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RIPARIAN RIGHTS IN A POLLUTED WORLD: PROPERTY RIGHT OR TORT?

*Daniel P. Fernandez, J.D.**

INTRODUCTION

It is well-established in Florida law that ownership of land abutting navigable waters carries with it certain appurtenances,¹ known as “riparian rights.”² However, the landowner’s property must extend to the high-water line in order to convey riparian rights.³ And two major categories of riparian water-use rights “can be separated into nonconsumptive uses—generally those that do not involve withdrawing the water from its natural location—and consumptive uses—those that do. The primary nonconsumptive uses are navigation (or boating), fishing, and swimming.”⁴ In addition, nonconsumptive uses also include rights to view, wharfing, and access to the water.⁵ Yet members of the public also have the basic riparian rights of boating, fishing, and swimming in navigable waters.⁶ Given this state of riparian law, whether there is a distinction between the status or rights of a riparian owner and a member of the public as to the navigable waters presents an interesting question.

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1. Appurtenance: “That which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy as principal, and which passes as incident to it, as a right of way or other easement to land” *What is APPURTENANCE?*, THE LAW DICTIONARY: FEATURING BLACK’S LAW DICTIONARY FREE ONLINE LEGAL DICTIONARY 2D ED., <http://thelawdictionary.org/appurtenance/> (last visited Feb. 17, 2017) (citations omitted); “[A]n incidental right (such as a right-of-way) attached to a principal property right and passing in possession with it.” *Appurtenance*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/appurtenance> (last visited Feb. 17, 2017).

2. See FLA. STAT. § 253.141(1) (2017); *Broward v. Mabry*, 50 So. 826 (Fla. 1909); see also *Ferry Pass Inspectors’ & Shippers’ Ass’n v. White’s River Inspectors’ & Shippers’ Ass’n*, 48 So. 643, 644 (Fla. 1909) (“Riparian rights are incident to the ownership of lands contiguous to and bordering on navigable waters. The common-law rights of riparian owners with reference to the navigable waters are incident to the ownership of the uplands that extend to high-water mark. The shore or space between high and low water mark is a part of the bed of navigable waters, the title to which is in the state in trust for the public. If the owner of land has title to high-water mark, his land borders on the water, since the shore to high-water mark is a part of the bed of the waters; and, if it is a navigable waterway, he has as incident to such title the riparian rights accorded by the common law to such an owner.”).

3. *Ferry Pass*, 48 So. at 644; see also *Teat v. City of Apalachicola*, 738 So. 2d 413, 413–14 (Fla. Dist. Ct. App. 1999).

4. FRANK E. MALONEY, SHELDON J. PLAGER & FLETCHER N. BALDWIN, JR., *WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE* 32 (1968).

5. See *id.* at 98–99, 104, 116.

6. See, e.g., *Broward*, 50 So. at 829; see also *Frost v. Wash. Cty. R.R.*, 51 A. 806, 809 (Me. 1901).

Some riparian rights are property rights exclusive to the riparian owner.⁷ These include accretion, reliction, access, wharfing, and view.⁸ However, activities of boating, fishing, and swimming are also public rights in navigable waters that exist by virtue of the Public Trust Doctrine, i.e., state ownership of submerged lands that are held in trust for public use.⁹ Accordingly, the riparian owners would merely share these rights as members of the public. Admittedly, riparian owners have a unique mode of access via their property. Yet if the riparian owner should lose the riparian rights, and they are also lost to the public, is this loss compensable to the riparian? More specifically, in a world where pollution spills into waterways are commonplace,¹⁰ does a riparian owner have a right superior to that of any member of the public to have the navigable waters kept free of pollution? One viewpoint may be that unless the riparian owner suffers a specific injury beyond that which is suffered by the public in general, an action brought by a riparian owner for pollution damages would be overlapped by any related action brought on behalf of the public.¹¹ Thus, the private action would be foreclosed by the action brought on behalf of the public.¹² An alternative view may assert that riparian rights are property rights and that a riparian owner could maintain a separate action to protect those rights.¹³

Accordingly, this analysis first examines whether, and which, riparian rights constitute property rights, and whether the riparian owner has rights superior to, or separate and distinct from, the public regarding adjacent navigable waters. Then, the inquiry addresses the central question, that is, whether under Florida law a riparian owner has a greater legal right than any member of the public to have the water abutting the landowner's property kept free of pollution.

I. NONCONSUMPTIVE RIPARIAN RIGHTS AS A FORM OF PROPERTY

Section 253.141(1), Florida Statutes, states that riparian rights are not property rights.¹⁴ The statute provides:

Riparian rights are those incident to land bordering upon navigable waters. They are rights of ingress, egress, boating, bathing, and fishing and such others as may be or have been defined by law. *Such rights are not of a proprietary nature.* They are rights inuring to the

7. See, e.g., *Broward*, 50 So. at 830.

8. See *id.*

9. See *id.*; see also Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 43–45 (1995) (discussing the purpose of the Public Trust Doctrine).

10. See, e.g., World Wildlife Fund, Marine Problems: Pollution, http://wwf.panda.org/about_our_earth/blue_planet/problems/pollution/#TB (last visited Mar. 27, 2017) (discussing frequency of pollution spills into waterways).

11. See *Frost*, 51 A. at 809.

12. See *id.*

13. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 98–99.

14. This statute has an interesting and strange history dealing with navigability, submerged lands, taxation, and whether it even applies to riparian rights outside of the taxation context. See FLA. STAT. § 253.141 (2017). For a more extensive discussion, see MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4; see also RALPH E. BOYER, FLORIDA REAL ESTATE TRANSACTIONS § 112.21(1)(b) (1984).

owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land. The land to which the owner holds title must extend to the ordinary high watermark of the navigable water in order that riparian rights may attach. Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.¹⁵

While this statute generally describes the common-law nonconsumptive riparian rights,¹⁶ the statement that these rights are not proprietary is overly broad.¹⁷ For example, the authoritative and highly respected treatise *Water Law and Administration: The Florida Experience*, provides a contrasting view:

It seems clear that in Florida, as in most eastern jurisdictions, *riparian rights are property*, a lawful taking of which necessitates compliance with the requirements of constitutional due process. But while this much may be clear, the precise quality of a riparian right as property is considerably less clear. The legal mind is accustomed to thinking about property as specific rights in relation to particular things, and visualizing objects of property that are inert in character and occupy an ascertainable situs, such as buildings and furniture. Jurists have experienced considerable difficulty in their efforts to apply traditional property concepts to an unfettered substance such as water. Attempts to solve the problem of who owns the water in a navigable stream or lake resulted in the early determination that there is no private property in the substance of flowing water; the most a person can have is a *usufructuary right—right to use the water*.¹⁸

The concept of “usufructuary” rights in water is generally considered a consumptive use concept rather than a nonconsumptive use.¹⁹ Even if the owner of riparian land has a right to consumptive use of the water, it is not an ownership right as in tangible property but merely a right to use the water subject to the concurrent

15. FLA. STAT. § 253.141(1) (2017) (emphasis added).

16. *See id.*

17. For cases referring to this provision as a statutory recognition of substantive riparian rights, previously numbered FLA. STAT. § 271.09 and FLA. STAT. § 192.61, see *Hayes v. Bowman*, 91 So. 2d 795, 800 (Fla. 1957), and *Tri-State Enters., Inc. v. Berkowitz*, 182 So. 2d 40, 43 (Fla. Dist. Ct. App. 1966), discussing that “[t]he riparian owner has certain preferential rights to acquire from the Trustees title to adjacent submerged sovereignty lands.” *See also Carmazi v. Bd. of Cty. Comm’rs of Dade Cty.*, 108 So. 2d 318, 322 (Fla. Dist. Ct. App. 1959) (discussing how riparian rights “amount[] to a right of a landowner to use the water adjacent to his property and to be guaranteed the right of ingress to and egress from his property to the water adjacent thereto.”); *Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955) (discussing how the riparian rights definition in the Florida Statutes is merely “a partial codification of the common law on the subject.”); *Feller v. Eau Gallie Yacht Basin, Inc.*, 397 So. 2d 1155, 1157 (Fla. Dist. Ct. App. 1981).

18. MALONEY, *WATER LAW AND ADMINISTRATION*, *supra* note 4, at 31–32 (emphasis added).

19. *See Vill. of Tequesta v. Jupiter Inlet Corp.*, 371 So. 2d 663, 670–71 (Fla. 1979) (discussing permits for the consumptive use of water).

water use rights of others.²⁰ Thus, no one owns the water in its free-flowing state.²¹ However, a person can have “a usufructuary right—a right to use the water.”²² The Supreme Court of Florida first applied this rule of law in *Village of Tequesta v. Jupiter Inlet Corp.*²³ Under the *Tequesta* decision, the landowner (or, by an extension of the concept, possibly a riparian owner along a surface water body) attains ownership in water only when it is actually captured (withdrawn) and put to use pursuant to a permit (or an exemption) from a water management district.²⁴ It is significant that the *Tequesta* case dealt with the right to withdraw groundwater for consumptive use and not nonconsumptive riparian rights.²⁵ Yet if some form of property right springs up by capturing and making a consumptive use of the water, then applying the same logic to a riparian owner who begins making a nonconsumptive use of the water in the river could arguably imbue the riparian owner with an actionable loss of that use separate and apart from the public.²⁶

While *Tequesta* clearly holds that there is no property right in groundwater until it has been put to beneficial use under a permit (or exemption), in apparent dictum, the court states, “There is a distinction when this right of user as to water has been invaded by circumstances showing an intentional invasion in an unreasonable manner or an unintentional invasion when the conduct was negligent, reckless, or ultrahazardous, resulting in a destruction of the right of user as to land.”²⁷ The court’s language seems to imply some kind of prospective right.²⁸ While rather tenuous, under this logic riparian owners may contend that a prospective intention to use the river adjacent to their riparian lands constitutes property. However, it is important to remember that *Tequesta* was a consumptive use case, not one involving the nonconsumptive uses of boating, fishing, or swimming and that *Tequesta* dealt with groundwater and not surface water.²⁹ Thus, while certain riparian rights may be considered property in Florida, the question remains as to which ones, if any, and how and when they ripen or vest.

