SELLING FLORIDA'S WATER UP THE RIVER

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"All the water that will ever be is, right now."[1]

~

"When the well is dry, we know the worth of water."[2]

The State of Florida is blessed with ecological diversity like no other place on the planet. Within its borders are over 700 natural springs, at least thirty of which are first magnitude springs.[3] In addition to these springs, Florida is home to 18 natural ecosystems, 7,800 lakes, and 82 different plant communities, all of which results in more biological diversity than any other state in America.[4]

While Florida has the second highest rainfall in the United States, from the northern Okefenokee Swamp to the southern

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1. NAT'L GEOGRAPHIC (Oct. 1993).
2. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANACK (1746).
3. WALTER SCHMIDT, ET AL., SPRINGS OF FLORIDA, BULLETIN NO. 66, 29 (Fla. Dep't of Envtl. Prot. ed. 2004).
4. Kariena Veaudry, *State and Regional Prospectives: Water Quality & Conservation in Florida*, EARTHJURIS, http://earthjuris.org/wp-content/uploads/2011/05/FloridaNative Plant.pdf. (last visited Feb. 7, 2016).

Florida Everglades, these bountiful ecosystems are still dependent to a great degree on the level and flow of underground water supplies.[5] Yet these life sustaining water bodies are under threat by the very government agency tasked to protect them. By selling millions upon millions of gallons of water from the Floridan aquifer to out-of-state bottling interests, Florida's water management districts are causing an unnecessary, yet life threatening, depletion of the aquifer waters. Over the last forty years of regulation by the water management districts, many of our springs have declined in quality and flow while others have dried up altogether.[6]

In Central Florida, the St. Johns River Water Management District issues numerous Consumptive Use Permits, or CUPs, to public and private development interests. Often selling millions of gallons each year for nothing more than a few hundred dollars in permitting fees.[7] In recent years, the St. Johns River Water Management District has issued hundreds of millions of gallons in CUPs despite outcry from both local governments and local citizens. This article reviews two of the most controversial of these permits.

I. FLORIDA'S PUBLIC TRUST FOR WATER RESOURCES

Since 1845, the "navigable water bodies" within the State of Florida, including rivers, lakes and tidelands, have been held in trust for the benefit of the citizens of this State.[8] This protected status is referred to as the Public Trust Doctrine.[9] This Doctrine imposes a legal duty upon State officials to preserve and control such waters for public navigation, fishing, swimming, and other lawful uses.[10] The Florida Constitution incorporates the Public Trust Doctrine and expressly limits private use of lands under navigable waters to such uses which are not contrary to the public interest.[11]

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5. *See* Chandra S. Pathak, *Frequency Analysis of Daily Rainfall Maxima for Central and South Florida*, SFWMD TECHNICAL PUBL'N EMA #390 (Jan. 2001), http://www.sfwmd.gov/portal/page/portal/pg_grp_tech_pubs/portlet_tech_pubs/ema-390.pdf. In recent decades, rainfall has averaged fifty-four inches per year with a peak of fifty-seven inches per year in the 1980s. WETLAND SOLUTIONS, INC., RAINBOW SPRINGS: RESTORATION ACT PLAN, 14 (Howard T. Odum Fla. Springs Inst., ed. 2013).

6. FLA. DEP'T OF ENVTL. PROT., FLORIDA SPRINGS INITIATIVE PROGRAM SUMMARY AND RECOMMENDATIONS 4 (2007), http://www.dep.state.fl.us/springs/reports/files/FSIreport2007FINAL.PDF.

7. Ivan Penn, *The Profits on Water Are Huge, but the Raw Material Is Free*, TAMPA BAY TIMES, Mar. 15, 2008.

8. Monica K. Reimer, *The Public Trust Doctrine: Historical Protection for Florida's Navigable Rivers and Lakes*, 75 FLA. B.J. 4, 10 (Apr. 2001).

9. *Id.*

10. *Id.*

11. FLA. CONST. art. X, § 11.

II. THE UNIQUE GEOLOGY AND HISTORY OF FLORIDA AS IT RELATES TO POTABLE WATER SUPPLY

Tens of millions of years ago, most of the state of Florida was submerged deep under ocean waters.[12] During that time, the bones of countless prehistoric sea creatures sank to the ocean floor.[13] Through the eons, these fossils formed a thick layer of limestone.[14] When the seabed eventually receded, this limestone became exposed to air and rain.[15] Future rains, with a slightly acidic quality caused by plant decay, pierced holes in the limestone.[16] These holes in the limestone grew larger and crevasses formed, eventually creating a labyrinth of chambers and interconnections which filled with fresh rainwater as well as brackish seawater.[17] These massive underground storage chambers, which store 60% of Florida's freshwater, are collectively referred to as the Floridan Aquifer.[18] In 2000, the human demand for potable water was an estimated 6.7 billion gallons per day.[19] This is estimated to increase by about 30% to 8.7 billion gallons per day by 2025.[20]

Despite the impact on our highly water dependent ecosystems, the State of Florida has one of the highest water withdrawal rates east of the Mississippi River.[21] The vast majority of this water is drawn from either the Floridan Aquifer or from surface water sources such as lakes and rivers.[22] Many argue that rather than continuing to withdraw more and more from our public waters, better conservation and technological techniques could dramatically curb the need to continually access more water resources. Support for this argument may be found in a recent report, which demonstrated that while Florida's population is expected to grow by 57% over the next ten years, additional potable water demands will

12. *Sinkholes: Florida Grapples with the Wonders of the Not-So-Deep*, EARTH MAG. (Aug. 2010), http://www.earthmagazine.org/article/sinkholes-florida-grapples-wonders-not-so-deep.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Marguerite Koch-Rose, et al., *Florida Water Management and Adaptation in the Face of Climate Change: A White Paper on Climate Change and Florida's Water Resources*, STATE UNIV. SYS. OF FLA. 5 (Nov. 2011), http://floridaclimate.org/docs/water_managment.pdf.

19. FLA. DEP'T OF ENVTL. PROT., ANNUAL REPORT ON REGIONAL WATER SUPPLY PLANNING (2010).

20. *Id.*

21. Sidney F. Ansbacher, Robert D. Fingar, & Adam G. Schwartz, *Strictly Speaking, Does F.S. 376.313(3) Create Duty to Everybody, Everywhere? Part I*, 84 FLA. B.J. 36 (2002).

