WATER LOG

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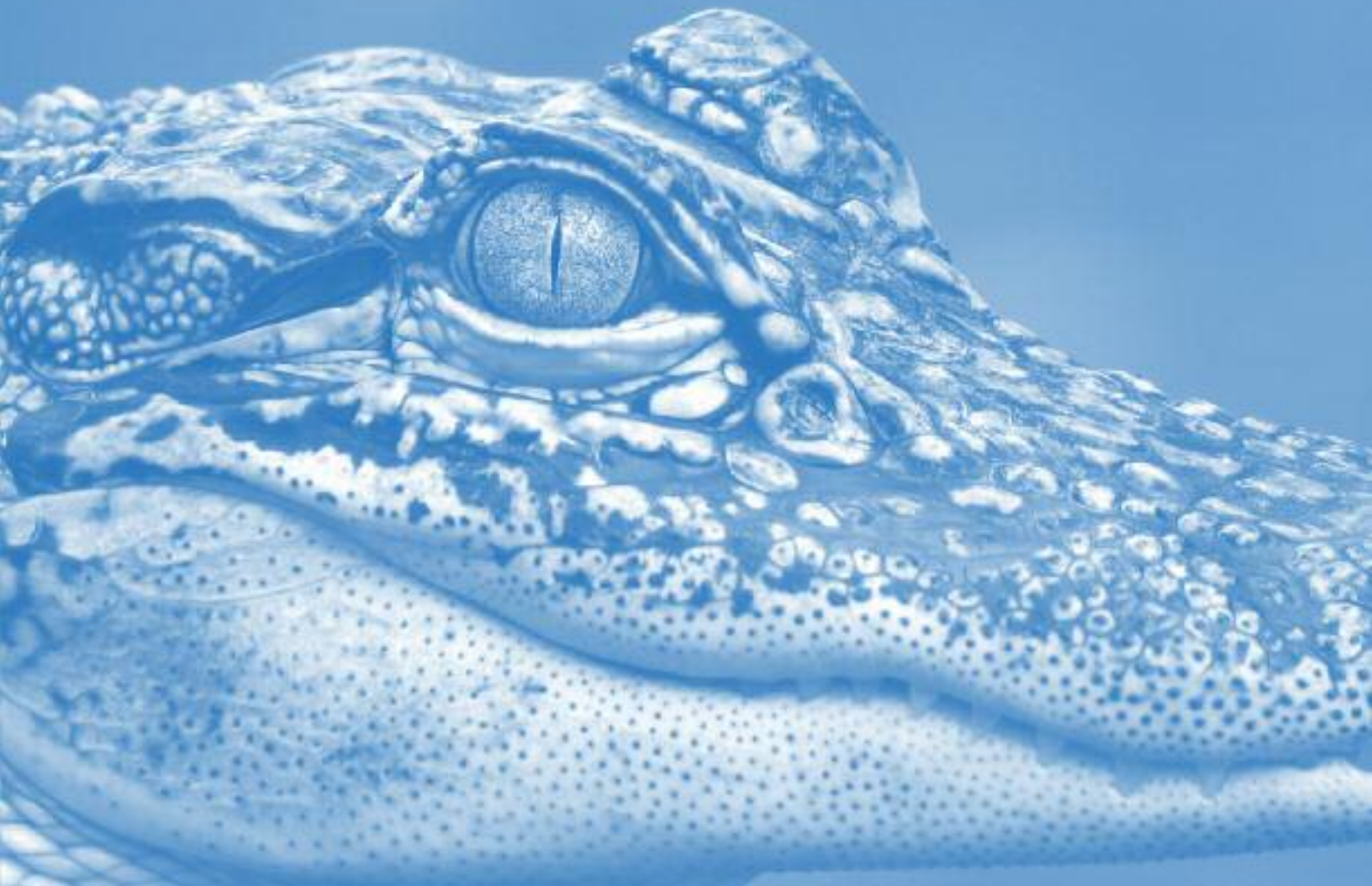
Alligator Infestation: When Should a Property Owner Reasonably Discover It?

Also,

The Flooding of White Oak Bayou

2013 Alabama Legislative Update



Water Log

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Cover photograph of a young alligator at the Noxubee National Wildlife Refuge in Brooksville, MS, courtesy of Roger Smith.

Contents photograph of the Everglades, courtesy of Rene Rivers.

• UPCOMING EVENTS •

2013 Alabama Water Resources Conference

September 3, 2013
Orange Beach, AL
http://auei.auburn.edu/conference

Oceans 2013

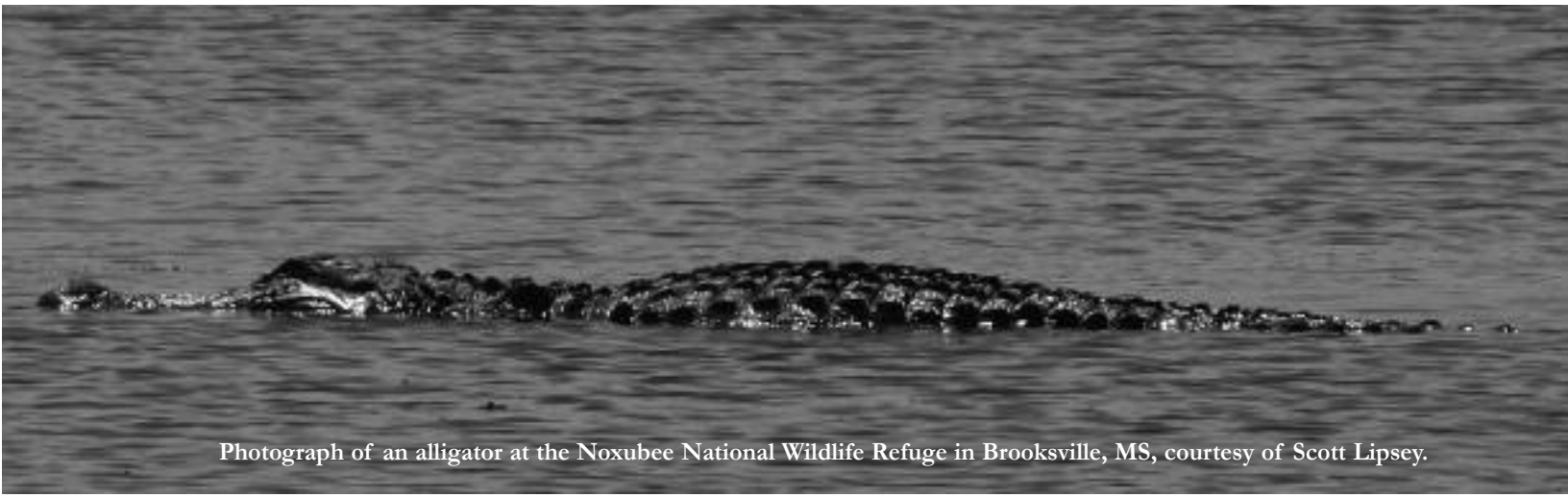
September 23-26, 2013
San Diego, CA
www.oceans13mtsieeesandiego.org

