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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

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Until quite recently, water law was regarded as an esoteric appendage to a part of the curriculum everyone knew to be "narrow" and "technical," certainly unfashionable and probably "irrelevant" (except that "irrelevant" was not yet a word). Water law, in other words, was a part of the (private) law of "Property," although undoubtedly several generations of law students remained blissfully unaware of its existence. True, *Property, Wealth, Land,* the McDougal and Haber call to arms, contained a chapter, "State and Regional Planning: The Interdependences of Land and Water and Rational Institutions."[1] So, for that matter, did its more orthodox antidote, *Cases and Text on Property* by Casner and Leach.[2] Not unexpectedly, water law appeared here in Part XI, under "Rights Incident to Ownership of Land;" Chapter 37—"Lateral and Subjacent Support;" Chapter 38—"Water Rights." But McDougal and Haber was (or so we were told) "unteachable," and who ever reached—or seriously strove to reach—pages one thousand two hundred and thirty-seven to one thousand two hundred and seventy-nine of Casner and Leach? Conceivably, someone "out West" was offering a seminar or even a course in water law[3]—water was rumored to be a problem in those far off parts. But the eastern schools paid scant heed to the nation's problems of developing, allocating, distributing and maintaining its water resources.

The literature accurately mirrored the general eastern attitude: even small law libraries could hardly have been taxed by efforts to accommodate scholarly work devoted to water resources problems

1. M. McDougal & D. Haber, Property, Wealth, Land (1948).
2. A. Casner & W. Leach, Cases and Text on Property (1959).
3. Some, like Dean Trelease, even wrote casebooks. F. Trelease, Water Law (1967). There were and are others: J. Beuscher, Water Rights (1967) (the first "non-western" casebook); C. Martz, Cases on Natural Resource Law (1951) and, most recently, J. Sax, Water Law, Planning and Policy (1968) (a stimulating and in many ways fascinating "non-casebook").

east of the 98th meridian.[4] There were a few notable exceptions. One of them, *The Law of Water Allocation in the Eastern United States*,[5] grew out of a 1956 symposium held in Washington, D.C. sponsored by the Conservation Foundation. Surely not coincidentally, Professor Haber was its senior editor. Perhaps *The Law of Water Allocation in the Eastern United States* was less an exception than a harbinger: the next decade saw a phenomenal growth in interest in eastern water law. It also saw eastern states turn increasingly to their legislatures for "modifications" of common law doctrines which more and more revealed their inadequacy in coping with the demands of an industrialized society.[6] Interestingly enough, the tide of legislative and scholarly activity has not broken the wall of indifference in the "big" eastern law schools—or so one must conclude from their curricula. What initiative there is has come from the state law schools as well as the smaller eastern and midwestern institutions, although none apparently has gone as far as Iowa and Buffalo where "Resource Planning" and "Environmental Management," respectively, are required first-year courses.[7] Perhaps the predominant role of these institutions is accidental, perhaps it is

4. For purposes of water law the continental United States is divided into the "East," meaning the 31 contiguous states that lie wholly east of the 98th meridian, and the "West," meaning the remaining 17 states. Generally speaking, the East follows the riparian system, the West the system of prior appropriation. *See* 1 Waters and Water Rights § 15.5 (Clark ed. 1967).

5. The Law of Water Allocation in the Eastern United States (Haber & Bergen eds. 1958).

6. The most comprehensive regulatory scheme was adopted by Iowa. A first-rate examination of it can be found in Hines, *A Decade of Experience Under the Iowa Water Permit System* (pts. 1-2), 7 Natural Resources J. 499 (1967), 8 Natural Resources J. 23 (1968). In very general terms, eastern regulatory schemes can be divided into compulsory and permissive schemes and into schemes of general application throughout the state and those limited to "critical" areas. For a more detailed discussion see *e.g.*, Ellis, *Some Current and Proposed Water-Rights Legislation in the Eastern States*, 41 Iowa L. Rev. 237 (1956); Heath, *Water Management Legislation in the Eastern States*, 2 Land & Water L. Rev. 99 (1967).

In 1958, the National Commissioners on Uniform State Laws approved a Model Water Use Act drafted by the Legislative Research Center of the University of Michigan Law School. See Legislative Research Center, University of Michigan Law School, Water Resources and the Law (Pierce ed. 1958) for an analysis of the Act as well as other valuable essays on water law problems. Obviously, any legislative tampering with the existing system of water rights raises constitutional questions. For a thorough exploration see Fisher, *Due Process and the Effect of Eastern Appropriation Proposals on Existing Rights, with Special Emphasis on the Michigan Proposal*, in The Law of Water Allocation in the Eastern United States 441 (Haber & Bergen eds. 1958).

