the world market with almost 16% of all bottled water sales, and 67 bottling plants

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32. *See* Gabriel, *supra* note 26, at 9.
33. *See* DeLuke, *supra* note 8.
34. Gabriel, *supra* note 26, at 9.
35. *See* Lambert, *supra* note 9, at 9.
36. *See* Golub, *supra* note 11 (discussing the Cryptosporidium outbreak in the municipal water supply which infected over 400,000 people).
37. Sharon Denny, *Why Bottled Water?*, CURRENT HEALTH 2, Oct. 1996, at 26.
38. Gabriel, *supra* note 26, at 9.
39. *See "Water, Water, Everywhere" … But Is It Safe to Drink?*, MED. UPDATE, Nov. 1993, at 5.
40. *"Purified" Bottled Water …. From Public Water Supplies*, TUFTS U. HEALTH & NUTRITION LETTER, Mar. 2000, at 1.
41. *Id.*
42. *See* Ferrier, *supra* note 10, at 10.
43. *See* DeLuke, *supra* note 8.

that employ 18,000 people around the world.[44] It collects water from 75 springs in the United States for 15 brands of bottled water like Ice Mountain, Deer Park, Zephyrhills, Poland Springs, and Ozarka.[45]

B. The Regulation of Bottled Water

1. Federal Regulations

The quality of bottled water is regulated by the federal government. Bottled water is regulated by the Food and Drug Administration (FDA) because it is classified as a food product under the Federal Food, Drug and Cosmetic Act (FFD&C Act).[46] All other water supplies for drinking water are regulated by the Federal Environmental Protection Agency (EPA).[47] However, the FDA is "responsible for ensuring that the quality standards for bottled water are compatible with EPA standards for quality and safety of tap water."[48] The Hammer Provision of 1996 further establishes that when the EPA changes or adds to its contamination standards, the FDA must also set a similar level for bottled water or report in the Federal Register why it is not doing so.[49] Therefore, the quality standards for bottled water set by the FDA must be at least as stringent as those issued by the EPA for municipal tap water.

In 1995, the FDA established standard of identity regulations for bottled water.[50] The standard of identity regulations describe the different types of bottled water. For instance, the FDA describes "spring water" as follows:

> water derived from an underground formation from which water flows naturally to the surface of the earth . . . [which] shall be collected only at the spring or through a bore hole tapping the underground formation feeding the spring …. If spring water is collected with the use of an external force, [the] water must continue to flow naturally to the surface of the earth through the spring's natural orifice.[51]

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44. *See* Ferrier, *supra* note 10, at 11.
45. *See also* Donnely, *supra* note 7.
46. *See* 21 U.S.C. §§ 301-321(f) (2000).
47. *See* Safe Drinking Water Act, 42 U.S.C. § 300(f) (1974), *amended by* Pub. L. No. 104-182, 110 Stat. 1613 (1996).
48. Lambert, *supra* note 9, at 9.
49. *See* 21 U.S.C. § 349 (2000).
50. *See* 21 C.F.R. § 165.110(a) (2002).
51. *Id.* § 165.110(a)(2)(vi).

Furthermore, the FDA requires that bottled water be labeled appropriately with its type in order to fall within the standard of identity or it will be deemed misbranded.

The FDA also requires water bottlers to follow its standards of quality[52] and its current good manufacturing practices (CGMP) regulations.[53] The standards of quality establish "limits for microbiological, physical, chemical, and radiological substances for both source water and finished bottled water products."[54] The CGMP regulations allow for the inspection of bottling facilities to review plant construction and design, bottled water production and process controls, and to ensure the sanitary operation of bottling plants.[55]

2. State Regulations

Water that is bottled and sold within the same state is not subject to federal regulations. The NRDC estimates that "between 60 and 70 percent of all bottled water sold in the United States" falls into this category that is not federally regulated.[56] States often use one of three models for their regulations on the quality of bottled water. First, under the Federal/FDA Model, bottled water is classified as a food product and must satisfy only the FDA's food safety and labeling requirements.[57] State requirements as to labeling and/or quality standards may also apply to intrastate bottled water under this model.[58] Second, the Environmental Model regulates bottled water through the state's environmental protection agency or natural resources department.[59] While this model is only followed by six states, regulation "begins at the source of withdrawal and usually includes inspection, sampling, analysis and approval of water sources."[60] Finally, the Combination Model incorporates regulations from both the Federal/FDA and the Environmental Models.[61] The environmental or natural resources

52. *See id.* § 165.110(b).
53. *See id.* § 129.1.
54. International Bottled Water Association, *Regulation of Bottled Water: An Overview*, *at* http://www.bottledwater.org/public/Bottled%20Water%20Regulation%20Overview.htm (last visited Feb. 25, 2003) [hereinafter IBWA, *Overview*].
55. *Id.*
56. National Resources Defense Council, *supra* note 12.
57. IBWA, *Overview*, *supra* note 54.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

agency regulates the source withdrawal of the water, and once bottled, the water is regulated as a food product.[62]

States are also primarily responsible for permitting for the extraction of bottled water from the natural resources within their borders. Many states have enacted legislation which grants the authority to regulate water consumption in the state to the environmental or natural resources agency, which may choose to further delegate authority to local water boards. These water boards often establish plans for the use of the water and the preservation of the sources within their jurisdiction. The boards also issue permits for water uses which comply with state law and are approved by the board itself. For example, in Florida, the legislature granted the authority and responsibility to the Department of Environmental Protection (DEP) in order to "accomplish the conservation, protection, management, and control of the waters of the state and with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to the various water management districts."[63] Florida's Administrative Code also guides water management districts in establishing their permitting rules.[64]

3. Trade Industry Regulation

The bottled water industry also has its own self-regulating body, the International Bottled Water Association (IBWA). IBWA was established in 1958,[65] and maintains standards for its members that are often stricter than federal and state regulations on bottled water.[66] IBWA reports that its Model Code has been adopted by at least sixteen states, including California, Florida, and Texas, mainly to act as a basis for their inspection programs for bottled water facilities.[67] IBWA has approximately 1,000 members who produce 85% of the bottled water sold in the United States.[68] Each member bottler of IBWA is required to pass a yearly unannounced inspection of its bottling facilities by the National Sanitation Foundation (NSF), an independent certifying agency.[69] "In order to maintain

62. *Id.*
63. FLA. STAT. § 373.016(5) (2002).
64. *See generally* FLA. ADMIN. CODE R. 62-40.410 (1995).
65. TECHNOLOGY OF BOTTLED WATER, *supra* note 21, at 205.
66. *See* Golub, *supra* note 11.
67. International Bottled Water Association, *Model Bottled Water Regulation*, January 2002, at 23, *at* http://www.bottledwater.org/public/2002ModelCode0102.pdf (last visited Feb. 25, 2003).
68. Elizabeth Ward, *Safe Drinking Water: Is Bottled Water Really Better?,* ENVTL. NUTRITION, Oct. 1994, at 1.
69. TECHNOLOGY OF BOTTLED WATER, *supra* note 21, at 205.

NSF certification, water bottlers must send daily samples to an independent lab for microbiological testing and must maintain records of filter changes and other quality checks."[70] IBWA also requires its bottler members to create a Hazard Analysis and Critical Control Points (HACCP) program to ensure "food safety and security within the production facility."[71]

4. Bottlers' Water Policies

Individual bottlers may also choose to establish their own water policies, which may address broader concerns about the responsible management of water resources. Nestlé's Water Policy shows its recognition of the need to preserve the quantity and quality of fresh water resources. The policy explains that the bottler "supports the sustainable use of water, strictly controls its use in the Company's activities and strives for continuous improvement in the management of water resources."[72] Three of the policy concerns expressed in Nestlé's Water Policy include the "[p]rotection of springs and their surroundings," the development of "methods that minimise [sic] water consumption and waste water generation," and the management of water to ensure that "fresh water use is reduced as much as possible and, wherever feasible, water is reused and recycled."[73] These policies are not, however, binding on the bottlers.

III. ENVIRONMENTAL EFFECTS OF EXTRACTING WATER FOR SALE

The tremendous expansion of the bottled water industry has increased concerns for the maintenance of local water resources and their environments. With the removal of large quantities of water, environmentalists and local residents fear for the degradation of springs, rivers, lakes, and in the end, their municipal and well water supplies. Objections also exist because the extracted water is transferred out of the local environment and water system only to be sold for a profit across the country.

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70. Golub, *supra* note 11.

71. IBWA, *Overview*, *supra* note 54.

72. Nestlé, *Nestlé Water Policy*, *at* http://www.nestle-water.com/english /nestl%E9%20water%20policy.pdf (last visited Feb. 25, 2003).

73. *Id.*

A. Adverse Effects on the Water Supply and on the Aquifer

1. Extraction Conflicts With Local Water Resource Protection Plans

The permitted consumption of millions of gallons of water for bottling each year conflicts with the establishment of local water resource protection plans put in place to conserve local water resources.[74] Many areas developed water resource plans in response to increasing populations, decreasing municipal water resources, and several years of drought conditions. As a result, it is illegal for local residents to use water at certain times for specified activities, such as lawn irrigation.[75] However, pumping gallons of water away to factories to be bottled and sold across the country directly conflicts with the goals of these programs. Water that is extracted and transferred out of the area permanently depletes the natural resource and the supply of water for the community's and the environment's needs.

2. Extraction Leads to a Drop in the Aquifer

The main fear of nearby residents is that the bulk removal of water from local water reservoirs will lead to a drop in the aquifer in that area. The aquifer is a "formation that can store groundwater and that is sufficiently permeable to transmit it to wells and springs."[76] When large quantities of water are removed from the aquifer without replenishment, the physical characteristics of the aquifer actually change and cause adverse effects that can be felt by nearby water sources and wells.[77] In the United States, an aquifer which covers one-third of the country is currently "being depleted at a rate eight times faster than it is being replenished."[78] Specifically, citizen activists working to protect water resources point out that local usages of water for irrigation and agricultural purposes return water to the aquifer, while the removal of water for bottling simply acts to reduce the aquifer's supply without replenishing it for use in

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74. *See, e.g.,* Year-Round Water Conservation Measures, Rules of the SWFWMD, FLA. ADMIN. CODE R. 40D-22 (1992), *available at* http://www.swfwmd.state.fl.us/rules/files/40d-22.pdf (last visited Feb. 25, 2003).

75. *See, e.g.,* Hillsborough County, Florida, Water Restrictions, *at* http://www.swfwmd.state.fl.us/waterres/restrictions/hillsborough.htm (last visited Feb. 25, 2003).

76. TECHNOLOGY OF BOTTLED WATER, *supra* note 21, at 77.

77. *See* Itzchak E. Kornfeld, *Groundwater Conservation: Conundrums and Solutions for the New Millennium*, 15 TUL. ENVTL L.J. 365, 372 (2002) (discussing how water movement in aquifers depends on high and low points and that bulk extractions from a newly drilled well can cause new low points which affect water flows to existing streams, springs, and wells).

78. Maravilla, *supra* note 2, at 30.

the future.[79] In addition, when the water table, or the top of the aquifer is reduced, there is an increase in the cost and the energy needed to continue to extract water from the source for other regular purposes. Finally, a reduction in the flow of fresh water into the aquifer allows "lower quality water to flow inward and contaminate the fresh water of the aquifer."[80]

3. Extraction Causes Wells to Dry Up and Salt Water Intrusions

Similarly, there is a fear that the removal of large quantities of local fresh water will lead to the drying up of nearby wells and problems with salt water intrusion into wells near coastal areas. When excessive pumping takes place, a "drawdown cone" is achieved that results in the drastic reduction of the water table directly at the pumping site and in those areas around the pumping site itself.[81] Therefore, those existing wells, which once received water at the former level of the water table, may become dry because the water level has fallen below the level of the well.[82]

Furthermore, when the naturally strong flow of fresh groundwater is reduced by excessive withdrawals for bottling purposes, saltwater can also enter the water system and affect drinking water supplies, farmlands, and wetlands.[83] Saltwater's presence in wells and freshwater resources also severely changes the environment.[84] Agriculture and natural vegetation that depend on fresh water supplied from the aquifer and local freshwater resources can no longer survive when saltwater invades the aquifer and travels further inland from the coasts.[85]

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79. *See* Marion County v. Priest, 786 So. 2d 623, 624-25 (Fla. 5th DCA 2001).

80. Kornfeld, *supra* note 77, at 367-68.

81. *See* Michael Sklash & Sharon Mason-Merrill, *Is There Enough Groundwater?, at* http://www.dragun.com/Groundwater%20Shortage.htm (last visited Feb. 25, 2003); Kansas Geological Survey Bulletin 120, *GroundWater: Recovery*, (Feb. 2001), *at* http://www.kgs.ukans.edu/General/Geology/Reno/gw03.html (last visited Feb. 25, 2003); Montana Ground-Water Information Center, *Typical Water Well Construction and Terms*, *at* http://mbmggwic.mtech.edu/help/welldesign.asp (last visited Feb. 25, 2003).

82. *See* Sklash & Mason-Merrill, *supra* note 81.

83. Tomas Matza, *Downstream Effects*, MOTHER JONES, (May 27, 2000), *available at* http://www.motherjones.com/news_wire/water.html (last visited Feb. 25, 2003).

84. *Id.*

85. *See, e.g.*, Kornfeld, *supra* note 77, at 367-68 (discussing the saltwater invasion from the Mediterranean Sea into Israel's Coastal Aquifer up to three kilometers inland).

B. Extraction's Effects on Species of Animals and Plants and Their Habitats

1. Threats to Plants and Fish from Salt Water Intrusion and Lower Water Levels

The excessive removal of water from natural environments may also reduce the water level of local fresh water resources and, therefore, threaten the fish populations and their habitats. Reduction in water levels can lead to increased water temperatures and changes in the physical and biological make-up of the water that could adversely affect fish and plant species. The removal of natural freshwater could upset fragile ecosystems and disrupt breeding grounds for native fish.[86] Also, more and longer periods of high salinity means that rivers cannot support the same varieties of organisms and species.[87]

If a spring is overpumped, there is a potential for a great reduction in the habitat of plants and animals in the area surrounding the spring. Kurt Cuffey, assistant professor of geology at the University of California-Berkeley, explained that "tapping springs and aquifers even on a small scale can alter the movement of sediment in nearby streams, which can in turn disrupt the food supply for fish and other wildlife."[88] Similarly, with the increased saltwater intrusion into aquifers and fresh water resources, the fresh water species existing in the area are forced out of their natural habitats. This affects the diversity and abundance of fish in the formerly fresh water sources.[89] Finally, different levels of salinity can lead to different plant species invading the area, therefore causing a severe change in the food supply for fish and other animals.

C. Effects of Bottled Water Transportation, Facilities, and the Plastic Bottles

1. Intrusion of Industry and Trucking into Natural Areas with Rural Roads

The pumping and transportation of water from its source to the bottling plant can also lead to the destruction of the once natural environment. With the expansion of bottlers and their plants, there is greater intrusion of industry and trucking into once

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86. Maravilla, *supra* note 2, at 29.

87. Crystal Springs Recreational Pres., Inc. v. S.W. Fla. Water Mgmt. Dist., Fla. Admin. Order No. 99-1415 2000 WL 248392, at *16 (Jan. 27, 2000).

88. Matza, *supra* note 83.

89. *See Crystal Springs Recreational Pres., Inc.*, 2000 WL 248392, at *22.

natural areas with rural roads.[90] Trucks traveling to and from the bottling plants would adversely affect traffic in small rural towns and destruct local roads and undeveloped areas. Hiroshi Kanno, of the Wisconsin water rights group, Concerned Citizens of Newport, Inc., explained that if a permit to bottle water from nearby Big Springs was issued, there would be an increase from about four trucks per day on local roads to about 900 trucks per day.[91] It is also extremely expensive to transport water from its source to the plant because of its difficulty and weight.[92]

2. Effects of Plastic Bottles and Recycling

A report in 2001 commissioned by the World Wildlife Fund (WWF) estimated that 1.5 million tons of plastic were used each year worldwide to contain bottled water.[93] In fact, the plastic bottles themselves tend to be more expensive than the quantity of water actually contained within them.[94] Furthermore, "the energy used in manufacturing plastic bottles, recycling them, and transporting them to market all drain fossil fuels and contribute to greenhouse gases."[95] The WWF's report suggests that "[e]nviron-mental impacts due to fuel combustion and energy needs are lower if the returnable bottles are simply washed and re-filled."[96] The abundant waste of plastic water bottles also pollutes the environment when they are not properly disposed of by consumers. For example, because bottled water is regularly sold in six-packs of plastic bottles and wrapped with another layer of plastic packaging, more plastic waste is created with each sale.[97]

IV. LEGAL CHALLENGES TO BOTTLED WATER MANUFACTURERS

Water bottlers have faced prominent legal challenges in Michigan, Texas, Wisconsin, and Florida over their plans to establish pumping facilities on local water sources. Nestlé/Perrier of America and its subsidiary brands have faced the most challenges by citizen activist groups.[98] In addition, Canadian leaders have

90. *See Marion County* v. Priest, 786 So. 2d 623, 624 (Fla. 5th DCA 2001).

91. Telephone Interview with Hiroshi Kanno, Newport Town Clerk, Concerned Citizens of Newport, Inc. (Nov. 13, 2002) (on file with author).

92. *See* Letiicia M. Diaz & Barry Hart Dubner, *The Necessity of Preventing Unilateral Responses to Water Scarcity--The Next Major Threat Against Mankind This Century*, 9 CARDOZO J. INT'L & COMP. L. 1, 36 (Spring 2001).

93. Ferrier, *supra* note 10, at 9-10.

94. *Id.* at 10.

95. Carol Potera, *The Price of Bottled Water*, ENVTL. HEALTH PERSP., Feb. 2002, at A76.

96. Ferrier, *supra* note 10, at 23.

97. *Id.*

98. Lowy, *supra* note 14.

asserted their authority over their natural water resources to prevent the mass extraction of water for exportation as bottled water.

A. Michigan

1. The Native American Tribes' Case

In February of 2002, three Native American tribes filed a federal lawsuit against Perrier's subsidiary brand, Great Spring Waters of America, and Michigan Governor John Engler.[99] The Little Traverse Bay Bands of Odawa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Little River Band of Ottawa Indians claimed that the 1986 Water Resources Development Act (WRDA) prevented Perrier's extraction of water from the Great Lakes Basin for sale as bottled water.[100] The WRDA requires the approval of each of the governors of the eight states bordering the Great Lakes of any diversion or exportation of water from the Great Lakes Basin.[101] The strict approval requirement was "intended to insure broad based decision making that promote[d] the protection of the Great Lakes."[102] The tribes argued that Michigan's granting of pumping permits to Perrier to extract up to 575,000 gallons of water per day would lead to the lowering of the water table in the entire Great Lakes area.[103] Furthermore, the tribes claimed that extraction of water would impact the natural environment of local rivers and streams, the navigation on local rivers and lakes, as well as the local commercial and sport fishing industries.[104] In response, Perrier and the state's Department of Environmental Quality claimed that bottled water, as a food product, was exempt from the WRDA.[105] On May 28, 2002, a federal judge ruled that the tribes' case against Perrier and Governor Engler could not persist because they did not have a right to sue under the WRDA.[106] The judge's ruling indicated that the WRDA

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99. Press Release, The Little Traverse Bay Bands of Odawa Indians, the Grand Traverse Band of Ottawa and Chippewa Indians, and the Little River Band of Ottawa Indians, Three Tribes File Suit (Feb. 22, 2002) (on file with author) [hereinafter Three Tribes].

100. *Id.*

101. 42 U.S.C. § 1962d-20(b)(3) (2000); *see* Diaz & Dubner, *supra* note 92, at 24.

102. Three Tribes, *supra* note 99.

103. *Id.*

104. *See* Ginsburg, *supra* note 45, at 24E.

105. Michigan Land Use Institute, *Liquid Gold Rush: Executive Summary* (Oct. 2001), *at* http://www.mlui.org/pubs/specialreports/waterdiversion/print4.asp (last visited Feb. 25, 2003).

106. *See* Associated Press, *Judge Tosses Out Tribes' Water Suit* (June 3, 2002), *at* http://www.greatlakesdirectory.org/mi/060202_bottled_water.htm (last visited Feb. 25, 2003).

was intended to grant the authority to protect the Great Lakes and its basin to state governments, not to private individuals.[107]

2. The Citizen Group's Case

A similar lawsuit was filed by a citizen activist group, Michigan Citizens for Water Conservation (MCWC), in September of 2001, to prevent the same mass extraction of water by the Perrier subsidiary.[108] The MCWC asserted that extraction of water by the Perrier subsidiary would violate the state's water and public trust law.[109] Terry Swier, the president of the citizen's group, explained that "'[t]he public trust protects the citizens rights in these waters for fishing, boating, swimming, and survival . . . . It is unreasonable and requires the approval of our Legislature for a private water company to divert water that is held in common by all.'"[110] The MCWC also argued that before the approval of the private extraction of water could take place, the state needed a comprehensive set of water laws in place to protect the state's economy and environment.[111] In October of 2002, Mecosta County Circuit Court Judge Lawrence Root dismissed three of the MCWC's claims that dealt with violations of Michigan's public trust law, public domain law, and riparian rights to water.[112] Judge Root did, however, postpone until May of 2003 the trial for the group's remaining claim that their "reasonable use" rights to the water were affected by the pumping.[113]

3. Michigan's Water Law

Currently, Michigan has no limits as to the amount of water that may be removed from the ground. The state's common law merely grants riparian rights to property owners that allows them to use a "reasonable" amount of the water that is found on or under their property.[114] The title to this water, however, still rests in the hands of the state. The Michigan Land Use Institute explains that the "[c]ommon law [of Michigan] does not … grant such 'riparian'

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107. *Id.*
108. Michigan Land Use Institute, *supra* note 105.
109. Press Release, Michigan Citizens for Water Conservation (Sept. 2001) (on file with author).
110. *Id.*
111. *Id.*
112. Telephone Interview with Gary Swier, Member, Michigan Citizens for Water Conservation (Nov. 25, 2002) (on file with author).
113. *Id.*
114. Michigan Land Use Institute, *Liquid Gold Rush: Executive Summary* (Oct. 2001), *at* http://www.mlui.org/pubs/specialreports/waterdiversion/print2.asp (last visited Feb. 25, 2003).

landowners the right to move water out of its rightful basin."[115] Instead, the Institute suggests that the state's public trust doctrine obligates the state to protect its natural resources, such as water, from the interests of private individuals and corporations.[116] Therefore, rather than allowing water from the state to be extracted and sold as a commodity, many groups argue that it should be treated like the essential natural resource that it really is.

In response to the call by residents and the MCWC for stricter water regulations in Michigan, legislators introduced a package of bills on March 7, 2002, to protect the state's resources from mass extractions of water that drain the aquifers and cause residential wells, which depend on the aquifers, to run dry.[117] The proposed bills would require Michigan's Department of Environmental Quality to "establish a permit application process for ground withdrawals over 100,000 gallons per day averaged over thirty consecutive days."[118] The bill would also allow the Department to monitor the permit for ten years and "[a]llow a person whose use or enjoyment of their property is adversely affected by a groundwater withdrawal to obtain an injunction or other equitable relief."[119] The bills require their passage as a package and are currently under review in the Committee on Natural Resources and Environmental Affairs. Legislators in Michigan need to pass these bills or similar regulations based on the *quantity* of water allowed to be extracted because existing Michigan laws do not adequately protect the state's water supply.

B. Texas

1. Citizen's Challenge Goes All the Way to the Texas Supreme Court

In Texas, Perrier also came searching for a natural water source to fill its bottles of Ozarka Natural Spring Water. In March of 1996, Perrier's subsidiary began to extract 90,000 gallons of water per day from Rohr Springs in Big Rock, Texas.[120] Just four days after the pumping started, local families noticed that their well water supplies were substantially depleted. Bart Sipriano, Harold

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115. *Id.*
116. *Id.*
117. *Senate Package to Safeguard Groundwater*, CENT. MICH. LIFE, Mar. 25, 2002, *at* http://www.cm-life.com/vnews/display.v/ART/2002/03/25/3c9ebab9d9c82?in_archive=1 (last visited Feb. 25, 2003).
118. Press Release, Michigan State Senate, Senate Unveils Plan for Aquifer Protection (Mar. 7, 2002) (on file with author).
119. *Id.*
120. *See* Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75, 75-76 (Tex. 1999).

Fain and Doris Fain, residents of Henderson County, sued the Perrier subsidiary claiming their wells were negligently drained by the pumping process.[121] The residents' suit also attempted to change the form of water regulations in the state from the "rule of capture," to the rule of "reasonable use."[122]

In the trial court, the judge granted the bottled water company's motion for summary judgment.[123] The appeals court affirmed the grant of summary judgment to the bottler, but the residents continued to pursue their claim in the Texas Supreme Court.[124] In May of 1999, Texas Supreme Court Justice Enoch, writing for the majority, upheld the state's common law "rule of capture," which has regulated groundwater supplies in the state since 1904.[125] The court explained that the "rule of capture essentially allows . . . a landowner to pump as much groundwater as the landowner chooses, without liability to neighbors who claim that the pumping has depleted their wells"[126] as long as the landowner's negligence is not the proximate cause of the neighbor's claimed harm.[127] While other cases have pursued the change to the rule of "reasonable use" in Texas, the court noted that it has consistently rejected "reasonable use" for the "rule of capture."[128]

The court also recognized that the people of Texas have empowered the legislature, through the state constitution, with the duty to protect natural resources in the state, including groundwater.[129] Therefore, it was the legislature, rather than the court, which should decide when and if groundwater regulations in the state required a change. The court recognized that in 1997, the state senate passed Senate Bill 1 which "revamped significant parts of the Water Code and other Texas statutes in an attempt to improve on this State's water management."[130] One major change in water regulation under Senate Bill 1 was the creation of "locally-controlled groundwater conservation districts for establishing requirements for groundwater withdrawal permits and for regulating water transferred outside the district."[131] In the end, the majority affirmed the holdings of the lower courts and placed the

121. *Id.* at 75.
122. *Id* at 76.
123. *Id.* at 75.
124. *Id.*
125. *Id.* at 76.
126. *Id.* at 75.
127. *Id.* at 78.
128. *Id.* at 76.
129. *Id.* at 79.
130. *Id.*
131. *Id.* at 79-80.

ball in the legislature's court to adapt the water law in the state to respond to the plaintiffs' claims.[132]

In his concurrence, Justice Hecht criticized the court's maintenance of the "rule of capture" in Texas because it hinders groundwater management in the state.[133] Justice Hecht noted that Texas is the only western state out of eighteen to still follow the "rule of capture" based on outdated policy concerns.[134] However, in the end, Justice Hecht was "persuaded for the time being that the extensive statutory changes in 1997, together with the increasing demands on the State's water supply, may result before long in a fair, effective, and comprehensive regulation of water use that will make the rule of capture obsolete."[135]

2. Texas Water Law

Article 4 of Senate Bill 1 specifically addresses concerns with groundwater and surface water supplies in the state. Article 4 "does not directly alter the rule of capture, [but] it does open the door for local control through the Underground Water Conservation Districts (UWCDs) to regulate unrestrained pumping" according to their respective needs.[136] Texas does not otherwise have statewide regulations on its groundwater supplies. Therefore, it must rely on its common law "rule of capture" and local conservation districts to protect its supplies.[137] The state's choice to use local districts, rather than a statewide system, allows local citizens to aid in the establishment of local water rules and the implementation of local water plans for the future.[138] The local board must submit the plan to the Texas Water Development Board (TWDB), however, for approval.[139] Because prior groundwater management legislation in the state has merely resulted in the creation of 42 conservation districts in the last 50 years, there is hope that this Bill will actively promote the state legislature's preferred method for groundwater management.[140]

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132. *Id.* at 80-81.
133. *Id.* at 81.
134. *Id.* at 82-83.
135. *Id.* at 83.
136. Cynthia DeLaughter, Comment, *Priming the Water Industry Pump*, 37 HOUS. L. REV. 1465, 1471 (2000).
137. *Id.* at 1476-77.
138. *See id.* at 1478-79.
139. *Id.* at 1479.
140. *See Sipriano*, 1 S.W.3d at 81.

C. Wisconsin

1. The Ho-Chunk Indian Nation's Case

In December of 1999, Perrier began its search for a source for its Ice Mountain brand of bottled water. The Ho-Chunk Indian Nation filed suit against Wisconsin's Department of Natural Resources (DNR) in October of 2000 claiming that a proposed pumping site at a nearby spring was sacred land, and that the DNR failed to consult with the tribe before issuing permits for the extraction of water.[141] The proposed pumping site was east of Wisconsin Dells, a popular recreation and tourist area in the state. Perrier wanted to "drill two 200-foot wells that would pump a total of 500 gallons a minute near Big Spring."[142] The tribe's action was the third such action brought against Perrier's proposal to pump water in the area, but a circuit court judge threw out the tribe's claim in April of 2002.[143]

2. Citizens' Group Suits

Two citizen activist groups in the state have also waged legal battles against the DNR, the bottled water giant, Perrier, and its subsidiary. Waterkeepers of Wisconsin (WOW) filed its suit in Adams County on October 18, 2000 against a Perrier subsidiary, Great Spring Water of America, Inc.[144] WOW claimed that the bottler's drilling of two high-capacity water wells in the town of New Haven violated a county zoning ordinance which zoned the area for agricultural use.[145] WOW also opposed the bottler's construction of a one million-square foot bottling facility two miles from the wells in the rural town. WOW sought

> the removal of wells that have already been installed, an injunction forbidding drilling, construction and utilization of wells which violate Adams County zoning ordinances, and a declaratory judgment determining the test wells may not be utilized and production wells may not be installed or utilized because they violate local zoning laws.[146]

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141. *See Ho-Chunk Sue DNR Over Perrier Drilling*, *supra* note 17.
142. *Id.*
143. Telephone Interview with Hiroshi Kanno, *supra* note 91.
144. Press Release, Waterkeepers of Wisconsin, Inc., Waterkeepers of Wisconsin Files Lawsuit (Oct. 18, 2002) (on file with author).
145. *Id.*
146. *Id.*

According to Joan Byers, WOW member, the suit against the bottler remains on hold until the bottler officially decides if it will locate its facility in New Haven.[147]

Concerned Citizens of Newport, (CCN) Inc. also filed suit in October of 2000 against the DNR claiming that by conditionally approving permits for the bottler to remove large quantities of water from the Big Springs, "the DNR violated its own regulations, Wisconsin's Environmental Protection Act (WEPA) and its duty to protect the public trust in its actions."[148] Newport Town Clerk and CCN member, Hiroshi Kanno, stated that in April of 2002, Columbia County Circuit Court Judge Wright approved the disputed contract between the bottler and the DNR, failed to mention the CCN's public trust doctrine argument, and required the bottler to file an extensive environmental impact statement in order to comply with WEPA.[149] The judge also required public participation in the bottler's future permit approval process. Kanno also happily noted that the bottler failed to renew its permit to pump from Big Springs in September of 2002, therefore, if it chooses to return to Wisconsin, it will have to complete the entire permitting process again.[150]

D. Canada

Finally, in Canada, the government has taken an active role in protecting its natural fresh water resources from mass extractions and exportation. In February of 1999, Canada's Parliament voted unanimously to approve a moratorium on all bulk exports of the nation's water.[151] The moratorium described bulk water exports as "the siphoning of freshwater from lakes or other areas for shipment through pipelines, diversions, or by sea on supertankers."[152] It was intended to prevent U.S. and Canadian companies from shipping Canada's plentiful fresh water supply to the American southwest and midwest for agricultural and consumer use.[153] The moratorium, however, did not place any further limits on domestic bulk water extraction to be sold as bottled water within Canada.

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147. Telephone Interview with Joan Byers, Member, Waterkeepers of Wisconsin, Inc. (Nov. 13, 2002)(on file with author).
148. Press Release, Waterkeepers of Wisconsin, Inc., *supra* note 144.
149. Telephone Interview with Hiroshi Kanno, *supra* note 91.
150. *Id.*
151. Maravilla, *supra* note 2, at 29.
152. *Id.*
153. *Id.* at 31.

There were three main sections to the moratorium. The first section changed the International Boundary Waters Treaty Act (IBWTA) to give Canada's government the authority to prevent mass fresh water exportation from water sources bordering the United States.[154] The second section required the creation of an International Joint Commission (IJC) with the United States to study the effects of bulk water exports on the "consumption, diversion and removal from boundary waters."[155] The third and final section allowed Canada to join with its territories and provinces in a nationwide agreement to protect its natural water resources from bulk exportation.[156] Although many have argued that Canada's moratorium violates the North American Free Trade Agreement (NAFTA), it is unlikely that any claims will prevail because Canada, the United States, and Mexico agreed in 1993 that NAFTA did not apply to the bulk exportation of fresh water resources.[157]

V. CASE STUDY ON THE SALE OF BOTTLED WATER BY ZEPHYRHILLS FROM THE CRYSTAL SPRINGS

The Nestlé/Perrier group also faced a legal challenge in Crystal Springs, Florida. Crystal Springs is a natural spring located 15 miles north of Tampa, Florida.[158] The water in the spring originates from the upper Floridian aquifer.[159] Its water feeds into the Hillsborough River, which in turn supplies municipal water to the residents and businesses of Tampa. The springs supply the majority of the water to the Hillsborough River during its natural low-flow periods.[160]

A. History of the Springs and the Dispute

In 1911, R.W. Burke and his wife conveyed a warranty deed for a 24,000 acre tract of land, including the natural Crystal Springs, to A.B. Hawk of Toledo, Ohio.[161] Hawk then formed a company, The Co-operative Homestead Company, to develop the tract of land with 10 to 40 acre farms to be sold. The area was called "The Crystal Springs Colony," and with a lot came a promise of perpetual

154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 35.
158. Save our Springs, Inc., *supra* note 19.
159. Crystal Springs Recreational Pres., Inc.v. S.W. Fla. Water Mgmt. Dist., Fla. Admin. Order No. 99-1415, 2000 WL 248392, at *5 (Jan 27, 2000).
160. *Id.*
161. Save our Springs, Inc., *supra* note 19.

recreational and consumptive use of the spring and its clear waters. In 1912, forty acres of Hawk's tract of land was dedicated and recorded as a public park reservation and was subsequently called "Crystal Springs." Over the next 17 years, Hawk and his business partners were involved in many schemes and questionable land deals. The main issue, however, was the fact that Hawk refused to abide by an original land purchase agreement which stated that when the colony grew to include 100 families, he would grant to the colony control of the Crystal Springs. When the colonists took legal action against Hawk to preserve their rights to the springs, a federal judge in Jacksonville, Florida declared their suit null and void.[162]

With the clear legal ownership of the springs declared in his name, Hawk decided to lease the springs and the rights to bottle spring water to a man by the name of Waters.[163] In 1929, Hawk ultimately sold the springs to a group of private owners from New York, from which Mabry and Crowder of Tampa purchased the springs in 1944. Finally, in 1975, the springs were purchased by the current owners, the Thomas family.[164]

B. Permit to Pump and Contract with Zephyrhills

The Thomas family was able to preserve the springs' natural beauty and recreational charm for many years. The springs remained open to the public for more than 20 years. Robert Thomas, President of the Crystal Springs Recreation Preserve ("Preserve"), received a water use permit to remove water from the springs to sell to Zephyrhills Water Company in 1989.[165] Thomas was permitted to withdraw 301,000 gallons of water per day from the springs until 2004.[166] In 1996, the Preserve closed the springs to the public "to protect the 'quality and quantity of the springs and the surrounding area.'"[167] Thomas promised to reopen the springs in 1997 as a research center, but he has yet to do so.[168]

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162. *Id.*
163. *Id.*
164. *Id.*
165. *See* James Thorner, *Swiftmud Asks For Perrier Plan Data*, ST. PETERSBURG TIMES, PASCO TIMES, Aug. 18, 1998, at 1, 5.
166. Brady Dennis, *Rancher Lets Too Much Spring Water Be Taken*, ST. PETERSBURG TIMES, PASCO TIMES, Oct. 5, 2000, at 1.
167. Green, *supra* note 20.
168. *See* David Karp, *Spring Owner Withholds Study*, ST. PETERSBURG TIMES, June 17, 1998, at 3B.

C. Increase in Permit Sought with the Local Water Management Board

In 1998, Thomas sought to increase his water use permit from 301,000 gallons per day to 1.8 million gallons per day until 2008.[169] The Preserve submitted a year long study that "concluded that its proposed withdrawal would not cause quantity or quality changes that adversely impact the water resources."[170] In January of 1999, however, the Southwest Florida Water Management District (SWFWMD or SWIFTMUD) replied with a Notice of Proposed Agency Action to deny the Preserve's permit because it did not offer reasonable assurances that its proposed permit would meet each of the statutory requirements for permitting bulk water extraction.[171]

D. Appeal to an Administrative Law Judge and The Second District Court of Appeal

The Preserve filed a petition for an administrative hearing with SWIFTMUD in February of 1999.[172] SWIFTMUD referred the petition to Florida's Division of Administrative Hearings in March of 1999.[173] Administrative Law Judge (ALJ) Lawrence Stevenson was required to determine "whether … [the Preserve] … provided reasonable assurances … that it has satisfied the conditions for [water use] permit issuance."[174] The ALJ recognized that the Preserve carried the burden to show both individually, based on fourteen separate factors, and cumulatively that it had satisfied SWIFTMUD's conditions to receive a valid permit to increase its pumping.[175]

SWIFTMUD requires that those seeking permits for water use provide reasonable assurances on several individual factors related to the extraction of water from natural resources.[176] The parties

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169. Crystal Springs Recreational Pres., Inc. v. S.W. Fla. Water Mgmt. Dist., Fla. Admin. Order No. 99-1415, 2000 WL 248392, at *1 (Jan. 27, 2000).

170. *Id.* at *7.

171. *Id.* at *8.

172. *Id.* at *1.

173. *Id.*

174. *Id.* at *9.

175. *Id.; see* FLA. STAT. § 373.223 (2002), implemented by FLA. ADMIN. CODE ANN. R. 40D-2.301(1) (2002).

176. FLA. ADMIN. CODE ANN. R. 40D-2.301(1) (2002). Under the current form of rule 40D-2.301(1), the party seeking the permit must provide:

> reasonable assurances, on both an individual and a cumulative basis, that the water use: (a) Is necessary to fulfill a certain reasonable demand; (b) Will not cause quantity or quality changes which adversely impact the water resources, including both surface and groundwaters; (c) Will not cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife or other natural resources; (d) Will comply

stipulated that the Preserve satisfied seven of the factors before the suit.[177] The ALJ then determined that the Preserve had also satisfied its burden in three additional factors. Rule 40D-2.301(1)(a) required the Preserve to show that its permit was necessary to fill a certain reasonable demand.[178] The Preserve and Zephyrhills pointed to the fact that the source of all of its bottled water was the Crystal Springs. Therefore, it claimed that if SWIFTMUD rejected its permit, it would face difficulties in finding another water source or it would be forced to stop bottling at Crystal Springs entirely.[179] The Preserve also explained that its greatly increased pumping request was necessary to keep up with its calculated 20-22% annual growth rate.[180] However, SWIFTMUD claimed that the Preserve failed to adequately support its calculated growth rate with actual data. Therefore, SWIFTMUD itself had to conduct an independent study and came to merely a 17.5% annual growth rate.[181] The ALJ agreed that SWIFTMUD's growth rate was closer to the statistical information required to show necessity under 40D-2.301(1)(a), and he determined that the Preserve failed to satisfy its burden on that factor.[182]

Rule 40D-2.301(1)(b) required the Preserve to show that no quantity or quality changes would adversely impact the water resources in the area.[183] The Preserve claimed that their additional extractions would have no quantitative effect on the local ground water system because Crystal Springs is a "naturally discharging spring" that would have discharged the same amount of water from the spring, no matter if it was captured by a pipe or not.[184] The Preserve did admit, however, that its increased pumping would reduce the flow of the Hillsborough River and would take water

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> with the provisions of 4.3 of the Basis of Review described in Rule 40D-2.091, F.A.C.; (e) Will utilize the lowest water quality the Applicant has the ability to use; (f) Will not significantly induce saline water intrusion; (g) Will not cause pollution of the aquifer; (h) Will not adversely impact offsite land uses existing at the time of the application; (i) Will not adversely impact an existing legal withdrawal; (j) Will incorporate water conservation measures; (k) Will incorporate reuse measures to the greatest extent practicable; (l) Will not cause water to go to waste; and (m) Will not otherwise be harmful to the water resources within the District.

177. *Crystal Springs Recreational Pres., Inc.*, Fla. Admin. Order No. 99-1415, 2000 WL 248392 at *9.
178. *Id.*
179. *See id.* at *10.
180. *Id.*
181. *Id.* at *11.
182. *Id.* at *13.
183. *Id.*
184. *Id.*

from the river and the City of Tampa even on days when it was most needed.[185] As a result, the ALJ determined that the Preserve failed to satisfy its quantitative burden. Conversely, the ALJ could not determine that the Preserve failed to satisfy its qualitative burden because there was disputed evidence from both parties. As a result, the ALJ ruled that the Preserve had satisfied the qualitative factor.[186]

Rule 40D-2.301(1)(c) required the Preserve to show that no adverse environmental impacts would result to "wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resource[s]" in the area.[187] The ALJ determined that SWIFTMUD's generic environmental concerns could not override the Preserve's evidence of few adverse environmental effects to the area from its increased pumping.[188] Similarly, the ALJ determined that the Preserve satisfied its burden to show, according to rule 40D-2.301(1)(f), that its increased pumping would not lead to a large saline water intrusion into the area's aquifers.[189]

Finally, rule 40D-2.301(1)(i) required the Preserve to show that no adverse impacts would result to existing legal withdrawals of water.[190] SWIFTMUD argued that the only other legal user of the spring water was the City of Tampa via the Hillsborough River, and any increase in the withdrawals from the springs would certainly lead to a decrease in the flow of the river to Tampa. SWIFTMUD worried about "the impact the proposed withdrawals would have on the City of Tampa's water supply during low-flow periods, when the City is most dependent on flow from the Hillsborough River."[191] In the end, the ALJ sided with SWIFTMUD's findings and further based his decision on the fact that the Preserve's "[a]pplication makes no provision for lesser withdrawals during low-flow periods on the Hillsborough River."[192]

The Preserve was also required to show that no adverse cumulative impacts would result from its proposed increase in pumping. The ALJ stated that it had only succeeded in providing reasonable assurances on factors (c), (f), (k), and (m).[193] The ALJ noted that SWIFTMUD had, instead, provided the "greater weight of the evidence … that the Preserve failed to provide reasonable

185. *Id.* at *14.
186. *Id.* at *19.
187. *Id.*
188. *Id.* at *23.
189. *Id.* at *25.
190. *Id.* at *26.
191. *Id.*
192. *Id.* at *27.
193. *Id.* at *42.

assurances on a cumulative basis" on factors (a), (b), and (i).[194] Therefore, in his recommended order to SWIFTMUD, in January of 2000, the ALJ determined that the "Preserve … failed to provide reasonable assurances, on both an individual and a cumulative basis" to meet the requirements of receiving a permit from SWIFTMUD.[195] The ALJ recommended to SWIFTMUD's 11-member governing board that it deny the Preserve's increased permit request. After SWIFTMUD's denial of the permit request, the Preserve appealed to Florida's Second District Court of Appeal. In February of 2001, the court of appeal affirmed the decision of SWIFTMUD without a published opinion.[196] This ruling likely brought an end to the Preserve's proposed permit increase, yet the future of Zephyrhills Spring Water, from Crystal Springs, Florida, is still undetermined.

VI. RECOMMENDATIONS FOR A LEGAL FRAMEWORK TO PROTECT WATER RESOURCES WITHIN THE STATES

Because many states lack adequate regulations on bottled water extraction, their resources are extremely vulnerable to abuse and absolute depletion. Therefore, legislators must propose strict regulations in order to protect their own fresh water resource supplies.

