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Water Law and Administration: The Florida Experience, by Frank E. Maloney, Sheldon J. Plager, and Fletcher N. Baldwin, Jr.

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BOOK REVIEWS

WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE. By Frank E. Maloney, Sheldon J. Plager & Fletcher N. Baldwin, Jr. Gainesville: University of Florida Press. 1968. Pp. xx, 488. $25.00.

This book is the most complete analysis of the water resources law of any state east of the Mississippi. Use of the book should not, however, be confined to those concerned with Florida law. The state has long faced a wide range of problems which are now becoming acute in other states. For this reason much of the state's experience is relevant to other states currently formulating legal strategies for water management. Florida has been faced with widespread flooding and the increasing conflicts between the claims of the public and private littoral and riparian owners to the recreational use of lakes and streams. As a consequence, they have a rich variety of case and statutory law dealing with these problems. In addition, Florida has and is facing a number of environmental management questions which are representative of the policy choices now facing all levels of government throughout the country. The controversies over the water needs of the Everglades National Park and the tension between the filling of estuarine areas and the claim that they be managed to preserve existing ecosystems are examples of the Florida experience in environmental management. Only in the area of pollution is Florida's experience of little interest to other states except as a model of how to encourage pollution. In 1939 the state supreme court held that a statute granting industries which located in the state a 15 year tax exemption also exempted them from public nuisance suits.[1] A specialized pollution control agency was not established until 1967, and from the evidence presented in the book it does not appear to have a high potential for effective enforcement compared with administrative systems such as that established in New York.

The book is organized as a treatise and is designed to fulfill several functions. The first is a comprehensive cataloging of state cases and statutory laws relating to water use. The only subject matter excluded which might have been covered is the distribution of water to urban and agricultural users by public utilities and private water companies. The second function is to place Florida law in the context of the common law, federal constitutional developments and recent statutory modifications of

1. National Container Corp. v. State *ex rel.* Stockton, 139 Fla. 32, 189 So. 4 (1939).

the riparian system in the East.[2] The third is to present an analysis of the important Florida cases and statutes and to identify use problems which require a re-evaluation of existing doctrines and statutes. The fourth is to survey, in a non-systematic manner, state administrative practices. The result is a book which is very useful to both the practicing attorney and scholar but is substantively uneven.

Those familiar with the common law and the expansion of federal regulatory power by the Supreme Court will find much of the discussion a restatement of existing law with few fresh insights. There is no effort, for example, to relate legal doctrines to current economic thought about the law's function in resource allocation. The reader will also find a great deal of information with relatively little legal or empirical evaluation, as the authors have undertaken the thankless task of compiling and describing a number of relatively obscure regulatory statutes. In other areas, however, the authors have presented a discussion of problems which have not received adequate attention in the literature. There is, for example, a very useful analysis of the problems of allocating riparian rights between the abutting owners and the public after a street abutting a waterway has been dedicated to the public.[3] Likewise the discussion of the complex tangle of Florida common law precedents and statutes allocating titles to beds of navigable lakes and streams is a welcome contribution to scholarship.[4] The brief case study of the legal problems of the Everglades National Park controversy is a helpful introduction to a very complex problem.[5]

The majority of the book contains an accurate description of existing doctrine, but there are occasional lapses. The authors sometimes fail to refer to important cases on point, and the result is a truncated discussion that does not adequately expose the complexity of a problem and the diverse points of view courts have taken. An example is the author's discussion of the rights of those owning property on an artificial lake to maintenance of the lake level by using the lake for the prescriptive period in a manner consistent with the dam owner's use. The authors state that in some instances the court can classify the lake as a natural water body and apply the rule that a riparian has a right to minimum level since

2. F. MALONEY, S. PLAGER & F. BALDWIN, JR., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE ch. 6 (1968) [hereinafter cited as MALONEY, PLAGER & BALDWIN]. The chapter contains a brief summary of recent eastern permit systems, but it gives little indication of the problems actually being faced in these jurisdictions. *Compare* Waite, *Beneficial Use in a Riparian Jurisdiction*, 1969 WIS. L. REV. 864, which is an evaluation of Indiana water law and administration based on empirical research.