7. This is not to say that substantial attention is necessarily paid to water resources problems. According to Professor Tarlock, a survey of law school catalogues for 1968-1970 shows 46 courses concerned exclusively or substantially with water law. Most are in western law schools, the major state universities and smaller eastern and midwestern schools. Tarlock, Current Developments in Legal Education in the Development of a Curriculum in Environmental Management, September 11-12, 1969 (unpublished paper delivered at the Conference on Law and the Environment, Warrenton, Va.).

symptomatic. It has, in any event, been furthered by the federal government. Concern over the nation's water resources and concern over the anemic state of the art of water-related research and training in all fields led Congress to enact the Water Resources Act of 1964.[8] The Act sought to duplicate a page of American history: its model was the agricultural extension service of the land grant colleges; consequently, it called for the establishment at land grant colleges of Water Resources Research Institutes to initiate, support (in whole or in part) and administer research, especially research of a kind which would include or necessarily lead to the training and teaching of graduate students. At this writing, the "legal" part of the federal program has resulted in a series of publications addressed to various aspects or, in some cases, the entire system of water law in a number of states.[9]

Water Law and Administration—The Florida Experience[10] is the most ambitious legal publication yet to emerge under the aegis of the Office of Water Resources Research.[11] This handsome volume is the fruit of a three-year collaboration between Dean Maloney and Professors Plager and Baldwin. Dean Maloney and Professor Plager brought a very special expertise to their task. Dean Maloney had served as chairman of the Water Law Committee of the Florida Water Resources Commission and later became Commission counsel; Professor Plager had been Committee research assistant and had served as special counsel to the Department of Water Resources from 1960 to 1961. Together, Dean Maloney and Professor Plager apparently bore the burden of the Florida part of this study; prime responsibility for the federal part seems to have rested on Professor Baldwin. The end result is not free from ambiguity. As the title hints, the authors appear to have intended something more than a careful and comprehensive study of Florida water law. Rather, without ever saying so in so many words, the book frequently comes across as a (substantial) stab at an eastern water law treatise. As some of us know, the road to water law treatises is fraught with

8. 42 U.S.C. § 1961(a) (1964).

9. *E.g.*, R. Haik, W. Walton & D. Hills, Aspects of Water Resources Law (1969); M. Lugar, Water Law in West Virginia (1963); R. Reis, Connecticut Water Law: Judicial Allocation of Water Resources (1967); D. Tarlock, Evaluation of the Legal Institutions of Diversion, Transfer, Storage, and Distribution of Water in Kentucky (1968); Hanks, *The Law of Water in New Jersey,* 22 Rutgers L. Rev. 621 (1968); Weatherford, *Legal Aspects of Interregional Water Diversions,* 15 U.C.L.A.L. Rev. 1299 (1968).

10. F. Maloney, S. Plager & F. Baldwin, Water Law and Administration—The Florida Experience (1968) [hereinafter cited as Maloney].

11. Financial support for the study apparently also came from the Florida Board of Conservation. *Id.* at vi.

dangers[12] and in the reviewer's opinion, the authors of *Water Law and Administration—The Florida Experience* have not avoided all of them. The final verdict is that the parts are greater than the whole. That is, the book does a fine job with the more limited task of compiling and analyzing Florida law; it is flawed where it goes substantially beyond those limits.

It may be well to turn first to the "successful" part. The authors' plan after an introductory chapter calls for an exploration of the "traditional problems and doctrines of the riparian system;"[13] a shifting of focus along "functional lines" to consumptive uses;[14] a consideration of eastern statutory modifications of common law doctrines, with special attention given to relevant portions of the Florida Water Resources Law of 1957;[15] a discussion of rights in diffused surface waters;[16] a "detailed examination" of appropriate Florida governmental agencies;[17] and a look at water management at the district and local levels.[18] The authors devote a separate chapter each to ownership (and rights) in "submerged bottoms" underlying navigable waters and to pollution control.[19] The last chapter, finally, outlines, in the authors' words, "some of the anticipated problems that are likely to arise as a result of future population growth and increasing demands on a limited although presently adequate fresh-water supply."[20]

The introductory chapter is a rich and valuable one. After the obligatory bow to critics of the legal system for its categorization of water in disregard of the hydrologic cycle, the authors move swiftly to paint a picture of Florida's "water facts" and quantitative needs. The discussion is interesting, informative and though brief, thorough. It serves well to place the subsequent legal analysis into a framework and is illuminating to one who, having perused the table of contents, wonders at the meager place allotted to surface stream and lake water diversion problems: Florida's principal supply for its consumptive needs comes from its vast ground water reservoirs.[21]

