

Riparian Doctrine and the Protection of Swamps

Does a riparian water right provide protection of a swamp ecosystem? One would think: "yes". However, there does not appear to have been any cases where a riparian water right was asserted to sustain a swamp. For swamps, a number of statutory laws appear to have replaced riparian water rights. It is very uncertain how a riparian water right may protect the magnitude, frequency, duration, timing, and rate of change of streamflow over time.

The Everglades in southern Florida is America's best-known swamp. Beloved as a haven for wildlife, especially its birds, what is today seen as a national treasure was once seen as a wasteland. Though early conservationists focused attention on protecting birds from plume hunters supplying the hat industry, ironically, they promoted drainage of the swamp - not contemplating the habitat making the avian life possible. The national interest was to rid itself of wasteland, and swamps were perceived to be just that. Under the shallow waters was soil capable of becoming fertile farmlands and communities. If the water could be removed, lucrative crops were all but certain. And since this was a warm climate, removal of the water would foster the development of communities, and a real estate bonanza.

Not everyone saw it this way. Charles Torrey Simpson, a botanist and naturalist in southern Florida wrote in 1920: "We shall proudly point someday to the Everglade country and say: 'Only a few years ago this was a worthless swamp; today it is an empire.' But I wonder quite seriously if the world is any better off because we have destroyed the wilds and filled the land with countless human beings." This kind of perspective was firmly in the minority.

Consequently, a series of laws emerged to address swampland water and authorize projects to control it. The first Federal law addressing the Everglades (as well as swamps throughout the nation) was the Swamp and Overflowed Lands Act of 1850, which, in order to promote drainage, transferred swamplands from Federal to State ownership, requiring that proceeds from subsequent state sale of the land be used to finance swamp drainage. Twenty million acres were transferred from the Federal government to the state of Florida, and 17 million of those acres were transferred from the state to private holders. Under the common law Riparian Doctrine, the right to water on or

adjacent to lands stay with the land when sold. However, this Act could have served to sever water rights from the land, as Congress has the Constitutional authority to replace the common law Riparian Doctrine with a regulated statutory water law; such as one devoted to the purpose of water drainage. Whether or not this is what occurred with the Overflowed Lands Act is not expressly addressed in the statute, and there has been no judicial attention to this issue.

In 1904, the Federal government considered drainage of the Everglades an issue of national importance and offered the state assistance in studying and designing drainage projects. This advisory role changed to active participation with the River and Harbor Act of 1930 and the Flood Control Acts (1936, 1948, 1954, 1958, 1960, 1962, and 1968). These laws defined a federal role in drainage and flood control and authorized and funded specific projects to be built by the Army Corps of Engineers in the Everglades and other locations. No mention of water rights or the effect of the Act on water rights is made in these statutes.

The splendor of the Everglades ecosystem and the millions of birds which depend upon it was not completely lost as the development of water projects ensued. After the southern extent of the Everglades was found to lack the soil capable to support farmlands, agreement emerged to protect this part of the Everglades as a National Park. Everglades National Park was authorized by Congress in 1934 "to be permanently reserved as a wilderness," and in 1947, upon the transfer of lands within the area to the federal government, it was established as a National Park. In 1947, in his dedication speech for the new National Park, President Truman said: "Here is land, tranquil in its quiet beauty, serving not as the source of water, but last receiver of it." In 1978 Congress protected the majority of the Park under the Wilderness Act, and now 87 percent of the National Park is protected as the Marjory Stoneman Douglas Wilderness. It is unclear if water rights existed and were transferred with the land that became the National Park, and neither enabling law mentions water rights. Was a water right previously separated from the land because of the Overflowed Lands Act of 1850 or a subsequent law?

As water was drained in the upper Everglades, the land was developed into farmland or communities, and the public interest shifted to flood control during the summertime "wet season," and assurance of water supplies during the winter "dry season." Ironically, after swamplands were drained, they became subject to major flooding and droughts previously unknown to swamp ecosystems that are adeptly attuned to receive and

discharge great quantities of water over a vast area. Congress established the Central and Southern Florida Flood Control Project in 1948 to address these problems by replacing the earlier piecemeal drainage projects with a coordinated system of water control in the Everglades. The series of Flood Control Acts authorized additional water control facilities to drain additional areas and to provide flood protection and assure reliable supplies of water.