A. States Should Classify Water as a Natural Public Resource

In order to protect the nation's fresh water resources, it is necessary to change water's regulatory status from that of a tradeable good, to that of a finite and threatened natural resource. Just like any other non-renewable resource, the more water that is extracted, bottled, and sold, the less that remains in the resources themselves. Furthermore, by protecting water as a public resource, it is "incapable of private ownership" or abuse, and it cannot be considered a taking to restrict its use.[197] Holding water supplies in a public trust gives the states the authority over water above that of all other claimants. With this authority, states can protect and preserve their fresh water resources adequately.[198]

States also need to recognize that each source of water within their borders is part of an invaluable global ecosystem which

194. *Id.*
195. *Id.*
196. Crystal Springs Recreational Pres., Inc., v. S.W. Fla. Water Mgmt. Dist., 782 So. 2d 390 (Fla. 2d DCA 2001).
197. Diaz & Dubner, *supra* note 92, at 33.
198. *See id.* at 38.

provides broader benefits and effects than simply those in the direct area of the resource. Under the broad principle of "inter-generational equity," states must take protective measures for our water resources because "as 'members of the present generation, we hold the earth in trust for future generations' … [and] 'at the same time, we are beneficiaries entitled to use it.'"[199] States must plan to use water resources responsibly in order to ensure an adequate supply for future needs and to ensure the survival of the environment. One possible solution would be to require states to establish a reliable monitoring system for their supply of fresh water resources.[200]

B. States Should Strictly Restrict Bulk Transfers of Water

State legislation needs to define and establish stricter regulations on commercial water extractions and transfers of local freshwater resources. States need to develop stricter rules for the permitting of bulk water withdrawals and for the review of those permits by water management districts. For example, states can establish a special permit application process for bulk water extractions that will consist of more than "x" gallons per day for "x" number of days, where the factors will depend on the water supply deemed available in the area by the water management district itself. States should also require more extensive environmental impact studies by local water permitting boards to look into not only current or near future environmental effects, but also cumulative potential future impacts of bulk water extraction from resources. Finally, states may also choose to provide relief in the form of a compensation system to private well owners and to the public in general, who are adversely affected by bulk water extractions.[201]

C. States Should Encourage Experimentation with Desalinization Processes

States should also consider encouraging bottlers to experiment with desalinization systems for water in order to find new sources of potable water without depleting natural fresh water resources beyond their replenishment. For example, in Tampa, Florida population growth and the lack of a natural abundance of fresh

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199. *Id*. at 28.

200. *See* Michigan Land Use Institute, *Liquid Gold Rush: Executive Summary* (Oct. 2001), *at* http://www.mlui.org/pubs/specialreports/waterdiversion/print6.asp (last visited Feb. 25, 2003).

201. Michigan Land Use Institute, *Liquid Gold Rush: Executive Summary*, Oct. 2001, *at* http://www.mlui.org/pubs/specialreports/waterdiversion/print3.asp (last visited Feb. 25, 2003).

water resources has forced the Tampa Bay Water Authority to seek out new options like desalinization in order to supply water to those who need it.[202] States can provide benefits to bottlers who invest in desalinization research and technology to enhance the value of abundant saltwater resources, and local water management boards can use tax money collected from local citizens to help support the movement towards desalinization.[203]

D. States Should Charge Consumers and Establish Eco-Labeling Programs to Cover the Costs of the Bottled Water Demand

Finally, states can charge bottled water consumers, rather than the producers, for some of the costs created by the great demand for bottled water. Legislators can add a tax to all bottled water sales to be used in order to preserve springs and their environments. While these taxes will not replenish the water supply itself, they can protect against the harms that may further deplete the resources. For example, a trust fund may be established in a state with taxes from bottled water sales in order to "enhance research, stewardship, quality, public access, con-servation, and restoration" of the state's fresh water resources.[204]

Another option for states to explore would be the establishment of an eco-labeling system for bottlers selling their product in the state. The eco-label would indicate that the bottlers comply with strict environmental and water extraction standards set by the state to ensure the persistence of fresh water resources. Consumers could also rely on these eco-labels in making their purchases. This would likely weed out the most environmentally abusive bottlers and inform the demanding consumers of the threats created by the bottled water industry.

VII. CONCLUSION

The bottled water industry has grown tremendously in the past two decades, yet few laws exist to regulate the quantity of water that is pumped from the nation's fresh water resources. Extraction of large amounts of water threatens water supplies which individual wells and municipalities depend upon. It can also adversely affect the environment of the resource and local species of animals, fish, and plants. As legal challenges to bottlers proposed pumping actions increase, state legislatures must enact stricter

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202. Douglas Jehl, *Tampa Bay Looks to the Sea to Quench Its Thirst*, N.Y. TIMES, Mar. 12, 2000, at A1.

203. *See id.*

204. Michigan Land Use Institute, *supra* note 201.

legislation to protect the *quantity* of their fresh water resources for the future.

REVENUE OPTIONS FOR A RISK-BASED ASSESSMENT OF DEVELOPED PROPERTY IN HURRICANE HAZARD ZONES

ROBERT E. DEYLE* AND MARY KAY FALCONER**

Table of Contents

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* Associate Professor of Urban and Regional Planning, The Florida State University.
** Research Associate, Institute for Science and Public Affairs, The Florida State University.

I. INTRODUCTION***

Development of land in areas exposed to hurricanes places individuals, private property, and public facilities and infrastructure at risk from the potentially damaging forces of wind, waves, and storm surge.[1] In response to this risk, governments at the local, state, and federal levels have assumed responsibility for planning and preparedness for disasters that result from hurricanes that strike human settlements and for response actions such as evacuation, provision of public shelters, and search and rescue. Governments also assume much of the cost of recovery and reconstruction after disasters through direct payments for repairs to damaged public facilities and infrastructure, and through disaster assistance to individuals and businesses whose property has been damaged or destroyed. Governments also have increasingly assumed the costs of mitigation initiatives designed to reduce the vulnerability of both the public and private sectors to hurricane losses.

The public costs engendered by private decisions to develop land in hurricane hazard zones are substantial. Federal expenditures for individual assistance, public assistance, and hazard mitigation associated with hurricanes totaled approximately $3.7 billion between 1988 and 1996.[2] Local government losses from hurricanes in Florida between 1979 and 1995 exceeded $650 million.[3]

In recent years, planning scholars have advocated applying the principle of tax benefit equity to the financing of local government emergency management services consumed by property owners who choose to develop lands in hazardous areas.[4] They have argued that

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1. Storm surges are increases in sea level associated with tropical cyclones that result from low barometric pressure and strong on-shore winds. *Storm Surge*, *at* http://www.windows.ucar.edu/cgi-bin/redirect.cgi/earth/Atmosphere/hurricane/surge.html (last visited Jan. 29, 2003).

2. *See* DAVID R. GODSCHALK ET AL., NATURAL HAZARD MITIGATION: RECASTING DISASTER POLICY AND PLANNING 8 (1999).

3. This figure represents the local share of disaster response and recovery costs that were eligible for federal disaster assistance. *See* Michael R. Boswell et al., *A Quantitative Method for Estimating Public Costs of Hurricanes,* 23 ENV'T. MGMT. 359 (1999). No data is available for the additional local government costs that were not eligible for federal aid. It has been estimated, however, that those costs may be as much as four times greater. *See* WILLIAM J. PETAK & ARTHUR A. ATKISSON, NATURAL HAZARD RISK ASSESSMENT AND PUBLIC POLICY: ANTICIPATING THE UNEXPECTED 246 (1982).

4. *See* RAYMOND J. BURBY, COOPERATING WITH NATURE: CONFRONTING NATURAL HAZARDS WITH LAND-USE PLANNING FOR SUSTAINABLE COMMUNITIES 278 (1998); GODSCHALK ET AL.,

it is inequitable and economically inefficient for taxpayers to subsidize private property owners who choose to build vulnerable structures in areas exposed to natural hazards. Under the normative principle of tax benefit equity, consumers of government services pay in proportion to their use of those services. Applied to local emergency management services, such a principle would dictate a shift from funding such services with general revenues to an alternative method of revenue generation based on differential consumption of those services by private property owners.

Such a proposal poses several public policy and legal challenges. Can the costs of emergency management services associated with hurricanes be accurately estimated? Are there practical methods for measuring the differential consumption of such services by property owners in the community? Do local governments have the authority to employ such a method to raise the revenues to finance such services?

Others have answered the first two questions in the affirmative.[5] The results of those analyses are briefly summarized in the next two sections. Section II identifies the major local emergency management services associated with hurricanes and methods for estimating the costs of those services. Section III summarizes a method for apportioning those costs based on the relative risk associated with individual developed properties. A detailed examination of alternative revenue options follows. Section IV assesses the potential for financing local emergency management services associated with hurricanes using alternative revenue sources that local governments may be authorized to employ. That assessment identifies special assessments as the most promising revenue source for a risk-based assessment. Section V then examines the feasibility of such an assessment in the context of state constitutional and legislative authorities in Florida and their interpretation by the state courts. Recent case law suggests that a risk-based special assessment may be feasible in Florida, but it may be necessary to modify the approach as originally proposed and summarized in the opening sections of this article.

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supra note 2, at 174; Robert E. Deyle & Richard A. Smith, *Risk-Based Taxation of Hazardous Land Development*, 66 J. AM. PLAN. ASS'N. 422 (2000).

5. ROBERT E. DEYLE ET AL., THE COSTS OF HURRICANE EMERGENCY MANAGEMENT SERVICES: A RISK-BASED METHOD FOR CALCULATING PROPERTY OWNERS' FAIR SHARE 5-31 (2003); Boswell et al., *supra* note 3; Deyle & Smith, *supra* note 4.

II. LOCAL COSTS OF EMERGENCY MANAGEMENT SERVICES FOR HURRICANES

A. Local Emergency Management Services for Hurricanes

Local emergency management services primarily benefit the owners and occupants of developed property but have little value for undeveloped land. The services provided can be divided into two major categories: (1) ongoing services; and (2) event services. Ongoing services for hurricanes include planning, preparedness, and mitigation activities that occur independently from specific storms. Event services include responses to anticipated or actual hurricane strikes and recovery and reconstruction activities after a hurricane strikes within the jurisdiction.

On-going services are performed by an array of local government agencies. In agencies such as planning, building inspection, and public works, whose primary missions are not focused on emergency management, ongoing services primarily consist of planning and preparedness. Associated activities include participation in annual disaster response training exercises and the procurement and maintenance of specialized equipment used in fulfilling the agency's assigned duties in disaster response and recovery. Typically, the local emergency management department performs the majority of planning and preparedness activities and may have responsibility for administering programs for hazard mitigation as well.

Event services are those associated with responding to an anticipated or actual hurricane. They can be differentiated based on whether or not a given storm physically affects the jurisdiction. Where a hurricane approaches but does not strike an area, the jurisdiction may provide evacuation services for at-risk populations and take other measures to protect life and property such as supplemental police and fire protection, sandbagging or other flood protection for low-lying areas, and barricading of dangerous locations. These are *anticipated event services*. Where a hurricane does strike within the jurisdiction, the local government will take response and recovery actions in addition to pre-disaster protective measures. These *actual event services* typically include public shelter provision, search and rescue, emergency medical services, abatement of hazards such as downed power lines and broken gas lines, assessment of damage to private property, preparation of federal disaster assistance documentation, debris collection and disposal, repair and reconstruction of damaged or destroyed public facilities and infrastructure, assistance to private individuals seeking state and federal disaster assistance, administration of permitting systems for repair and reconstruction of private

property, and application for and administration of federal and state aid for post-disaster repair, reconstruction, and mitigation.

Response services are provided primarily by local emergency management agencies, emergency medical services agencies, and police and fire agencies. Recovery and reconstruction services are provided by a wider array of agencies involved in the repair and reconstruction of public facilities and infrastructure, restoration of public services, and managing the process of procuring and administering federal and state disaster assistance to both local governments as well as individuals and private organizations.[6]

B. Estimating the Costs of Local Emergency Management Services

The costs of providing ongoing emergency management services are not easily documented for local agencies other than those directly involved in emergency management. Most such agencies do not have individual personnel dedicated to emergency planning and preparedness tasks, and most do not have separate budget line items for equipment and materials used in such activities. Documenting such costs therefore requires a special effort by budget managers and personnel directors.[7] Equipment costs must be annualized based on appropriate assumptions about depreciation, and employee time devoted to such activities must be estimated.

Separating the costs associated with hurricanes from those associated with other disasters is even more difficult. At best, local emergency management officials may be able to estimate the proportion of services, and their associated costs, that can be attributed to hurricane risks as opposed to other natural and technological hazards. The public safety director for Lee County, Florida, for example, has estimated that natural hazards account for two-thirds (67 percent) of the emergency management services provided in the county, and that risks associated with hurricanes and flooding account for 90 percent of all natural hazard risks.[8]

The magnitude of annual ongoing emergency management costs attributable to hurricanes is not great. For example, estimates for Lee County, Florida, based on 1995 budget figures, are approximately $700,000.[9]

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6. See DEYLE ET AL., *supra* note 5, for a detailed analysis of local agency roles in Lee County, Florida.

7. *Id*.

8. *See* Interview with John Wilson, Director, Division of Public Safety, Lee County, Florida, (Jun. 12, 1995) (on file with author Robert E. Deyle) [hereinafter Interview with Wilson].

9. Deyle & Smith, *supra* note 4, at 425.

Assessment of property owners for hurricane event services requires estimation of the annual expected value of such services. This is a function of two parameters: (1) the joint probability of initiating anticipated event or actual event actions for all possible hurricanes that might threaten or strike the jurisdiction; and (2) the costs of taking such actions. Local emergency management officials have access to the information needed to estimate the joint probabilities of hurricane strikes and, therefore, the joint probabilities of taking actual event actions.[10] Such data are not available, however, for estimating the joint probabilities of taking anticipated event actions, although a method has recently been devised for doing so.[11]

Local officials typically are unable to estimate the costs of providing event services because most jurisdictions have had no more than one hurricane within the past 10 or 20 years. Estimates of such costs can be derived, however, in a manner similar to that employed by insurance companies to set actuarial rates. Cost functions based on local conditions and different hurricane intensities can be estimated from federal public assistance claims submitted by local governments for hurricanes that qualify for presidential disaster declarations.[12]

As an example, the total (anticipated plus actual) event costs for Lee County, Florida, have been estimated to range from $5 million for a Category 1 hurricane (maximum sustained winds of 74 to 95 miles per hour and storm surge elevations of 4 to 5 feet) to greater than $200 million for a Category 5 hurricane (maximum sustained winds in excess of 155 miles per hour and storm surge elevations in excess of 18 feet).[13] When these costs are annualized based on probability estimates for the occurrence of anticipated events and actual events, the annual expected value of total event costs ranges from $496,000 to $978,000.[14] These result in total annualized costs for ongoing and event services that range from $1.2 to $1.7 million based on 1995 budget figures.[15] This represented less than one percent of Lee County's general revenue budget in 1995.[16]

III. RELATIVE-RISK-BASED ASSESSMENT OF PROPERTY DEVELOPMENT IN HURRICANE HAZARD ZONES

10. Hurricane probability estimates can be obtained for local jurisdictions from the National Hurricane Center's HURDAT data base.

11. DEYLE ET AL., *supra* note 5, at 38.

12. Boswell et al., *supra* note 3, at 362-66.

13. Deyle & Smith, *supra* note 4, at 424.

14. *Id.* at 425.

15. *Id.*

16. *Id.* at 432.

The principle of tax benefit equity requires that the costs of local emergency management services necessitated by development of land exposed to hurricanes be allocated among property owners in proportion to the demand they create for such services. Relative risk can be used as the basis for allocating these costs where service consumption can be linked to the exposure and vulnerability of structural improvements on private property and the exposure and vulnerability of public facilities and infrastructure that are provided to serve that property. The location of a private structure or public facility, defined by distance from the open coast and topographic elevation, determines exposure to the damaging forces of wind, waves, and storm surge. Vulnerability is the potential to be damaged. It is a function of the design and construction of the structure, including its elevation, building materials, and construction methods.

A. Relative Risk Indices

The relative risk approach for apportioning the local costs of emergency management services for hurricanes is based on calculating the ratio between the risk associated with an individual developed property parcel and the total risk represented by all developed parcels in the jurisdiction. In practice, however, the risks vary for different emergency management services. Thus, applying this approach requires partitioning the costs of those services and calculating separate risk ratios or indexes for each cost component. An assessment formula based on four risk indexes can accommodate this necessity: (1) anticipatory protective measures index; (2) damage risk index; (3) public facility risk index; and (4) ongoing services risk index.[17]

Properties that benefit from evacuations and other protective actions when a hurricane threatens are primarily determined by their exposure to flooding by storm surges. Some jurisdictions also evacuate all mobile homes regardless of location when a hurricane threatens. For structures other than mobile homes, therefore, a relative risk index approximating consumption of protective measures taken in anticipation of a hurricane strike can be based on the cumulative probability of evacuation for the evacuation zone within which a parcel is located. If, for example, a developed property parcel is located in the Category 2 evacuation zone, it will be evacuated for Category 2 storms plus all storms of greater magnitude (Categories 3-5). Its risk index value is the sum of the

17. The description here is a summary of a complex set of steps and formulas detailed in DEYLE ET AL., *supra* note 5, at 45-61.

annual probabilities of all storms of Category 2 or greater threatening the jurisdiction and stimulating evacuations and other protective actions. For mobile homes, the anticipatory protective measures risk index would be the sum of the probabilities of initiating evacuations and other measures for all five hurricane categories.

A damage risk index can be calculated based on the annualized magnitude of damage likely to be experienced by a private structure. This, in turn, can serve as a proxy for the amount of debris likely to be generated when that structure is damaged. The resulting index value can be applied to the costs of debris collection and disposal, which are often the single largest cost of hurricane disaster recovery.[18] Annualized damage levels are a function of the type of structure and its elevation, and the magnitude and probabilities of the wind, breaking waves, and flooding to which it may be exposed. Levels of damage based on these characteristics can be approximated from damage functions developed by the National Flood Insurance Program[19] and the United States Army Corps of Engineers,[20] plus property appraiser data on the assessed value of the structure.

Ideally a public facility risk index would capture the proportion of damage to public facilities and infrastructure that can be attributed to each parcel of developed property. This would be a function of where the parcel is located, the public facilities provided by local governments to serve that parcel, and the annualized risk of damage to those facilities. In practice, it is not feasible to make all of these distinctions. Aggregate data on recovery costs associated with damage to public facilities and property cannot be easily broken down to estimate probable damage costs for different facilities of different types with different levels of vulnerability, e.g. parks, roads, sewage treatment plants, police stations, libraries, etc. In addition, there is no easy way to estimate proportional usage of these facilities by individual property owners. Two options are apparent: (1) exclude these costs from a risk-based assessment; or (2) use a proxy measure for the index. One approach under the second option is to approximate relative usage of all vulnerable public facilities based on the size of the structure and/or the assessed value of the property.[21]

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18. *Id.* at 46.

19. *See, e.g.,* NAT'L FLOOD INS. ADMIN., FLOOD INSURANCE RATE REVIEW–1995 (1995).

20. U. S. ARMY CORPS OF ENG'RS, TRI-STATE HURRICANE LOSS AND CONTINGENCY PLANNING STUDY PHASE II B-3 - B-6 (1990).

21. Deyle & Smith, *supra* note 4, at 427 (using the product of the square footage and assessed value of a structure to create such a proxy measure).

An appropriate risk index for consumption of ongoing services should reflect the local government's approach to providing such services. A simple rationale is that greater effort is or should be devoted to planning, preparedness, and mitigation for those properties perceived to be at the greatest risk.[22] One approach, therefore, might be to construct the ongoing services risk index as the average of the other three indices.[23]

B. Annual Property Assessments

The annual property assessment that would be levied on a developed property parcel can be calculated by multiplying the individual risk index values by the annual costs of each of the four corresponding components of local emergency management services: (1) anticipatory protective measures; (2) debris collection and disposal; (3) public facility repair and reconstruction; and (4) ongoing services concerned with planning, preparedness, and mitigation.

There is, then, a feasible method to estimate the costs of emergency management services associated with hurricanes, although it depends on information not readily available in most agency budgets and rough approximations of the proportion of emergency management costs that can be legitimately attributed to hurricanes as opposed to other hazards to which a community may be exposed. Practical methods also can be devised for measuring the differential consumption of emergency management services by property owners in a community. However, these methods are fairly data-intensive, would require the development of new computer programs to make the calculations,[24] and must rely on a number of simplifications and assumptions.

The next two sections address the other major question critical to the feasibility of applying a risk-based assessment method to achieve tax benefit equity in the financing of local emergency management services associated with hurricanes. Section IV examines the alternative revenue options available to local governments and their relative merits for achieving the objectives of a risk-based assessment. Section V then examines the question of whether or not a risk-based special assessment, which appears to be the most appropriate non-tax revenue option for funding emergency management services, is feasible under the revenue

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22. This is the approach taken in Lee County, Florida. Interview with Wilson, *supra* note 8.

23. Deyle & Smith, *supra* note 4, at 427.

24. DEYLE ET AL., *supra* note 5, at D-1, D-38 (describing the design of MicroSoft ACCESS program to calculate annual assessments using the risk-based method summarized here).

authority granted to local governments in Florida under the state's constitution and statutes.

IV. LOCAL GOVERNMENT REVENUE OPTIONS FOR FINANCING EMERGENCY MANAGEMENT SERVICES FOR HURRICANES

A. Overview of Local Government Revenue Sources

The power to levy revenues for the purpose of financing local services and infrastructure is delegated to local governments through state constitutions, statutory laws, and special laws. This authority varies from state to state and can span a wide range. At one end of the revenue spectrum are taxes, which are typically compulsory and used to cover general services and expenditures. At the other end are fees or charges, based on the cost of the service, that are paid voluntarily by the resident or unit served.

Local government authority may be narrow or broad. Typically broader local revenue authority corresponds with the granting of "home rule" powers through the state constitution or statutes. Forty-eight states currently grant home rule authority to municipalities, and thirty-seven grant it to counties.[25] Principal revenue categories are described in the following sections.[26] Local governments in home-rule states are likely to have the authority to use most of these revenue sources.

1. *Taxes*

Most taxes serve as sources of "general revenues" that are used to fund basic government functions and services, the benefits of which are consumed community wide. There typically is no direct connection between the amount of revenue collected and the level of consumption of services consumed by the individual paying the tax. Examples include property or ad valorem taxes and sales taxes. Narrow-based taxes are levied on specific activities or purchases. Revenues from these taxes are usually earmarked for particular expenditure categories and are sometimes, but often indirectly, related to the use of public facilities. Examples include fuel taxes and motor vehicle taxes used to finance highway infrastructure and tourist "bed" taxes, which are often used to finance economic development.

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25. U. S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LOCAL GOVERNMENT AUTONOMY: NEEDS FOR STATE CONSTITUTIONAL STATUTORY, AND JUDICIAL CLARIFICATION 1 (1993).

26. U. S. ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, LOCAL REVENUE DIVERSIFICATION: USER CHARGES (1987).

2. *Utility Fees*

Utility fees are analogous to private market prices. They are used primarily to cover the operation and maintenance costs of a wide range of municipal utility services for which benefits accrue to identifiable individuals. Examples include charges for sewage disposal, water supply, and publicly-provided electricity. Payment varies with consumption, and rates are typically based on easily measured units of consumption, e.g. gallons of water per month.

3. *User Fees and Service Charges*

These are similar to private market prices, but they may involve a subsidy to specific users. They are usually voluntary, and payments are normally based on consumption. Examples include fees for public swimming pools, health services, and public museums, and service charges for trash collection. They are often flat fees for all users (pool entrance fee), or there may be a simple rate structure for different categories of users, for example residential versus commercial trash collection charges.

4. *Impact Fees*

Impact fees have specific characteristics that distinguish them from other fees or charges. They are used to finance the capital costs of public facilities and infrastructure needed to serve new development (operating costs are excluded). Examples include roads, water and sewer facilities, parks and recreation facilities, and schools. Generally, an impact fee is a direct payment from a developer or builder to the local government, as opposed to an individual payment from each property owner or resident. They are one-time charges, although they may be collected over an extended period of time. State case law has established that impact fees must be based on a clear nexus between the fee and the demands created by new development, and that the level of the fee must be proportional to the cost of the needed facilities.[27]

27. *See, e.g.,* St. John's County v. N.E. Fla. Builders Ass'n, 583 So. 2d 635, 637 (Fla. 1991); *see also* Banberry Dev. Corp. v. S. Jordan City, 631 P.2d 899, 905 (Utah 1981).

5. *Special Assessments*

The special assessment has attributes of both a tax and a fee. Special assessments are similar to taxes in that they are compulsory. They are similar to fees in that they are based on some measure of service consumption. They are limited, however, to services that directly benefit real property rather than individuals. Typically they are levied in a limited geographic area within a jurisdiction where special services or facilities are provided. As with impact fees, state courts have held that there must be a clear nexus between the level of the fee and the benefits that accrue to individual properties.[28] Improvements that are typically financed using special assessments are street paving, sidewalk and gutter construction, and street lighting. Public services funded using special assessments have included, among others, fire protection, solid waste collection and disposal, and stormwater management.

B. Criteria

Several criteria are useful in comparing revenue options for financing local emergency management services for hurricanes based on relative risk.

1. Nexus

The existence of a "nexus" or connection between the service provided, a benefit to the consumer, and the level of payment is at the crux of the tax benefit equity principle that underlies the argument for imposing a risk-based assessment for local emergency management services associated with natural hazards such as hurricanes. The connection between revenues collected and services provided by a local government also allows for greater accountability in the provision of those services and for easier monitoring of the demand, cost efficiency, and quality. Such a nexus is typically a feature of a fee, charge, or special assessment, but it is usually absent from most taxes.

2. *Extant Authority*

This criterion concerns whether the authority to levy the revenue is sufficient under existing constitutional or statutory powers without the enactment of a general law or special law. This will vary from state to state, but it is most likely to be the case in home-rule states, where local governments have broad authority to

28. *See, e.g.,* City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992).

levy an array of revenues. A revenue option for which authority already exists can be more easily implemented than one that requires new legislation.

3. *Mandatory/Voluntary*

This criterion indicates whether reliance upon services or infrastructure, and payment for those services or infrastructure, are mandatory or voluntary. An assessment for emergency management services must be mandatory because it would be impractical, and arguably undesirable, to deny services to those who elect not to pay. Taxes and certain types of non-tax revenues, such as special assessments, are mandatory. Fees and charges are typically voluntary.

4. *Geographic Area*

This criterion addresses whether the area that will be receiving the services must be clearly identified and any limitations on what that area should or can encompass. In Florida and many other states, counties provide emergency management services to all residents and property, within both incorporated areas (municipalities) and unincorporated areas. A county must be authorized, therefore, to levy the assessment throughout the jurisdiction. Some emergency management services may also be provided by municipal governments within their boundaries. In counties where emergency management services are provided to properties in incorporated areas by both county governments and municipal governments, separate assessment systems would be required to fully implement the tax benefit equity principle.

5. *Consent Requirements*

State law may require a local government to secure the consent of the affected property owners for taxes or special assessments for financing services within limited geographic areas. Where a county initiates an assessment for services provided in an incorporated municipality, formal consent by the governing body of the affected municipality also may be required before the assessment can be levied. Revenue sources that do not require such agreements will be easier to implement than those that do.

6. *Expenditure Limitations*

This criterion addresses the extent to which limits are imposed on the categories of expenditures for which the revenue proceeds

may be used. With the exception of narrowly based taxes, taxes are considered general revenue and may fund all requirements related to services or infrastructure. Non-tax revenues may be limited to only capital costs (*e.g.*, impact fees) or the costs of operation and maintenance (*e.g.*, sewer and water user fees). It is important for local governments to be authorized to levy an assessment for emergency management services that covers both operational and capital costs.

7. *Authorized Purposes*

Specific purposes for which an assessment may be levied are often detailed in authorizing legislation. Because emergency management services have historically been funded from general revenues, it is unlikely that such services are explicitly listed in the legal authorities of state law. An important question, therefore, will be whether or not such services are likely to be viewed by the courts as consistent with the revenue authority granted under specific state constitutional provisions or statutes.

8. *Assessment Rates and Methods*

This criterion concerns whether there is a maximum assessment rate for the revenue, whether that level or rate must be uniform for all assessed units, and what methods of calculating the rate are authorized under state law. The extent to which these may serve as constraints to using different revenues for a risk-based assessment for emergency management services also will vary from state to state.

The presence of a maximum assessment rate might constrain the ability to impose a risk-based assessment that could be used to raise sufficient revenues to cover the full costs of hurricane emergency management services. Typically, state laws impose ceilings on ad valorem tax millage rates, the assessment rates for sales taxes, and narrowly based taxes such as motor fuel and tourist taxes. Absolute caps are generally not imposed on non-tax revenues that are linked to consumption of specific services or the financing of specific capital facilities through such revenue sources as utility fees, user fees, service charges, impact fees, or special assessments. However, the assessment rates generally must be proportional to levels of service consumption or facility use.

Requirements for uniform rates should not pose a problem for a risk-based assessment where such requirements allow for the use of a common formula for calculating the rate. Such formulas are a feature of most of the revenue options described in the preceding section. For example, ad valorem taxes are assessed as a

percentage of the market value of the property. That percentage must be uniform throughout the area subject to the tax. Utility fees impose a charge per unit of the service or commodity consumed. User fees may vary with different classes of users if the rates are equitable, reasonable, and fair. For impact fees, the rate must be proportional to the cost incurred by the municipality in providing the service. For special assessments, the rate must be proportional to the benefit received by the assessed property unit.

An assessment based on relative risk is unlike most assessment methods used for both tax and non-tax revenues. The viability of such an approach will likely depend upon the judicial interpretation of authorizing statutory law.

C. Leading Options for a Risk-Based Assessment For Hurricane Emergency Management Services

While many of these criteria depend upon the particulars of state law, the scope of options for a risk-based assessment local emergency management services associated with hurricanes can be narrowed considerably. Taxes generally do not meet the nexus criterion, which is central to the tax benefit equity principle upon which the concept of the risk-based tax is based. Utility fees and impact fees are designed for purposes that differ from the provision of emergency management services, that is, the provision of municipal utility services and the recouping of capital costs for facilities and infrastructure necessitated by new developments. Voluntary user fees and service charges do not meet the requirement that payment of the assessment be mandatory. The optimal revenue source appears, therefore, to be the special assessment. Special assessments are mandatory, and they are based on the tax benefit equity principal. Evaluation of the remaining criteria depends on the particulars of state law. This is the focus of the next section, which examines the feasibility of a risk-based special assessment for hurricane emergency management services by local governments in Florida.

V. THE FEASIBILITY OF A RISK-BASED SPECIAL ASSESSMENT FOR HURRICANE EMERGENCY MANAGEMENT SERVICES IN FLORIDA

The following sections address the feasibility of a risk-based special assessment for local hurricane emergency management services based on evaluation criteria that are dependent on state constitutional and statutory law and judicial interpretation thereof. The threshold question, addressed in the first section, concerns the nature of *extant authority* for local governments to levy special assessments in Florida. The next sections address the issue of

whether or not local governments are authorized to levy a special assessment throughout the appropriate *geographic area* and the extent to which state law sets *consent requirements* or *expenditure limitations* that may constrain the ability to levy such an assessment. The final sections address the questions of whether or not the *purpose* of a special assessment for hurricane emergency management services is consistent with state law, and if the rules governing *assessment rates and methods* might constrain the use of a risk-based method for apportioning the costs of such services.

A. Special Assessment Revenue Authority in Florida

Expediency favors a revenue for which local government has *extant authority* and therefore does not require new state legislation. Compared to other states, local government revenue authority in Florida is relatively generous and flexible. Specific revenue authority is granted through several constitutional and statutory provisions. Florida law also grants home rule authority to municipalities and counties. The following sections summarize the granting and practice of home rule in Florida, the specific grants of authority to local governments for levying special assessments for municipal services, and judicial interpretation of that authority.

1. *Local Government Home Rule*

Local government home rule was granted to Florida municipalities and counties by the state and its electorate in the 1968 amendments to the Florida Constitution and in subsequent amendments to statutory law. The legal sources granting the authority differ for counties and municipalities. Article VIII, Section 1 of the Florida Constitution grants clear home rule power to charter counties. With the adoption of a county charter, a county has "all the powers of local self-government not inconsistent with general law,"[29] with the authority to enact local ordinances without specific state legislative authority to do so.[30] The provisions of Article VIII, section 1 of the State Constitution concerning non-charter county government[31] are supplemented by statutory provisions granting broad powers of self-government limited only by required consistency with general or special law.[32] Municipal

29. FLA. CONST. art. VIII § 1, cl. G.
30. *See id.*
31. *Id.* § 1, cl. f.
32. FLA. STAT. § 125.01 (2001).

government powers are also addressed in the 1968 amendments to the State Constitution[33] supplemented by state statute.[34]

Decisions issued by the Florida Supreme Court soon after the relevant home rule provisions were added to the State Constitution affirmed the granting of the power of local self-government to charter counties.[35] *Volusia County v. Dickinson*[36] *clarified that charter counties had the powers of municipal government.*[37] *However, in Broward County v. City of Ft. Lauderdale*,[38] the Supreme Court of Florida stated that a charter county could not preempt a municipality's provision of services without meeting the requirements of Article VIII, section 4 of the State Constitution.[39]

2. *Local Authority for Levying Special Assessments*

Several means are specified in Florida statutory law for local governments to levy special assessments for a variety of purposes. This section addresses only the use of special assessments by general-purpose local governments in the funding of infrastructure and public services.

Statutory law authorizes the levy of special assessments by counties in three separate provisions. Section 125.01, *Florida Statutes*, provides broad authority for counties to levy special assessments.[40] It is not clear, however, whether counties have levied special assessments solely on the basis of this broad authority. Most have apparently relied on more detailed authority in the same statute for the formal creation of municipal service benefit units (MSBUs)[41] in unincorporated areas and municipalities

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33. FLA. CONST. art. VIII § 2, cl. b.

34. FLA. STAT. § 166.021(4).

35. *See* Broward County v. City of Ft. Lauderdale, 480 So. 2d 631 (Fla. 1985); State *ex rel.* Volusia County v. Dickinson, 269 So. 2d 9 (Fla. 1972).

36. 269 So. 2d 9 (Fla. 1972).

37. *Id*. at 11.

38. *480 So.2d 631 (Fla. 1985).*

39. *Id*. at 635. Article VIII, section 4 of the Florida Constitution requires that a transfer of any function or power of a county, municipality, or special district to another county, municipality, or special district must be approved by the electorate through referendum in both jurisdictions affected or as otherwise provided by law. There are techniques available in general law for addressing and implementing the transfers without referenda. The predominant approach is by the execution of an interlocal agreement (FLA. STAT. § 163.01) or the exercise of extraterritorial powers by a municipality (FLA. STAT. § 180.02(2)).

40. FLA. STAT. §125.01(1)(r). The statute provides: "The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power includes, but is not restricted to, the power to . . . (r) Levy and collect taxes, both for county purposes and for the providing of municipal services within any municipal service taxing unit, and special assessments. . . ." *Id.*

41. FLA. STAT. § 125.01(1)(q).

or on authority in sections 125.01 and 189.4041, *Florida Statutes*, for the creation of dependent special districts.[42]

For municipalities, the explicit authority for levying special assessments resides in section 170, *Florida Statues*.[43] Florida courts have held that cities also have the power to levy special assessments under home rule.[44] As is suggested in *Volusia County*, the Supreme Court of Florida would appear to extend this authority to charter counties.[45]

B. Jurisdictional Issues

Because emergency management services are provided throughout an entire local government jurisdiction, the revenue source must be authorized for application throughout the entire *geographic area* to be served. Municipalities are authorized to levy special assessments throughout their jurisdiction.[46] Counties may levy special assessments through the creation of municipal service benefit units (MSBUs) or special districts that encompass both unincorporated areas and incorporated municipalities.[47] However, a special district may not be used to provide services only in the unincorporated areas of the county.[48] No comparable restriction applies to MSBUs.[49]

Florida courts have recently explicitly recognized the authority of a county to impose a jurisdiction-wide special assessment.[50] Because emergency management services do not benefit unimproved properties, the tax benefit equity principle dictates that it also must be legally feasible to limit the assessment to developed property parcels. The Supreme Court of Florida has also explicitly approved of special assessments that are structured in this fashion.[51]

Consent requirements would not apply where a municipality elects to impose a special assessment for emergency management services. However, formal consent of the governing boards of

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42. *Id.* §§ 125.01(5) and 189.4041. Dependent special districts are those created and administered by local government. Independent special districts are separate entities chartered by special state legislation or other methods specified in section 189.404(4), *Florida Statutes.*

43. *Id.* § 170.01; *see also* § 170.201(1).

44. City of Boca Raton v. State, 595 So. 2d 25, 30-31 (Fla. 1992).

45. State *ex rel*. Volusia County v. Dickinson, 269 So. 2d 9, 11 (Fla. 1972).

46. FLA. STAT. § 170.201 (2001).

47. *Id.* §§ 125.01(1)(q); 125.01(5); 189.4041.

48. *Id.* § 125.01(5)(c).

49. *Id.* § 125.01(1)(q).

50. *See* Harris v. Wilson, 693 So. 2d 945 (Fla. 1997); Sarasota County v. Sarasota Church of Christ, Inc., 667 So. 2d 180 (Fla. 1995).

51. *See Harris*, 693 So. 2d 945; *Sarasota County*, 667 So. 2d 180.

affected municipalities is required under Florida law where a county decides to levy such an assessment in both unincorporated and incorporated areas, through either an MSBU[52] or special district.[53] This requirement would, therefore, lend an element of uncertainty to a county initiative to finance hurricane emergency management services in this way.

C. Expenditure Limitations

There are no expenditure limitations codified in state law that would constrain the use of a special assessment to finance the capital costs or the costs of operation and maintenance associated with hurricane emergency management services.[54]

D. Authorized Purposes

It is not entirely certain whether financing hurricane emergency management services would be judged to be a legitimate basis for a special assessment in Florida. There is no explicit authority for local governments to levy special assessments for such purposes among the public services and facilities that are listed in the authorizing statutes. However, both counties and municipalities are accorded more open-ended authority to levy special assessments for capital improvements and public services. A more difficult question concerns how a special assessment for hurricane emergency management services would fare under the Florida Supreme Court's "special benefit test." The following sections address these two issues.

1. *Statutory Constraints on Authorized Purposes of Special Assessments*

Public improvements and services for which counties are explicitly authorized to create MSBUs include the following:

> [F]ire protection; law enforcement, beach erosion control; recreation service and facilities; water, … streets; sidewalks; street lighting; garbage and trash collection and disposal; waste and sewage collection and disposal; drainage; transportation; indigent

52. FLA. STAT. § 125.01(1)(q).
53. *Id.* §§ 125.01(5)(a); 189.4041(2).
54. *See id* §§ 125.01(1)(q); 125.01(5)(c); 170.01(2); 170.201(1).

> health care services; mental health care services; and other essential facilities and municipal services.[55]

These services must be financed exclusively from the special assessment revenues collected within the MSBU.

Special districts may be created by counties to provide "capital infrastructure, facilities, and services,"[56] but no comprehensive list of specific municipal services and facilities is included in this statutory authorization beyond a definition of "public facilities":

> major capital improvements, including, but not limited to, transportation facilities, sanitary sewer facilities, solid waste facilities, water management and control facilities, potable water facilities, alternative water systems, educational facilities, parks and recreational facilities, health systems and facilities, and, except for spoil disposal by those ports listed in s. 311.09(1), spoil disposal sites for maintenance dredging in waters of the state.[57]

Under section 170, *Florida Statues*, municipalities may only levy special assessments for a specific set of enumerated local municipal improvements.[58] These include the following:

> (a) construction, reconstruction, repair, and other improvements to streets and sidewalks;
>
> (b) construction, reconstruction, repair, and upgrading of stormwater sewers and other drainage structures, sanitary sewers, water bodies, marshlands, and natural areas, and all or part of a comprehensive stormwater management system;
>
> (c) construction or reconstruction of water mains and other water distribution facilities;
>
> (d) relocation of utilities including electrical, telephone, and cable television services;

55. *Id.* § 125.01(1) (q).
56. *Id.* § 189.402(3)(a).
57. *Id.* § 189.403(7).
58. *Id.* § 170.01(2).

> (e) construction or reconstruction of parks and other recreational facilities and improvements;
>
> (f) construction and reconstruction of seawalls;
>
> (g) drainage and reclamation of wet, low, or overflowed lands;
>
> (h)off-street parking facilities, parking garages or similar facilities;
>
> (i) mass transportation systems;
>
> (j) improvements for watercraft passage and navigation; and
>
> (k) payment of all or any part of the costs of any such improvements by levying and collecting special assessments on the abutting adjoining contiguous, or other specially benefitted property. [59]

Additionally, more open-ended authority, provided elsewhere in section 170, permits municipalities to levy special assessments for funding "capital improvements and municipal services, including, but not limited to fire protection, emergency medical services, garbage disposal, sewer improvement, street improvement, and parking facilities."[60]

The Supreme Court's holding in *City of Boca Raton*[61] that municipalities also have the power to levy special assessments under home rule, appears to have further broadened the purposes for which municipalities may collect special assessments: "[A] municipality may now exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law, and a municipality may legislate on any subject matter on which the legislature may act, except those subjects described in paragraphs (a), (b), (c), and (d) of section 166.021(3)."[62]

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59. *Id.* § 170.01(1).
60. *Id.* § 170.201(1).
61. 595 So. 2d 25, 30 (Fla. 1992).
62. *Id.* at 28. The exceptions listed in section 166.021(3), *Florida Statutes*, are "(a) [t]he subjects of annexation, merger, and exercise of extraterritorial power, which require general or special law pursuant to … the state constitution; (b) [a]ny subject expressly prohibited by the constitution; (c) [a]ny subject expressly preempted to state or county government by the constitution or by general law; and (d) any subject preempted to a county pursuant to a county charter."

As noted above, the court's extension of municipal powers to charter counties may also be interpreted as extending this broad power for levying special assessments.[63]

The most common public purposes funded using special assessments in Florida have been solid waste, street lighting, fire protection, road paving, and ambulance/emergency medical services (EMS) in counties, and road paving, sidewalks, road improvements, and streets/curbs in municipalities.[64] The public services or facilities for which special assessment levies have been upheld in recent case law include fire protection,[65] solid waste disposal services,[66] stormwater management,[67] and specifically enumerated improvements to the infrastructure of a downtown area.[68]

2. *Application of the Supreme Court's Special Benefit Test*

The Florida Supreme Court articulated a two-part test for special assessments in *City of Boca Raton*.[69] The court held that special assessments must (1) confer a special benefit to the burdened property, and (2) be fairly apportioned:

> A legally imposed special assessment is not a tax. Taxes and special assessments are distinguishable in that, while both are mandatory, there is no requirement that taxes provide any specific benefit to the property; instead, they may be levied throughout the particular taxing unit for the general benefit of residents and property. On the other hand, special assessments must confer a specific benefit upon the land burdened by the assessment.…[70]
>
> It is imposed upon the theory that that portion of the community which is required to bear it receives some special or peculiar benefit in the enhancement of value of the property against which it is imposed as

63. *See* State *ex rel.* Volusia County v. Dickinson, 269 So. 2d 9, 11 (Fla. 1972).

64. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, SPECIAL ASSESSMENTS: CURRENT STATUS IN LAW AND APPLICATION 14 (1992).

65. S. Trail Fire Control Dist., Sarasota County v. State, 273 So. 2d 380 (Fla. 1973); Fire Dist. No. 1 of Polk County v. Jenkins, 221 So. 2d 740 (Fla. 1969).

66. Harris v. Wilson, 693 So. 2d 945 (Fla. 1997); Charlotte County v. Fiske, 350 So. 2d 578 (Fla. 2d DCA 1977).

67. *See* Sarasota County, 667 So. 2d 180; *see also* City of Gainesville v. State of Florida, 778 So. 2d 519 (Fla. 1st DCA 2001).

