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UNFINISHED BUSINESS—PROTECTING PUBLIC RIGHTS TO STATE LANDS FROM BEING LOST UNDER FLORIDA'S MARKETABLE RECORD TITLE ACT

COMMENT BY
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I. INTRODUCTION

In 1985, the Florida Legislature again considered one of the most intractable problems it has faced in recent years—the application of the Marketable Record Title Act (MRTA)¹ to state land claims. Rather than pass substantive legislation, however, lawmakers suspended the use of MRTA against the state until October 1, 1986,² and created a seventeen-member study committee to review yet again MRTA's operation against the state.³ The committee's report, due not later than February 15, 1986, may be the basis for future corrective legislation to protect state claims from the effects of MRTA. It will be the fourth time since 1978 that the issue has received serious legislative attention.⁴

Even as the legislature pondered this problem, the issue of MRTA's applicability to state lands was again before the Florida Supreme Court. In *Coastal Petroleum Co. v. American Cyanamid Co.*⁵ and three companion cases,⁶ the supreme court has been asked whether MRTA can divest the state of title to sovereignty lands beneath navigable rivers.⁷ Several district courts have ruled

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1. FLA. STAT. ch. 712 (1983).

2. Ch. 85-83, 1985 Fla. Laws 516.

3. *Id.*

4. Previous reviews were conducted by the State Lands Study Committee in 1978, see ch. 78-301, 1978 Fla. Laws 866; STATE LANDS STUDY COMM., FINAL COMMITTEE REPORT (Mar. 1979) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 915, Tallahassee, Fla.) [hereinafter cited as SLSC REPORT]; by the Senate in 1983, see STAFF OF FLA. S. COMM. ON NAT. RESOURCES & CONSER., A REVIEW OF THE MARKETABLE RECORD TITLE ACT (CHAPTER 712, FLORIDA STATUTES) AND ITS OPERATION AGAINST STATE-OWNED LANDS (Jan. 1983) [hereinafter cited as S. STAFF REPORT]; and by the House in 1985, see STAFF OF FLA. H.R. COMM. ON NAT. RESOURCES, OVERSIGHT REPORT ON THE MARKETABLE RECORD TITLE ACT (Mar. 5, 1985) [hereinafter cited as H.R. STAFF REPORT].

5. No. 65,696 (Fla. argued May 6, 1985), reviewing 454 So. 2d 6 (Fla. 2d DCA 1984).

6. Board of Trustees v. American Cyanamid Co., No. 65,755 (Fla. argued May 6, 1985), reviewing 454 So. 2d 6 (Fla. 2d DCA 1984); Board of Trustees v. Mobil Oil Corp., No. 65,913 (Fla. argued May 6, 1985), reviewing 455 So. 2d 412 (Fla. 2d DCA 1984); Board of Trustees v. Agrico Chemical Co., No. 66,565 (Fla. argued May 6, 1985), reviewing 462 So. 2d 829 (Fla. 2d DCA 1984).

7. Sovereignty lands are those lying beneath navigable fresh and salt waters when Florida was admitted to the Union in 1845. See *infra* text accompanying notes 58-61.

that MRTA will extinguish the state's title in such a situation,⁸ but the supreme court has not clearly held so.⁹ Conceivably, the supreme court could dispose of this issue altogether through its decision in the *Coastal Petroleum* case.

Nevertheless, some legislative action seems likely in the near future. The purpose of this Comment is to review the history of MRTA, explain its general features, recount how it has been applied to state lands, discuss its suspension under the 1985 Act, and suggest possible steps the legislature might take to protect public claims to valuable lands.

II. THE MARKETABLE RECORD TITLE ACT

The legislature enacted the Marketable Record Title Act in 1963¹⁰ after a years-long campaign by the Florida Bar's Real Property, Probate and Trust Law Section.¹¹ The Bar wanted a statute that would help simplify the cumbersome and tedious process of conveying title to land.¹² Patterned after the Model Marketable Title Act drafted by a conveyancing reform study group at the University of Michigan Law School,¹³ the Bar's proposal had undergone at least six drafts by the end of 1960.¹⁴ With a few noteworthy exceptions, the Act as passed by the legislature was taken almost verbatim from the Bar proposal.¹⁵

8. See, e.g., *Sawyer v. Modrall*, 286 So. 2d 610 (Fla. 4th DCA 1973), cert. denied, 297 So. 2d 562 (Fla. 1974).

9. See *infra* text accompanying notes 103-07 (discussing *Odom v. Deltona Corp.*, 341 So. 2d 977 (Fla. 1976)).

10. Ch. 63-133, 1963 Fla. Laws 257 (current version at FLA. STAT. ch. 712 (1983)).

11. *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 118 (Fla. 1970), *aff'g* 224 So. 2d 743 (Fla. 4th DCA 1969), cert. denied, 400 U.S. 964 (1970). For background on the Bar campaign for MRTA, see generally Aigler, *Marketable Title Acts*, 13 U. MIAMI L. REV. 47 (1958) (speech to the Florida Bar advocating a marketable title act); Carmichael, *The Current Proposed Marketable Title Act*, 34 FLA. B.J. 1056 (1960) (progress report by Bar's Marketable Title Act Committee); Catsman, *Function of a Marketable Title Act*, 34 FLA. B.J. 139 (1960) (committee progress report) [hereinafter cited as Catsman, *Function of Act*]; Catsman, *A Proposed Marketable Record Title Act for Florida*, 13 U. FLA. L. REV. at 334 (1960) (committee progress report) [hereinafter cited as Catsman, *Proposed Act*].

12. Catsman, *Proposed Act*, *supra* note 11, at 334.

13. Catsman, *Function of Act*, *supra* note 11, at 141.

14. See Carmichael, *supra* note 11, at 1056.

15. Compare ch. 63-133, 1963 Fla. Laws 257, with the draft of the Act in Carmichael, *supra* note 11, at 1057-60. Indeed, the Bar's role did not end with MRTA's enactment. The Florida Bar appeared as amicus curiae in several key cases in which MRTA was construed by the courts. See *Askew v. Sonson*, 409 So. 2d 7, 7 (Fla. 1981); *City of Miami v. St. Joe Paper Co.*, 364 So. 2d 439, 441 (Fla. 1978), *appeal dismissed*, 441 U.S. 939 (1979); *Marshall v. Hollywood, Inc.*, 236 So. 2d 114, 115 (Fla. 1970), *aff'g* *Marshall v. Hollywood, Inc.*, 224 So. 2d 743, 745 (Fla. 4th DCA 1969).

As explained by the practitioners who drafted it, MRTA was designed to shorten the period of title searches in land transfers,¹⁶ thus making the sale and purchase of land cheaper, faster, and safer. These goals became the express purpose of the Act when lawmakers finally gave the measure their imprimatur. The Act provided that MRTA's purpose was to "[simplify] and facilitat[e] land title transactions by allowing persons to rely on a record title" unless one of MRTA's exceptions applied,¹⁷ and the courts have consistently relied on this provision in construing the Act.¹⁸ The premise underlying MRTA was that "any public policy that may be served by the preservation of old claims seems outweighed by a policy aimed at encouraging reliable and expeditious transfers of land."¹⁹ The public was supposed to benefit from greater alienability of land.²⁰ Scholars said "very few people will ever be deprived of any property interest, however slight."²¹

Although MRTA was billed as a refinement of the present conveyancing system rather than a radical change,²² there was never any question that it was an unusually powerful statute.²³ This recognition of MRTA's force sprang from its peculiar nature. The Act is a hybrid containing features of curative acts, statutes of limita-

16. Catsman, *Proposed Act*, *supra* note 11, at 334. Practitioners have concluded that the Act will not shorten the period of search. Cochran, *How to Use the Florida Marketable Record Title Act*, 52 FLA. B.J. 287, 288, 290 (1978). Despite the overwhelmingly favorable commentary on MRTA in its early years, this shortcoming was forecast in 1967 by one of the few critics of marketable title acts. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 56 n.36, 70, 86, 91 (1967). The Act's chief value now lies in its curative powers. See Cochran, *supra*, at 290.

17. Ch. 63-133, § 10, 1963 Fla. Laws 257, 262 (current version at FLA. STAT. § 712.10 (1983)). The legislature's intent in enacting MRTA is difficult to discern because no materials on the Act's legislative history were preserved. However, the Florida Bar's published preparatory work offers some insight. For a discussion of the efficacy of bar materials in assessing legislative intent, see Comment, *The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria*, 12 PAC. L.J. 189, 196-98 (1980).

18. See, e.g., *Askew*, 409 So. 2d at 13; *ITT Rayonier, Inc. v. Wadsworth*, 346 So. 2d 1004, 1008 (Fla. 1977); *Marshall*, 236 So. 2d at 119-20; *Sawyer*, 286 So. 2d at 612; *Wilson v. Kelley*, 226 So. 2d 123, 126 (Fla. 2d DCA 1969); *Whaley v. Wotring*, 225 So. 2d 177, 181 (Fla. 1st DCA 1969).