By the early 1950s, the Army Corps of Engineers was fully engaged in an attempt to control water from its falling from the sky to its exit to the ocean. Road construction further acted to divert water. Naturally, prior to these actions, the swamp ecosystem received and discharged great quantities of water and in doing so, habitat was provided to an abundant diversity of species. The extensive manipulation wreaked havoc on the habitat and the avian fauna which depended upon it. Feeding grounds created by inundated lands were lost, dried soils caught fire and decimated rookery habitat, water quality deteriorated, erratic inflows of water flooded nests, and organic material dried and decayed causing soil subsidence and an associated increase in water depth when water is present, altering the habitat provided. Though the impact to swamp ecosystems was documented, only limited effort was given to supplying water to the Everglades National Park; the focus of attention was agriculture and communities, the Park came last. A 1950 report from the Water Control District states: "The aesthetic appeal of the Park can never be as strong as the demands of home and livelihood. The manatee and the orchid mean something to people in an abstract way, but the former cannot line their purse, nor the latter fill their empty bellies."

In 1959, the State of Florida enacted a law identifying water as a "common enemy," giving the Water Control District "the right to dike, dam and construct levees... divert the course and flow [of]... and/or pump the water" to protect the property interests involved. There was no mention of the law's relationship with or limitation by water rights held by other landowners.

The purpose of the National Park was wilderness protection, and that was later emphasized with the 1978 Wilderness designation within the Park. Fulfilling the wilderness purpose of these Federal reservations requires water sufficient to maintain the lands in their natural and untrammelled condition; an objective clearly being degraded. However, no assertions of an existing water right (either an existing riparian

right or a federal reserve right) were made. Instead, Congress directly intervened in several subsequent laws to specify the Park's and Wilderness's right to water.

In 1970, Congress enacted Public Law 91-282 which identified a minimum flow to the Park from the central and southern Florida project of 315,000 acre-feet annually or 16.5% of total deliveries from the project, whichever is less. The deliveries were to be provided by a monthly schedule previously specified by NPS research. In 1989, through the Everglades National Park Protection and Expansion Act, Congress directed the Army Corps of Engineers "to construct modifications to the Central and Southern Florida Project to improve water deliveries into the park and shall, to the extent practicable, take steps to restore the natural hydrological conditions within the park." In 2000, through the Water Resources Development Act, Congress authorized the Comprehensive Everglades Restoration Plan (CERP) with its purpose to "restore, preserve, and protect the south Florida ecosystem while providing for other water-related needs of the region, including water supply and flood protection."

The laws addressing water manipulation and park management from 1850 to 2000 are silent as to the existence of a riparian water right, or the laws effect on a water right. The later laws established a right of water (or rather allocated an amount of water) to the wilderness which protects wilderness character to some degree. It is unclear if a water right in the sense of conventional water law exists for the Marjory Stoneman Douglass Wilderness. Even if it did exist, it is unclear if the riparian system is capable of preserving wilderness character in a swamp setting. How do you balance users' interest if one owners "use" of the water is to dispose of it? Would that be an unreasonable impact to the adjacent Park whose water use is to support an ecosystem? Or vice versa? There is no middle ground, except to devise a highly manipulated and controlled watershed that may accomplish both goals. That is precisely what happened in the Everglades, because the protection of the ecosystem came very late in the process, and, perhaps, after riparian water rights that may have been useful for ecosystem purposes were lost. Consequently, all rights, or allocations, to water for the Marjory Stoneman Douglass Wilderness were established through the legislative process. With the backing of science to approximate the water needs of the ecosystem, and delivered through pumps, floodgates, and retention ponds in a complex system of water control and dispersal above the wilderness, the wilderness is kept alive on life support, though in a diminished condition. The NPS in cooperation with its partners further seeks opportunities to

restore the ecosystem such as replacing causeways with bridges to allow natural water flows.