68. City of Boca Raton v. State, 595 So. 2d 25, 30 (Fla. 1992).

69. *Id.* at 29.

70. *Id.*

> a result of the improvement made with the proceeds of the special assessment. It is limited to property benefited.…[71]

> There are two requirements for the imposition of a valid special assessment. First, the property assessed must derive a special benefit from the service provided.… Second, the assessment must be fairly and reasonably apportioned among the properties that receive the special benefit.[72]

The first condition has proved to be problematic. In 1994, the Second District Court of Appeal (DCA) upheld a special assessment in Sarasota County for fire and rescue services but declared a special assessment for funding stormwater management services invalid.[73] The appellate court held that stormwater management services, unlike fire and rescue services, "benefit the community as a whole and provide no direct benefit, special benefit, increase in market value or proportionate benefit regarding the amount paid by any particular land owner."[74] The Florida Supreme Court subsequently reversed, and declared the special assessment for stormwater management services to be valid:

> Because … stormwater must be controlled and treated, developed properties are receiving the special benefit of control and treatment of their polluted runoff. This special benefit to developed property is similar to the special benefit received from the collection and disposal of solid waste.[75]

In *Water Oak Management Corporation v. Lake County Florida*,[76] the Fifth DCA held that Lake County had failed to make a legislative determination as to the special benefit to the assessed properties in a county-wide fire protection district.[77] The court found that Lake County had attempted to reduce its *ad valorem* burden by shifting the funding for fire protection services to a special assessment. The court concluded that the special

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71. *Id.* (quoting Klemm v. Davenport, 129 So. 904, 907-08 (1930)).
72. *Id.* (citations omitted).
73. Sarasota County v. Sarasota Church of Christ, 641 So. 2d 900 (Fla. 2d DCA 1994), *rev'd*, 667 So. 2d 180 (Fla. 1995).
74. *Id.* at 902.
75. Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180, 186 (Fla. 1995).
76. 673 So. 2d 135 (Fla. 5th DCA 1996), *rev'd* 695 So. 2d 667 (Fla. 1997).
77. *Id.*

assessment "merely funds an undifferentiated service for the county in general and is designed to reduce costs of this service that would otherwise come from general revenue funded by *ad valorem* taxes."[78]

The Florida Supreme Court reversed in *Lake County Florida v. Water Oak Management Corporation*.[79] The court observed that the special benefit test "is not whether the services confer a 'unique' benefit or are different in type or degree from the benefit provided to the community as a whole … rather, the test is whether there is a 'logical relationship' between the services provided and the benefit to real property."[80] The court reiterated its findings in *Fire District No. 1 of Polk County v. Jenkins*[81] that "fire protection services do … specially benefit real property by providing for lower insurance premiums and enhancing the value of the property."[82]

An important case that has not yet been fully adjudicated is *SMM Properties, Inc. v. City of North Lauderdale*.[83] The Fourth DCA reversed the trial court and held that the emergency medical services component of a special assessment for an integrated fire rescue program did not provide a special benefit to the assessed properties and was, therefore, an illegal ad valorem tax. The appellate court observed that "emergency medical transportation services benefit people, not property."[84]

The difficult legal issue raised in *SMM Properties* is whether or not a court can "dissect[] … the services funded by [a] special assessment and then invalidat[e] the entire special assessment based on a finding that one particular element … failed to satisfy the special benefit test."[85] In *City of Pembroke Pines v. McConaghey*,[86] the Fourth DCA held that it was improper for the trial court to dissect the services of an integrated fire protection program.[87] However, in *SMM Properties*, this same court rejected that rationale, and held that each component of a service program funded through a special assessment must survive the special benefits test.[88]

The Fourth DCA reiterated this rationale in rejecting the City of North Lauderdale's argument that a special assessment for

78. *Id.* at 138.
79. 695 So. 2d 667 (Fla. 1997).
80. *Id.* at 669 (citations omitted).
81. 221 So. 2d 740 (Fla. 1969).
82. *Lake County*, 695 So. 2d at 669.
83. 760 So. 2d 998 (Fla. 4th DCA 2000).
84. *Id.* at 1004.
85. *Id.* at 1002 (quoting City of Pembroke Pines v. McConaghey, 728 So.2d 347, 351 (Fla. 4th DCA 1999)).
86. 728 So. 2d 347 (Fla. 4th DCA 1999).
87. *Id.* at 351.
88. *SMM Properties*, 760 So. 2d at 1003.

emergency medical services must be sustained because section 170.201(1), *Florida Statutes*, lists emergency medical management services as one of several municipal services for which special assessments may be levied.[89] The court maintained that the specific services encompassed by an emergency medical services program must confer a special benefit to the assessed property. The DCA certified the case to the Florida Supreme Court to finally resolve this question. The Supreme Court upheld the Fourth DCA ruling that emergency medical services benefit people not property.[90] The Supreme Court of Florida did not address the issue of dissecting the services, thus affirming the Fourth DCA decision.

In *City of North Lauderdale*, the Supreme Court of Florida held that it is not sufficient for a local legislative body to declare a service to be a benefit to property.[91] To pass the logical relationship test set forth in *Lake County*, a special assessment must be shown to have demonstrable benefits to real property such as reduced insurance premiums or enhanced assessed property value.[92] The court further held that public services that "may provide a sense of security to individuals" do not meet the test of providing a benefit to the property itself.[93]

These cases demonstrate that it is critical for a local government to substantiate clearly the "special benefit" to the assessed property when enacting a special assessment for public facilities or services. To augment efforts to meet the "special benefit" test, one legal reference on special assessments recommends that the following questions, among others, be addressed in the development of a special assessment for a public service or facility:[94]

> [1]Does the levy finance a system, facility, or service from which a special benefit ascertainable to each parcel of property is derived, over and above a general benefit to the community or to property, whether direct or immediate? Can the special benefit be measured by current use or possible future use of the property? Is the special benefit direct, approximate, and reasonably certain of computation at some point?

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89. FLA. STAT. § 170.201(1) (2001).
90. City of North Lauderdale v. SMM Properties, 825 So. 2d 343 (Fla. 2002).
91. *Id.* at 348.
92. *Id.* at 349.
93. *Id.*
94. Henry Kenza van Assenderp & Andrew Ignatius Solis, *Dispelling the Myths: Florida's Non-Ad Valorem Special Assessments Law,* 20 FLA. ST. U. L. REV. 825, 861 (1993).

> [2]Would the nature of the special benefit derived from the system, facility, or service include any one or more of the following: increased market value, actual or potential added use or enjoyment of the property, impact on existing and possible future uses of property, potential for decreases in insurance premium, potential for enhancement and value of business property, potential for increases in rental value of the property, and potential for enhanced protection of public safety?[95]

The benefits to assessed property of a special assessment for local emergency management services would be numerous, including the following:

> (1) planning and preparedness for, as well as actual implementation of, protective measures taken prior to the arrival of a hurricane that serve to reduce property damage, for example, sand bagging and other emergency flood protection measures;
>
> (2) planning and preparedness for and implementation of post-disaster response actions taken to reduce fire hazards, theft and vandalism, and secondary damage from debris;
>
> (3) planning for and implementation of recovery actions to restore damaged public facilities and infrastructure and remove and dispose of debris;
>
> (4) planning for and implementation of mitigation measures designed to reduce damage to public facilities and infrastructure that serve assessed properties; and
>
> (5) provision of educational information and other technical and financial assistance for mitigating the vulnerability of private property.

These services would not only help to reduce losses to assessed properties, some could also contribute to reduce insurance premiums, and others might enhance property values.

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95. *Id.*

A potential sticking point is the fact that some of the services provided are directed at protecting public health and safety. As noted above, the Supreme Court of Florida determined that emergency medical transportation services are provided to individuals rather than property and held, therefore, that such services are not a benefit to property for which a special assessment may be levied. Given this ruling, it may be necessary to exclude from the special assessment any levy tied to emergency medical services or public safety services targeted at individuals rather than property. This might include evacuation, search and rescue, and provision of emergency shelters.

Doing so could be problematic. While it would not be difficult to exclude all evacuation services, emergency medical services, and the costs of providing emergency shelters from a special assessment for emergency management services, it would be impossible to segregate police and fire emergency response services that are targeted at public safety as opposed to property protection. However, the Supreme Court's ruling in *City of North Lauderdale* suggests this may not be necessary. The court draws a distinction between first response medical aid performed by fire fighters and emergency medical services, observing that first response medical aid is "one of the routine duties of a firefighter" that is inseparable from their duties of fighting fires.[96] A comparable argument could be made for disaster response activities by police that are directed both at protecting property from looting and protecting individuals from safety hazards caused by storm hazards.

E. Assessment Rates and Methods

Because there is typically a variation in the need for emergency management services within a jurisdiction or service area, it is desirable, under a policy of tax benefit equity, for the *assessment method* to account for this variation. As noted in Section III.B., there are two criteria that concern the assessment method: (1) whether or not state law imposes a cap on the assessment rate; and (2) whether the method of assessing properties for the services provided passes muster under state law.

Although state statutes and the Florida Constitution impose millage rate caps on municipal service taxing units (MSTUs) and special districts where counties finance public services or improvements through the levy of ad valorem taxes,[97] there are no rate limits imposed on special assessments levied by counties for

96. *City of North Lauderdale*, 825 So. 2d at 346.
97. FLA. STAT. §§ 125.01(1)(q); 125.01(5)(c) (2001); FLA. CONST. art. VII § 9, cl. b (2001).

municipal service benefit units (MSBUs) or special districts, or on special assessments levied by municipalities.[98] The principal legal issue concerns whether or not the assessment method results in an allocation of costs among the properties assessed that is proportional to the benefits received. This is the second prong of the test articulated by the State Supreme Court in *City of Boca Raton*.[99]

State statutes are silent on this issue in those sections that detail the authority of counties to levy special assessments.[100] However, explicit rules are articulated that govern the apportionment of costs for municipal special assessments. The apportionment may be based on "(a) [t]he front or square footage of each parcel of land; or (b) [a]n alternative methodology, so long as the amount of the assessment for each parcel of land is not in excess of the proportional benefits as compared to other assessments on other parcels of land."[101]

The state courts have interpreted this broad language liberally. In *City of Boca Raton*, the special assessment for a downtown development district was apportioned on the basis of the property value of the benefited tracts.[102] The assessment for a particular tract corresponded to the ratio of its assessed value divided by the total assessed value of all land in the district. The methodology was also "self-correcting" in that if "over ten years the assessed value of that particular property, if it did not benefit to the same degree as the rest of the downtown, their percentage of the total assessment would go down proportionally."[103] A small number of residential properties in the downtown area and the churches in the area were exempted from the assessment because they would receive less benefit from the project than the business properties.

The stormwater management special assessment in *Sarasota County* was based on the type of land use on a developed tax parcel, and assumptions about the amount of impervious surface associated with different land uses and the resulting volumes of stormwater that would require management.[104]

Special assessments for street and road improvements typically use the residence/lot or the front footage in the apportionment methodology. Examples of variations on this approach include the following:

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98. *See* FLA. STAT. §§ 125.01(1) (q); 125.01(5)(c); 170.01(2); 170.201(1).
99. City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992).
100. FLA. STAT. §§ 125.01(1) (q); 125.01(5)(c); 189.4041.
101. *Id.* § 170.201(1).
102. 595 So. 2d at 30.
103. *Id.* at 30-31.
104. Sarasota County v. Sarasota Church of Christ, 667 So. 2d 180, 186 (Fla. 1995).

> The City of St. Petersburg divides 100% of the cost of paving roads up to 24 feet in width into the total front footage of property adjacent to the road paving project. However, corner lots receive a sixty percent rate break on side footage. If a road is wider than 24 feet then the municipality pays the cost of paving the additional width including any other costs, such as a thicker asphalt layer, associated with the wider street. The assumption is that roads wider than 24 feet benefit other-than-local property owners.
>
> The City of Vero Beach pays one-third of the costs of special assessment paving projects. Landownres [sic] on both sides of the roadway pay the remaining costs on a modified front footage basis. [T]he modification spreads costs more equitably among properties that generate identifiable differences in vehicular traffic such as high rise condominiums. If the roadway paving project extends through -City-owned property then the -City typically bills itself at an increased front footage rate modified to reflect high vehicular traffic.
>
> Pompano Beach divides 100% of the footage of adjacent land. Payment of the assessment is typically due over a three-year period with other installment options available to the landowner. [105]

These examples demonstrate that the connection between the assessment and benefit to property can depend on a complex interaction of property attributes, project complexity, and community standards. This complexity opens the door to legal challenge. These examples show, however, that the Florida courts have accorded local governments considerable flexibility in devising apportionment methods where reasonable efforts have been made to achieve an equitable distribution of the costs among benefited properties. In *City of Ft. Myers v. State*,[106] the State Supreme Court articulated the principles for evaluating the equitability and reasonableness of special assessment apportionment methods:

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105. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, *supra* note 64, at 15.
106. 117 So. 97 (Fla. 1928).

> No system of appraising benefits or assessing costs has yet been devised that is not open to some criticism. None have attained the ideal position of exact equality, but, if assessing boards would bear in mind that benefits actually accruing to the property improved in addition to those received by the community at large must control both as to benefits prorated and the limit of assessments for cost of improvement, the system employed would be as near the ideal as it is humanly possible to make it. [107]

A special assessment for local emergency management services associated with hurricanes that is based on relative risk, as proposed here, appears likely to satisfy the *City of Ft. Myers* criteria, and can be shown to have some parallels with specific apportionment methods sanctioned by the Florida Supreme Court. As shown in Section II, response and recovery costs can be clearly linked to the level of damage likely to be sustained by improved property parcels. There also is evidence that local governments may focus planning, preparedness, and mitigation measures and services on areas and types of property thought to be at greater risk by local officials. The approach of apportioning those costs based on risk can be construed as analogous to the apportionment approach taken for the Sarasota County special assessment for stormwater improvements, where assessments are based on the amount of stormwater likely to be generated. The use of proportional risk ratios is analogous to the apportionment method based on property value used for the Boca Raton downtown redevelopment special assessment described above.

One weakness may be the imprecision in differentiating emergency management services associated with hurricanes from those necessitated by other natural and technologic hazards, some of which, such as lightning, tornadoes, droughts, blizzards, freezes, earthquakes, and civil disturbances, pose essentially equal risks to all developed property. As noted in Section I, local emergency management officials may be able to estimate only a rough proportional basis for making such a distinction. One might argue, however, that such an approach is no more imprecise than the methods used in St. Petersburg or Vero Beach to allocate the costs of highway improvements between local property owners and the general public.[108]

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107. *Id.* at 104.
108. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, *supra* note 64.

A related issue may concern the fact that local government agencies, other than emergency management agencies, do not routinely specify budget lines for emergency management activities, and no local agencies are likely to separately budget expenses for individual types of hazards. This may make it difficult to unambiguously delineate the costs that should be covered by a risk-based special assessment.

VI. CONCLUSION

It is likely that a risk-based special assessment for hurricane emergency management services would be challenged in the courts, because it would result in some redistribution of the total tax burdens of different properties.[109] The outcome would depend on the details of statutory law, and judicial interpretation thereof, in the state in which a local government elected to initiate such a means of attaining greater tax benefit equity for such services.

The assessment method is novel and, therefore, may be one focus of attack. Florida law gives local governments considerable latitude in apportioning costs under a special assessment, and it appears that a method based on relative risk has parallels to at least two special assessment methods that have been validated by the State Supreme Court.[110]

The difficulty of precisely differentiating the proportion of emergency management services attributable to hurricanes from those attributable to other natural and technological hazards might prove to be an additional weakness, although the Florida courts also appear to have tolerated a range of good-faith approaches taken by local governments to apportion the costs of services and improvements that cannot be neatly differentiated. The challenge of clearly detailing the costs attributable to emergency management services in agencies other than the local emergency management department, might also be problematic and require a narrowing of the scope of the assessment from that described in section I.

The principal weakness in the concept of a risk-based special assessment for emergency management services due to hurricanes appears to lie in the details of meeting the "special benefit" criterion as it has been interpreted by the Florida courts. Given the Supreme Court's ruling that services that benefit individuals rather than property are not the appropriate domain of special assessments,[111]

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109. Deyle & Smith, *supra* note 4, at 429.

110. *See* Lake County v. Water Oak Mgmt. Corp., 695 So.2d 667 (Fla. 1997); City of Boca Raton v. State, 595 So.2d 25 (Fla. 1992).

111. City of North Lauderdale v. SMM Properties, 825 So.2d 343 (Fla. 2002).

it will likely be necessary to narrow the scope of the services that are encompassed by a risk-based special assessment for emergency management services to include only those that clearly benefit property as opposed to individuals. The argument will be strongest where it is possible to show a linkage between the provision of emergency management services and reductions in insurance premiums or enhancements in property values.

LAYING OUT AN "UNWELCOME MAT" TO PUBLIC BEACH ACCESS

JENNIFER A. SULLIVAN*

Table of Contents

"Florida is advertised as a playground, a retreat from the hurryscurry of the modern world and from the rigors of northern climes. Fishing and swimming are prominent if not principal items of the entertainment the stranger expects to find here."[1]

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* Juris Doctor candidate, May 2003, The Florida State University College of Law; B.A. The Florida State University, 2000. The author would like to express gratitude to her infinitely wise advisors Professor Harold P. Sutherland and Peter A. Lagonowicz.

1. Duval v. Thomas, 114 So.2d 791.795 (Fla. 1959).

I. INTRODUCTION

There is no doubt that public beach access is a hotly disputed issue in the State of Florida. Ninety-nine percent of coastal residents, as well as tourists, depend upon public access points to reach the beach; while less than one percent of Florida's coastal residents own beachfront property.[2] To some, the beach offers a vacation from their everyday life; to others, the beach offers a way of life. Amidst this sun, sand, and surf, however, lies an ongoing battle between beachfront property owners and the public. To some the beach is a playground; while to others the beach is a backyard. This beach turf war may lead Florida courts to dip their judicial toes in the rough surf, as they have time and time again. This Comment revisits the issue of public beach access and the doctrine of customary usage. Additionally, this Comment will visit the remaining issues that surround the battleground of the over-development of Florida Panhandle beaches, while discussing problems associated with public beach access. Finally, this Comment illustrates how four individual elements in Florida's history have created "the perfect storm" for Florida to test the strength of its policy on preserving public beach access.[3]

II. DEFINING THE BATTLEGROUND

To the average tourist who comes to visit a town on the beach, it may seem like the beach is their playground. However, to coastal residents, there are limitations and lines drawn on that tropical playground.

The battle over beach access concerns two rights — the right of the public to use the beach, and the right of the private landowner to exclude.[4] The concept of private land ownership is deeply embedded in U.S. property law. However, the importance of protecting the public interest in the beaches and oceans weighs strongly against this concept.[5] The increasing development of condominiums and mega-resorts in small beach towns is eroding the

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2. See FLA. COASTAL MGMT. PROGRAM, DEP'T OF ENVTL. PROT., BEACH ACCESS SIGNS, available at http://www.dep.state.fl.us/secretary/legislative/coastal/programs/access_signs.htm (last visited Nov. 24, 2002) [hereinafter BEACH ACCESS SIGNS].

3. Referring to "the [1991] storm of the century, boasting waves over one hundred feet high[,] a tempest created by so rare a combination of factors that meteorologists deemed it 'the perfect storm'." The Perfect Storm, available at http://www.wwnorton.com/catalog/fall00/005032.htm (last visited Nov. 24, 2002) (phrase coined by NOAA meteorologist Bob Case); see also SEBASTIAN JUNGER, THE PERFECT STORM (Harper Collins 1997) (depicting the story of the perfect storm and its victim, the swordfishing boat Andrea Gail).

4. JOSEPH J. KALO ET AL., COASTAL AND OCEAN LAW CASES AND MATERIALS 89 (2d ed. West Group 2002).

5. See id.

character for which tourists seek out Florida's beaches, especially the quiet and undeveloped character of the Emerald Coast.[6] "With Florida's population burgeoning and its recreational needs multiplying by leaps and bounds, the State's courts can ill afford any longer to be profligate with its public areas and allow them to be frittered away upon outmoded pretexts for commercial exploitation."[7]

There are two important beach access issues: horizontal access and perpendicular access.[8] Horizontal, or lateral, access encompasses the public's right to walk along the beach below, or parallel to, the mean high-tide line.[9] Perpendicular access deals with getting to the beach; in other words, the access from the road to the public segment of the beach.[10]

III. DRAWING THE LINE IN THE SAND

Traditionally, in the United States, the cleavage between private and public land is the "mean high-tide line."[11] Florida provides its boundary in the Florida Constitution:

> The title to lands under 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.[12]

The mean high-tide line is a fictional line that is measured by averaging "all high-tides over an 18.6 year cycle, as determined by the Department of Commerce, National Oceanic Survey."[13] This line

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6. The "Emerald Coast" is the name for the coastal area along the Northwest Florida Panhandle between Pensacola and Panama City Beach. It includes the communities and towns of Navarre, Fort Walton Beach, and Destin. The Emerald Coast is characterized by sugar-white, sandy beaches and emerald green, crystal-clear waters. See EMERALD COAST, available at http://www.see-emeraldcoast.com (last visited Nov. 24, 2002).

7. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 81 (Fla. 1974) (Ervin, J., dissenting).

8. KALO, supra note 4, at 83; DONNA R. CHRISTIE, PUBLIC ACCESS TO BEACHES AND SHORES 1 (citing unpublished supplemental materials to COASTAL AND OCEAN LAW CASES AND MATERIALS, Florida State University College of Law, Fall 2002, on file with author).

9. KALO, supra note 4, at 83.

10. Id. (addressing incidental access issues that concern parking, concessionaires, and dispersal).

11. KALO, supra note 4, at 43.

12. FLA. CONST. art. X, § 11 (emphasis added).

13. KALO, supra note 4, at 43. See generally Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10, 26-27 (1935).

is a legal fiction because it cannot be permanently drawn in the sand separating private land from public land. However, in some areas where the tide does not fluctuate, the mean high-tide line is evidenced best as the line between the dry sand and the wet sand.[14] This fictional line has only created trouble between private landowners and the public.[15]

IV. TRADITIONAL TOOLS TO PRESERVE PUBLIC BEACH ACCESS

A. The Public Trust Doctrine

The State holds the land seaward of the mean high-tide line in trust for the public.[16] Historically, the public trust doctrine encompassed navigation, commerce, and fishing — the traditional triad.[17] Over time, the public trust doctrine has been judicially expanded to include bathing and swimming.

> The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities.[18]

In recent years, the doctrine has been extended even further to include the right of access to the beach. In Matthews v. Bay Head Improvement Ass'n,[19] a non-association member brought suit against an association that controlled access to a municipal beach, on grounds that the association was denying the public its right of

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14. The dry sand extends landward to the vegetation line, while the wet sand extend seaward into the ocean or Gulf of Mexico. Id.

15. Id.

16. See FLA. CONST. art X, § 11; see also FLA. STAT. § 161.051 (2002) ("No grant under this [coastal construction] section shall affect title of the state to any lands below the mean high-water mark."); see also FLA. STAT. § 187.201 (8)(a) (2002) (introducing a comprehensive plan announcing Florida's goal of preserving public beach access in that "Florida shall ensure that development ... and beach access improvements in coastal areas do not endanger public safety or important natural resources. Florida shall, through acquisition and access improvements, make available to the state's population additional beaches ..., consistent with sound environmental planning."). Additionally, in its comprehensive plan Florida provides a state policy to "[e]nsure the public's right to reasonable access to beaches." FLA. STAT. § 187.201(8)(b)(2).

17. KALO, supra note 4, at 41.

18. Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 358 (N.J. 1984).

19. Id.

access to the beach in violation of the public trust doctrine.[20] Additionally, the plaintiff alleged that the public had the right to use the association's private land as incidental to its use of the public trust land.[21] The New Jersey Supreme Court preserved the public's right of access to the public trust lands on the beaches. In perceiving the public trust doctrine as a fluid doctrine to be molded to address modern social problems, the court held that "the public must be given both [reasonable] access to and use of privately-owned dry sand areas as reasonably necessary."[22] Thus, this court extended the public trust doctrine to include perpendicular access and horizontal, or lateral, access.

B. Prescriptive Easement

Along with the land that the State holds in "trust" for the public, the State may acquire a prescriptive easement over the dry-sand area of the beach. A prescriptive easement is:

> created only by adverse use of the privilege with the knowledge of the person against whom it is claimed, or by a use so open, notorious, visible and uninterrupted that knowledge will be presumed, and exercised under a claim of right adverse to the owner and acquiesced in by him; and such adverse user [sic] must have existed for a period equal at least to that prescribed by the statute of limitations for acquiring title to land by adverse possession.[23]

In other words, "the public can acquire easements in private land by long-continued user [sic] that is inconsistent with the owner's exclusive possession and enjoyment of his land."[24] However, Florida courts have "declined to find such prescriptive right in the public because of the absence of an adverse nature in the public's use of the private beach land"[25] in major recreational areas.

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20. Id. at 358.

21. Id.

22. Id. at 365 (emphasis added).

23. J.C. Vereen & Sons, Inc. v. Houser, 123 Fla. 641, 645, 167 So. 45, 47 (Fla. 1936); see also Downing v. Bird, 100 So.2d 57 (Fla. 1958); see also Zetrouer v. Zetrouer, 89 Fla. 253, 103 So. 625 (Fla. 1925). In Florida, the statute of limitations is seven years for adverse possession, while the statute of limitations for prescriptive easements is twenty years.

24. State ex rel. Thornton v. Hay, 462 P.2d 671, 675 (Or. 1969).

25. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 75-76 (Fla. 1974) (referring to City of Miami Beach v. Undercliff Realty & Investment Co., 21 So.2d 783 (Fla. 1945), and City of Miami Beach v. Miami Beach Improvement Co., 14 So.2d 172 (Fla. 1943), where the

C. Implied Dedication

As an alternative to a claim of prescription, the public can assert a claim of implied dedication. An implied dedication is the "setting apart of land for public use, and to constitute such a dedication there must be an intention by the owner clearly indicated by his words or act[ions] to dedicate the land to the public use."[26] The essential element of an implied dedication is the intent of the landowner to dedicate the land to the public.[27] It is hard to reconcile the intent of the landowner to dedicate when he or she is in court objecting to the dedication.[28] However, previous owners may have been responsible for the dedication and had the requisite intent to dedicate.

In addition to tools such as public trust doctrine, prescriptive easement, and implied dedication, the public has used the First Amendment[29] to preserve beach access.[30]

V. MODERN TOOL BASED ON TRADITIONAL CUSTOM: THE DOCTRINE OF CUSTOM

The doctrine of custom is based on seven requirements — the customary use must be ancient, exercised without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and consistent with other customs or other law.[31]

In State ex rel. Thornton v. Hay, the public brought suit against beachfront property owners to prevent them from enclosing

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court declined to find prescriptive easements in both cases).

26. City of Miami Beach v. Miami Beach Improvement Co., 153 Fla. 107, 113, 14 So.2d 172, 175 (Fla. 1943).

27. Id.

28. Additionally, it is hard to reconcile a landowner's intent to dedicate when a municipality is attempting to enforce an alleged implied dedication where the municipality has been collecting ad valorem taxes on the land in question. See City of Miami Beach v. Undercfliff Realty & Investment Co., 21 So.2d 783 (Fla. 1945).

29. See Leydon v. Town of Greenwich, 777 A.2d 552 (Conn. 2001) (holding local ordinance, allowing only residents and guests access to town beachside park, overbroad and violative of First Amendment right to engage in protected expressive and associational activities).

30. Additionally, private beachfront landowners have argued Fifth Amendment takings. See Lucas v. South Carolina Coastal Council, 112 S.Ct 2886, 2899 (1992) (determining the South Carolina Beachfront Management Act prohibited beachfront landowner from building any structures on land, and thus deprived landowner of all economical use of property; the court held that the state had effected a categorical taking); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (concluding there must be an essential nexus between the exaction imposed that required landowner to grant public easement for public beach access across beachfront property and effect of permitted use of the property); see also Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148 (Cal. App. 1st DCA 1985).

31. State ex rel. Thornton v. Hay, 462 P. 2d 671, 677 (Or. 1969) (drawing from 1 WILLIAM BLACKSTONE, COMMENTARIES *75-*78).

the dry-sand area contained on the beachfront deeds.[32] Resort owners wanted to erect fences in the dry-sand area to reserve the dry sand beach area for the resort guests.[33] The issue in the case was whether Oregon had the power to prevent these beachfront property owners from enclosing the dry-sand area.[34] The Oregon Supreme Court held that the public did not acquire a prescriptive easement to go onto the dry-sand area for recreational purposes, but the public did establish a right to the dry-sand area by the doctrine of custom.[35] The court found that the:

> dry-sand area in Oregon has been enjoyed by the general public as a recreational adjunct of the wet-sand or foreshore area since the beginning of the state's political history .... [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area ....[36]

The effect of the court's holding — that the public had established a right to the use of the dry-sand area of the beach based upon customary usage — was that the resort owners were enjoined from erecting a fence blocking the public's access.[37]

The court did not ignore the equitable issue surrounding the resort owners argument that they had expectations when buying the beachfront property — the expectation of privacy and the resulting payment of higher value for that expectation. The court reasoned that the public's use was so ancient, customary, and notorious that it created a presumption of notice of the custom on coastal land purchasers.[38] The announcement of Oregon's doctrine of customary usage effectively opened up all Oregon beaches to the public.

Recently, in denying certiorari in Stevens v. City of Cannon City,[39] the United States Supreme Court upheld Oregon's application[40] of its doctrine of customary usage, originally

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32. Id.
33. Id.
34. Id.
35. Id. at 676.
36. Id. at 673.
37. Id. at 678.
38. Id. at 677-78.
39. 510 U.S. 1207 (1994).
40. Stevens v. City of Cannon Beach, 835 P.2d 940 (Or. Ct. App. 1992), affirmed by 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994).

announced in Thornton.[41] In Stevens,[42] resort owners were denied a permit to build a replacement retaining-seawall in front of the resort in light of a city ordinance that prohibited building on the beach. The resort owners brought an inverse condemnation suit against the City on grounds the City had effected a taking of their property without just compensation.[43] The Court held there was no taking and thus, no compensation was required.[44] Based on Oregon's doctrine of customary use, the property interest that the landowners purported to have in the land was not part of their estate to begin with because the public had been using the beach for time immemorial.

In addition to Oregon, Texas and Hawaii have used the doctrine of customary use to preserve the public's interest in beach access.[45] Furthermore, Texas has codified its public policy in keeping the beaches open to the public along with enforcement mechanisms.[46]

In Florida, the Florida Supreme Court established its version of the doctrine of customary usage:

> If the recreational use of the sandy area adjacent to mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. However, the owner may make any use of

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41. Thornton, 462 P. 2d 671 (Or. 1969).

42. Stevens, 835 P.2d 940 (Or. Ct. App. 1992), affirmed by 854 P.2d 449 (Or. 1993), cert. denied, 510 U.S. 1207 (1994).

43. Id. Landowners' claim was based on the Supreme Court's holding in Lucas v. South Carolina Coastal Council, 112 S. Ct 2886, 2899 (1992), that a categorical taking has occurred "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use" requiring compensation; the only exception to this is if the nature of the owner's estate is such that the proscribed use or interests were not part of his title to begin with based on background principles of property law or nuisance law.

44. Id.

45. See In re Ashford, 440 P.2d 76 (Haw. 1968); Moody v. White, 593 S.W.2d 372 (Tex. Civ. App. 1979).

46. Texas Open Beaches Act, TEX. NAT. RES. CODE ANN. § 61.020 (creating a presumption that the sandy beaches of the state are public beaches). See also Texas Open Beaches Act, TEX. NAT.RES. CODE ANN. § 61.01 (stating that it is the policy of the State of Texas that:

> the public, individually and collectively, shall have the free and unrestricted right of ingress and egress to and from the state-owned beaches bordering on the seaward shore of the Gulf of Mexico, or if the public has acquired a right of use or easement to or over an area by prescription, dedication, or has retained a right by virtue of continuous right in the public, the public shall have the free and unrestricted right of ingress and egress to the larger area extending from the line of mean low tide to the line of vegetation bordering on the Gulf of Mexico).

> his property which is consistent with such public use and not calculated to interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore.[47]

In City of Daytona Beach v. Tona-Rama, Inc., a beachfront landowner in Daytona Beach operated an ocean pier on the dry sand area where he constructed an observation tower.[48] Plaintiff brought suit against this landowner to enjoin the erection of the observation tower, arguing that the public had acquired a prescriptive easement in the property.[49]

On writ of certiorari,[50] the Florida Supreme Court held that there were not sufficient facts to warrant a prescriptive easement because of the lack of adversity "inconsistent with the owner's use and enjoyment of the land."[51] In other words, had the defendant objected to the public coming upon its pier, and had the public's presence been adverse to the owner's use and enjoyment, then the court may have found a prescription to be proper. However, the court declined to find a prescriptive easement, but instead adopted the doctrine of customary usage.

Florida's doctrine differs, however, from Oregon's doctrine of customary use in that the effect of Tona-Rama is not to open all Florida beaches to the public. "[The] doctrine [of customary use] requires the courts to ascertain in each case the degree of customary and ancient use the [particular] beach has been subjected to ...."[52] The courts will decide the customary usage of Florida beaches on an ad hoc basis, based on a showing of the elements for customary usage for a particular beach. This case is the first element that creates "the perfect storm" for Florida to test the strength of its policy in preserving public beach access.

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47. City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d. 73, 78 (Fla. 1974) (emphasis added).

48. Id. at 74.

49. Id. at 74-5.

50. Id. The trial court found that the public had acquired a prescriptive easement and granted summary judgment in favor of the plaintiff, ordering defendant to remove the observation tower. Id. In affirmation, the First District Court of Appeal approved the destruction of the tower. Id. The decision was appealed to the Florida Supreme Court. Id.

51. Id. at 77.

52. Reynolds v. County of Volusia, 659 So.2d 1186, 1190 (Fla. 5th DCA 1995) (declining to apply the doctrine of customary use on grounds of the lack of private fee ownership in the dry sand beach because beach area had been expressly dedicated to the general public for the many purposes customarily incident to the use of the beach).

VI. UNCONQUERED ISSUES — THE FLORIDA PANHANDLE BATTLEGROUND

A. Destin, Florida[53] — The World's Luckiest Fishing "Village"[54]

Destin may still be the world's luckiest place to fish, but it has hardly retained its "village-like" character. Once part of what people in the south called the Redneck Riviera because "it was where working-class families throughout the South often took their vacations,"[55] it is now part of what is called the Emerald Coast, a more affluent name to attract more affluent, upper-class families.[56] Destin has, however, somehow retained its family-like character, rather than morphing into a spring-break haven for college and high-school students — Destin offers something for everyone.[57] But are there enough beaches to go around for everyone?[58] This is the enduring question that has haunted the Destin City Council.

The problem of lack of beach access is heightened in Destin due to minimal tide fluctuations, where the mean high-tide line is evidenced as the "debris line."[59] This has created a host of problems

53. Destin, Florida, has a population of approximately 11,119 full time residents. US Census Bureau (2000), at http://www.factfinder.census.gov (last visited Nov. 11, 2002).

54. Not only will this section examine the current public beach access problems in Destin, Florida, but this section will also update the events in Destin since this comment's predecessor, S. Brent Spain, Comment, Florida Beach Access: Nothing But Wet Sand?, 15 J. LAND USE & ENVTL. L. 167 (1999).

55. Carrie Alexander, Jewels of Florida's Emerald Coast Sparkle With Sun and Fun – White beaches and glassy green waters draw visitors to Destin and Fort Walton Beaches, ORLANDO SENTINEL, June 13, 2001, at L3.

56. See id.

57. See Charlotte Crane, Destin Lives on Tourism, PENSACOLA NEWS J., June 16, 2002, at 4B.

58. See Karen Spencer, Belligerent Beachgoer Sparks Confrontation, DESTIN LOG, June 2000, available at http://www.destin.com/news/archives/jun00/belliger.shtml (last visited Sept. 21, 2002) (relaying the opinion of veteran beach services manager George Noble, who moved to Destin in 1966, as saying, "[n]ot enough beach is left to go around.").

59. See John Ledbetter, Wanted: More Beach Talk, DESTIN LOG, Jan. 2000, available at http://www. destin.com/news/archives/jan00/wantedmo/shtml (last visited Sept. 21, 2002) (covering City of Destin's former land-use attorney David Theriaque discussing the problem of lateral beach access).

for Destin[60] resulting in beach turf wars between private beachfront landowners and the public concerning public beach access.[61]

The City of Destin has been grappling with the beach turf wars for the past few years, trying to keep the beachfront landowners happy and trying to satisfy the need to preserve the public's access to the beach. During 1999 and 2000, there were three ordinances proposed to address the public beach access problems:

- Beach Management Ordinance
- Pedestrian Zone Ordinance
- Dry-Sand Buffer Zone Ordinance

1. The Beach Management Ordinance

The proposed beach management ordinance applied to beach concessionaires and vendors. This ordinance restricted the ability of beach vendors to set up umbrellas and chairs (known as "beach set-ups") close to the water's edge to avoid blocking the public's lateral access along the beaches.[62] The Destin City Council unanimously passed the beach management ordinance, prohibiting rental "beach set-ups" within twenty feet of the water, applying only east of Henderson Beach State Park where the beaches are narrower.[63]

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60. See John Ledbetter, Sand Sitters Not Cited, DESTIN LOG, May 2000, available at http://www.destin.com/ news/archives/may00/sandsitt/shtml (last visited Sept. 21, 2002) (reporting how non-beachfront Destin landowners announced that the "sand belongs to all" and protested with a sit-down on the beach to frustrate beachfront property owners' efforts to keep the public off the dry-sand area of the beach); John Ledbetter, Beach Ordinances to Bypass Planning Commission, DESTIN LOG, May 2000, available at http://www.destin.com/news/archives/may00/beachord.shtml (last visited Sept. 21, 2002) (recognizing that "businesses [will] feel a backlash from customers who are intimidated to use the beach"); Karen Spencer, Tourist Finds Beach Rules Confusing, DESTIN LOG, July 2000, available at http://www.destin.com/news/archives/ jul00/touristf.shtml (last visited Sept. 21, 2002). This article involved an incident on the beach where a father-and-son outing turned into a dispute. The tourist "placed his chair under an umbrella rented out by the adjoining resort and went out to swim with his son . . . . [He] sat on [his] chair under one of their umbrellas drinking a diet Mountain Dew." Id. The Silver Dunes property manager asked him to move, telling him that he couldn't use his private beach equipment on Silver Dunes beach property. Id. The property manager subsequently called the police. Id.

61. See Spain, supra note 54.

62. See John Ledbetter, Public Beach Access to be Discussed, DESTIN LOG, May 2000, available at http://www.destin.com/news/archives/may00/publicbe.shtml (last visited Sept. 21, 2002).

63. DESTIN, FLA., ORDINANCE NO. 350 (June 19, 2000). See John Ledbetter, Sheriff's Policy Satisfies Council on Beach Issue, DESTIN LOG, June 2000, available at http://www.destin.com/news/archives/ jun00/sheriffs.shtml (last visited Sept. 21, 2002).

2. The Pedestrian Zone Ordinance

The proposed pedestrian zone ordinance, proposed by beachfront landowners as a compromise, established a ten-foot area for pedestrian lateral access along the beach, additionally prohibiting beach set-ups in the pedestrian zone. This ordinance was to be implemented by the landowners voluntarily granting easements to the City of Destin.[64] However, after public comments that the ordinance could effect a taking, the ordinance was superfluous, and the ordinance could create enforcement problems, the proposed ordinance failed to pass for lack of legislative sponsorship.[65]

3. The Dry Sand Buffer Zone Ordinance

The proposed dry-sand buffer zone ordinance was based on Florida's doctrine of customary usage announced in Tona-Rama[66] and proposed by the Destin City Land Use Attorney.[67] This ordinance carved out a twenty-five foot buffer zone from the most seaward permanent structure on the private beach while leaving the rest open for public use.[68] Attempts were made by the Destin City

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64. Ledbetter, supra note 63 (quoting Tom Becnel, a beachfront property owner and developer, who described the ordinance as a gift: "The landowners are offering a gift to the city. ... When you're offered a gift you either take it or reject it. You don't negotiate over it.").

65. DESTIN, FLA. PROPOSED ORDINANCE NO. 351 (June 19, 2000) (rejected).

66. City of Daytona Beach v. Tona-Roma, Inc., 294 So. 2d 73 (Fla. 1974).

67. David Theriaque, former Destin City Land Use Attorney.

68. Ledbetter, supra note 62; Spain, supra note 54, at 191 (Appendix A: Destin Draft Ordinance). The proposed ordinance, based on the language of customary usage, provided:

> AN ORDINANCE OF THE CITY OF DESTIN PROTECTING THE PUBLIC'S LONG STANDING CUSTOMARY USE OF THE DRY SAND AREAS OF THE BEACHES; PROVIDING FOR A BUFFER AREA AROUND PRIVATE PERMANENT STRUCTURES, PROVIDING FOR PENALTIES FOR VIOLATION OF THIS ORDINANCE; PROVIDING FOR SEVERABILITY; PROVIDING AN EFFECTIVE DATE.
>
> SECTION 1: AUTHORITY.
>
> The authority for the enactment of this Ordinance is Article 1, Section 1.01(b) of the City Charter, and Section 166.021, Florida Statutes.
>
> SECTION 2: FINDINGS OF FACTS.
>
> WHEREAS, the recreational use of the dry sand areas of the City's beaches is a treasured asset of the City which is utilized by the public at large, including residents and visitors to the City; and
>
> WHEREAS, the dry sand areas of the City's beaches are a vital economic asset to the City, Okaloosa County, and the State of Florida;

Land Use Attorney to build a record and collect information concerning the public's customary use of the beach.[69] Specifically, the City sought historical and archaeological information to establish that the beach had been used by the public for "time immemorial."[70] The ordinance received opposition from private beachfront landowners, coupled with threats of litigation from the Southeastern Legal Foundation, Inc. to the Destin City Council that it would fight the City if the ordinance passed.[71] After numerous fact-gathering workshops and public comments voicing concern over this ordinance, the ordinance failed to pass.

B. No Disturbances, No Harm

Instead of opting to pass a pedestrian zone ordinance or a dry sand buffer ordinance to deal with the beach turf wars, the City of Destin decided to leave the issue to the Okaloosa County Sheriff's Office.[72] The Sheriff's Office uses the debris line in the sand as a

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> and
>
> WHEREAS, the public at large, including residents and visitors to the City, have utilized the dry sand areas of the City's beaches since time immemorial; and
>
> WHEREAS, the Florida Supreme Court in City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974), has expressly recognized the doctrine of customary use in the state of Florida; and
>
> WHEREAS, the City desires to ensure that the public's long-standing customary use of the dry sand areas of the City's beaches is protected; and
>
> WHEREAS, the City recognizes and acknowledges the rights of private property owners to enjoy and utilize their property; and
>
> WHEREAS, in order to minimize such conflicts, the City desires to establish a twenty-five (25) foot buffer zone around any permanent structure owned by a private entity that is located on, or adjacent to, the dry sand areas of the City's beaches;...

69. Id., John Ledbetter, Now's A Time for Beachgoers to Speak Up, DESTIN LOG, Nov. 2000, available at http://www.destin.com/news/archives/nov99/nowsatim.shtml (last visited Sept. 21, 2002); see also John Ledbetter, Witnesses Theriaque Says He Wants Less Griping, DESTIN LOG, Nov. 2000 available at http://www.destin.com/news/archives/nov99/des-beac.shtml (last visited Nov. 24, 2002).

70. Ledbetter, supra note 63.

71. See Southeastern Legal Foundation at http://southeasternlegal.org. The Southeastern Legal Foundation is a conservative public interest law firm that advocates limited government, individual economic freedom, and free enterprise system. Its mission is to look for cases to engage in litigation and public policy advocacy.