20. *Id.* at 667.

21. *Id.*

22. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 32.

23. *Vill. of Tequesta*, 371 So. 2d at 667 (discussing the fact that ownership of water did not encompass a property interest in the water).

24. *Id.* at 667. See FLA. STAT. §§ 373.203–373.250 (2016), for the consumptive use permitting system administered by Florida’s five water management districts. See also *Schick v. Fla. Dept. of Agric.*, 504 So. 2d 1318, 1320 (Fla. Dist. Ct. App. 1987) (citing *Vill. of Tequesta*, 371 So. 2d at 667).

25. *Vill. of Tequesta*, 371 So. 2d at 665 (discussing whether it is possible for a municipality to affect a taking on an underground water source).

26. See *id.* at 667.

27. *Id.* at 668. But see *Schick*, 504 So. 2d at 1320 (stating that “appellants [were] deprived of the existing use of water in their wells and pipes” by pollution).

28. See *Vill. of Tequesta*, 371 So. 2d at 668.

29. Compare *id.* at 665, with *Moore v. State Rd. Dep’t*, 171 So. 2d 25 (Fla. Dist. Ct. App. 1965) (involving plaintiffs who sought injunction against construction of a new bridge proposed to be built that would not have a swing mechanism, therefore the passage of deep sea cargo ships and passenger ships were blocked from entering St. Andrews Bay).

II. EXCLUSIVE PRIVATE RIPARIAN RIGHTS VS. RIPARIAN RIGHTS SHARED WITH THE PUBLIC

A. Access and Navigation

While there seem to be substantial gray areas related to riparian rights, the riparian right of access to adjacent navigable waters appears to be imbued with the status of a property right.³⁰ And the courts generally grant relief to a riparian owner when there is a material interference with or destruction of access.³¹ However, the exception seems to apply when the government has impaired riparian access specifically for the improvement of navigation.³²

While the riparian owner has the right of access from his property to the adjacent waters, the question of the extent of the ability to navigate about the water body remains somewhat unsettled.³³ This has led some courts to evaluate the navigational aspects as to whether the access was meaningful.³⁴ In cases where riparian owners were physically blocked from getting to the river, some courts seem to have imbued the riparian rights of access and navigation with the status of a property right that is slightly different (or unique) from that of the public at large.³⁵ Generally, the public only has a right of access to navigable waters if there is a point of public access.³⁶ They do not have any right to trespass across private property (above the high water line) to get access to public waters.³⁷ Riparian owners have access rights to both navigable and non-navigable waters adjacent to their land.³⁸

On the one hand, “some courts have held that the riparian [owner] has no protectable interest in navigating a waterway; his right to navigate is simply as a member of the public, and in the absence of some *special injury* he is without remedy.”³⁹ For example, in *Frost v. Washington County Railroad*, the court said:

The only right of the plaintiff interfered with . . . was his right of navigation by water in and out of the cove through the channel. This right of the plaintiff, however, was not his private property, nor even his private right. It could not be bought, sold, leased or inherited. He did not earn it, create it, or acquire it The right was the right of the public The plaintiff only shared in the public right The

30. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 98 (citing *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909); *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 507 (Fla. 1918)); *see also* *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957); *Duval Eng'r & Contracting Co. v. Sales*, 77 So. 2d 431, 434 (Fla. 1954); *Tampa So. R.R. v. Nettles*, 89 So. 223, 223 (Fla. 1921).

31. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 99.

32. *See, e.g.*, *Frost v. Wash. Cty. R.R.*, 51 A. 806, 809 (Me. 1901).

33. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 99.

34. *See id.* (discussing “that the public right to use the waterway as a highway would yield to other public needs when the general good required it.”).

35. *See id.* (discussing how the rights of ingress and egress amount to common law riparian rights).

36. *See id.* at 104–05.

37. *See id.*

38. *Id.* at 98.

39. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 100 (emphasis added).

sovereign had the absolute control of it, and could regulate, enlarge, limit, or even destroy it, as he might deem best for the whole public; and this without making or providing for any compensation to such individuals as might be inconvenienced or damaged thereby.⁴⁰

Factually, the case dealt with the rights of an owner of an island where the state has erected and maintained a bridge across a tidewater cove.⁴¹ However, the “[c]ourts are not in agreement as to what constitutes special injury sufficient to entitle the riparian owner to object.”⁴² This “special injury” concept seems similar to the nuisance concept relating to damages “different in kind” and degree, but the riparian rights cases do not appear to be based on nuisance theory.⁴³ It seems that the courts may be using the concept loosely to do equity in certain cases, where navigation has a bearing on access, while skirting the basic premise such as the one stated in *Frost*, that a riparian owner, unable to show special injury, has no remedy other than as a member of the public.⁴⁴

The development of Florida law in this area began with *Thiesen v. Gulf, Florida & Alabama Railway*⁴⁵ and *Webb v. Giddens*.⁴⁶ According to the *Thiesen* court, the common-law riparian owner whose land extends to the high-water mark of tide waters has the right of ingress and egress to and from his land over the waters upon which his land bordered,⁴⁷ and “the rights of a riparian owner at common law constitute[] property of which he [cannot] be deprived [by the state] without just compensation.”⁴⁸ The case was “an action to recover damages for filling in from the shore line towards the channel opposite plaintiff’s land upon the waters of Pensacola Bay”⁴⁹ The action was brought under an 1856 statute dealing with commerce and the construction of wharves and warehouses to facilitate the landing and storing of goods.⁵⁰ Another main point of the case is that “[p]rivate ownership extends ordinarily to [the] high-water mark.”⁵¹

40. *Frost v. Wash. Cty. R.R.*, 51 A. 806, 809 (Me. 1901); *see also* *Bailey v. Driscoll*, 112 A.2d 3, 13 (N.J. Super. Ct. App. Div., 1955) (“[A] riparian owner has no rights at common law, except alluvion and dereliction, in such waters or the lands under them, beyond those of the public generally, even including unimpaired access thereto, merely by reason of his ownership of the ripa”).

41. *Frost*, 51 A. at 807.

42. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 100.

43. *Id.*

44. *See, e.g., Frost*, 51 A. at 809.

45. *See Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 500 (Fla. 1918) (holding that there exists a common-law right of riparian ownership).

46. *See Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955) (discussing the scope of riparian rights).

47. *Thiesen*, 78 So. at 501.

48. *Id.* at 506.

49. *Id.* at 492.

50. *Id.* at 501. *Thiesen* seems to involve one of the old bulkhead type statutes that gave up the state’s ownership of submerged lands adjacent to riparian properties where riparian property owners filled in those submerged lands to build docks, wharves, and warehouses as long as they did not fill out into the channel itself. There were a number of these statutes that attempted to improve commerce but at the same time protect the public navigation in the channel.

51. *Id.* at 494 (citing *Merrill-Stevens Co. v. Durkee*, 57 So. 428, 558 (Fla. 1912); *Ker & Co. v. Couden*, 223 U.S. 268, 179 (1912); *United States v. Pacheco*, 69 U.S. 587, 590 (1864)).

The owner of the lot also claimed common-law riparian rights of ingress and egress over the waters and “the right to bathe and fish in those waters.”⁵² On rehearing, the court reiterated the common-law principle that riparian lands are those “bounded by and extend[ing] to the high-water mark.”⁵³ But with regard to the underlying beds, the court said, “[A]pplying the common law doctrine . . . the title to the soil under such waters to the high-water mark is in the state of Florida, subject to the powers of Congress to regulate commerce.”⁵⁴ “[H]owever, [the title] is held in trust for the people who have the rights of navigating, fishing, bathing, and commerce upon and in the waters.”⁵⁵

Making a distinction between riparian rights that are exclusive to the riparian owner and those held in common with the public, the court stated:

[T]he right of ingress and egress to and from the lot over the waters of the bay, . . . [is a] . . . common-law right appertaining to riparian proprietorship. The common-law riparian proprietor enjoys this right, and that of unobstructed view over the waters, and in common with the public the right of navigating, bathing, and fishing⁵⁶

The *Thiesen* court, quoting *Ferry Pass Inspectors’ & Shippers’ Ass’n v. Whites River Inspectors’ & Shippers Ass’n*, noted “the superior rights of the public as to navigation and commerce and the concurrent right[] of the [riparian owner] as to fishing and bathing.”⁵⁷ The court in *Thiesen* also relied on *Merrill-Stevens Co. v.*

52. *Id.* at 499.

53. *Thiesen*, 78 So. at 500.

54. *Id.* (citing *Sullivan v. Moreno*, 19 Fla. 200, 299 (1882); *Broward v. Mabry*, 50 So. 826, 829 (Fla. 1909)).