12. *See* Meyers, Book Review, 77 Yale L.J. 1036 (1968).
13. Maloney, *supra* note 10, at chs. 2-4.
14. *Id.* at ch. 5.
15. *Id.* at ch. 6.
16. *Id.* at ch. 7.
17. *Id.* at ch. 9.
18. *Id.* at ch. 10.
19. *Id.* at chs. 11, 12.
20. *Id.* at 27, 28.
21. *Id.* at 14; ch. 5 at 141. The factual information in Chapter 1 is amply supplemented by a series of appendices giving, in this order, a summary of water use in Florida, 1965 (App. A); Major Florida Waterbodies (App. B); Meandered Florida Lakes (App. C); Corps of Engineers Activity in Florida (App. D); Applications Watershed Protection and Flood Prevention Location and Status (App. E); and Rules

On the other hand, this reviewer has two quarrels with Chapter 2, "Rights in Defined Waterbodies—Basic Considerations." First: As "a matter of writer's choice,"[22] the authors limit the term "riparian rights" to rights in navigable bodies of water. This leads them to claim an importance for the distinction between "navigable" and "nonnavigable" which simply does not exist in anywhere near the dimension asserted for it.[23] Navigable or nonnavigable determines, roughly, whether private, state-created rights are compensable vis-à-vis an exercise of either the federal or state "servitude." That is, it determines whether private owners are subject to overriding public rights in "navigation."[24] But the distinction has had little, if any, impact on the relative rights of upland owners among themselves.[25] For that matter, the authors repeatedly admit that the incidents attached to "riparian rights" are "quite similar"[26] to those attached to rights in nonnavigable waters, if indeed they are not the same, as is "generally true with regard to consumptive use of water."[27] It becomes difficult, then, to agree that the distinction "is perhaps the most important . . . in he law of water rights,"[28] and no worthwhile purpose seems to be served by clinging to it.[29]

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of State Board of Health: Chapter 170C-5, Pollution of Waters (containing a classification of water basins) (App. F).

22. *Id.* at 32.

23. The distinction drawn is that "riparian rights" are usufructuary rights only, whereas in nonnavigable waterbodies, the water itself is subject to private ownership. *Id.* at 35.

24. The federal servitude has last been examined in detail by Bartke, *The Navigation Servitude and Just Compensation,* 48 Ore. L. Rev. 1 (1968). *See* Colberg, Inc. v. State, 67 Cal. 2d 408, 432, P.2d 3, 62 cal. Rptr. 401 (1967), *cert. denied,* 390 U.S. 949 (1968) for the most recent case involving the state servitude. The word "roughly" is used because the federal government, at least, can destroy (without compensation) private rights in nonnavigable waters as well, provided it exercises its "superior" right expressly. *See* Morreale, *Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation,* 3 Natural Resources J. 1, 62-3 (1963).

25. New Jersey may be the exception that proves the rule. New Jersey still uses a tidal-nontidal distinction rather than the navigable-nonnavigable one. It also claims a *proprietary* right in tidal streams and has denied "riparian" status to one bordering a tidal stream (or a tidal stretch) even in a controversy with upstream private owners. *See* Attorney General v. Mayor of Paterson, 58 N.J. Eq. 1, 42 A. 749 (Ch. 1889) *rev'd,* 60 N. J. Eq. 385, 45 A. 995 (E.&A. 1900).

26. Maloney, *supra* note 10, at 35.

27. *Id.*

28. *Id.*

29. In one instance, this distinction leads the authors to what can only be called a distortion of a case. McCord v. Big Brothers Movement, Inc., 120 N.J. Eq. 446, 185 A. 480 (Ch. 1936) is described in these words: "the New Jersey court found it unreasonable to use water from a small nonnavigable stream to provide swimming in an adjacent pond for boys in groups of seventy." *Id.* at 54 n.123. The author has shown elsewhere that *McCord* was a strict (and probably unreasonable) application of the New Jersey rule against diverting and transporting water. There is nothing in the opinion to suggest it turned on the nonnavigability of the stream. For that matter, the court relied heavily on McCarter v. Hudson County Water Co., 70 N.J. Eq. 695, 65 A. 489 (E.&A.

The second quarrel is over the use of western cases for allegedly generally applicable propositions.[30] This seems dangerous and misleading business, unless the reader clearly understands the fundamental differences between the eastern and western systems, something this book does not take up until Chapter 6 and then only briefly and superficially.[31]

In Chapter 3, "Ownership of Upland as the Source of Riparian Rights," one is struck by the clear, careful and readable treatment of a perennial pain, namely, problems of description and platted streets. For the most part, the discussion concentrates on Florida law and, in this reader's opinion, gains tremendously by that concentration.