19. Catsman, *Proposed Act*, *supra* note 11, at 334.

20. Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 U. MIAMI L. REV. 103, 124 (1963) (quoting Aigler, *Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185, 201 (1951)).

21. L. SIMES & C. TAYLOR, *THE IMPROVEMENT OF CONVEYANCING BY LEGISLATION* 271 (1960).

22. Catsman, *Function of Act*, *supra* note 11, at 141; *contra* Barnett, *supra* note 16, at 57.

23. *Marshall*, 236 So. 2d at 119.

tion, and recording laws.²⁴

MRTA resembles a curative act in that it reaches back and corrects certain deficiencies in the attempted executions of prior conveyances. But, where an ordinary curative act usually corrects only minor, technical defects in deeds, MRTA is more far-reaching because it destroys most competing interests in land altogether.²⁵

MRTA also resembles a statute of limitation. It requires stale claims to be asserted within a certain period or they will be lost. But, where the ordinary statute of limitation bars only vested, present interests, MRTA operates against vested and contingent, present and future interests.²⁶ Moreover, where an ordinary statute of limitation will not run against one under a disability, MRTA will.²⁷

Lastly, MRTA resembles a recording law. It requires a periodic re-recording of claims to preserve them.²⁸ No wonder one court described MRTA as "the most important piece of legislation dealing with real property titles enacted in the State of Florida in many years."²⁹

For all its clout, MRTA operates with great simplicity. It declares that anyone with the legal capacity to own real property has a marketable record title to an estate in land³⁰ if, alone or with predecessors in title, that person has been vested with the estate by virtue of a title transaction³¹ at least 30 years old, purporting to create the estate claimed.³² Subject to certain exceptions, any estate or interest that predates the root of title³³ is declared to be "null and void."³⁴ Claims subsequent to the root of title also are cleared unless they fall within one of the Act's exceptions.³⁵

24. *St. Joe Paper Co.*, 364 So. 2d at 442-43.

25. *Id.* These expansive curative powers are now viewed as MRTA's chief utility. Cochran, *supra* note 16, at 290.

26. *St. Joe Paper Co.*, 364 So. 2d at 442.

27. Boyer & Shapo, *supra* note 20, at 104.

28. *St. Joe Paper Co.*, 364 So. 2d at 442.

29. *Marshall*, 224 So. 2d at 748.

30. Estates validated by the Act include all those inheritable at common law. *Holland v. Hattaway*, 438 So. 2d 456, 463 n.9 (Fla. 5th DCA 1983); see also *Barnett*, *supra* note 16, at 65.

31. A "title transaction" is any recorded instrument or court proceeding which affects title to an estate or interest in land and which describes it well enough to locate the land and its boundaries. FLA. STAT. § 712.01(3) (1983). For a liberal construction of the term "affecting" as used in FLA. STAT. § 712.02 (1983), see *Marshall*, 224 So. 2d at 749.

32. FLA. STAT. § 712.02 (1983).

33. A "root of title" is the last title transaction at least 30 years prior to the date that marketability is being determined. FLA. STAT. § 712.01(2) (1983).

34. *Id.* § 712.04.

35. *Id.* ch. 712 declares that a "marketable record title . . . shall be free and clear of all

The critical step in applying MRTA is fixing the root of title. The Act requires that the root be a recorded instrument or court proceeding "purporting to create or transfer the estate claimed,"³⁶ and that it be the last such title transaction recorded at least 30 years prior to the time when marketability is being determined.³⁷ Thus, MRTA relies on a "moving limitation."³⁸ The courts have liberally construed the Act in determining what will qualify as a root. The root need not in fact vest a person with an estate in land.³⁹ Indeed, it may be a void deed.⁴⁰ Among the instruments that have served as a valid root of title are a wild deed,⁴¹ a void deed in a chain of title emanating from a forged deed,⁴² and a quitclaim deed with a sufficient description of the property.⁴³ In sum, MRTA is "not concerned with the quality of the title conveyed by the root of title so long as the root purports to convey the estate claimed."⁴⁴

MRTA will not extinguish property rights in exceptional situations prescribed by the Act. The construction given to these exceptions is crucial because they describe what Florida courts have ruled to be the only situations in which MRTA will not wipe out property rights.⁴⁵ The practice of literally construing the Act and its exceptions perhaps arose from the view of MRTA's drafters that the more exceptions allowed, the more difficult it would be for the Act to attain its goals.⁴⁶

These are the current exceptions:

(1) MRTA will not eliminate any estates or interests disclosed by, or any defects inherent in, the root of title or any subsequent

claims except the matters set forth as exceptions to marketability." *Id.* § 712.02 (emphasis added). See Barnett, *supra* note 16, at 62 & n.48. The Act usually is interpreted as extinguishing only claims prior to the root of title. *E.g.*, *City of Pensacola v. Capital Realty Holding Co.*, 417 So. 2d 687, 689 (Fla. 1st DCA 1982).

36. FLA. STAT. § 712.01(2) (1983). For a discussion of the significance of the term "purporting," see *Marshall*, 224 So. 2d at 749.

37. FLA. STAT. § 712.01(2) (1983). The Model Act on which the Florida Act was based had a 40-year limitation. L. SIMES & C. TAYLOR, *supra* note 21, at 6-10.

38. Cochran, *supra* note 16, at 287-88.

39. *Marshall*, 224 So. 2d at 749-50.

40. *Id.* at 750.

41. *St. Joe Paper Co.*, 364 So. 2d at 120.

42. *Marshall*, 236 So. 2d at 120.

43. *Travick v. Parker*, 436 So. 2d 957, 958 & n.3 (Fla. 5th DCA 1983).

44. *Wilson*, 226 So. 2d at 127 (emphasis in original omitted).

45. *Askew*, 409 So. 2d at 15; *Marshall*, 224 So. 2d at 750.

46. *Aigler*, *supra* note 11, at 54; see also Carmichael, *supra* note 11, at 1057 (noting that the recognition of additional exceptions could give rise to "favored" classes of interests).

muniments of title in the chain.⁴⁷ Any interest predating the root of title can be preserved by a reference to it in the root or subsequent muniments of title only if it is described by reference to the book and page number of the records, or by the name of the recorded plat. A general description will not suffice.⁴⁸

(2) The Act will not eliminate estates or interests preserved by a claimant who filed a proper notice within thirty years of the date of the root of title.⁴⁹ Such a notice, filed with the clerk of the court in the county where the land is located, is effective only for thirty years.⁵⁰ Thus, a claimant must re-record his claim every thirty years to preserve it.

(3) Also protected are the rights of anyone in possession of the land, but only for so long as he remains in possession.⁵¹

(4) MRTA will not extinguish any estates or interests "arising out of" an instrument or court proceeding which was recorded after the root of title.⁵²

(5) Easements, servitudes, and similar interests that remain in use are preserved from extinguishment.⁵³ These interests are pro-

47. FLA. STAT. § 712.03(1) (1983); see also *ITT Rayonier, Inc.*, 346 So. 2d at 1010-11; *Reid v. Bradshaw*, 302 So. 2d 180, 183-84 (Fla. 1st DCA 1974); *Marshall*, 224 So. 2d at 751-52; *Barnett*, *supra* note 16, at 67; *Cochran*, *supra* note 16, at 289.

48. FLA. STAT. § 712.03(1) (1983); see also *Board of Trustees v. Paradise Fruit Co.*, 414 So. 2d 10, 11 n.2 (Fla. 5th DCA 1982), *petition for review denied*, 432 So. 2d 37 (Fla. 1983).

49. FLA. STAT. §§ 712.03(2), .05(1) (1983). "Regularly filing a notice of claim is [the claimant's] surest protection" that his claim will not be wiped out by MRTA. *Barnett*, *supra* note 16, at 54. For an analysis of the recording provision of the Florida Act, see *Barnett*, *supra* note 16, at 82-83.

50. FLA. STAT. § 712.05(1) (1983).

51. *Id.* § 712.03(3) (1983); see also *ITT Rayonier, Inc.*, 346 So. 2d at 1011; *Wilson*, 226 So. 2d at 127; *Boyer & Shapo*, *supra* note 20, at 107.

52. FLA. STAT. § 712.03(4) (1983). This provision apparently was intended to preserve any estate or interest transferred after the root of title, see *Barnett*, *supra* note 16, at 69, but an ambiguity has caused "a substantial construction problem." *Holland*, 438 So. 2d at 464. How a court construes this exception in a given case is of "tremendous significance," *Barnett*, *supra* note 16, at 69 n.67, because the Act appears to extinguish *all* claims other than those excepted. Despite the ambiguity, this provision has been described as protecting the interests of a party to any title transaction recorded subsequent to the root of title. *Holland*, 438 So. 2d at 468.

