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Title: Appraisal of Aquatic Preserves in Florida

Requested by: State of Florida Coastal Coordinating Council

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I. Introduction

On September 24, 1968, Attorney General Earl Faircloth offered a resolution [1] to the Trustees of the Internal Improvement Fund ("Trustees" or "Board") entitled "A Resolution Relating to State Sovereignty (Publicly-Owned) Lands (No Private Property Ownership Rights Involved) wherein certain areas were to be dedicated as inviolate aquatic preserves of the State of Florida. Upon proper motion, this resolution was referred to the Interagency Advisory Committee on Submerged Land Management for study. On November 12, 1968, the Committee submitted a report to the Trustees entitled "Committee's Report No. 2, A Proposed System of Aquatic Preserves." [2]

The purpose of this paper is to analyze this report; review the Minutes of the Trustees from the introduction of the report until the present time and discuss the powers of the Trustees, if any, with regard to setting aside and characterizing areas as aquatic preserves.

II. Report No. 2 ("report")

The report is broken up into four parts: background, aquatic preserve concept, mechanics for establishing an

aquatic preserve system and prospective aquatic preserves recommended for initial establishment.

A. Background.

Florida holds title to nearly all submerged tidal lands lying between the mean high water line and the outer territorial limits of the United States--consisting of some 10,000 square miles--containing areas of open water, coastal marshes, mangrove islands, grass flats, oyster bars, and coral reefs. The coastal waters provide excellent marine sport, commercial fisheries (although no figures are given) and contain flora and fauna that have great aesthetic appeal. In other words, these areas are a valuable natural resource. The problem presented is that man and nature are having their difficulties coexisting on equal terms. Population growth and economic development, including landfill, exploratory oil wells and erection of all types of structures, create an impact resulting in physical alteration of the coastal waters. One of the best ways to protect the natural values that remain in order to insure adequate overall protection for coastal water areas is to select and set aside areas as permanent preserves ". . . forever offlimits to incompatible human

activity." 3/ Thus, the report contains a proposal for a statewide system of aquatic preserves for Florida.

B. The Aquatic Preserve Concept

The concept, as set forth in the report, assumes that some areas of the State are more valuable in their natural condition and that these areas are reasonably identifiable and delimited. These areas would be dedicated in perpetuity as aquatic preserves and would be managed in such a fashion as to protect and enhance their basic natural qualities ". . . for public enjoyment and utilization . . . ". 4/ The following are suggested criteria to be used in order to make judicious selections:

(1) Purpose.

Aquatic preserve is an exceptional area of coastal water to be preserved in its natural or existing condition by regulating human activity.

(2) Types.

It will be one or a combination of three principal interrelated types: (a) biological, to preserve animal and plant life or their supporting habitats, (b) aesthetic, defined in connection with preserving scenic qualities, or (c) scientific, to preserve for scientific and educational purposes.

(3) Quality.

This will be determined mainly by using informed judgment.

(4) Size.

This should be large enough to include the features that justify the establishment of the preserve ". . . and to provide a sufficient buffer zone to insure protection from unnatural peripheral influences. . . ". 5/

(5) Number.

No fixed number but each preserve should be justified by its intrinsic merit.

(6) Distribution.

A balance should be sought both in geographical distribution and in types of areas. ". . . Such balance is necessary in order for the aggregation of preserves to constitute a true statewide system. . . ". 6/

(7) Priority.

The order of selection and establishment should be governed by the relative vulnerability of the qualities intended to be preserved. Early consideration should be given to areas in close proximity to rapidly developing areas.

(8) Competing Uses.

In order to insure that maximum utilization of areas

will inure to the public, consideration should be given to all potentially competing uses.

C. The Mechanics for Establishing an Aquatic Preserve System

1. Selection.

Recognition is given to the fact that operation of a aquatic preserve system should be coordinated among several agencies at both state and federal levels. Since the Trustees own the underlying water bottoms, they should formally establish the preserves but it is recommended that they should receive advisory assistance from an inter-agency committee in order to provide a high degree of consistency in evaluating and selecting sights.