22. Koch-Rose, *supra* note 18, at 5.

only increase by 30%.[23] Yet enhanced conservation and advanced technological efforts will be of little avail if the water management districts continue to grant CUPs to private commercial interests for corporate profit, and to the governments which pay little heed to conservation and will not do so unless required to do so.[24]

III. FLORIDA WATER RESOURCES ACT AND THE WATER MANAGEMENT DISTRICTS

Until the 1970's, Florida's water withdrawal and allocation laws were founded upon common law concepts of riparian rights.[25] This legal framework allowed any property owner adjacent to a water body, known as a "riparian owner," to freely withdraw and utilize the water so long as that use did not unreasonably interfere with other riparian owners.[26]

On the heels of a severe drought that struck Florida in 1970, however, University of Florida Professor Frank Maloney led a group of colleagues in the preparation of the Model Water Code.[27] It was Professor Maloney's intent to present a ready-made regulatory scheme to preserve water resources for future human consumption.[28] He developed the innovative, yet quite obvious, concept of drawing jurisdictional boundaries for water regulation based upon hydrologic boundaries of various surface basins, rather than upon existing political boundaries.[29]

The 1972 Florida Legislature adopted the Model Water Code, largely as Professor Maloney designed it. The new law became known as the Florida Water Resources Act of 1972 and was set forth in chapter 373, Florida Statutes.[30] Originally including only four water management districts, the law currently provides for five regulatory areas encompassing Florida's main water basins: Northwest Florida, Suwannee River, St. Johns River, South Florida, and Southwest Florida Water Management Districts.[31] Each Water Management District (WMD) is managed by a board of nine members, except for the South Florida WMD which has thirteen

23. Koch-Rose, *supra* note 18, at 5.
24. *Id.*
25. Andrew J. Baumann, *General Overview of Riparian Rights in Florida*, http://www.llw-law.com/files/presentations/General%20Overview%20of%20Riparian%20Rights%20in%20Florida.pdf (last visited on Feb. 7, 2016).
26. *Id.*
27. FRANK E. MALONEY, RICHARD C. AUSNESS, & JOE SCOTT MORRIS, A MODEL WATER CODE, WITH COMMENTARY (1972).
28. *Id.* at preface.
29. *Id.* at 9.
30. FLA. STAT. § 373.013 (2014).
31. FLA. STAT. § 373.069 (2014).

members.[32] These members are appointed by the Governor with approval confirmed by the Florida Senate. Each member has a term of four years.[33]

WMDs function as dependent units of local government, crossing the political jurisdictional boundaries of cities, counties, and other regional planning districts.[34] Each district is delegated with broad authority to engage in independent decision making and policy setting.[35] While technically supervised by the Florida Department of Environmental Protection (FDEP), day-to-day decisions, particularly with regard to permitting, remains with the WMDs.[36]

The purpose of a water management district is to plan for water supply and restoration of Florida' water bodies including surface and ground waters.[37] To accomplish these goals, the districts are vested with far reaching authority over almost all waters of the State including: regulatory authority over wetland conversions, surface water management facilities, and well construction; authorization to construct and operate water management structures such as dames, dikes, levees and pumps; planning for future water supply; and land acquisition and management.[38] In a demonstration of public support for the goal of protecting water resources, Florida's voters passed a constitutional amendment in 1976 to grant each WMD the power to levy ad valorem taxes of up to 1 mills.[39]

Of the many tasks delegated to the water management districts, the most controversial action tends to be the districts' allowance of the large water withdrawals from public waters, known as Consumptive Use Permits, for private and government interests. It is the overly generous, even frivolous, issuance of these permits by the St. Johns River Water Management District (WMD) with which this article is concerned.[40]

At its heart, a Consumptive Use Permit (CUP) is a government sanctioned withdrawal of billions of gallons of water from the State's water supply. [41] Yet, as demonstrated further in this article, withdrawal of waters, especially in large amounts, is almost always

32. FLA. STAT. § 373.073(1)(a) (2014).
33. FLA. STAT. § 373.073(1)(b) (2014).
34. FLA. STAT. §§ 373.026, .046, .047 (2014).
35. *Id.*
36. FLA. STAT. §§ 373.016(5), .026, .069 (2014).
37. FLA. STAT. §§ 373.016(22), .016, .083 (2014).
38. *Id.*
39. FLA. STAT. ch. 373 (2014).
40. In addition to the cases discussed in this article, many other consumptive use battles have been fought in Florida. *See* Kelly Samek, *Unknown Quantity: The Bottled Water Industry and Florida's Springs*, 19 J. LAND USE & ENVTL. L. 569 (2004); Press Release, Food & Water Watch, Florida Fights Back Against Bottled Water Extraction (Oct. 2, 2008).
41. FLA. STAT. § 373.216 (2014).

deleterious to the health, purity, and functionality of a water body. Indisputably though, citizens and agricultural interests of Florida require clean fresh water for survival. The natural cycle of bountiful summer rainfalls interrupted by several winter months of draught is insufficient to meet the current needs of Florida's vast population: economic and physical development, production of food products, and maintenance of a high quality of life defined by manicured lawns, ample potable water for showers and pools, and even water park amusements. Chapter 373 is drafted such that water management districts are tasked to carefully balance and limit the inherent harm to public water bodies by massive water withdrawals with the public's need for clean potable water.[42]

In Professor Maloney's Model Water Code, he envisioned a balancing of the immediate human demands for water for sustenance, hygiene, and recreation, against the hydrologic needs of our varied ecosystems for the historic water flows and levels upon which these ecosystems formed.[43] The long term goal of the Model Water Code was to ensure that future Floridians and long standing ecosystems would have an ample supply of clean water.[44] Since current law allows a consumptive use permit to vest its holder with the right to withdraw significant amounts of water for up to twenty years, even fifty years in certain circumstances, it is important that this balancing act be carefully evaluated during review of every CUP permit.[45]

The Floridan Aquifer supplies water at several levels.[46] The ground level, referred to as the Surficial Aquifer, reaches from the surface to about fifty feet below ground level.[47] From 50 feet to 150 below ground level is the Intermediate Confining Unit.[48] Immediately below this, from about 150 feet to 550 feet, is the Upper Floridan Aquifer.[49] Below this is the Middle Semi-Confining Unit, which extends approximately another 450 feet.[50] Finally, below this level, is the Lower Floridan Aquifer extending to sea level.[51] Most of the water used for drinking, irrigation, and other human needs is drawn from the Upper Florida Aquifer.[52] Florida is

42. FLA. STAT. § 373.223 (2014); FLA. STAT. § 373.227 (2014).
43. Maloney, *supra* note 27.
44. *Id.*
45. *Id.*
46. Sandra M. Eberts, et al., *Assessing the Vulnerability of Public-Supply Wells to Contamination: Floridan Aquifer System Near Tampa, Florida* (U.S. Geological Survey ed. 2009), http://pubs.usgs.gov/fs/2009/3062/pdf/fs20093062.pdf.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. Eberts, *supra* note 46.

one of the most highly populated states in America and home to approximately 20 million residents.[53] This population is expected to increase to approximately 25 million by 2015.[54]

IV. THE SCIENCE OF WATER QUALITY

Water resource preservation and associated laws are highly dependent on accurate scientific data, such as analysis of historic high and low water levels, speed of water flow, catalogue of riparian and literal habitat and species, and the amounts and types of pollutants in a particular water body. Data collected from the hundreds of water bodies across the State is so voluminous that it must be distilled and summarized in order to draft appropriate statutes, codes, and policies.