53. FLA. STAT. § 712.03(5) (1983). The breadth of this exception was one of the earliest criticisms of MRTA by the Act's proponents. *Boyer & Shapo*, *supra* note 20, at 115, 128. Its wide scope may be due more to practical politics than legal theory. After the Bar's proposal failed to pass the legislature in 1961, the Bar reported that the measure "can be amended in a form satisfactory to the utility interests so that it can be presented at the 1963 session of the Legislature." *Real Property, Probate & Trust Law Notes*, 36 FLA. B.J. 156 (1962). As passed, the Act had a broad easements exception that named utilities for preferential treatment they had not received in early Bar drafts. *Compare* ch. 63-133, § 3, 1963 Fla. Laws 257, 258, with the text of the proposed act in Carmichael, *supra* note 11, at 1058.

tected even if they are unrecorded. Any use of an existing easement will preserve it in its entirety.

(6) MRTA will not eliminate the estate of any person in whose name the land was assessed on the county ad valorem tax rolls within three years of the time when marketability is being determined.⁵⁴

(7) The state's title to lands beneath navigable waters, acquired by the state upon gaining statehood, also is protected from extinguishment,⁵⁵ although—as will be seen—this exception so far has been ineffectual.

(8) MRTA will not eliminate any right, title, or interest of the United States or the state reserved in the patent or deed by which either sovereign parted with title.⁵⁶

III. MRTA'S OPERATION AGAINST STATE LANDS

MRTA's operation against the interests ostensibly protected by these last two provisions—state lands—was considered by the legislature in 1985 and deferred for further study. While many kinds of state lands are vulnerable, the threat to public interests has been most pronounced with respect to sovereignty lands. Indeed, the entire problem is a belated consequence of the state's profligate stewardship of its most valuable public lands.⁵⁷

Upon admission to the Union in 1845, the state received title to all lands beneath navigable fresh and salt waters, up to the ordinary high watermark.⁵⁸ This grant of lands, title to which had been held by the federal government while Florida was a territory,⁵⁹ was

54. FLA. STAT. § 712.03(6) (1983). The rights under this provision appear to be cumulative such that they will pass to a taxpayer's grantee. *Holland*, 438 So. 2d at 465 n.11.

55. FLA. STAT. § 712.03(7) (1983).

56. *Id.* § 712.04. This provision has been interpreted as requiring an explicit reservation in order to preserve an interest. *E.g.*, *Askew*, 409 So. 2d at 14-15; *Sawyer*, 286 So. 2d at 613. Whether MRTA could extinguish interests of the federal government is extremely doubtful. *See, e.g.*, *Gibson v. Chouteau*, 80 U.S. (13 Wall.) 92, 99 (1871).

57. For general criticism of the state's disposition of public lands, see S. STAFF REPORT, *supra* note 4, at 7-9.

58. *State ex rel. Ellis v. Gerbing*, 47 So. 353, 355-56 (Fla. 1908). The problem of defining the boundaries of sovereignty lands has been most difficult for Florida courts. A thorough exposition is beyond the scope of this Comment. *See generally* Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where is the Boundary?*, 1 FLA. ST. U.L. REV. 596 (1972). Much of the confusion surrounds the early surveyors' practices in meandering waters believed to be navigable. Because Florida courts currently interpret MRTA as extinguishing state claims to assertedly sovereignty lands, whether meandered or unmeandered, *State v. Bronson's, Inc.*, 469 So. 2d 214, 215 (Fla. 5th DCA 1985), meandering is not a significant issue in most cases.

59. *Gerbing*, 47 So. at 355.

subject only to a federal navigational servitude.⁶⁰ It was accomplished without any transmission of paper title.⁶¹ Consequently, the state's claims to sovereignty lands were not recorded like the claims of private landowners. Until 1913, the legislature alone had stewardship of all sovereignty lands;⁶² title was not held by any agency.⁶³

Because sovereignty lands were an incident of statehood, the courts viewed them as "property of a special character,"⁶⁴ and an elaborate body of judge-made law was promulgated to protect them. Title to these lands was regarded as necessary for control of the superjacent waters,⁶⁵ so it was held by the state in trust to ensure free public use of the waters for navigation and other purposes.⁶⁶ This trust was governmental and inalienable.⁶⁷ Only limited grants were permissible, and then only when public purposes would be served.⁶⁸ Any grant of sovereignty lands had to show clear intent and authority to convey,⁶⁹ and any sovereignty lands granted remained subject to public use of the waters.⁷⁰

Because sovereignty lands were held for public use, "not for the purposes of sale or conversion into other values,"⁷¹ they differed from other state lands.⁷² These other lands, conveyed from the federal government's vast holdings, were intended to help Florida develop economically.⁷³ By far the largest federal grant came under

60. See *Brickell v. Trammell*, 82 So. 221, 226 (Fla. 1919); see also *Gerbing*, 47 So. at 356.

61. Under the equal footing doctrine, a new state succeeds to the same rights of sovereignty as one of the original states. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845). Thus, upon a state's admission to the Union, title to lands beneath navigable waters automatically vests in the new state. See also Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 581-82 & 582 n.140 (1982).

62. *State v. Black River Phosphate Co.*, 13 So. 640, 648 (Fla. 1893).

63. Note, *supra* note 58, at 604.

64. *Black River Phosphate Co.*, 13 So. at 646.

65. *Gerbing*, 47 So. at 356.

66. *Broward v. Mabry*, 50 So. 826, 829 (Fla. 1909). The nature and extent of the public's interest in navigable waters has never been definitively settled in Florida. In *Black River Phosphate*, 13 So. at 648, the court described the interest as rights for fishing and navigation. In *Mabry*, 50 So. at 829, Justice Whitfield described it as "navigation, commerce, fishing, bathing and other easements." In *Gies v. Fischer*, 146 So. 2d 361, 363 (Fla. 1962), it was described as "public servitudes."

67. *Gerbing*, 47 So. at 356.

68. *Mabry*, 50 So. at 829.

69. *Martin v. Busch*, 112 So. 274, 285 (Fla. 1927).

70. *Mabry*, 50 So. at 830.

71. *Gerbing*, 47 So. at 355.

72. *Black River Phosphate Co.*, 13 So. at 645.

73. These lands included 500,000 acres of internal improvement lands, Act of Sept. 4,

the Swamp Lands Act of 1850,⁷⁴ which granted Florida all federal lands that were swamp or overflowed. The design was for the state to reconvey these lands into private hands for reclamation.⁷⁵ Under this program, Florida received federal patents to 20.4 million acres of land, roughly two-thirds the area of the state.⁷⁶ By 1919, all but 1.2 million acres had been conveyed away.

Title to these swamp and overflowed lands was vested in the Trustees of the Internal Improvement Fund,⁷⁷ who rapidly transferred the land, usually to promoters. The aspect of these conveyances directly bearing on the current MRTA controversy was the trustees' haphazard conveyancing practices. "Deeds which described property only by township, range, and section often included land beneath navigable [waterbodies] without reservation of the state's interest."⁷⁸

This omission was understandable in light of Florida law. For one thing, the trustees did not have title to any sovereignty lands in this period. Secondly, under the leadership of Justice Whitfield, the Florida Supreme Court had fashioned a robust public trust doctrine with rules that limited the squandering of Florida's patrimony by the legislature and the trustees.⁷⁹

Under the trust doctrine,⁸⁰ the unshakable rule was that a swamp and overflowed lands deed did not convey sovereignty

1841, ch. 16, §§ 8-9, 5 Stat. 453, 455; eight sections for a seat of government, Act of Mar. 3, 1845, ch. 75, § 1, 5 Stat. 788; the sixteenth section of every township for public schools, *id.*; and four townships in all for two seminaries of learning, *id.*

74. Act of Sept. 28, 1850, ch. 84, § 4, 9 Stat. 519, 520. For definitions of swamp and overflowed lands, see *Gerbing*, 47 So. at 357. For an account of the procedures for selecting and classifying these lands for sale, see Affidavit of Joseph R. Julin, Answer Brief of Respondent, Appendix at A 16-23, *Board of Trustees v. Mobil Oil Corp.*, No. 65,913 (Fla. argued May 6, 1985) (on file with the Clerk of the Florida Supreme Court).

75. F. MALONEY, S. PLAGER & F. BALDWIN, *WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE* 296 (1968) [hereinafter cited as *WATER LAW*].

76. *Everglades Sugar & Land Co. v. Bryan*, 87 So. 68, 73 (Fla. 1921).

77. Ch. 610, § 2, 1854 Fla. Laws 9, 10. The trustees were reconstituted as the Board of Trustees of the Internal Improvement Trust Fund in 1969. Ch. 69-106, § 27, 1969 Fla. Laws 490, 547.

78. S. STAFF REPORT, *supra* note 4, at 8.

79. The trust doctrine is now embodied in FLA. CONST. art. X, § 11. For a concise overview of how American courts have traditionally applied the public trust doctrine, see Johnson, *Public Trust Protection for Stream Flows and Lake Levels*, 14 U.C.D. L. REV. 233, 242-44 (1980).