55. *Id.*; accord *Marine One, Inc. v. Manatee Cty.*, 898 F.2d 1490, 1492 (11th Cir. 1990) (“The Florida Constitution provides: ‘The title to lands under navigable waters, within the boundaries of the state . . . is held by the state, by virtue of its sovereignty, in trust for all the people.’ Fla. Const. art. X § 11. Florida’s highest court recently termed it an ‘uncontroverted legal proposition’ that ‘Florida received title to all lands beneath navigable waters, up to the ordinary high water mark, as an incident of sovereignty, when it became a state in 1845.’ . . . Those proprietary powers are founded on the ‘public trust doctrine,’ long a part of Florida jurisprudence, even before article X, § 11 of the Florida Constitution was adopted.”); see also *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957); *Brickell v. Trammell*, 82 So. 221, 226 (Fla. 1919); *Ferry Pass Inspectors’ & Shippers’ Ass’n v. Whites River Inspectors’ & Shippers’ Ass’n*, 48 So. 643, 644 (Fla. 1909) (“The state by virtue of its sovereignty holds in trust for all the inhabitants of the state the title to the lands under the navigable waters within the state including the shore or space between [the] high and low water marks.”); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909) (“Where a stream or body of water is permanent in character, and in its ordinary natural state is in fact navigable for useful purposes, and is of sufficient size and so situated and conditioned that it may be used for purposes common to the public in the locality where it is located, such water may be regarded as being of a public character, and the title to the land thereunder, including the shore or space between ordinary high and low water marks, when not included in the valid terms of a grant or conveyance to private ownership, is held by the state in its sovereign capacity in trust for the lawful uses of all the people of the state in the water and the land, subject to lawful governmental regulation of such uses. . . . Those who own land extending to ordinary high-water mark of navigable waters are riparian holders who, by implication of law, and in addition to the rights of navigation, commerce, fishing, boating, etc., common to the public, have in general certain special rights in the use of the waters opposite their holdings; among them being the right of access from the water to the riparian land and perhaps other easements allowed by law. These special rights are easements incident to the riparian holdings, and are property rights that may be regulated by law, but may not be taken without just compensation and due process of law.”).

56. *Thiesen*, 78 So. at 501.

57. *Id.* at 502 (emphasis added) (quoting *Ferry Pass*, 48 So. at 645 (“Subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like, a riparian owner may erect upon the bed and shores adjacent to his riparian holdings bath houses, wharves, or

Durkee, for the proposition that “the owner of land abutting on navigable waters had no exclusive right in the waters below ordinary high-water mark or in the lands under the waters, except the right of access to and from the navigable waters, and rights in the land growing out of accretion or reliction.”⁵⁸ The court in *Thiesen* discussed the nature of the riparian rights of view and access, concluding that they are property that cannot be taken for public use without compensation.⁵⁹

The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability, whether for residence or business purposes. The right of access to the property over the waters, the unobstructed view of the bay, and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not, in many cases, be exchanged for the price of an inland lot in the same vicinity. In many cases, doubtless, the riparian rights incident to the ownership of the land where the principal, if not the sole, inducement leading to its purchase by one and the reason for the price charge by the seller.⁶⁰

In that case, the court concluded that an “owner of land bounded by tidewater may maintain an action against a railroad corporation constructing its road [or railway] so as to cut off [] access to the water”⁶¹

Webb v. Giddens was a case dealing with Lake Jackson, a navigable lake in Leon County, Florida.⁶² Giddens owned a parcel of land on an arm of the lake and had a business renting fishing boats.⁶³ The arm was separated from the main part of the lake by a road, but a wooden state highway bridge left a passable waterway giving people in boats access to the main part of the lake.⁶⁴ The state replaced the bridge with fill and a culvert that the court concluded did not provide a practical means of access.⁶⁵ The lower court decreed that Giddens had a right of access to the main body of the lake for fishing, hunting, or boating.⁶⁶ The Supreme Court of Florida began its analysis with the principle stated in *Thiesen*, that a riparian owner has the common law right of ingress and egress to and from the adjacent water.⁶⁷ The Supreme Court of Florida in *Webb* held that the right of ingress and egress would be virtually

other structures to facilitate his business or pleasure; but these privileges are subject to the rights of the public to be enforced by proper authority or by individuals who are specially and unlawfully injured.”)

58. *Thiesen*, 78 So. at 503 (quoting *Merrill-Stevens Co. v. Durkee*, 57 So. 428, 431 (Fla. 1912)).

59. *Id.* at 507.

60. *Id.*

61. *Id.*; see also *Rumsey v. N.Y. & New England R.R.*, 30 N.E. 654, 654–56 (N.Y. 1892) (involving plaintiffs who sought to recover damages after railroad cut off plaintiffs’ access to the river); *Williams v. Mayor of New York*, 11 N.E. 829, 835 (N.Y. 1887) (finding that plaintiff should be compensated when his land and wharf rights are taken away or destroyed).

62. *Webb v. Giddens*, 82 So. 2d 743, 744 (Fla. 1955).

63. *Id.*

64. *See id.*

65. *Id.*

66. *Id.*

67. *Id.* at 745 (citing *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 501 (Fla. 1918)).

meaningless if Giddens were not allowed access to the main body of the lake.⁶⁸ On the other hand, the Third District Court of Appeal in *Carmazi v. Board of County Commissioners* found no encroachment on the property rights of riparian owners when the county constructed a dam on the Little River, thereby blocking the plaintiffs' access to Biscayne Bay.⁶⁹ The dam blocked the riparian owners' access.⁷⁰ The court distinguished the right of the riparian landowner to launch a boat from his property into the immediately adjacent waters from the right to navigate.⁷¹ The court ruled that there is no private right to navigate on public waters.⁷² Rather, this is a public right that the plaintiffs acquired as members of the public and not due to any particular riparian status.⁷³ Accordingly, when the public could no longer navigate on the Little River, the riparian owner lost his right to navigate as well.⁷⁴

Thus, *Carmazi* stands for the proposition that riparian owners do not have any rights to navigation other than those shared in common with the public.⁷⁵ Additionally, citing *Thiesen*, the court stated that bathing and fishing are also rights held in common with the public.⁷⁶ In the words of the court:

[A] right of navigation is a right common to the public in general. Riparian owners acquire no additional rights to navigation other than those shared concurrently with the public. . . . In the instant case, the appellants are complaining of the fact that once access is had to the water adjacent [to] their property, they cannot navigate to Biscayne Bay. This amounts to a deprivation of a right of navigation which will affect the public as a whole. The eminent domain statutes protect only private rights; not rights which accrue to the public as a whole.⁷⁷

However, relying on *Thiesen*, the *Carmazi* court acknowledged the exclusive riparian rights of ingress, egress, and unobstructed view.⁷⁸

Moreover, in *Intracoastal North Condominium Ass'n, Inc. v. Palm Beach County*, the Fourth District Court of Appeal held that a condominium association's

68. *Webb*, 82 So. 2d at 745 (emphasis added).

69. *Carmazi v. Bd. of Cty. Comm'rs*, 108 So. 2d 318, 320 (Fla. Dist. Ct. App. 1959); see also *Cent. & S. Fla. Flood Control Dist. v. Griffith*, 119 So. 2d 423 (Fla. Dist. Ct. App. 1960) (relating to a similar issue on an artificial canal, i.e., the Biscayne Canal, and applying the principle stated in *Carmazi* and *James v. Cent. & S. Fla. Flood Control Dist.*, 281 So. 2d 402 (Fla. Dist. Ct. App. 1973)).

70. *Carmazi*, 108 So. 2d at 320.

71. See *id.* at 322 (ruling that whatever rights exist to citizens must yield to a necessary benefit to the public).

72. See *id.*

73. See *id.*

74. See *id.*

75. *Id.* But see *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 193 (Fla. 1981) ("To the extent that *Carmazi* . . . conflicts with our decision in the instant case, it is disapproved.")

76. *Carmazi*, 108 So. 2d at 323 (citing *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 501 (Fla. 1918)).

77. *Id.* at 322–23; see also *Silver Springs Paradise Co. v. Ray*, 50 F.2d 356, 359 (5th Cir. 1931) ("In operating glass-bottom boats on the navigable waters of Silver Springs the appellees exercised, not a right which accrued to them by reason of their ownership of upland contiguous to those waters or of land beneath them, but the right of navigation which they possessed concurrently with the public generally.")

78. *Carmazi*, 108 So. 2d at 323 (citing *Thiesen*, 78 So. at 501).

“riparian right of access was subject to the superior right of the public as to navigation and commerce”⁷⁹ Both the trial court and district court of appeal quoted and relied on *Ferry Pass* for this proposition.⁸⁰ Thus, while the Third District Court of Appeal in *Carmazi* considered the riparian right of navigation to be held in common with the rights of the public, the Fourth District Court of Appeal in *Intracoastal* said that the rights of the public to navigation are superior to those of the riparian owner.⁸¹

On the other hand, the contrast between *Webb* and *Carmazi* makes for a somewhat challenging comparative analysis. The task is further complicated by *Game & Freshwater Fish Commission v. Lake Islands, Ltd.*, discussed later in this section.⁸² However, the *Carmazi* court distinguished *Webb* as being “premised upon equitable grounds due to the unusual facts and circumstances existent in that case.”⁸³ Some of the “unusual facts and circumstances” referred to by the court in *Webb* were that the action of the state left the riparian owner without access to the main body of a navigable, landlocked body of water, thereby damaging his commercial enterprise of renting out boats.⁸⁴ In *Carmazi*, on the other hand, the riparian owners apparently wanted to use the water for personal recreational purposes.⁸⁵ If a significant distinction lies in the commercial vs. recreational characterization, then *Carmazi* arguably places the riparian owner wanting to partake of recreational uses in a weaker position than a counterpart who uses the navigable water for a commercial endeavor.