Essentially the same observation—that the book gains whenever it concentrates on Florida—could be made about Chapter 4, "Nonconsumptive Uses of Natural Navigable Waterbodies." The nub of the chapter deals with the rights of both riparians and the public to access and navigation, fishing and swimming, an apparently unique Florida "right to view" and wharfing and filling, the latter problems clearly of great magnitude in that state. The discussion is, for the most part, distinguished by a careful, case by case treatment of Florida case law. This is worth commenting on for two reasons: it is not a practice uniformly pursued throughout the book and yet it is a practice which adds interest and value. Perhaps the authors feared that the utility of the book would be impaired by too much detailed, "untreatise-like" analysis of individual cases and perhaps they are right, if the goal was indeed to produce a treatise. If it was to produce primarily a study of Florida law, a good case can be made against the more summary treatise style, namely, that it can distort the volume and kind of authority which exists on any given point and obscure the grey and ambiguous areas. A fuller presentation of the cases (and especially, of course, greater emphasis on the facts) would tend to leave the reader freer to come to his own conclusions about "the law."

The title of Chapter 5, "Consumptive Use of Water: Common Law Rules," is something of a misnomer. Quite properly, given Florida's "water facts," the chapter is almost completely devoted to

1906), *aff'd on other grounds,* 209 U.S. 349 (1908) involving the navigable Passaic River. *See* Hanks, *The Law of Water in New Jersey,* 22 Rutgers L. Rev. 621, 663-66 (1968).

30. *See e.g.,* Maloney, note 10 *supra,* at 32 n.5, citing a California case for the nature of a riparian right. An even more serious example occurs in Chapter 6, § 63, where the authors again use California to discuss "riparian land," *Id.* at 191 n.155, without mentioning that California courts have good reason to define riparian land as niggardly as possible, namely, to cut down riparian rights and thus mitigate the tensions of having a dual system of water rights.

31. *Id.* § 65, at 193.

ground water problems.[32] It contains a short but first-rate description of ground water hydrology and geology, and a fine physical explanation of the three main conflict areas: interference between wells; aquifer overdrafts; and contamination, including salt water intrusion.[33] The "legal" discussion follows more familiar paths. It sets out the "underground stream" or "percolating waters" classification and deals briefly and unsuccessfully, it appears to me, with the significance of the classification. The lack of success is attributable to statements like "It is generally agreed that the riparian and prior appropriation doctrines governing surface watercourses are equally applicable to subterranean streams. . . ."[34] when neither riparian let alone prior appropriation stream doctrines have been explained.[35] There is an equally off-hand and, for the average lawyer, equally as unenlightening reference to the California ground water doctrine of correlative rights. The authors are more careful, and thus more successful, in comparing the percolating water reasonable use rule with the surface watercourse reasonable use rule. However, their statement that "a number of eastern courts have abandoned the special reasonable use rule for percolating water and have specifically adopted a . . . rule . . . that is similar to the reasonable use rule governing riparian rights in surface streams"[36] sounds just a bit too assured, considering that the authority for this proposition is made up of four cases, one of them a 1908 Minnesota case and another a 1963 Delaware chancery court decision. One of the banes of eastern water law is its uncertainty, an uncertainty deriving at least in part from the relative paucity of litigation (and thus law), especially since the early part of the century. No one is really served by advancing with too much assurance as general rules what may be no more than judicial cries in the wilderness.

One final comment to this chapter: in dealing with the consumptive use of diffused surface waters, the authors chart what they call "Modern Developments."[37] It is a fine summary of problems to come, and one wishes we had been treated more often to such a bird's eye view of the future.

Chapter 6 acquaints the reader with "Statutory Modifications of Eastern Consumptive Use Doctrines." It is a short chapter, largely

32. §§ 51-54, at 141-61, deal with ground water; § 55, at 162-64, deals with springs; § 56, at 164-66, with defined surface waterbodies; and § 57, at 167-71, with diffused surface water.

33. However, the general area of pollution, including ground water pollution, is deferred until Chapter 11.

34. *Id.* at 152.

35. Nor is the difference explained in § 54, as promised in § 53.5.

36. *Id.* at 157.