2. Establishment.

This should be accomplished by a resolution adopted by the Trustees " . . . with the formal concurrence of other governmental bodies which might have some jurisdiction in such matters . . . ". 2/ Any included lands or water bottoms privately owned would be excluded from the preserve upon discovery but the State would negotiate in order to obtain the areas so included.

3. Management.

The Trustees would have this responsibility pursuant

to suggested criteria contained in the report: (a) no alteration of physical conditions with exceptions, (b) no bulkhead lines, (c) regulation of human activity without interfering with traditional uses, (d) ". . . Neither the establishment nor the management of an aquatic preserve shall infringe upon the lawful and traditional riparian rights of private property owners adjacent to a preserve . . . ". [8]

D. Prospective Aquatic Preserves Recommended for Initial Establishment

Twenty-six areas were set forth with explanations of the reasons therefor, all of which were fully discussed in the "concept" part of the report.

III. Adoption of the Report by the Trustees and a Summary of Resolutions regarding Aquatic Preserves from November 12, 1968 to Present

On November 12, 1968, the Trustees declared that it was to be considered as a policy of the Trustees to establish a system of aquatic preserves using the areas designated in the report as the first phase; that considerable additional field work would be necessary for the setting of exact boundaries; and public hearings would not be precluded but would be held at a later date.[9]

Thereafter, on November 19, 1968, it was decided by the Trustees that if hearings were to be held, they should be located at about seven different locations. 10/ Hearings were scheduled to begin on February 13, 1969 in Panama City, Florida, and each Thursday night thereafter through April 10, 1969 in other cities, for the purpose of obtaining information relative to the proposal to establish aquatic preserves in locations recommended in the report.11/

On October 21,1969, the Trustees, upon proper motion, adopted a concept and management policy resolution which would set in motion action on specific aquatic preserve resolutions, with the understanding that any member of the Board would be entitled to place on the agenda for a hearing any particular resolution involving an area where objections had been received for consideration of possible alterations in the boundaries.12/

This resolution established a statewide system of aquatic preserves as a means of protecting and preserving in perpetuity certain areas of state-owned land. It also stated that preserves ". . . shall be administered and managed, either by the said State of Florida Board of

Trustees of the Internal Improvement Trust Fund or its designee as may be specifically provided for in the establishing resolution for each individual aquatic preserve . . . ". [13]

Except for the boundary line problems [14] the only interpretation of the policy or concept resolution (paragraph (6)) occurred at the Board meeting held on October 28, 1969, [15] and concerned the clarification of the term "similar purposes" contained in paragraph 6:

> "(6) Neither the establishment nor the management of an aquatic preserve shall infringe upon the lawful and traditional riparian rights of private property owners adjacent to a preserve. In furtherance of these rights, reasonable improvement for ingress and egress, mosquito control, shore protection and similar purposes may be permitted by the State of Florida Board of Trustees of the Internal Improvement Trust Fund and other jurisdictional agencies, after review and formal concurrence by any specifically designated managing agency for the preserve in question." Emphasis mine.
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> "'Similar purposes' referred to in the second sentence would include docks, both private and commercial, so long as they do not interfere with public enjoyment and use of the preserve. This paragraph also includes normal drainage of uplands and in no way is intended to inhibit the use of privately-owned uplands so long as publicly-owned bottoms are not unduly disturbed."

Another policy was adopted by the Board on November 18, 1969 [16] regarding navigation channels within aquatic preserves. In reviewing an application for a navigation channel, the Board would attempt to see that channels were placed where the least damage would occur to marine biological environment, also where the channels would be of greatest use and of sufficient size to avoid requirement of frequent maintenance:

> ". . . that the Trustees adopt a policy that encourages single large navigation channels and requires payment for all material excavated calculated at the minimum rate of 10¢ per cubic yard with no deduction for yardage as heretofore allowed in the construction for the standard minus-five feet mean low water by fifty feet wide bottom width channel. The charge represents compensation for damage to the marine biological environment and payment would be made irrespective of spoil area location. Those publicly funded authorized navigation channel projects would be exempt from such charges in the administration of this policy."