72. Sheriff Cobb, Okaloosa County Sheriff's Department, addressing the Destin City Council during Destin City Council Meeting, June 19, 2000. Since the City of Destin does not have its own municipal police force, it contracts with the Okaloosa County Sheriff's Department for law enforcement services. This issue, however, will have to be revisited if the

surrogate for the mean high water line, allowing the public leeway of ten to fifteen feet landward.[73] If the public beachgoer goes ten to fifteen feet landward of the debris line and is not creating a disturbance or misconduct, he is left alone.[74] However, if the public beachgoer goes ten to fifteen feet landward of the debris line and the private beachfront property owner asks the Sheriff's Office to ask the party to leave, then the deputies will ask the public beachgoer to leave.[75] If the public beachgoer refuses, then he will be given a "Notice to Appear" in court.[76]

The Destin City Council, although interested in finding a compromise for beachfront property owners and the public, was likely worried most about the possible cost of litigation if they were to pass the dry-sand buffer zone ordinance. Small local governments, such as Destin, do not have the financial resources to battle large "public policy" interest groups that have bottomless spending accounts, even if the ordinance is supported by the doctrine of customary use announced in City of Daytona Beach v. Tona-Rama, Inc.[77]

In 2002, the Destin City Mayor and Okaloosa County Sheriff[78] requested an advisory opinion from the Office of the Attorney General for the State of Florida[79] regarding the beach management ordinance, doctrine of customary use, and use of the Sheriff's Office in enforcement.[80] The Attorney General for the State of Florida responded:

Sheriff changes the policy. See Ledbetter, supra note 63. Will Destin be willing to make a stance then?

73. Id.
74. Id.
75. Id.
76. Id.
77. 294 So.2d 73, 75 (Fla. 1974).
78. Craig Barker and Charlie Morris, respectively.
79. Robert A. Butterworth.
80. 2002-38 Fla. Op. Att'y Gen. (June 24, 2002) states the issues as follows:

> "....[w]hether the City of Destin is authorized to apply its beach management ordinance to certain identified dry sand areas of the beach ..., [w]hether the City of Destin's authority to apply the beach management ordinance to the dry sand portion of the beach is dependent on the existence of a customary right of recreational use by the general public as enunciated by the Supreme Court of the State of Florida in City of Daytona Beach v. Tona-Rama, Inc., " [and] " [w]hether a private property owner holding title to certain dry sand areas of the beach falling within the area defined as 'beach' within the beach management ordinance may utilize local law enforcement and enforcement of state trespass laws to curtail or discourage the public's right of customary use to this same dry sand area of the beach? ...

> [ ] The City of Destin may regulate in a reasonable manner the beach within its corporate limits to protect the public health, safety, and welfare. This regulation must have a rational relation to and be reasonably designed to accomplish a purpose necessary for the protection of the public. The city may not exercise its police power in an arbitrary, capricious, or unreasonable manner. Such regulation may be accomplished regardless of the ownership of this area, with the exception of state ownership, and without regard to whether the public has been expressly or impliedly allowed to use that area of the beach by a private property owner who may hold title to the property.
>
> [ ] The right of a municipality to regulate and control dry sand beach property within its municipal boundaries is not dependent on the finding of the Florida Supreme Court in City of Daytona Beach v. Tona-Rama, Inc.
>
> [ ] Private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City of Destin may utilize local law enforcement for purposes of reporting incidents of trespass as they occur.
>
> The city's beach management ordinance[81] does not expressly specify that it be applied only on public land or land on which the public has been expressly granted a right of use and access ... [T]he ordinance as written applies to all areas falling within the definition of "beach," regardless of whether such areas are located on public or private property and regardless of whether the public has been expressly or impliedly allowed to use such areas by a private property owner.[82]

The Attorney General advised that "whether th[e] 'customary right of use' [announced in City of Daytona Beach v. Tona-Rama, Inc.][83]

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81. DESTIN, FLA. ORDINANCE NO. 350 (June 19, 2000).
82. 2002-38 Fla. Op. Att'y Gen. 1-2 (June 24, 2002).
83. 294 So.2d 73 (Fla. 1974).

exists in a particular piece of property is a mixed question of law and fact that must be resolved judicially."[84]

In his advisory opinion, the Attorney General recognized the importance of the common-law doctrine of customary use and opined that it may be relied on for ad hoc determinations of the degree of customary and ancient use of the beach.[85] Finally, the Attorney General stated that:

> private property owners who hold title to dry sand areas of the beach falling within the jurisdictional limits of the City of Destin may utilize local law enforcement for purposes of reporting incidents of trespass upon their property on a case-by-case basis .... However, local law enforcement officers may not be pre-authorized to act as agents of private landowners for the purpose of communicating orders to leave private property to alleged trespasses ...[86]

It is still to be determined what this means for the preservation of the public's right of beach access. By keeping the dry-sand area buffer zone ordinance off the "ordinance books," the City appeases the private beachfront property owners. Additionally, by relaxing the enforcement of its trespass law using local law enforcement on a case-by-case basis, the City calms the public's fear of legal action from frolicking too far landward of the "debris" line. Although at this time Destin has declined an invitation into the litigious side of determining the scope of the doctrine of customary use, the City of Destin, as a test case, is the second element that creates "the perfect storm" for Florida to test the strength of its policy of preserving public beach access.

VII. THE EFFECT OF PINECREST LAKES, INC. V. SHIDEL[87] ON THE PRESERVATION OF PUBLIC BEACH ACCESS

Another prominent issue in the battle to preserve public beach access is that local governments have approved development orders that are inconsistent with its comprehensive plan policy on preserving public access to the beaches. In essence, these local governments have allowed developers to develop over public easements that are public beach accessways.[88] A recent Florida

84. 002-38 Fla. Op. Att'y Gen. 4 (June 24, 2002).
85. Id.
86. Id. (emphasis added).
87. 795 So.2d 191 (Fla. 4th DCA 2001), rev. denied, 821 So.2d 300 (Fla. 2002).
88. Issuing development orders that allow development over public beach accessways is in

decision that has developers acting more cautiously[89] may be a tool that proponents of public beach access may be able to use.

In Pinecrest Lakes, Inc. v. Shidel,[90] property owners challenged the Martin County[91] Board's approval of a $3.3 million apartment development on grounds that it was inconsistent with the county's comprehensive plan.[92] The trial court reviewed the record created before the County Commission using a "substantial competent evidence" standard of review and found the development order consistent with the county's comprehensive plan.[93] However, on appeal the Fourth District Court of Appeal remanded the case to the trial court for de novo review to determine whether the development order was consistent with the comprehensive plan and if not, to fashion an appropriate remedy.[94] Using de novo review, the trial court found that the development order was inconsistent with the county's comprehensive plan and the developer had acted in bad faith by continuing construction during the appeal.[95] The court ordered an injunction on further development, and ordered the removal of the apartment buildings.[96]

On it's second appeal, the Fourth District Court of Appeal affirmed the trial court's finding of inconsistency and affirmed the removal of the apartment buildings that were in violation of the comprehensive plan.[97] The court held that the complete demolition and removal of a development was an appropriate remedy where the development was inconsistent with the county's comprehensive

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violation of the Florida Comprehensive Plan, which provides in its coastal and marine resources element the assurance of the public's right to reasonable access to the beaches. See FLA. STAT. § 187.201(8)(b)(2) (2002). Thus, development orders in violation of this policy would be inconsistent with the policy of the comprehensive plan. Additionally, through the Local Government Comprehensive Planning and Land Development Regulation Act, Florida requires that all development orders and land development regulations be consistent with the local comprehensive plan, which must be consistent with the state comprehensive plan. See generally FLA. STAT. § 163.3194(3)(a) (2002). Finally, the Florida Coastal Protection Act requires developers to provide comparable alternative accessways if the development interferes with the public's right of access established through "private lands to lands seaward of the mean high tide or water line by prescription, prescriptive easement, or any other legal means ...." See FLA. STAT. § 161.55(5) (2002) (emphasis added to illustrate that 'any other legal means' may include rights established by the doctrine of customary use).

89. Ron Word, High Court Rules Developers Must Destroy Apartments, TALLAHASSEE DEM., June 7, 2002, at 8B.

90. 795 So.2d 191 (Fla. 4th DCA 2001).

91. Martin County, Florida.

92. Id.

93. Pinecrest Lakes, 795 So.2d at 194-95.

94. Id.

95. Id.

96. Id.

97. Id. See generally John Cardillo, Recent Developments, 17 J. LAND USE & ENVTL. L. 183, 192-96 (2001) (summarizing recent developments in Florida environmental and land use decisions).

plan.[98] The court declined to use the alternative form of relief of compensating the aggrieved party for any diminution in property value.[99] In May 2002, the Florida Supreme Court denied review.[100] Finally, on September 5, 2002, the demolition of the $3.3 million luxury apartment complex was commenced.[101] "It is the first time in Florida that a developer has been forced to raze a project already built."[102]

The plaintiff in Pinecrest Lakes was a local resident who alleged that the development order was inconsistent with the county's comprehensive plan.[103] Florida creates standing for any party adversely affected by a development order that changes the density or intensity of a parcel of property inconsistent with the local comprehensive plan.[104] Thus, local residents and general members of the public have standing to maintain an action against a local government on grounds that a development order is inconsistent with the comprehensive plan.

The effect of Pinecrest Lakes on the preservation of public beach access is that members of the public may be able to enjoin development over public accessways based on inconsistency with the local comprehensive plan.[105] Additionally, if there is continuous construction during an appeal of the local government's decision — indicia of bad faith — then a court may be willing to order the demolition and removal of the development.[106] If the State of Florida and local governments are serious about preserving the public's beach access, this may be the appropriate remedy for preservation. The courts, as Pinecrest Lakes has indicated, are already prepared to use this tool to enforce the comprehensive plan.[107] Pinecrest Lakes and the remedy it offers is the third

98. Pinecrest Lakes, 795 So.2d at 207-08.
99. Id.
100. Pinecrest Lakes, Inc. v. Shidel, 821 So.2d 300 (Fla. 2002).
101. Razing of Apartments Makes History in Florida, ST. PETE. TIMES, Sept. 7, 2002, at 5B.
102. Id.
103. Id.
104. FLA. STAT. § 163.3215(3)(2002) states that:

> [a]ny aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief against any local government to challenge any decision of such local government granting ... an application for ... a development order ..., which materially alters the use or density or intensity of use on a particular piece of property which is not consistent with the comprehensive plan adopted under this part ... The de novo action must be filed no later than 30 days following rendition of a development order or other written decision ...

105. 795 So.2d 191 (Fla. 4th D.C.A. 2001), rev. denied, 821 So.2d 300 (Fla. 2002).
106. See id.
107. Id.

element that creates "the perfect storm" for Florida to test the strength of its policy of preserving public beach access.

VIII. CONSISTENCY AND ENFORCEMENT OF COMPREHENSIVE PLANS

Florida is one of the most aggressive states in requiring comprehensive plans and enforcing the consistency doctrine. Florida's Local Government Comprehensive Planning and Land Development Regulation Act requires the adoption of a local comprehensive plan with mandatory and discretionary elements.[108] Two of the mandatory elements of a local government comprehensive plan are a recreational and open space element and a coastal management element for coastal governments.[109] The statute specifically provides for public access to the beaches as follows:

> (6) [t]he comprehensive plan shall include the following elements:
>
> (e) A recreation and open space element indicating a comprehensive system of public and private sites for recreation, including, but not limited to, natural reservations, parks and playgrounds, parkways, beaches and public access to beaches, open spaces, and other recreational facilities.[110]

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108. FLA. STAT §§ 163.3177, 163.3194 (2002).

109. FLA. STAT §§ 163.3177(6)(e), 163.3177(6)(g) (2002) (providing a coastal management element). In addition, Florida's coastal construction statute protects perpendicular access and access to the sand beach:

> PUBLIC ACCESS — Where the public has established an accessway through private lands to lands seaward of the mean high tide or high water line by prescription, prescriptive easement, or any other legal means, development or construction shall not interfere with such right of public access unless a comparable alternative accessway is provided. The developer shall have the right to improve, consolidate, or relocate such public accessways so long as the accessways provided by the developer are:
>
> a) Of substantially similar quality and convenience to the public;
>
> b) Approved by the local government;
>
> c) Approved by the department whenever improvements are involved seaward of the coastal construction line; and
>
> d) Consistent with the coastal management element of the local government comprehensive plan ...

FLA. STAT. § 161.55(5) (2002).

110. FLA. STAT. § 163.3177(6)(e) (2002) (emphasis added).

The City of Destin's Comprehensive Plan originally provided incentives to encourage public beach access.[111] However, recent amendments to Destin's comprehensive plan have not been as consistent with Florida's comprehensive plan policy in preserving public beach access as the subsequently drafted comprehensive plan.[112] The amendments eliminate the requirement that the city provide public beach access facilities, and instead require only incentives to encourage public beach access.[113] Regardless of the proposed amendments, the city's comprehensive plan must be consistent with the state comprehensive plan and state law, which does provide for reasonable public access to beaches.[114] Florida's aggressive stance on consistency and enforcement of comprehensive plans is the fourth element that creates "the perfect storm" for Florida to test the strength of its policy of preserving public beach access.

IX. PROBLEMS ASSOCIATED WITH PUBLIC BEACH ACCESS

A. Overcrowding and Adjacent Landowners

One major problem with limited public beach access points is that of overcrowding. If the access points are few and far between then the public has to crowd onto one or two beaches to bathe or swim. Of course, the public can access the beach at those points and then walk down the beach to spread out, but realistically, the beachgoer is more likely to walk approximately 500 feet in the hot sun before she plops down on her towel and goes for a swim. This overcrowding can result in the beachfront landowner next to these public beach access points bearing the brunt of the crowd. It would be more fair to spread out these beach access points throughout the municipality or county, so as to share the crowd as this would cut down on the crowding at any one beach.

In Destin, there are eleven recorded public beach access points.[115] On the east side of Destin, there are seven beach access

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111. The original comprehensive plan read: "The City shall require public beach access to the extent lawful and promote additional beach access by adopting incentive provisions where mandated beach access is unlawful." DESTIN, FLA. COMPREHENSIVE PLAN, POLICY 1-1.3.3 (June 9, 2002), available at http://www.cityofdestin.com (last visited November 1, 2002) (emphasis added). The amendments to the comprehensive plan read: "Incentives shall be developed to encourage provision of public beach access where possible." DESTIN, FLA. COMPREHENSIVE PLAN, POLICY 1-1.3.3 (June 9, 2002), available at http://www.cityofdestin.com (last visited January 29, 2003) (emphasis added).

112. Id.

113. Id.

114. Florida provides in the Comprehensive Plan a state policy to "[e]nsure the public's right to reasonable access to beaches." FLA. STAT. § 187.201(8)(b)(2) (2002).

115. From west Destin to east Destin respectively, the non-fee charging beach access points

points fairly close to one another, all within a few blocks.[116] However, on the west side of Destin, there are only four beach access points.[117] Two of the beach access points on Restaurant Row are right next to each other, while the other two are clear across town at the end of an isle.[118] It is not clear whether there are additional public beach access points, obtained by the public through prescription, prescriptive easement, or other legal means, such as customary use, that have not been recorded and that may fall in the large area of land between these four access points.

B. Locating Public Beach Access Points

"[M]ost [public beach] accesses are so small and so inadequately designated 'you have to be an Eagle Scout to find them[.]'... Trying to locate public accesses is frustrating and time consuming for those not familiar with the area ..."[119] If people cannot find the beaches, they certainly do not have reasonable access to them.

> Finding exactly where all these [public beach access] points are located can be a difficult challenge for those who want to spend the day at the beach. Many public beach access ways are underused because no one knows they exist. In 1995, a public access study found that only 35 percent of access points on publicly owned lands are adequately marked. To the beach goer, this statistic translates into restricted access to a public resource.[120]

The Florida Department of Environmental Protection is the state agency responsible for implementing the Florida Coastal Management Program that ensures Florida's coast is available to the public by offering uniform beach access signs free of charge to

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are: Norriego Point, Gulf Shore Drive, Scenic Highway 98 at Restaurant Row, June White Decker Park, Shirah St., Hutchinson St., Crystal Beach Drive, Barracuda St., Pompano St., and James Lee Park. Additionally, there is a state park that charges a fee for entrance, the Henderson Beach State Recreation Area. ENG'G DEP'T, CITY OF DESTIN, CITY OF DESTIN STREET MAP, available at http://www.cityofdestin.com (last visited Nov. 9, 2002).

116. Id.

117. Id.

118. Id.

119. Karen Spencer, Destin Resident Asks City For Better Public Access, DESTIN LOG, July 2000, available at http://www.destin.com/news/archives/jul00/destinre.shtml (last visited November 24, 2002).

120. See BEACH ACCESS SIGNS, supra note 2.

local governments.[121] Although the number of access signs available each year may be restricted by the availability of annual financial resources, local governments can apply to receive beach access signs that will help steer the public to public beach access points.

C. Parking

Parking has proved to be problematic in preserving reasonable access to public beaches.[122] In addition to problems associated with locating the beach via public beach access signs, once members of the public find the access point, they will have to be able to park. If there is no parking, then there is a restriction on reasonable public beach access. Local governments are facing problems trying to provide adequate parking. In places such as Daytona Beach, Florida, it has become a necessity for beachgoers to park on the beach.[123] In City of Daytona Beach Shores v. State of Florida, the Florida Supreme Court was faced with issues concerning the validity of beach "user fees" for vehicle entry onto the beach.[124] The court stated that charging users a reasonable access fee for cars was permissible, and that since "little other parking is available to the public, prohibiting motor vehicle access to the beaches would deny beach use to many and effectively restrict their use to beach residents."[125]

Parking on the beach is an extreme measure to correct the lack of parking and, while vehicular traffic is now prohibited on coastal beaches,[126] local governments are still facing the problem of providing the public with reasonable parking access to the beach. Recently in Destin, the City Council has made efforts to provide more adequate parking by adding additional spaces and paving crushed-shell parking lots.[127] This will help indicate to the public that it is not just a parking lot, but it is parking for a public beach

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121. Id.

122. See Spencer, supra note 119.

123. See City of Daytona Beach Shores v. State of Florida, 483 So.2d 405 (Fla. 1985).

124. Id. at 406.

125. Id. at 408.

126. FLA. STAT. § 161.58 (2002) (providing that vehicular traffic is prohibited except where local governments have authorized it by at least three-fifths vote prior to 1985 and determined by 1989 that less than 50% of peak user demand for off-beach parking is available).

127. See Fraser Sherman, Beach Access Upgrade Inches Closer to Reality, DESTIN LOG, May 2002, available at http://www.destin.com/news/archives/may02/020503c.shtml (last visited Sept. 22, 2002); Fraser Sherman, Norriego Point Parking Lot Gets Paved, DESTIN LOG, Oct. 2001, available at http://www.destin.com/news/archives/ oct01/norriego.shtml (last visited Sept. 22, 2002). See generally Fraser Sherman, Beach Access Sites to be Fixed Up, DESTIN LOG, April 2001, available at http://www. destin.com/news/archives/apr01/beachacc.shtml (last visited Sept. 21, 2002); Spencer, supra note 119.

accessway. Although the Destin City Council is making efforts to add additional parking spaces, the Okaloosa County's Tourist Development Council (TDC) will likely only add one or two more spaces. As the crowds in Destin grow larger with every summer, these few extra spaces may not provide any help in alleviating the lack of parking.

Naples, Florida, provides a parking scheme that may be more amenable to smaller coastal governments. The City of Naples uses parking meters and parking permits for local residents to solve its parking problems. Residents who own property within Collier County or who register their vehicles in Collier County may receive a permit[128] to park at all City of Naples beaches free of charge.[129] Visitors who are lodging within the city limits may purchase a temporary parking permit and enjoy the same privileges as other permit holders.[130] Visitors who are not lodging within the city limits may pay and park at the meters provided at city beaches and at beach-ends at city streets.[131]

D. Blocked Accessways

As discussed earlier in this Comment, there is a problem when public beach access is blocked, whether it involves easements blocked by approved development or by individual beachfront residents, or whether it involves beach concessionaires and vendors blocking lateral access. This problem can arise when developers grant local governments an easement for public access and then subsequently build over that accessway. If local governments do not act as a watchdog over these developments, the limited public beach access points can disappear. In addition to developers, individual beachfront residents may block accessways with chains, fences, or pilings. Local governments must ensure these platted public beach access easements are preserved; in the case of developers blocking them by building over them, local governments must require alternate access or compensation from the developers to acquire other access or enhance existing access points.

In addition to developers and individual beachfront property owners, concessionaires and vendors block public beach access when beach set-ups are too close to the water's edge, impeding the public's lateral beach access. Local governments can enact ordinances that

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128. The permit is a beach-parking sticker that is affixed to the bumper of the vehicle. Additionally, this permit allows people to park at meters, free of charge.

129. CITY OF NAPLES, FLORIDA, BEACH PERMITS, available at http://www.naplesgov.com/questions/beach/ beach.htm (last visited Nov. 11, 2002).

130. Id. (noting that such temporary permits last only one week and cost ten dollars).

131. Id.

restrict the ability of these vendors to block access below the mean high tide line, or debris line. For example, the City Council in Destin passed a beach management ordinance that prohibited beach vendors from putting out their beach set-ups within 20 feet of the water's edge.[132]

X. CONCLUSION

Disputes over public beach access will continue to prevail until the Florida Supreme Court revisits the doctrine of customary use. This Comment has presented four individual elements in Florida's recent history that have created "the perfect storm" for Florida to test the strength of its policy on preserving public beach access. Tona-Roma with its announcement of Florida's doctrine of customary use, together with Destin as the perfect test case, Pinecrest Lakes and the remedy it offers, and Florida's aggressive stance on the consistency and enforcement of comprehensive plans all create the perfect environment for taking the doctrine of customary use back to the Florida courts. After all, "bathers have the 'right of way' to the use of the beach, not only for access to and from the water, but for reclining on the beach near the water's edge for rest and recreation between their dips in the surf ...."[133] It is about time for Florida courts to dip their judicial toes back into the rough surf.

132. DESTIN, FLA., ORDINANCE NO. 350 (June 19, 2000). See John Ledbetter, Sheriff's Policy Satisfies Council on Beach Issue, DESTIN LOG, June 2000, available at http://www.destin.com/news/archives/jun00/sheriffs.shtml (last visited Sept. 21, 2002).

133. White v. Hughes, 139 Fla. 54, 71; 130 So. 446, 453 (Fla. 1939).

PROCEEDINGS OF THE 9TH ANNUAL PUBLIC INTEREST ENVIRONMENTAL CONFERENCE: "FLORIDA'S FINAL FRONTIERS: SAVING WHAT'S LEFT"[1]

The 9th Annual Public Interest Environmental Conference (PIEC 9) was held from February 28 through March 1, 2003 at the University of Florida and included more than 200 attendees from academia, the legal profession, science, non-governmental and governmental agencies and the public. These Proceedings include articles related to issues discussed at PIEC 9.

The first day of panels was structured around four tracks: Land & Development; Water; Wildlife & Habitat; and Policy & Procedure. The panel sessions, held in the J. Wayne Reitz Union, began with an "Introduction to the Conference Tracks" plenary, wherein experts at the top of each field represented set the tone for the respective tracks. Dr. John DeGrove spoke for Land & Develop-ment; Richard Hamann for Water; Laurie MacDonald for Wildlife & Habitat; and Clay Henderson for Policy & Procedure.

The Land and Development track featured panels entitled "Do We Have the Right Stuff to Save What's Left? Protecting Florida's Green Infrastructure Through Large Scale Planning"; "Area-Wide Planning Strategies: Case Studies"; and "Grow Trees, Not Houses: Protecting Private Forestry Lands From Sprawl." The Water track included panels on "Navigating the Comprehensive Everglades Restoration Plan Through Uncharted Waters"; "Reserving Water for Natural Systems in Florida"; and "Total Maximum Daily Loads and Florida's Impaired Waters Rule." The Wildlife & Habitat track tackled the hot-button issues in natural resource protection with such panels as "Strategies for Identifying and Recovering Endangered Species"; "Protecting Florida's Rare Plants and Their Habitats"; and "There are Aliens in Our Backyard … and We Invited 'Em! Intentional Introduction of Exotics Into the State of Florida." Finally, the Policy & Procedure track included a "2003 Legislative Update"; a panel called "SLAPP Suits: Developers are Turning Up the Heat!"; as well as a "Workshop on Public Commenting: A Missing Link in Florida."

The second day of sessions included: "Toxic Torts & Public Interest Lawyers: Potential Avenues for Achieving Environmental Justice"; "Citizen's Training: The Planning Short Course"; "Sustainable Energy: The Future of Florida"; "Is the Legislative

1. The individual authors of the articles in these proceedings accept responsibility for the accuracy of their information, quotations, and citations.

Process Broken?: A Discussion About Legislative Reform"; and "The Land Use Amendment Process: A Public Hearing Simulation."

But even before the first panel session, reception speaker Dr. Bron Taylor, a professor in the University of Florida's Department of Religion and renowned scholar on religion and nature, spoke at the Harn Museum of Natural History. His speech, entitled "Eco-Anarchy or Eco-Law? Sustainability Politics and Spirituality from Radical Environmentalism to the World Summit on Sustainability," examined the evolution of environmentalism, religion's relationship to the environment, environmental philosophy, and environmental law.

Keynote speaker Wes Skiles's film, "Water's Journey," was shown to a sold-out audience at the University of Florida Hotel and Conference Center Doubletree on the evening of Friday, February 28. There is no doubt that his cinematic depiction of Florida's aquifer and springs inspired many to renew their resolve to protect the state's priceless water resources.

Saturday, March 1st brought a special bonus. Jan Schlichtmann, the civil litigator whose crusade for the families of Woburn, MA was documented in the book by Jonathan Harr, *A Civil Action* (and later depicted on the silver screen by John Travolta in the movie of the same name) spoke of coming to terms with his famous case against the corporations of Beatrice Foods and the W.R. Grace.

The articles on the following pages represent contributions by several of the conference's presenters as well as by students who worked to put together the many successful sessions.

We hope that you will attend the 10th Annual Public Interest Environmental Conference, scheduled for February 19 – 21, 2004. Please see the conference website for details at http://grove.ufl.edu /~els.

Kelly Martinson Kelly Samek

PIEC 9 Conference Co-Chairs

FLORIDA WATER LAW AND ENVIRONMENTAL WATER SUPPLY FOR EVERGLADES RESTORATION

JOHN J. FUMERO*

Table of Contents

I. INTRODUCTION

This article provides a general overview of Florida's water law from its common law origin through the present day framework set forth in chapter 373 of the Florida Statutes.[1] It also surveys key provisions of the Water Resources Development Act of 2000[2] ("WRDA"), as well as state law, concerning the legal framework for environmental water supply assurances in support of Everglades restoration.

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* John J. Fumero, a graduate of the University of Miami School of Law, is General Counsel of the South Florida Water Management District. Mr. Fumero represents the agency before State, Federal, and administrative forums on a variety of environmental and water law issues. Mr. Fumero has been awarded an AV rating in Martindale-Hubbell and is a member of the U.S. District Court – Southern District and the U.S. 11th Circuit Court of Appeals; Florida Supreme Court certified mediator; Executive Council of the Environmental and Land Use Law Section of The Florida Bar; Palm Beach County Bar Association Environmental, Land Use and Eminent Domain Law Committee; Florida Chamber of Commerce Environmental Issues Committee. In addition, Mr. Fumero sits on the Board of Directors of ASPIRA, Leadership Palm Beach County, American Lung Association of South East Florida, American Water Resources Association–Florida Section, the Forum Club of the Palm Beaches, and the Nonprofit Resource Institute. Mr. Fumero is also on the West Palm Beach Advisory Committee of the John S. and James L. Knight Foundation. Mr. Fumero holds certificates in Environmental Negotiation from the Massachusetts Institute of Technology and Harvard Law School. He is an author for the *Florida Environmental Law Treatise* on several wetland regulatory topics. Mr. Fumero is a frequent author/lecturer on water management and environmental law issues.

1. FLA. STAT. ch. 373 (2002).
2. Pub. L. No. 106-541, Title VI, § 601.

II. FLORIDA WATER LAW 101

A. Common Law

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

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

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

B. A Model Water Code

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

3. Florida Water Resources Act of 1972, FLA. STAT. ch. 373 (1972).
4. MALONEY, AUSNESS & MORRIS, A MODEL WATER CODE (1972).
5. *Id*. at 156-195.

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

C. Florida Water Resources Act of 1972

The Florida Legislature adopted most of the water use provisions of *A Model Water Code* unchanged as the Florida Water Resources Act of 1972[7], ("Act"). Basic premises of the Act include that:

1. east and west common law are blended;

2. ownership of land does not carry with it the ownership of or the right to use water; and

3. Florida's water is held in trust for the benefit of the people of the state.

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

1. The Consumptive Use Permit System

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

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

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6. *Id.*
7. *FLA. STAT. ch. 373 (1972).*
8. *FLA. STAT. § 373.219 (2002).*
9. *FLA. STAT. § 373.216 (2002).*
10. *FLA. STAT. § 373.223(1) (2002).*
11. *FLA. STAT. § 373.223(1)(a) (2002).*

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

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

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

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

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12. *FLA. STAT. § 373.019(13) (2002).*
13. *FLA. STAT. § 373.223(1)(c) (2002).*
14. *See, e.g.*., FLA. ADMIN. CODE r. 40E-2.301 (2002).
15. *FLA. STAT. § 373.233(1) (2002).*
16. *FLA. STAT. § 373.233(2) (2002).*
17. *FLA. STAT. § 373.223(1)(b) (2002).*
18. *FLA. STAT. § 373.226 (2002).*
19. *FLA. STAT. § 373.236 (2002).*
20. *FLA. STAT. § 373.239 (2002).*

2. Water Shortage Restrictions

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

3. Planning

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

The Act and subsequent revisions to the Act required the water management districts and the Florida Department of Environmental Protection to undertake various planning initiatives relative to the State's water resources, including, but not limited to, establishing minimum flows and levels and water supply planning.[24] Initiatives such as the Florida Water Plan[25], District water management plans[26] and regional water supply plans[27] are intended to be the primary planning vehicles.

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

The appropriate management and diversification of water supply sources will provide sufficient water to meet the needs of each region. The Legislature's intent is to promote the availability of sufficient water for all existing and future reasonable-beneficial

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21. *FLA. STAT. §§ 373.175, .246 (2002).*
22. *FLA. ADMIN. CODE r. 40A-21, 40C-21, 40D-21,40E-21 (2002).*
23. *MALONEY, AUSNESS & MORRIS, A MODEL WATER CODE 103-104(1972).*
24. *See, e.g.*, § 373.042, .0361 (2002).
25. *FLA. STAT. § 373.036(1) (2002).*
26. *FLA. STAT. § 373.036(2) (2002).*
27. *FLA. STAT. § 373.0361 (2002).*
28. *FLA. STAT. § 373.0361(2) (2002).*
29. *FLA. STAT. § 373.0831 (2002).*

uses and natural systems.[30] Implementation of the water supply plans can avert potential supply problems through proper water resource management.

4. Minimum Flows and Levels

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

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

5. Water Reservations

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

30. *FLA. STAT. § 373.0831(2)(a) (2002).*
31. *FLA. STAT. § 373.042 (2002).*
32. *FLA. STAT. § 373.042(1)(a) (2002).*
33. *FLA. STAT. § 373.042(1)(b) (2002).*
34. *FLA. STAT. § 373.042(1)(b) (2002).*
35. *FLA. STAT. § 373.042(1)(b) (2002).*
36. *FLA. STAT. § 373.223(4) (2002).*
37. *Id.*
38. *Id.*

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

D. Florida Water Law Summary

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

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

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

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

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

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

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

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

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39. *Id*.
40. *Id*.
41. *FLA. STAT. § 373.223(4) (2002).*
42. *FLA. STAT. § 373.223 (2002).*
43. *FLA. STAT. § 373.239 (2002).*
44. *FLA. STAT. §§ 373.175, 373.246 (2002).*
45. *Id*.
46. *FLA. STAT. § 373.223(1) (2002).*
47. *FLA. STAT. § 373.223(1)(b) (2002).*

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

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

III. ENVIRONMENTAL WATER SUPPLY ASSURANCES

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

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

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48. *FLA. STAT. § 373.0831 (2002).*

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

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

A. Water Reservations Concerning CERP

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

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

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

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

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51. *FLA. STAT. §§ 373.223(4), 373.470 (2002).*
52. *FLA. STAT. § 373.470(3) (2002).*
53. *FLA. STAT. § 373.223(4) (2002).*
54. *Id*.
55. *See* SOUTH FLORIDA WATER MANAGEMENT DISTRICT, DRAFT RESERVATION OF WATER FOR THE ENVIRONMENT AND ASSURANCES FOR EXISTING LEGAL SOURCES CONSISTENT WITH FEDERAL AND STATE LAW (June 25, 2002) at http://www.sfwmd.gov/org/wsd /waterreservations/index.html
56. *Id*.
57. *FLA. STAT. § 373.236 (2002).*

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

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

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

Pursuant to state law, the District, as local sponsor[62], is required to participate in the development of Restudy project components to ensure that the component meets all legal responsibilities under chapter 373, Florida Statutes for water supply, water quality, flood protection, threatened and endangered species and other water or natural resources.[63]

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

Development, funding and implementation of regional water supply plans to meet demands of both human and environmental water demands are mandated.[66] Issuance of consumptive use permits that cause harm to the water resources is prohibited. Permits expire periodically in order to reallocate water to implement water reservations.[67] The adoption of minimum flows and levels is required to prevent significant harm to water resources, and recovery and prevention strategies to achieve minimum flows and levels are required.[68]

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58. *Pub. L. No. 106-541, Title VI, § 601(h)(2).*
59. *Pub. L. No. 106-541, Title VI, § 601(h)(4)(A).*
60. *Pub. L. No. 106-541, Title VI, § 601(h)(4)(B).*
61. *Pub. L. No. 106-541, Title VI, § 601(h)(4)(C).*
62. *FLA. STAT. § 373.1501(4) (2002).*
63. *FLA. STAT. § 373.026(8)(b) (2002).*
64. *Id.*
65. *FLA. STAT. §373.470((3)(c) (2002).*
66. *FLA. STAT. § 373.0361 (2002).*
67. *FLA. STAT. § 373.223 (2002).*
68. *FLA. STAT. § 373.042 (2002).*

IV. CONCLUSION

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

THE IMPORTANCE OF SCALE IN AREA-WIDE PLANNING STRATEGIES: BAY COUNTY OPTIONAL SECTOR PLAN

ROGER B. ANDERSON, SR.[1]; DAVID M. HAIGHT[2]; KATHERINE G. ANAMISIS[3]; WIATT F. BOWERS[4]; PAMELA LATHAM[5]

Table of Contents

I. INTRODUCTION

Strategies for area-wide planning are as variable as they are numerous. Both spatial and temporal strategies are needed to address the physical location issues as well as the impacts and opportunities that will occur over time. Also, there is a scale of strategies, ranging from the major decisions on the project approach and process to the minor day-to-day strategies of responding to issues. All strategies are dependent on a catalyst or trigger, usually some development pressure, event, or activity that forces the recognition that land use and infrastructure in a large area need to be examined. In addition, there must be an advocate to bring the issues to the attention of the public and land use regulatory agencies. This advocate may be a local government, regional or state agency, private landowner, or a citizens group. The objective of the advocate is to argue for a course of action and hopefully a solution to the area-wide land use problems.

This article addresses one area-wide planning effort that is taking place in Bay County, Florida. The catalyst for this effort was the Panama City-Bay County Airport and Industrial District who sought an alternative site for the Airport, since the District was unable to expand the existing location due to environmental constraints. FAA safety requirements and the 20-year forecasted growth of air traffic at the Airport mandated an evaluation of a series of alternatives. The recommended strategy was to relocate

1. AICP, SR. ENVIRONMENTAL PLANNER, PBS&J TAMPA
2. AICP, SR. PLANNER, PBS&J/PANAMA CITY BEACH
3. ENVIRONMENTAL PLANNER, PBS&J TAMPA
4. AICP, SR. TRANSPORTATION PLANNER, PBS&J/TAMPA
5. PHD, SENIOR SCIENTIST, PBS&J/TAMPA

rather than expand at the existing Airport. The potential relocation of the Panama City-Bay County International Airport from its current 700 acre location within the urbanized area of Panama City to a 4,000 acre tract in the undeveloped north central portion of the County set in motion a series of spatial strategic decisions that culminated in the area-wide planning effort named the West Bay Area Vision, *a planning framework*. Once a potential site for the new Airport had been identified, the landowner, The St. Joe Company, supported the effort and became an advocate of this area-wide planning effort.

The prospect of relocation of the International Airport to this new site created a unique opportunity for Bay County to examine long-term land use changes. To answer questions regarding long-term spatial land use changes and balance the opportunities of economic development with potential growth impacts, an optional sector plan was initiated. The optional sector planning process, authorized by Section 163.3245, Florida Statutes, is intended to support innovative and flexible planning strategy for areas within local governments that are experiencing development and growth pressures. This statute authorizes the state land-planning agency, Florida Department of Community Affairs (FDCA), to enter into an agreement authorizing preparation of an Optional Sector Plan upon the request of a local government.

In the first major strategy decision, Bay County began the Optional Sector Plan process by requesting reservation of one of the five authorized Sector Plan demonstration projects for an undetermined portion of the County. In February 1999 the FDCA acknowledged the request and indicated that the proposal was an acceptable candidate for an Optional Sector Plan.

The Optional Sector Plan was considered an appropriate strategy to address the land use changes that may result from the relocation of the airport to the north central portion of the County. A major strategic planning partnership was formed between Bay County, the Panama City-Bay County Airport and Industrial District, and The St. Joe Company to facilitate the planning effort. Together the planning partners conducted an Optional Sector Plan process, entitled the **West Bay Area Vision,** *a planning framework.*

Once the decision was made to conduct the Optional Sector Plan, it was important to define the spatial boundaries of the Sector. Here the strategy becomes ill defined with multiple options and an equal amount of input from the partners and public participants. After evaluating numerous alternatives, the selected sector planning area encompasses approximately 75,000 acres of north central Bay County. The dominant existing land use in the sector

planning area is silviculture, but small enclaves of rural residential communities include West Bay, Woodville, and areas east of Crooked and Burnt Mill creeks. The St. Joe Company is the largest landowner in the sector planning area.

The sector planning process is being implemented through two steps: (1) a long-term conceptual buildout overlay or Vision Plan; and (2) Detailed Specific Area Plans (DSAPs). The long-term overlay creates the vision or template for future development. However, an important element of the process is that the land uses defined in the overlay plan have no immediate effect on the issuance of a development order until followed by a detailed specific area plan. Land use and development in these areas continues to be subject to the Bay County Comprehensive Plan Future Land Use Map in effect on January 1, 2002. Only after the adoption of a DSAP will the land use changes be made to the Bay County Comprehensive Plan Future Land Use Map. DSAPs, by law, must encompass a minimum of 1,000 acres (unless exempted by the Department of Community Affairs), must be consistent with the overlay, and must provide adequate details necessary for consideration and approval.

II. VISION

Public participation was an important strategy in the development of the long-range vision plan. While not specifically required by the Optional Sector Planning process, a number of public forums were conducted to obtain input regarding the opportunities and potential impacts afforded by the West Bay Area Sector. These public forums addressed issues related to:

- the Bay County Comprehensive Plan;
- environmental features;
- economic development; and,
- public facilities and transportation.

The vision planning process was conducted in a series of informational meetings and public forums during which community issues were identified, guidelines and principles were defined, and a land use plan was developed. The informational meetings and public forums are outlined below.

III. PUBLIC SECTOR PLANNING FORUMS

Introduction to the Optional Sector Planning Process	Several, various dates
Comprehensive Plan and Demographics	October 23, 2001
Environmental	October 30, 2001
Economics	November 13, 2001
Public Facilities and Transportation	November 27, 2001
Open Forum at West Bay Elementary	December 3, 2001
Design Charrette	December 11, 2001
Review of Detailed Specific Area Plans (DSAPs)	Several, various dates

The vision planning process culminated in the preparation of the Sector Overlay Plan in a Design Charrette. The Sector Overlay Plan provides an interpretation of the land use changes expected from the relocation of the airport and initiation of the conservation and economic development initiatives recommended at the public forums. This plan forecasts land uses to buildout of the Sector planning area, surpassing the ten-year planning horizon of the Bay County Comprehensive Plan.

One major strategy was developed from the public forums. This strategy advocated the protection of St. Andrew Bay from the primary and secondary impacts of development within the Sector. The Planning Partners recognized this objective and responded by establishing a large contiguous conservation area. The strategy of this conservation area was to eliminate development pressures, buffer land uses, and provide wildlife corridors throughout the Sector.

IV. PROPOSED LAND USES

Acres of land uses anticipated in the sector planning area, based on buildout conditions, are listed in the following table.

Proposed Sector Land Use Summary *		
Description	**Acres**	**Percent**
Agriculture/Timberland	7,690	10.3
Airport and Industrial District	4,000	5.4
Business Center	2,070	2.8
Conservation	37,232	49.8
Low-Intensity Village	1,547	2.1
Regional Employment Center	3,565	4.8
Village	16,648	22.3
Village Center	348	0.5
West Bay Center	307	0.4
Major Roads (SR 79, SR 77, and CR 388)	577	0.7
Water	745	1.0
Total	**74,729**	**100.0**

*All acres are estimates.

Conservation is the largest single land use identified in the Sector Overlay Plan at approximately 50 percent of the sector area. The proposed Panama City-Bay County International Airport will occupy approximately five percent of the sector area. The proposed Airport will include commercial and general aviation facilities to accommodate existing and future needs. New facilities will initially include an 8,400 foot primary runway for commercial aircraft, a 5,000 foot crosswind runway for general aviation needs, a new 67,600 square foot commercial terminal, access road, and commercial and aviation support facilities. Eventual expansion of the primary runway to 12,000 feet, as well as the future addition of a third runway, is also planned.

The regional employment center, approximately five percent of the sector area, is planned for the area west of the airport. The center will attract aviation related and general industry, and service and distribution facilities that would benefit from a location near an airport. The Airport will be further complemented by the business center land use adjacent to the airport entrance road and eastern boundary, accounting for approximately three percent of the sector area. This commercial land use will include hotels, restaurants, office buildings, and distribution and maintenance facilities. The relocated Panama City-Bay County Airport is identified as one of

the land uses within the sector planning area. Other land uses include conservation lands, employment centers, commercial, and residential areas.

V. THE SECTOR PLANNING EXPERIENCE

The sector planning process authorized by Chapter 163.3245 of the Florida Statutes, envisioned five such plans across the state as a pilot program to prove the merit of long-range strategic visioning and planning. Other sector plans have been produced and adopted in Orange and Clay counties, with a fourth underway in Palm Beach County. Thus far, the experience has produced mixed results with only Orange County producing a detailed specific area plan out of the process. The sector planning history to date also suggests some changes to the authorizing statute that might be suggested by FDCA in the next legislative session, and include the following:

> Although the sector plan process was a substitute for the Development of Regional Impact (DRI) process and actually provides exemption from some of the DRI requirements, the technical preparation of the plans must follow the requirements of the DRI Rule, Chapter 9J-2, FAC. This has led to confusion amongst reviewers about the Plan requirements and entitlements that are actually conveyed by both the Overlay Plan and Detailed Specific Area Plan.
>
> Sector Plans and DSAPs as authorized by the statute can be prepared and approved concurrently. However, since the sector planning process is a visioning process developing standards, principles, and guidelines for future growth and development, and the Detailed Specific Area Plans are the equivalent of comprehensive plan amendments, requiring consecutive review and adoption rather than concurrent review, might be appropriate.
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> The DSAPs, since they are equivalent to a major Comprehensive Plan Amendment, are subject to the Comprehensive Plan Amendment limitation to a twice-annual cycle. Exemptions to this rule may be considered.

> Debate also centers on what level of detail is necessary for both the Optional Sector Plan and individual DSAPs.