37. *Id.* § 57.3.

expository, and as such serves its purposes well—to provide a thumbnail sketch of compulsory and permissive permit systems in general and a somewhat closer look at the Florida laws.[38] However, the authors also touch on several matters which could have benefited by more attentive treatment. Thus the examination of "The Constitutional Problems in Regulating Withdrawals"[39] lacks sufficient emphasis on the East-West differences which make western courts far more hostile to riparian rights (and hence far more receptive to their statutory curtailment) than eastern courts may turn out to be. Both the discussion of the "Advantages Inherent in Eastern Permit Systems"[40] and the comparison to "Western Consumptive Use Regulations"[41] suffer from a more basic flaw: the authors have apparently accepted the characterization of the western (appropriation) system as an "inflexible" one which "freezes" specific quantities of water because it grants the right to their use in perpetuity and thus "prevents more effective use by subsequent landowners."[42] This is contrasted—unfavorably—to the Iowa scheme which limits permits to a maximum of ten years. Yet as its ablest student reminds us, Iowa's system has never been put to the test because it "had its infancy blessed with nearly a decade of relatively abundant water supplies."[43] Nor do we know whether the ten year limitation has had a chilling effect on potential investors. Furthermore, relatively free transferability of western rights no doubt mitigates their supposed "inflexibility."[44] The authors' case would have gained persuasiveness had these considerations been dealt with more carefully. Finally, this reader is not sanguine about the assertion that it "would appear desirable to give the administrative authorities broad emergency power [in times of drought] to suspend permits and apportion the water among all the users rather than allowing the senior appropriator to take his entire amount while the junior gets nothing."[45] One need not question whether it makes sense to speak of senior and junior appropriators in a system which would give the senior the "right" to share with the juniors in times of plenty—and in times of

38. The author is not altogether clear, though, why the "Use of Water Beyond Riparian or Overlying Land" is dealt with in this chapter. *See* § 63.

39. *Id.* § 61.

40. *Id.* § 64.

41. *Id.* § 65.

42. *Id.* at 195.

43. *Id.* at 177, quoting from Hines, *A Decade of Experience Under the Iowa Water Permit System,* 8 Natural Resources J. 23, 27 (1968).

44. Trelease, *A Model State Water Code for River Basin Development,* 22 Law & Contemp. Prob. 301 (1957), is highly recommended reading.

45. Maloney, *supra* note 10, at 195.

drought. The issue is: how many appropriators, senior or junior, would such a system produce?

Chapter 7 is devoted to "Rights in Disposal of Diffused Surface Water." It first deals briefly with the irksome question of distinguishing diffused surface water from such things as lakes, ponds, marshes and swamps. It then proceeds to a short description and comparison of the civil and common enemy rules, takes note of the reasonable use rule,[46] and turns next to an analysis of Florida's position and its application of the rules. The chapter is rounded out by a discussion of remedies and defenses.

Chapter 9 is a description and analysis of Florida's major (state) agencies responsible for water resources administration. Understandably, the Division of Beaches and Shores is accorded a prominent place; so is the Division of Waterways Development and the Cross-Florida Barge Canal Project. The discussion is lucid and informative; it is also factual enough to make Florida's very special problems come alive even for the distant reader. Much the same can be said of Chapter 10, "Single Purpose and Multipurpose Water Management Districts," made especially valuable by the critical comments woven into the texture of the discussion.[47]

The story told in Chapter 11, "The Law and Administration of Pollution Control in Florida" is, unfortunately, the old familiar one: too little too late. One can only cheer the authors' repeated and forceful emphasis on the futility of even the most ideally structured pollution control machinery unless it has the financial underpinnings required for effective enforcement. Here, too, apparently, Florida's story is typical.[48] What is true of the states is also, as the authors remind us, true of the federal government.[49] To those who fear growing federal dominance of water resources management and especially pollution control, the book sounds a warning note: if the states will not provide both the tools and the financial support, it is "inevitable"[50] that federal power will replace state power.

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46. One wishes, though, that the authors had not simply repeated the old criticism of the civil law rule, namely, that it tends to inhibit development and improvement of land, *Id.* at 202; whether it does so or not depends on where we focus, *i.e.*, on the upper or on the lower owner. *See* Hanks, *The Law of Water in New Jersey,* 22 Rutgers L. Rev. 621, 691 (1968).

47. *See, e.g.*, Maloney, *supra* note 10 at 100.4, "Critique of Single Purpose Drainage by County and District."

48. Thus the authors recount a serious industrial pollution incident ultimately blamed on inadequate financing of the Board of Health and the resulting lack of inspectors. *Id.* § 111.2(b), at 319.

49. And see this headline in the New York Times, Oct. 9, 1969, at 1, col. 7: "House Limits Funds For Clean Water."

50. And as I read the authors, *should* be inevitable for large interstate and multistate problems. Maloney, *supra* note 10, at 345.