80. For an overview of the origins of the public trust doctrine, see *WATER LAW*, *supra* note 75, at § 122; Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475-91 (1970); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D. L. REV. 195, 196-202, 210-12 (1980).

lands.⁸¹ A grantee of unsurveyed swamp and overflowed lands took with notice that the grant did not include sovereignty lands.⁸² If the trustees mistakenly conveyed sovereignty lands in a swamp and overflowed lands deed, the doctrine of after-acquired title could not be invoked to vest title in the grantee if the trustees subsequently obtained title.⁸³ Moreover, unlike the rule in private transactions, conveyances from the state were construed strictly against the grantee.⁸⁴ These rules were grounded in the belief that private ownership of lands beneath navigable waters was "most unusual and extraordinary."⁸⁵

Beginning in the 1920's, contemporaneous with the Florida real estate boom, the public trust doctrine began to erode.⁸⁶ But, given the fact that title to most privately held land in Florida can be traced back to swamp and overflowed lands deeds, and that the trustees often did not explicitly reserve the state's title to sovereignty land, the most ominous threat to sovereignty lands came to be MRTA.

The possibility that MRTA could divest the state of title to sovereignty lands first gained credence in 1973, in *Sawyer v. Modrall*.⁸⁷ Sawyer sought an injunction for trespass against his neighbor Modrall, alleging that Modrall had built a seawall and dock partially on submerged lands in the intracoastal waterway in Boca Raton, lands to which Sawyer claimed title under a chain beginning with an 1890 deed. Modrall contended the land was sovereignty land that had not been legally conveyed in 1890. The trial court held that the state owned the land, and therefore Sawyer did not have standing to sue.⁸⁸

The Fourth District Court of Appeal reversed, holding that Modrall could not collaterally attack the 1890 deed.⁸⁹ The significance of the case, however, came in dicta where the court said that

81. *Busch*, 112 So. at 285.

82. *Id.*

83. *Id.* at 286, 287.

84. *Black River Phosphate Co.*, 13 So. at 648, 654.

85. *Brickell*, 82 So. at 227.

86. The trend began in *State ex rel. Buford v. City of Tampa*, 102 So. 336 (Fla. 1924) (Florida Constitution does not prohibit alienation of state interests in sovereignty lands). For an approving review of this process, see Rosen, *supra* note 61, at 591-600 & n.199; but see Sax, *supra* note 80, at 548 & n.236, for a more critical assessment.

87. 286 So. 2d 610 (Fla. 4th DCA 1973), *cert. denied*, 297 So. 2d 562 (Fla. 1974).

88. *Sawyer*, 286 So. 2d at 611.

89. *Id.* at 612. The court grounded the resolution of this issue on *Pembroke v. Peninsular Terminal Co.*, 146 So. 249 (Fla. 1933) (private party could not collaterally attack deed from state eight years after it was effected).

even if Modrall could have attacked the deed, Sawyer would have prevailed anyway because MRTA could extinguish the state's title.⁹⁰ The court reasoned that MRTA's purpose of simplifying land transfers would best be advanced by construing the Act strictly against the state, especially because the Act purported to extinguish all interests unless they were excepted. The court declined to interpret MRTA as including an implied exception that protected the state's title to sovereignty lands; it said any reservation in a deed or patent had to be express.⁹¹ Without explanation, the supreme court denied certiorari.⁹² Thus was born—without the state ever appearing—the conception that MRTA could eliminate state title to sovereignty lands by the mere passage of time.

The result replaced a time-honored doctrine that had preserved public ownership of these resources to advance overriding public policies with one where the determination of ownership was based solely on the age of a piece of paper in the county courthouse. Given the historically stringent rules governing sovereignty lands, a more radical change in direction is difficult to imagine. That is especially so because marketable title acts are "designed and intended to apply to private and singular interests and defects and not to wide-ranging, multiple interests."⁹³ In protecting its claims from MRTA, the state labors under disadvantages that do not burden private landowners. Its holdings are vast, reaching to all corners of the state, and it does not receive an annual tax bill officially reconfirming its ownership each year.⁹⁴ Moreover, filing notice is not satisfactory protection. In *Holland v. Hattaway*,⁹⁵ Judge Cowart said the notice procedure is "burdensome and a nuisance and should be unnecessary"⁹⁶ to preserve the claim of one who is a true owner not in actual possession, but whose name is not on the tax

90. *Sawyer*, 286 So. 2d at 612-14. Although the court's discussion of MRTA was not necessary to its decision, it is possible to interpret this case as holding that MRTA extinguished the state's title. The court concluded that MRTA "governs and clears plaintiff's title." *Id.* at 614.

91. *Id.* at 613.

92. *Sawyer*, 297 So. 2d 562 (Fla. 1974). Justice Ervin dissented vigorously. *Sawyer*, 297 So. 2d at 562-66 (Ervin, J., dissenting). As attorney general 11 years earlier, he had negotiated with the Bar on behalf of the state when MRTA was drafted. See *infra* note 120.

93. Hicks, *The Oklahoma Marketable Record Title Act*, 9 TULSA L.J. 68, 99 (1973). "Although the government can protect its interests in the same ways that private citizens can, such action would impose large additional expenses upon the taxpayers." Note, *The Indiana Marketable Title Act of 1963: A Survey*, 40 IND. L.J. 21, 29 (1964).

94. S. STAFF REPORT, *supra* note 4, at 44.

95. 438 So. 2d 456 (Fla. 5th DCA 1983).

96. *Id.* at 469 n.17.

rolls for a legitimate reason⁹⁷—in other words, a claimant like the state.

Nevertheless, the strict application of MRTA against the state was endorsed by the Florida Supreme Court in *Odom v. Deltona Corp.*⁹⁸ In this bellwether case, the court agreed that MRTA would divest the state of title to sovereignty lands. The case grew out of Deltona's request for a declaratory judgment that it held valid title to some nonmeandered lakes, varying in size from less than 50 acres to 140 acres, in Volusia and Hernando counties. Deltona claimed it owned the lakes by virtue of various deeds which had not expressly reserved the state's claim. It sought to preclude the state from requiring permits to dredge and partly reclaim the lakes for its residential developments. The state contended the lakes were sovereignty lands not legally conveyed. The trial court granted summary judgment for Deltona,⁹⁹ holding the lakes were nonnavigable,¹⁰⁰ meaning they were validly conveyed nonsovereignty lands. The court went beyond this dispositive issue, however, and buttressed its decision with principles of legal estoppel, equitable estoppel, and MRTA.¹⁰¹

On direct appeal, the supreme court affirmed¹⁰² in an opinion so lacking in focused legal analysis that it has mystified commentators.¹⁰³ The court appeared to agree the lakes were nonnavigable,¹⁰⁴ but it, too, went further. The court concluded the state's claim would be barred by legal estoppel and equitable estoppel.¹⁰⁵ A four-member majority went beyond that.¹⁰⁶ Citing *Sawyer*, they agreed that MRTA would divest the state of title to sovereignty

97. *Id.* at 469.

98. 341 So. 2d 977 (Fla. 1976).

99. *Id.* at 979.

100. *Id.* at 984. On this key issue, the trial court was guided by two statutes. *Id.* at 982-984. One, FLA. STAT. § 253.151, was declared unconstitutional by the supreme court after the trial court's decision but before *Odom* was affirmed. *Id.* at 989. The other, FLA. STAT. § 197.228, was recently described by the supreme court as a tax statute inapplicable to property law. *Belvedere Dev. Corp. v. Dep't of Transportation*, 10 Fla. L.W. 375, 377 (Fla. July 12, 1985). Thus, the *Odom* trial court's analysis of the navigability issue would be at least suspect today.

101. *Odom*, 341 So. 2d at 985-86.

102. *Id.* at 990.

103. "Differentiating between holding and dicta is difficult." Comment, *The Public Trust Doctrine and Ownership of Florida's Navigable Lakes*, 29 U. FLA. L. REV. 730, 749 n.128 (1977).

104. *Odom*, 341 So. 2d at 988-89.

105. *Id.* at 989.

106. *Id.* This majority included a circuit court judge temporarily assigned to duty on the supreme court. Thus, the justices split 3-3 on this crucial issue.

lands, and that the state's only recourse would be to purchase or condemn these submerged properties.¹⁰⁷

It seems logical to this Court that, when the Legislature enacts a Marketable Title Act, as found at Chapter 712, Florida Statutes, clearing any title having been in existence thirty years or more, the state should conform to the same standard as it requires of its citizens; the claims of the Trustees to beds underlying navigable waters previously conveyed are extinguished by the Act.¹⁰⁸

The court's analysis was grounded in the public policy favoring stability of land titles; the countervailing policies favoring public rights were dismissed as being of transitory significance.¹⁰⁹ This abbreviated discussion drew a sharp and cogent dissent from Justice Sundberg that cut to the heart of the logical difficulties in construing MRTA to operate against sovereignty lands.¹¹⁰ He noted that, prior to this construction of MRTA, sovereignty lands could be transferred only in compliance with statutory requirements, and then only when the public interest would not be harmed.¹¹¹

The court's decision soon came under criticism.¹¹² Nevertheless, its implications became undisputed when a federal court relied on it in 1978. In *Starnes v. Marcon Investment Group*,¹¹³ the United States Court of Appeals for the Fifth Circuit cited *Odom* in validating title to approximately eleven acres of sovereignty land in the Florida Keys claimed under a chain of title stretching back to

107. *Id.* There has been much dispute as to whether the *Odom* court held that MRTA would divest the state of title to sovereignty land. One interpretation considers this language a holding. See Rosen, *supra* note 61, at 604 & n.276. However, another interpretation views the MRTA language as only dictum. See Board of Trustees v. Stevens, 472 So. 2d 1287, 1290 (Fla. 2d DCA 1985) (Bentley, J., dissenting); S. STAFF REPORT, *supra* note 4, at 17-18; H.R. STAFF REPORT, *supra* note 4, at 11. This interpretation seems more plausible in light of the fact that the supreme court went out of its way twice in each of two subsequent decisions to note that it was not addressing MRTA's applicability to sovereignty lands. *Askew*, 409 So. 2d at 9, 15; *St. Joe Paper Co.*, 364 So. 2d at 445, 449. These comments may have signalled that the issue was unresolved.