American Bar Association SEER 21st Fall Conference

October 9-12, 2013
Baltimore, MD
www.ambar.org/environfall

Alligator Infestation: When Should a Property Owner Reasonably Discover It?

Ryan J.F. Pulkrabek[1]



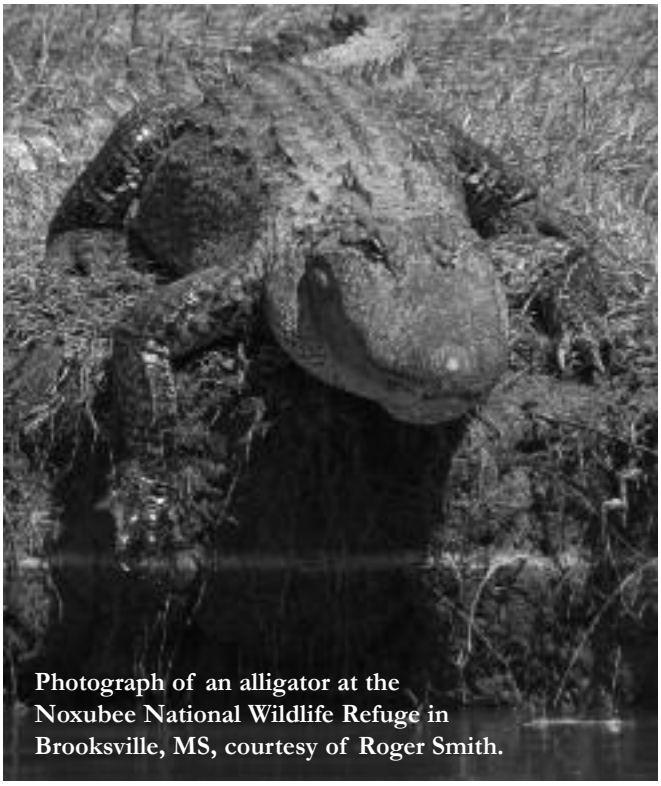
Photograph of an alligator at the Noxubee National Wildlife Refuge in Brooksville, MS, courtesy of Scott Lipsey.

Should the occasional alligator sighting put a property owner on notice of a possible alligator infestation? A local Mississippi court must now answer that question after the Mississippi Court of Appeals determined that reasonable minds could differ as to when a property owner may reasonably discover an alligator infestation. In their lawsuit against Exxon Mobil Corporation, Cosandra and Tom Christmas allege permanent injury to their property after discovering that their land was infested with at least eighty-four alligators spilling over from retention ponds on the adjoining property owned by Exxon.

Alligator Infestation

Cosandra and Tom Christmas bought approximately thirty-five acres of property in 2003 in rural Wilkinson County, Mississippi. Wilkinson County is located along the western lower corner of Mississippi, and borders the Mississippi River. The Christmases claim they were unaware at the time of the purchase that the adjacent Centreville Landfarm, a refinery waste disposal site owned and maintained by Exxon Mobil Corporation, was infested with alligators.[2] The Christmases would later learn that these alligators were spilling over from Exxon's retention ponds on the adjoining property, and that the alligators were originally placed on Exxon's property as "canaries" to give people notice of the need to get away from the retention ponds because they contained contamination.[3] A real estate agent stated that the Christmases were informed that an alligator had previously attacked a horse kept on the property.[4]

At the time of the purchase, the rural property was overgrown and apparently used for hunting and timber by previous owners. The land had previously been logged, leaving the property covered in dense underbrush at the time of purchase. Although the Christmases admit to occasionally sighting alligators on their property after the purchase, they contend that they did not suspect anything abnormal about the property until they moved onto the land and began clearing it in 2007. The Christmases assert that they first learned of the source of the alligator infestation shortly thereafter when Tom Christmas entered the Exxon property in search of a lost hunting dog.



Photograph of an alligator at the Noxubee National Wildlife Refuge in Brooksville, MS, courtesy of Roger Smith.

The Christmases notified Exxon that the alligators from Exxon's property were entering and infesting the Christmases' land, and on July 2, 2007, the Mississippi Department of Wildlife, Fisheries, and Parks (MDWFP), acting on the request of Exxon, observed about eighty-four alligators on Exxon's property and stated that it had not counted all of the alligators.[5] At least sixteen of the alligators were four feet or greater in length. At Exxon's request, MDWFP created a harvest plan to remove all of the alligators over four feet in length. In July 2008, MDWFP culled seven adult alligators from Exxon's property and Exxon reinforced its fence along the Christmases' property, presumably to prevent alligators from escaping onto the Christmases' property.

Despite the efforts of the MDWFP and Exxon to stop the alligator infestation, the Christmases sued Exxon's Centreville Landfarm on August 11, 2008 contending that the alligator infestation created a "stigma" that could not be eliminated or even lessened, and because of this stigma, their property was permanently injured.[6] In response to the Christmases claims, Exxon filed a motion for summary judgment in an attempt to get the entire case thrown out based on two affirmative defenses: statute of limitations and prior trespass. The trial court agreed with Exxon and dismissed the case. The Christmases appealed.

When is an Alligator Infestation Reasonably Discoverable?