3. MALONEY, PLAGER & BALDWIN, § 34.

4. *Id.* at ch. 12.

5. *Id.* at § 84, 3(c).

recreation is a reasonable use. They also conclude:

> Even though a court may be unwilling to accept the idea of a metamorphosis from artificial to natural, other doctrines may be invoked to protect an adjacent or downstream owner who for an extended period of time has had the enjoyment of the waters resulting from the artificially created condition. For example, a landowner built a dam that created an artificial lake and apparently intended that the lake be permanent. The court found an implied easement or prescriptive right running to other bordering landowners, without necessarily finding that the lake itself had become 'natural.' Additionally a court may prevent an owner from altering an artificial waterway which has been in existence for a number of years by finding that a reciprocal easement has been granted to the lower owners.[6]

This analysis rests on two cases. One held that the right to maintenance of the lake level existed because the construction of a dam by a common owner created quasi-easements when the property was severed.[7] The second, an 1832 decision,[8] has not been followed in the recent cases.[9] More typical of the modern approach is *Kiwanis Club Foundation, Inc. v. Yost.*[10] An artificial lake was created in 1924, and plaintiff operated a recreational camp on it for 40 years. The defendant announced his intention of removing the dam, and plaintiff sued claiming a prescriptive right to have the lake level maintained. The court, refusing to follow earlier cases which had enjoined removal of dams on the theory that a reciprocal easement had been obtained by prescription, held:

> . . . where a dam has been built for the private convenience and advantage of the owner, he is not required to maintain and operate it for the benefit of an upper riparian proprietor who obtains advantages from its existence; and that the construction and maintenance of such a dam does not create any reciprocal rights in upstream riparian proprietors based on prescription, dedication, or estoppel.[11]

This rationale is consistent with the rule that negative easements cannot be obtained by prescription. To hold that a prescriptive easement

6. *Id.* at 64.
7. Greisinger v. Klinhardt, 321 Mo. 186, 9 S.W.2d 978 (1928).
8. Belknap v. Trimble, 3 Paige 577 (N.Y. 1832). *But see* Findley Lake Property Owners, Inc. v. Town of Mina, 154 N.Y..2d 775 (1956).
9. *See, e.g.*, Goodrich v. McMillan, 217 Mich. 630, 187 N.W. 368 (1922); Hood v. Slefkin, 88 R.I. 178, 143 A.2d 683 (1958).
10. 179 Neb. 598, 139 N.W.2d 359 (1966).
11. *Id.* at 602, 139 N.W.2d at 361.

could be acquired by use consistent with that being made by the owner of the alleged servient tenement would constitute an abandonment of this long established, and in my judgment, rational rule. The relevant question is whether the operation of the private market is the preferred solution in this type of allocation problem. In this instance the law need only define property rights so that they may become the subject of private exchanges. In the case of small artificial lakes the market should operate to allocate the resource efficiently, since the transaction costs would not be great. Thus, the party desiring to have his lake level maintained should purchase a negative easement from the dam owner.[12]

My major criticism with the book is that the authors did not devote more attention to the policy problems which underlie the emerging law of public rights to use water for recreational purposes. In their concluding chapter they recommend that more non-navigable water be opened to the public first by an expansion of the concept of navigability and second by theories such as the following:

> Some non-navigable lakes might be made available to the public, for example, through the recognition of easements for public use. Thus where a lake has been stocked with fish by the state and opened to the public for a period of years, an easement for fishing might be found. Encouragement might be given to the permission of public access through special tax benefits and protection against tort liability resulting from the provision of such access. Additional legal research will be necessary to ascertain which of these and other suggestions for protection of the public interest are feasible. But with the increasing pressure to develop and conserve more of Florida's fresh-water lakes for public use, steps need to be taken to bring about a more equitable harmonizing of the public interest with property rights of private owners.[13]