The most common distillation of data relied upon by regulatory agencies is known as the "Total Maximum Daily Load" or TMDL.[55] TMDL is a numerical evaluation of the total amount of a particular pollutant which a particular water body can receive over a certain period of time and still maintain its quality.[56] TMDLs must be established by the FDEP for any surface water body in Florida with low water quality standards.[57] Once established, the TMDL allows for objective analysis as to whether a requested water withdrawal through a Consumptive Use Permit would be overly harmful to the quality and viability of the water body.[58]

Another common distillation of the water quality science is referred to as "minimum flows and levels" or MFL.[59] As the term implies, this is a two-part analysis of the impact of necessary minimum water flow and water level of a particular water body to ensure its health and viability.[60] The minimum flow is the "limit at which further withdrawals would be significantly harmful to the water resource or ecology of the area."[61] The minimum level is the level at which "further withdrawals would be significantly harmful to the water resources of the area."[62] Different water bodies have different needs so far as rate of flow and water quantity for

53. Noted as 19,074,434 by the St. Johns River Water Management District. ST. JOHNS RIVER WATER MGT. DIST., 2012 SURVEY OF ESTIMATED ANNUAL WATER USE FOR ST. JOHNS RIVER WATER MANAGEMENT DISTRICT: TECHNICAL FACT SHEET SJ2013-FSI (2013).

54. Koch-Rose, *supra* note 18.

55. U.S. ENVTL. PROT. AGENCY, WHAT IS A TMDL?, http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/overviewoftmdl.cfm (last visited on Feb. 7, 2016).

56. *Id.*

57. *Id.*

58. *Id.*

59. FLA. STAT. § 373.042 (2014).

60. FLA. STAT. §§ 373.042-.0421 (2014).

61. FLA. STAT. § 373.042(1)(a) (2014).

62. FLA. STAT. § 373.042(1)(b) (2014).

continued viability.[63] By analyzing MFL for each water body, an objective determination is made as to whether a Consumptive Use Permit would reduce the surface level to a point significantly harmful to the functionality of the water body and the aquatic or riparian habitat it supports.[64]

However, these levels are established by the districts themselves and may be too liberal; allowing a district to issue more CUPs than the affected water body can actually assimilate. Overly liberal water withdrawals can result in:

- Reduced water levels;
- Brackish and saltwater intrusion as freshwater is used up;
- Saltwater intrusion into wells;
- Creation of sink holes;
- Destruction of aquatic and literal habitat; and
- Increased nutrient loading.[65]

In 2013, the St. Johns River WMD, as well as the South Florida WMD and the Southwest Florida WMD, took part in a collaborative study to predict the future water needs of Central Florida and ascertain what amount of additional water withdrawals would be sustainable.[66] The collaboration resulted in a report entitled "Development of Environmental Measures for Assessing Effects of Water Level Changes in Lakes and Wetlands in the Central Florida Water Initiative Area."[67] This report noted that the traditional reliance upon more and more consumptive use of water resources was not a sustainable method by which to accommodate anticipated population growth in Central Florida.[68] Rather, there was an immediate need to develop alternative water supplies and engage in stringent conservation as well as seek ways to modify the extent of water demand.[69]

In reaction to these findings, the St. Johns River WMD amended its CUP permitting rules to limit applicants within the Central

63. FLA. STAT. § 373.042 (2014).

64. FLA. STAT. § 373.042 (2014).

65. S.W. FLA. WATER MGMT. DIST., WEST-CENTRAL FLORIDA'S AQUIFERS: FLORIDA'S GREAT UNSEEN WATER RESOURCES, https://www.swfwmd.state.fl.us/publications/files/flas_aquifers.pdf (last visited Feb. 7, 2016); U.S. GEOGRAPHICAL SURVEY, GROUNDWATER DEPLETION, http://water.usgs.gov/edu/gwdepletion.html (last visited Feb. 7, 2016).

66. Cent. Fla. Water Initiative's Envtl. Measures Team, *Development of Environmental Measures for Assessing Effects of Water Level Changes in Lakes and Wetlands in the Central Florida Water Initiative Area,* http://cfwiwater.com/pdfs/CFWI_Environmental_Measures_finalreport.pdf (Nov. 2013) [hereinafter *Water Initiative*].

67. *Id.*

68. *Id.*

69. *Id.*

Florida Study Area to water allocations no greater than the predicted 2013 demand level.[70]

V. STANDARDS FOR ISSUANCE OF A CONDITIONAL USE PERMIT

Chapter 373, Florida Statutes is a detailed legislative work, which clearly identifies the goal of water resource preservation and methods by which to obtain such preservation.[71] In regards to Consumptive Use Permit applications, chapter 373, Florida Statutes does not create any entitlement of any person or party to obtain a CUP.[72] Rather, the chapter establishes standards which should be used by the water management districts in determining whether a CUP application should be granted.[73]

Considering the purpose of the law, which is to protect and preserve public water resources, this legislation instructs the water management district to evaluate the application primarily in regard to how such application will affect the public interest. In fact, the three key evaluation standards as set forth in section 373.223, are:

- Will not be harmful to the water resource;
- Will not be inconsistent with the public interest; and
- Is a "reasonable-beneficial" use of the water.[74]

While definitions of the first two elements are arguably easy to define, the definition of "reasonable-beneficial" use is not so self-evident.[75] Therefore, section 373.019, Florida Statutes sets forth the factors which a water management district should consider in order to determine if a requested consumptive use application is a "reasonable-beneficial" use. "Reasonable-beneficial" is defined as "the use of water in such quantity as is necessary for economic and efficient utilization for a necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."[76] Unfortunately, in issuing recent consumptive use permits, it appears that the subjective "reasonable beneficial use" element has become the prevailing, if not sole, consideration by the St. Johns River WMD in issuance of CUPs.

70. FLA. ADMIN. CODE ch. 40C-1 (2014).
71. FLA. STAT. ch. 373 (2014).
72. *Id.*
73. FLA. STAT. ch. 373, pt. II (2014).
74. FLA. STAT. § 373.223 (2014).
75. FLA. STAT. § 373 (2014).
76. FLA. STAT. § 373.019(16) (2014).

It may be considered self-evident that no CUP should be issued by a water management district if the requested water withdraw would adversely affect the TMDLs, minimum flows and levels, or otherwise violate the Basin Management Action Plan for a given water body. Unfortunately, that which seems obvious in a theoretical world often becomes obscured during the permitting process. As two recent CUP permits in the Central Florida Coordination Area demonstrate, despite decades long deterioration of Central Florida's lakes, rivers, and springs, the St. Johns River WMD continues to permit unnecessary and harmful mass water withdrawals despite public objection that such withdrawals violate chapter 373 and misuse waters within the Public Trust.[77]

A. St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District[78]

The St. Johns River (the "River") is a watershed approximately 310 miles long flowing northward from Indian River County to its release into the Atlantic Ocean just east of Jacksonville.[79] The river has historically been a source of commerce, recreation, and ecological diversity.[80] It teems with wildlife whose habitat can be found in the river's sawgrass lakes, spring runs, tributaries, and marsh beds.[81] Yet it is a notoriously slow moving, or sluggish, water body, flowing at a rate of approximately one inch per mile.[82] Due to the river's slow-moving nature, pollutants and saltwater intrusion do not quickly flush away as they might in a faster moving water body.[83] Additionally, natural or human-caused reductions to water flow in the St. Johns River also increase the duration and impact of pollutants and saltwater intrusion.[84]

In response to the numerous threats to the water quality, quantity, and health of aquatic life in the St. Johns River, concerned citizens formed the nonprofit corporation, St. Johns Riverkeeper,

77. Answer Brief for Appellee, St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011) (Nos. 5D09-1644, 5D09-1646).

78. St. Johns Riverkeeper Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011).

79. ST. JOHNS RIVER, http://www.sjrwmd.com/stjohnsriver/ (last visited Feb. 7, 2016).

80. ST. JOHNS RIVER TIMELINE, http://www.stjohnsriverkeeper.org/the-river/history/ (last visited Feb. 7, 2016).

81. ST. JOHNS RIVER, http://www.sjrwmd.com/stjohnsriver/ (last visited Feb. 7, 2016).

82. *Id.*

83. *Id.*

84. Initial Brief for Appellant, St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011) (Nos. 5D09-1644, 5D09-1646).

