

FLORIDA WATER LAW 101

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WATER LAW ORIGIN

Common Law

- Eastern Water Law—riparian or reasonable use doctrine
- Western Law—prior appropriation

Florida Water Resources Act of 1972

- Reasonable–beneficial use rule

EASTERN WATER LAW

Riparian or reasonable use doctrine

- based upon ownership of property abutting watercourse
- riparian doctrine
 - owner of property entitled to receive flow across land in an unaltered manner without decrease of quantity or quality
- reasonable use rule modified strict riparian doctrine
 - no unreasonable interference with use of other riparian owners

WESTERN WATER LAW

- Prior appropriation
 - withdrawal of water perfected rights to continued use without interference from new users
 - water rights could be bought and sold and passed down from generation to generation

FLORIDA WATER RESOURCES ACT OF 1972

- Implemented *A Model Water Code*
- Reasonable–beneficial use system
 - East and West common law blended

LEGAL DOCTRINES OF FLORIDA WATER RESOURCES ACT

- No property interest in water
- Held in the public trust—Florida Supreme Court case
- Administrative system supplants common law—permit required

ADMINISTRATIVE SYSTEM

- **Permit Required**
 - Permit Allocation System
 - > three prong test
 - > permit duration
 - > competition

THREE PRONG TEST

- Reasonable–beneficial use
- Use consistent with public interest
- Use will not interfere with presently existing legal uses of water

PERMIT DURATION

- Gives certainty of water availability
- Impacts to use protected for permit duration
- Opportunity to re-examine use = flexibility built into system

COMPETITION

If otherwise comply with requirements and quantity of water inadequate, use most in public interest approved, or if equal, renewals preferred

WATER SHORTAGES

- Declared when insufficient water available to meet needs or to protect resource from harm
- All uses eventually share hardship
 - equitably distribute available supply
 - minimize adverse impacts

FLORIDA WATER LAW 101

Florida water law tools regarding protection of water for natural systems and consumptive uses:

- Regulation of consumptive uses to prevent harm to the natural systems
- Establishment of water reservations to protect fish and wildlife
- Imposition of water shortage restrictions on consumptive uses to protect natural systems during droughts
- Establishment of minimum flows and levels to prevent significant harm to water resources during droughts

CONSUMPTIVE USE PERMITS

- All water users required to get a permit or be exempt as domestic use = "existing legal users"
- Right to use water is not a "property right"
 - Right to use water defined by a permit for a finite duration—permits expire
 - Upon expiration user must re-establish right based on updated conditions for issuance
- Conditions for permit issuance designed to protect water resources from harm up to drought condition
 - Include Minimum Flow and Levels
 - Include Water Reservations
- During drought condition permitted use subject to cutbacks under Water Shortage Plan

"EXISTING LEGAL USES"

State Law

- Domestic Uses
- Permitted Uses

"EXISTING LEGAL SOURCES"

Federal Law

(5) SAVINGS CLAUSE

(A) NO ELIMINATION OR TRANSFER—Until a new source of water supply of comparable quantity and quality as that available on the date of enactment of this Act is available to replace the water to be lost as a result of implementation of the Plan, the Secretary and the non-Federal sponsor shall not eliminate or transfer existing legal sources of water, including those for:

- (i) an agricultural or urban water supply;
- (ii) allocation or entitlement to the Seminole Indian Tribe of Florida under section 7 of the Seminole Indian Land Claims settlement Act of 1987 (25 U.S.C. 1772e);
- (iii) the Miccosukee Tribe of Indians of Florida;
- (iv) water supply for Everglades National Park; or
- (v) water supply for fish and wildlife.