108. *Odom*, 341 So. 2d at 989 (footnote omitted). As Judge Bentley observed recently, this reasoning was "patently illogical." *Stevens*, 472 So. 2d at 1290 (Bentley, J., dissenting).

109. *Odom*, 341 So. 2d at 989.

110. *Id.* at 990-92 (Sundberg, J., concurring in part, dissenting in part).

111. The constitution allows the sale of sovereignty lands only when the public interest will be furthered and private use—as under a lease—only when not contrary to the public interest. FLA. CONST. art. X, § 11.

112. See Comment, *supra* note 103, at 748-49; but see Rosen, *supra* note 61, at 603-08.

113. 571 F.2d 1369 (5th Cir. 1978).

an 1883 United States patent,¹¹⁴ a patent that Florida law previously regarded as ineffectual to convey sovereignty land.¹¹⁵ By chance, the decision was handed down while the legislature was in session. MRTA's operation against state lands was about to become a legislative concern.

IV. THE 1978 SOVEREIGNTY LANDS EXCEPTION

The judicial decisions applying MRTA to extinguish state claims were surprising, not only because of the violence they did to the public trust doctrine, but also because they were contrary to the published analyses of MRTA before and after its enactment. Although the Florida Bar's first draft of the Act expressly exempted the state from its operation¹¹⁶ as well as from the requirement of filing notice,¹¹⁷ these provisions were omitted from the second draft "as the act could not affect the rights of the State of Florida in any event."¹¹⁸ After the Bar's work was reviewed by scholars and practitioners in 1960, this omission was carried forward in subsequent drafts.¹¹⁹

When the legislature enacted MRTA in 1963, however, the governmental exemption had been expanded to include the state, but with different wording. The provision exempted from extinguishment "any right, title or interest of the United States or Florida reserved in the deed or patent by which the United States or Florida parted with title."¹²⁰ The early commentators whose analyses

114. *Id.* at 1370-71.

115. *Gerbing*, 47 So. at 357.

116. *Catsman*, *Function of Act*, *supra* note 11, at 143 n.8.

117. *Id.* at 144 & n.13.

118. *Id.* at 143 n.8. The Bar committee reached this conclusion even though its proposal was drafted to operate against private and governmental interests. *Id.* at 143. The Bar's representations to the legislature in 1961 and 1963 about the Act's effects on state interests were not preserved.

119. Carmichael, *supra* note 11, at 1058. Indeed, the bill introduced in the legislature in 1961 followed these early drafts by exempting "any right, title or interest of the United States unless congress [sic] shall assent to its operation." Fla. HB 2478, sec. 3 (1961). The Bar published little on its marketable title act campaign after the 1961 Regular Session. However, the Bar renewed its efforts prior to the 1963 Regular Session. *Report to You, Summary of Board of Governors Actions*, 37 FLA. B.J. 10, 11-12 (1963); *Real Property, Probate & Trust Law Notes*, 37 FLA. B.J. 170 (1963); *Real Property, Probate & Trust Law Notes*, 37 FLA. B.J. 255 (1963).

120. Ch. 63-133, § 4, 1963 Fla. Laws 257, 259. This exemption for the state and federal governments was in the bill as introduced in 1963. Fla. SB 613, sec. 4 (1963). The Bar's chief proponents of MRTA had worked on the proposal with Attorney General Ervin and his staff. Letter from Richard W. Ervin, Esq., Tallahassee, Fla., to J. Hyatt Brown, Chairman, Marketable Record Title Act Study Comm'n, Daytona Beach, Fla. (Sept. 30, 1985) (on file,

greatly influenced judicial construction of the Act concluded that this provision protected state land claims. Professor Barnett classified the Florida statute as one of several that "except from their operation *all* interests of the state itself."¹²¹ The only state interest that Professor Boyer and Mr. Shapo warned might be at risk was governmental liens.¹²² In light of these analyses—not to mention the fact that lawmakers had evinced an intention to give state interests protection afforded to virtually no other landowner except the federal government—the strict construction of MRTA against the state was extraordinary.

The legislature attempted to amend MRTA to eliminate this threat during its 1978 Regular Session. However, a bill intended to make that change did not have enough support in the Senate to surmount procedural obstacles during the session's last week.¹²³ So Governor Askew called the legislature into special session to consider the issue again.¹²⁴

When they convened, the Senate and House received bills from committees that, except for superficial changes, ultimately became the seventh exception to MRTA.¹²⁵ Whether the new exception would operate retrospectively was one of the central issues. At a hearing held by the House Select Committee on Sovereignty Lands, the bill's supporters warned that applying the new exception only prospectively would allow further losses of sovereignty lands under MRTA.¹²⁶ Their fear was that, if the exception was prospective only, anyone who could show a root of title to sovereignty lands at least thirty years old any time between 1963 and the effective date of the new exception would still prevail over the state. The Bar's representative advised the committee that the ex-

Florida State University Law Review). Justice Ervin later said that, when he reviewed the Bar proposal, "I did not believe the Act could affect sovereignty lands unless it expressly said so." *Id.* The Bar noted the Act's passage with a two-sentence item saying only that "[c]ertain interests in land are extinguished unless preserved by the recording of a notice of claim." *Real Property, Probate & Trust Law Notes*, 37 FLA. B.J. 1044 (1963).

121. Barnett, *supra* note 16, at 77 (emphasis added).

122. See Boyer & Shapo, *supra* note 20, at 115.

123. See FLA. S. JOUR. 683 (Reg. Sess. 1978) (reverting to consideration of amendments to Fla. CS for SB 970 (1978) with bill failing to pass to third reading); FLA. LEGIS., HISTORY OF LEGISLATION, 1978 REGULAR SESSION, HISTORY OF SENATE BILLS at 266, SB 970.

124. FLA. S. JOUR. 1 (Spec. Sess. 1978).

125. Compare ch. 78-288, 1978 Fla. Laws 820, with Fla. CS for HB 3-D (1978) and Fla. SB 4-D (1978).

126. Fla. H.R., Select Comm. on Sovereignty Lands, transcript of hearing at 40 (June 7, 1978) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 767, Tallahassee, Fla.) (statement of David Gluckman) [hereinafter cited as H.R. SCSL Transcript].

ception would be applied retrospectively.¹²⁷ He urged that the bill be amended to indicate it was only prospective in effect and even suggested language he said would do that.¹²⁸ The Committee did not even vote on the Bar proposal; it made cosmetic changes in the bill so it would conform to a Senate-passed measure,¹²⁹ then approved a committee substitute.¹³⁰

The Senate version, Senate Bill 4-D,¹³¹ was the vehicle for the final legislation.¹³² In both chambers, amendments were offered to limit the reach of the new exception by exempting certain lands from retrospective operation of the new measure.¹³³ These identically worded amendments strongly indicated that their sponsors believed the sovereignty lands exception would operate retrospectively. Both bodies rejected these proposed exceptions to retroactivity,¹³⁴ suggesting that lawmakers wanted the new exception to operate retrospectively to all lands within its ambit.¹³⁵

Governor Askew signed Senate Bill 4-D into law on June 15, 1978.¹³⁶ As enacted, it excepted from the operation of MRTA "[s]tate title to lands beneath navigable waters acquired by virtue of its sovereignty."¹³⁷ A separate measure created a State Lands Study Committee to, among other things, determine whether further changes were needed in MRTA.¹³⁸

127. *Id.* at 31 (statement of Charles Gardner). The only committee member to express an opinion on whether the bill would operate retrospectively, Rep. Sadowski, Dem., Miami, 1976-1982, disagreed with Mr. Gardner's assessment. *Id.* at 32.

128. *Id.* at 28-31.

129. H.R. SCSL Transcript, *supra* note 126, *passim*.

130. *See* Fla. CS for HB 3-D (1978).

131. Fla. SB 4-D (1978) evolved from Fla. CS for SB 970 (1978), a measure that had failed during the 1978 Regular Session. *See supra* note 123 and accompanying text.