On appeal, the court considered whether the motion for summary judgment was properly granted in favor of Exxon. A motion for summary judgment can only be granted when there is no dispute between the parties as to the material facts of the case.[7] Thus, if the court finds that both sides agree about what happened, but disagree about what they are entitled to by law under the circumstances, the judge can decide the matter on legal grounds without the aid of a jury.

Based on that standard, the court considered whether reasonable minds could disagree about whether the Christmases had failed to file suit prior to the running of the statute of limitations. A statute of limitations is a period of time after the incident occurs, or is discovered, in which a suit must be filed before it is barred. The statute of limitations period begins when any owner of the property, whether current or previous, discovers or reasonably should have discovered the injury.[8] In this case, the statute of limitations was three years from the time in which the injury occurred unless the injury was latent, i.e. undiscoverable by reasonable methods.[9] If the injury was latent, the statute of limitations did not begin running until the infestation should have reasonably been discovered. Exxon did not present evidence that would suggest that the previous owners knew about the alligator infestation, so the appellate court could only assess whether the injury was latent and whether the Christmases should have reasonably discovered the infestation prior to their occupation of the property in 2007.

Exxon argued that the case should be dismissed on the grounds of the Christmases' failure to comply with the statute of limitations. Exxon contended that the Christmases should have reasonably discovered the alligator infestation when they purchased the land in 2003; therefore, the Christmases suit should be barred because it was filed in 2008, which is outside of the three-year

statute of limitations period. The Christmases countered that the alligator infestation was a latent injury and was not reasonably discoverable until they moved onto the property and began clearing it in 2007; thus, their 2008 filing was within the three-year statute of limitations.

To determine when the alligator infestation should have been reasonably discovered, the court assessed the nature of the injury, the character of the property, and the use of the property.[10] The Christmases' property was overgrown, as is common with rural land used predominantly for hunting and recreation. This likely made Exxon's retention ponds difficult to see from Christmases' property. Furthermore, alligators are nocturnal and are scarce in the winter, so they were arguably less noticeable at times in which the Christmases used the land, since they likely used the land mostly during winter days for hunting prior to permanently moving onto the property. The nature of the injury is particularly unusual, so an occasional alligator sighting arguably did not put the Christmases on notice of a potential alligator infestation. For all of these reasons, the court held that reasonable minds could differ as to whether the infestation was latent and reasonably discoverable before the Christmases' moved onto the property.[11] Thus, since there is a genuine issue of material fact, the appellate court held that the trial court should not have granted summary judgment for the statute of limitations expiring.

Exxon also argued that the case should be dismissed on the grounds of prior trespass. The doctrine of prior trespass refers to the notion that (1) any damage occurred prior to the current owner's purchase of the property, (2) the current owner knew about the damage at the time of purchase, and (3) the current owner paid less for the property.[12] For the prior trespass doctrine to bar the Christmases' claim, the Christmases would have to have known about the alligator infestation at the time of purchase and agreed to pay less for the property as a result. Because the Christmases presented a factual dispute as to when the alligator infestation was discovered, the court ruled that the doctrine of prior trespass was an inappropriate basis for granting a motion for summary judgment in favor of Exxon.[13]

The nature of the injury is particularly unusual, so an occasional alligator sighting arguably did not put the Christmases on notice of a potential alligator infestation.

Conclusion

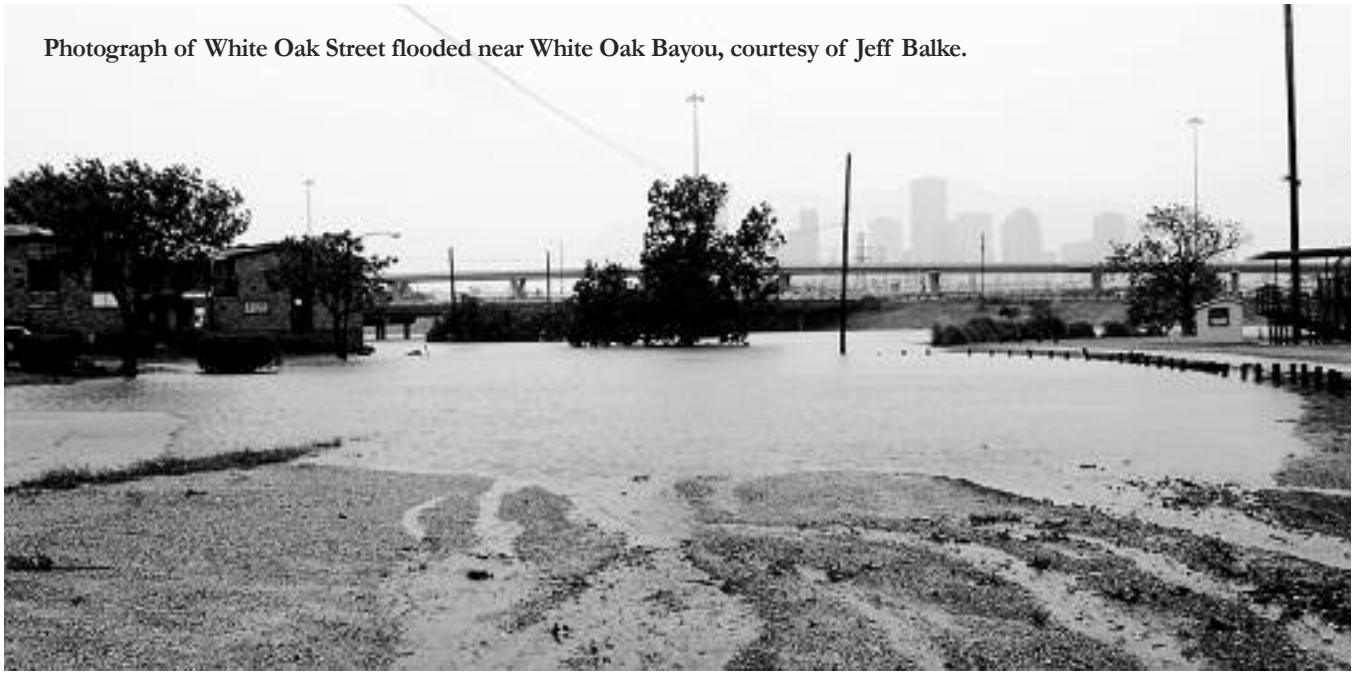
The question of when the Christmases should have discovered the alligator infestation comes down to when the Christmases, or the previous owners of their property, should have reasonably discovered the alligator infestation of their property. Based on the information available, the court concluded that reasonable minds could differ about when the Christmases should have reasonably discovered the alligator infestation. As the court points out, there are several factors in the Christmases favor that the infestation was not reasonably discovered until 2007. The case has been returned to the trial court to further consider the merits of the case.