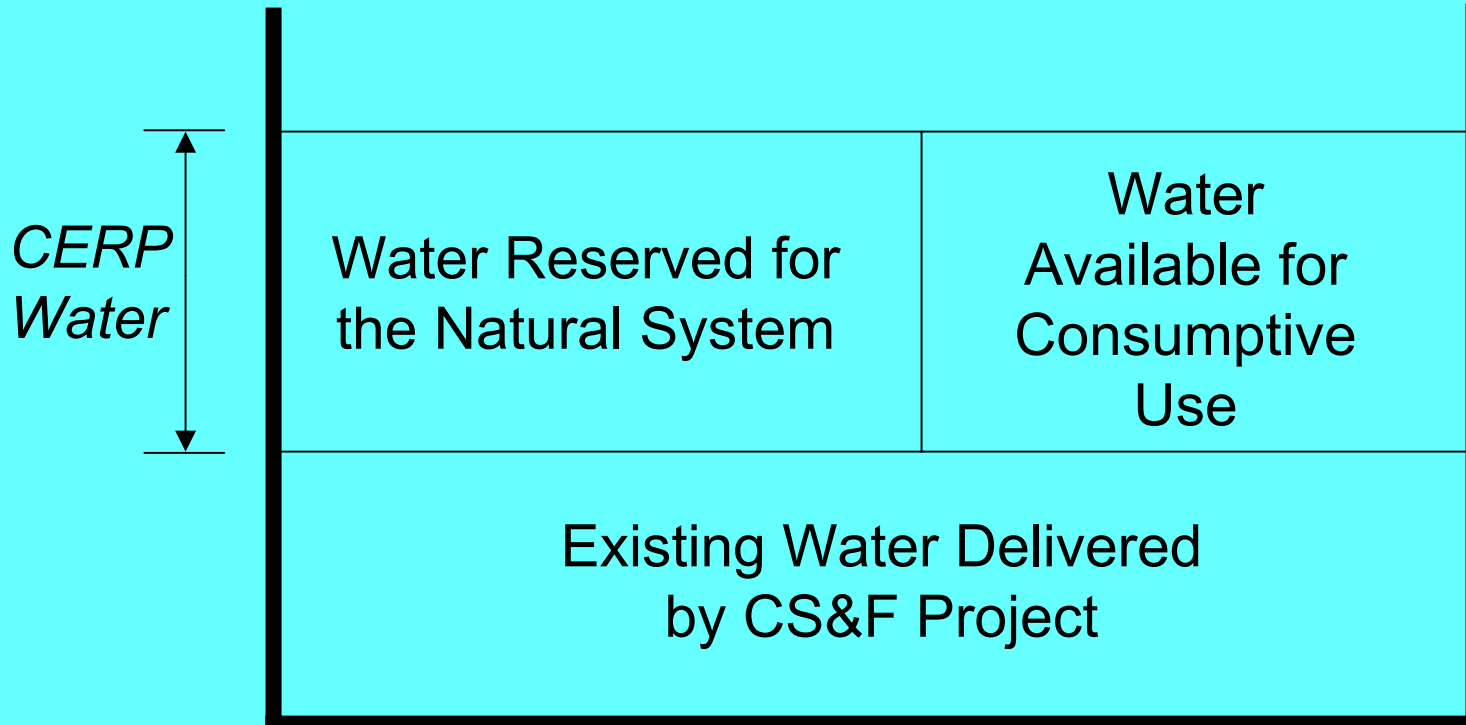
REQUIREMENTS FOR A CONSUMPTIVE USE PERMIT

- Reasonable demand-need for the water, e.g., public water supply
- Efficient non-wasteful use
- Water currently available—not otherwise permitted
- Not cause harm to water resources, aquifers, wetlands, pollution, saltwater intrusion
- Reasonable assurances through duration of permit

RESERVATION OF WATER

- Identifies water for protection of fish and wildlife and public health and safety
- Used as a condition for permit issuance which caps water available for allocation to consumptive use from source
- Natural system water to be reserved under Florida law
 - Water reserved prior to project construction to prevent CUP allocation
 - Adopted by rule to provide force of law

Identifying Water Made Available by CERP



CERP PRESIDENT AND GOVERNOR AGREEMENT

. . . . State shall ensure, by regulation or other appropriate means, that water made available by each project in the Plan shall not be permitted for a consumptive use or otherwise made unavailable by the State until such time as sufficient reservations of water for the restoration of the natural system are made under State law in accordance with the project implementation report for that project and consistent with the Plan.