132. FLA. S. JOUR. 6 (Spec. Sess. 1978); FLA. H.R. JOUR. 6 (Spec. Sess. 1978).

133. FLA. S. JOUR. 6 (Spec. Sess. 1978) (Amendment 2 to Fla. SB 4-D (1978)); FLA. H.R. JOUR. 6 (Spec. Sess. 1978) (Amendment 1 to Fla. SB 4-D (1978)).

134. The Senate rejected the amendment by a vote of 18-18, FLA. S. JOUR. 6 (Spec. Sess. 1978); the House rejected it 59-48. FLA. H.R. JOUR. 6 (Spec. Sess. 1978).

135. An alternative explanation is that the legislature did not want the new exception applied retrospectively at all. However, given the advice of the bill's supporters that prospective-only application would defeat the bill's purpose, this interpretation seems unlikely. Moreover, any legislative desire to achieve prospective-only application could have been achieved simply by adding the appropriate language, as the Bar suggested. Thus, the legislature must have desired retrospective application. *But see* Respondent's Brief at 32, Board of Trustees v. American Cyanamid Co., Nos. 65,755 and 65,696 (on file with the Clerk of the Florida Supreme Court) (quoting a senator in floor debate as declining to say whether exception should be retrospective).

136. Ch. 78-288, 1978 Fla. Laws 820.

137. *Id.*

138. Ch. 78-301, 1978 Fla. Laws 866. Corrective legislation to deal with MRTA's operation against other classes of state lands was deliberately postponed until after the issue

Among the issues considered by the State Lands Study Committee was the reach of the 1978 sovereignty lands exception. The Florida Land Title Association urged the Committee to recommend that any ambiguity about the exception's potential retrospective operation be eliminated by making it expressly prospective.¹³⁹ The state's attorneys replied that prospective application would leave sovereignty lands still vulnerable to MRTA.¹⁴⁰ Ultimately, the Committee took no position on whether the sovereignty lands exception should be clarified to say whether or not it was retrospective.¹⁴¹ The Committee also made no recommendation on whether the legislature should create another exception to MRTA for other state lands that were concededly vulnerable to loss.¹⁴² Nevertheless, the legislature was advised that it had halted the loss of sovereignty lands under MRTA.¹⁴³ Indeed, the Florida Supreme Court later cited the 1978 exception as proof that lawmakers had "come to grips" with the problem.¹⁴⁴

In fact, they had not. For one thing, the new exception by its very terms did not prevent the loss of nonsovereignty state land claims. Moreover, it did not protect the state's title to sovereignty lands that, by artificial lowering of the waters, had become dry.¹⁴⁵ Furthermore, it did not address any remaining public rights for the

could be studied by the State Lands Study Comm. See H.R. SCSL Transcript, *supra* note 126, at 9 (statement of Joe Cresse) (recommending adoption of a study committee Act).

139. State Lands Study Comm., addendum to the Summation of Minutes, meeting of Feb. 7, 1979, at 4 (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1091, Tallahassee, Fla.) (remarks of John S. Thornton, Jr.). Mr. Thornton said the exception could be made prospective by limiting its reach to sovereignty lands "which have not been alienated." *Id.* Significantly, the Senate had rejected nearly identical language when it considered the ill-fated forerunner of Fla. SB 4-D (1978), Fla. CS for SB 970 (1978). FLA. S. JOUR. 683 (Reg. Sess. 1978) (Amendment 2A to Fla. CS for SB 970 (1978)).

140. State Lands Study Comm., Summation of Minutes, meeting of Jan. 8, 1979, at 9 (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1091, Tallahassee, Fla.) (statement of James R. Hubbard on behalf of the Governor).

141. See SLSC REPORT, *supra* note 4, at 20, 25; see also Memorandum to Senator Vogt, Chairman of the State Lands Study Comm., from Bill Preston at 3 (Apr. 9, 1979) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 915, Tallahassee, Fla.) (failure to address retrospective effect issue attributed to inability of state and title companies to agree on report language).

142. SLSC REPORT, *supra* note 4, at 25.

143. STAFF OF FLA. S. COMM. ON NAT. RESOURCES & CONSERV., PUBLIC LANDS IN FLORIDA 13-14 (Oct. 1978) (on file with the committee).

144. *Askew*, 409 So. 2d at 15.

145. The doctrine of reliction will vest sovereignty lands in the riparian owner, *State v. Contemporary Land Sales, Inc.*, 400 So. 2d 488, 491 (Fla. 5th DCA 1981), but title to exposed lands remains in the state when navigable waters are artificially lowered, *Busch*, 112 So. 2d at 287.

use of navigable waters over sovereignty lands that MRTA might put into private hands. Lastly, and most significantly, it did not specify that the new exception should be given retrospective effect.

These defects were soon apparent. In *State v. Contemporary Land Sales, Inc.*,¹⁴⁶ the Fifth District Court of Appeal applied MRTA to validate a corporation's claim to sovereignty lands in Lake County that had become dry by virtue of an artificial lowering of Lake Louisa. The property at issue did not fall within the ambit of the 1978 exception because the land was no longer under navigable water. Nevertheless, Judge Cowart suggested that the new exception would not be given retrospective effect.¹⁴⁷ He also observed that lawmakers had drawn the exception so poorly that "not only did the horse in this case escape in the hiatus, but the barn door is still ajar."¹⁴⁸

Two months later, in *Askew v. Sonson*,¹⁴⁹ the supreme court specifically declined to determine whether the 1978 exception would operate retrospectively.¹⁵⁰ However, the court said the exception protected only sovereignty lands still under navigable water.¹⁵¹ The court then confirmed a private individual's claim to state school land¹⁵² even though the land had never been conveyed by the state and the state's title was recorded in the public lands office in Tallahassee as required by law.¹⁵³ The narrow scope of the 1978 exception had been confirmed.

The exception's prospective-only effect was pronounced by the Fifth District Court of Appeal in *Board of Trustees v. Paradise Fruit Co.*¹⁵⁴ In this most extreme of the cases applying MRTA against the public, the Fifth District held that the exception could not be applied retrospectively.¹⁵⁵ In an opinion written by Judge

146. 400 So. 2d 488 (Fla. 5th DCA 1981).

147. Judge Cowart framed the issue as whether MRTA should be applied "as it existed prior to the 1978 amendment." *Contemporary Land Sales, Inc.*, 400 So. 2d at 492.

148. *Id.*, at 492 n.4.

149. 409 So. 2d 7 (Fla. 1981).

150. *Id.* at 9.

151. *Id.* at 14.

152. *Id.* at 15.

153. *Id.* at 16 (Overton, J., dissenting on motion for rehearing).

154. 414 So. 2d 10 (Fla. 5th DCA 1982), *petition for review denied*, 432 So. 2d 37 (Fla. 1983).

155. *Paradise Fruit Co.*, 414 So. 2d at 11. The Second District Court of Appeal later aligned itself with this view in *Coastal Petroleum Co. v. American Cyanamid Co.*, 454 So. 2d 6, 9 (Fla. 2d DCA 1984). This construction removes from the scope of the 1978 exception "the greatest bulk" of swamplands deeds, *Stevens*, 472 So. 2d at 1290 (Bentley, J., dissenting), making the exception a virtual dead letter.

Cowart, the court did not decide whether the lands were sovereignty lands; rather, the court held that MRTA had perfected the company's title to submerged portions of Lake Poinsett in Brevard County upon its enactment in 1963 whether the lands were sovereignty or nonsovereignty. Thus, if applied retrospectively, the exception would unconstitutionally take away private property rights. Judge Cowart struck a defensive note by blaming the legislature and the trustees for loss of the public's claim.¹⁵⁶ The supreme court denied review.¹⁵⁷

V. THE 1985 LEGISLATION AND BEYOND

By 1985, MRTA had been applied in at least fourteen lawsuits to extinguish state claims to 50,000 acres of land valued at an estimated \$165 million.¹⁵⁸ Another eight potential cases had been identified.¹⁵⁹ The state already had spent \$5 million to defend its claims against several phosphate companies in one major case,¹⁶⁰ and the Department of Natural Resources estimated that surveying the state to determine what sovereignty land claims the state might record or litigate would cost the taxpayers \$600 million.¹⁶¹ With the press decrying a "Great Land Grab" by private interests,¹⁶² MRTA again took a leading position on the legislative agenda.

In the 1985 Regular Session, Senators McPherson,¹⁶³ Mann,¹⁶⁴ and Stuart¹⁶⁵ introduced Senate Bill 673 to broaden the 1978 sovereignty lands exception to include all state-owned lands.¹⁶⁶ The bill also would have added to chapter 712, Florida Statutes, language indicating legislative intent, in an attempt to redirect the judicial interpretation of MRTA.¹⁶⁷ A new subsection of section 197.228, Florida Statutes was proposed, which would have mandated that a conveyance of sovereignty land not be considered

156. *Paradise Fruit Co.*, 414 So. 2d at 11-12.

157. *Paradise Fruit Co.*, 432 So. 2d at 37.

158. *State could lose claim to waters*, Orlando Sentinel, April 21, 1985, at B4, col. 1.