Inc. ("Riverkeeper") in 2000.[85] The organization is dedicated to the "protection, preservation, and restoration of the ecological integrity of the St. Johns River watershed for current users and future generations." [86] The group engages in ongoing water quality monitoring and community education efforts regarding the River.[87]

In February of 2008, the St. Johns River WMD ("District") issued a Notice of Intent to issue a twenty year permit to Seminole County to withdraw an additional 5.5 million gallons per day (or 2,007,500 millions of gallons per year) of surface water for public water supply, and the Riverkeeper noticed.[88] Similarly, the City of Jacksonville, in northeast Florida, which relies upon the St. Johns River as a primary source of drinking water for its population of approximately one million people, objected to additional withdrawals due to the anticipated adverse impact on drinking water quality.[89] St. Johns County echoed concerns regarding adverse environmental impacts of this CUP, particularly in regard to the Wekiva River Aquatic Preserve and the Black Bear Wilderness Area in Seminole County.[90]

Seminole County's application sought water withdrawal for a variety of uses, including household, commercial, industrial, landscape irrigation, utilities, and the catch-all: "essential types of uses."[91] All the water would be withdrawn from the St. Johns River at the Yankee Lake Water Treatment Facility.[92] Notably, the water requested in Seminole County's application exceeded the predicated 2013 water demand for Seminole County. [93] Arguably, such an application would be disallowed in the Central Florida Coordination Area since the St. Johns River WMD had committed to deny any CUP that exceeded predicted water demand.[94]

In asserting standing to challenge issuance of the permit, Jacksonville also noted that it had unique standing rights as a party to the 1998 River Accord ("Accord").[95] This Accord memorialized the

85. ST. JOHNS RIVERKEEPER, http://www.stjohnsriverkeeper.org/ (last visited Feb. 7, 2016).

86. *Id.*

87. Initial Brief for Appellant, *supra* note 84.

88. Of the 5.5 millions of gallons per day requested by Seminole County, 4.4 would be used for potable water and the remaining 1.0 would be used to augment reclaimed water supply. However, only the potable water became subject to challenge. Answer Brief for Appellee, *supra* note 77.

89. *Id.*

90. St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., Case Nos. 08-1316, 08-1317, 08-1318 (DOAH Jan. 12, 2009), *modified in part by* FOR Nos. 2008-31, 2008-33, 2008-34 (SJRWMD Apr. 15, 2009).

91. Answer Brief for Appellee, *supra* note 77.

92. *Id.*

93. *Id.*

94. *Id.*

95. THE RIVER ACCORD: A PARTNERSHIP FOR THE ST. JOHNS, http://www.coj.net/departments/river-accord.aspx (last visited Feb. 7, 2016).

agreement between the FDEP, the St. Johns WMD, the Jacksonville Water and Sewer Expansion Authority, and the City of Jacksonville whereby the parties agreed to jointly invest $700 million to improve the health and quality of the St. Johns River.[96] The Accord imposed obligations upon the City of Jacksonville to undertake certain capital improvements in order to reduce pollutant loads and improve water quality in the river.[97]

Due to its vast reliance upon and financial commitments toward the preservation of water quality within the St. Johns River, the City of Jacksonville challenged the District's proposed issuance of this permit as contrary to sound water conservation and preservation policies.[98] Joining the City in the brewing legal battle were both the Riverkeeper and St. Johns County.[99]

These concerned parties filed respective petitions for an administrative hearing with the District in March of 2008.[100] The Petitioners argued that the issuance of this CUP lacked adequate justification.[101] Specifically, Petitioners challenged issuance of the permit on the following bases:

- That the Seminole County failed to meet its burden to provide reasonable assurances that the proposed water use met standards for a CUP as set forth in chapter 373, Florida Statutes.
- Issuance of the permit was a detriment to the water quality improvement efforts mandated in the Central Florida Coordination Area.[102]

In regard to its assertion that the proposed permit would violate the standards of section 373.223, Florida Statutes, the Petitioners disputed the findings of the St. Johns River WMD Technical Staff Report determination that issuance of the CUP was a "reasonable and beneficial use" and was "consistent with the public interest."[103]

Rather, the City of Jacksonville argued that additional withdrawal of water would detrimentally slow, or even stagnate, the notoriously slow water flow of the River.[104] It noted that this additional withdraw of water could easily turn the historic slow flow

96. *Id.*
97. *Id.*
98. Initial Brief for Appellant, *supra* note 84.
99. *Id.*
100. Petition for an Administrative Hearing, City of Jacksonville v. St. Johns River Water Mgmt. Dist. (DOAH 2008) (No. 08-1317).
101. *Id.*
102. *Id.*
103. Initial Brief for Appellant, *supra* note 84, at 10.
104. *Id.*

into a detrimental "slug" flow which would result in significant adverse impacts on aquatic species and water quality.[105] Such impacts would include disruption of the seasonable lifecycle changes of aquatic species, such as mating and spawning, as well as increase the extent and size of algae blooms which could deoxygenate the river and result in wholesale fish kills.[106]

Jacksonville argued that such significant water withdrawals would over-salinate the water, further degrading the River's quality and ability to support aquatic life, ultimately killing aquatic vegetation and wildlife.[107] At its mouth near Jacksonville, salt water from the Atlantic Ocean is able to enter and mix with the St. Johns River.[108] A certain amount of salinity results and is eventually filtered away by water flow.[109] However, when the river level is low, high tides from the ocean flood the river, resulting in greater salt water intrusion.[110] The extra salinity takes longer to dissipate from the River during low flow periods, resulting in longer and more extensive periods of salinity several miles into the River.[111]

In argument against issuance of the permit, the river advocates asserted that Seminole County's average daily household consumption of water was significantly higher than the average daily household consumption in either Jacksonville or in St. Johns County, demonstrating a lack of serious conservation efforts.[112] This difference was noted to be 103 gallons per capita daily ("gpcd") in Jacksonville or 90 gpcd in St. Johns County versus the significantly higher 140 gpcd in Seminole County.[113] Petitioners then noted that Seminole County anticipated even greater average daily household use by 2025 than what it had in 2008.[114] The City of Jacksonville suggested that rather than allowing Seminole County nearly unfettered access to water from the St. Johns River through this CUP, that the District should demand more aggressive conservation techniques be implemented by Seminole County and a lesser CUP granted.[115]