> 'Of all the difficult questions which have arisen in the application of the law involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion or produced more diverse results than that relating to the title of the land under the waters.' The truth of this quotation is nowhere more apparent than in Florida where the already confused common law is further complicated by old Spanish law, numerous statutes, and the activities of various administrative agencies. The result is a body of law which requires lengthy explanation and, even then, defies any real degree of certainty.[51]

Thus the authors introduce their last substantive chapter, "Title to Beds Under Navigable Waters." In this reader's opinion, it is easily the most impressive single chapter in the book. A number of factors underlie this judgment. The chapter begins with an exposition of "Basic Considerations:"[52] the general historic development, commencing with the proclamation of Florida as a Spanish territory in 1513 and the various sources of land title to seas and bays, public rivers and lakes. This is followed by a careful analysis of the "Trust Theory"[53] which reexamines the English common law,[54] deals briefly with the federal common law and turns then to a case by case analysis of "The Trust Theory in Florida."[55] Against this background, the authors set an extensive discussion of Florida's many "Riparian Acts,"[56] starting with the Riparian Act of 1856 and ending with the Bulkhead Act of 1957,[57] to date the most important attempt to "correct the deficiencies in policy and administration that had existed up to that time."[58] The remainder of Chapter 12 is devoted to problems of changing shorelines by accretion, reliction and avulsion,[59] and "Special Problems with Respect to Fresh-Water Lakes and Watercourses."[60] The wealth of these materials alone, superbly organized, would support the view that the authors rose fully to their most difficult task. However, there are additional reasons. One is the uncompromising candor with which the authors retell the sad

51. *Id.* at 347, quoting from 1 Farnham, Waters and Water Rights § 36 (1904).
52. *Id.* § 121.
53. *Id.* § 122.
54. It concludes, no doubt properly, that prior to Lord Hale's *De Jure Maris* the theory that the Crown had title to all beds under tidal waters was unheard of. The authors concede, as they must, the "tremendous impact" of *De Jure Maris* and its role as "the main source of the modern law." *Id.* at 353.
55. *Id.* § 122.2.
56. *Id.* § 123.
57. A separate section (§ 125) is devoted to this legislation.
58. *Id.* at 368.
59. *Id.* § 126.
60. *Id.* § 127.

tale of Florida's "indiscriminate development"[61] of what may well be its most precious natural resource, described by one writer as follows:

> Historically, resource efforts were aimed primarily at placing the state's natural resource heritage in private hands as quickly as possible. . . . At one time or another the Trustees[62] have had under their control more than 23,000,000 acres of the total 35,000,000 acres of land and water area in the state. By the turn of the century, all but 3,000,000 acres of this land had passed into the hands of private interests, most of it in the form of lavish grants to railroad companies. Since that time the Trustees have disposed of almost all of the land remaining in the Fund.[63]

It is little comfort that the essence of this passage is reminiscent of so much of the history of the federal public domain and, for that matter, of the history of our dealings with natural resources everywhere. There is comfort, though, small as it may be, in the increasing willingness to abandon the simplistic matrix of "free enterprise equals great progress" and to face our environmental facts. The authors' discussion is a contribution to that growing awareness.

A second factor making this chapter outstanding is that it gives a picture of the contending forces[64]—something which does not always emerge in the authors' discussion of other areas of water resources law. But perhaps no other area is as emotion-charged and thus so susceptible to the formation of strong partisan groups.

Finally, the focus of this chapter is decidedly "environmental." That is, the narrow legal question, who has title to Blackacre (Blackacre being bottom land), is put into its larger setting of "the overall problem of development and management of the state's water resources" which, in turn, is merely one facet of "the totality

61. *Id.* at 385.

62. The Trustees referred to are those of the Internal Improvement Fund, a state agency established in 1855 and charged with primary responsibility for administering sovereignty bottoms. *Id.* at 356-57 & n.75.

63. *Id.* at 357, quoting from DeGrove, Administrative Problems in the Management of Florida's Tidal Lands 20 (Studies in Pub. Admin. No. 18, U. Fla. Pub. Admin. Clearing Serv., 1959). And see the discussion of the Act of 1951 (*Id.* § 124). The Act gave the Trustees title to all sovereignty tidal bottoms (except those in Dade and Palm Beach Counties) in an attempt to curb the postwar outbreak of bay fills by giving the Trustees discretion to refuse to sell. No criteria were set forth for the exercise of that discretion. The authors conclude: "Thus, the Trustees, all elected officials, had little motivation to change the status quo of easy sales. The administrative agency could not point to a legislative directive to justify a strong conservation-oriented policy." *Id.* at 368.

64. *See, e.g., id.* § 125.5, "Critique of the Bulkhead Act" and § 127.3, "Appraisal and Recommendations" (regarding the Trustee Management of (fresh-water) Lakes and Watercourses and their submerged beds).

of legal, physical and environmental problems"[65] faced by Florida and the nation.