159. H.R. STAFF REPORT, *supra* note 4, Appendix.

160. *Senators agree to debate bill on state lands*, Tallahassee Democrat, May 28, 1985, at 2C, col. 1.

161. *Tempers rise in river land dispute*, Orlando Sentinel, June 24, 1985, at B1, col. 5.

162. *The land grab continues*, St. Petersburg Times, Mar. 31, 1985, at 2D, col. 1.

163. Dem., Fort Lauderdale.

164. Dem., Fort Myers.

165. Dem., Orlando.

166. Fla. SB 673, sec. 1 (1985).

167. *Id.* sec. 2.

valid unless made with authority or ratified by the legislature.¹⁶⁸ Senator Kiser¹⁶⁹ and Representative Sample¹⁷⁰ introduced companion bills¹⁷¹ that were nearly identical to Senate Bill 673.¹⁷²

After Governor Graham warned that "the people of the state stand to lose a great legacy of lands" without corrective legislation,¹⁷³ the Senate Committee on Natural Resources and Conservation favorably reported a committee substitute for Senate Bill 673.¹⁷⁴ The House Judiciary Committee then introduced a committee bill invoking sovereign immunity and precluding all quiet title actions against the state until October 1, 1986, and creating a special committee to study the MRTA problem.¹⁷⁵ A related bill would have given statutory recognition to the public trust doctrine by confirming that the public's right to use navigable waters constituted a servitude upon sovereignty lands once title passed into private hands.¹⁷⁶ When enough support could not be garnered to pass Committee Substitute for Senate Bill 673, the bill's supporters agreed to and passed a compromise version of the bill patterned after House Bill 1418.¹⁷⁷ It added a new subsection to section 712.02, Florida Statutes, suspending MRTA's application against sovereignty or school lands until October 1, 1986.¹⁷⁸ The compromise legislation also created a seventeen-member study commission to review the effect of MRTA on state lands and recommend any changes.¹⁷⁹ Governor Graham signed the bill into law on June 7, 1985.¹⁸⁰ It took effect immediately.¹⁸¹

168. *Id.* sec. 3. This provision would have precluded the application of legal estoppel against the state to validate claims to sovereignty lands under swamp and overflowed lands deeds.

169. Repub., Palm Harbor.

170. Repub., St. Petersburg.

171. Fla. SB 934 (1985); Fla. HB 1125 (1985).

172. Compare Fla. SB 934 (1985) and Fla. HB 1125 (1985) with Fla. SB 673 (1985).

173. News release (May 6, 1985) (from Gov. Graham urging committee approval of Fla. SB 673 (1985)) (on file, *Florida State University Law Review*).

174. FLA. S. JOUR. 272 (Reg. Sess. May 13, 1985).

175. Fla. HB 1418 (1985).

176. Fla. HB 1420 (1985).

177. *Lawmakers: Land-title squabble will bring special session*, Tallahassee Democrat, May 30, 1985, at 6A, col. 1. The measure passed the Senate 26-9. FLA. S. JOUR. 974 (Reg. Sess. May 30, 1985). It passed the House 104-11. FLA. H.R. JOUR. 1163-64 (Reg. Sess. May 31, 1985).

178. Ch. 85-83, § 1, 1985 Fla. Laws 516, 516.

179. *Id.* at 517, § 2 (creating the Study Commission on MARTA [sic]).

180. *Id.*

181. *Id.* The 17 members of the study committee were urged to report well before the Feb. 15, 1986, deadline. *Panel is appointed to look into title act*, Tallahassee Democrat, July 4, 1985, at 1B, col. 2.

Lawmakers appear to have had the authority to suspend MRTA. While the legislature's power to suspend a statute has been acknowledged only indirectly in Florida,¹⁸² authorities in other jurisdictions have described it as "an inherent and integral part of the lawmaking power."¹⁸³ The Supreme Court has long recognized that Congress may suspend statutes in any manner it chooses.¹⁸⁴ State legislatures may suspend statutes where—as in Florida—their state constitutions do not prohibit it.¹⁸⁵ Frequently, lawmakers suspend a statute only by implication.¹⁸⁶ Once a statute has been suspended, the courts may not enforce it,¹⁸⁷ however, there are limitations on the suspension power. Those most relevant to the suspension of MRTA are that a suspension must be general and not directed to an individual case,¹⁸⁸ and that it not abridge any rights that vested under the suspended statute.¹⁸⁹

The suspension of the application of MRTA in quiet title actions over disputed sovereignty and school lands appears to meet both criteria. First, it is directed at all actions, whether in law or equity, where any party seeks to quiet title to specified lands claimed by the state.¹⁹⁰ Second, it does not apply to pending litigation¹⁹¹ and will not extinguish, vest, or create rights in anyone.¹⁹²

More significantly, the suspension of MRTA's applicability to quiet title actions against the state may be justified under the doctrine of sovereign immunity. At common law, the state is immune from lawsuit over its property interests,¹⁹³ although the Florida Constitution authorizes the legislature to waive sovereign immunity by general law.¹⁹⁴ Any suit against the state must be brought

182. *State ex rel. First Savings & Trust Co. v. Sholtz*, 169 So. 849, 853 (Fla. 1936).

183. *Merchants' Exchange v. Knott*, 111 S.W. 565, 571 (Mo. 1908). See generally 2 C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 34.10 (4th ed. 1972); 73 AM. JUR. 2D *Statutes* § 374 (1974); 82 C.J.S. *Statutes* § 304 (1953).

184. See, e.g., *United States v. Will*, 449 U.S. 200, 222 (1980); *United States v. Dickerson*, 310 U.S. 554, 555 (1940); *United States ex rel. Levey v. Stockslager*, 129 U.S. 470, 475 (1889).

185. *Cunningham v. Smith*, 53 P.2d 870, 872 (Kan. 1936).

186. E.g., *King v. Sununu*, 490 A.2d 796, 799 (N.H. 1985).

187. *Davis v. Board of Educ.*, 43 N.E.2d 67 (N.Y. 1942).

188. *Cunningham*, 53 P.2d at 872; *State v. Allstate Ins. Co.*, 654 S.W.2d 45, 47 (Tex. Ct. App. 1983).

189. *Patterson v. Dempsey*, 207 A.2d 739, 745 (Conn. 1965).

190. Ch. 85-83, § 1, 1985 Fla. Laws 516.

191. *Id.*

192. *Id.*

193. *Hampton v. State Bd. of Educ.*, 105 So. 323, 327 (Fla. 1925).

194. FLA. CONST. art. X, § 13.

subject to the terms or conditions of the waiver,¹⁹⁵ and the waiver must be construed strictly against the claimant.¹⁹⁶ These rules govern quiet title actions against the state.¹⁹⁷ By temporarily prohibiting MRTA's application in quiet title suits over sovereignty and school lands, lawmakers have imposed a condition on the exercise of the rights granted in the waiver of sovereign immunity from quiet title suits.¹⁹⁸ A claimant may still sue to quiet title, but the claim may not be based on MRTA. Theoretically, MRTA's application against the state could be suspended indefinitely.

This expedient does not address the issue of whether MRTA vested property rights in private claimants to state lands in the first place. That issue lies at the center of the controversy. If MRTA created rights, the legislature faces constitutional constraints on regaining title to any disputed lands. If it did not, the legislature has far more latitude.

Whether MRTA created any property rights in claimants with a valid root of title depends in part upon how the Act is construed to operate. In general, there are two kinds of marketable title acts—those in the nature of statutes of limitation that merely bar remedies, and those that expressly extinguish property interests predating the root of title.¹⁹⁹ The extinguishment provision in the Florida Act,²⁰⁰ which was patterned after the Model Marketable Title Act,²⁰¹ places it within the latter class. An act of this kind "should not be conceived of as an act of limitation."²⁰² Scholars agree that such an act automatically reaches back at any time to extinguish property interests predating a valid root of title.²⁰³ Thus, all interests prior to a valid root and not within the Act's exceptions cease to exist upon the root's attaining the required

195. *Valdez v. State Rd. Dep't*, 189 So. 2d 823, 824 (Fla. 2d DCA 1966).

196. *Tampa-Hillsborough Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 928 (Fla. 1983).

197. *See, e.g., Kirk v. Kennedy*, 231 So. 2d 246, 247-48 (Fla. 2d DCA 1970); *Seaside Properties, Inc. v. State Rd. Dep't*, 121 So. 2d 204, 206 (Fla. 3d DCA 1960).

198. FLA. STAT. § 69.041(1)-(2) (1983).

199. Note, *Marketable Title Legislation—A Model Act for Iowa*, 47 IOWA L. REV. 389, 391-93 (1962). A statute of limitation "withdraw[s] the privilege to litigate and den[ies] the aid of the courts in asserting claims." L. SIMES & C. TAYLOR, *supra* note 21, at 37.

200. FLA. STAT. § 712.04 (1983).

201. *See P. BAYSE, CLEARING LAND TITLES* § 187 (2d ed. 1970); compare FLA. STAT. § 712.04 (1983) with L. SIMES & C. TAYLOR, *supra* note 21, at 7-8 (extinguishment section of the Model Marketable Title Act).