Maloney provides the following analysis:

The cases are not irreconcilable, however. To the extent that the *Carmazi* decision holds that a riparian owner does not have a private property right to travel over navigable waters, even those adjacent to his uplands, it is consistent with the position taken by many courts. And *Webb v. Giddens* does not say otherwise. What *Webb v. Giddens* does seem to say is that for travel over a navigable body of water to be materially obstructed by the state there must be an overriding public interest that justifies depriving either the public or the riparian of the enjoyment of this right.

Webb v. Giddens also established that, whether such an obstruction is called a public nuisance from which the riparian owner sustains special injury, or whether it is called a private nuisance as to him,

79. *Intracoastal N. Condo. Ass'n v. Palm Beach Cty.*, 698 So. 2d 384, 385 (Fla. Dist. Ct. App. 1997).

80. *Id.*

81. *Carmazi*, 108 So. 2d at 322; *Intracoastal*, 698 So. 2d at 385.

82. *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 190 (Fla. 1981) (finding that a law prohibiting use of motorized boats in duck season was unreasonable as applied to owners of a navigable lake, and constitutional with regard to the general public).

83. *Carmazi*, 108 So. 2d at 323.

84. *See Webb v. Giddens*, 82 So. 2d 743, 744 (Fla. 1955).

85. *See Carmazi*, 108 So. 2d at 322 (discussing the asserted property right being “the right of passing by boat from [the riparian owner’s] property to nearby waters).

the riparian owner has the individual right to object and have the courts hear his objection.

The conclusion in [*Webb*] was that replacing a bridge with a dirt fill was an unwarranted deprivation of the right to navigate. In *Carmazi*, once the District Court of Appeal concluded that the plaintiff's rights were merely public rights, it dealt with them summarily.⁸⁶

So it seems that a significant part of the analysis of these cases depends upon how a court distinguishes or intertwines access and navigation. For example, in *Moore v. State Road Department*,⁸⁷ the First District Court of Appeal dealt with a situation where a bridge was to be built by the state just west of the plaintiff's land.⁸⁸ The bridge would effectively cut off accessibility for large ships entering from the Gulf of Mexico.⁸⁹ The plaintiff sought to enjoin construction of the bridge alleging it would impair the plaintiff's riparian rights.⁹⁰ The court pointed out the distinction between access and navigation:

The point at which the rights of the riparian landowner as such end and the public rights of navigation begin is not always easy to determine, but it is the controlling factor in cases of this kind. The public right of navigation at a particular point may be restricted by a bridge or dam having a greater public value without invading the property rights of any citizen although the result may be substantial business losses to persons previously exercising the public right to use the waterway. But riparian property rights may not be taken without compensation.⁹¹

The court concluded that the *Carmazi* rule applied and said that the plaintiffs maintained access to the channel in front of their uplands.⁹² Thus, only the right of navigation, which is shared with the public, was impaired.⁹³ In reaching that decision, the court quoted and adopted the trial court's opinion distinguishing the access issue of *Webb* from the navigation problem in *Carmazi*:

The distinction between the two cases is that in the *Webb* case access to the main body of the waters was not preserved, and riparian rights were impaired, while in the *Carmazi* case access to the main body

86. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 102.

87. *Moore v. State Rd. Dep't*, 171 So. 2d 25 (Fla. Dist. Ct. App. 1965), cert. denied, 177 So. 2d 475 (Fla. 1965).

88. *See id.* at 26.

89. *See id.*

90. *Id.*

91. *Id.* at 28.

92. *Id.* at 28–29.

93. *Id.*

of the *river* was not impaired, and the only rights infringed were rights of navigation.⁹⁴

The court's decision may have been influenced by its finding that the bridge would leave clearance for all traffic moving on the inland waterway.⁹⁵ Navigation was not actually blocked; only the large deep-sea ships would be denied access.⁹⁶ "The theory of the plaintiffs' case is that the construction of the new bridge will impair substantially the riparian rights incident to the plaintiffs' ownership of the land lying between the old bridge and the new bridge."⁹⁷ The court determined that such a potential use was too remote to constitute a special injury that would entitle the plaintiff to relief.⁹⁸

The Supreme Court of Florida in *Lake Islands*, indicates that the riparian owner's right of navigation is different from that of the public only where there is some *special injury*.⁹⁹ This case further muddies the waters (so to speak) regarding riparian rights of navigation. But the facts and circumstances of the case make it distinguishable from other cases addressing this issue.¹⁰⁰

In *Lake Islands*, the Game and Freshwater Fish Commission (the "Commission"), acting pursuant to its statutory authority, enacted a rule "to absolutely prohibit the use of motor boats, including airboats, on the lake during duck hunting season."¹⁰¹ There were some islands in Lake Iamonia (in Leon County, Florida), owned by Lake Islands, Ltd.¹⁰² Lake Islands, Ltd. sought permission from the Commission to use airboats on the lake to take prospective purchasers out to see the property.¹⁰³ But the Commission denied that permission.¹⁰⁴

The trial court described the navigability of the lake as shallow with vegetation making navigation even more difficult.¹⁰⁵ And even though boat paths had been cut by some persons using the lake, these paths did not provide access to some of the islands.¹⁰⁶ The court noted that to access some of the islands, boats would have to be poled or airboats would be necessary.¹⁰⁷ For some of the islands, where water levels were too low even for pole boats, an airboat would be the only means of access.¹⁰⁸

94. Moore, 171 So. 2d at 28.

95. *Id.* at 26.

96. *Id.*

97. *See id.* at 27.

98. *See id.* at 29 (holding that the plaintiffs' "loss, if any, [was] *damnum absque injuria*.").

99. Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd., 407 So. 2d 189, 192 (Fla. 1981).

100. Compare *id.* at 189–90, 193 (holding that island owners had no reasonable means of water navigation), with Moore v. State Rd. Dep't, 171 So. 2d 25, 28 (Fla. Dist. Ct. App. 1965) (finding that property owners had a reasonable access to navigable waters).

101. *Lake Islands*, 407 So. 2d at 190.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Lake Islands*, 407 So. 2d at 190.

108. *Id.*

The court noted that navigation of the lake had been made even more difficult by a drawdown of the lake by the Commission in 1977.¹⁰⁹

The trial court entered a final judgment requiring the Commission to issue permits to island owners for the reasonable use of motorboats and airboats on the lake during the hunting season.¹¹⁰ The Supreme Court of Florida in its discussion of the constitutional issues affirmed the trial court's view that riparian owners have a right of access to their islands on a lake because this is their guaranteed right of ingress and egress which is a "well established common law right incident to ownership of property."¹¹¹

The Supreme Court of Florida said, "We agree with this holding. Riparian rights under both common law and Florida [S]tatute include the right of ingress and egress," citing as authority the *Thiesen* and *Ferry Pass* cases.¹¹² There is dictum in the *Ferry Pass* case, and it is quoted in the *Lake Islands* case, regarding the right of riparian owners to have their water kept free from pollution, and the right to prevent obstruction to navigation or an unlawful use of the water or shore or bed that specially injures riparian owners.¹¹³ As previously noted, the *Ferry Pass* case says that "the injury must relate to [the] riparian lands or business conducted thereon and not to business conducted on the waters by virtue only of the right of navigation."¹¹⁴ This implies a special injury requirement for riparian owners to have a separate cause of action.¹¹⁵ Also, there is language in the case about "the rights of the public to be enforced by proper public authority or by individuals who are specially and unlawfully injured. . . . [and that] [r]iparian owners have no exclusive rights to navigation in or commerce upon a navigable stream opposite the riparian holdings. . . ." ¹¹⁶ And there is language in the *Ferry Pass* case that says "[A]s to mere navigation in and commerce upon the public waters, riparian owners as such have no rights superior to other inhabitants of the State."¹¹⁷ Yet, once again in dictum, *Ferry Pass* declares an undefined right to have water kept free from pollution, even though the court does not cite any specific authority for that proposition nor was such a statement essential to the court's decision in the case.¹¹⁸

The *Lake Islands* court stated, "It is a recognized general rule of law that a riparian owner's interest in waterway navigation is the same as a member of the public except where there is some special injury to the riparian owner."¹¹⁹ Then the

109. *Id.*

110. *Id.*

111. *Id.* at 191, 193.

112. *Id.* at 191 (citing *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 491 (Fla. 1918)).

113. *Lake Islands*, 407 So. 2d at 191.

114. *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909).

115. *See id.* ("A riparian owner has a right to enjoin in a proper proceeding the unlawful use of the public waters or the land thereunder including the shore which is part of the bed, when such unlawful use operates as a special injury to such riparian owner in the use and enjoyment of his riparian lands.")

116. *Id.*

117. *Id.*

118. *See id.*

119. *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 192 (Fla. 1981).