Endnotes

1. Dec. 2013 J.D. Candidate, University of Mississippi School of Law.
2. Christmas v. Exxon Mobil Corp., 2011-CA-01311-COA, 2013 WL 2302708, *3 (Miss. Ct. App. May 28, 2013).
3. *Id.* at *2.
4. *Id.* at *3.
5. *Id.* at *2.
6. *Id.* at *1
7. *Id.* at *2.
8. *Id.* at *3.
9. Miss. Code Ann. § 15-1-49.
10. *Christmas*, 2013 WL 2302708, at *3.
11. *Id.* at *3.
12. *Id.* at *4.
13. *Id.*

The Flooding of White Oak Bayou: Did Harris County, Texas Take Private Property?

Caroline Shepard[1]



Photograph of White Oak Street flooded near White Oak Bayou, courtesy of Jeff Balke.

With over twenty-two watersheds surrounding Houston, Texas, it is not surprising the city is nicknamed "The Bayou City." Over the last century, these naturally flood-prone bayous, rivers, and creeks have been impacted by Houston's urbanization resulting in a history of destructive floods. After two catastrophic floods in 1929 and 1935, Houston's Harris County community recognized a critical need for future flood protection, leading to the creation of the Harris County Flood Control District (HCFCD) on April 23, 1937.

Since that time, local population booms led to increased urban sprawl and expensive annual flooding despite efforts by HCFCD to implement new "flood damage reduction projects" each year. After suffering severe flooding following three major storms in five years, over 200 current and former residents of Harris County's White Oak Bayou community filed a lawsuit against Harris County. The residents claimed that HCFCD intended and caused the flooding due to poor watershed management thereby resulting in a taking of their properties for public use.[2] On March 7, 2013 the Texas Court of Appeals ruled that Harris County was not immune from litigation as the residents asserted sufficient facts to raise a takings claim.

Background

Located northwest of Houston, White Oak Bayou is one of the largest watersheds in Harris County. White Oak Bayou covers 111 square miles, contains over 151 miles of streams, and drains most of Harris County and the city of Houston into the Buffalo Bayou. During a five-year period, Tropical

Storm Frances in 1998, Tropical Storm Allison in 2001, and an unnamed storm in 2002, hit White Oak Bayou causing excessive flooding of the residents' homes and properties in the upper portion of the watershed.

Increased urbanization in the 1950s and 1960s placed enormous strain on the watersheds' drainage capacity. During the early 1960s, the U.S. Army Corps of Engineers (the Corps) developed a flood plan to mitigate population growth for the heavily developed lower 10.7 miles of White Oak Bayou. In the 1970s, the Corps expanded the bayou and lined it with concrete, essentially channelizing the lower portion of the bayou. In 1976, the Corps considered extending the flood plan to the rapidly developing upper region of White Oak Bayou and partnered with HCFCD to draft an Interim Report for future mitigation. This report emphasized that heavy rainfall would result in excessive flooding of the upper watershed due to insufficient storm drainage in the residential areas and that continued growth would only increase the problem.

By the early 1980s, federal funding delays led HCFCD to commission a local flood protection program to eliminate the 100-year floodplain in the upper White Oak Bayou. In 1983, HCFCD completed the Flood Hazard Study which analyzed the effect of unmitigated urban development. Harris County supplemented this study in 1984 with the White Oak Bayou Regional Flood Control Project (the Pate Plan). The Pate Plan was a collective product of new research by contracted engineers, the previous 1983 Flood Hazard Study, and several Federal Emergency Management Authority maps. The Pate Plan was designed to eliminate all future flooding, including the 100-year event, through the construction of detention basins and concrete-lined channels that would reduce flooding after several phases of development.[3] In 1988, still waiting on federal funding for the Corps' original mitigation plan, HCFCD notified the Corps they no longer needed funding as they had developed a new flood plan that would be quickly implemented with local funds.

A flood of the upper White Oak Bayou in 1989 led residents to voice their concern that HCFCD had not begun implementing a mitigation plan. By 1990, the HCFCD recognized that the Pate Plan was inadequate and contracted for a new study called the Klotz Plan. The Klotz Plan found that the Pate Plan's predictions of flooding levels were far too low yet only called for the construction of detention basins and shallower earthen channels that did not reach the residential areas of the upper watershed. While the Klotz Plan supposedly recognized errors in the Pate Plan, once implemented, the Klotz Plan ultimately protected fewer residents from less-severe flooding events than the Pate Plan would have.

In reaction to the major flooding from three tropical storms in five years, over 200 property owners in White Oak Bayou (collectively the Kerrs) sued HCFCD and others (collectively Harris County) alleging that poor flood control caused damage to their properties. In response, Harris County asked the court to dismiss the lawsuit arguing that as a government entity it was protected from suit by sovereign immunity. At this stage of litigation, the court did not rule on the merits of the case; rather, the court was determining whether there was sufficient evidence for the case to advance. The trial court denied Harris County's plea leading to an appeal and this resulting opinion.

Recovering From the Taking

The Kerrs argued that Harris County's approval of upper watershed development without proper mitigation efforts directly caused a taking of their property by intentional flooding. A taking refers to the U.S. Fifth Amendment's prohibition against the government intentionally taking private property for public use without compensation. A takings claim is composed of three elements: "(1) an intentional act by the government on its lawful authority, (2) resulting in a taking of the plaintiff's property, and (3) for public use."[4] To succeed, the Kerrs must show that Harris County knew that its actions would result in "identifiable harm" or that specific damage was substantially certain to occur. In other words, if the government's action is an accident and not truly intended, the elements of a takings claim are not met and the claim is not valid.