In addition to their call for better conservation measures in lieu of massive additional water withdrawals, Petitioners disputed the District's finding that the St. Johns River was the "lowest acceptable

105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. Initial Brief for Appellant, *supra* note 84, at 10.
110. *Id.*
111. Petition for an Administrative Hearing, *supra* note 100.
112. Initial Brief for Appellant, *supra* note 84, at 12.
113. *Id. See also* Petition for an Administrative Hearing, *supra* note 100, at 12.
114. Initial Brief for Appellant, *supra* note 84.
115. Initial Brief for Appellant, *supra* note 84, at 12.

quality water source" available to Seminole County.[116] Rather, Petitioners noted that stormwater could be successfully used to fulfill Seminole County's irrigation demands.[117] Of particular focus was Seminole County's admission that it expected to have a surplus of reclaimed water by 2025, which should be used for irrigation rather than withdrawal of more water from the St. Johns River.[118]

Jacksonville further asked the District to postpone granting this additional water withdrawal until the District concluded its review of four other concurrently pending CUP applications, each of which would affect the St. Johns River, so that the District could properly evaluate if the combination of all five CUPs would require modification of the River's TMDLs.[119] As explained by the Riverkeepers, the reduced water flow caused by so many water withdrawals might lead to increased nutrient loading from chemical runoff into the river.[120] With less water in the river to offset and dilute runoff, due to the additional conditional use withdrawals, the ability of the River to flush such chemicals would likely be dramatically reduced and thereby decrease the allowable TMDL.[121] In turn, a reduced TMDL would be an additional reason to deny Seminole County's application.[122]

Further, Jacksonville argued that if the Water Management District did in fact issue all five pending CUPs, this massive water withdrawal would result in direct harm to Jacksonville by forcing the City and other stakeholders to develop new basin plans at a significant cost of time and money.[123] Jacksonville noted that section 373.016, Florida Statutes requires water management districts to evaluate the cumulative impacts of all water withdrawals before issuing additional CUPs, which the St. Johns WMD had failed to do.[124]

Similarly, the parties reminded the District that it could not adequately determine that the environmental and economic harm caused by issuance of this CUP would be reduced to an acceptable level, as required by section 373.223, Florida Statutes, since the District was just starting a two year study of the St. Johns River to ascertain the extent and cause of environmental concerns in the

116. Petition for an Administrative Hearing, *supra* note 100, at 12.
117. Initial Brief for Appellant, *supra* note 84, at 14.
118. *Id. See also* Petition for an Administrative Hearing, *supra* note 100, at 12.
119. Initial Brief for Appellant, *supra* note 84.
120. *Id.* at 8.
121. *Id.*
122. *Id.*
123. *Id.*
124. *St. Johns Riverkeeper, Inc.*, 54 So. 3d at 1053. The Riverkeepers further argued that the threat of exceeding TMDLs was a violation of section 373.019, Florida Statutes.

River.[125] In fact, as noted by the Riverkeepers, the District at that time had still not even promulgated minimum flow and level standards for the river.[126] In addition to the parties' allegations that demonstrable harm would be caused to the St. Johns River by 1) Seminole County's 25.6 million gallon per day withdrawal and 2) a prediction that additional harm would be caused to the river by the compounded affect of five new, concurrently issued CUPs, the parties were also critical of the District's failure to include any standards to address the timing or management of the proposed water withdrawals so as to minimize additional environmental impacts.[127]

Jacksonville's petition was referred to the Division of Administrative Hearings pursuant to the Florida Administrative Procedures Act. [128] Seminole County was granted intervener status to participate in this administrative hearing and associated legal actions.[129] A ten day hearing was held in October of 2008 before Administrative Law Judge, Lawrence Johnston.[130] During the course of this hearing, Seminole County and the District agreed to a slightly modified permit which limited withdraw on any day(s) between April 1 and September 15 that followed a day when the Iron Bridge wastewater treatment facility has discharged polluted water into the St. Johns River.[131]

After ten days of testimony, on January 12, 2009, Judge Johnston issued a Recommended Order advocating issuance of the permit.[132] This order dismissed or disregarded most of the expert testimony presented by permit opponents.[133] While acknowledging disparities in several aspects of testimony from Seminole County's experts, including the key issue of Seminole County's future water demands, Judge Johnston found these disparities did not devalue the evidence.[134]

Although not apparently asserted by experts from any party, Judge Johnston also rendered his own factual conclusion that

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125. *Id.* at 1052. The study was known as the *St. Johns River Water Withdrawal Cumulative Impact Study*.

126. *Id.* at 1053; *see also* Concerned Citizens of Putnam Cnty. for Responsible Gov't, Inc. v. St. Johns River Water Mgmt. Dist., 622 So. 2d 520 (Fla. 5th DCA 1993).

127. *St. Johns Riverkeeper, Inc.*, 54 So. 3d at 1053.

128. FLA. STAT. ch. 120 (2014).

129. Memorandum from Stanley Niego to Kris Davis (Mar. 19, 2009) (on file with author) (regarding adoption of final order for DOAH Case No. 08-1316, 08-1317, 8-1318).

130. *Id.*

131. St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., Case Nos. 08-1316, 08-1317, 08-1318 (DOAH Jan. 12, 2009), *modified in part by* FOR Nos. 2008-31, 2008-33, 2008-34 (SJRWMD Apr. 15, 2009).

132. *Id.*

133. *Id.*

134. *Id.*

Seminole County's future withdraw of water from the St. Johns River would not cause adverse affect since several cities had past CUP approvals.[135] Judge Johnston dismissed concerns regarding salinity, nutrient loading, and extensive algal blooms.[136] He also dismissed Jacksonville's suggestion that the CUP should incorporate the conservation measures set forth in the District's own Florida Water Start Program, finding it not appropriate to include a CUP requirement to implement such conservation tools.[137]

Judge Johnston concluded that issuance of the permit would be in the public interest because the environmental harm caused to the St. Johns River by this additional water withdrawal was at an acceptable amount.[138] As to the assertion that harm would be caused to both the Wekiva River Aquatic Preserve and the Seminole Black Bear Wilderness Area, he simply deferred consideration of those concerns to some unnamed further required permitting.[139] Similarly, the judge passed on any evaluation of adverse impacts at the pipeline and treatment facility, finding them outside his scope of review of the public interest component of CUP review.[140]

In accordance with the Florida Administrative Procedures Act, after the parties filed exceptions to the ALJ Order, a final determination on the CUP was considered by the St. Johns Water Management District Governing Board.[141] In a close 4-3 vote, on April 13, 2009, the District Governing Board adopted the Recommended Order to grant the permit to Seminole County modified only in regard to the withdrawals immediately after an Iron Bridge discharge.[142]

Not surprisingly, on August 28, 2009 the City of Jacksonville and the St. Johns Riverkeeper, Inc. filed an appeal before the Fifth District Court of Appeals challenging issuance of this permit.[143] Jacksonville limited its appeal to the issue of whether Seminole County had provided "reasonable assurance" that the 5.5 million gallons per day was necessary for "economic and efficient utilization."[144] Jacksonville objected to Judge Johnston's determination that Seminole County would be denied by the District, in whole or in part, its concurrent application to withdraw