The sector planning process envisioned by the statute encourages spatial and temporal strategic planning. It is designed for very long range planning for large portions of a community with identified critical growth issues. The history of the optional sector plans in Florida is incomplete, but first indications are that the process is a necessary and productive option to the process of adopting changes to a community's comprehensive plan, incrementally, with the added benefit of the visioning process and a strategy for growth and development.

The West Bay Area Vision Sector Overlay Plan was approved for transmittal to the Florida Department of Community Affairs in September 2002. Two DSAPs, one detailing the development plan for the relocated airport, the other for mixed-use development around West Bay, are expected to be submitted for review in Spring 2003.

RELEASE OF EXOTIC NATURAL ENEMIES FOR BIOLOGICAL CONTROL: A CASE OF DAMNED IF WE DO AND DAMNED IF WE DON'T?

LANCE S. OSBORNE* & JAMES P. CUDA**

The benefits and risks associated with the discipline of biological control have become extremely complex and controversial. To adequately address the topic would require more time and space than we have been allotted here. In fact, the nontarget effect of biological control is the subject of several recent books.[1] Before we attempt to examine and summarize a few of the key points, we should first define some of the relevant terms that will be used in this discussion.

Biological control is the use of living natural enemies to control or suppress pest populations. The most commonly used organisms are predators (or herbivores, in weed biological control), parasitoids, and pathogens. The targets of biological control programs can be insects, mites, weeds, plant pathogens or even vertebrates. For the purpose of this discussion, we will limit the definition of biological control to the intentional manipulation by humans of natural enemies in order to manage pest organisms. We also will use the term 'pest'as it is defined in the Federal Insecticide Fungicide and Rodenticide Act (FIFRA): "Any organism that interferes with the activities and desires of humans." As stated by Norris,[2] "The term pest is anthropocentric, and is defined differently by diverse segments of the human population. There are no pests in an ecological sense; in the absence of humans, all organisms are just part of an ecosystem."

From this premise, it follows that the designation of pest status is relative. What one person considers a pest may not be a pest to someone else. One example might be those big "ugly" worms that are eating my neighbor's beautiful yellow and red flowers. In my

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* Professor of Entomology, University of Florida, Mid-Florida Research and Education Center, 2725 Binion Road, Apopka, FL 32703. 407-884-2034 ext. 163, lso@ifas.ufl.edu.

** Assistant Professor of Entomology, University of Florida, Department of Entomology and Nematology, PO Box 110620, Gainesville, FL 32611-0620. 352-392-1901 ext. 126, jcuda@ifas.ufl.edu.

1. NONTARGET EFFECTS OF BIOLOGICAL CONTROL (Peter A. Follett & Jian J. Duan eds., Kluwer Academic Publishers, Dordrecht 2000); BIOLOGICAL CONTROL: BENEFITS AND RISKS (H.M.T, Hokkanen & J.M. Lynch eds., Cambridge University Press 1995); SELECTION CRITERIA AND ECOLOGICAL CONSEQUENCES OF IMPORTING NATURAL ENEMIES. (W.C. Kauffman & J.E. Nechols eds., Proc. Thomas Say Publ. Entomol. Entomological Society of America, 1992); EVALUATING INDIRECT ECOLOGICAL EFFECTS OF BIOLOGICAL CONTROL (E. Wajnbberg et al. eds., CABI Publishing 2001).

2. ROBERT NORRIS ET AL., CONCEPTS IN INTEGRATED PEST MANAGEMENT (2003).

yard, these same worms are the "beautiful" larvae of the Monarch butterfly that are eating the yellow and red flowers of my butterfly weed. I want them to eat these plants so they will develop into adult butterflies.

There are three types of biological control that use living organisms or natural enemies to suppress target pest populations. These three approaches are Conservation, Augmentation and Classical. Although all three biological control methods are currently used, there are major differences between them especially with regard to the potential for non-target effects.

In conservation biological control, every effort is made to conserve and foster the impact that existing populations of natural enemies have on pest populations. This would include minimizing the use of pesticides or other management tools that have a negative impact on these beneficial organisms, or providing host plants that supply needed resources such as nectar and pollen to adult predators or parasitoids. It also would include establishing refuges where beneficial organisms can maintain viable populations.

An example of conservation biological control is the use of corn plants infested with the Banks grass mite, *Oligonychus pratensis* (Banks). This mite does not feed on ivy or palms, which are the crops that we would like to protect from the most serious pest of ornamental plants, the two-spotted spider mite (*Tetranychus urticae* Koch). The Banks grass mite serves as an alternate host for predatory flies, *Feltiella* spp. that occur naturally on mite infested plants[3] (Osborne et al. 2002). As the populations of this fly establish and increase within the greenhouse on the corn, they move throughout the ornamental crop attacking the pest mite, *T. urticae*.

Augmentative biological-control programs include those where beneficial organisms are mass-produced commercially or field-collected and then released to "augment" the existing populations. These beneficials can be native, adventive (established exotics), species that have been released previously but did not establish and, in some cases, new exotic species. The distinction between augmentation and classical biological-control programs is that species normally used in augmentation programs may not establish permanent populations or they may become established but their population densities are too low or they do not appear at the appropriate time to exert sufficient pest suppression. These programs are often used in unstable and/or annual cropping systems such as greenhouse-grown crops, strawberries, or some

3. RYAN S. OSBORNE ET AL., DEPARTMENT OF ENTOMOLOGY, UNIVERSITY OF FLORIDA, FEATURED CREATURES: PREDATORY GALL MIDGE, NO. EENY-269, available at http://creatures.ifas.ufl.edu/beneficial/f_acarisuga.htm, (last visited Feb. 22, 2003).

vegetable, fruit or field-grown crops. This approach also has been used effectively in stable aquatic ecosystems for the biological control of alligatorweed, *Alternanthera philoxeroides* (Mart.) Griseb, in the northern part of its range where the climate is too cold for the alligatorweed flea beetle, *Agasicles hygrophila* Selman & Vogt, to become permanently established.[4]

These organisms are not relied upon to survive from season to season. They are expected to exert control during a single growing season or for a relatively short period of time after their release. Sometimes large numbers of a biological control agent are released (inundative strategy) to supplement the small numbers already present, in expectation of a greatly increased effect. This is sometimes likened to a pesticide but in this case they are living organisms. The inundative approach is commonly used with some microbrial plant pathogens (bacteria, fungi, or viruses) or macrobial pathogens (nematodes) that are mass produced, formulated, standardized and applied as bioherbicides or biorational products. For example, DeVine® is a fungus that has been used for over 20 years to selectively control stranglervine, *Morrenia odorata*, in citrus groves. *Paecilomyces fumosoroseus* is a fungal pathogen that was discovered by L. S. Osborne in a University of Florida greenhouse and patented by the University. It is currently registered as a pesticide in Europe and the United States. Other well known examples include *Bacillus thuringiensis* (Bts) and entomopathogenic nematodes.

Augmentative biological control is often used to manage mites on many crops. The predatory mite, *Phytoseiulus persimilis* is mass reared by commercial insectaries worldwide. One palm grower we have worked with in South Florida now produces between 1 & 2 million *P. persimilis* each month. These predators are released into his palm crops on a weekly basis to control *T. urticae*. These releases replace the weekly application of pesticides to manage this pest. In reality, the predators are being used as a biological "pesticide". These predators have been released for more than 20 years in many different crops without any reports of negative impacts. They are rather poor competitors and very few cases exist that report their establishment in natural situations.

Classical biological control programs rely on the importation and release of exotic natural enemies into an area in which they are not already present for the purpose of establishing a permanent population of the organism. The classical approach is the most

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4. Gary Buckingham, G.R., *Biological control of aquatic weeds*, *in* PEST MANAGEMENT IN THE SUBTROPICS: BIOLOGICAL CONTROL- A FLORIDA PERSPECTIVE 413-80 (David Rosen et al. eds., Intercept 1994).

controversial form of biological control and is usually what people are referring to in discussions about non-target ecosystem effects and the risks to native fauna and flora from the inappropriate introduction of natural enemies. A recent and environmentally benign example of a classical biological control program for a pest insect is the release of parasitic wasps for the control of the pink hibiscus mealybug, *Maconellicoccus hirsutus*. This pest has devastated agriculture in various Caribbean islands. It feeds on more that 300 host plants and has killed 100 year-old trees.

Pink hibiscus mealybug was found in South Florida in June 2002. The initial infestations were found in residential areas in South Broward County. Regulatory officials from the state and federal governments had limited ability to enter private properties to inspect or manage this pest. This limited access was the result of the citrus canker programs. Public concern with the canker program and legal challenges to inspectors entering private property without search warrants for each property greatly reduced their ability to respond in timely fashion. Biological controls and the release of natural enemies appear to have been the only option to manage this serious pest. Predators and parasitoids don't respect property lines and search for prey with impunity. The wasps that were released, *Anagyrus kamali* and *Gyranusoidea indica*, are very host specific and die if they can't find pink hibiscus mealybugs to attack. These wasps to not attack people, plants or other pests. They are mass produced in Puerto Rico and California and released into the South Florida infestations by the United States Department of Agriculture and the Florida Department of Agriculture & Consumer Services. It is too early to determine what impact these releases will have.

The primary concern with the release of exotic natural enemies for classical biological control of arthropod pests and weeds is the potential for unforeseen or unintended environmental effects.[5] For example, the full impact to native Opuntia cacti in North America from the intentional introduction of the Argentine cactus caterpillar *Cactoblastis cactorum* in the Caribbean for biological control purposes, and its unanticipated arrival in Florida in 1989 has yet to be realized. In the preface of the book by Follett and Duan,[6] the crux of the controversy is succinctly stated as follows:

> Biological control (Follett and Duan are probably talking about Classical biological control) has many

5. E. TENNER, WHY THINGS BITE BACK: TECHNOLOGY AND THE REVENGE OF UNINTENDED CONSEQUENCES (1996).

6. NONTARGET EFFECTS OF BIOLOGICAL CONTROL vii (Peter A. Follett & Jian J. Duan eds., Kluwer Academic Publishers, Dordrecht 2000).

> benefits including essentially permanent management of the target species, no harmful residues, nonrecurrent costs, host specificity, and for successful programs, a favorable cost-benefit ratio. In addition, it may be one of the few methods for reducing pest numbers over a broad geographical range. Now, biological control practitioners are on trail to justify the use of introduced organisms given the potential for unintended environmental effects. Important areas of concern include the irreversibility of alien introductions, the possibility of host range expansion to include innocuous native or beneficial species (nontargets), dispersal of the biological control agent into new habitats, and the lack of research on the efficacy and environmental impact of previous biological control programs.
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> The debate over nontarget effects has been polarized strongly between biological control advocates and conservationists. The strict conservationist's point of view of no intentional introductions of alien species whatsoever has proved hard to defend because evidence for nontarget effects of arthropod biological control introductions is thins and often circumstantial. As a result, some biological control practitioners have been quick to dismiss the importance of adverse nontarget effects. However, the lack of available information appears to reflect the difficulties in evaluating the impact of biological control agents, which include the need to anticipate where nontarget effects may occur in order to gather pre-impact data, as well as our poor attempts at documenting nontarget effect after agent introductions.
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> In the United States, Executive Order 11987 requires the U.S. Department of Agriculture, in cooperation with the Department of the Interior, to restrict the introduction of exotic species unless it has been determined that the introduction will not have and adverse effect upon the natural ecosystem."

Unfortunately, this scrutiny is not being applied to all of the pathways by which exotic organisms gain entry into the United States as exemplified by the monthly establishment of alien

arthropods in Florida.[7] It is only being applied to the pathway where scientists apply for permits to import and possibly release natural enemies of pests that gain entry via these other routes. As a result, a double standard does exist because of liberalization of international trade and conflicts between different segments of society (a different but related topic which will not be discussed here).

The key point that we would like to make in this discussion is that pest control is inherently risky. There are various tactics used to manage pests. Biological, physical and cultural controls have always been considered safe relative to the use of broad-spectrum pesticides. These other tactics have all come under closer scrutiny in the last few years because of their potential to have undesirable side effects. Managing agricultural pests with any tactic should be viewed in the context that 30% of all crops are lost to pests in developed countries. This is in spite of our best efforts to manage them. The losses in other countries are probably significantly higher. If we are going to feed the rapidly increasing human population that is expected to reach 8.9 billion by 2050,[8] we cannot afford to sustain this level of losses to pests. Biological control, and specifically classical biological control, is one of the essential weapons needed in this battle.

We would like to emphasize the fact that the importation of exotic biological control agents should be carefully scrutinized to prevent the importation, release and possible establishment of natural enemies that pose a risk to nontarget organisms. Governments are reviewing these issues and revising current regulations or developing new ones in an effort to "restrict the introduction of exotic species unless it has been determined that the introduction will not have an adverse effect upon the natural ecosystem." The risks associated with an introduction should be measured against the benefits and risks associated with other control tactics or against what could reasonably be expected by not intervening at all. It is obvious that other control tactics may not last as long nor pose the long-term threat to the environment that establishing an exotic organism may cause, but they all represent significant risks especially in the minds of the general public.

At the local level, the University of Florida's Institute of Food and Agricultural Sciences developed and implemented a protocol in October 2002 for reviewing permit applications for biological control

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7. M.C. THOMAS, THE EXOTIC INVASION OF FLORIDA, at http://www.doacs.state.fl.us /~pi/enpp/ento/exoticsinflorida.htm (last revised Aug. 8, 2000).

8. *See* the agricultural database of the Food and Agricultural Organization of the United Nations, at http://apps.fao.org/default.htm (last visited Feb. 22, 2003).

agents before their release in Florida. The purpose of the review process is to make sure that the faculty member proposing the release of the biological control agent addresses important questions regarding nontarget issues and whether biological control is appropriate for the intended target pest. Clearly, this is a step in the right direction because it provides an opportunity for peer review of the petition.

The primary issue most naturalists have with exotic natural enemies is that they have the potential to permanently impact vulnerable native organisms, which can lead to irreversible ecological consequences, or revenge effects.[9] Given this concern, how do we evaluate potential risks prior to release so that a benefit-risk analysis can be conducted? Currently, the science does not exist that would allow analysis for more than a limited number of ecosystems, if any. The desire is there, but the necessary funding and coordination for such a monumental task does not exist. An alternative approach would be to consider a protocol for guiding the development of biological control programs that was recently proposed by Howarth[10] and is based on a framework developed by Bax.[11] The adoption of this 14-step flowchart or the development of an objective scoring system for arthropod pests similar to that proposed for selecting weed targets[12] could improve biological control success while ensuring that questions of safety and conflicts of interest are addressed.

The arguments and attacks against the current and past practices of classical biological control programs are both compelling and provocative. On the surface, they are very con-vincing. But the critics fall into the same trap that they accuse biological control practitioners of. They are myopic and are not looking at the whole picture. They de-emphasize one important and significant component of this puzzle, the human component. Humans are going to react to threats against themselves or their interests whether they are perceived or real. Actions will be taken utilizing whatever tools are available. We would like to believe that we would take into account any negative and unintended damage to the environment,

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9. TENNER, *supra* note 5, at 346.

10. F.G. Howarth, *Non-target effects of biological control agents*, *in* BIOLOGICAL CONTROL: MEASURES OF SUCCESS 369-403 (G. Gurr & S. Wratten eds., Kluwer Academic Publishers, Netherlands, 2000).

11. N. Bax, et al., *Conserving Marine Biodiversity: The Control of Biological Invasions in the World's Oceans*, CONSERVATION BIOLOGY (forthcoming).

12. *See* D.P. Peschken, & A. S. McClay, *Picking the target: a revision of McClay's scoring system to determine the suitability of a weed for classical biological control*, *in* PROCEEDINGS, EIGHTH INTERNATIONAL SYMPOSIUM ON BIOLOGICAL CONTROL OF WEEDS, 2-7 FEBRUARY 1992 137-43 (E. S. Delfosse & R. R. Scott eds., Lincoln University 1995).

nontarget organisms, neighbors or even ourselves. Does history demonstrate these concepts to be foremost or even components of people's decision making process? Do we worry about soiling other people' s nests let alone our own when dealing with a threat?

In our opinion, questioning the safety of releasing exotic biological-control agents is valid and possibly long overdue. However, the importance of this one aspect of the exotic organisms issue is dwarfed by the overall impact that invasive organisms and their management have on our environment. We should probably be asking the following questions: How serious are the environmental, social and economic consequences of the establish-ment and management of invasive organisms?

In spite of significantly more than 100 years of successful biological control utilization, there is still a reliance on the unilateral use of chemicals to solve our pest problems. Pesticides and their unwanted and unanticipated impacts are often poorly documented. The impact they have on organisms other than the target pest cannot be separated from some of the negative impacts that are attributed to the use of certain biological controls. This does not mean that the arguments presented by such authors as Stiling and Simberloff,[13] Lockwood[14] or Strong and Pemberton[15] are not valid. As Strong and Pemberton[16] 16 (2001) state: "Restraint is the key to safe biological control. Judicious winnowing of potential targets comes first. Not every invasive species is a threat, and note every pest is appropriate for biological control." This should be the mantra of every proponent of biological control!

Scientists, regulators and ultimately society must make critical decisions based on a limited database. One fact is clear, established exotic pests will continue to be a problem. During the period from 1970 to 1989, Florida averaged the importation and establishment of one exotic arthropod a month.[17] This trend continues and during this past year it probably surpassed this average. Many of these exotic arthropods are invasive and cannot be ignored. Those faced

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13. Peter Stiling & Daniel Simberloff, *The frequency and strength of nontarget effects of invertebrate biological control a gents of plant pests and weeds*, *in* NONTARGET EFFECTS OF BIOLOGICAL CONTROL 31-43 (Peter A. Follett & Jian J. Duan eds., Kluwer Academic Publishers, Dordrecht 2000).

14. Jeffrey Lockwood, *Nontarget effects of biological control: What are we trying to miss?*, *in* NONTARGET EFFECTS OF BIOLOGICAL CONTROL 15-30 (Peter A. Follett & Jian J. Duan eds., Kluwer Academic Publishers, Dordrecht 2000).

15. D.R. Strong, & R.W. Pemberton, *Food webs, risks of alien enemies and reform of biological contro*l, *in* EVALUATING INDIRECT ECOLOGICAL EFFECTS OF BIOLOGICAL CONTROL 57-79 (E. Wajnbberg, J.K. Scott & P.C. Quimby eds., CABI Publishing 2001).

16. *Id*. at 70.

17. M.C. THOMAS, THE EXOTIC INVASION OF FLORIDA, at http://www.doacs.state.fl.us/~pi /enpp/ento/exoticsinflorida.htm (last revised Aug. 8, 2000).

with dealing with the impact of these species will use whatever tools available to mitigate any negative impact they may have. Pesticides will continue to be used and exotic natural enemies will be imported and released. Expedient choices will be made and some will have a negative result on nontarget organisms. As scientists, we must continue discussing these issues and strive to make appropriate and ethical decisions based on the best science available. As Ehler[18] (2000) has stated, "In future projects, a "sensible balance" may well include a given level of impact on nontarget species in the recipient community. If we cannot reach a sensible balance between economic reality and environmental ethics, then classical biological control may become an endangered scientific discipline."

18. Lester E. Ehler, *Critical issues related to nontarget effects in classical biological control of insects*, *in* NONTARGET EFFECTS OF BIOLOGICAL CONTROL 11 (Peter A. Follett & Jian J. Duan eds., Kluwer Academic Publishers, Dordrecht 2000).

ENVIRONMENTALISTS AND FOREST LANDOWNERS: WHY WE MUST WORK TOGETHER

RAY VAUGHAN*

Table of Contents

> If the 21st century is to be the time of healing the forests of the world, we must be willing to work together as people who care about our own future and that of our children and their children. To heal the forests, we must be willing to share openly and freely any and all knowledge necessary to achieve that end. In addition, we must be willing to cooperate with one another in a coordinated way, for cooperation without coordination is empty.[1]

> If a man walks in the woods for love of them half of each day, he is in danger of being regarded as a loafer, but if he spends his whole day as a speculator, shearing off those woods and making earth bald before her time, he is esteemed an industrious and enterprising citizen.[2]

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* Ray Vaughan is the founder and Executive Director of WildLaw, a nonprofit environmental law firm based in Montgomery, Alabama. Mr. Vaughan received his J.D. (1986) and his LL.M. (1999) from the University of Alabama School of Law. Brett Paben, a staff attorney in the Florida office of WildLaw, assisted with parts of this article. www.wildlaw.org.

1. CHRIS MASER, SUSTAINABLE FORESTRY: PHILOSOPHY, SCIENCE AND ECONOMICS, xviii (CRC Press 1997).

2. HENRY DAVID THOREAU, LIFE WITHOUT PRINCIPLE (1854).

I. INTRODUCTION

Despite all the inflammatory rhetoric from front groups controlled by multinational timber corporations,[3] the reality is that environmental organizations have much more in common with individual forest landowners and most foresters and loggers than the timber corporations do. While corporations and their allies decry government "regulations" limiting forestry,[4] the reality is that there is virtually no regulation of the timber industry in the Southern United States at all. Indeed, the biggest threats to forests are the same threats to wildlife, water quality and other environmental interests: the loss of forests and habitat due to (1) unsustainable forestry practices and (2) conversion to farms, pine plantations, strip malls, subdivisions and parking lots. Environmental organizations recognize that the individual forest landowner is usually a friend of the environment, a person who loves and cares for their land. Even a poorly managed forest is better for the environment than another parking lot and mega-mall surrounded by subdivisions. And a well-managed forest is a great environmental asset. Rarely does a landowner make bad decisions for their forests due to greed; usually, it is because of a lack of knowledge about alternatives or about ways that help them protect their land.

The South's forests are the wood fiber basket of the world. As found by the United States Forest Service during the recent Southern Forest Resource Assessment:

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3. Various groups characterize environmentalists as "primary opponents of free enterprise" (Center for the Defense of Free Enterprise, http://www.eskimo.com /~rarnold/opposition.htm), and as radicals who "seek to remove PEOPLE from the environmental equation and to remove humanity from the land, placing us in the concrete jungles only" (American Land Rights Association, http://www.landrights.org/interest.htm). Others declare, without any supporting evidence, that "property owners have frequently found themselves unable to use their property and unable to recover their losses." Statement of Roger Pilon, Ph.D., J.D., Senior Fellow and Director, Center for Constitutional Studies, Cato Institute before the Committee on Environment and Public Works United States Senate (June 27, 1995), *available at* http://www.cato.org/testimony/ct-pe627.html.

4. One web site declares, without any supporting material, that regulating private lands or conserving them in any way means "Natural resources, ie. raw materials become scarce and expensive." http://www.allianceforamerica.org/Position%20Papers%202001.htm. They fail to mention how a lack of conservation leads to market gluts and prices so low that landowners cannot realize a profit from their land, such as the situation with pulpwood prices in late 2002 and early 2003. Pulpwood prices in the South are so low and the market is so glutted, mainly due to any public or private "regulation" that would conserve the resource that many landowners literally cannot give away pulpwood harvested from their lands. Daniel B. Warnell School of Forest Resources, The University of Georgia, *Pine pulpwood prices declined to decade-low levels*, TIMBER MART - SOUTH (October 31, 2002).

> The South produces approximately 60 percent of the nation's timber products, almost all of it from private forests; the South produces more timber than any other single country in the world, and it is projected to remain the dominant producing region for many decades to come.[5]

And that situation is only going to grow larger. It is predicted that softwood and hardwood harvests in the South will increase by 56 and 47 percent, respectively, between 1995 and 2040.[6] Most of the forestlands in the South are owned by private individuals.[7]

While being the major economic player in the world's timber market, private forest lands in the South are also the key to protecting biodiversity and other environmental resources in the eastern United States. While publicly-owned forests are essential for their environmental functions and values, the majority of American forests are privately owned, and despite the vast holdings of forested land by a small number of corporations, a majority of the privately owned forests are owned by individuals. As summarized by the National Research Council:

> America's nonfederal forests are extensive and important. Two-thirds of the nation's forest-land — nearly 490 million acres — are owned and managed by nonfederal entities. These owners include: state, county, and tribal governments; corporations; and millions of individual private citizens, including more than nine million who each own fewer than 100

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5. U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 1 (2002).

6. U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 3.3 (2002).

7. The 13 Southern States contain an estimated 215 million acres of forest land. About 201 million acres are classified as timberland. In 1999, an estimated 179 million acres of the South's timberland (89 percent) were in private ownership. Birch (1996) found southern private timberlands to be in 4.9 million tracts owned or controlled by private individuals and legal entities, including corporations, clubs, trusts, partnerships, American Indian tribes, and Native American corporations. More than three-quarters of all private owners owned only one tract. More than two-thirds of these tracts were located <1 mile from owners' residences.

In 1999, about 21 percent (37 million acres) of the South's private timberlands were owned by forest industries. In 1994, forest industries represented <1 percent of all private ownership units (Birch 1996). Although forest industry timberland acreage slowly increased from 1953 until 1989, it declined by about 1 million acres (3 percent) between 1989 and 1999.

In 1994, an estimated 4.7 million individual owners held the largest share of private southern timberland. Individual owners compose the core of the group commonly referred to as NIPF owners (Moulton and Birch 1995). Almost 95 percent of all private timberland owners in the South are in this group (Birch 1996). In 1999, they controlled 63 percent of the total private timberland acreage.U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5.1 (2002).

> acres. This later group is referred to nonindustrial private forestland owners.... Forest industries own about 71 million acres of forestland, with particularly heavy concentrations in the South.
>
> About 75 percent of the nation's nonfederal forests are located in the eastern part of the nation. Four of 10 acres are in the South, and about one-third of the nonfederal forestland is located in the North. the remaining portion spreads across the western United States, where the dominant landowner is the federal government.[8]

The increasingly important role of all forests in society has been stated this way:

> Sustainable forestry is emerging worldwide because the contexts and conditions of forests are changing at an unprecedented rate and in ways that were never before possible. Long viewed as hinterlands valued primarily for meeting the extractive needs of societies, or as preserves of wilderness, forests are now mainstream concerns in the United States and throughout most of the world. Increasingly, forests are recognized as pervasive and crucial features of the social landscape that supply fundamental human needs for wood, paper, water, food, jobs, medicines, minerals and energy. They form watersheds, agricultural systems, and reservoirs of genes, species, and ecosystems; and they regulate climate. In the process they distribute resources and services among groups, communities, and nations. In this new context, people have come to view forests as critically scarce systems within the bounds of direct human interest rather than as abundant resources beyond those limits.[9]

Thus, private forestlands in the United States are essential for protection of the environment. It is vital that private forest

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8. NATIONAL RESEARCH COUNCIL, FORESTED LANDSCAPES IN PERSPECTIVE: PROSPECTS AND OPPORTUNITIES FOR SUSTAINABLE MANAGEMENT OF AMERICA'S NONFEDERAL FORESTS 1 (National Academy Press 1998) [hereinafter FORESTED LANDSCAPES IN PERSPECTIVE].

9. JENKINS & SMITH, THE BUSINESS OF SUSTAINABLE FORESTRY: STRATEGIES FOR AN INDUSTRY IN TRANSITION 11 (Island Press 1999).

landowners learn more about options for forest management that will provide them with the economic returns they desire while protecting the environmental values the public and the landowners both need.

Federal forestlands must be managed according to a host of federal laws and regulations, and thus environmentalists can use the courts to ensure that management is done properly when agencies will not do so of their own accord. But private forest lands do not have nearly so many laws and regulations applicable to them, and forcing private landowners to manage their lands in a particular way is simply not possible. The most laws can do on private forestlands is set outside limits on what landowners can do, such as not allowing them to build a toxic waste dump next to a school or adhere to minimum standards for protecting water quality Laws on private lands prohibit bad things, but they do not and cannot mandate good things. For private landowners, the personal desire to manage land well is the key factor, but for that desire to become reality, the landowner must be provided good information and an honest range of options so that they can choose the management methods and techniques that meet their needs and best fit with their land. The landowner must also be provided the incentives and the resources to make good forest management a reality. Society cannot just expect the private landowner to do the best thing, and private landowners cannot just expect society to provide for them, either environmentally or economically. We all bear responsibility for making our world the best it can be. As stated by the National Research Council:

> Sustainable management of the nation's nonfederal forests is important because nonfederal forests are an important part of the nation's economic, community and environmental landscape. Expectations for the human and ecological benefits these forests are capable of providing are growing. If these expectations are to be met in a sustainable manner, greater financial and human investments in these nationally important forests must be made.[10]

While government can play some role in informing landowners and encouraging better and more sustainable management, its role is ultimately limited. If private forestlands are to managed sustainably and protected from conversion into subdivisions, the

10. FORESTED LANDSCAPES IN PERSPECTIVE, *supra* note 8, at 21.

energy for such an advancement must come from the landowners and from those who are concerned about the ecological values of the land.

What is needed is for private landowners, consulting foresters, loggers and people with environmental concerns to begin a better and deeper dialogue in order to learn from one another and to help each other achieve their goals. What we will find when we talk together instead of attacking each other for narrow political reasons is that we have a great deal in common. The goals of most environmentalists can be met while meeting the goals of most private forest owners and forestry practitioners. Good stewards of private land produce good environmental results. Good environmental practices produce good economic results for private landowners.

II. BAD LOGGING HURTS PRIVATE LANDS AND PUBLIC LANDS

Why do so many logging operations damage the very land that is harvested? Simply put, the large multinational corporations that drive the world timber and paper pulp markets demand that fiber be provided to them in the most efficient and profitable manner, for them. Massive cut-and-run clearcutting is the best way to get trees off land quickly and into the hands of large pulp and timber corporations, but it is not the best way for an individual landowner to make money and maintain the integrity of their land. Industrial harvesting methods, such as clearcutting, cause great damage to land, wildlife, water quality and scenic beauty. Clearcutting done wrong can also destroy a landowner's future chances of making good money from that land. More than 2,000,000 acres are clearcut every year in the South.[11]

Irresponsible logging practices on private lands can also adversely impact public forests. Bad clearcuts in the year 2000 on inholdings in the middle of the Bankhead National Forest in northwestern Alabama caused major damage to streams on the public land below. Every bit of sediment that ran off those clearcuts went into streams on public land, streams that are home to a number of endangered species. Thus, learning about better ways to manage forests can lead a landowner to being a better neighbor, both to other landowners and to the public at large.

When timber harvesting is not done in a responsible manner, the land and people suffer. Streams can be choked with sediment; wildlife can be killed. Neighboring landowners can have their lands and waters degraded and their property values diminished. The

11. U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5.1 (2002).

landowner whose forest is mangled through bad forestry practices suffers the most, losing soils, productivity, wildlife, the beauty of their land, and even future revenues. Also, WildLaw has represented landowners in trespass and nuisance cases against their upstream neighbors who allowed sediment to flow downstream due to bad forestry practices. Being hit with a six-figure jury verdict because the forester and loggers you hired did a bad job is no way to make money off one's forest.

But when landowners have more information about their choices, they can make better decisions about forest management and avoid the problems that come when improper methods are forced on them. Landowners can decide to manage their land in a way that maximizes revenue for them (as opposed to maximizing revenue for corporations) while also protecting the soils, wildlife, water and beauty that makes that land special to them. Making sure that Best Management Practices (BMPs) are always followed in timber harvesting can dramatically improve even clearcutting.[12] Methods such as selective logging can provide great revenue from sawtimber without ever removing the majority of the trees from the forest. Landowners who cut selectively and who wisely chose to take their timber to a quality sawmill have made more money from their land than neighbors who clearcut and just sold the trees for pulp to the nearest multinational pulp mill and protect and maintain their forest at the same time.[13]

Sustainable forests come from knowledge and landowner care, and smart choices about forestry methods require research. A group called the Sustainable Forests Alliance[14] seeks to aid landowners in making intelligent choices about how to manage their forests for now and for future generations to come. Other environmental organizations from around the country also work to assist private

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12. Forestry operations have been identified as nonpoint sources of pollution to water bodies draining forest land. Silvicultural activities have the potential to increase sedimentation and alter stream channel conditions (National Council for Air and Stream Improvement 1994). Impacts from these activities are site-specific, varying across the South. Effects depend on elevation, slope, and the rate at which vegetation recovers following harvest. However, in general, if BMPs are properly designed and implemented, the adverse effects of forestry activities on hydrologic response, sediment delivery, stream temperature, dissolved oxygen, and concentrations of nutrients and pesticides can be minimized.
U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5 (2002).

13. "Research conducted by Beasley and Granillo (1985) demonstrated that selective cutting generated lower water yields and sediment yields than did clearcutting. Selective cutting resulted in sediment yields 2.5 to 20 times less and water yields 1.3 to 2.6 times less than those resulting from clearcutting." U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 4.8 (2002).

14. More information about this group is available at www.southernsustainableforests.org.

land owners to make their lands as productive and sustainable as they can be.

III. INDUSTRIAL LOGGING: THE PROBLEM

Industrial logging practices are not designed to benefit private landowners; they are not designed to protect forest lands. Industrial logging practices are designed to benefit the timber and pulp industry by getting trees off the land and into the mills as quickly and cheaply as possible. The huge multinational timber corporations are not concerned with whether the forest landowner makes as much money from their land as they could have or even whether the forest landowner's land is still viable after logging. The corporations' concerns are maximizing next quarter's profits and driving up share prices.

Industry has huge investments in facilities and processes that are designed for mass manufacturing of consumable goods. Their goal is maximizing short-term profits. People who make unique products from wood also suffer when forests are not managed sustainably, as the multinational corporations absorb so much of the available timber. A typical paper mill is a tree-consuming machine, being fed by logging from many thousands of acres of each year.

When forest land is logged recklessly just to maximize timber and pulp production in the present, the land suffers over the long term. Wildlife, biodiversity, water quality, air quality, and scenic beauty all suffer as well. The forest landowner also suffers by not realizing the maximum economic return from their land and from the loss of all the non-economic values and resources that make a person's land mean much more to them than just property.

When land is treated as nothing but industrial resources and forests are managed merely as commodities, the environment and the private landowner both suffer. Industrial demand for cheap fiber has caused massive clearcutting of southern forests. Instead of trees being allowed to mature and provide valuable sawtimber for local sawmills, forests are clearcut young and fed into chip mills. The chips are then shipped overseas to be made into paper and other products there. Value-added jobs are lost. Studies show that for every one job created by clearcutting and chip mill use of the timber, as many as 40 jobs in the cabinet and furniture industries here in America are lost. This industrial row cropping of trees has also driven prices for timber to new lows, thus forcing many small operators, family sawmills and private landowners into selling out to the multinational corporations cheaply. Causing a world glut of timber fiber benefits the multinational corporations by allowing them to buy up small competitors and timber at prices that allow

them to consolidate power over the timber market. Doing business on a global scale, these corporations do not care if their practices cause harm to a regional economy.

IV. LAND IS MORE THAN JUST PROPERTY AND FORESTS ARE MORE THAN JUST TIMBER

Individual landowners realize these truths. Local sawmills that produce the lumber than gets turned into products locally also know these things. Multinational corporations do not. Unfortunately, the private forest landowner often gets "advice" about how to manage their land only from those corporations and people who have a vested interest in the global timber market. Corporations and the foresters who work for the industry usually do not provide forest landowners information about real alternatives to industrial logging practices and do not give them assistance with long-term protection of their land. Environmental coalitions like the Sustain-able Forests Alliance do provide such information to landowners.

Massive soil and water quality damage can be caused by log skidders and trucks when proper Best Management Practices (BMPs) are not followed. In most southern states, BMPs are not required; they are entirely voluntary, except for certain minor requirements mandated by the United States Army Corps of Engineers related to filling of wetlands.[15] Following BMPs and protecting the soil and water quality during timbering operations costs more money than just cutting all the trees and hauling them out as fast as possible. Thus, a good landowner who follows BMPs

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15. BMP implementation is largely voluntary in Southern States, but three States (Florida, North Carolina, and Virginia) have linked BMP implementation to other State regulatory programs, making them quasi-regulatory in some circumstances, and BMP implementation became mandatory in Kentucky in July 2000. There are also 15 mandatory Federal BMPs, or conditions, required in all States for exemption of certain silvicultural activities conducted in waters of the United States.... Compliance with these Federal conditions has not been systematically monitored by any agency.

U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5.4 (2002).

For a comparison of all state laws on forestry in the South, *see* http://www.southernsustainableforests.org/laws.html. As an example, Alabama's BMPs are quite good in their recommendations, but as stated by the Alabama Forestry Commission:

> Alabama's Best Management Practices for Forestry are non-regulatory guidelines (except for the U.S. Army Corps of Engineer's baseline BMPs on pages 16 and 17 which are mandatory) suggested to help Alabama's forestry community maintain and protect the physical, chemical and biological integrity of waters of the state as required by the Federal Water Pollution Control Act, the Alabama Water Pollution Control Act, the Clean Water Act, the Water Quality Act and the Coastal Zone Management Act.

http://www.forestry.state.al.us/bmps_table_of_content.htm. Alabama's BMPs can be found at http://www.forestry.state.al.us/publication/BMPs/BMPs.pdf.

because he wants to protect his land and the water quality of the stream below it is put at a competitive disadvantage with the bad landowner who ignores BMPs and cuts for maximum short-term profit. With even a small amount of concern, foresight and planning, damage can easily be avoided. But large corporations that log private land are often not interested in sustainability but in maximizing the next quarterly report's profit margin.

Skid trails can cause erosion, even many months (and even years) after the area was logged, and act as funnels sending sediment down into the streams below. Such damage could be prevented while still harvesting virtually the same amount of timber off of a tract if the landowner, forester and logging operators took more care in designing and implementing the logging operation.

Landowners who are not given options are often talked into having their land clearcut and replant into a monoculture; in the South that means rows of loblolly pines. Currently, 24 percent of Alabama's forests are in loblolly pine plantations.[16] The U.S. Forest Service predicts that by 2040, 25 percent of all southern forests will be pine plantation monocultures. As that agency stated:

> Private landowners in the South are projected to continuously expand areas of pine plantations in the region far into the future. An outcome of this is a projected increase in the area of pine plantations – in the base scenario, by 67 percent (from 33 to 54 million acres) between 1995 and 2040.[17]

These tree farms are no longer forests in any sense of the word. They are farms, crops, and nothing else. Wildlife suffers when natural forests are replaced with plantations or development. An exposé on the conversion of healthy natural forests into pine monocultures can be found in an article by Ted Williams in the May/June 2000 issue of Mother Jones magazine. As stated by Mr. Williams:

> Since mechanized forest removal became de rigueur in the 1960s, the industry has been excusing

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16. Planted pine may surpass natural pine in these States [Louisiana and Virginia] in the near future, as was recently witnessed in Alabama (Hartsell and Brown 2002) and South Carolina (Conner and Sheffield 2001b). The just-released inventory results revealed that pine plantation acreage has now surpassed the area of natural pine by 1.1 million acres in Alabama and by 130,000 acres in South Carolina.
U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5.5 (2002).

17. U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 1 (2002).

itself with ads that begin: 'Clearcuts may seem ugly at first....' As I gain the brow of the hill, I have to agree. But here, on this frozen, snag-littered mud flow salted with land snails roasted white, there is something even uglier — a greener, more insidious threat to the environment apparent in the freshly planted pine seedlings that barely make it to my boot tops. Directly to my left, a rectangular plantation almost ready for harvest stretches to the next hollow like a roll of teased Astroturf. The plantation to my right is maybe two years old and just greening up. For miles in all directions, the earth is clad in genetically identical, genetically "superior" specimens of loblolly jammed into the dirt in straight rows — trees the timber industry calls 'vigorous' and 'thrifty,' all goose-stepping their way to harvestable diameter.

There is no genuine forest in sight, save a relict scrap to the north that contains hardwoods: oak, beech, dogwood, ash, sweet gum, magnolia, yellow poplar, hickory, cherry, and maple. It is a reservoir for wildlife, but also for what companies like Champion seek to correct — 'deadwood, decadence, and disorder.' With a pine plantation, the forest has not only been removed, it has been prevented. Countless species of insects, arachnids, mollusks, amphibians, reptiles, birds, and mammals -- each as much a part of a forest as a tree -- are gone because the diverse vegetation on which they depend is gone. E.O. Wilson, a Harvard biologist and Pulitzer Prize winner, estimates that a pine plantation contains 90 to 95 percent fewer species than the forest that preceded it. He compares the effects of tree farms on biological diversity to 'building a line of Wal-Marts.'

Over the past decade, tree farms have certainly proliferated like discount chains. The U.S. Forest Service estimates that plantations now make up 36 percent of all pine stands in the South and within 20 years will make up 70 percent. Like other industries, pine farming has migrated to the region for its mild climate, cheap labor, and low taxes. Trees grow more quickly here, and they cost less to plant, tend, and

> harvest. What's more, most of the pine conversion is taking place on private land, where regulation is virtually nonexistent. More than half of evergreens harvested in the U.S. come from the South, making it the world's largest pulpwood producer.[18]

Clearcutting for conversion to pine plantation exposes the soil and causes great loss of nutrients and soil microbes that make the whole forest ecosystem work. This conversion of natural forests into plantations is devastating to the environment[19] and can be devastating to the landowner as well. What was once a diverse and beautiful landscape capable of producing steady income forever is reduced to a farm that will not produce a dollar to its owners for decades to come. Of course, getting any income at all from a monoculture plantations assumes a big gamble that the packed pines survive attacks from southern pine beetles, wind storms, ice storms and more for decades. Such natural "disasters" are all things that have little impact on a natural and diverse forest, as diversity enables a natural forest to withstand such impacts well.

Pine plantation conversion also hurts communities far beyond the actual tract of land that is converted. As Ted Williams wrote:

> What the companies neglect to mention is that pine farming, like other large-scale, industrial agriculture, harms the environment and the economy. Pine plantations require enormous amounts of fertilizer and herbicide, much of which winds up in streams and drinking water. They impoverish soil

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18. Ted Williams, *False Forests,* MOTHER JONES 72, 73-74 (May/June 2000), *available at* http:// www.motherjones.com/mother_jones/MJ00/false_forests.html.

19. Plantations produce more growing-stock volume than natural stands in relation to the standing volume. Natural stands tend to have a greater variety of species, especially hardwoods, and have larger diameter distributions.

Rosson (1999) found similar results in a 30-year study of Arkansas and Mississippi. He used FIA data that covered three decades (four measurement periods) and over 2,500 plots per measurement period to investigate the effects of pine plantations on species richness and species evenness for an entire State. Species richness for the study was defined as the number of species found on a sample plot. The study showed that pine plantations had a notable impact on tree species richness at the State level. In this study, Arkansas plantations had 14.1 percent lower species richness, and Mississippi plantations had 28.9 percent lower species richness than natural stands. Rosson reported that tree species richness declines as plantations replace harvested natural stands. Plots that had harvesting activity over the same study period experienced increases in tree species richness. Species richness on non-harvested plots increased 21.6 percent in Arkansas and 43.8 percent in Mississippi over the 30-year period.

U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5.11 (2002).

and destroy habitat, including wetlands. And they rob communities of valuable sawtimber for lumber and of real forests that produce clean water and provide recreation. Few of the profits end up in local communities, and many of the companies are multinational. Champion, for example, is owned by a firm based in Helsinki.

Alabama is particularly generous to pine converters. Among the benefits bestowed by the state is a tax exemption on almost $4 billion worth of timberland – an arrangement that, together with other tax breaks, deprives public schools of an estimated $50 million per year. So pine conversion is being underwritten in part by the future enlightenment and earning potential of Alabama's children. An Auburn University study reveals that rural counties most dependent on the forest-products industry have the highest levels of unemployment, poverty, and infant mortality. They also spend $200 less per student for public education than rural counties less reliant on timber. Tax revenue that would have gone to schools and other social services goes instead for such industry accommodations as road maintenance for fleets of logging trucks.