Chapter 13, "A [brief] Look to the Future," serves as the authors' vehicle for stating their own views. They do so, cogently and forcefully, on a number of issues: the need for coordination in planning, not only between federal and state agencies, state agencies among themselves, and state and municipal agencies, but between what they call "scientific and operational levels;"[66] the need for that dreaded (in some quarters, that is) concept, centralized planning responsibility; the need for planning on the basis of hydrologic units; the need for a master plan, for pollution control, for recreation demands, for state-federal cooperation and, finally, for research, both scientific and legal.

In a way, one wishes the authors had given us the benefit of their own views wherever possible at the time of the substantive discussion. The danger of holding back until the final chapter is that it may remain unread. If the book will be used primarily as a treatise, the likelihood is that its user will search out "his" problem without bothering with the rest. I hope this will not happen. I hope, rather, he will be lured to take that Look to the Future: it is a thoughtful catalogue of imperatives and we will ignore it to our peril.

This, then, is the substance of the book or rather, its Florida part. But before giving any overall assessment, an unpleasant task remains, namely, to deal with Chapter 8, "Federal Authority and Activity Affecting Florida's Water Resources." The task is unpleasant because Chapter 8 fails the standard set in the rest of *Water Law and Administration—The Florida Experience* by a considerable margin. Frankly, this is astonishing. The job of bringing together the appropriate federal materials must have been considerably easier than that of compiling and analyzing Florida law. There is a relatively extensive "federal literature";[67] presumably,

65. *Id.* at 405. As a matter of fact, one of the emerging "environmental law" cases, Zabel v. Tabb, 296 F. Supp. 764 (M.D. Fla. 1969), comes from Florida. *Zabel* is discussed by the authors (at 379) and was, at the time of their writing, pending before the United States District Court for the Middle District of Florida. In *Zabel*, the Corps of Engineers, after conferring with the United States Fish and Wildlife Service and a host of public and private groups (who had lost their case in the Florida supreme court in Zabel v. Pinellas County Water & Navigation Control Authority, 171 So. 2d 376 (Fla. 1965) refused a filling permit primarily because the dredging and filling would be harmful to fish and wildlife. The plaintiff's argument is that the Corps may consider only harm to navigation, not to fish and wildlife. The district court has since agreed and the Secretary of the Army has appealed to the Court of Appeals for the Fifth Circuit. *See* Prospectus for the Environmental Law Reporter app. A (The Public Law Education Institute, The Conservation Foundation, September 1, 1969).

66. Maloney, *supra* note 10 at 407.

67. For a non-exhaustive list see 2 Waters & Water Rights 4 n.4 (Clark ed. 1967).

little or nothing of that sort existed for the Florida materials. No excuse appears, therefore, for the sins committed in this chapter. To name a few: the "Introduction and Background"[68] lighthandedly dismisses the general welfare clause, among others, as being "generally considered of secondary significance, at least as far as water development and control are concerned."[69] This will come as a surprise to those who thought that federal reclamation activity—hardly an undertaking of "secondary significance"—has taken place under the general welfare power.[70]

Section 82.1 on "the Meaning of Commerce" stops with *Gilman v. Philadelphia*,[71] decided in 1865. There is no mention, here, of such cases as *United States v. Twin City Power Company*.[72] Yet *Twin City* raised an important question of the "meaning of commerce," namely, do multi-purpose projects which benefit navigation at best only incidentally nevertheless fall within the permissible limits of sovereign dealings with navigable waterways under the rubric "commerce?" The book discusses *Twin City* for the first time when it deals with the compensability of private rights vis-à-vis an exercise of the federal power (the navigation servitude), a second, albeit important, aspect of the case. Other cases bearing on the sweep of the power, *i.e.*, on the "meaning of commerce," can be found in a footnote accompanying this textual statement: "Flood control and waterway development have been recognized as having equal importance with the maintenance of navigation as constitutional objectives of Congress."[73] The statement is unobjectionable, except for its presence in a subsection entitled "The New Meaning of Navigability."[74] Analytical clarity would be better served by sharply separating the question, what is navigable, from the question, for what purposes may the navigation power be exercised.

Similarly, "The New Meaning of Navigability" includes this dis-

68. Maloney, *supra* note 10 at § 81.

69. *Id.* § 222.

70. *See* United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950). Perhaps the authors were speaking about the East exclusively. If so, that should have been made clear. As it is, the statement purports to be a general one.

71. 70 U.S. (3 Wall.) 713 (1865).