On appeal, Harris County claimed the trial court incorrectly denied its sovereign immunity plea as the Kerrs failed to raise adequate claims. In reviewing the Kerrs' arguments, the court focused on two aspects: (1) intent and public use, and (2) causation.[5] First, the court considered whether there was sufficient evidence to show that Harris County intended to flood the upper watershed for public use. Harris County argued that the Kerrs failed to show how the county intended to take their properties for public use as the county reasonably relied on the certifications of the engineers who drafted the Klotz Plan.[6] Harris County claimed that by choosing to implement this newer plan, it did not know "identifiable harm" or damage was substantially certain to result from flooding of the upper watershed.

The court recognized that by adopting this plan, Harris County knew that flooding of the upper watershed was substantially certain to occur.

Without determining fault, the court concluded that the Kerrs showed sufficient evidence to raise a claim about Harris County's intent for public use, meaning that a jury could decide the matter. Specifically, the court relied on the numerous studies and reports, which showed that upstream development without adequate mitigation would result in flooding, presented to Harris County as early as 1976. The court also relied on Harris County's decision to implement the Klotz Plan, a plan the court identified as, "a scaled-back version of the Pate Plan . . . which undeniably provided less protection to fewer property owners."[7] The court recognized that by adopting this plan, Harris County knew that flooding of the upper watershed was substantially certain to occur. On this basis, the court returned the matter to the lower court for a jury to decide whether Harris County had intent to flood the Kerrs' property.

Second, the court evaluated whether there was sufficient evidence to support the claim that Harris County caused the flooding of the Kerrs' properties. Harris County argued that the Kerrs did not show that the county's choice to implement the Klotz Plan caused the flooding. Harris County supported this argument by providing affidavits of three expert witnesses who attributed the severity of the flooding to the rainfall that occurred with each storm event, along with inadequate storm sewers.[8] However, the court found there was enough uncertainty in the record about the cause of the flooding for the matter to be decided by a jury. Specifically, the court noted that the testimony of the Kerrs' expert witness contradicted Harris County's experts by claiming that they failed to show that unmitigated urbanization was *not* the cause of flooding.

Conclusion

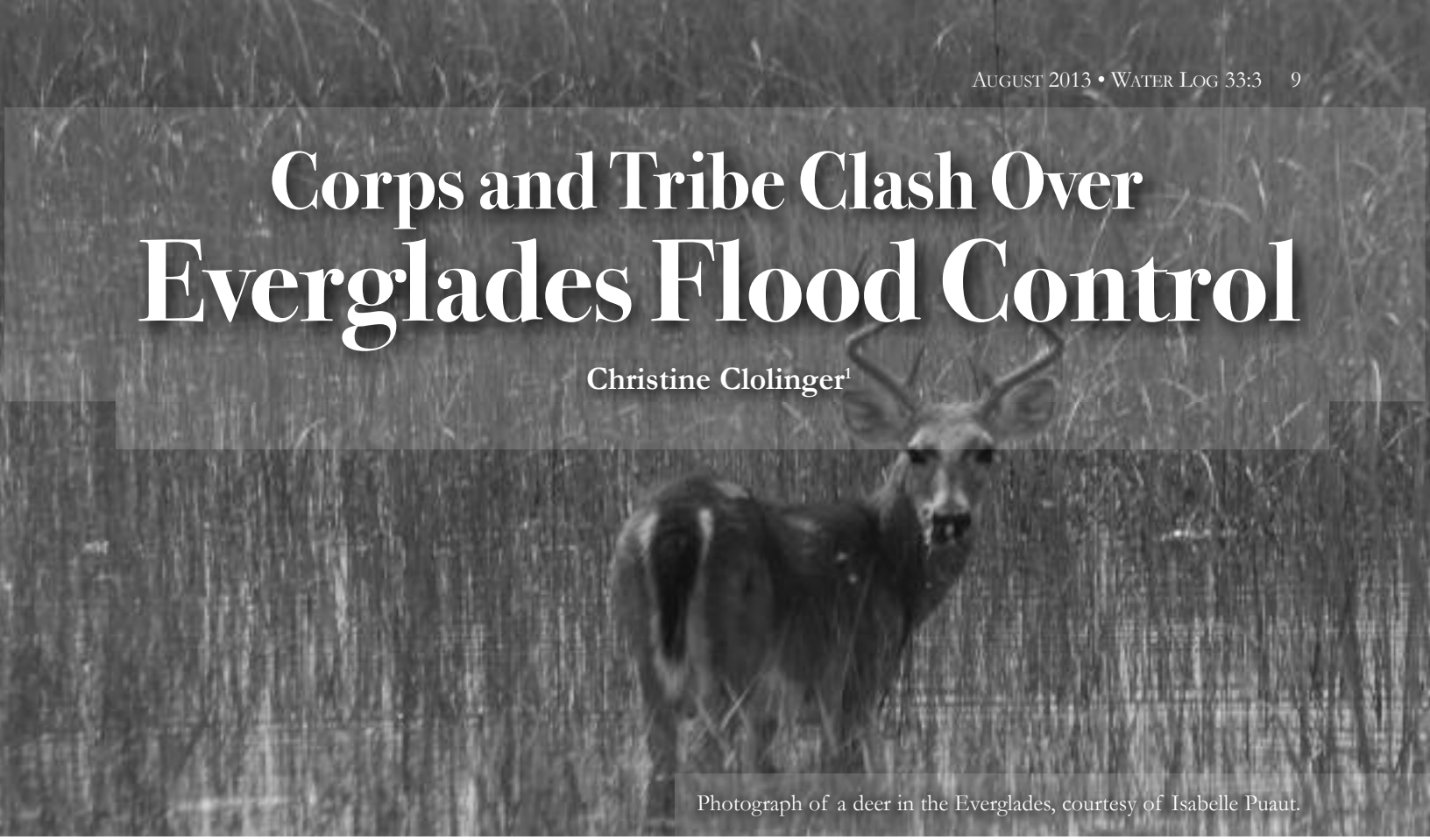
The court found that the Kerrs presented sufficient evidence to introduce a takings claim for the case to move forward. The matter will be sent back to the trial court where a jury will weigh the facts of the case to determine whether the Kerrs have proven a takings claim against Harris County. While no trial date has been set for this matter, the formal petition for review was filed with the Texas Supreme Court on June 21, 2013.[9]

Endnotes

1. 2015 J.D. Candidate, University of Mississippi School of Law.
2. Harris Cnty. Flood Control Dist. v. Kerr, 01-11-00014-CV, 2013 WL 842652, *1 (Tex. App. Mar. 7, 2013).
3. *Id.* at *2.
4. *Id.* at *7.
5. *Id.* at *8-11.
6. *Id.* at *8.
7. *Id.* at *9.
8. *Id.* at *11.
9. Harris Cnty. Flood Control Dist. v. Kerr, The Supreme Court of Texas Blog, http://data.scotxblog.com/scotx/no/13-0303 (last visited June 25, 2013).