Another hidden cost of pine conversion is that young hardwood trees are ground into chips before they have a chance to mature into valuable sawtimber. Unlike Western logging, which is often conducted on public land, pine conversion happens mostly on private property where regulations are lax or nonexistent. Foresters for companies like Champion routinely pass out free seedlings and free advice to landowners, encouraging them to sell their timber before it matures and to 'reforest' with loblolly. The landowner gets quick cash, the company gets wood for chips, and workers at local sawmills get laid off. Lamar Marshall, director of Wild Alabama, one of the state's largest and most active environmental groups, showed me the results of this system as we toured the countryside in his truck. 'Look there,' he exclaimed as we passed someone's back 40, a once-diverse woodlot replaced by a

> monotonous expanse of young pine. 'If the forester isn't real ethical, he'll cut every stick of hardwood for chips. He'll pay $5 for a red oak, which might have been worth $50 or $75 in five years.' All trees look the same by the time a Japanese fax machine spits them into the holding tray.[20]

Another threat to private forest lands is the use of forests for biomass energy production; this is currently a small but fast-growing problem. Large corporations are advocating that the current manufactured "energy crisis" be addressed, in part, by using biomass energy. Biomass is the removal of all living things from a tract of land and converting that biomass into pellets or chips which are fed into a boiler to produce steam to power electric turbines. This process literally vacuums all plant matter off a piece of land, making it even more devastating that clearcutting. While some limited biomass energy production is currently fueled by biomass from private lands, there are proposals to start using the National Forests (especially those in the West, like in California) to produce biomass energy.

What makes the conversion of natural forests into pine plantations so particularly tragic for Alabama is that Alabama's forests and waterways once supported the most diverse biodiversity anywhere in the continental United States. Half of all known extinctions in the continental U.S. since white settlement have occurred in Alabama. Alabama has experienced more extinctions than any other state in the lower 48, almost twice as many as the number two state, and more than 25% of its remaining 3,800 species are in danger of extinction As stated in the *Nature Conservancy* magazine, Alabama is "America's monster of biological diversity," and "is lately drawing comparisons to the legendary treasures of the tropics."[21]

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20. Williams, *supra* note 18, at 74-76.
21. *Nature Conservancy* (Sept./Oct. 1997).

V. THE REAL PROBLEMS FACING FOREST LANDOWNERS

Front groups for the multinational timber interests often claim falsely that environmentalists are coming for private land and want to take it away. They love to scare landowners with horror tales of environmentalists pushing laws that take away private property rights. Of course, when pressed for details and facts, these anti-environmental groups and the industry can almost never provide them, except for a few anecdotal stories, most of which can never be independently verified. Yes, environmental laws and regulations (just like tax laws, drug laws, speeding laws, and every other form of law) can occasionally cause harm to private rights, and such instances need to be corrected and compensated. One can find isolated instances of seat belts actually making injuries worse during a car accident, but should we get rid of all seat belts because of that? Just as the fact that seat belts make things worse in an accident on rare occasions does not negate the reality that the vast majority of time they make things better, so too rare problems with environmental laws do not mean we should abandon all the good they do.

The reality is that every study done on the issue shows conclusively that environmental laws and regulations do not cause broad adverse economic impacts. Research into the impact of environmental laws has shown that these laws have no detectible adverse impact on the national economy or on the economy of any state.[22] These laws do have some occasional real impacts on the local scale, but in the vast majority of instances, these laws amount to nothing more than an additional cost of business such as compliance with labor laws, zoning requirements, engineering requirements, etcetera. Just as people do not want ten-year-old children working 16-hour days in factories, they do not want their children breathing unclean air. Environmental laws in general are not "unnecessary and excessive" regulations and limitations on the free market and private property; society has legitimate interests in limiting anything that conflicts with the values of society, whether it be child labor or toxic pollution, just so long as those limits do not infringe on constitutionally protected rights.

Indeed, to "prove" their case that environmentalists are "bad," anti-environmental groups have to make things up, sometimes going so far as to create false web sites claiming to be the web sites of environmental groups. A prime example was the web site www.wildlandsproject.org, which was a site set up by an anti-

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22. Dr. Stephen Meyer, *Environmentalism and Economic Prosperity: Testing the Environmental Impact Hypotesis*, MASS. INST. OF TECH. (Oct. 5, 1992).

environmental group and which masqueraded as the web site of The Wildlands Project, a scientifically-based organization showing what is possible in protecting and restoring wildlands and biodiversity. The real web site of The Wildlands Project was www.twp.org. Whenever opponents of good land management wanted to scare people, they told them "environmentalists want to take your land away; go look at the web site of The Wildlands Project," and then give them the address of the false site. The Wildlands Project does not advocate taking people's private property away. It sets forth idealistic but scientifically-sound visions of what a biologically-recovered North America might look like (after all, you cannot know you are making progress in any area unless you have a vision of what the final goal is), but nowhere does the organization call for those visions to be forced on anyone. But the false web site took logos and materials from the real web site and changed them to make things appear "bad."

For years, the false web site was a form of "cyber-sqatting" that led many people to believe false things about The Wildlands Project, such as that they wanted to force people off the land and "lock it up." After an appeal by The Wildlands Project to use the Uniform Domain Name Dispute Resolution Policy adopted by the Internet Corporation for Assigned Names and Numbers (ICANN), an Internet governing body, the false site was given up, and The Wildlands Project took that domain name over.

What the timber industry and their front groups are up to is scaring landowners into listening only to the industry, so that landowners will do what industry tells them to do, even if that is not what is best for the landowner. Making environmentalists into boogeymen is a way for industry to keep landowners from learning about different ways of managing their land and to keep them from making their own decisions about their land.

What is ironic is that it is very true that there are people who desire to take private forestlands away from their owners, but those people are not environmental organizations. While the timber industry tries to demonize environmentalists, they never inform landowners about people who really do want to take away forestlands and destroy their forests, by developing them.

Huge areas of American forest land are lost each year to development. Fore example, Florida has lost the most timberland in the South, primarily due to urbanization. Since 1953, timberland area in Florida has declined 19 percent to less than 15 million acres in 1999.[23] Even forests that are not converted to urban or suburban

23. U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5.2 (2002).

land are fragmented by the development that occurs around and near them.[24] This fragmentation is bad for the general environment and bad for the health of private forests. Recent studies show that in the United States 1.5 million acres of private forest land are fragmented each year by development pressures and another 1.2 million acres are converted and lost forever to development.

Even if an individual does not sell his forest to developers, if his land gets surrounded or even encroached upon by development, the taxes on his land can rise dramatically, making it harder for him to keep his land. Indirect effects from the development can cause damage to his land through many impacts such as erosion, sediment runoff, pollution of both air and water, driving off of wildlife and many more.

Uncontrolled sprawl eats into private forests at an alarming rate. A recent conference of experts on forest fragmentation made some disturbing findings. The conference was "FRAGMENTATION 2000- A Conference on Sustaining Private Forests in the 21st Century," and it was held September 17-20, 2000, in Annapolis, Maryland.[25] Some of the major findings of the conference were:

> 1. Fragmentation rates are increasing faster than population growth. Development-supporting economies keep expanding out over the landscape, replacing forest-and-farm-supporting economies. 2. A 'bow wave effect' extends far in front of expanding development. It raises land prices, taxes, social and regulatory pressures that discriminate against rural land uses well before a development rush. 3. Subsidized development demands subsidized services, which increases demand for more development… Most residential development costs government more in services than it pays in taxes. 4. Plants and animals thriving on edge-and-disturbance effects

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24. Currently, strong economic growth has led to increased urbanization in parts of the South. Urbanization fragments the natural landscape, destroys habitat required for many species, modifies habitat for others, and creates new habitat for some species (Adams 1994). This land use shift will continue to influence the region"s forests along with forest wildlife and habitat. Recent patterns of urban growth in the South have moved more people into the historically rural areas in low-density residential developments. In some areas of the South, forest cover remains relatively high, but the landscape is highly fragmented. Land use changes that result in increased forest fragmentation could have negative impacts on a number of forest wildlife species, including many mature forest and early successional bird species.

U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 2.2 (2002).

25. The summary report of the Forest Fragmentation 2000 Conference is available at http://www.sampsongroup.com/acrobat/fragsum.pdf.

expand; those needing large undisturbed expanses decline. 5. Exotics and invasive weeds replace native systems. Vulnerability to insects and diseases increases. Plantings at developed sites create 67% of the invasive exotics in the U.S. according to Alavalapati. 6. Timber harvests 'go terminal' in and near developed areas. One last cut is made in preparation for development; then the infrastructures and economic incentives helping keep land in forests disappear. Since this is not accompanied by a reduction in U.S. demand for forest products, imports rise, driving up harvests outside the area while local forests are unused.

FRAGMENTATION RATES ARE INCREASING FASTER THAN POPULATION GROWTH — From 1945 up to 1992 each new person added to the U.S. population caused the conversion of about half an acre of undeveloped land to urban uses. The rate more than doubled between 1992 and 1997 as each new person added to the population converted 1.2 acres of undeveloped land to urban uses. About 40% of the land used is forested, meaning that each new person converted .22 acres of forest prior to 1992 and converts about .50 acres now.

Death and taxes: people who inherit valuable land are forced to subdivide it to pay taxes. People who are 65 and older hold 48% of all private timberland acres, meaning that land keeps getting divided among heirs. Owners of high-value land who haven't made complex legal tax-avoidance arrangements before dying leave their heirs with the problem of being forced into selling land and timber to pay high estate taxes. According to Greene and others, the number and percent of estates owing federal estate tax has risen in recent years. At the same time, increased stumpage prices and urban expansion have driven up the value of both the timber and land components of forestland, pushing more land into higher brackets. Greene estimates that there are presently about 87,000 forest estate transfers annually. Ownerships forced to sell timber or land to pay the federal estate tax range from under

> 100 acres to several thousand acres of forestland, and average over 500 acres.
>
> The South is the next most densely populated region and very heavily forested. It contains 50% of the nation's private timberland. The population is growing rapidly, creating massive expansions of urban areas. Between 1960 and 1990, the South's share of the U.S. population increased by about 3%, but the amount of southern land covered by metropolitan areas more than doubled, increasing from about 10% to more than 23%. Florida is gaining population at the rate of nearly 900 people per day, decreasing timberland from 19.7 million acres in 1936 to 14.7 million acres in 1995 This is expected to increase, creating significant negative impacts on the environment and the economy. Georgia has the most timberland of any state in the country but also now ranks third in the annual rate of development (USDA FS 1999. US Department of Commerce, 1992). American forest industries have been con-centrating in the south in recent decades because of the region's highly productive private forests, but many of those same forests are now under fragmentation pressure as urbanization increases.[26]

Another threat to private forest lands is their conversion into much more damaging resource extraction. Coal strip mining continues in many areas. The road and building construction industries need huge amounts of crushed stone, but it is rarely economical to ship such rock long distances. Therefore, the rock industry tries to develop rock quarries near places that are experiencing growth. What this means is that even if a landowner's forest is not itself lost to nearby development, it could be lost to a quarry that supports the development. WildLaw is currently representing community organizations involving hundreds of landowners fighting four rock quarries (two for limestone and two for granite) in Lee and Elmore Counties in Alabama.

What this shows is that the major real threat to private forest landowners is not environmentalists and reasonable government regulations but the very loss of their forests to development and

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26. SUMMARY REPORT OF THE FRAGMENTATION 2000 CONFERENCE ON SUSTAINING PRIVATE FORESTS IN THE 21ST CENTURY, *available at* http://www.sampsongroup.com/acrobat /fragsum.pdf.

resource extraction that forever eliminates the forest. In facing this threat, the timber industry is useless to the individual private landowner, because the industry is not interested in what happens to individually-owned forest land. The industrial timber corporations want logs, and they will happily buy and process logs cut off land slated to be converting into a strip mall as from anywhere else. But in facing this ultimate threat to private forest land, environmental organizations are uniquely situated to help land owners. Indeed, environmentalists have spent decades learning how to oppose poorly planned development and mines.

A unique aspect of when private forest owners come into contact with the real threat of development is how they often embrace the very environmental laws and regulations that timber industry front men have told them are out to get them. For example, industry groups rail against the Endangered Species Act (ESA),[27] claiming that the ESA will prevent a landowner from realizing any revenue from his land.[28] But the reality is that a tract of private forest with an endangered species is a rare thing, and if the species is there, that usually means that the landowner's preferred way of managing his land is compatible, even good, for the species, or else it would not normally be there. When threatened with suburban development, a forest with an endangered species can usually continue as a working forest but it cannot legally be converted into pavement. Thus, the forest landowner can find that the ESA will defend not just rare species but also his very land. I have person-ally had dozens of landowners approach me and ask if I could please find an endangered species on their land. Why? Because their land was being threatened with encroaching development or mines. Of course, I could not magically put an endangered species on land that did not already have them. But the lesson is that when the real threat to private landowners appears, they instinctively realize that what they had been told was the threat is instead their hope of salvation.

Indeed, WildLaw has helped hundreds of private landowners defend their land from takings by corporations that have been given the power of eminent domain. Industry front groups that spent years telling these very same landowners that environmentalists and environmental laws would take their land from them never raised a finger to help these people when industry (not government) came to take their land away for a pipeline, a power line, a road or whatever. Instead, it was the environmentalists using the

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27. 16 U.S.C. §§ 1531 et seq.

28. For an example, see the web site for the Alliance for America, http://www.allianceforamerica.org/Position%20Papers%202001.htm#Endangered%20Species.

environmental laws and regulations who came to the defense of these private landowners.

Unfortunately, due to the overwhelming power of the eminent domain given to corporations, we were unable to keep the majority of the lands from being taken, but we did prevent some takings. And those private lands that were spared in the cases WildLaw brought for private landowners were spared because environmental laws such as the ESA forced the corporation doing the taking to modify its plans and avoid certain lands.

Throughout the South, there is virtually no legal protection for private property rights. There is a fallacy propounded by industry front groups that if environmental regulations are weak, then private property rights are strongly protected. The opposite is true; a state that does not value the environment also does not value private property (of individuals anyway). Corporations have the right to take people's property from them any time they want, all without having to show any public purpose.[29] Corporations even have more powers of eminent domain than the State does. A corporation can take your land for their private economic gain, something the State itself cannot do..

What companies can take private land? In Alabama, the list includes railroads;[30] electric utilities and power lines;[31] dam builders, pipeline companies, telephone companies, bridges or canals;[32] mining companies,[33] and any other work of internal improvement or public utility.[34] These companies can go onto anyone's land, survey, dig and do other things, all without the landowner's permission.[35]

Alabama's Supreme Court has actually ruled that corporations can pollute private land and have no liability for that unless the landowner can prove with nearly perfect evidence exactly when the contamination happened and how much it was.[36] In Alabama at least, companies can effectively take private property away and render it less valuable or even useless and owe the landowner nothing for that privilege.. Under current state laws, the Alabama Legislature and Alabama's courts have basically enshrined a "right to pollute" for big corporations. But people and private landowners have no right to clean air, clean water, or a healthy environment.

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29. ALA. CODE § 10-5-1 (1975).
30. *Id*. at § 10-5-2.
31. *Id*. at § 10-5-1.
32. *Id.*
33. *Id*. at § 10-5-3.
34. *Id*. at § 10-5-1.
35. *Id*. at § 10-5-8.
36. Russell Corp. v. Sullivan, 790 So. 2d 940 (Ala. 2001).

Due to this incredible bias in the law toward large corporate interests and against private landowners and citizens, it is imperative that forest landowners work with other people interested in protecting the land and find solutions that they can implement on their own.

VI. MOVING TOWARD SUSTAINABLE FORESTRY

Chris Maser discussed some causes of trouble in the forestry profession:

> Ignorance might be excused in the absence of information, but to act in defiance of documented knowledge is inexcusable. The forestry profession is in trouble because of the resistance of many traditionally educated foresters to alter their thinking in terms of the world today. Five major causes of trouble in the profession of forestry are (1) the economic myth of forestry, (2) dogmatization of forestry, (3) limitations of science, (4) informed denial, and (5) university training.[37]

Many of the problems that result from industrial forest practices come from the knowing refusal of the forestry profession to admit that forests are more than trees. The incredible dynamics of water, soil, soil organisms, wildlife and all forest plants are complex, difficult to predict and impossible to reduce fully to simplistic economic terms. Taking into consideration what is a forest and what it takes to wring economic benefits from a forest without damaging or even destroying that forest can get in the way of "getting the cut" out. Maximizing long-term economic benefits from forest land demands that the totality of the forest and its needs be taken into account, but maximizing short-term profits requires only that one turn a blind eye to reality and just cut trees as fast as possible. As stated in one book:

> Trees are only part of a forest. The monoculturalist, who wants to centralize control and standardize methods, requires no place-specific wisdom, does not recognize that it exists, and instead practices on abstract theories and piecemeal information. The monoculturalist relies primarily on imposing his or her will on the land and forest to control it, taking

37. MASER, *supra* note 1, at 78-79.

> over its evolutionary destiny to replace it with plantation trees in cornlike rows.[38]

A landowner usually knows their land better than anyone. To turn that land over to the industrial foresters of huge corporations that care only about short-term profit is to take a special place and have it ground down into somewhere just like a million other places. It is like a great family cook who wants to open a restaurant being forced to open a McDonald's and cook their food just like it is cooked everywhere else. To ignore the unique aspects and values of a piece of land is the surest way to degrade and devalue that land. Thus, a landowner must insure that they operate with more knowledge than what is parceled out to them by the timber industry, state agencies and state forestry schools if that landowner wants to protect and preserve the things about their land that they care about.

Examples of smart, sustainable forestry that makes money are available. The Pioneer Forest[39] in Missouri has been managing more than 160,000 acres of hardwood forest through selective logging practices only for more than 50 years and making plenty of money doing it. The more than half a century of work on the Pioneer Forest has shown that, thinking long-term, sustainable forestry makes more money for the landowner than the industry-standard clearcut logging.

A good example of a vital forest component that is totally ignored by traditional forestry is the insect. Industry foresters lament long and loud about insects that damage tree crops, but they do not seem to realize that the very timber practices they use are the root cause of the insect outbreaks that plague them. Or if they do realize it, they dare not speak that truth for fear of being out of favor with the giant timber industry that drives forestry and most forestry jobs. As stated by Chris Maser:

> The implications of 'homogenizing' forested landscapes as related to insect activity are interesting and instructive, but seldom discussed in the classroom. Taking a landscape of diverse, native forest and homogenizing it through clearcutting and planting single-species monocultural plantations has the effect of eliminating predators and such physical barriers to insect dispersal as fire-maintained habitat diversity.

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38. ECOFORESTRY: THE ART AND SCIENCE OF SUSTAINABLE FOREST USE 270 (Alan Drengson & Duncan Taylor, eds., New Society Publishers 1997).

39. More information about this organization is available at http://www.pioneerforest.com.

> Loss of such habitat diversity increases both the survival of forest-damaging insects and the likelihood of regionwide outbreaks.[40]

The implications for the massive build-up of pine plantation monocultures in the South are severe:

> By designing a forest based largely on a single-species short rotation that is intensively managed, we are grossly simplifying forest systems. We are speeding up early successional stages as much as possible and liquidating mature and old-growth stages. We are eliminating snags and large down woody material over time as we emphasize short-term economic expediency instead of sustainable forest diversity and stability. Intensively managed stands have little or no wood in the system.[41]

Indeed, by turning forests into yet another agricultural crop, we may well be destroying the very things that make the economically desirable timber from forests possible.

> A biologically sustainable forest is a prerequisite for a biologically sustainable yield (harvest). A biologically sustainable yield is a prerequisite for an economically sustainable industry. An economically sustainable industry is a prerequisite for an economically sustainable economy, which, finally, is a prerequisite for an economically sustainable society.
>
> We are not headed toward sustainable forestry because plantation managers rather than foresters are being trained. A forester manages a forest. Forests are being liquidated and replaced with short-rotation plantations. We will have foresters only when we have sustainable forests in which we manage not just trees, but the constantly changing processes.[42]

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40. MASER, *supra* note 1, at 84.
41. *Id.* at 185.
42. *Id.* at 199.

What is "sustainable forestry"? Chris Maser provides a good description of not only what is sustainable forestry but why we need it:

> Liquidating old-growth forests is not forestry; it is simply spending our inheritance and stealing from our children. Nor is planting a monoculture forestry; it is simply plantation management, which more often than not is what we are practicing. Industry is trying very hard to make a gigantic, monotypic plantation out of most of the forested lands of the United States. In fact, the timber industry seems to be trying exceedingly hard to make plantations whenever and wherever they can anywhere in the world. We will practice 'forestry' only when we begin to see the forest and begin to restore its health and integrity – sustainable forestry. Sustainable forestry if the only true forestry. Sustainable means that the whole is greater than the sum of its parts. Forestry in this sense is scientific knowledge guided by a land ethic or ethos in its application to the art and business of manipulating the forested portion of the ecosystem in a manner that assures the maintenance and sustainability of biological diversity and ecological productivity throughout the centuries. The outcome of such forestry will be the perpetual production of amenities, services, and goods for human use.
>
> In sustainable forestry, we use the forest by removing products, often in the form of biological capital, and then restore its vitality, its sustainability, so that we can remove more products in time without impairing its ability to function. From the time we cut the original old growth, we must continually practice sustainable forestry. Anything else is not forestry. It is simply abuse of the system for short-term economic profit.[43]

Unless forestry practices in the South change soon and change dramatically, the losses in terms of both ecological and economic terms may well be unbearable.

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43. *Id.* at 277-78.

VII. HELPING LANDOWNERS PROTECT THEIR LAND IN PERPETUITY

Groups such as WildLaw[44] and the Sustainable Forests Alliance[45] seek to help private landowners protect their land for the uses they desire. One major tool used for protecting private land is the conservation easement.

In general, a conservation easement is a nonpossessory interest of a holder in real property imposing limitations or affirmative obligations, for the purposes of protecting or preserving the natural, scenic, historical or open-space values of the property. The easement permanently limits the uses of the land in order to assure its availability for forest, agricultural, recreational, educational, open-space or wildlife uses, maintain or enhance air and water quality or preserve the natural aspects of the property.[46] In other words, a conservation easement is a voluntary legal agreement between a private landowner and an easement holder, usually a public agency empowered to hold an interest in real property or a charitable organization such as a land trust.

Owning a piece of property comes with a number of rights. For example, a property owner generally has the right to construct buildings on his or her land, to subdivide the land, to allow or restrict access, or to harvest natural resources such as timber. A property owner can sell or give away any or all of these rights. If the property owner gives away some of these rights and retains others, he or she grants an easement of those rights given away to a third party. The third party (e.g., government agency or charitable organization) then has the right to enforce those property rights granted to them in the easement.

Each easement can be specifically tailored to meet the landowner's interests and personal objectives for the property. Each conservation easement document contains the specific rights the property owner gives away in order to protect his or her land. For example, a property owner may give away the right to subdivide the land, to allow or limit access, or to harvest all or a portion of the timber resources. Most conservation easements are granted in perpetuity, assuring property owners that the values of their land that they seek to preserve will be protected indefinitely.

Donating a conservation easement can reduce a property owner's income tax. The donation of a conservation easement qualifies as a tax-deductible charitable gift, provided that the easement is

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44. More information about this group is available at http://www.wildlaw.org.

45. More information about this group is available at http://www.southernsustainableforests.org.

46. *See, e.g.*, MISS. CODE § 89-19-3; ALA. CODE § 35-18-1.

donated to a qualified public agency or conservation organization "exclusively for conservation purposes … [and] protected in perpetuity."[47] For tax purposes, "conservation purpose" is generally defined as:

> the preservation of land areas for outdoor recreation or public education; the protection of a relatively natural habitat of fish, wildlife or plants, or similar ecosystem; and the preservation of open space (including forest land) where the preservation is for the scenic enjoyment of the general public or pursuant to a clearly delineated Federal, state or local governmental policy.[48]

To determine the value of the conservation easement donation, the property owner has the property appraised at both its fair market value without the easement restrictions and its fair market value with the easement restrictions. The difference between these two values is the value of the conservation easement.

Granting a conservation easement can reduce a property owner's estate tax. Many heirs to large tracts of land face monumental estate taxes. Although heirs may want to keep the property in its existing condition, federal estate taxes are levied on the property's fair market value, not on the value of its existing use. The fair market value is usually the amount a developer or speculator would pay. The estate tax can be so high that the heirs must sell the property to pay the taxes or, at a minimum, clearcut the land to get enough money to pay the taxes.

Conservation easements can reduce estate taxes by decreasing the fair market value of the property. If an owner has restricted the development of the property through a conservation easement before his or her death, the property is then valued at its restricted value. Thus, the property will be subject to a lower estate tax. If owners do not want to restrict the property during their lifetime, they can specify in a properly structured will that a charitable gift of a conservation easement be made upon their death. The value of the easement will be subtracted from the value of the property, again resulting in lower estate taxes.

Granting a conservation easement can reduce a property owner's property tax. In general, property tax assessment is based on the property's market value, which reflects the property's development

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47. I.R.C. § 170(h)(5)(A).
48. *Id*.

potential. If a conservation easement reduces the development potential of the property, it may reduce the amount of the property owner's property tax. However, state laws and the attitude of local property tax assessors may determine whether property tax relief will be granted to a conservation easement donor. In short, a conservation easement is a flexible tool that protects land while leaving it in private ownership.

Environmental groups also help private landowners by providing them free forestry and legal advice. Some groups, like several in the Sustainable Forests Alliance, are hiring their own foresters in order to provide unbiased advice to landowners about what techniques and what equipment would best meet their needs while having the least amount of adverse impact on their land. Often, landowners only hear from the large timber companies, and the advice those corporations give landowners is anything but comprehensive. Normally, it is nothing more than "you should clearcut it all," because that is the logging method that benefits the corporation the most. Environmental groups can provide a valuable second opinion to landowners that will show them the true range of options they have when they want to manage their land for timber production. Then the decision on what to do with the land and why is truly up to the landowner.

Legal advice on things such as what contract clauses should go into a logging contract to make the logging company respect and care for a landowner's land can make the difference between a profitable logging operation that leaves the land intact the way the landowner wants or a barren, sun-baked desert. Many times, I have seen landowners find out too late that the logging contract they signed allowed the corporation to strip their land bare, even when the landowner specifically told them not to. Landowners who get good contract information before they agree to logging on their land can insure that better results occur and that unscrupulous companies are punished.

A number of new efforts to unite environmentalists, landowners, foresters and other forestry practitioners are now underway. These efforts include the aforementioned Sustainable Forests Alliance, the Southern Forests Network and the Model Forest Policy Program. The Southern Forests Network (SFN) is bringing together environmental groups and organizations that are made up of foresters, loggers and other practitioners who practice sustainable forestry methods. Key participants in the SFN include WildLaw, Appalach-

ian Voices,[49] the Forest Stewards Guild[50] and The Forest Management Trust,[51] based in Florida.

The Model Forest Policy Program brought together attorneys, scientists, foresters, economists and people from other disciplines to develop a model forest practices act. This model act will include a set of model provisions for forest management regulation and incentives for encouraging sustainable forestry. The idea behind the model act is to provide statutory language, regulatory language and supporting materials to allow state policy makers to pick and choose among the various provisions to craft sustainable forestry policies that fit their state situations. It should be finished and available for use by the time of the publication of this article.[52]

There is a great need for sustainable forestry policies in the Southern states. As shown above, BMPs are entirely voluntary in most states. Monitoring of compliance with BMPs has been erratic and spotty at best throughout the various southern states.[53] For example, Alabama monitors BMP compliance only through aerial reconnaissance, but it is impossible to determine if road crossings, culverts and other detailed requirements of BMPs are being followed when one is flying overhead at 1,000 feet at 200 miles per hour. Even with such an imprecise and crude method as Alabama's aerial surveys, the state still reported that 20 percent of the logging operations looked at failed to comply with BMPs for streamside management zones.[54] Virginia has a requirement that the state agency be notified of logging operations prior to their beginning; that state actually surveys a certain amount of logging operations on the ground for BMP compliance. In Virginia, logging operations' full compliance with all BMPs ranged from 16 percent in 1991 to 7

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49. More information about this group is available at http://www.appvoices.org.

50. More information about this group is available at http://www.foreststewardsguild.org.

51. More information about this group is available at http://www.foresttrust.org.

52. Once the model act is finished and available, it will be on WildLaw's web site, www.wildlaw.org.

53. States have differed in their aggressiveness toward monitoring BMP implementation, a direct reflection of State priorities and available resources. Seven States have completed more than one comprehensive statewide survey (Florida, 10; Texas, 4; Louisiana, 3; Georgia, 3; Arkansas, 2; North Carolina, 2; and Tennessee, 2). Louisiana is in the process of data analysis and report preparation of its fourth survey. South Carolina has completed four harvesting BMP and two site-preparation BMP surveys. Their current survey system is unique to the region in that it includes three visits to each surveyed site to observe status of BMPs. Alabama has surveyed implementation in differing manners since 1994, but has produced no formal survey report to date. Mississippi and Kentucky have completed one statewide survey, but neither has published a formal report to date. Pursuant to State law, Virginia monitors a percentage of the activities of which it is notified. Oklahoma is planning but has not yet surveyed BMP implementation statewide.
U.S. FOREST SERV., SOUTHERN FOREST RESOURCE ASSESSMENT § 5.4 (2002).

54. *Id*.

percent in June 1999.[55] The reality is that a drive down any highway in the South can quickly reveal numerous clear violations of BMPs at many logging operations visible from the road. Indeed, WildLaw has handled a number of cases for landowners who wanted to sue upstream neighbors who violated BMPs and thus caused damage to our clients' land and streams. If BMPs were being enforced, such instances should not occur.

The main forests policy in most southern states is no policy; they allow the industry and forestry practitioners to do whatever they want whenever they want without any oversight or monitoring at all. Most states do nothing to ensure sustainable forestry practices are used, and they do nothing to keep forestlands in forests instead of being developed. Such a policy of inaction is doomed to failure with costs that we will all pay both environmentally and economically.

VIII. CONCLUSION

The Southern United States is currently the largest timber producing region in the world. To maintain the health of the land and to ensure that landowners get long-term benefits, other voices must become fully and equally involved in the discussion over how land will be managed and how logging operations will occur. Despite the divisive rhetoric of multinational corporations and their puppet front groups, the reality is that a private forest landowner will, more often that not, find his desires and wishes more closely aligned with environmentalists than with the corporations that wish to profit off of his land and work.

Environmental organizations do not want to put private landowners out of business; they do not want to lock up their land. Anyone who says otherwise is, quite simply, lying. In fact, environmentalists want landowners to have a perpetual and significant source of income from their forest lands much more than multinational corporations want that. What I advocate in this article is not that landowners stop listening to the timber industry that has demanded all their attention and their allegiance but only that landowners take the time to get all the facts. Listen to what environmentalists and practitioners of truly sustainable forestry have to say about forests, timber management and land conservation instead of what corporations tell you environ-mentalists are saying. A landowner who takes the time to learn the facts and find out what everyone involved is really after will be able to make better choices for the management of his or her land.

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55. *Id.*

Huge timber corporations want landowners to listen only to industry and do what they are told. Industry does not trust landowners enough to show them all the facts and all sides to the issue of forest management. Environmentalists and sustainable forestry practitioners like those in the Sustainable Forests Alliance, the Southern Forests Network and the Model Forest Policy Program trust the landowners of the South much more than industry does; we trust th at, once they have access to all information on forest management and conservation, landowners will make the right decisions. The entire South will be better off when forest landowners take the time to decide for themselves what is best for their lands.

FERAL CAT COLONIES IN FLORIDA: THE FUR AND FEATHERS ARE FLYING

PAMELA JO HATLEY*

Table of Contents

I. INTRODUCTION[1]

An enormous and growing population of free-roaming cats exists in Florida, posing a threat to the state's native animal species, and creating a serious public health concern. Proponents of trap-neuter-release (TNR) and maintenance of cat colonies have been pressing local governments to enact ordinances to permit establishment and registration of cat colonies in local jurisdictions. But TNR and

* J.D. Candidate, 2003, University of Florida Levin College of Law.

1. The University of Florida Conservation Clinic is an interdisciplinary legal clinic housed in the Center for Governmental Responsibility at the University of Florida Levin College of Law. Under the supervision of its Director, the clinic provides value-added, applied educational opportunities to graduate and law students at the University of Florida by offering its services to governmental and non-governmental organizations and individuals pursuing conservation objectives. This project represents an effort by the University of Florida Conservation Clinic to assist the U. S. Fish & Wildlife Service by researching the legal and policy considerations of feral cat colonies in Florida. *See* http://conservation. law.ufl.edu.

managing large numbers of cats in colonies does not effectively control cat overpopulation. Additionally, federal and state wildlife laws designed to protect endangered and threatened species conflict with the practice of releasing non-indigenous predators into the wild. An intense public education campaign, together with licensing incentives, animal control laws that enforce high penalties against violators, and other methods of reducing the flow of non-indigenous species into the wild, are essential components to a long-term solution to pet over-population in general, and particularly to cat over-population and the resulting predation on wildlife.

II. MAGNITUDE OF FREE-ROAMING CAT POPULATIONS

A. In the United States

Though considered a separate species, *Felis catus*, the domestic cat, originated from a wild ancestral species, *Felis silvestris*, the African wild cat. In many ways, the domestic cat is an intriguing replica of its wild ancestor. It is similar in appearance, but most interestingly, its hunting behavior and other activity patterns remain essentially unchanged from the ancestral wild cat.[2]

Domesticated in Egypt about 4,000 years ago, the *Felis catus* has become America's favorite pet. The Humane Society of the United States (HSUS) estimates there are approximately 73 million owned cats in the United States.[3] Unfortunately, their popularity as a companion species to humans has led to many millions of this efficient mesopredator roaming free in the U.S., either because their owners allow them to or because they are homeless. A poll by the American Bird Conservancy (ABC)shows that only about 35 percent of owned cats are kept exclusively indoors, leaving some 47 million owned cats free to prey on wildlife all or part of the time.[4] In addition, the number of free-roaming unowned, or feral[5], cats probably falls in the range of 40 to 60 million.[6] Thus the number of

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2. John S. Coleman, Stanley A. Temple & Scott R. Craven, *Cats and Wildlife: A Conservation Dilemma* (1997), *available at* Cooperative Extension Publications, Room 170, 630 W. Mifflin Street, Madison, WI 53703 *or* http://www.wisc.edu/wildlife/e-pubs.html.

3. HSUS, *U.S. Pet Ownership Statistics*, (2002) *at* http://www.hsus.org/ace/11831.

4. ABC, Cats Indoors! Campaign, *Domestic Cat Predation on Birds and Other Wildlife* (undated), information sheet *available at* American Bird Conservancy 1834 Jefferson Place, N.W., Washington, DC 20036 *or* http://www.abcbirds.org.

5. As used in this paper, "Feral" refers to cats that are unowned, free-roaming, and not generally tame, either because they were born in the wild or have lived in the wild for such a length of time that they have become unaccustomed to being handled by humans.

6. FLORIDA FISH & WILDLIFE CONSERVATION COMMISSION, IMPACTS OF FERAL AND FREE-RANGING DOMESTIC CATS ON WILDLIFE IN FLORIDA (2001), *available at* http://www.floridaconservation.org/viewing/articles/cat.pdf.

cats in the United States spending all or part of their time outdoors is likely well over 100 million.

B. In Florida

The Florida Fish and Wildlife Conservation Commission (FWCC) estimates that the population of owned cats in Florida is about 9.6 million, and the feral cat population may be 6.3 to 9.6 million.[7] Based on ABC's poll showing an average of 35 percent of owned cats are kept exclusively indoors, the number of owned and feral cats, combined, that are outdoors and potentially preying on wildlife in Florida is in the neighborhood of 12.5 to 15.8 million.

III. ENVIRONMENTAL IMPACT OF FREE-ROAMING CATS

So what is the harm in allowing cats to roam free outdoors? First, allowing cats to roam free places the cats themselves in danger of harm. The HSUS explains that free-roaming cats often are hit by cars or fall victim to disease, starvation, poisons, attacks by other animals, and mistreatment by humans.[8] Second, free-roaming cats take a tremendous toll on native wildlife populations by direct predation and by competition. Cats are instinctive predators that are able to hunt as effectively as their wild ancestors, and feeding does not suppress the cat's instinct to hunt and kill.[9] It is estimated that nationwide, cats kill over a billion small mammals and hundreds of millions of birds each year.[10] Third, free-roaming cats are vulnerable to contracting and spreading disease among themselves, other wildlife, and even people. The Centers for Disease Control and Prevention (CDC) reports that rabies cases in cats are more than twice as numerous as those in dogs or cattle.[11]

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7. *Id*.

8. HSUS, STATEMENT ON FREE-ROAMING CATS 1 (2003), *available at* http://www.hsus.org/ace/11857.

9. John S. Coleman & Stanley A. Temple, *On the Prowl*, WISCONSIN NATURAL RESOURCES MAG., Dec. 1996, Wisconsin Department of Natural Resources, *at* http://www.wnrmag.com/stories/1996/dec96/cats.htm (Coleman and Temple conducted a four-year study of cat predation in Wisconsin); *see also* Michele Ameri, *The Australian Cat Dilemma*, TED CASE STUDIES, CASE NUMBER: 396 (1997) *available at* http://www.american.edu/ted/cats.htm; B. M. Fitzgerald & D. C. Turner, *Hunting behavior of domestic cats and their impact on prey populations*, *in* THE DOMESTIC CAT: THE BIOLOGY OF ITS BEHAVIOUR 123-147 (D.C. Turner & P. Bateson, eds., Cambridge University Press 2000);
O. Liberg, *Food habitat and prey impact by feral and house-based domestic cats in a rural area in southern Sweden*, JOURNAL OF MAMMALOGY 65:424-432 (1984); Robert E. Adamec, *The interaction of hunger and preying in the domestic cat (Felis catus)*, BEHAVIORAL BIOLOGY 18:263-272 (1976).

10. Coleman, Temple & Craven, *supra* note 2.

11. CDC, NATIONAL CENTER FOR INFECTIOUS DISEASES, RABIES: EPIDEMIOLOGY (2000), available *at* http://www.cdc.gov/ncidod/dvrd/rabies/Epidemiology/Epidemiology.htm.

Additionally, cat scratch fever, hookworms, roundworms and toxoplasmosis may be transmitted to other animals and people through scratches, bites and fecal contamination by cats.[12]

IV. FREE-ROAMING CATS IN FLORIDA

For decades the accepted method of managing the exploding population of homeless and unwanted pets has been simply to trap and destroy them humanely. Pet shelters attempt to find homes for the animals they deem suitable as human companions, but a far greater number of animals taken to pet shelters end up with the death sentence than with a loving home. A paradox of this tragic state of affairs is that humans perpetuate it, and at the same time are distressed by it. Hence, a growing trend in the U.S., and particularly in the states of Florida and California, is to attempt to manage populations of feral cats by trapping, sterilizing and vaccinating them, and then releasing them back into the wild. In some cases these feral cats congregate in "colonies" that are looked after by volunteers who feed them and provide TNR to new strays that find their way to the group. Feral cat advocates see the TNR method as a more humane solution to the sad consequence of so many perfectly healthy animals being put to death just because they are, through no fault of their own, homeless.

There are known feral cat colonies in at least 17 Florida counties.[13] The largest of these known colonies is the ORCat colony located at the Ocean Reef Club residential resort in Key Largo, which has an estimated 1,000 cats.[14] The ORCat colony is well organized and operates on an annual $100,000 budget supplied by donations from residents and the local community association.[15] The operating budget is used to purchase cat food, retain a local veterinarian's services, and pay salaries for a full-time and a part-time employee.[16] Ironically, the Ocean Reef Club ORCat colony is located next to the Key Largo Hammocks State Botanical Site, which contains habitat that supports the federal endangered Key Largo woodrat and the Key Largo cotton mouse.[17]

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12. Christine M. Storts, DMV, *Feral Cats Harm Wildlife, Pose Health Threat*, FLORIDA TODAY, Feb. 13, 2002, at Editorial Page.

13. FWCC, *supra*, note 6.

14. *Id*.; *But cf*. Alice L. Clarke & Teresa Pacin, *Domestic Cat "Colonies" in Natural Areas: A Growing Exotic Species Threat*, NATURAL AREAS JOURNAL 22:155-159, 157 (2002) (stating that, while management of cats at the club began in 1995 with an estimated more than 1,000 cats, by June 1999 the colony had been reduced to about 500 individuals).

15. Alice L. Clarke & Teresa Pacin, *Domestic Cat "Colonies" in Natural Areas: A Growing Exotic Species Threat*, NATURAL AREAS JOURNAL 22:155-159, 157 (2002).

16. *Id*.

17. *Id.*

In Brevard County, volunteers associated with the Space Coast Feline Network, Inc. (SCFN), a Florida not-for-profit organization, feed feral cats and conduct TNR clinics countywide.[18] The organization was formed in 1996 when workers at Kennedy Space Center began caring for feral cats in an abandoned building.[19] Within the first three years, the group had rescued more than 100 cats by caring for the adults and adopting out the kittens.[20] In the past two and a half years, the group has treated nearly 4,000 cats through their TNR clinics.[21] SCFN recently purchased 10 acres of land in Mims, Florida, on which the organization plans to place a colony of feral cats, and build an office, a veterinarian facility, and caretaker residence.[22] SCFN plans to shelter cats at its Miss facility in four modules that will house up to 25 cats each, and that have indoor and outdoor areas which are fenced and screened to prevent the cats from roaming and keep other animals out.[23]

In recent years, local governments have begun to sanction and regulate TNR and feral cat colonies. For example, a Brevard County ordinance allows feral cat colonies to be established and maintained by care givers as long as the colonies are registered with the county and meet certain requirements.[24] The ordinance requires care givers to assure the cats will be fed regularly, sterilized and vaccinated.[25] The county even provides funds and services to help offset the costs of TNR.[26] Some three years after Brevard County's feral cat colony ordinance was passed, the county had spent almost $100,000 on the program, had 244 registered colonies, and had sanctioned the release of more than 2,300 cats into the wild.[27]

But not all feral cat colonies are organized and maintained by volunteer associations of care givers. The number of feral cats in Brevard County is estimated to be over 100,000.[28] Lee County is home to possibly more than 200,000 feral cats, some of which are fed by sympathetic residents.[29] Most colonies are simply a group of cats

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18. Email communication from Kathleen Harer, President of SCFN, to author (Oct. 1, 2002) (on file with author).

19. SCFN, HOW IT ALL BEGAN, *at* http://www.spacecoastfelinenetwork.com /SpaceCatsClub.html.

20. *Id*.

21. Email communication from Kathleen Harer, President of SCFN, to author (Jan. 13, 2003) (on file with author).

22. *Id*.

23. SCFN, *We're Off and Running*, SCFN NEWSLETTER, Fall/Winter 2002-2003, at 2, *available at* http://www.spacecoastfelinenetwork.com; Harer, *supra* note 18.

24. BREVARD COUNTY, FLA. PART II CODE OF ORDINANCES, ch. 14, art. II, § 14-64 (1999).

25. *Id*. at § 14-64(a).

26. *Id*. at § 14-64(d)(2), (3), (4).

27. Christine M. Storts, DMV, *supra*, note 12.

28. Harer, *supra* note 18.

29. Pamela Smith Hayford, *Lee's Population Estimated near 200,000 Animals*, THE NEWS-

congregated around a food supply, such as a dumpster. New individuals regularly enter the colonies when irresponsible owners release their unwanted pets into the wild, or when kittens are born in the wild to intact females.[30] Because cats are not strictly territorial, new ones are freely allowed to join existing colonies.[31] As new cats arrive, older ones disappear by falling victim to one of the many perils that feral cats face, or simply wandering away to a different food source. Thus, despite the policy intent to have feral cat colonies dwindle away through attrition, this result apparently rarely occurs.[32]

V. IMPACT OF FREE-ROAMING CATS ON WILDLIFE IN FLORIDA

Cats are known to prey on small mammals, birds, and even sea-turtle hatchlings, frogs and toads, snakes, lizards, and insects. As stated above, there are some 15 million cats, both feral and owned, spending all or part of their time outdoors in Florida. This large number of free-roaming cats takes a devastating toll on native Florida wildlife. Based on extrapolated data from a Wisconsin study, the FWCC has estimated that free-roaming cats in Florida may kill as many as 271 million small mammals and 68 million birds each year.[33] However, the actual number may be much higher since FWCC also reports that a single free-roaming cat may kill as many as 100 or more birds and mammals per year.[34] To make matters worse, many of the animals preyed upon by cats are federal and state listed threatened and endangered species. In Florida, domestic cats have been recognized as predators and a serious threat to the Key Largo cotton mouse, rice rat, Key Largo woodrat, Lower Keys marsh rabbit, Choctawhatchee beach mouse, Perdido Key beach mouse, Anastasia Island beach mouse, Southeastern

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PRESS (Ft. Myers, FL), July 28, 2002, at 1D.