RESERVATIONS OF WATER

Consumptive use protections when establishing reservations:

- State law protects “existing legal use” insofar as the use is not contrary to the public interest
 - public interest determined by the Governing Board
 - allow for CERP public interest considerations
 - existing use right expires with permit
- WRDA protects all existing legal sources as of December 2000
 - includes all “existing legal uses” as of December 2000
 - includes all water demands for resource protection, saltwater intrusion, wetlands, aquifer recharge

WATER SHORTAGE PLAN

- Identifies process for managing water supplies during droughts
- Temporary cutbacks on water uses imposed based on severity of drought, potential for environmental harm and potential for impacts caused by consumptive use withdrawals
- Incorporates Minimum flows and levels and water reservations

MINIMUM FLOWS AND LEVELS

- Tool to help prevent significant harm to the water resources
- Recovery and prevention plans approved by Governing Board
- Additional permit allocations limited to allow recovery of MFL
- Used to identify need for severe cutbacks in consumptive uses during droughts (>45%)
- Established for Everglades National Park, Water Conservation Areas, Lake Okeechobee, and Caloosahatchee River
- Recovery plan for these areas is CERP

WRDA:

Requires execution of an agreement between the Florida Governor and the President.

- Agreement 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.

WRDA:

Requires that Project Implementation Reports identify up front how much water will be reserved for environmental restoration and the appropriate timing and distribution of environmental water.

WRDA:

Requires the adoption of water reservations before any federal funds are released for construction of a CERP project.

WRDA:

Requires the development of operating manuals for projects that include how water supplies will be delivered and distributed for environmental purposes consistent with water reservations.

STATE WATER LAW:

As a local sponsor, the SFWMD is required to participate in the development of Restudy project components to ensure that the component meets all legal responsibilities under Chapter 373, F.S., for water supply, water quality, flood protection, threatened and endangered species and other water or natural resources.

STATE WATER LAW:

Requires the identification of water for environmental purposes to receive state funds for construction.

Requires adoption of water reservations based on state project authorizations.

Requires the development, funding and implementation of regional water supply plans to meet demands of both human and environmental water demands.

STATE WATER LAW:

Prohibits the issuance of consumptive use permits that cause harm to the water resources. Permits expire periodically in order to reallocate water to implement water reservations.

STATE WATER LAW:

Requires adoption of MFLs to prevent significant harm to water resources; and

Requires recovery and prevention strategies to achieve MFLs.

Florida water law protects the environment through various mechanisms:

- Minimum flows and levels
- Reservation of water for environmental purposes
- Permit requirements and conditions to prevent harm to the water resources
- Permit rights are not property rights; the evolving public interests in environmental restoration and protection can be implemented when permits are renewed

Florida water law equitably manages the resource during droughts:

- Water shortage plans equitably divide available water during drought conditions between use classes
- Provides advance notice to users of risk of cutbacks during droughts

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

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
- 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

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.

Alternative Permitting of CERP Components

Section 373.1501 F.S.

- Under Section 373.1501, F.S., District is authorized to serve as local sponsor for CERP projects after a project component analysis is complete. That analysis will consider:
 - Water supply, water quality, flood protection, endangered species, and other natural system needs;
 - Project feasibility and cost-effectiveness;
 - Permittability
 - Protection of flood protection and legally existing users
 - Coordination with public infrastructure
- Review and approval of analysis by Department

Alternative Permitting of CERP Components

Section 373.1502 F.S.

- Comprehensive Everglades Restoration Plan Regulation Act (CERPRA)
- These permits in lieu of Chapter 373 and 403, except EFA and Lake Okeechobee Restoration Act
- Department issues permits for CERP projects upon receipt of reasonable assurances that:
 - Project achieves design objectives (as described in Section 373.1501 analysis and application);
 - State Water Quality Standards met to the maximum extent practicable;
 - Discharges do not present serious danger to health, safety or welfare
 - Impacts to species minimized or avoided