Lake Islands court discussed *Webb*, a case that was distinguished in *Carmazi*.¹²⁰ The *Lake Islands* court elaborated on its interpretation of the decision in *Webb*, in that the issue in *Webb* was whether there was a denial of ingress and egress “which deprived the owner of ‘a practical incident of his riparian proprietorship.’”¹²¹ The court concluded that in *Webb*, the rights of ingress and egress would be virtually meaningless unless the plaintiffs were allowed access to the main body of the lake.¹²²

The *Lake Islands* court was focused on the plaintiffs’ access to their property, apparently considering denial of reasonable access to constitute a special injury that is actionable by the riparian owner.¹²³ At this point, the court adds ambiguity to the analysis by saying “[t]o the extent that [*Carmazi v. Board of County Commissioners*] conflicts with our decision in the instant case, it is disapproved.”¹²⁴ The court in *Lake Islands* is not clear as to what part of *Carmazi* is disapproved.¹²⁵ Presumably, the court is acknowledging the special injury exception.¹²⁶ Perhaps the court is saying that where the rights of navigation throughout the entire water body have a bearing on whether or not riparian owners have meaningful access to their property from the water, the court is qualifying the *Carmazi* decision. The *Carmazi* decision stands for the proposition (substantiated by *Thiesen*) that as long as one has access to and from riparian property via the water, if navigation upon those waters is in some way limited, then the riparian owner is not in a position superior to the public at large to complain about it.¹²⁷

In his dissent in *Lake Islands*, Chief Justice Sundberg concludes:

[O]nce the majority finds the act and regulation in the instant case a reasonable exercise of the police power over navigation insofar as the general public is concerned, it must be found reasonable as to the island owners because they enjoy no greater rights to navigation on the lake than does the public in general. I would reverse the judgment of the trial court.¹²⁸

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 192, 193 (“For the riparian right of ingress and egress to mean anything, it must at the very least establish a protectable interest when there is a special injury. To hold otherwise means the state could absolutely deny reasonable access to an island property owner or block off both ends of a channel without being responsible to the riparian owner for any compensation. A waterway is often the street or public way; when one denies its use to a property owner, one denies him access to his property. This is particularly so in the case of island property. As stated [by] F. Maloney, . . . ‘What good is access to a thirty-foot-deep channel a hundred yards or so long and blocked at both ends?’ Reasonable access must, of course, be balanced with the public good, but a substantial diminution or total denial of reasonable access to the property owner is a compensable . . . deprivation of a property interest.”) (citation omitted).

124. *Id.* at 193.

125. *Lake Islands*, 407 So. 2d at 193.

126. *Id.*; see also *Bertram v. State Rd. Dep’t.*, 118 So. 2d 674 (Fla. Dist. Ct. App. 1960).

127. *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 501 (Fla. 1918); *Carmazi v. Bd. of Cty. Comm’rs*, 108 So. 2d 318, 323 (Fla. Dist. Ct. App. 1959).

128. *Lake Islands*, 407 So. 2d at 197.

In *Krieter v. Chiles*, a riparian owner sued, challenging the state's denial of permission to construct a dock on sovereign submerged lands.¹²⁹ In affirming the denial of permission, the court qualified the riparian right of access.¹³⁰ The Third District Court of Appeal held that a riparian owner did not have a right of access to the property from the water if the landowner had access to her property by way of a road adjacent to the property.¹³¹ It is interesting to note that while the plaintiff in *Krieter* sought access to the water, the court decided the case based on access to the land.¹³²

Thus, to summarize this portion of the analysis, the general rule to be gleaned from the cases is that a riparian owner has a unique right of access to the navigable waters adjacent to his property.¹³³ But he shares the right of navigation with the public.¹³⁴ Loss of the ability to navigate (or to go boating) is not compensable in the absence of special circumstances.¹³⁵ And indirectly, a right to navigate on the waters may be upheld if it is the only means of access to the riparian property.¹³⁶

B. Fishing and Swimming

The public has the right to boat, fish, and bathe in the navigable waters of the state.¹³⁷ Yet case law also categorizes fishing and swimming as riparian rights, and a Florida statute has defined fishing and swimming as riparian rights.¹³⁸ However, the rights of the public and those of riparian owners in the waters themselves are generally indistinguishable and sometimes are described as rights held in common with the public.¹³⁹

The critical questions are whether or not a riparian owner holds any rights to such uses beyond those held by the general public, and if so, whether such additional rights would give the riparian owner a cause of action distinct from that of any other member of the public. The Florida cases that discuss the intersection of riparian and public rights have dealt primarily with the relationship between the right of ingress

129. *Krieter v. Chiles*, 595 So. 2d 111, 112 (Fla. Dist. Ct. App. 1992).

130. *Id.*

131. *Id.* at 113 (“*The appellant does not have the right to wharf out for purposes of ingress and egress. Ingress and egress is available from the property by land-based routes. Only in the absence of this modern-day alternative could the appellant argue a necessity of ingress and egress. In the absence of such a necessity, the appellant’s riparian rights are subject to the public’s interests.*”) (emphasis added).

132. *Id.* at 112.

133. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 98. *But see Krieter*, 595 So. 2d at 112 (“*The appellant’s upland property carries with it certain riparian rights. . . . Although the riparian right of ingress and egress is an appurtenance to the ownership of private upland property, . . . it is a qualified right which must give way to the rights of the state’s people.*”) (citations omitted).

134. *Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955) (quoting *Thiesen v. Gulf, Fla. & Ala. Ry.*, 78 So. 491, 501 (Fla. 1918)).

135. *Game and Fresh Water Fish Comm’n v. Lake Islands, Ltd.*, 407 So. 2d 189, 192 (Fla. 1981).

136. *Id.* at 189; *see also Krieter*, 595 So. 2d at 111.

137. *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919); MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 32.

138. FLA. STAT. § 253.141(1) (2016).

139. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 98–99 (citing *Brickell*, 82 So. at 227; *Ferry Pass Inspectors’ & Shippers’ Ass’n v. White’s River Inspectors’ & Shippers’ Ass’n*, 48 So. 643 (Fla. 1909)); *see Adams v. Elliott*, 174 So. 731, 733 (Fla. 1937).

and egress and the public right of boating and navigation.¹⁴⁰ Accordingly, it is necessary to extrapolate from these cases their application, if any, to injury from a wastewater spill or water pollution. While that should be part of the analysis, it is also important to look to the early source of the various riparian rights. Even though the courts seem to group the rights of boating, fishing, and swimming and say that they are held in common with the public, the origins of each of them are different, and a brief historical analysis may help in determining riparian rights relative to public rights.¹⁴¹

1. Fishing

The English common law did not provide a riparian right to fish for the owner of upland adjacent to navigable waters.¹⁴² In fact, exclusive fishing rights belonged to the owner of the bed underlying the water, and “[t]he English rule has received varied treatment at the hands of the American courts, although most of the courts seem to follow it, at least verbally.”¹⁴³ Yet the English rule does not normally apply when the beds under the navigable waters are held by the state in trust for the people, as they are in Florida.¹⁴⁴ In that situation, the right of a riparian owner to fish is not considered exclusive and either must be attributable to ownership of land bordering a navigable water body or being a member of the public where there is a public right to fish.¹⁴⁵

Additionally, private ownership of submerged lands may confuse the riparian rights issue with regard to potential conflict between the rights of riparian owners in contrast to those of the public, rather than the issue of whether there is a separate, private riparian right to fish.¹⁴⁶ However, “[b]ecause of its English origins, the right to fish is associated with ownership of the underlying land.”¹⁴⁷ Thus, if a riparian owner did happen to own some of the submerged lands, he might have a private riparian right to fish but not because of his status as a riparian owner of upland abutting the water.¹⁴⁸ Rather, the right to fish would arise as a property right associated with ownership of the underlying submerged lands.¹⁴⁹ Accordingly, this discussion contradicts a rule of law that a riparian owner has special fishing rights that arise from ownership of the adjacent upland.¹⁵⁰ The contrary appears to be true. The right to fish arises out of ownership of the submerged lands.¹⁵¹ If the state owns

140. See, e.g., *Carmazi v. Bd. of Cty. Comm’rs*, 108 So. 2d 318, 323 (Fla. Dist. Ct. App. 1959).

141. “Fishing and swimming are often described in the case law as riparian rights and are so defined in a Florida statute. Historically, however, the law has generally made these pleasures as much available to nonriparians as to riparian owners.” MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 108 (citations omitted).

142. *Id.*

143. *Id.*

144. *Id.* at 109.

145. *Id.*

146. *Id.*

147. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 109.

148. *Id.*

149. *Id.*

150. *Id.* at 110.

151. See *Ferry Pass Inspectors’ & Shippers’ Ass’n v. White’s River Inspectors’ & Shippers’ Ass’n*, 48 So. 643, 645 (Fla. 1909).

the land under navigable waters, which is generally the case in Florida,¹⁵² then fishing is a public right that the riparian owner shares with the public and the only aspect of it that is unique to the riparian owner is that he has access from his property while members of the public must find a point of public access.¹⁵³

Regardless of which of these views is followed in Florida, the result would seem to be the same from the standpoint of the riparian owner vs. the public.¹⁵⁴ That is, fishing is a public right based on either the state's ownership of the submerged lands or the navigational servitude.¹⁵⁵ The riparian owner merely shares the public fishing rights and has only a unique point of access from his property.¹⁵⁶

2. Swimming

With regard to the right to swim in navigable waters, the riparian right does not stem from the same historical foundation as the right to fish.¹⁵⁷ While the courts frequently mention a riparian right to swim in the context of upland ownership, these comments by the courts are generally dicta.¹⁵⁸ Yet the Florida statute that defines riparian rights specifically mentions "bathing" (swimming) as one of those rights that accompany ownership of land bordered by navigable waters.¹⁵⁹ However, the statute specifically says that these rights are not of a proprietary nature.¹⁶⁰ The limited cases that have addressed the riparian right to swim have generally involved governmental attempts to restrict the use of the waters in order to protect a public water supply.¹⁶¹ The cases have turned on whether the court viewed the government action as limiting a public use or an attempt to restrict the riparian owner.¹⁶² Limiting a public use would give government wide latitude.¹⁶³ However, since the Supreme Court of Florida has repeatedly stated that riparian rights are property rights, a

¹⁵². See MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 111 (noting that under English law, the Crown owned the land under water and how "Most American courts apply the same rule to nontidal bodies.").