30. Daniel Castillo, Population Estimates and Behavioral Analyses of Managed Cat Colonies Located in Miami-Dade County, Florida Parks (2001) (unpublished Master of Science thesis, Florida International University), *available at* http://www.fiu.edu/%7Eclarkea/students/castillo.

31. *Id*.

32. *Id*. (Castillo's study contradicts the assertion that managed cat colonies decline in size over time. He states, "Even though the number of original colony members decreased over time, illegal dumping of unwanted cats prevented the colonies at A.D. Barnes Park and Crandon Marina from decreasing over time." Castillo witnessed people abandoning unwanted cats, and observed that numerous kittens and females with litters were abandoned at the parks.)

33. FWCC, *supra* note 6.

34. FWCC, *Domestic Cat* (Jan. 19, 2003) *at* http://wld.fwc.state.fl.us/critters/domestic_cat.asp.

beach mouse, green sea turtle, roseate tern, least tern, and Florida scrub-jay, all federal listed species.[35]

The Lower Keys marsh rabbit is a federal endangered species with a population estimated to be about 100 to 300 individuals.[36] The species could go extinct within 2 or 3 decades if current mortality rates continue, and the greatest threat to the Lower Keys marsh rabbit now appears to be predation.[37] A 1999 study of management options for the Lower Keys marsh rabbit reported that free-roaming cats were responsible for 53% of all marsh rabbit deaths, both juvenile and adult.[38] The researchers recommended that management efforts to save the species from extinction should be centered on developing a plan to reduce cat use of marsh rabbit habitat, and they suggested that intensive public education on the effects of cat predation would not only help save the marsh rabbit, but would also have a positive effect on other rare native species, such as the Key ringneck snake, silver rice rats, and white-crowned pigeon.[39]

There are several subspecies of beach mice in Florida, six of which are federal listed as endangered or threatened. Beach mice are found only in the southeastern U.S., and are an important beacon of dune ecosystem health.[40] However, scientists believe that cat predation poses a major threat to the continued existence of beach mice in some areas.[41] Dr. Michael Wooten, an associate professor in the Department of Biological Sciences at Auburn University, has conducted extensive research on beach mice, and concluded that domestic cats played a major role in the extinction of the Florida Point population of Perdido Key beach mice.[42] Dr. Wooten advises that beach mice, while they appear to be able to

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35. *Id*.; Castillo, *supra* note 30; Glen E. Woolfenden & John W. Fitzpatrick, *Florida Scrub-jay, in* BIRDS, RARE AND ENDANGERED BIOTA OF FLORIDA, VOL. V, at 267, 276 (James A. Rodgers, Jr., Herbert W. Kale II & Henry T. Smith, eds, University Press of Florida 1996); Jeffrey A. Gore, *Least Tern*, *in id*., at 236, 241; James L. Wolfe, *Lower Keys Marsh Rabbit, in* MAMMALS, RARE AND ENDANGERED BIOTA OF FLORIDA, VOL. 1, at 71, 74 (Stephen R. Humphrey, ed., University Press of Florida 1992); Stephen R. Humphrey & Philip A. Frank, *Anastasia Island Beach Mouse, in id*., at 91, 98.

36. Beth Forys & Susan Jewell, *Effort Continues to Save Florida Keys Marsh Rabbit*, ENVIRONMENTAL NEWS NETWORK (May 30, 2002), *available at* http://www.enn.com/news/enn-stories/2002/05/05302002/s_47324.asp.

37. *Id*.

38. Elizabeth A. Forys & Stephen R. Humphrey, *Use of Population Viability Analysis to Evaluate Management Options For the Endangered Lower Keys Marsh Rabbit*, 63 J. WILDLIFE MGMT. 251, 256-58 (1999).

39. *Id*.

40. Michael C. Wooten, Ph.D., *The Beach Mouse FAQ*, *#4. Why so much fuss over a mouse?*, *at* http://www.ag.auburn.edu/~mwooten/mouse.html.

41. Michael C. Wooten, Ph.D., *The Beach Mouse FAQ*, *#14. Are house cats a problem?*, *at* http://www.ag.auburn.edu/~mwooten/mouse.html.

42. *Id*.

escape native predators such as fox, raccoons, birds and snakes, do not survive well against non-native predators such as cats.[43]

Coincidentally, a study conducted by a graduate student at Auburn University confirmed scientists' suspicions that domestic cats prey on beach mice. During fieldwork conducted in 1999 and 2000, researchers fitted radio transmitters on a number of Choctawhatchee beach mice at Grayton Beach State Recreation Area in Walton County, and tracked the mice for several days.[44] The researchers soon found themselves tracking a feral cat, which had killed and ingested one of the mice fitted with a radio transmitter. The cat was followed for several days as it roamed throughout the recreation area and a local village.[45]

In addition to small mammals, free-roaming domestic cat predation detrimentally impacts the populations of many bird and possibly turtle species in Florida. For example, cats have preyed on piping plover, young and adult Florida scrub-jay, and least tern, all federal listed bird species, as well as black skimmer, painted bunting, and oystercatcher.[46] A report on the ecology and management of the Florida scrub-jay warns that "a population of domestic cats supported by human food offerings could eliminate a small, local population of Florida scrub-jays."[47] A graduate student conducting a study of feral cat colonies in two Miami-Dade County parks witnessed cats stalk and kill a juvenile common yellowthroat and a blue jay, and found the carcass of a gray catbird in the colony feeding area.[48] Outside of Florida, there are documented cases of cat predation on sea turtle hatchlings.[49] Although there are no studies

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43. *Id*.

44. Jeffrey L. Van Zant & Michael C. Wooten, Ph.D., *Translocation of Choctawhatchee Beach Mice: Hard Lessons Learned*, 1 (undated) (unpublished article, Auburn University) (on file with author).

45. *Id*.

46. Glen E. Woolfenden & John W. Fitzpatrick, *Florida Scrub-jay, in* BIRDS, RARE AND ENDANGERED BIOTA OF FLORIDA, VOL. V, 267, 276 (James A. Rodgers, Jr., Herbert W. Kale II & Henry T. Smith, eds., University Press of Florida 1996); Jeffrey A. Gore, *Least Tern*, *in id*., at 236, 241; James Cox, *Painted Bunting*, *in id*. at 644, 648; Theodore H. Below, *American Oystercatcher*, *in id*. at 232. *See also* ABC, Cats Indoors! campaign, *Domestic Cat Predation in Florida*, *available at* 1834 Jefferson Place, NW, Washington, DC 20036, *or* http://www.abcbirds.org.

47. John W. Fitzpatrick, Ph.D & Glen E. Woolfenden, Ph.D, *Ecology and Development-Related Habitat Requirements of the Florida Scrub Jay (Aphelocoma coerulescens coerulescens), in* FLORIDA GAME & FRESH WATER FISH COMM., NONGAME WILDLIFE PROGRAM TECHNICAL REPORT NO. 8, 26 (1991).

48. Castillo, *supra* note 30.

49. Wendy Seabrook, *Feral cats as predators of hatchling green turtles*, 219 J. ZOOLOGY 83-88 (1989); April, M. L. *Visitation and predation of the Olive Ridley sea turtle at nest sites in Ostional, Costa Rica*, *in* PROCEEDINGS OF THE FOURTEENTH ANNUAL SYMPOSIUM ON SEA TURTLE BIOLOGY AND CONSERVATION (1994) *available at* http://www.nmfs.noaa.gov/prot_res/PR3/Turtles/symposia.html.

revealing the extent to which cats prey on sea turtles in Florida, since free roaming cats are known to visit the state's beach areas, and since cats prey on turtles in other parts of the world, it is likely that turtle hatchlings in Florida are also taken by cats.

But predation is not the only negative impact free-roaming cats have on wildlife in Florida. Cats can also spread disease. The FWCC states that cats can spread rabies to wildlife such as raccoons, skunks, and foxes.[50] Castillo reported witnessing dogs, gray foxes, Eastern spotted skunks, raccoons, black vultures, blue jays, European starlings, and Eurasian collared doves feeding on left over cat food at feeding stations in Miami-Dade county parks.[51] In addition, park visitors reportedly fed cats on top of the picnic tables, and cats were seen defecating in the picnic areas.[52] Domestic cats are likely responsible for spreading feline panleukopenia (FPV) to the endangered Florida panther and feline leukemia virus (FeLV) to the mountain lion, a close relative of the Florida panther.[53] But potential for cats to transmit diseases presents a health hazard to humans as well as a threat to wildlife, because rabies, toxoplasmosis, cat scratch fever, encephalitis (from cat scratch fever), plague, hookworms and roundworms can be contracted by humans through contact with infected cats.[54]

Not only do cats impact Florida wildlife through predation and spread of disease, but they can outnumber and compete with native predators, such as owls, hawks, and foxes.[55] Domestic cats hunt many of the same animals that native predators do, and when present in large numbers, cats can reduce the availability of prey for native predators.[56] Because cats benefit from human feeding and vaccination, they are protected from many of the perils that limit the populations of native predators. Therefore, cat populations in the wild reach artificially high numbers and present a serious threat to native predators' ability to feed themselves and their young.

VI. STRATEGIES FOR DEALING WITH FREE-ROAMING CATS

Because of the domestic cat's role in society as a companion animal, any strategy to deal with the problem of free-roaming cats

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50. FWCC, *supra* note 6.
51. Castillo, *supra* note 30.
52. *Id*.
53. FWCC *supra* note 6; Coleman, Temple & Craven, *supra* note 2.
54. ABC, *Why Allowing Cats Outdoors is Hazardous to Cats, Wildlife, and Humans*, *available at* ABC, 1834 Jefferson Place, NW, Washington, DC 20036.
55. Coleman, Temple, and Craven, *supra* note 2.
56. *Id*.

will present challenges. A "round 'em up and kill 'em" approach would undoubtedly be met with intense public outcry. Further, efforts to remove from the wild all free-roaming cats would have to be constantly applied if no steps are taken to stop the introduction of more cats into the wild. But because humans domesticated this animal, and because we tend to love it so much, it is our responsibility to manage it properly. Cats are not indigenous to Florida, or to anywhere in North America. As a non-indigenous species, or "invasive" species, cats have spread throughout and threaten to destabilize native ecosystems.

A. Cat Colonies and TNR

The managed colony and TNR approach is highly controversial and strongly opposed by many conservationists, wildlife biologists, veterinarians, and animal welfare groups.[57] Proponents of this method argue that it is a more humane and effective way of controlling the exploding homeless pet population than is the "trap and kill"method. Advocates claim that, by reducing the number of unwanted litters being born, the TNR strategy will help stabilize the population of free-roaming cats over time.[58] Supporters also claim that well fed cats will not prey on wildlife, that the territorial behavior of cats living in established colonies will prevent new cats from joining, and thus the number of cats living in managed colonies will stabilize and decrease over time through natural attrition.[59]

However, studies have proven that the instinctive hunting and killing behavior in cats is "de-coupled" from their hunger mechanism, so that cats kill impulsively even when they are not hungry.[60] Further, Castillo's study of two Miami-Dade County cat colonies found that the colonies did not decline in size over time,

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57. Many organizations have adopted official position statements either against feral cat colonies or discouraging the practice under most circumstances. Some of these include: The Wildlife Society, 5410 Grosvenor Lane, Bethesda, MD 20814-2197; Association of Avian Veterinarians, P. O. Box 811720, Boca Raton, FL 33481; American Veterinary Medical Association, 1931 N. Meacham Road, Suite 100, Schaumburg, IL 60173-4360; American Bird Conservancy, 1834 Jefferson Place, NW, Washington, DC 20036; People for the Ethical Treatment of Animals, 501 Front Street, Norfolk, VA 23510; American Society for the Prevention of Cruelty to Animals, http://www.aspca.org..

58. Castillo *supra* note 30.

59. *Id*.

60. Joe Schaefer, *Impacts of Free-ranging Pets on Wildlife*, University of Florida Cooperative Extension Service, document WEC-136 (1991), *available at* http://edis.ifas.ufl.edu. *See also* B.M. Fitzgerald & D.C. Turner, *Hunting behavior of domestic cats and their impact on prey populations*, *in* THE DOMESTIC CAT: THE BIOLOGY OF ITS BEHAVIOUR 123-147 (D.C. Turner & P. Bateson, eds., Cambridge University Press 2000); O. Liberg, *Food habitat and prey impact by feral and house-based domestic cats in a rural area in southern Sweden*, JOURNAL OF MAMMALOGY 65:424-432 (1984); Robert E. Adamec, *The interaction of hunger and preying in the domestic cat (Felis catus)*, BEHAVIORAL BIOLOGY 18:263-272 (1976).

partly because people continued to illegally dump their unwanted cats, and also because not all the cats were sterilized, thus litters were born.[61] Castillo's study also revealed that the cats were not strictly territorial, and would freely allow new individuals to join the colonies.[62] It has also been observed, by Castillo and others, that food set out for cats attracts other wildlife, such as raccoons and skunks, which can facilitate the spread of disease.[63] Additionally, some cats become wary of traps and so cannot be caught for re-vaccination.[64]

B. Eradication Campaign

As stated above, any effort at eradication would be met with public outcry. In fact, where steps have been taken in some cases to remove feral cats from public or even private lands, there has been strong protest and even sabotage attempts by feral cat advocates.[65] Further, eradication would have to be continually applied because of the steady introduction of new cats into the wild from abandonment and new litters. Thus eradication alone would be resource intensive and ineffective as a strategy for dealing with free-roaming cats.

C. Stemming the Flow

Before any efforts to control the free-roaming cat population can be successful, there will have to be an intensive and continuing public education campaign aimed at informing people about the problems associated with free-roaming cats. Some animal owners, realizing that if they take their unwanted pet to a shelter it will be likely be euthanized, often choose the alternative of abandonment. Though unable or unwilling to properly care for the pet, they hate to see it put to death. However, these same people may not realize the potential harm and misery their pet faces once abandoned, or the potential harm their pet may inflict on native wildlife. Additionally, many people may not realize they are breaking the law

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61. Castillo, *supra* note 30.

62. *Id*.

63. *Id*.; ABC, *supra* note 54; FWCC, *supra* note 6.

64. ABC, *supra* note 54.

65. James P. Sterba, *Fur Flies in Critter Crowd Over Fate of Feral Felines*, WALL STREET JOURNAL, October 11, 2002 (reporting that a nuisance animal trapper with a pest management company in Old Bridge, NJ has been screamed at, threatened and jostled, his truck has been jumped on and pounded, his traps run over, and his trapped cats freed); J. Nealy-Brown, *Feline feedings infuriate Navy*, ST. PETERSBURG TIMES, June 25, 2001 (civilian employee at Jacksonville Naval Air Station in Florida was caught springing traps that had been set to capture some of the 800 feral cats on the property).

by abandoning their pet. Furthermore, cat owners may not realize their pets are efficient predators that can be fatal to Florida's native wildlife. Perhaps if fully informed on these issues, fewer people would allow their cats to roam free or abandon them into the wild.

VII. LEGAL CONSIDERATIONS

Wildlife laws exist at the federal and state level that are designed to protect species such as migratory birds, and those listed as endangered or threatened. Properly applied, these existing laws could be effective in discouraging the use of TNR and cat colonies as a way to attempt to manage the free-roaming cat population in this country. In addition, local governments enact ordinances to control both domestic and wild animals in their jurisdictions. However, most local government ordinances in existence are not effectively treating the problem of free-roaming cats, and are, in some cases, even exacerbating the problem.

A. *FEDERAL WILDLIFE LAWS*

1. Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) represents the incorporation of, and domestic implementation of, four treaties that are concerned with, among other things, preventing the extinction of migratory birds.[66] The MBTA makes it unlawful to, at any time and by any means or manner, "...take, capture, kill, attempt to take, capture, or kill...any migratory bird, ...nest, or egg of any such bird... ."[67] Under the violations and penalties section of the MBTA, any person, association, partnership, or corporation who violates the provisions of the MBTA is guilty of a misdemeanor and, if convicted, can be fined up to $15,000 or imprisoned up to six months, or both.[68] There is no requirement for an element of intent for a misdemeanor violation of the MBTA.

Corporations have been found guilty of violations of the MBTA for the accidental release of toxic chemicals which were subsequently ingested by and resulted in the death of migratory birds.[69] The court in *U.S. v. FMC Corporation* found that the corporation engaged in the manufacture of a highly toxic pesticide, and that it failed to prevent this dangerous chemical from escaping

66. Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L. J. 1, 9 (1996).
67. 16 USCA § 703 (2002).
68. 16 USCA § 707(a)(2002).
69. U. S. v. FMC Corporation, 572 F. 2d 902 (2d Cir. 1978).

into a pond where the chemical was dangerous to birds.[70] Though the corporation asserted that it had no intention to kill birds, the court applied strict liability.[71]

In another case, a pesticide maker, sales representative, alfalfa field owner, and aerial sprayer were all charged with violating the MBTA when several migratory birds died after application of a pesticide to an alfalfa field.[72] The court found that it was clear from the language of the MBTA that Congress intended to make the unlawful killing of even one bird an offense.[73] Further, the court declared that the MBTA can be applied to impose criminal penalties on those who did not intend to kill migratory birds, because the guilty act alone was sufficient to make out the crime.[74]

In yet another case several protected birds were killed when roosting on an electric association's power lines on which the association had failed to install equipment that would have protected the birds from electrocution.[75] The court held that whether the defendant intended to cause the deaths of the protected birds was irrelevant to its prosecution under section 707(a) of the MBTA .[76] The court found that Congress, by prohibiting the act of "killing" in addition to the acts of hunting, capturing, shooting, and trapping, intended to prohibit conduct that went beyond that normally exhibited by hunters and poachers, and in fact did not seem overly concerned with how captivity, injury, or death occurred.[77]

These cases raise the question of whether a person violates the MBTA when that person releases a cat into the wild, and that cat kills a migratory bird. If an accidental chemical leak, aerial application of a pesticide, or failure to install equipment to protect birds from power lines can result in a person being charged with violation of the MBTA, why not release of cats into the environment? It does not take a great stretch of the imagination toconclude that a cat's impact on birds can be as lethal as any poison.

And in answer to the argument some have made that a broad interpretation of the MBTA could lead to such absurd results as convictions for bird deaths caused by automobiles, airplanes, and

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70. *Id.* at 907.
71. *Id.*
72. U.S. v. Corbin Farm Service, 444 F. Supp. 510 (E. D. Calif. 1978), *aff'd,* 578 F. 2d 259 (9th Cir. 1978).
73. *Id.* at 529.
74. *Id.* at 536.
75. U.S. v. Moon Lake Electric, 45 F. Supp. 2d 1070 (Co. Dist. 1999).
76. *Id.* at 1074.
77. *Id.*

plate glass windows, the *Moon Lake* court pointed out that to obtain a guilty verdict, the government must prove proximate causation.[78] In other words, the government must prove there was a natural and continuous sequence of events, without any intervening causes, which produced the death of a migratory bird, without which the death could not have happened, and the death of a bird must be an event which might have reasonably been foreseen.[79] It is quite obvious that cats can be lethal to birds, and if the death of a migratory bird can be traced to a cat, or a cat colony, which can be further traced to an individual or organization, there may be strict liability for that person under the MBTA.

2. Endangered Species Act

The Endangered Species Act (ESA) has been described as the "pit bull" of environmental laws. Its language has been interpreted strictly and literally. An early case involving the ESA concluded that Congress had made it clear that the "balance has been struck in favor of affording endangered species the highest of priorities."[80] Section 9 of the ESA prohibits any person from "taking" any endangered fish or wildlife within the United States, or from violating any regulation pertaining to any endangered or threatened species.[81] The term "take" is defined as "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[82] The ESA authorizes "any person" to "commence a civil suit to enjoin any person" from violation of the act or any regulation issued under the act.[83]

The rules promulgated by the U. S. Fish & Wildlife Service (FWS) pursuant to the ESA define "harm" as an act which "actually kills or injures wildlife. Such act may include significant habitat modification or degradation, where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[84] Furthermore, the rules apply the "take" prohibition to listed threatened species as well as to listed endangered species.[85] As stated above, in application the language of the ESA has been interpreted quite strictly and

78. *Id*. at 1085.
79. *Id*.
80. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).
81. 16 USCS § 1538(a)(1)(2002).
82. 16 USCS § 1532(19).
83. 16 USCS § 1540(g)(1)(A).; Pete Schenkkan, *Citizen Suits, in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES, 415 (Donald C. Baur & Wm. Robert Irvin, eds., American Bar Association 2002).
84. 50 CFR § 17.3 (2002).
85. 50 CFR § 17.31(a) (2002).

literally. The ESA may also be applicable to the issue of free-roaming cats and maintenance of cat colonies.

Liability under section 9 of the ESA has been found in cases based on the issuance of permits or licenses by a governmental body to a private party in which the authorized activity causes a take of an endangered species.[86] In *Strahan v. Coxe*, the Massachusetts Executive Office of Environmental Affairs was found liable for a take after evidence showed that Northern Right whales were becoming entangled in fishing gear which was permitted by the state.[87] The court found that the State of Massachusetts allowed commercial fishing in a manner likely to cause a take under the ESA. Thus there was an indirect but proximate causal link between the permitting agency and the recipient of the license.[88] The court held that "a governmental third party, pursuant to whose authority an actor directly exacts a taking of an endangered species, may be deemed to have violated the provisions of the ESA."[89]

In another example of governmental third party liability, a court found that Volusia County, Florida's practice of allowing vehicular driving on its beaches was causing a take of endangered turtles. The court partially enjoined Volusia County from allowing vehicles on its beaches during nighttime hours.[90] More recently, the same court was presented with the issue of whether Volusia County's beachfront lighting ordinance harmed the turtles.[91] Finding that turtles were being taken in violation of the ESA, and that these takes resulted from artificial beachfront lighting, the court nevertheless held that, because the County's beachfront lighting ordinance was designed to prohibit, restrict, and limit artificial beachfront lighting, the County could not be held liable for takes caused by the non-compliance of the County's citizens.[92]

Counties and municipalities in Florida typically adopt animal control ordinances, sometimes called "leash-laws," that set forth the local government's requirements for rabies vaccinations, animal license tags, and pet leashes. Many of these local ordinances require that dogs be kept on the property of their owner, not be allowed to roam free, wear a license tag, and be kept on a leash if off their owner's property. These same requirements, however, are

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86. Luna Ergas, *Section 9 of the ESA: Prohibitions on Taking Listed Species*, *in* TREATISE ON FLORIDA ENVIRONMENTAL & LAND USE LAW, §§ 17.3-1, 17.3-5 (The Florida Bar 2001).

87. *Id*.; Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997).

88. Ergas *supra* note 86 at 17.3-5; *Strahan*, 127 F.3d at 163.

89. *Strahan,* 127 F.3d at 163.

90. Ergas *supra* note 86, at § 17.3-5; Loggerhead Turtle v. Volusia Cty., 896 F. Supp. 1170, 1180 (M.D. Fla. 1995).

91. Loggerhead Turtle v. Volusia Cty., 92 F. Supp. 2d 1296 (M.D. Fla. 2000).

92. *Id*. at 1305-1306, 1308.

often not applied to cats. In addition, some local governments in Florida have adopted ordinances affirmatively authorizing programs of TNR and maintenance of cat colonies in their jurisdictions. Applying the third party governmental liability principles of the *Strahan* and *Loggerhead Turtle* cases, a local government could find itself liable under the ESA for authorizing cat colonies that result in the illegal take by feral cats of an endangered species.

In addition to cases which have found liability based on issuance of a permit or license by a governmental body, are those which concentrate on the definition of a take. In the cases of *Palila v. Hawaii Department of Land & Natural Resources,*[93] the state of Hawaii was maintaining on public land, for recreational hunting purposes, feral sheep and goats, that were eating and destroying the mamane tree which also furnished food and shelter to an endangered bird. The Ninth Circuit, in *Palila I* held that the destruction of critical habitat upon which an endangered species depended for food, shelter, and nesting harms the species within the FWS's definition of harm.[94] After the FWS amended its definition of harm by adding "an act which actually kills or injures wildlife," as it reads today, the Ninth Circuit held in *Palila II* that habitat destruction that could result in extinction is sufficient to conclude a taking.[95]

In a series of cases subsequent to *Palila,*[96] plaintiffs with economic interests dependant on the forestry industry challenged the FWS' definition of harm, primarily the inclusion of habitat modification and degradation.[97] The challenge found its way to the U.S. Supreme Court, which found that "Congress intended 'take' to apply broadly to cover indirect as well as purposeful actions."[98] Thus the Court held that the definition of "harm" within the definition of "take," to include habitat modification that kills or injures wildlife, was a reasonable construction of Congress' intent.[99] The current interpretation of the definition of "harm" in the ESA, remains that which was articulated in *Sweet Home,* to include

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93. 471 F. Supp. 985 (D. Haw. 1979), *aff'd* 639 F.2d 495 (9th Cir. 1981) (*Palila I*); 649 F. Supp 1070 (D. Haw. 1986), *aff'd*. 852 F.2d 1106 (9th Cir. 1988) (*Palila II*); Gina Guy, *Take Prohibitions and Section 9*, *in* ENDANGERED SPECIES ACT: LAW, POLICY, AND PERSPECTIVES 191, 197 (Donald C. Baur & Wm. Robert Irvin, eds., American Bar Association 2002).

94. Ergas, *supra* note 86, at 17.3-3.

95. *Id*.

96. Sweet Home Chapter of Communities for a Great Oregon v. Babbitt, 1 F.3d 1 (D.C. Cir. 1993); *rev'd* 17 F.3d 1463 (D.C. Cir. 1994); Babbit v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995).

97. Ergas, *supra* note 86, at 17.3-4.

98. *Id*.; *Babbit v. Sweet Home*, 515 U.S. at 704.

99. Ergas, *supra* note 86, at 17.3-4; *Babbit v. Sweet Home*, 515 U.S. at 708.

habitat modification and not only direct application of force to a species.[100]

Applying the ESA prohibition on the take of an endangered species, including habitat degradation, to the issue of free-roaming cats, it would appear that under the right circumstances, aa court could find that cats degrade the habitat of endangered or threatened predator species by killing the prey upon which those species depend for food. As explained in a preceding section of this paper, free-roaming cats prey on many of the same small mammals and birds as do native predators. Additionally, because they are subsidized by human care givers, cats occur at higher densities and compete with native predators for food, thus making it more difficult for native predators to feed themselves and their young. Consequently, persons who release cats into the wild or who maintain feral cat colonies could be found liable for a take under section 9 of the ESA if maintenance of feral cats in the wild is found to kill or injure wildlife by degrading habitat.

B. State Statutes

1. Wildlife Protection Laws

The Florida Legislature has enacted laws designed to protect the state's fish and wildlife resources. In adopting the Florida Endangered and Threatened Species Act, (ETSA) the Legislature declared that the "State of Florida harbors a wide diversity of fish and wildlife and it is the policy of this state to conserve and wisely manage these resources, with particular attention to those species defined by the Fish and Wildlife Conservation Commission, the Department of Environmental Protection, or the United States Department of Interior as being endangered or threatened."[101] Furthermore, the Legislature stated its intent was to "conserve and protect these species."[102] The ETSA makes it unlawful to "intentionally kill or wound any fish or wildlife designated by FWCC as endangered, threatened, or of special concern."[103] Thus, the Florida Legislature has expressly recognized the value of the state's wildlife resources and the importance of protecting those resources through effective laws designed to do so.

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100. Ergas, *supra* note 86, at 17.3-4.
101. FLA. STAT. § 372.072(2) (2002).
102. *Id*.
103. FLA. STAT. § 372.0725 (2002). (Florida maintains its own protected species lists and creates take liability, although the statute has not been applied as expansively as the federal ESA.)

Importantly, the Florida Legislature has enacted a statute that makes it unlawful to release within the state *any species* of the animal kingdom not indigenous to Florida without first obtaining a permit from the FWCC.[104] FWCC is a state agency authorized by the Florida Constitution, to "exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life."[105] The constitution also authorizes FWCC to promulgate rules to carry out its constitutional and statutory mandates.[106] Accordingly, FWCC has promulgated a rule implementing the above statute prohibiting the release of non-indigenous species without a permit.[107] However, FWCC's rule makes it unlawful for any person to release *wildlife* that is not native to the state, without first securing a permit from the FWCC.[108] Because FWCC defines "wildlife" as "all wild or *non-domestic* birds, mammals, fur-bearing animals, reptiles and amphibians," its rule does not apply to cats.[109]

The FWCC considers *Felis catus*, feral or owned, to be a domestic species and therefore under the jurisdiction of county authorities.[110] Thus, the Legislature, with the express intent to protect Florida's wildlife resources, has enacted a statute that makes it unlawful to "release within the state any non-indigenous species of the animal kingdom." But FWCC, charged with the duty to carry out that mandate, has adopted a rule that fails to regulate the release of cats, a non-indigenous species, into the wild. The rule therefore contravenes the specific provisions of the very statute it was intended to implement.[111]

Furthermore, the Florida Constitution provides that revenue shall be appropriated to the FWCC for "purposes of management, protection, and conservation of wild animal life."[112] Thus, the constitution places on the FWCC an affirmative duty to protect and conserve Florida's native wild animal life.[113] The FWCC therefore has a duty to protect native wildlife from being exterminated by

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104. FLA. STAT. § 372.265(1) (2002) (emphasis added).
105. FLA. CONST. art. IV, §9.
106. *Id*.
107. FLA. ADMIN. CODE r. 68A-4.005(1) (2002).
108. *Id*. (emphasis added).
109. FLA. ADMIN. CODE r. 68A-1.004(86) (2002) (emphasis added).
110. FWCC, *supra* note 6.
111. FLA. STAT. § 120.52(8)(c) (2001) (Chapter 120 is the Florida Administrative Procedures Act (APA). This section states that an existing rule is an invalid exercise of delegated legislative authority if it enlarges, modifies, or contravenes the specific provisions of law implemented.)
112. FLA. CONST. art. IV, §9.
113. *Id*.

free-roaming cats, whether owned or unowned, regardless whether feral cats are considered wildlife or domestic species.

Additionally, FWCC has adopted a rule that prohibits the release of any "wildlife or *other organism*" that might reasonably be expected to transmit any disease to wildlife in Florida.[114] Logically, since the FWCC's own rule prohibits the release of "any organism" that might reasonably be expected to transmit disease to Florida wildlife, the FWCC has a duty to protect native wildlife from free-roaming cats which might be likely to spread disease. The FWCC itself acknowledges the following: cats are the most common carriers of rabies among domestic animals, and can transmit rabies to wildlife such as raccoons, skunks an foxes; feline leukemia virus, a leading cause of death due to infectious disease in cats, has been reported in a mountain lion, a close relative of the endangered Florida panther; domestic cats were identified as one possible reservoir host for feline panleukopenia, which has been discovered in the Florida panther.[115] Therefore, under the Florida constitution, state statutes, and the FWCC's rules, the FWCC has a duty to take action to protect native animal life in Florida from disease spread by free-roaming cats.

The Florida Constitution requires the FWCC "to establish procedures to ensure adequate due process in the exercise of its regulatory and executive functions."[116] Accordingly, the FWCC adopted the Florida Uniform Rules of Procedure as its procedural rules.[117] Furthermore, the FWCC is defined by the Florida Administrative Procedures Act (APA) as an agency when acting pursuant to statutory authority derived from the Legislature.[118] Because all provisions of the APA are applicable when the FWCC is acting pursuant to its statutory responsibilities, citizens can access the FWCC through the APA rule challenge and hearing procedures.[119]

A citizen or group concerned about the impacts of feral cats, that could establish standing as a substantially affected party, might successfully challenge the FWCC in at least two ways: (1) seek an administrative determination of the invalidity of the FWCC's rule prohibiting the release in the state of non-native wildlife–defined as

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114. FLA. ADMIN. CODE r. 68A-4.005(3) (2002) (emphasis added).

115. FWCC, *supra* note 6.

116. FLA. CONST. art. IV, §9. *See also* FLA. STAT. § 20.331(6)(a) (FWCC "shall implement a system of adequate due process procedures to be accorded to any party, as defined in s.120.52, whose substantial interests will be affected by any action of the FWCC in performance of its constitutional duties or responsibilities").

117. FLA. ADMIN. CODE r. 68A-2.009 (2002); Chapter 28, FLA. ADMIN. CODE (2002).

118. FLA. STAT. § 120.52(1)(b)4 (2002).

119. Clay Henderson, *The Conservation Amendment*, 52 FLA. L. REV. 285, 297-98 (2000).

non-domestic animals, and thus not including cats– on the ground that the rule is an invalid exercise of delegated legislative authority because it modifies or contravenes the specific provisions of the law implemented; or (2) seek an administrative determination that FWCC's statement that the agency does not regulate cats because they are a domestic species is an agency statement defined as a rule, in violation of §120.54(1)(a).[120] Under the second type of challenge, the FWCC might take steps to begin rulemaking to adopt the policy as a rule, in which case the challenging citizen or group could then challenge the proposed rule as an invalid exercise of delegated legislative authority which modifies or contravenes the specific provisions of law implemented. Additionally, a citizen has standing to intervene as a party in any ongoing administrative proceeding involving decisions which affect substantial interests, upon the filing of a verified pleading asserting that the activity will injure natural resources of the state.[121] Thus, there are a number of ways in which citizens can take steps to force the FWCC to live up to its duty to protect and conserve Florida's native wildlife from the impacts of free-roaming cats.

2. Animal Cruelty Laws

In addition to wildlife protection laws, the Florida Legislature has enacted statutes prohibiting cruelty to animals. For example, it is a first degree misdemeanor, punishable by a fine of up to $5,000 for a person to deprive an animal of necessary sustenance or shelter.[122] It is also a first degree misdemeanor, punishable by a fine of up to $5,000 or imprisonment, or both, for a person who "is the owner or possessor, or has charge or custody, of any animal" to abandon that animal "in a street, road, or public place without providing for the care, sustenance, protection, and shelter" of the animal.[123] "Owner" is defined to include "any owner, custodian, or other person in charge of an animal."[124]

Persons who trap cats for the purpose of TNR have possession, charge, or custody of those animals, and therefore are the owners under Florida law. When those persons subsequently release the cats back into the wild, they are abandoning them. Even cats living in established colonies which are cared for regularly by care givers do not receive the level of care considered humane for domestic animals. They do not have shelter, they do not all receive regular

120. FLA. STAT. § 120.56(1)(a), (4)(a) (2002); *id*. at §120.52(8)(c).
121. FLA. STAT. § 403.412(5) (2002).
122. FLA. STAT. § 828.12(1) (2002).
123. FLA. STAT. § 828.13(1)(a), (3) (2002).
124. FLA. STAT. § 828.13(1)(b) (2002).

vaccinations, and if a cat does not show up to feed because it is injured or sick, it is likely that no one will take the time to try to find it. Most cats that are put through TNR are truly free-roaming, and no one controls where they go or when, or what subsequently may happen to them after they are released.

C. Local Government Ordinances

Most, if not all, counties and municipalities in Florida have enacted animal control ordinances, and thereby regulate domestic animals in their respective jurisdictions. Unfortunately, most fail in several ways to adequately protect the public or native wildlife from impacts by free-roaming cats. Like Volusia County in the *Loggerhead Turtle* cases, these local governments need to be aware that they could be found in violation of the ESA for allowing the take of endangered species by permitting cat colonies to be maintained, or if their animal control ordinance is deemed not to be specifically intended to protect endangered species from free-roaming cats in their jurisdiction. Furthermore, local governments should be aware of the tort liability they could face if a person contracts rabies or other disease from a cat that is a member of a cat colony registered in that county or municipality. Many local governments are grappling with these issues recently, as well-meaning citizens push for ordinances permitting TNR and cat colonies. Some Florida local governments that have enacted ordinances which permit establishment and maintenance of cat colonies include Brevard County[125], Gilchrist County[126], Okaloosa County[127], and Palm Beach County[128], although there may be others. An Alachua County ordinance implicitly sanctions feral cat colonies, though with no regulatory oversight, by explicitly reserving for the county the right to impound a feral cat colony if the animals create public health and safety concerns, or a public nuisance.[129]

The Brevard County ordinance mentioned earlier in this paper allows feral cat colonies to be established and registered with the county, and contains a provision for the county to establish a fund or provide services to offset costs of TNR.[130] Each cat that is put through TNR must have its ear tipped or be given some other distinguishing mark to identify it as a colony cat.[131] If a colony cat

125. BREVARD COUNTY, FLA., CODE OF ORDINANCES § 14-64 (1999).
126. GILCHRIST COUNTY, FLA., CODE OF ORDINANCES § 14-38 (2000).
127. OKALOOSA COUNTY, FLA., CODE OF ORDINANCES § 5-31 (2001).
128. PALM BEACH COUNTY, FLA., CODE OF ORDINANCES § 4-8 (1998).
129. ALACHUA COUNTY, FLA., CODE OF ORDINANCES § 72-24 (1999).
130. BREVARD COUNTY, FLA., CODE OF ORDINANCES § 14-64(a) & (b) (1999).
131. *Id*. at § 14-64(d)(8).

is picked up by the county animal services and enforcement agency, it is returned to the colony.[132] Colony care givers must make arrangements for the colony to be fed regularly, for sterilizing all cats that can be captured, vaccinating all cats that can be captured, and must make every attempt to sterilize kittens over eight weeks of age, remove kittens from the colony for adoption, remove sick or injured cats for veterinary care, and maintain records.[133] The ordinance further provides that if a feral cat care giver fails to comply with the requirements of the ordinance, the county animal control agency will attempt to resolve the situation prior to removal of the animals.[134] Brevard County's ordinance does not require the cats be contained so they cannot roam free. Furthermore, the ordinance does not require that all cats be sterilized, vaccinated, or removed if they are sick, it just requires that care givers "make every attempt" to do this, or that they do this for all the cats that "can be captured."

Another local ordinance that affirmatively sanctions free-roaming cats is that of Orange County. In one section the county prohibits persons having charge, care, custody or control of an animal from allowing that animal to run at large upon any public property or off the premises of the owner.[135] However, in another section the county defines "at large" as (1) "a dog off the owner's premises, not under a person's control by means of leash, cord or chain..."; or (2)"a cat which does not exhibit identification by a collar and a current county rabies license tag."[136] Thus, while Orange County's ordinance would prohibit cats without a county rabies tag from roaming free, it fails to place the same restriction on free-roaming cats that are wearing a rabies tag.

Likewise a Monroe County ordinance makes it unlawful for "any owner or keeper of an animal *other than a domestic cat* willfully or negligently to allow the animal to run at large on public property or on any private property of another without permission of the property owner."[137] This ordinance makes it permissible for owners of cats to allow their animals to roam free. An Alachua County ordinance defines "physical control" as "immediate and continuous control of a dog" but not a cat.[138] As mentioned earlier in this paper, some 65% of cat owners allow their cats to roam free at least part of the time. Though they may be owned and well-fed, all cats are

132. *Id*. at § 14-64(c).
133. *Id*. at § 14-64(d)(1)-(9)
134. *Id*. at § 14-64(f).
135. ORANGE COUNTY, FLA., CODE OF ORDINANCES § 5-33 (1995).
136. *Id*. at § 5-29.
137. MONROE COUNTY, FLA., CODE OF ORDINANCES § 3-7(1) (2001) (emphasis added).
138. ALACHUA COUNTY, FLA., CODE OF ORDINANCES § 72.02 (2000).

predators by instinct, and owned cats impact Florida's wildlife just as feral cats do.

In contrast to these ordinances which sanction free-roaming cats, is that of the City of Ormond Beach, which states that "it shall be the duty of the animal control officer to apprehend any dog or cat found running at large and to impound such dog or cat."[139] The ordinance goes on to state that "the city shall establish and operate...a suitable place for the impounding, care and final disposal of all dogs and cats picked up."[140] A Volusia County ordinance also applies to free-roaming cats. The ordinance defines "animal" to mean both dogs and cats, and requires animal owners to keep their animal leashed while the animal is off the real property limits of the owner.[141] Additionally, the Volusia County ordinance defines "stray" as any "unlicenced and unattended animal off the premises of its owner," and all strays are considered public nuisance animals.[142] Consequently, an owner whose animal is determined to be a stray, and therefore a public nuisance, is subject to a civil penalty of up to $500.[143]

VIII. CONCLUSION

Florida is a state with many native endangered and threatened species. Some, like the Lower Keys marsh rabbit, Key Largo woodrat and some subspecies of beach mice, are teetering on the edge of extinction. Florida also has an enormous population of non-native, free-roaming cats. Ironically, the cats, rather than the native wildlife, seem to have the more vocal support. Proponents of TNR and feral cat colonies have exerted tremendous pressure on local officials to enact ordinances permitting the establishment and maintenance of cat colonies, and in some cases, even to spend taxpayer dollars subsidizing the programs. Unfortunately, many well-intended friends of felines are determined to ignore the evidence that proves such programs do not work, are inhumane to the cats, dangerous to the public, and lethal to Florida's native wildlife.

But the socio-political and practical implications of the cat issue cannot be solved by simply outlawing TNR and killing all the cats tomorrow. First of all, local politicians are sensitive to the desires of the citizens of their districts, and rightly so. Second, it is truly a tragedy that so many thousands of perfectly healthy companion

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139. ORMOND BEACH, FLA., CODE OF ORDINANCES § 5-70 (1991).
140. *Id*.
141. VOLUSIA COUNTY, FLA., CODE OF ORDINANCES §§ 14-31, 14-46 (1994).
142. VOLUSIA COUNTY, FLA., CODE OF ORDINANCES § 14-31 (1994).
143. *Id*. at §§ 14-48, 14-32.

animals are put to death each year for no reason other than that they happen to be homeless and unwanted. This is a human-caused, human perpetuated problem which requires a human solution. Third, if cat colony proponents were to immediately stop practicing TNR and maintaining colonies, the large population of cats would remain, except that no one would be trapping them for sterilization and vaccination, or feeding them or trying to find homes for them.

Cat colony proponents have argued for years that the traditional method of "trap and kill" does not work. The homeless pet population explosion of recent decades indicates that they are right. Cat lovers would love to see this problem solved. So would bird lovers and native wildlife lovers and recovery biologists working with dwindling populations of endangered species. One thing that all these groups agree on is that the problem begins with irresponsible humans who neglect to sterilize their pets, and who abandon unwanted cats and dogs, kittens and puppies. The problem as well as the solution lies with human behavior, and human behavior can be altered.

At the state and local levels, there must be a pervasive, loud, continuing campaign to educate the public about the impacts of free-roaming cats on Florida's wildlife and human health. The campaign must include public service announcements on television, radio and in newspapers, as well as education in public schools. New ideas, like the campaign to not litter, or to recycle, catch on if they are continually put before the public, and especially if they are taught to children in schools. But the feral cat issue has not been a popular one with either state or local public officials. Past efforts to inform people and encourage sterilization and discourage abandonment have been half-hearted at most. Incentives for sterilization should be so great, and penalties for abandonment should be so severe, that people would take notice and no longer ignore the law.