Corps and Tribe Clash Over Everglades Flood Control

Christine Clolinger[1]



Photograph of a deer in the Everglades, courtesy of Isabelle Puaut.

Water resource management must balance not only competing ecological needs, but cultural values as well. The U.S. Army Corps of Engineers (the Corps), in particular, must balance their duties to provide water to the citizens of Florida, prevent floods, and protect the myriad of endangered species that live in the Everglades. An equitable balance is not easy to obtain, as the Corps discovered when its decisions to protect the endangered, genetically valuable Cape Sable seaside sparrow caused flooding on land leased by the Miccosukee Tribe (the Miccosukee). The Miccosukee value the land for educational, religious, and medicinal claim. They further claim that the flooding harms the endangered Everglade Snail Kite. The Eleventh Circuit Court of Appeals recently considered and judged the Miccosukee's claims in court.[2] The court, however, found each claim too vague to be upheld.

The Miccosukee Tribe

The Miccosukee reside in the Florida Everglades and speak a native language called Mikasuki. They are descendants from the Creek Nation that moved to Florida before the United States acquired the territory. About 100 Mikasuki-speaking Creeks escaped capture and relocation during the Indian Wars in the 1800s by hiding in the Everglades. The Miccosukee received federally recognized status in 1962 once the United States officially distinguished them from the Seminole Tribe.

After years of litigation, the Miccosukee reached a settlement in 1982 allowing them a perpetual, but not absolute, lease of land. In exchange, the Miccosukee relinquished all rights, titles, interests, or claims it may have previously held on any Florida land, although it did retain the right to use and enjoy the leased land. Their rights on the leased land, however, were subject to the rights, duties, and obligations of both the Corps and the South Florida Water Management District (SFWMD).

The Flooding

The Miccosukee lease a 189,000 acre, undeveloped wetland subject to Corps and SFWMD management. The wetland serves as the largest of three water conservation areas that are "remnants of the original South Florida Everglades."[3] The Miccosukee hunt, fish, gig frogs, and farm the wetland in accordance with traditional tribal customs. The wetland also provides a valuable educational opportunity to teach Miccosukee children

about their tribal religion, history, and culture. For instance, the Miccosukee build and preserve traditional homes called chickees on the tree islands in the wetland. They also grow herbs used for religious and medicinal purposes on the wetland.[4]

The Corps manages a floodgate that controls the flow of water running off of the Miccosukee's wetland. As mandated to the Corps by the Fish and Wildlife Service (FWS), the floodgate must be closed from November 1st to July 15th in order to preserve the nesting habitat for the endangered Cape Sable seaside sparrow (the Cape Sable). In 2008, a wildfire burned nearly 2,000 acres of the Cape Sable habitat. The FWS and the Corps consequently decided keep the gate closed until July 25th in order to aid the damaged vegetation's growth.

The amassing water in the Miccosukee wetland north of the floodgate consequently reached unusually high levels. According to the Miccosukee, the high water levels flooded tree islands, killed native species and hardwoods, destroyed Miccosukee traditional homes and crops, and endangered indigenous animals and vegetation including the endangered Everglade Snail Kite.

The Miccosukee's Chairman submitted a letter to the Corps requesting that they allow the gate to remain open past November 1st. The Chairman noted that the conditions on the leased land were "extremely dire" and that the "health, safety, and welfare of the Tribe" would be endangered if additional water was not released from the floodgate. The Corps denied the Chairman's request. The Corps further claimed it was not aware of any threats to the Miccosukee's health and safety that were not included in their initial investigations of the floodgate. The Corps' reply also stated that the FWS would not allow the Corps to open the floodgate past November 1st.

Endangered Avian

The Miccosukee land is home to two endangered species: the Cape Sable seaside sparrow and the Everglade snail kite. The Cape Sable seaside sparrow has been listed as an endangered species for nearly half a century and is native only to south Florida. Consequently, the Corps is required under the Endangered Species Act to preserve each of the six Cape Sable subpopulations in Florida. The Miccosukee wetland is a critical habitat to one of the six Cape Sable subpopulations. The subpopulation inhabiting the Miccosukee wetland shrunk from 2,600 birds in 1992 to 112 birds in 2006, largely due to the Corps' past water management practices. The Corps experimented with various water management methods since 1983 to restore a natural flow of water, which have resulted in increased water flows through the subpopulation's habitat. The Corps' previous efforts to restore natural water flow in the Everglades resulted in higher water levels throughout the subpopulation's habitat. Because the Cape Sable requires access to a dry habitat at least twice a year for successful nesting, the Corps decided to close the floodgate from November 1 to July 15 to allow for at least two, but up to four, nesting cycles on dry habitat.[6]

The Everglade Snail kite was listed as endangered in 1967. Only 685 kites survive today. Because the kite's diet almost entirely consists of apple snails, they are highly sensitive to the hydrology of their habitat. Clear, shallow water is necessary for kites to search for the snails. A part of their designated critical habitat is located in the Miccosukee wetland, but the kites are nomadic depending on their habitat's water depth, hydroperiod, and food availability. Their use of the Miccosukee wetland is known to vary greatly. However, the FWS has recommended in previous reports that the soil should remain under deep water for long periods of time.