While the authors speak of harmonizing public rights with those of

12. Another area which would have benefited from a more extensive discussion of recent cases is § 127, "Special Problems with Respect to Fresh Water Lakes and Watercourses." The section discusses the application of the trust doctrine to allow the state to reassert title to beds under navigable waterways which have been conveyed to the public. A case, Adams v. Crews, 105 So.2d 584 (2d D.C.A. Fla. 1958), holding that the state can assert the trust doctrine to halt a fill project partially completed appears the basis for the sweeping statement later in the book that "the state is not estopped from attacking" deeds given by the state to private individuals. MALONEY, PLAGER & BALDWIN 416. But cases from other jurisdictions indicate that estoppel is available if the investment is made in reliance on a long legislative history of non-assertion of the trust. *See, e.g.*, Hickey v. Illinois Central Railroad Co., 35 Ill. 2d 427, 220 N.E.2d 415 (1964).

13. MALONEY, PLAGER & BALDWIN 416.

private property owners, they give the impression that the function of the law should be to expand legal doctrines in favor of public rights. My objection is that this type of solution implies that the problem is basically one of a judicial or legislative declaration of rights. In recent years the courts have been active in holding that the public has a right to use non-navigable waters for a number of reasons,[14] but they have not resolved the major economic and ecological problems which stem from an expansion of public rights. For example, *in Botton v. State,*[15] the Supreme Court of Washington recently held that the state may purchase an access area on a non-navigable lake, and since each riparian has a right to use the entire surface of the lake, the public may use the lake as licensees of the state. They further held that the state did not have to condemn the riparian rights of the private owners. The area turned into a go-go beach and junkyard, and the state was enjoined to limit the public users to quiet fishermen. While the decision may rest in part on the fundamental concept in western water law that all water is public, the approach of the Washington court should be available to all eastern states which have adopted the civil law rule of surface use, and thus public rights can be expanded through the condemnation of small strips of land on non-navigable waterways.

As *Botton* indicates, a blanket declaration of public rights or a removal of constraints, such as the duty to condemn all riparian rights, causes many new problems which are not amenable to judicial solution. The book would have been improved if the authors had given some attention to the limits of judicial and blanket legislative solutions. If the author's suggestions or the *Botton* approach is adopted, future private recreational development may be impeded, since there is no guarantee that the value of the investment will be protected from diminishment by subsequent public use of the water. Public control of the users by injunction will be most difficult to accomplish, so the reasonable use limitation on the state's power may prove ineffective to the private littoral owners. The problem is similar to federal assertions of reserved rights in western waters to displace state created priorities. The question is not can the doctrine be expanded to fulfill a given purpose, but should it?[16] Some of the adverse impact of opening non-navigable waters to the public might be avoided by a comprehensive state classification of lakes. My view is that the state should seek methods of quantifying public rights by the formulation of a comprehensive state recreation plan.

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14. *See* Johnson and Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams,* 7 NAT. RESOURCES J. 41-45 (1967).

15. 69 Wash. 2d 751, 420 P.2d 352 (1966).

16. See Meyers, *Book Review,* 77 YALE L.J. 1036, 1042 (1968).

A more rational basis for harmonizing the expansion of public use with private development would result if lakes were classified for potential public use according to such factors as their size, the tolerance of the ecosystem to absorb increased use and their proximity to urban areas and this information were used as a basis for a state wide purchase or condemnation plan. The public interest would have been asserted and to some extent quantified, and future private investment would be rendered more secure because the risks of potential public use would be known, and the market could adjust to them.

As with all treatises, the need to be comprehensive has not produced as intensive an analysis of some problems as one might wish. However, *Water Law and Administration: The Florida Experience* is a very useful book either as a summary of existing water law doctrine in Florida and the East generally or as a starting point for research on developing problems.

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