In addition to public education, the FWCC should take the lead in enforcing the existing statutes that prohibit release of non-indigenous species or organisms likely to spread disease. The FWCC must fulfill its duty to the people of Florida to protect native wildlife from the negative impacts of free-roaming cats. The FWCC should inform local governments that by permitting cat colonies to be established and TNR to be performed in their jurisdictions, they are violating state wildlife laws. In turn, local governments should enact ordinances that set strict control, license, and vaccination requirements for cats as well as dogs. Local governments should post signs in public parks warning that it is illegal to feed stray cats and dogs as well as to feed wildlife. Local governments should enforce mandatory sterilization of all cats and dogs placed for

adoption at shelters. Finally, local governments should establish substantial economic disincentives, in the form of double or treble licensing fees, for owners who do not wish to sterilize their pets.

Concurrent with these efforts, the state should inform the public that it intends to take eradication action at some set future date. When that date arrives, the public will have been warned, and the state should make good on its promise, engaging the resources of local government animal control agencies and animal shelters. But efforts aimed at eradication can be successful only if the public is properly prepared first, and even then eradication will likely have to be continuously applied, while at the same time keeping up with the public education campaign and enforcement of state statutes and local government ordinances aimed at reducing the flow of new cats into the wild. The recommendations in this section may seem drastic, but the situation is critical and calls for serious and immediate action. If state and local governments continue to ignore this crisis and pass the buck, the feral cat population will continue to grow. It is up to the human population to decide how many native Florida species we will let become extinct, and how big a public health problem we will allow free-roaming cats to become.

BOOK REVIEW

KAREN M. SMITH

Daniel Fitzpatrick, *Land Claims in East Timor.*

In August 1999, the East Timorese populace voted by an 80% majority for independence from their Indonesian occupiers.[1] Following this vote, the Indonesian military rampaged throughout the countryside, destroying infrastructure and displacing the populace.[2] Besides the human tragedy, there is a little-considered effect of this wholesale destruction - that of the destruction of a system of land ownership.[3]

East Timor has had a varied history. For several hundred years, it was a Portuguese colony.[4] In 1975, the Portuguese left East Timor in response to pressure from the United Nations.[5] As a result, rival East Timorese factions battled for control of the tiny country.[6] When it became clear the Uniao Democratica Timorense and Apodeti parties were losing their bid for political control of East Timor, they petitioned Indonesia for military assistance.[7] In response, Indonesia invaded and subsequently occupied East Timor, claiming it as a subject state.[8]

Currently, the East Timorese government is being administered by the United Nations Transnational Authority in East Timor (UNTAET).[9] UNTAET's mission includes that of establishing an interim land claims administration.[10] However, making this mission more difficult is that there are many subtle issues involved in untangling the web of land claims in East Timor. First, there are claims by the traditional occupiers of land, those who were dispossessed by the Portuguese colonials in the early 1700s.[11] There are also the claims of both native East Timorese and Portuguese, who own land under Portuguese title.[12] During the 24-year Indonesian occupation, Indonesian land law was applied, and thus there are many individuals, both Indonesian nationals and native

1. DANIEL FITZPATRICK, LAND CLAIMS IN EAST TIMOR 1 (Asia Pacific Press 2002).
2. *Id.*
3. *Id.*
4. *Id.* at 33.
5. *Id.* at 49.
6. *Id.*
7. *Id.* at 49-50.
8. *Id.* at 50, 198.
9. *Id.* at 3.
10. *Id.*
11. *Id.* at 35.
12. *Id.* at 33-34.

East Timorese, who own land under Indonesian title.[13] Finally, there are the current occupiers of property. This category includes those who have adversely possessed abandoned property since the military action of August 1999, and also those, such as foreign humanitarian aid groups, who entered into land transaction contracts with one purporting to be the owner of the property in question.[14]

"Land Claims" considers the claims of each of these competing groups, taking an unbiased look at the position of each. At first blush, it would seem that the claims of the Indonesian nationals would bear little consideration. After all, Indonesia was a hostile occupier. However, Indonesia claims they were asked to intervene by the government of East Timor, and thus were not a hostile occupying force.[15] Much of the world community discounts this argument, as the request for Indonesian intervention was made by a political faction, not by the populace at large or even by the ruling government.[16] However, Indonesia, in negotiating with East Timor regarding reparation for the damage done by its occupation, refuses to move from its stated position, and this has, in turn, stalled the creation of a land claims administration system.[17]

Equally problematic are the claims of current occupiers of property. Fitzpatrick gives an example of a hotel in Dili, the capitol of East Timor.[18] The hotel, during Indonesian occupation, was used as an army barracks. After the United Nations took over the administration of East Timor, a foreign company entered onto the hotel property and made many improvements to the property.[19] The foreign company claims it is lawfully occupying the land under a lease executed by an agent of the Portuguese titleholder.[20] However, the status of the Portuguese title is unknown, as is the date of the lease.[21] The foreigcompany had, in reliance on the purported lease, made several million dollars worth of improvements to the property, and isre unsurprisingly resisting UNTAET's attempts to evict them.[22]

Finally, there are the claims of traditional holders of land. East Timor, before Portuguese colonization, had a patriarchal, clan-type

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13. *Id.* at 44-45.
14. *Id.* at 65.
15. *Id.* at 198.
16. *Id.* at 49-50.
17. *Id.* at 198.
18. *Id.* at 161-62.
19. *Id.* at 161.
20. *Id.* at 162.
21. *Id.*
22. *Id.*

society, with "liurai"[23] at the heads of the clans.[24] The clans held tracts of land, which were administered by the liurai as head of the clan. However, at the time of Portuguese occupation, the colonials evicted these clans from their ancestral land, taking the rich farming land for the creation of plantations.[25] Today, these clan groups are asserting ancient claims to the land.[26] Their claims, while clearly worthy, are nearly impossible to prove by conventional means, as there was no written deed or other proof of ownership of the land.[27]

The business of life goes on, even in countries as unstable as East Timor. The transfer of land for myriad purposes is part of that business. East Timor's lack of an effective and permanent system of land administration has slowed, but not halted, land transactions. As illustrated by Fitzpatrick, there are no easy answers to the land claims problems facing the fledgling East Timorese government. The United Nations has refused to establish a land claims commission, citing concerns that the regulation of private land transactions is a decision best left to a democratically elected government. "Land Claims" presents the problems and possible solutions for resolving these land claim issues in East Timor, in a clear and unbiased manner.

23. "Liurai" translates loosely as "king" or "lord." *Id.* at 29.
24. *Id.* at 29-30.
25. *Id.* at 35.
26. *Id.* at 204-05.
27. *Id.*

2003 RECOMMENDED WEB SITES FOR WATERSHED MANAGEMENT

CYNTHIA NORGART*

Table of Contents

I. INTRODUCTION

Most practitioners have become very familiar with researching the internet's vast quantity of information with the convenient click of the mouse. In the past several years, the *Journal of Land Use and Environmental Law* has attempted to simplify the overwhelming sea of information through its annual website review. Past reviews have provided outlines on websites focusing on Wetlands law, Oceans and Coastal law, and Endangered Species. This year the *Journal's* review will present an overview of websites on Watershed Management.

A watershed is the land area that drains to a given body of water.[1] Thus, we all live in a watershed. The protection of watersheds is vital as they supply our drinking water, contain critical habitat for plants and animals, and provide recreation.[2] Watershed Management Programs are intended to protect, manage and restore watersheds. The websites listed below are designed to provide information and tools on Watershed Management so that the public and government officials can make better decisions to help preserve this important resource.

* J.D., The Florida State University College of Law (expected 2004); B.A., The University of Florida (2000).

1. http://www.cwp.org/whats_a_watershed.htm
2. *Id.*

II. WATERSHED MANAGEMENT

A. Federal Government Agencies

- Environmental Protection Agency (EPA), Office of Wetlands, Oceans, and Watersheds / URL: http://www.epa.gov/owow/watershed/

This is the EPA's main web page on watersheds. This site contains many links to a variety of watershed topics. The major categories include "Intro to Watersheds," "Regulations/Policy," "Watershed Academy," "Watershed Projects," "Watershed Funding," and "Watershed Links." These links provide a lot of useful information including what a watershed approach is, online training in watershed management, information on watershed projects and groups, as well as links to state watershed management programs.

This web site also provides several graphic links including a Watershed Information Network which presents a roadmap to information and services for protecting and preserving water resources. There is also a link to a calendar of national conferences on watershed protection. Another link provides information on how to get involved locally through the EPA's "Adopt Your Watershed" campaign. "Surf Your Watershed" allows you to locate your watershed and learn more about it.

- EPA Region 4 Watersheds and Nonpoint Source Section // URL: http://www.epa.gov/region4/water/watersheds/ index.html

This page provides information on projects in the Southeast, Region 4, which includes Florida. The EPA's site includes links to all other regions as well. Included is a map of targeted watersheds and basins in Region 4.

- United States Department of Agriculture (USDA), Natural Resources Conservation Service (NRCS), Conservation Programs // URL: http://www.nrcs.usda.gov/programs/

There are three programs listed on this webpage that are relevant to Watershed Management. These include "Watershed Protection and Flood Prevention," "Watershed Rehabilitation," and "Emergency Watershed Protection."

"Watershed Protection and Flood Prevention" has links to "Program Information," "Watershed Surveys and Planning," "Success Stories and Reports," "Watershed Status Reports," "National Watershed Manual," and "Watershed Project Locations."

"Watershed Rehabilitation" includes links to "Reinvesting in America's Watersheds," "Dams in Danger," "Keeping Dams Safe," and "Links to Other Sites and Information."

"Emergency Watershed Protection" provides links to "EWP-Floodplain Easement Sign Up Information," "EWP Forms," and "EWP Draft Environmental Impact Statement."

- United States Geological Survey (USGS), Office of Water Quality // URL: http://water.usgs.gov/owq/

This site provides coordination in the development of programs that address water quality issues. This includes information on application of techniques for the collection, analysis, and interpretation of water-quality data. There are links to national programs addressing water quality as well as information on the quality of the nation's surface and ground water resources. Some other links on this site include "Publications," "Data," "Labs," "Techniques," "USGS Water Resources," and "Other Sources."

B. Florida Government

- Florida Department of Environmental Protection (DEP), Watershed Management // URL: http://www.dep.state.fl.us/water/watersheds/index.htm

This site's main links include "About Watershed Management," "Surface Water Improvement and Management Program," "Watershed Management's Geographic Information Systems," and "Watershed Monitoring." All of these programs focus on Watershed management in Florida. There are also several links to many different categories of watersheds and watershed management programs including "Bioassessment," "Drinking Water," "Ground Water," "Wastewater," "Water Policy," "Watershed Monitoring," and "Water Reuse."

C. Florida Water Management Districts

All of these sites provide local information on water management issues in each district in Florida.

- Northwest Florida Water Management District // URL: http://www.state.fl.us/nwfwmd/

- Southwest Florida Water Management District // URL: http://www.swfwmd.state.fl.us

- South Florida Water Management District // URL: http://www.sfwmd.gov

- St. Johns River Water Management District // URL: http://sjr.state.fl.us

- Suwannee River Water Management District // URL: http://www.srwmd.state.fl.us

D. Non-governmental Organizations

- Center for Watershed Protection // URL: http://www.cwp.org/

This informative, well-designed site provides local governments, activists, and watershed organizations with the technical tools for protecting watersheds. It provides information on what a watershed is, as well as a watershed quiz. This site provides links to its strategy for watershed protection including "watershed planning," "watershed restoration," "stormwater management," "watershed research," "better site design," "education and outreach," and "watershed training."

- River Network // URL: http://www.rivernetwork.org/

The purpose of this site is to help people understand, protect and restore rivers and their watersheds by linking them with river information, services and resources. The River Network supports grassroots river and watershed conservation groups. Among the special features of this site are "Resource Library," "Directory of River Groups," "Funding Sources," "Calendar of River Events," "River Jobs," "State-by-State Clean Water Act Info," "Books and newsletters," and a "List of Current River Network Partners."

- The Watershed Management Council // URL: http://www.watershed.org/

The Watershed Management Council is a non-profit education organization dedicated to the advancement of the art and science of watershed management. This site provides links to information about the council, how to join the council, and how to sign up to receive the council's newsletter.

- The Association of State and Interstate Water Pollution Control Administrators (ASIWPCA), Watershed Management Program // URL: http://www.asiwpca.org/programs/mgmt.htm

The ASIWPCA is an independent organization of State and Interstate water program managers. This site provides information on watershed management, as well as a link to a "Watershed Action Guide" to assist local communities in developing Watershed Management Plans.

RECENT DEVELOPMENTS

BENJAMIN B. BUSH

Table of Contents

I. INTRODUCTION

This article summarizes recent developments in federal and state environmental and land use case law. This article also provides an update to the Apalachicola-Chattahoochee-Flint River Basin Water Dispute between Florida, Georgia, and Alabama that has been ongoing since the 1980's.[1] For more information on environmental issues, the reader should consult the official websites of the United States Environmental Protection Agency,[2] the Florida Legislature,[3] the Florida Department of Environmental Protection,[4] and the Department of Community Affairs.[5] Another source that might be useful to the reader is the website of the Environmental & Land Use Law Section of the Florida Bar.[6]

II. FEDERAL DECISIONS

Bordon Ranch Partnership v. United States Army Corp of Engineers, 123 S.Ct. 599, *aff'g* 261 F.3d 810 (9th Cir. 2001).

On December 16, 2002, the Supreme Court affirmed the Ninth Circuit Court of Appeals decision in *Bordon Ranch*.[7] The *Bordon Ranch* case dealt with alleged Clean Water Act[8] ("CWA") violations

1. Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83, 86 (2000).

2. http://www.epa.gov

3. http://www.leg.state.fl.us This article does not discuss legislation that is before the Florida Legislature because at the writing of this article the Legislature is still in session.

4. http://www.dep.state.fl.us

5. http://www.dca.state.fl.us

6. http://www.eluls.org

7. The circuit court decision was affirmed without a written opinion by an equally divided Court with Justice Kennedy taking no part in the consideration or decision of the case. *Bordon Ranch P'ship v. U.S. Army Corp of Eng'r,* 123 S.Ct. 599, *aff'g* 261 F.3d 810 (9th Cir. 2001).

8. 33 U.S.C. §§ 1251-1387 (1972).

in wetlands under the United States Army Corp of Engineers ("Corp") authority over "dredge and fill."[9]

Angelo Tsakopoulos, purchased the 8400-acre Bordon Ranch, the main use of which had been rangeland for cattle grazing.[10] Portions of the ranch had hydrologic features that created vernal pools[11] and swales[12] most of which were attached to navigable waterways.[13] These features were found to be caused by a "clay pan" beneath the soil surface that trapped water.[14]

Tsakopoulos wanted to convert the land to vineyard and orchards, divide the land, and sell off parcels.[15] However, the hydrologic features prevented the possibility of vineyards and orchard being successful because the roots of these plants could not penetrate the clay pan.[16] Tsakopoulos engaged in a technique called "deep ripping," which involved vertically inserting four to seven foot rods into the soil and then pulling them with a tractor to slice the soil open.[17] These rods were long enough to penetrate the clay pan the gashes in the soil drained the wetlands.[18]

Tsakopoulos engaged in these activities without a permit from the Corp due to an ongoing dispute with the Corp over whether it had the authority to regulate this technique.[19] At one point, the parties reached an agreement that Tsakopoulos would discontinue any deep ripping on this land, however, not long after the agreement, the deep ripping continued.[20] The Corp issued a regulatory guidance letter that distinguished plowing from deep ripping techniques because of the destruction that deep ripping caused to the hydrologic characteristics of the land.[21] The Corp reasoned that this allowed it to regulate the use of deep ripping techniques.[22]

Tsakopoulos challenged the Corp's authority by filing suit.[23] The Corp counterclaimed for injunctive relief to stop Tsakopoulos from deep ripping and for statutory penalties under the Clean

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9. 33 U.S.C. § 1344.
10. *Bordon Ranch P'ship v. U.S. Army Corp of Eng'r*, 261 F.3d 810, 812 (9th Cir. 2001).
11. Vernal pools form during the rainy season but are dry for most of the summer. *Id.* at 812.
12. Swales are wetlands that are sloped to allow for water flow and filtration. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 812-13
20. *Id.* at 812.
21. *Id.*
22. *Id.*
23. *Id.* at 813.

Water Act ("CWA").[24] The district court ruled that Tsakopoulos violated the CWA.[25] The district court awarded $1,000,000 in statutory penalties, and also ruled that there were 348 violations.[26] The district court did give Tsakopoulos the choice of only paying $500,000 plus mitigation for the damage done, but he declined.[27]

The Ninth Circuit looked to cases that analyzed the accidental fall back and gold mining.[28] The court analogized the mixing of the soils with the accidental fall back from dredging and "addition" of "pollutants" from the return of soil due to placer gold mining operations.[29] The court stated that even though the soil that was redeposited, was of the same type, and from the same area, it qualified as a pollutant.[30] The court went on to reason that the deep mixing of the soil was the exact same as the redeposit in *Rybachek*.[31] Also, the court stated the prongs qualified as a discrete point source.[32] Therefore, the court ruled that the deep ripping technique was a violation of the CWA.[33]

The court stated that the deep ripping technique did not qualify under the express farming exception because of the change in hydrologic characteristics.[34] The court also analyzed the statutory penalties that the district court doled out.[35] Tsakopoulos argued that the penalties in the CWA only allowed a maximum of $25,000 *per day*.[36] The court ruled that this was against the intent of the CWA and that penalties were to be assessed up to $25,000 *per violation*.[37] The court concluded that the $1.5 million that was awarded against the petitioner was proper, though it remanded the case for recalculation of the penalties because a portion of the penalties was tied to the vernal pools.[38]

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24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 814 (analyzing *Rybachek v. United States Envtl. Prot. Agency*, 904 F.2d 1276 (9th Cir. 1990) and *United States v. Deaton*, 209 F.3d 331 (4th Cir. 2000)).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 815.
33. *Id.*
34. *Id.* at 815-16.
35. *Id.* at 816-17.
36. *Id.* at 817.
37. *Id.* at 818.
38. The court reasoned that, in light of *Solid Waste Agency of Northern Cook County v. United States Army Corp of Engineers*, 531 U.S. 159 (2001), the isolated vernal pools did not fall within the regulatory ambit of the CWA. *Id.* at 812.

Judge Gould dissented to the decision.[39] Judge Gould reasoned that the deep ripping was nothing more than plowing.[40] He stated that the mixing of the soil through deep ripping was nothing more than the same type of mixing of the soil achieved through plowing.[41] He called for a more explicit indication from Congress as to whether the CWA was to cover the "deep plowing" that was performed by Tsakopoulos.[42]

The Supreme Court upheld the decision by a split decision.[43]

McAbee v. City of Fort Payne,
318 F.3d 1248 (11th Cir. 2003).

In *McAbee*, the Eleventh Circuit Court of Appeals ruled that state Clean Water Act ("CWA") provisions must be "roughly comparable" to the federal provisions in order to preclude citizen suits.[44] Since rough comparability between the different provisions did not exist, a third-party citizen suit would not be precluded even though administrative action had already been taken against the defendant.[45]

The city of Fort Payne, Alabama, ("City") held a CWA permit for its wastewater treatment plant.[46] The Alabama Department of Environmental Management ("ADEM") filed an enforcement order and penalty of $11,200 fine pursuant to its delegated authority under the CWA.[47] The Alabama statute did not require notice to the public prior to the administrative action.[48] The treatment plant was only required to give *post hoc* notice that did not include the location of the plant nor the waterways affected.[49] The notice that was actually given did not provide information about the process for third parties to contest the penalty.[50]

McAbee, a riparian landowner downstream from the treatment plan, filed a suit claiming that the City was in further violation of its permit limitations.[51] The City requested summary judgment

39. *Id.* at 819.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Borden Ranch P'Ship v. United States Corp of Eng'rs*, 123 S.Ct. 599 (2002).
44. *McAbee v. City of Fort Payne,* 318 F.3d 1248, 1257 (11th Cir. 2003).
45. *Id.*
46. *Id.* at 1250.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*

claiming the CWA precluded citizen suits when the enforcement agency, ADEM in this case, was diligently regulating the permit holder.[52] The district court denied the motion for summary judgment after analyzing the comparability of the Alabama statute to the federal scheme.[53]

The Eleventh Circuit analyzed the citizen suit provision of the federal CWA[54] looking to the specific language of the statute, the purposes behind the statute, and the split between the circuits that currently exists on this issue.[55] The court found that, under the federal CWA, a citizen suit would be precluded unless two conditions are met.[56] First, the implementing agency must be diligently prosecuting violations of the CWA.[57] Second, the court stated that the state enforcement provisions must be "roughly comparable" to the federal scheme.[58] However, the court recognized that there was a split between the circuits as to what constitutes comparability.[59]

The court recognized that Congress intended that the States were to be the primary enforcement arm of the CWA.[60] Because of this, the court reasoned that the state regulatory scheme need not be exactly the same but only required "rough comparability."[61] The court went on to note that the citizen suit aspect was also important in supplementing the enforcement efforts of the government by allowing enforcement where the government is not willing to act.[62] The court noted that the First Circuit required comparable penalties, access to the penalties, and the overall scheme must roughly regulate the same violations as the CWA.[63] The court noted that the Eighth Circuit adopted the First Circuit's method but added the requirement of citizen participation.[64] The court noted that the Ninth Circuit did not evaluate comparability respective to the overall statutory scheme but required comparability under the specific section contested.[65] Lastly, the court noted that the decision

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52. *Id.*
53. *Id.*
54. 33 U.S.C. § 1319(g)
55. *McAbee*, 318 F.3d at 1251-54.
56. *Id.* at 1251.
57. *Id.*
58. *Id.*
59. *Id.* at 1252-54.
60. *Id.* at 1252.
61. *Id.*
62. *Id.*
63. *Id.* at 1252-53.
64. *Id.* at 1253.
65. *Id.*

of the Sixth Circuit also required overall comparability between the state statute and the federal scheme.[66]

The Eleventh Circuit announced that its standard would be that comparability must be viewed in light of "each class of state-law provisions."[67] The Eleventh Circuit specifically pointed to public participation provisions, penalty assessment provisions, and judicial review processes as the classes of state law provisions that needed to be comparable to their federal law counterparts.[68] The court stated that requiring courts to compare the overall statutory schemes would be too burdensome and could result in uncertainty to possible litigants as to whether there was comparability.[69] The court ruled that the Alabama scheme was not comparable, because there was no prior public notice requirement, no right to petition for a hearing, no notice of a hearing, and no judicial review if a hearing was not held.[70] Therefore, the court affirmed the district court's decision and allowed the citizen suit to continue.[71]

III. FLORIDA DECISIONS

Caribbean Conservation Corporation v. Florida Fish and Wildlife Conservation Commission, 2003 WL 124536 (Fla. January 16, 2003).

The Caribbean Conservation Corporation ("Corporation") brought suit against the Florida Fish and Wildlife Conservation Commission ("FWCC") seeking a declaratory judgment as to whether certain statutory sections, which require the FWCC to comply with Chapter 120, *Florida Statutes*, usurped of constitutionally granted power.[72] The Supreme Court of Florida analyzed the history of the creation of the FWCC, including the duties that are granted to it constitutionally and statutorily.[73] The Court found that the named statutes dealing with species of special concern are unconstitutional but that statutes requiring adherence to Chapter 120 relating to endangered or threatened were constitutional.[74]

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66. *Id.*
67. *Id.* at 1256.
68. *Id.*
69. *Id.*
70. *Id.* at 1256.
71. *Id.* at 1257.
72. *Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Comm'n*, 2003 WL 124536, *1 (Fla. January 16, 2003).
73. *Id.*
74. *Id.* at *10.

The Court analyzed the creation of the FWCC to discern where its duties arose.[75] The FWCC was created by a constitutional amendment in 1998.[76] This amendment combined the Florida Game and Fresh Water Fish Commission ("Game Commission") and the Marine Fisheries Commission to create the FWCC.[77] The Court noted that the Game Commission was a constitutionally created agency but that the Marine Fisheries Commission was created statutorily.[78] The Court found that the Marine Fisheries Commission had exclusive jurisdiction over all marine life except endangered species.[79] In *State v. Davis*,[80] the Court stated that this meant that the Marine Fisheries Commission had jurisdiction over endangered species; however, the jurisdiction was shared with the Department of Environmental Protection ("DEP").[81] The constitutional amendment that created the FWCC included all duties that the Game Commission and Marine Fisheries Commission each held.[82]

The Legislature then enacted Chapter 99-245, which required the FWCC to adhere to Chapter 120 with respect to any statutory duty that it exercised.[83] This statute was challenged as a usurpation of the constitutional powers of the FWCC.[84] Other statutes that required the FWCC to comply with Chapter 120 when dealing with endangered or threatened species were also challenged.[85]

The circuit court stated that the statutory sections were constitutional because the FWCC lacked full authority over endangered or threatened species, rather, it shared authority with DEP.[86] The First District Court of Appeals approved the decision of the circuit court following a different interpretation of *State v. Davis*.[87]

The Supreme Court of Florida reviewed the text and legislative history of the constitutional amendment.[88] The Court found that

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75. *Id.* at *2-5.
76. *Id.* at *3-5.
77. *Id.* at *3-4.
78. *Id.* at *2
79. *Id.*
80. *State v. Davis*, 556 So.2d 1104 (Fla. 1990).
81. *Caribbean*, 2003 WL 124536 at *2.
82. *Id.* at *3-4.
83. *Id.* at *4-5.
84. *Id.*
85. *Id.*
86. *Id.* at *5-6.
87. *Id.* at *6-7.
88. *Id.* at *7-10.

the text of the amendment was seemingly ambiguous.[89] The legislative history, however, explicitly showed that the amendment did not grant constitutional authority to the FWCC over endangered or threatened species.[90] The Court also agreed with the First District's interpretation of *Davis* in that the FWCC had authority to regulate endangered or threatened species because of incidental effects that would be felt due to its proper exercise of its authority.[91] The Court ruled that the statutory sections at issue were constitutional except that Chapter 120 did not have to be adhered to when regulating species of special concern.[92]

Florida Department of Agriculture and Consumer Services v. Haire, 836 So.2d 1040 (Fla. 4th DCA 2003).

In *Haire*, the Fourth District Court of Appeals decided that the statute requiring the destruction of all citrus trees within 1900-foot radius of a tree infected with citrus canker is a valid exercise of the state's police power.[93] The court also ruled that because citrus canker posed imminent danger to the citrus industry, the state need not give a pre-deprivation hearing before summarily destroying the citrus trees within the 1900-foot radius.[94]

In 1999, the Department of Agriculture and Consumer Services ("Department") reviewed a study that concluded that the rule calling for the destruction of all citrus trees within 125 feet of an infected tree was not sufficient to eradicate a newly discovered strain of citrus canker.[95] The Department proposed adopting a rule that would expand the destruction radius to 1900 feet from the infected tree.[96] Following litigation, the Department was enjoined from enforcing the rule during an administrative review of the rule.[97] During the administrative review period, the Legislature enacted 2002-11, Laws of Florida, which statutorily created the 1900-foot destruction radius.[98]

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89. *Id.* at *8.
90. *Id.* at *9.
91. *Id.* at *10.
92. *Id.*
93. *Florida Dep't of Agric. and Consumer Serv. v. Haire*, 836 So.2d 1040, 1054 (Fla. 4th DCA 2003).
94. *Id.* at 1056-60.
95. *Id.* at 1044.
96. *Id.*
97. *Id.*
98. *Id.*

The Appellees amended their current action to add claims for a declaratory judgment as to the constitutionality of 2002-11.[99] The trial court declared the act unconstitutional and enjoined the Department from searches pursuant to area-wide warrants that had been electronically signed.[100] The trial court also enjoined the Department from destroying any trees that were not visibly infected with citrus canker.[101]

The Fourth District analyzed the constitutionality of the act.[102] The court noted the importance of the citrus industry on Florida's economy and stated that it was within the state's police powers to protect Florida's economic welfare.[103] The court analyzed two other decisions where the respective courts had reasoned that the eradication of citrus canker was within the police power.[104] Under these cases, both courts upheld a destruction radius of 125 feet.[105] Both the *Nordmann* and *Denney* courts evaluated the *Corneal* decision,[106] which stated that if a harm was imminent, then the state could summarily destroy property to protect the industry.[107] Both of these courts ruled that citrus canker posed an imminent threat and the state could summarily destroy the infected trees and the exposed trees so long as the actions were compensated.[108] The *Haire* court also analyzed the *State Plant Board* decision[109] that concluded that pre-deprivation hearings were not required so long as the danger was imminent.[110] The *Haire* court concluded that citrus canker posed a imminent danger and, thus, it was within the police power to destroy seemingly healthy trees without a pre-deprivation hearing but that full compensation was required.[111]

The *Haire* court then analyzed whether the expansion of the destruction radius violated substantive due process requirements.[112] The court ruled that the reasonable relationship test was the appropriate test to use because the expansion was based on scientific evidence which was not adequately challenged,

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99. *Id.* at 1044-45.
100. *Id.* at 1045.
101. *Id.*
102. *Id.* at 1046.
103. *Id.* at 1047.
104. *Id.* at 1047-49 (analyzing *Nordmann v. Fla. Dep't of Agric.*, 473 So.2d 278 (Fla. 5th DCA 1985) and *Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985)).
105. *Id.*
106. *Corneal v. State Plant Bd.*, 95 So.2d 1 (Fla. 1957).
107. *Haire*, 836 So.2d at 1048.
108. *Id.*
109. *State Plant Bd. v. Smith*, 110 So.2d 401 (Fla. 1959).
110. *Haire*, 836 So.2d at 1048.
111. *Id.* at 1050.
112. *Id.*

compensation was given, and inverse condemnation claims were adequate to cover the value of the property lost.[113] The court specifically relied on the fact that the scientific evidence relied on by the Legislature was published in peer-reviewed journals.[114] Therefore, the court noted that "debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment."[115]

On the issue of damages, the court noted that the statute specifically provided for compensation for any trees destroyed.[116] The court did require that fair and full compensation be awarded by a court based on the value of the tree destroyed, but that this could be done in conjunction with the statutory compensation scheme.[117] In coming to this conclusion, the court pointed to language that the statute did not "limit the amount of any other compensation that may be paid by another entity *or pursuant to court* order."[118]

The court went on to discuss the necessity and requirements for a search warrant.[119] The court ruled that the Department was required to have a warrant before it could enter private property to search for infected trees or to search for trees that fall within the definition of "exposed."[120] The court ruled that citrus canker did not fall within the exigent circumstances exception.[121] The court also ruled that area-wide search warrants were unconstitutional under federal Supreme Court jurisprudence; however, the court did allow that multiple properties could be listed on the same warrant and still meet constitutional muster.[122] Finally, the court ruled that the judge could electronically affix his signature to the warrants but expressed reservations about the Department itself performing this task.[123]

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113. *Id.* at 1051.
114. *Id.* at 1051-52.
115. *Id.* at 1052.
116. *Id.* at 1053-54.
117. *Id.* at 1058.
118. *Id.*
119. *Id.* at 1055.
120. *Id.* at 1056-57.
121. *Id.* at 1057-58.
122. *Id.* at 1058-59.
123. *Id.* at 1059-60.

IV. ACF WATER WARS UPDATE

In 1989, a dispute arose between Florida, Georgia, and Alabama.[124] Florida and Alabama claimed that Atlanta was pulling too much water from the Chattahoochee and Flint Rivers and was polluting the water that was actually allowed to escape downstream.[125] Interstate water apportionment suits were filed in 1990.[126] Florida and Alabama were asking for a judicial apportionment of the waters of the Apalachicola-Chattahoochee-Flint river basin.[127]

In 1992, all cases were voluntarily dismissed and the three states agreed try to resolve the dispute through the Compact Procedure.[128] The United States Army Corp of Engineers ("Corp") performed a five-year, fifteen million dollar study of the ACF River Basin.[129] In 1997, the three states enacted the ACF Interstate Compact into their individual statutory schemes and Congress ratified the Compact.[130] The discussions then began and so did the collateral attacks.[131]

In 2001, Georgia circumvented the ACF Compact and petitioned the Corp for a larger volume of water to be taken for Atlanta's needs directly from Lake Sidney Lanier.[132] The Corp denied the petition and Georgia appealed.[133] The Eleventh Circuit finally ruled that Georgia's request was not appropriate because the charter that created the Buford Dam did not allow for any greater releases for drinking and municipal water than was already taking place.[134]

In the Spring of 2002, as the deadline was drawing near, the States seemed to be near an agreement.[135] However, Florida pulled out of the discussions at the last minute threatening to end the entire compact discussion process.[136] Florida was coaxed to rejoin

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124. *Deadline in water talks extended again*, ATLANTA JOURNAL-CONSTITUTION, July 31, 2001, at 6B.
125. *Id.*
126. Dustin S. Stephenson, *The Tri-State Compact: Falling Waters and Fading Opportunities*, 16 J. LAND USE & ENVTL. L. 83, 87 (2000).
127. *Id.*
128. *Id.* at 88.
129. *Id.*
130. ACF River Basin Compact, Pub. L. No. 105-104.
131. *Georgia v. U.S. Army Corps of Engineers*, 302 F.3d 1242, 1247 (11th Cir. 2002).
132. *Id.*
133. *Id.*
134. *Id.*
135. Harry Franklin, *Florida to Extend Water-Sharing Talks with Georgia, Alabama* (March 20, 2002).
136. *Id.*

the talks, though the agreement which was so close all but disappeared.[137]

Since 1997, the three States have extended the deadline for reaching an agreement thirteen different times.[138] The last extension was in January of 2003 that extended the deadline to July 31, 2003.[139] Since January, the States have agreed to dismiss and discontinue any further collateral attacks and instead focus on the agreement as a whole.[140]

Currently, discussions continue and the July 31st deadline is looming.[141] The latest meeting occurred in Bainbridge, Georgia on March 31st.[142] This meeting was merely an opportunity for the three governors to meet and become acquainted and set a date for the next round of negotiations.[143] The three governors will meet again on April 21st in Dothan, Alabama, in an attempt to set the final parameters for the apportionment of the ACF waters.[144] If the discussions fail, then the States will be headed to a long, drawn out-even more so than it already is-and costly court battle to determine who gets how much water.[145]

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137. *Id.*

138. *All Georgians have a stake in negotiations over water*, ATLANTA JOURNAL-CONSTITUTION, January 9, 2003, at 18A.

139. *Id.*

140. Bruce Ritchie, *Water fight looming State gears up for a possible legal tussle with Georgia*, Tallahassee Democrat (April 3, 2003) at 1B.

141. *All Georgians*, supra footnote 138.

142. Ritchie, supra footnote 140.

143. *Id.*

144. *Id.*

145. *Id.*

ABSTRACTS

VOLUME 18

Edward A. Fitzgerald, *The Seaweed Rebellion: Federal-State Conflicts Over Offshore Energy Development*, 18 J. LAND USE & ENVTL. L. 1 (2002).

This article addresses the conflict, commonly called the Seaweed Rebellion, between federal and state governments regarding offshore energy development on the outer continental shelf. It focuses on Florida's involvement in the conflict and follows the evolution of Florida's position from a supporter to an opponent of offshore development. The article discusses the major issues faced by administrations from Franklin D. Roosevelt through George W. Bush and the policies implemented by each. The article recommends the establishment of an ocean management program and provides suggested statutory changes to help Florida protect its coast in the future.

Blake Hood, *Transgenic Salmon and the Definition of "Species" Under the Endangered Species Act*, 18 J. LAND USE & ENVTL. L. 75 (2002).

This note considers how transgenic Salmon should be classified under the current definition of species in the Endangered Species Act. The author first considers and explains the different historical definitions for species of animals, such as: Taxonomists views of species; the Essentialists views; Darwin's theory of evolution as it relates to the definition of species; Mayr's Biological Species Concept (BCS); and other more general considerations. Following this scientific analysis, the author looks to the Endangered Species Act, its regulations, and judicial definitions of species to examine how lawmakers have defined species.

After establishing these differing views on species, the author explores how transgenic Salmon - genetically engineered salmon - fit within this legally-established view of species. Noting that transgenic Salmon, like other genetically modified fish, are regulated by the government, the author stills points out that there may be potential problems of threats posed by these genetically engineered fish to the general population of salmon.

Thusly, the author concludes that transgenic Salmon, as they may cause harm to Salmon, are not deserving of protection under

the Endangered Species Act, as they are not a species but a hybrid, not a category worthy of protection.

Charles R. Fletcher, *Florida Resource Development: A Call for Statewide Leadership*, 18 J. LAND USE & ENVTL. L. 113 (2002).

In his article, *Florida Water Resource Development: A Call for Statewide Leadership*, Charles R. Fletcher argues that Florida's current drought is due to a lack of statewide leadership in water resource planning and development. In discussing how Florida might improve its system, Mr. Fletcher surveys water resource development in North Carolina, New York, Texas, Kansas, Arizona, and California. These states offer alternatives to Florida's current system, and Mr. Fletcher identifies a number of proposals to effectively increase water resource development in Florida without the need for revision of Florida's administrative water use permitting system.

Michael C. Soules, *Constitutional Limitations of State Growth Management Programs*, 18 J. LAND USE & ENVTL. L. 145 (2002).

This article focuses on the under-analyzed facet of growth management efforts- their constitutional limitations. The goal is to aid policymakers by providing an analysis of successes and failures of existing state growth management plans. The author first analyzes the general structure of growth management programs in three states: Florida, Oregon, and Vermont. Then the author discusses several different constitutional topics in which he examines the best ways in which any constitutional deficiencies could be corrected while still meeting the goals of growth management. These topics include relevance of regulatory takings, unlawful delegation of power, standing, and due process. The author then concludes with suggestions for lawmakers to avoid breaching the constitutional limits upon state growth management efforts.

Alice F. Harris, *Recent Developments in Land Use & Environmental Law*, 18 J. LAND USE & ENVTL. L. 187 (2002).

This section highlights recent developments in federal and state environmental and land use case law. The section also summarizes Florida Legislation from the 2002 Legislative Session. Readers may also research these topics online at the official website of the Florida Legislature, http://www.leg.state.fl.us, the Florida Department of Environmental Protection's website, http://www.dep.state.fl.us, and

the Florida Department of Community Affairs' website, HTTP://www.dca.state.fl.us.

J. David Breemer, *Overcoming Williamson County's State Procedures Rule: How the England Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. LAND USE & ENVTL. L. 209 (2003).

This article discusses an avenue available to takings claimants so that they may open the nearly closed door of the federal courts. In *Williamson County*, the United States Supreme Court established two ripeness prongs that create powerful barriers to landowners seeking to have their takings claims heard on the merits in federal court. Through an in depth analysis of the facts and litigation of this case and others, the author assesses the foundation of the state procedures requirements and concludes it is not required by the Takings Clause. The article scrutinizes the rule's fundamental unfairness and error in its application. Additionally, the author addresses exceptions that should allow many takings claimants to raise their federal constitutional claim in the federal courts.

Tara Boldt-Van Rooy, *"Bottling Up" Our Natural Resources: The Fight Over Bottled Water Extraction in the United States*, 18 J. LAND USE & ENVTL. L. 267 (2003).

This note begins by looking at the bottled water industry and its recent, enormous growth — for instance, in 2001 U.S. consumers drank five billion gallons of bottled water. Noting that the industry has grown in such a significant manner, this note takes issue with the regulations of the bottled water industry. The author argues that the federal regulations, state regulations, and self-imposed regulation (from the industry itself) were insufficient because the regulations focus on the quality of the water extracted from the source versus the quantity of the water extracted.

Following the explanation of the author's theory, that the industry should be regulated in the amount that it extracts, the author explores the environmental issues experienced in several states, including Michigan, Wisconsin, Texas, and a specific case study in Florida. Arguing that extraction for bottled water, taken from a local source and shipped elsewhere, causes significant environmental problems such as salt-water intrusion, and depletion of the local water sources, the author supports her quantity-based regulation theory.

Finally, the author suggests, as a means of counteracting the negative environmental impacts experienced because of bottled water extraction, that states: (1) classify water as a natural public resource; (2) restrict bulk transfers of water; (3) encourage experimentation with desalinization processes; and (4) establish eco-labeling programs to cover the costs incurred locally.

Robert E. Deyle and Mary Kay Falconer, *Revenue Options for a Risk-Based Assessment of Developed Property in Hurricane Hazard Zones*, 18 J. LAND USE & ENVTL. L. 299 (2003).

This article focuses on minimizing the risk of developing land in hurricane-prone areas. First, the author discusses major local emergency management services associated with hurricanes and methods for estimating the costs of those services. Second, the author summarizes a method for apportioning those costs based on alternative revenue options. Third, the author assesses the potential for financing local emergency management services associated with hurricanes. Finally, the author examines the feasibility of local emergency financing in the context of state constitutional and legislative authorities in Florida.

Jennifer A. Sullivan, *Laying Out An "Unwelcome Mat" to Public Beach Access*, 18 J. LAND USE & ENVTL. L. 331 (2003).

Florida beaches attract tourists from around the world. However, many are unaware of the issues surrounding public beach access; issues that potentially threaten the ability of the Florida visitor to enjoy the warm sands and blue waters that define the state to many. In her comment, Ms. Sullivan revisits the issue of public beach access and the doctrine of customary usage. Specifically, the battle that is occurring in the over-development of Florida Panhandle beaches is analyzed, with the "fishing village" of Destin serving as a prime example. The effect of recent Florida decisions concerning strict adherence to local comprehensive plans is applied to the current problems facing Panhandle beaches. Finally, Ms. Sullivan documents four distinct areas that have historically proved problematic within other areas of the state and discusses potential remedies as applied to the village of Destin.

Joshua M. Duke and Kristen A. Sentoff, *Managing Isolated Wetlands after* Solid Waste *and* Tahoe*: The Case of Delaware*, 18 J. LAND USE & ENVTL. L. 355 (2003).

Perhaps as few as fifteen states have adequate protection of isolated wetlands, which were left vulnerable by the U.S. Supreme Court's *Solid Waste* decision. This paper also examines the recent *Tahoe* decision and the case of Delaware to assess the impact of *Solid Waste* on isolated wetlands. The interim between *Solid Waste* in 1999 and any forthcoming legislation is the most challenging time, for this is when landowners can manifest their investment-backed expectations for recently proscribed land uses. The interim also produces uncertainty, which may lead to suboptimal landowner decisions. If state law is put in place soon, the government will minimize the possibility of costly compensation for regulatory takings and minimize the degradation of isolated wetlands. One possible solution to the difficulties in crafting swift legislation is the use of moratoria.

Karen Smith, Book Review: LAND CLAIMS IN EAST TIMOR, by Daniel Fitzpatrick, 18 J. LAND USE & ENVTL. L. 467 (2003).

In "Land Claims," Daniel Fitzpatrick presents a comprehensive and interesting view of the challenges facing the fledgling East Timorese government. He reviews the variety of competing land claims, from those of traditional occupiers of land in East Timor to the claims of Indonesian nationals following East Timor's bid for independence. In addition to giving a broad picture of the competing land claims situation, Mr. Fitzpatrick also illustrates individual situations, humanizing the problem for his readers. "Land Claims" is an interesting read for those interested not only in international law, including the laws of property and occupation, but also for those interested in the human issues arising from conflicts under those laws.

Cynthia Norgart, Recommended Web Sites For Watershed Management, 18 J. LAND USE & ENVTL. L. 471 (2003).

Most practitioners have become very familiar with researching the internet's vast quantity of information with the convenient click of the mouse. In the past several years, the *Journal of Land Use and Environmental Law* has attempted to simplify the overwhelming sea of information through its annual website review. Past reviews have provided outlines on websites focusing on Wetlands law, Oceans and Coastal law, and Endangered Species.

This section provides an outline of useful websites on Watershed Management.

Ben Bush, *Recent Developments in Land Use & Environmental Law*, 18 J. LAND USE & ENVTL. L. 477 (2002).

This section highlights recent developments in federal and state environmental and land use case law. The section also summarizes Florida Legislation from the 2002 Legislative Session. Readers may also research these topics online at the official website of the Florida Legislature, http://www.leg.state.fl.us, the Florida Department of Environmental Protection's website, http://www.dep.state.fl.us, and the Florida Department of Community Affairs' website, http://www.dca.state.fl.us.