Miccosukee Claims

The Miccosukee brought four claims against the Corps essentially arguing that the Corps' operation of the floodgate produced and would continue to produce damaging floods on tribal lands. The Corps responded that the Miccosukee were granted only limited rights in their lease and thus could not bring claims against the Corps for its operation of the floodgate. In other words, the Miccosukee's property interest in the wetland was not unfettered. Rather, the interest is subject to the terms of the Lease Agreement which specifically provided that "easements held by the SFWMD and the Corps are superior to the Tribe's rights of use and enjoyment of the Leased Land…."[7] The trial court dismissed the claims of the Miccosukee, holding that the Tribe's rights to the land "are subservient to, and cannot interfere with, the rights and duties of the Corps and the SFWMD to raise or lower the water levels in the Leased Lands."

Photograph of a sunset over the Everglades, courtesy of Ester Lee.

On appeal, the court considered the appropriateness of dismissal based on the information in the court record, while acknowledging that the Miccosukee had done a poor job of pleading their case. According to the Miccosukee, the Corps has a duty not to interfere with the Tribe's use and enjoyment of the land and the flooding was a violation of the Lease Agreement terms. However, the court found nothing in the Lease Agreement to support this position. This does not necessarily mean that Corps is free to flood the land with impunity. But as the court pointed out, the Corps' flood control activities on the land are governed by the terms of the easements to the SFWMD. Going back to the insufficiency of the Miccosukee's pleadings, the court noted that those easements were not introduced into evidence. Without knowing the terms of the easements, the court had insufficient information to determine whether the flooding exceeded the Corps authority. Therefore dismissal of the claims was appropriate based on the limited information in the record.[8]

Conclusion

Compromise solutions must be identified and met in order to balance the demands for water and for endangered species restoration in the Everglades. However, cultural values are inevitably affected by those demands. The Miccosukee were unfortunately affected by such decisions but were nonetheless found to have no claims protectable under law. The Corps will continue to manage the water flow of the Everglades taking into consideration the needs of the Florida citizens and Cape sable seaside sparrow and Everglade Snail Kite as legally required.

Endnotes

1. 2015 J.D. Candidate, Florida State University School of Law.
2. Miccosukee Tribe of Indians of Fla. v. United States, 2013 WL 1984423, *1 (2013).
3. S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians, 541 U.S. 95, 100 (2004).
4. Brief for Miccosukee Tribe, Miccosukee Tribe of Indians of Fla. v. United States, 2013 WL 1984423 (2013).
5. *Id.* at *14.
6. *Miccosukee Tribe*, 2013 WL 1984423, at *7.
7. *Id.* at *16.
8. *Id.*

2013 Alabama Legislative Update

Benjamin Sloan[1]

The 2013 Regular Session of the Alabama Legislature was held from February 5th to May 20th of this year. The following is a summary of legislation of interest enacted during the 2013 session that may impact coastal resources.

Aquaculture

House Bill 361 creates a Shellfish Aquaculture Review Board responsible for developing shellfish aquaculture policy and implementing a sustainable program for leasing submerged coastal lands in the coastal waters of Alabama for the cultivation and harvesting of oysters for commercial purposes. This bill authorizes the Department of Conservation and Natural Resources to implement the leasing program and it authorizes the commissioner of the Department to adopt rules for licensing of state lands for oyster aquaculture in accordance with the recommendations of the board, with fees established by the State Lands Division in a manner that encourages the economic viability of oyster aquaculture in the state. Approved May 20, 2013.

Energy

House Bill 339 creates the Alabama Board for Aquatic Plant Management and also creates the Aquatic Plant Management Fund. Previously, there was no board designated for the management of aquatic plants. Approved May 20, 2013.

Gulf State Park

Senate Bill 231 authorizes the Department of Conservation and Natural Resources to undertake park enhancement activities at Gulf State Park. This bill also prohibits a sale or long-term lease of any state park or park real property, other than the project site, lying seaward of the current location of Alabama Highway 182 in Baldwin County, Alabama, unless the Legislature approves the sale or lease by majority vote. Approved May 7, 2013.

Water

Senate Bill 35 authorizes a small private water system purchasing water from a municipal water system in a Class 8 municipality to elect to be exempt from regulation of the Public Service Commission in order to be regulated by the municipality. Approved May 9, 2013.

House Bill 204 provides that the term navigable waters include canals. The bill also prohibits anchoring, mooring, or abandoning a vessel in navigable waters in a manner that obstructs navigation, and it provides for criminal penalties. Approved May 20, 2013.

1. 2014 J.D. Candidate, University of Mississippi School of Law.

Citizen Suit Utilized to Force Alabama Prison into Compliance

Ryan J.F. Pulkrabek[1]

Over the past forty years, citizen suits have provided any citizen the opportunity to both prompt governmental enforcement action and to supplement governmental enforcement action of environmental statutes, particularly with regard to the Clean Water Act (CWA).[2] From its adoption in 1972, the CWA has authorized citizens to file a civil suit against any alleged violator of effluent limitations or against the EPA Administrator if it fails to enforce a non-discretionary act or duty required by the CWA.[3] In February 2013, Black Warrior Riverkeeper, Inc. (Riverkeeper), a citizen-based nonprofit organization dedicated to improving water quality, habitat, recreation, and public health throughout the Black Warrior River watershed area, leaned on the citizen suit to spur governmental enforcement of the CWA by suing the Alabama Department of Corrections and Alabama Utility Services, LLC for alleged violations of the CWA resulting from Donaldson Prison's discharge of pollution into the Black Warrior River.

Background

With an expansion of inmates at Donaldson Correctional Facility (Donaldson) in Bessemer, Alabama from the 700 inmates envisioned in 1982 to the 1,492 inmates it currently houses, two things became readily apparent: an increase in sewage and an increased strain on the wastewater treatment facility. Discharges flow from the Donaldson Correctional Facility Wastewater Treatment Plant into the Big Branch, a tributary of Valley Creek on the Black Warrior River upstream of Bankhead Lake. These discharges are regulated under the CWA's National Pollution Discharge Elimination System (NPDES) permit system.