¹⁵³. See *id.* at 111–12 ("The Florida Supreme Court has recognized the existence of a right in the public to fish in navigable lakes and rivers. It has not, however, determined whether this right exists as an incident of navigation or as a separate right stemming from the trust under which the state holds title to lands under navigable waters, although there is early dictum indicating that the sovereignty lands trust is the basis. Anchoring the public fishing right to the trust theory seems reasonable, since historically fishing has been a major use of Florida waters. A trust for the benefit of the public to use the water would be anomalous without including such an established use. Indeed, the more widely accepted theory in other jurisdictions is that fishing rights inhere in the public because the state holds title to the underlying land in trust for the people. The common right of fishing is incident to such ownership, and the navigation right is a right of passage merely. Under this view, in those jurisdictions in which land underlying navigable waters may be held in private ownership, it is the private owners, and not the public, who have the right to fish in the waters. . . . A few states consider the public right to fish to be an incident to the right to navigate upon the waters. Fishing rights so established are independent of the ownership of the submerged bottom, and are entirely a function of navigability and the resulting public easement.") (footnotes omitted).

¹⁵⁴. *Ferry Pass*, 48 So. at 644–45.

¹⁵⁵. *Id.*; MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 111.

¹⁵⁶. See *Ferry Pass*, 48 So. at 645.

¹⁵⁷. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 110.

¹⁵⁸. *Id.*

¹⁵⁹. FLA. STAT. § 253.141(1) (2016).

¹⁶⁰. *Id.*

¹⁶¹. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 111; see, e.g., *Pounds v. Darling*, 77 So. 666 (Fla. 1918).

¹⁶². MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 110; see *Pounds*, 77 So. at 669.

¹⁶³. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 110; see *Pounds*, 77 So. at 669.

restriction on the riparian owner's use of adjacent waters without compensation may result in an unconstitutional taking.¹⁶⁴

Thus, in situations where a public entity attempts to take the water for a public purpose and deprive the riparian owner of the ability to swim in the waters for public health reasons, riparian rights seem to possess more of a proprietary element.¹⁶⁵ Aside from that type of situation, the analysis of the riparian right to swim may be similar to that of fishing.¹⁶⁶ That is, the right is a public right and the riparian owner merely shares in it.¹⁶⁷ He does not have a separate or distinct right to swim, only the unique point of access from his property.¹⁶⁸

C. Additional Riparian Rights that “may be or have been defined by law”

In addition to confusing the issue of whether riparian rights are a form of property, section 253.141(1), Florida Statutes, lends vagueness to the analysis after listing the riparian rights of ingress, egress, boating, bathing, and fishing by adding “and such others as may be or have been defined by law.”¹⁶⁹

Considering this vague catch-all phrase of the statute, one may question whether this language implies a riparian right to have the water maintained at a certain quality level.¹⁷⁰ It does not appear that such a right has been clearly defined by Florida law but has surfaced as dicta in some of the cases.¹⁷¹ For example, the *Ferry Pass* case does provide a foothold for an argument that such a right exists.¹⁷² However, the court's statement in this regard is dictum.¹⁷³ Furthermore, one significant challenge in defining such a right would be to differentiate it from the general public's right. In the *Ferry Pass* case, distinguishing the “right to have water free from pollution” language as dictum leads to a conclusion that only “special injury” would enable a private cause of action.¹⁷⁴ This position is based on the premise that, because some riparian rights are held in common with the public, a public right subsumes all private riparian owner injuries except where a riparian owner can show special injury.¹⁷⁵

In *Ferry Pass*, the plaintiff owned lands fronting on a navigable river and was engaged in the business of inspecting timber and logs and shipping timber.¹⁷⁶ The plaintiff would use long stretches of the river for the handling, inspecting, and

164. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 110; *see Pounds*, 77 So. at 669.

165. *See* MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 110.

166. *Id.* at 110–11; *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909).

167. *See* MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 110–11; *Ferry Pass*, 48 So. at 645.

168. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 111–12; *Ferry Pass*, 48 So. at 645.

169. FLA. STAT. § 253.141(1) (2016).

170. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 322 (regarding the Reasonable Use Rule).

171. *See, e.g., Ferry Pass*, 48 So. at 645; *see also Mildenberger v. United States*, 91 Fed. Cl. 217, 246 (Fed. Cl. 2010).

172. *Ferry Pass*, 48 So. 645.

173. *See id.*; *Mildenberger*, 91 Fed. Cl. at 246.

174. *Ferry Pass*, 48 So. at 645.

175. *Id.*

176. *Id.* at 644.

shipping procedure.¹⁷⁷ The defendant was engaged in a similar business and had dominated the river with its own inspection and shipping of logs and timber, thus, depriving the plaintiff access to, and use of, the river for conducting its business.¹⁷⁸ While the court only needed to decide the respective rights of the parties as to access, navigation, and commerce on the river, it expounded at length on the scope of riparian rights, and included among riparian rights “*the right to have the water kept free from pollution.*”¹⁷⁹ While the court acknowledged that the riparian owner’s right of access from his property to the navigable waters may be exclusive, the court said that the riparian owner does not have a right superior to the public with regard to navigation in and commerce upon public waters.¹⁸⁰ The *Ferry Pass* court opined that those rights are concurrent with other inhabitants of the state.¹⁸¹ Yet the opinion offers a qualifying comment on the concept of “special injury.” The court stated that a

riparian owner has a right to enjoin in a proper proceeding the unlawful use of the public waters or the land thereunder including the shore which is a part of the bed, when such unlawful use operates as a *special injury* to such riparian owner in the use and enjoyment of his riparian lands.¹⁸²

And unless a statute were to provide otherwise, in order to show special injury the riparian owner must demonstrate impact to riparian lands or a business conducted by the riparian owner on his property, and not to a business that the riparian owner conducts on the waters pursuant to only the right of navigation.¹⁸³ Tying together the right to have the water kept free from pollution (albeit in dictum) with the concept

^{177.} *Id.*

^{178.} *Id.*

^{179.} *See id.* at 644–45 (emphasis added) (“Among the common-law rights of those who own land bordering on navigable waters, apart from rights of alluvion and dereliction are the right of access to the water from the land for navigation and other purposes expressed or implied by law, the right to a reasonable use of the water for domestic purposes, the right to the flow of the water without serious interruption by upper or lower riparian owners or others, *the right to have the water kept free from pollution*, the right to protect the abutting property from trespass and from injury by the improper use of the water for navigation or other purposes, the right to prevent obstruction to navigation or an unlawful use of the water or of the shore or bed that *specialily injures* the riparian owner in the use of his property, the right to use the water *in common with the public for navigation, fishing, and other purposes in which the public has an interest*. Subject to the superior rights of the public as to navigation and commerce, and to the concurrent rights of the public as to fishing and bathing and the like, a riparian owner may erect upon the bed and shores adjacent to his riparian holdings, bath houses, wharves, or other structures to facilitate his business or pleasure; but *these privileges are subject to the rights of the public to be enforced by proper public authority or by individuals who are specially and unlawfully injured*. Riparian owners have no exclusive right to navigation in or commerce upon a navigable stream opposite the riparian holdings, and have no right to so use the water or land under it as to obstruct or unreasonably impede lawful navigation and commerce by others, or so as to unlawfully burden or monopolize navigation or commerce. The *exclusive rights of a riparian owner are such as are necessary for the use and enjoyment of his abutting property and the business lawfully conducted thereon*; and these rights may not be so exercised as to injure others in their lawful rights.”) (emphasis added). Although the Supreme Court of Florida cited to mostly other jurisdictions outside of Florida, it did cite to the Florida case of *State v. Black River Phosphate Co.*, 13 So. 640 (Fla. 1893).

^{180.} *Ferry Pass*, 48 So. at 644–45.

^{181.} *Id.*

^{182.} *Id.* at 645 (emphasis added).