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135. *Id.*
136. *Id.*
137. St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt. Dist., Case Nos. 08-1316, 08-1317, 08-1318 (DOAH Jan. 12, 2009), *modified in part by* FOR Nos. 2008-31, 2008-33, 2008-34 (SJRWMD Apr. 15, 2009).
138. *Id.*
139. *Id.*
140. *Id.*
141. FLA. STAT. § 120.57 (2008).
142. *St. Johns Riverkeeper*, 54 So. 3d at 1052.
143. *Id.*
144. *Id.*

25.6 mgd from the Floridan Aquifer.[145] Jacksonville noted that such assumption was nothing more than a prediction, and if the judge were wrong and the entire concurrent application were in fact approved, then Seminole County would be able to withdraw significantly more water than the amount for which it had a demonstrable need.[146]

Jacksonville also argued that the consultant retained by Seminole County to demonstrate potable water needs for the county over the next twenty years failed to demonstrate that there was not actually any need for new potable water sources until at least the seventh year of the permit period and no significant need for potable water until the eleventh year of the permit period.[147] Describing this as water "banking", the City of Jacksonville argued that a CUP should not allow such excessive amounts of water withdrawal.[148]

The Riverkeepers also argued, via a separate appellate brief, that the District's own consumptive use expert determined that Seminole County would not need any additional water for at least twenty years. [149] The Riverkeepers further asserted that the condition prohibiting withdraw within one day of a discharge from the Iron Bridge facility, was illusory in that Seminole County did not own or control the Iron Bridge facility.[150]

In a dismissive response to these arguments, the District explained that it could sort out any excess allotments when it reviewed the concurrent groundwater permit application.[151] It then adopted the ALJ Recommended Order with minor modifications and inclusion of the Iron Bridge discharge limitation.[152]

On February 18, 2011, the Fifth District Court of Appeals affirmed the Order of the District Governing Board with little discussion as to its merits.[153] As to the merits of the CUP, the court only noted that the "administrative proceeding was for the purpose of ensuring that Seminole's CUP would not harm the St. Johns River or that any harm would be offset." [154] Deferring to the Administrative Law Judge's conclusion "that there was no proof of

145. *Id.*

146. *Id.*

147. *St. Johns Riverkeeper, Inc.*, 54 So. 3d. at 1052. Such testimony demonstrated a need of 0.46 MGD in year 7 with no further increase until year 11.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *St. Johns Riverkeeper, Inc.*, 54 So. 3d. at 1052.

153. The Court's discussion centered upon the standing of the St. Johns Riverkeeper, Inc. In holding that the group did have standing the Court reiterated that the law in regard to standing must be analyzed separately from analysis of the merits of the case. *Id.*

154. *Id.*

harm or that the harm would be offset" the court affirmed without further analysis of the CUP application.[155]

B. City of Groveland v. St. Johns River Water Management District[156]

Niagara Bottling Company, LLC is a California bottling company headquartered in Ontario, Canada.[157] However, it is allowed to do business in Florida as a registered foreign corporation.[158] The company operates numerous bottling facilities that withdraw water throughout the United States and resell this water domestically and internationally.[159] In 2009, Niagara operated a bottling facility at Christopher C. Ford Commerce Park in Lake County to the northwest of the City of Groveland.[160]

In 2009, Niagara sought a Consumptive Use Permit to withdraw an additional 484,000 gallons of water per day (176,660,000 gallons per year) from three wells to be drilled into the Upper Floridan Aquifer.[161] Niagara was straightforward in noting that the sole purpose of this requested water withdrawal was a commercial enterprise to increase revenues for the corporation.[162] The application stated the purpose of the withdrawal was primarily to bottle and resell the water (with approximately 30,000 mgd as a coolant for facility equipment.)[163] As a result, 363,000 gallons would be bottled and sold for profit and 91,000 would be disposed of as wastewater each day.[164]

The associated conservation plan proposed by Niagara detailed only basic efforts to reduce water spillage and leaks in the facility.[165] In credit to Niagara, its request for 484,000 million gallons per day was only 74% of the productive capacity of its production equipment, the average productivity of the facility.[166] Niagara could have requested sufficient water entitlements to

155. *Id.*

156. City of Groveland v. St. Johns River Water Mgmt. Dist., Case No. 08-4201 (Fla. DOAH Aug. 7, 2009) (regarding SJWMD Consumptive Use Permit #114010).

157. *Id.*

158. NIAGARA CONTACT US PAGE, www.niagarawater.com/contact-us/ (last visited Feb. 7, 2016).

159. City of Groveland v. St. Johns River Water Mgmt. Dist., ALJ Recommended Order, Case No. 08-4201 (Fla. DOAH Aug. 7, 2009).

160. *Id.*

161. *Id.* at 6.

162. *Id.*

163. *Id.*

164. *Id.* at 7.

165. City of Groveland v. St. Johns River Water Mgmt. Dist., ALJ Recommended Order at 8, Case No. 08-4201 (Fla. DOAH Aug. 7, 2009).

166. *Id.* at 10.

satisfy 100% daily capacity.[167] Niagara also proposed to send a portion of the wastewater produced by its bottling facility to a nearby golf course or municipality for irrigation purposes, reducing the use of potable water at the facilities.[168]

The St. Johns Water Management District, as the reviewing authority, only added a single requirement to this basic conservation plan, namely that Niagara monitor environmental quality of the water in Lake Arthur.[169] However, this monitoring requirement failed to include the logical next step: a requirement that Niagara remediate or mitigate any degradation of environmental quality indicated by such monitoring.

Rather than limit this commercial water withdrawal or create assurance that the Public Trust waters would be protected from degradation, the District placed no substantive protections in place. Disturbingly, one reviewing official actually congratulated Niagara on its conservation plans noting that it was far better than prior conservation plans the District had required of other bottling companies.[170]

Due to concerns that this CUP would limit future public water supply, and harm water resources and related natural systems, Lake County and the City of Groveland jointly filed a petition with the District seeking an administrative hearing to challenge issuance of this permit.[171] This petition alleged that the proposed CUP failed to meet legal standards of section 403.412(5), Florida Statutes, in that it was not a reasonable-beneficial use, it interfered with presently existing legal uses of water, and was inconsistent with the public interest.[172]

The Petitioners noted the dramatic inconsistency of the District's recent water restrictions upon local Lake County residents' water usage while permitting Niagara to drawdown the superficial aquifer, the Upper Floridan Aquifer, and the Lower Floridan Aquifer, by millions of gallons per day, thereby reducing water supply available to community residents.[173]

Further, Petitioners noted that in Groveland's own preexisting CUP, the District had required Groveland to utilize alternative

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167. *Id.*

168. *Id.* at 12.

169. *Id.* at 8.

170. *Id.* at 12.

171. City of Groveland v. St. Johns River Water Mgmt. Dist., Joint Petition, Case No. 08-4201 (Fla. DOAH Aug. 28, 2008). The City and Lake County jointly filed a Petition for Administrative Hearing on Aug. 11, 2008. Lake County subsequently withdrew its petition on Mar. 3, 2009. The City of Groveland withdrew a number of claims on Mar. 26, 2009, including its claim that the city would be specially injured by the permit, that the permit would not adversely affect minimum flows and level or water quality.

