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## Millender v. Fla. Dep't of Transp., 774 So. 2d 767 (Fla. Dist. Ct. App. 2000)

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**Millender v. Fla. Dep't of Transp., 774 So. 2d 767 (Fla. Dist. Ct. App. 2000)** (holding the continuing tort theory and the Dickinson stabilization doctrine affect the running of the statute of limitations to render action for injunctive relief and damages timely).

In 1975, the Florida Department of Transportation ("FDOT") rerouted the Carrabelle River channel in order to build a new bridge. Ferris G. and Margaret Millender, and Millender & Sons Seafood Co. (collectively, "Millender") were located within blocks of the new bridge and soon found their property eroding. Among initial efforts to retard erosion, Millender constructed a seawall that successfully hindered the erosion. After eight years of litigation, another state agency forced Millender to remove the seawall in 1993. As erosion continued, Millender sued FDOT for injunctive relief, full compensation, and damages in 1993. In a 1994 deposition, Millender described his damages to include destruction of the docks, buildings, and ice machines that were necessary to the operation of his seafood business. The trial court found FDOT's river channel realignment caused Millender's property to erode, but held the statute of limitations barred Millender's action against FDOT. Millender appealed.

The Court of Appeal of Florida reversed the trial court's decision based on the continuing tort theory and the Dickinson stabilization doctrine. The court reviewed Florida case law that recognizes the continuing tort theory's vitality. The court stated injunctive relief could redress FDOT's continuing tort against Millender. The court also held Millender's action was timely since the statute of limitations in a continuing tort action runs from the time of the last tortious act.

In addressing the Dickinson stabilization doctrine, the court cited the United States Supreme Court opinion that holds the statute of limitations for inverse condemnation runs from the time "the situation becomes stabilized." The Supreme Court noted that under such diverse circumstances where the source of the claim is continuous, the uncertainty of damage and the risk of res judicata requires the court to avoid procedural rigidities. Thus, this court found Millender justly waited until the consequences of state agency action "so manifested themselves that a final account may be struck." Millender's cause of action accrued when another state agency prevented Millender from protecting his property from the erosion caused by FDOT's actions.

FDOT argued that since federal case law created the Dickinson stabilization doctrine and no Florida court had applied it, the court could not utilize the doctrine in the state context. The court held this argument was incorrect. The court stated a sound federal doctrine is not barred from application in an appropriate case under state law. Moreover, the court cited a Florida district court of appeal that had also approved the federal case and applied the Dickinson stabilization doctrine reasoning to support its decision. Thus, the court held the statute of limitations barred Millender's action and remanded the cause for consistent proceedings. The court also certified to the

highest court the question pertaining to whether the Dickinson stabilization doctrine applies in an appropriate Florida case.

*Vanessa L. Condra*

**S.W. Fla. Water Mgmt. Dist. v. Charlotte County, 774 So. 2d 903 (Fla. Dist. Ct. App. 2000)** (holding district rules involving water use permits (1) were a valid exercise of delegated legislative authority, (2) granted the water management district valid discretion, and (3) were not vague).

Southwest Florida Water Management District and the Environmental Confederation of Southwest Florida (collectively, the "District") challenged a comprehensive order of the Administrative Law Judge ("ALJ"), invalidating several existing and proposed District rules and agency statements. On cross-appeal, Pinellas County ("Pinellas") challenged several portions of the rules upheld by the ALJ's order. The court reversed the orders considered on appeal and affirmed the orders considered in the cross-appeal.

The District proposed rules and agency statements governing the water use permitting process under its jurisdiction in the Southern Water Use Caution Area ("SWUCA"). The 1972 Florida Water Resources Act ("Act"), codified in Chapter 373 of the Florida statutes ("Chapter 373"), governs Florida water rights. The Act grants authority to the Department of Environmental Protection ("DEP") to conserve, protect, manage, and control the waters of the state, with flexibility and discretion to delegate powers to water management districts. The Act includes provisions for reviewing district rules and agency statements.

Several of the District's existing and proposed rules and agency statements, which governed the issuance of Water Use Permits ("WUP"), were in dispute. Chapter 373 of the Act stipulated proposed water use must: (1) be reasonable-beneficial; (2) not interfere with any presently existing legal water right use; and (3) be consistent with the public interest. The District had authority to adopt reasonable rules pursuant to its water use permitting duties to implement this three-prong test. The DEP had exclusive authority to review those rules. The District proposed a fourteen-point criteria test that a WUP applicant must meet in order to fulfill Chapter 373's three-prong test.

The ALJ invalidated the District's proposed fourteen-point test, finding it conflicted with the balancing approach articulated in the state Water Policy Rules, the former authority governing WUP criteria. The court reversed, holding, under Chapter 373, DEP had exclusive authority to review whether rules are consistent with Water Policy Rules.

The ALJ invalidated the rule that allowed an applicant to meet WUP conditions by mitigating adverse impacts. Under the existing