^{183.} *Id.*

of “special injury” presents an issue as to whether the court would have viewed pollution as a form of special injury.¹⁸⁴ However, since the public would also likely suffer the same injury from pollution, presumably the court would require the riparian owner to show special injury to the use and enjoyment of his riparian lands or to a business conducted on the property beyond merely pollution of adjacent waters.¹⁸⁵

The Supreme Court of Florida ruled that if the defendant used the water, submerged lands, or shore to deprive the plaintiff of all access to the river from its lands, or injured the plaintiff “in the use and enjoyment of his riparian land or the business thereon, the defendant may be enjoined from a continuance of such wrong; but the complainant has no exclusive right to use the waters or shore for its business.”¹⁸⁶ However, the court continued, if only navigation is obstructed then the proper parties to bring an action are public officials.¹⁸⁷

Perhaps some perspective can be gleaned from the reasonable use rule.¹⁸⁸ The reasonable use rule evolved from the natural flow doctrine.¹⁸⁹ Under the latter concept, the riparian owner has no right to change the natural conditions or characteristics of navigable waters.¹⁹⁰ However, “[t]he reasonable use rule . . . grants . . . the lower riparian [owner] only the right to have his water kept free from unreasonable interference.”¹⁹¹ And case law supports the proposition that pollution is an unreasonable interference.¹⁹² In *Tampa Waterworks v. Cline*, the Supreme Court of Florida said that the upper riparian owner in making use of his land cannot “divert or pollute the stream that flows through the land.”¹⁹³

In *Florida Water Law*, the authors stated that “Riparian owners are endowed with *special status* to abate water pollution in adjacent waters, such status being sufficient in and of itself to meet the special injury requirement.”¹⁹⁴ Plaintiffs alleging a special type of pecuniary damage have also been found to meet the special injury rule.¹⁹⁵ For example, *Harrell v. Hess Oil & Chemical Corp.* was a class action

184. *See id.*

185. *Id.* at 645 (applying the requirement of a riparian owner to show the riparian owner suffered a special injury from the unlawful use of public waters to a riparian owner suffering injury to his riparian rights from water pollution).

186. *Ferry Pass*, 48 So. at 646.

187. *Id.* (emphasis added); *see also* Page v. Niagara Chem. Div. of Food Mach. & Chem. Corp., 68 So. 2d 382, 384 (Fla. 1953) (stating that public rights must be redressed by the state).

188. *See* MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 322–23.

189. *Id.* at 322.

190. *Id.*

191. *Id.*; *see also* Tampa Waterworks Co. v. Cline, 20 So. 780, 782 (Fla. 1896).

192. *Tampa Waterworks*, 20 So. at 786.

193. *Id.* (emphasis added).

194. FRANK E. MALONEY ET. AL., FLORIDA WATER LAW 481 (1980) (citing *Harrell v. Hess Oil & Chem. Corp.*, 287 So. 2d 291, 293, 295 (Fla. 1973) (stating that the riparian owner is not limited to public officials seeking relief from water pollution); *Nat’l Container Corp. v. State*, 189 So. 4, 13–14 (Fla. 1939) (stating that riparians need not show special damage in suit to abate water pollution); *Wetzel v. Duda & Sons*, 306 So. 2d 533 (Fla. Dist. Ct. App. 1975) (stating that riparians on lake had standing to abate nuisance); *Bd. of Trs. of Internal Improvement Tr. Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973) (stating that obstruction of the riparian right of access is considered a special injury)).

195. *See* *Skaggs-Albertson’s v. ABC Liquors, Inc.*, 363 So. 2d 1082, 1086–87, 1091 (Fla. 1978); *Keating v. State*, 173 So. 2d 673, 675 (Fla. 1965).

seeking damages for an alleged discharge of sand and silt into a navigable creek.¹⁹⁶ The named plaintiffs were riparian owners along the waterway asserting a class action on behalf of all the owners along the creek.¹⁹⁷ The court ruled that a class action had not been properly pled but that the complaint did state an individual cause of action.¹⁹⁸ While the case does not specify the exact nature of the plaintiffs' damages, it does say "that their riparian rights have been adversely affected by respondents' acts" and that "petitioners claim injury to their riparian rights sufficient to support a claim for individual relief."¹⁹⁹ The "special status" discussion in *Florida Water Law* was in a section on nuisance actions.²⁰⁰ However, *Webb* and *Lake Islands*, the "special status" or "special injury" cases discussed earlier relating to navigation, etc., were not necessarily brought under nuisance theories, but the courts seemed to imbue riparian owners with some kind of special status if they could find no other way to bring about an equitable result.²⁰¹

*Harbor Beach Surf Club, Inc. v. Water Taxi of Ft. Lauderdale, Inc.*²⁰² is an example of a case where there was obstruction to navigation, an action in nuisance, and special injury shown.²⁰³ There, the court reiterated the general rule of *Ferry Pass*:

[W]e admit the outcome of this case may appear inequitable as against Harbor Beach. However, the result is not inequitable with reference to the well-recognized rule that a riparian owner's right to use navigable waters and the lands thereunder is concurrent with that of the public, not superior to that of the public.²⁰⁴

Harbor Beach was a riparian owner, but it is not clear whether Water Taxi had any riparian status.²⁰⁵ Water Taxi was, as the name implies, a water taxi service that was being hampered in transporting passengers to a hotel by a footbridge that had been built by Harbor Beach.²⁰⁶ The court focused on the economic harm to business to conclude that there was a special injury different from the public to confer standing in this nuisance action.²⁰⁷

196. *Harrell*, 287 So. 2d at 293.

197. *Id.*

198. *Id.* at 294, 295.

199. *Id.* at 295; *see also* *Conrad v. Whitney*, 141 So. 2d 796, 798, 799 (Fla. Dist. Ct. App. 1962) (finding that riparian owners whose use of bayou waters had been limited and whose access across the bayou to Sarasota Bay had been blocked were entitled to mandatory injunction requiring defendants to remove the fill that they had placed across the bayou); *Duval v. Thomas*, 107 So. 2d 148, 149, 151, 152–53 (Fla. Dist. Ct. App. 1958) (establishing the principle that the owner of a portion of the bed of a non-navigable landlocked lake does not have the right to exercise exclusive dominion and control over that portion of the bed and the waters of the lake that he owns).

200. MALONEY, *FLORIDA WATER LAW*, *supra* note 193, at 481.

201. *See* *Webb v. Giddens*, 82 So. 2d 743, 745 (Fla. 1955); *Game & Fresh Water Fish Comm'n v. Lake Islands, Ltd.*, 407 So. 2d 189, 191, 192, 193 (Fla. 1981).

202. *Harbor Beach Surf Club, Inc. v. Water Taxi of Ft. Lauderdale, Inc.*, 711 So. 2d 1230 (Fla. Dist. Ct. App. 1998).

203. *Id.* at 1231.

204. *Id.* at 1233–34; *see also* *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909).

205. *See* *Harbor Beach Surf Club*, 711 So. 2d. at 1231.

206. *Id.*

207. *Id.* at 1232–33.

In *Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc.*, the court posed the question, “Does a strip of accreted land become the property of the upland riparian owner even where the accretion is the result of a lawful exercise of the police power by a municipality to prevent beach erosion?”²⁰⁸ One of the reasons the court touched on as the basis for the doctrine of accretion is to preserve the riparian owner’s access to the water.²⁰⁹ As part of its analysis, the court, mostly in dicta elaborated on riparian rights, saying that the status of riparian owners entitles them to greater rights than the public.²¹⁰ But the court only mentions this in regard to riparian owners’ exclusive right of access over their property to the water and to an unobstructed view.²¹¹ Moreover, the court, citing *Webb v. Giddens*,²¹² opined, “The riparian owner suffers special injury when a nuisance obstructs his right to navigation.”²¹³ Yet the court offered little explanation other than to make a broad statement that the “impact of governmental regulation on the rights to swim and fish may be greater on the riparian than on the public. Thus, a police power regulation prohibiting swimming, fishing, or boating may be unchallengeable by the public but constitute a taking with respect to a riparian.”²¹⁴

Yet in *Brickell v. Trammell*, the Supreme Court of Florida seems to distinguish the riparian rights in common with the public from those that are “special.”²¹⁵ The court, citing *Ferry Pass*, said that the rights of “navigation, commerce, fishing, boating, etc.” are held in common with the public.²¹⁶ Yet riparian owners have “certain special rights in the use of the waters opposite their holdings, among them being the right of access from the water to the riparian land and such other rights as are allowed by law.”²¹⁷ And the court opined that “[t]hese special rights are easements incident to the riparian holdings”²¹⁸ While these rights may be regulated, they “may not be taken without just compensation and due process of law.”²¹⁹

On the other hand, in *Bair v. Central & Southern Florida Flood Control District*, the plaintiffs sought injunctive relief against the predecessor to the South Florida Water Management District.²²⁰ In *Bair*, the Supreme Court of Florida did not find facts sufficient to support an action in either public or private nuisance, stating that “there is no showing of injury or damage of the essential character different from that which might be suffered by the populace generally.”²²¹

208. Bd. of Trs. of Internal Improvement Tr. Fund v. Medeira Beach Nominee, Inc., 272 So. 2d 209, 211 (Fla. Dist. Ct. App. 1973).

209. *Id.* at 212–13.

210. *Id.* at 214.

211. *Id.*

212. *Webb v. Giddens*, 82 So.2d 743 (Fla.1955).

213. *Medeira*, 272 So. 2d at 214.

214. *Id.* (citing *Richardson v. Beattie*, 95 A.2d 122 (N.H. 1953); *People v. Hulbert*, 91 N.W. 211 (Mich. 1902)).

215. *Brickell v. Trammell*, 82 So. 221, 227 (Fla. 1919).

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Bair v. Cent. & S. Fla. Flood Control Dist.*, 144 So. 2d 818, 819 (Fla. 1962).

221. *Id.* at 820–21.