172. *Id.* at 8.

173. *Id.* at 3.

water sources.[174] Yet it had placed no similar condition on the out-of-state bottler.[175] Such disparate treatment made little sense since Groveland's permit predated Niagara's and, if there was a need for conservation through alternative water sources in the past, such need would have only grown since Groveland had begun withdrawing water for its citizens.[176] Further, the citizens of Groveland, Florida were the very persons for whom the public waters were held in trust.[177] Why did a Consumptive Use Permit for out-of-state commercial sale of the water have less stringent conservation conditions than the CUP which enabled a local government to provide potable water to the local residents?[178]

A multi-day administrative hearing was held by Administrative Law Judge Bram Canter in April of 2009.[179] Due to a pre-trial stipulation in which Groveland retracted many of its claims, the hearing was limited to the single issue of whether Niagara demonstrated that the quantity of water requested was necessary for economic and efficient utilization.[180] As in the Seminole County hearing discussed above, Groveland asserted that the massive quantity of water requested by Niagara amounted to prohibited "water banking."[181]

Groveland also set forth the most obvious argument against this additional withdraw from the Floridan Aquifer: bottled water could be provided by any number of existing bottling companies with existing water entitlements, so an additional CUP was not necessary to promote the public interest.[182] An argument which might have been raised, but was not, is that bottled water itself is not a necessity since nearly all areas of the State and country are serviced by public utilities or private wells. These utilities and wells deliver treated water to meet nearly all potable water needs and at far less a cost than bottled water companies.[183] The limited need which does exist for bottled water is arguably already satisfied

174. *Id.* at 4.

175. *Id.* Interestingly, Niagara's CUP exceeded the total consumptive use from the Florida Aquifer permitted to the entire City of Groveland of 368,000 MGD.

176. *Id.*

177. *Id.*

178. *Id.*

179. City of Groveland v. St. Johns River Water Mgmt. Dist., ALJ Recommended Order at 1, Case No. 08-4201 (Fla. DOAH Aug. 7, 2009).

180. *Id.* at 2.

181. *Id.* at 10.

182. City of Groveland v. St. Johns River Water Mgmt. Dist., Joint Petition at 16, 5D09-3765 (Fla. DOAH Aug. 28, 2008).

183. Stephen J. Dubner, *The Strange Economics of Water, and Why It Shouldn't Be Free*, FREAKONOMICS (Apr. 15, 2011, 12:00 pm) http://freakonomics.com/2011/04/15/the-strange-economics-of-water-and-why-it-shouldnt-be-free-a-guest-post/.

by numerous bottling companies using existing entitlements-such as Niagara's own preexisting CUP allotments at the Lake County facility.

Ultimately Judge Canter found the Petitioner's arguments regarding the lack of public need for Niagara to bottle and sell more water to be irrelevant. Noting that "no statute or rule requires Niagara to demonstrate that this particular CUP is the only means to meet consumer demand for bottled water" the judge looked not to whether the public needed this water, but rather, whether the corporation needed this water.[184] Expanding upon this theory, the judge stated, "the District does not evaluate the appropriateness of the associated business or activity, but only whether the applicant can reasonably be expected to use the requested volume of water, and to so efficiently based on the industry standard."[185] Yet Judge Canter failed to note what precedent or authority he had relied upon in determining whether chapter 373 standards had been met, appearing to rely solely upon whether Niagara could demonstrate that it could commercially use the water.

Nor did Judge Canter consider what net environmental harm could be caused by the water withdrawal. Rather, the judge determined that Niagara had demonstrated "by a preponderance of the evidence that the potential for environmental harm ha[d] been reduced to an acceptable amount."[186] With that standard of review, and focusing on the wastewater to be generated, the judge then concluded that since almost all industrial and commercial water withdrawals convert clean water to wastewater, the only necessary analysis was whether Niagara's proposed conversion of 91,000 gallons per day of clean water to wastewater was "efficient" by industrial standards.[187] Relying on Niagara's assertion that the requested withdrawal was the anticipated amount its facility could process each day, the judge found that his efficiency standard had been satisfied.[188]

As the designated finder of fact, Judge Cantor essentially blocked any appellate review regarding the potential environmental harm by noting, "the wetlands and lakes in the area are not currently showing signs of environmental harm as a result of existing groundwater withdrawals." [189] This determination was

184. Groveland v. St. Johns River Water Mgmt. Dist., ALJ Recommended Order at 10, Case No. 08-4201 (Fla. DOAH Aug. 7, 2009).

185. *Id.*

186. *Id.* at 32.

187. *Id.* at 11.

188 *Id.*

189. *Id.* at 18.

made in reliance upon the applicant's report.[190] Yet from the record, it is clear that one of Niagara's own experts would not testify that this withdrawal of 484,000 gallons each day was ecologically sound, but rather could only assert that the ecological harm was "acceptable."

In fact, Groveland's expert testified that the drawdown would adversely affect the local ecology and habitat by reducing the geographical area of the wetlands.[191] While this expert opinion seems in-line with the logic that the daily withdrawal of thousands of gallon of water could result in reduced wetlands, which rely upon water to remain wet, Judge Canter disregarded Groveland's expert's opinion determining that it was based upon "unconventional methodology" and "unreasonable assumptions."[192]

At the conclusion of this extensive hearing, Judge Canter issued a Recommended Order in favor of issuance of the 484,000 gallons per day, or up to 176,660,000 gallons per year, CUP.[193] Upon consideration of the Administrative Law Judge's order, on September 25, 2009, the District Executive Director issued his agency's Final Order adopting the Recommended Order essentially in its entirety.[194] Groveland filed an appeal with the Fifth District Court of Appeals, but voluntarily dismissed it.[195]

The unfortunate precedent which may be set by this case, at least in so far as the water management district policy is set, is that the districts may avoid the public interest evaluation required by chapter 373, Florida Statutes if a commercial enterprise can simply demonstrate that: 1) they have the ability to withdraw the requested water, 2) the ability to convert it to a profitable enterprise, and 3) the adverse effects of such withdrawal is no worse than the industry standard. Such evaluation would skip the very key issue of chapter 373, Florida Statutes: is the withdrawal of water for a commercial use, such bottling for resale by an out-of-state bottling company, in the public interest of the citizens of Florida?

Unfortunately, the unhappy conclusion of this case was not the end of the story. Niagara thereafter filed a civil suit against the City of Groveland asserting damages for tortious interference with

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190. Groveland v. St. Johns River Water Mgmt. Dist., ALJ Recommended Order at 18, Case No. 08-4201 (Fla. DOAH Aug. 7, 2009).

191. *Id.* at 19.

192. *Id.* at 20.

193. *Id.*

194. City of Groveland v. St. Johns River Water Mgmt. Dist., Case No. 08-4201 (Fla. SJRWMD Sept. 25, 2009).

194. *Id.* at 19.