Prior to December 2005, Donaldson amassed about 1,060 violations of its NPDES permit. Those violations culminated in an earlier investigation and lawsuit. As a result of that investigation, Donaldson retained Alabama Utility Services, Inc. (AUS). AUS is an Alabama corporation that was formed in 2003 for wastewater collection as well as treatment plant construction, management, and operation. After hiring AUS, the State of Alabama dismissed charges against Donaldson because it determined that Donaldson was now in substantial compliance with its NPDES permit. In 2006, Donaldson named AUS as the sole permittee to operate and manage its wastewater treatment plant.[4] At this time, AUS became the permit holder for the Donaldson facility's NPDES permit.

The Donaldson facility self-reported 519 violations of its NPDES permit between September 2008 and September 2012. In response to these violations, Riverkeeper sent AUS a notice of intent to sue in the summer of 2012 and then filed suit in February 2013. Riverkeeper alleges that Donaldson's wastewater treatment plant violated its permit under the CWA by discharging pollutants from point sources in excess of the permitted amounts into Big Branch and Valley Creek, tributaries of the Black Warrior River, and into the Black Warrior River itself.[5] Riverkeeper alleges that the violations continued between 2008 and 2012 under the new permit issued, and later reissued, to AUC and that the violations are ongoing. Specifically, Riverkeeper highlighted the 519 self-reported violations and a sampling that Riverkeeper took in February 2013 that found an additional violation of the NPDES permit.

Photograph of the William E. Donaldson Correctional Facility in Bessemer, Alabama, courtesy of UK-K Photos.

Citizen Suits & the Clean Water Act

Under the NPDES, facilities request a permit to discharge pollutants into waters of the United States. The goal of the NPDES is to establish a comprehensive permit program to regulate the discharge of any pollutants. One of the most important enforcement mechanisms of the Clean Water Act is the citizen suit.

To help enforce the NPDES permits, the CWA allows private citizens to bring lawsuits against alleged polluters through a mechanism know as a citizen suit. Before filing a citizen suit, the citizen party must notify the alleged violator and appropriate regulatory agencies.[6] The alleged violator then has 60 days to investigate the allegations and correct any potential violations. Regulators also have 60 days to investigate and initiate its own actions if it chooses. A citizen suit may only be filed if, at the end of 60 days, the regulatory agency failed to require a violator's compliance with the CWA's effluent standards or limitations, and the regulatory agency did not begin, and did not continue, to diligently prosecute a civil or criminal action against the violator. One hope of the citizen suit is to provide a supplemental means

of enforcing the CWA in instances where the government has failed to prosecute alleged polluters, or even to pressure environmental officials to enforce the laws so that polluters will be stopped from damaging the precious natural resources of the community.

Black Warrior Riverkeeper Citizen Suit

After receiving the notice of intent to sue, AUS took steps to correct the violations. According to Bart Slawson, attorney for AUS, Donaldson acted promptly to return to compliance with their NPDES permit. AUS took action to correct the violations and regain compliance first by firing one firm that AUS had contracted with to operate the plant and hiring A.G. Gaston Engineers in its place, a firm managed by former director of Alabama Department of Environmental Management (ADEM).[7]

However, Riverkeeper disputed AUS's contention and filed a citizen suit on February 28, 2013. According to Riverkeeper, violations are ongoing. To support this contention, Riverkeeper performed two additional samplings at Donaldson's wastewater treatment plant one week before filing the suit. Riverkeeper's sampling allegedly found additional violations by AUS in the Donaldson wastewater treatment facility in that the sample showed an excess of *e coli* and fecal coliform bacteria in the Donaldson wastewater discharge. Slawson contests the accuracy of the sampling.

While the court has yet to consider the merits of the case, the court has concluded that the case may only proceed against AUS. In dismissing the claims against ADOC, the court noted that ADOC, although the owner of the facility, was not the permit holder. The court reasoned that although the ADOC owns the plant, it does not hold the NPDES permit; rather, AUS owns, operates, and controls the NPDES permit, so only the AUS can be sued for permit violations.

Conclusion

ADEM is currently monitoring the compliance status of the Donaldson facility, and Slawson contends that AUS and Donaldson have been in compliance since September 2012.[8] The court dismissed Riverkeeper's claims against the ADOC, but the court did not dismiss Riverkeeper's claims against AUS; thus, the court will weigh the merits of AUS's and Riverkeeper's contentions as the case moves forward. Notably, the court did not resolve whether the owner of a facility that contracts with a third-party for operation of the facility as the sole NPDES permittee may be sued for violation of a NPDES permit; it only held that Riverkeeper did not point to any law that allowed the court to hear its contention against ADOC.[9] It is clear, however, that citizen suits continue to be a valuable tool in the CWA enforcement arsenal.

The suit against Donaldson brings light to just one prison in Alabama that is struggling to adjust their infrastructure to handle a boom in prisoners; however, the Donaldson facility is part of a larger systemic problem. According to Prison Legal News, Alabama prisons under the ADOC's watch have had pollution issues in Draper, Elmore, Fountain/Holman, and the Limestone prisons, as well as in the Farcquhar Cattle Ranch and Red Eagle Honor Farm.[10]

Endnotes

1. Dec. 2013 J.D. Candidate, University of Mississippi School of Law.
2. Edward Lloyd, *Citizen Suits and Defenses Against Them*, The American Law Institute, SP059 ALI-ABA 781 (2009).
3. 33 U.S.C. § 1365 (CWA § 505).
4. Black Warrior Riverkeeper, Inc. v. Thomas, 2013 WL 1663871 (N.D. Ala. Apr. 12, 2013).
5. *Id.* at *2.
6. 33 U.S.C. § 1365(b).
7. Kent Faulk, *Black Warrior Riverkeeper lawsuit says Jefferson County prison sewage treatment plant violates permit*, AL.COM, available at http://blog.al.com/spotnews/2013/02/black_warrior_riverkeeper_laws.html (Feb. 28, 2013).
8. *Id.*
9. *Black Warrior Riverkeeper*, 2013 WL1663871 at *3.
10. Harris John E. Dannenberg, *Prison Drinking Water and Wastewater Pollution Threaten Environmental Safety Nationwide*, Prison Legal News, June 5, 2013, available at https://www.prisonlegalnews.org/%28S%2824bwww45u0tkqaytqsr5c345%29%29/displayArticle.aspx?articleid=19162&AspxAutoDetectCookieSupport=1.

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