Maloney discusses the confusion and how the *Restatement of Torts, Second*, attempts to address the situation:

Because of the similarity between nuisance theory and the “reasonable use” theory of riparian rights, the *Restatement of Torts, Second*, has adopted a modified approach towards pollution cases, whereby such injuries are considered under nuisance theory instead of the law of riparian rights. This approach was taken to avoid confusion in the law and provide greater protection to plaintiffs suffering from pollution related injuries. Under riparian doctrine, the tendency of the courts is to consider reasonable, beneficial uses of water as a property right incident to ownership of the riparian land. Beneficial uses of water which cause pollution might then acquire the status of a property right under [the] riparian doctrine. Pollution cases were therefore classified under nuisance law to emphasize “that pollution is a tort and not the exercise of a property right.” Riparian law is still applied regarding disputes affecting the quantity of water to be allocated between riparian uses.²²²

So it seems that the Restatement tends to negate the position that there is some kind of riparian property right that would entitle the riparian owner to damages as a result of pollution. In fact, most of the cases were brought for injunctive relief to abate pollution.²²³ Another distinguishing factor is that, as in *Tampa Waterworks*, the cases primarily involved actual or threatened damage to consumptive uses.²²⁴ *Florida Water Law* alludes to this in the last sentence of the quoted language.²²⁵

Additionally, in *Florida Water Law* there is discussion of *Cities Service Co. v. State*.²²⁶ In that case, the operators of a phosphate mine were held liable for water pollution caused by a break in an earthen dam that impounded phosphate slime.²²⁷

222. MALONEY ET. AL., *FLORIDA WATER LAW*, *supra* note 210, at 333 (citing RESTATEMENT (SECOND) OF TORTS § 849(1)(a)-(c)); see also RESTATEMENT (SECOND) OF TORTS § 849(c)(2) (“The pollution of water by a riparian proprietor that creates a nuisance by causing harm to another person’s interest in land or water is not the exercise of a riparian right.”).

223. MALONEY ET. AL., *FLORIDA WATER LAW*, *supra* note 210, at 331 (citing *Parsons v. Tenn. Coal, Iron, & R.R.*, 64 So. 591 (Ala. 1914) (affirming denial of damages because no substantial injury shown from pollution from defendant’s coal mining operation); *Clark v. Lindsay Light & Chem. Co.*, 93 N.E.2d 441, 443 (Ill. App. Ct. 1950) (denying injunction against pollution because damages shown were only nominal); *Panther Coal Co. v. Looney*, 40 S.E.2d 298, 300–04 (Va. 1946) (finding that defendant company did not have a legal right to pollute the plaintiff landowner’s water in a material and substantial way even if that pollution was caused by the non-negligent, lawful operation of its mining business, but the landowner was awarded no damages because he had failed to prove that the damage to his water was due more to the actions of the company than to his own pollution of that water)); see also *Tampa Waterworks Co. v. Cline*, 20 So. 780 (Fla. 1896).

224. MALONEY ET. AL., *FLORIDA WATER LAW*, *supra* note 210, at 333 (citing *Parsons*, 64 So. 591; *Clark*, 93 N.E.2d at 442; *Panther Coal*, 40 S.E.2d at 302–03); see also *Tampa Waterworks*, 20 So. at 782, 785, 786.

225. MALONEY ET. AL., *FLORIDA WATER LAW*, *supra* note 210, at 333 (“Riparian law is still applied regarding disputes affecting the quantity of water to be allocated between riparian uses.”).

226. *Id.* at 334 (citing *Cities Serv. Co. v. State*, 312 So. 2d 799 (Fla. Dist. Ct. App. 1975)).

227. *Cities Serv.*, 312 So. 2d at 800, 803–04.

The court invoked the doctrine of strict liability.²²⁸ However, the state, not riparian owners, brought this action.²²⁹

At this juncture, it is not clear whether the doctrines of reasonable use, special status, and strict liability are, or create, additional riparian rights that “may be or have been defined by law” as contemplated by: (1) section 253.141, Florida Statutes; (2) its predecessor legislation; or (3) even the common law.²³⁰ But it seems that these theories relate more to the remedy of removing the pollution or nuisance rather than an award of money damages. In some cases, nature may attenuate the pollution and accomplish remediation rather quickly.

CONCLUSION

One thing is clear, there is a great deal of dicta and confusion concerning riparian rights, especially regarding the question of whether a riparian owner has rights that are superior to the public regarding adjacent navigable waters. While the Florida courts have not definitively answered this question as to fishing and swimming, the body of current Florida water law strongly supports an argument that a riparian owner has no right superior to that of any member of the public to use the water for navigation or boating.²³¹ By analogy, the same should hold true for fishing or swimming. For example, fishing is a public right based on either the state’s ownership of the submerged lands or the navigational servitude.²³² The riparian owner merely shares the public fishing rights and has only a unique point of access from his property.²³³ The riparian right to swim arguably is similar to that of fishing; that is, the right is a public right and the riparian owner merely shares in it.²³⁴ The riparian owner does not have a separate or distinct right to swim, only the unique point of access from the riparian property.²³⁵ However, the right to have water kept free of pollution, loosely expressed by some courts, is not as clear.²³⁶

228. *Id.* at 803.

229. *Id.* at 800.

230. FLA. STAT. § 253.141 (1) (2016).

231. *See* MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 100; *Ferry Pass Inspectors’ & Shippers’ Ass’n v. White’s River Inspectors’ & Shippers’ Ass’n*, 48 So. 643, 644 (Fla. 1909) (“The State by virtue of its sovereignty holds in trust for all the inhabitants of the State the title to the lands under the navigable waters within the State, including the shore or space between high and low water marks.”); *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909) (finding that rights of navigation, commerce, fishing, and boating are common to the public); *Carmazi v. Bd. of Cty. Comm’rs*, 108 So. 2d 318, 322 (Fla. Dist. Ct. App. 1959) (“[A] right of navigation is a right common to the public in general. Riparian owners acquire no additional rights to navigation other than those shared concurrently with the public.”).

232. MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 111.

233. *Ferry Pass*, 48 So. at 645.

234. *Id.*

235. *Id.*

236. *Id.*; *see also* *Harrell v. Hess Oil & Chem. Corp.*, 287 So. 2d 291, 293, 295 (Fla. 1973) (stating that the riparian owner is not limited to public officials seeking relief from water pollution); *Nat’l Container Corp. v. State*, 189 So. 4, 5, 13–14 (Fla. 1939) (stating that riparians need not show special damage in suit to abate water pollution); *Wetzel v. Duda & Sons*, 306 So. 2d 533 (Fla. Dist. Ct. App. 1975) (stating that riparians on the lake had standing to abate nuisance of defendant farmers discharging noxious chemicals and other substances into the lake); *Panther Coal Co. v. Looney*, 40 S.E.2d 298, 300–01 (Va. 1946) (finding that defendant company did not have a legal right to pollute the plaintiff landowner’s water in a material and substantial way even if that pollution was caused by the non-negligent, lawful operation of its mining business).

On the one hand, case law holds that there are some riparian rights that are considered property rights exclusive to the riparian owner.²³⁷ These include accretion, dereliction, access, wharfing, and view.²³⁸ But the stronger argument as to boating, fishing, and swimming is that these are public rights in navigable waters that exist under the Public Trust Doctrine, i.e., state ownership of the submerged lands held in trust for the public use. The weight of authority indicates that riparian owners merely share these rights as members of the public.²³⁹ And while riparian owners have a unique mode of access via their property, the loss of these public rights is not compensable to the riparian owner absent some special injury.²⁴⁰ On the other hand, a right to navigate on the waters may be upheld indirectly if it is the only means of access to the riparian property.²⁴¹

The least clear part of the analysis relates to pollution. But the statutory language in section 253.141, Florida Statutes, adds confusion by including in the body of riparian rights, those that “may be or have been defined by law.”²⁴² Moreover, the doctrines of reasonable use, special status, and strict liability also lend ambiguity to the issue.²⁴³ The pollution cases generally involve nuisance actions for abatement.²⁴⁴ Accordingly, the question of whether, under Florida law, a riparian owner has a legal right distinct from, larger than, or superior to, that of any member of the public to have the abutting navigable waters kept free of pollution, or to use the waters for boating, fishing, or swimming remains, at best, muddied.

237. See *Ferry Pass*, 48 So. at 644–45 (discussing rights exclusive of riparian owners, rights held in common with the public by riparian owners, and superior rights held by the public).

238. *Id.*; see also *Bd. of Trs. of Internal Improvement Tr. Fund v. Medeira Beach Nominee, Inc.*, 272 So. 2d 209, 214 (Fla. Dist. Ct. App. 1973).

239. See, e.g., *Ferry Pass*, 48 So. at 645.

240. *Id.*

241. See *Medeira Beach Nominee*, 272 So. 2d at 214.

242. FLA. STAT. § 253.141 (1) (2016).

243. See MALONEY, WATER LAW AND ADMINISTRATION, *supra* note 4, at 322–23 (discussing the reasonable use doctrine); MALONEY ET. AL., FLORIDA WATER LAW, *supra* note 210, at 481 (discussing special status); *Cities Serv. Co. v. State*, 312 So. 2d 799, 803 (Fla. Ct. App. 1975) (invoking strict liability).

244. MALONEY ET. AL., FLORIDA WATER LAW, *supra* note 210, at 333 (citing *Wetzel v. Duda & Sons*, 306 So. 2d 533, 533–34 (Fla. Dist. Ct. App. 1975); *Nat’l Container Corp. v. State*, 189 So. 4, 5 (Fla. 1939)).