195. Fifth District Court of Appeals Case 5D09-3765 was dismissed via Groveland's voluntary dismissal, dated Dec. 7, 2009.

business relationships, among other claims.[196] In an effort to avoid further protracted litigation, in 2010 the City agreed to settle the litigation with the initial payment of $10,000 of taxpayers money to Niagara, plus up to an additional $30,000 for Niagara's expenses relating to modification of permits, plus all of Niagara's impact fees and connection fees, as well as a $1,240,000 credit for Niagara's city sewer utility account.

Just three years later, Niagara came back to the St. Johns River WMD with an application to nearly double this 484,000 gallon per day withdraw to 910,000 gallons per day.[197] In following its liberal consumptive use permitting for commercial bottling facilities, on February 12, 2014, the St. Johns Water Management District issued a permit to allow Niagara to withdraw of an additional 332,150,000 million gallons per year.[198] No opponents dared to appeal this doubling of the water withdrawal.[199]

VI. CONCLUSION

These recent decisions by the St. Johns River Water Management District, affirmed by the Florida Division of Administrative Hearings and implicitly approved by Florida Department of Environmental Protection, indicate a lack of effort to curb excessive and unnecessary water withdrawals from entities seeking to use public trust waters. In fact, it appears that the first two elements for review of any CUP: 1) whether the water withdrawal will harm the water resource, and 2) whether such withdrawal will be consistent with the public interest, have been completely disregarded by the District so that only the third element, whether the requested CUP is a "reasonable-beneficial" use, is considered at all. In review of this third standard, it seems that the District has set the bar for what constitutes a "reasonable-beneficial" use quite low. Such interpretation by the District hamstrings local governments, such as the City of Jacksonville and the City of Groveland, in attempting to preserve and protect their local water resources since chapter 373, Florida Statutes preempts all local government authority over water withdrawals.

As demonstrated by *St. Johns Riverkeeper, Inc. v. St. Johns River Water Management District*, the District may allow a CUP

196. City of Groveland v. St. Johns River Water Mgmt. Dist., Settlement Agreement at 1, Case No. 08-4201 (Jan. 3, 2010) (DOAH 2008; SJWMD 2008).

197. Consumptive Use Permit, St. Johns River Water Mgmt. Dist. to Niagara Bottling, Permit No. 114010-4 (Feb. 12, 2014).

198. *Id.*

199. E-mail from Pamela Perry, paralegal for St. Johns River Water Management District, confirming lack of appeal of CUP 2-069-114010-4 (Mar. 3, 2015) (on file with author).

applicant to withdraw far in excess of demonstrable need. In that case, opponents to the CUP demonstrated that Seminole County had a significantly higher per capita rate of water consumption than comparable Central Florida communities and such per capita consumption had actually grown in recent years, indicating a lack of substantive conservation efforts.[200] Yet the District failed to require the County to engage in conservation measures which would reduce its water consumption to the level of conservation demonstrated by other Florida communities.[201] Permit opponents also demonstrated that the water requested by Seminole County for immediate withdraw was far in excess of what was then needed by the County.[202] Yet the District failed to limit the allowable water withdrawal to this demonstrable need. The District did very little to ensure that this CUP for 2,007,500 gallons per year was the minimum necessary to meet Seminole County's potable use needs nor that it would be carefully conserved.

Then, in *City of Groveland v. St. Johns River Water Management District*, a case in which the District allowed a Canadian-based bottling company, Niagara Bottling, to withdraw 177 million gallons of water per year from the St. Johns River watershed despite objection from local governments Groveland and Lake County regarding the impact of this withdraw on local citizens' water resources and environmental harm to community waters.[203] Yet neither the District nor the Administrative Law Judge considered whether such an expansive gift of Florida waters to Niagara was actually in the public interest of Florida citizens.[204] Rather, they simply evaluated whether this commercial enterprise could use and profit from the water withdrawal.[205] It is difficult to see how any aspect of this commercial enterprise, creating profit for a foreign corporation, had any benefit to the Florida public interest.

Chapter 373, Florida Statutes was drafted to create a reasonable balance between conserving and sustaining Florida's Public Trust waters for current and future residents while still enabling use of the waters for "reasonable beneficial" uses.[206] Yet this balancing test requires basic conservation efforts from the CUP applicant to

200. St. Johns Riverkeeper Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011). *See also* Cynthia Barnett, *Our Water Our Florida: A Water Ethic for Florida,* COLLINS CENTER FOR PUBLIC POLICY (Feb. 2011) (noting that average daily water consumption in Sarasota County is less 80 gallons per day).

201. St. Johns Riverkeeper Inc. v. St. Johns River Water Mgmt. Dist., 54 So. 3d 1051 (Fla. 5th DCA 2011).

202. *Id.*

203. City of Groveland v. St. Johns River Water Mgmt. Dist., ALJ Recommended Order, Case No. 08-4201 (Fla. DOAH Aug. 7, 2009).

204. *Id.*

205. *Id.*

206. FLA. STAT. § 373.016(4)(a) (2014).

demonstrate that it has attempted to reduce the water needed.[207] Further, the District should evaluate whether the applicant will use the water to benefit Florida citizens or private commercial interests, local or foreign interests. Further, the District should evaluate if there existing a demonstrable need for the amount of water requested during the period requested or if the applicant is simply "water banking." And of course, the environmental impact of any water withdraw should be a paramount consideration prior to issuance of any permitted consumptive use.

A Consumptive Use Permit can last for twenty, even fifty years.[208] Therefore, wasteful CUPs and the potential harm they cause to the water supply and environment can have very long-lasting effects. It is time to evaluate if selling off the already stressed ground and surface waters of Florida to foreign commercial bottling interests could ever pass the public interest requirement of chapter 373, Florida Statutes. Or, at least, where such CUPs would not provide much benefit to the public interest, require the applicant and beneficiary to pay a fair market value to the State of Florida for such waters. This fee which might then be used to remediate some of the damage caused by massive withdrawals from our public waters.

Communities in other states have in fact stood up to bottling companies like Niagara and halted the withdrawal of their public resources for corporate profit. In 2008, the community of McCloud, California stopped Nestle Corporation from pumping water from from Mount Shasta Springs.[209] In Wells, Maine the community fought an exhaustive battle to stop Nestle from opening a well to feed its Poland Springs brand.[210] As explained by Wenonah Hauter, the executive director of Food and Water Watch, "[c]ommunities around the country are mobilizing to stop the confiscation of their water by corporate interests. They want control of their water for their own purposes, not to see it commoditized and sold back to them at over 250 times its actual value."[211] It is time for Florida citizens to speak up too and defend our own water resources.

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207. FLA. STAT. §§ 373.016, .227 (2014).

208. FLA. STAT. § 373.236 (2014).

209. Press Release, Food & Water Watch, Activists Celebrate Nestle Withdrawal from McCloud, Calif. (Sept. 11, 2009) http://www.foodandwaterwatch.org/news/activists-celebrate-nestle-withdrawal-mccloud-california.

210. PBS News Hour, *Bottling Giant, Maine Residents Battle Over Water* (Aug. 18, 2008). http://www.pbs.org/newshour/bb/environment-july-dec08-waterbottle_08-18/.

211. Press Release, Food & Water Watch, Florida Fights Back Against Bottled Water Extraction (Oct. 2, 2008) http://www.alternet.org/story/103386/florida_fights_back_against_bottled_water_extraction.