72. 350 U.S. 222 (1956). Other relevant cases are United States v. Appalachian Power Co., 311 U.S. 377 (1940); Oklahoma v. Atkinson, 313 U.S. 508 (1941); United States v. Grand River Dam Authority, 363 U.S. 229 (1960), which upheld flood control and watershed development projects as constitutionally sanctioned measures of "commerce." *See also* Arizona v. California, 283 U.S. 423 (1931) (suit to declare Boulder Canyon Project Act unconstitutional).

73. Maloney, *supra* note 10, at 229. Footnote 47 lists, in addition to Oklahoma v. Atkinson and Appalachian, United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899); United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

74. *Id.* § 82.4.

cussion of *United States v. Chandler-Dunbar Water Power Company*:[75]

> [The case] made it clear that riparian rights of individuals, if they in any way limited federal control, are subordinated. It should be noted that the government was willing to give some compensation for the rights taken in that case, although not nearly as much as plaintiff asked for. Mr. Justice Burton was willing to concede that quite possibly some rights might exist in the waters of a private non-navigable stream wholly upon the lands of one person.[76]

Aside from the observation that this is an unenlightening discussion of the case *qua* case, what does it have to do with "The New Meaning of Navigability"? Why does it not belong in the next section, "Federal Authority and Private Rights,"[77] which deals with the navigation servitude, although without giving the reader any real feeling for what the problem is all about?[78]

Other examples are at hand: Section 84 purports to examine "Federal Authority and State Interests," a subject of obvious importance and concern. Yet the brief and superficial discussion of *First Iowa Hydro-Electric Coop. v. Federal Power Commission*,[79] *Arizona v. California*,[80] (the first case) and *Oklahoma v. Atkinson*[81] hardly begins to convey the tensions generated by a federal system so often put under additional stress because of the inability or unwillingness of the states to assume their share of the burden.

Section 84.2 is entitled "Federal Management of Water Resources," a title which promises more than the bare listing of federal agencies involved in water resources.

Finally, in turning to "The Federal Role in Florida,"[82] the authors quite properly devote attention to the activities of the Corps

75. 229 U.S. 53 (1913).

76. Maloney, *supra* note 10, at 228-29.

77. *Id.* § 83.

78. *Id.* § 83.1, "Nonnavigable and Navigable Distinction," concludes that the Court's position regarding the rights of riparian owners along nonnavigable streams was "confused at best." In this context, footnote 67 asks the reader to compare United States v. Cress, 243 U.S. 316 (1917), with United States v. Chicago, M., S.P. & P.R.R., 312 U.S. 592 (1941) and United States v. Willow River Power Co., 324 U.S. 499 (1945). It then adds: "*See also* Munro, *The Pelton Decision: A New Riparianism?* 36 Oregon L. Rev. 221 (1957)," an article dealing with the implications flowing from FPC v. Oregon, 349 U.S. 435 (1955) under the reserved rights doctrine for the public land states. This reviewer simply cannot imagine what bearing it is supposed to have on the subject under discussion.

79. 328 U.S. 152 (1946).

80. 283 U.S. 423 (1931).

81. 313 U.S. 508 (1941).

82. Maloney, *supra* note 10, at § 84.3.

of Engineers.[83] Unfortunately, however, the discussion is a paraphrase of (and in places is taken verbatim from) a self-congratulatory pamphlet issued by the Corps.[84] Many impartial observers view the Corps as an agency devoted to the single-minded pursuit of burying under tons of concrete the last remaining streams which still dare bubble. It would have been desirable, therefore, to have the authors' appraisal of the Corps' work and not the Corps'.

In short, Chapter 8 is a poor relation to the other twelve chapters.[85] It is badly organized, not very thoughtful and often careless. Fortunately, it is not a major part of the book. Thus it does not impair the work's usefulness, although it does little to enhance it.

Water Law and Administration—The Florida Experience is a major contribution to the growing water law literature of the East. It is highly readable, contains much valuable and useful factual information, and presents a thorough and comprehensive analysis of Florida law. It occasionally falters[86]—usually when it tries too hard to be an eastern treatise. That is not to say and is not meant to say that its usefulness is limited to Florida courts and lawyers. One should hope, rather, that it will take its place on the shelves of all to whom the nation's water problems are a matter of urgent concern.

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83. *Id.* § 84.3(a).

84. *See id.* at 240 n.102.

85. The chapter concludes with a discussion of the Everglades National Park Problem. It gives a good description of the physical problems of that beleaguered treasure, briefly presents some of the proposed physical solutions and turns then to the legal issues. I may be mistaken, but I seem to detect a slight bias in favor of the State of Florida. Perhaps that is because the authors consider the Park to be "a major asset of the people of the state" rather than the people of the nation (*Id.* at 256).

86. Setting aside Chapter 8 where it more than falters.

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