Thereafter, the Board completed approval of the 26 preserves listed in the report [17] by approving G-8, St. Martins Marsh, as modified, and then formed an Advisory Committee on Aquatic Preserves in order to study proposals

for additional preserves; hold public hearings; and report to the Board no later than December 31, 1970 with its recommendations.[18]

On February 2, 1971, and August 31, 1971, the Board approved a few more areas for designation as aquatic preserves.[19]

From that day to the present time, only two boundary disputes have occurred.[20] Thus, although aquatic preserves are environmentally sensitive areas, no further areas have been recommended for approval.

IV. Jurisdiction of the Board

A. Brief History of the Board

On January 6, 1855, the Florida legislature created a special fund consisting of lands that then remained unsold from those previously received under Federal Grants.[21] The administrative trust into which such lands became corpus was called the "Internal Improvement Fund of the State",[22] and has continued to be so designated under Florida law.[23] In 1967, the legislature passed the Randell legislation which increased the number of Trustees to seven.[24]

B. Powers and Duties of the Board

The powers and duties of the Trustees are set forth in

Sec. 253.02 F.S. The Trustees are responsible for the lands constituting the fund as well as administering any land that may inure to the state,[25] including swamp and overflow lands, tidal lands, etc. Nevertheless, Sec. 253.03(6) requires that lands held by any board, commission, department or agency for public purpose be transferred to the Trustees ". . . for the use and benefit of the state. . .", and that the Trustees shall administer all state owned lands, ". . . and shall be responsible for the creation of an overall and comprehensive plan of development concerning the acquisition, management and disposition of state owned lands so as to insure maximum benefit and use. . . ".[26]

Thus, we have implied authority for the Trustees to set up aquatic preserves because (a) they are using land owned by the state and (b) the preserves seem to fall within a plan that is being established for the altruistic purposes mentioned in the report.

If private property falls within a preserve area, the Trustees have authority to exchange lands.[27] In addition, the Trustees have vast permit authority concerning issuance of dredge and fill permits, fixture of bulkheads,[28] and the power to negotiate oil and gas leases.[29]

V. Conclusion

Thus, it is apparent from a legal standpoint, that aquatic preserves do not have a legal status but were, at one time, an environmentally sensitive area.

There are two basic problems confronting the Trustees:

(a) If private ownership occurs within a preserve and the private owner is deprived of the use of his land, he may have a potential lawsuit for damages based upon condemnation of his land by the Trustees.

(b) Setting aside areas as preserves, without considering the interdependency of the entire ecosystem, will not really preserve any area. This situation can be resolved by hemming in governmental agencies to act as one cohesive unit pursuant to a formula rather than passing piece-meal legislation which does not resolve the uniform problems.

Footnotes

1. 37 Minutes of the Trustees of the Internal Improvement Trust Fund, State of Florida 85-87.

   The cites commencing with footnote 2 and terminating with footnote 19 all come within the aforementioned minutes.

2. 37 at 129-137.

3. 37 at 129.

4. 37 at 130.

5. 37 at 130.

6. 37 at 131.

7. 37 at 131.

8. 37 at 132.

9. 37 at 127-128.

10. 37 at 139.

11. 37 at 207.

12. 37 at 482-484.

13. 37 at 483.

14. 37 at 488.

15. 37 at 492.

16. 37 at 508.

17. 37 at 594.

18. 37 at 607-608.

19. 38 at 196-197; 359-360.

20. Meetings held on December 12, 1972 at p. 21 and January 16, 1973 at p. 22--all found in loose form rather than bound volumes.

21. Fla. Laws 1855, Ch. 610

22. Fla. Laws 1855, Ch. 631.

23. Fla. Stat., Sect. 253, et. seq.

24. Sec. 253.02(2) F.S.

25. Sec. 253.03 F.S.

26. Sec. 253.03(7) F.S.

27. Sec. 253.42 F.S.

28. Sec. 253.122-253.125 F.S.

29. Sec. 253.47-253.62 F.S.