202. Smith, *The Marketability of Land Titles*, 33 OHIO B.J. 683, 690 (1960).

203. Smith, *The New Marketable Title Act*, 22 OHIO ST. L.J. 712, 713-14 (1961) [hereinafter cited as Smith, *New Act*]; Note, *supra* note 93, at 25. *But see Anderson v. Pickering*, 541 P.2d 1361, 1365 (Okla. Ct. App. 1975) (Oklahoma MRTA not "self-executing").

age.²⁰⁴ The destruction is absolute.²⁰⁵ Moreover, such an act "will continuously move forward, eliminating claims based on transactions which predate the newly developing roots of title."²⁰⁶

The Florida Supreme Court has been beset with some confusion on this point. It has alternately described the Act's effect as a bar to a claim²⁰⁷ and as complete extinguishment of the affected interests.²⁰⁸ While the interchangeable use of these descriptions is an understandable imprecision, given the peculiar nature of MRTA,²⁰⁹ it nevertheless makes more difficult any legislative response to the loss of state claims under MRTA. The view more likely to prevail is that MRTA does indeed extinguish affected interests automatically.²¹⁰ This conclusion is probable partly because the supreme court has concluded that MRTA "goes beyond previous enactments and is in a category of its own."²¹¹

Whether MRTA does more than extinguish rights by creating new property rights from what had previously been an imperfect title is another matter. The Florida Supreme Court has said MRTA can create a new and valid title.²¹² The Fifth District has been even more explicit. In *Paradise Fruit*, the court held that, by eliminating competing claims that came within its purview, MRTA perfected title, thus vesting property rights that could only be revoked within constitutional limitations.²¹³ This view was embraced by the Second District in *Coastal Petroleum*.²¹⁴

This issue becomes important in determining what constitutional constraints apply to the state in dealing with the MRTA problem. Generally, courts have been hostile to retroactive legislation that abridges property rights.²¹⁵ There is no magic formula to

204. L. SIMES & C. TAYLOR, *supra* note 21, at 11 (hypothetical illustrating operation of Model Act).

205. *Id.* at 353-54.

206. Smith, *New Act*, *supra* note 203, at 713-14.

207. *St. Joe Paper Co.*, 364 So. 2d at 443, 447.

208. *Askew*, 409 So. 2d at 13; *Odom*, 341 So. 2d at 989.

209. *See supra* text accompanying note 24.

210. *Askew*, 409 So. 2d at 14-15 (description of MRTA's essence).

211. *Marshall*, 236 So. 2d at 119.

212. *St. Joe Paper Co.*, 364 So. 2d at 447. The Minnesota Supreme Court reached an opposite conclusion in *Wichelman v. Messner*, 83 N.W.2d 800 (Minn. 1957). "The statute does not operate to provide a foundation for a new title." *Id.* at 819. However, an interlocking deed would not be a valid root of title under *Wichelman*. *Id.* Under Florida law, a wild deed may be a valid root of title. *St. Joe Paper Co.*, 364 So. 2d at 447.

213. *Paradise Fruit*, 414 So. 2d at 11-12.

214. 454 So. 2d at 9.

215. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960).

determine in advance the legislature's authority to use retroactive legislation to extinguish any inadvertently created rights to state-claimed lands, but it goes too far to say that the state's only recourse is to condemn or buy them. The touchstone is the reasonableness of the statute.²¹⁶ In evaluating retrospective statutes, the Supreme Court weighs the nature of the right abridged and the extent of the abridgement.²¹⁷ It also weighs the public policies that the retroactive statute seeks to achieve.²¹⁸ The Court has even gone so far as to say that rights which accrue from a windfall brought about by an error of the government may be abridged in some situations more easily than would otherwise be permitted.²¹⁹

The courts have upheld statutes that cut off property rights when the legislature has allowed a grace period in which the rights could be preserved through reasonable means.²²⁰ The Florida Supreme Court has adhered to this rule.²²¹ Indeed, it was one basis for finding MRTA constitutional.²²² Thus, if MRTA created rights and the legislature chooses to eliminate them directly with a retroactive statute, lawmakers might be required to provide a grace period for the assertion of those new rights before they may be wiped out. That could set off a land rush, leaving the state in a position little better than the one it is in now. Conversely, if MRTA is construed to be merely a remedy that created no rights, the state may revoke it because the courts have determined there is no right to a remedy.²²³ In either event, the question remains: What interest could the state reassert if MRTA has extinguished the public's claim?

The approach urged upon the legislature until now has avoided this conceptual problem. Lawmakers have been asked to enact a special interpretive statute, an act that would suggest a judicial interpretation of a prior act.²²⁴ Usually, courts will not allow an interpretive act to operate retroactively in a way that will overrule a

216. *Id.* at 694-95.

217. *Id.* at 696-97.

218. *Id.*

219. *Graham & Foster v. Goodcell*, 282 U.S. 409, 429-30 (1931). The Supreme Court's rationale in this case seems particularly suited to any legislation addressed to the loss of state claims under MRTA.

220. *E.g.*, *Vance v. Vance*, 108 U.S. 514, 517-18. (1883).

221. *Trustees of Tufts College v. Triple R. Ranch, Inc.*, 275 So. 2d 521, 526 (Fla. 1973).

222. *St. Joe Paper Co.*, 364 So. 2d at 443-44.

223. *Mahood v. Bessemer Properties, Inc.*, 18 So. 2d 775, 779-80 (Fla. 1944).

224. 1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 27.04 (4th ed. 1973).

prior judicial decision.²²⁵ Such a result would violate the separation of powers doctrine by making the legislature a court of last resort. Courts are more likely to employ an interpretive act as an aid in construing an ambiguous or previously unconstrued provision.²²⁶

In 1978, after the decision in *Odom v. Deltona Corp.*,²²⁷ Dean Maloney suggested an interpretive statute as a possible legislative response.²²⁸ This approach was the basis for the corrective measure proposed in 1985.²²⁹ In theory, such an act would not retroactively divest private claimants of rights to state lands; it would guide the supreme court to a decision that MRTA never bestowed any rights on them in the first place.

The legislative model usually suggested for this approach arose in Louisiana, where the state had a strikingly similar problem. A 1912 statute of limitation²³⁰ was interpreted as precluding the state from asserting its claims to sovereignty lands. In 1954, the Louisiana Legislature passed an interpretive statute asserting that the 1912 Act did not apply to state claims to sovereignty lands.²³¹ Ultimately, in *Gulf Oil Corp. v. State Mineral Board*,²³² the Louisiana Supreme Court held that the 1912 Act was inapplicable to sovereignty lands.

This exhaustively researched, well-reasoned decision offers a sound policy basis for interpreting MRTA in a way that protects state claims from extinguishment. That is the chief significance of *Gulf Oil Corp.* Its value is limited for several reasons. Most significantly, the decision was grounded on the public trust doctrine,²³³ not the interpretive statute.²³⁴ Thus, the decision's value as persuasive authority for a special interpretive statute is weak. Sec-

225. *E.g.*, *Roth v. Yackley*, 396 N.E.2d 520, 522 (Ill. 1979).

226. *See, e.g.*, *Gibbons & Reed Co. v. Dep't of Motor Vehicles*, 220 Cal. App. 2d 277, 287 (Cal. Ct. App. 1963).

227. 341 So. 2d 977 (Fla. 1976).

228. Fla. S. Select Comm. on Sovereignty Lands, unpaginated partial transcript of tape recording of proceedings, lines 375-83 (June 6, 1978, tape 1) (available at Fla. Dep't of State, Div. of Archives, ser. 18, carton 1091, Tallahassee, Fla.) (statement of Dean Frank E. Maloney).

229. The Senate bill would have added language of intent to FLA. STAT. ch. 712 (1983) that MRTA "does not create rights to state-owned lands in private parties and shall not be construed to divest or to have divested the state" of any interests. Fla. SB 673, sec. 2 (1985).

230. Act of July 5, 1912, 1912 La. Acts 73.

231. Act of July 8, 1954, 1954 La. Acts 1275.

232. 317 So. 2d 576 (La. 1975) (as modified on rehearing).

233. *Id.* at 589.

234. *Id.* at 590. Louisiana courts did not give effect to the 1954 Act for 21 years. The reinterpretation of the 1912 statute has been attributed primarily to a change in membership on the Louisiana Supreme Court. Comment, *supra* note 103, at 745.

only, the trust doctrine is more robust in Louisiana than in Florida; Louisiana has a strict rule against alienation of sovereignty lands²³⁵ while the Florida Constitution expressly allows their sale.²³⁶ Lastly, the rules of property in a civil law jurisdiction are different from those of a common law jurisdiction.²³⁷ Of particular importance here is the Louisiana Supreme Court's observation that the common law doctrine of *stare decisis* has no special importance in Louisiana property law.²³⁸ The Florida Supreme Court has said that "[s]ubstantive rules governing the law of real property are peculiarly subject to the principles of *stare decisis*."²³⁹ Accordingly, Florida lawmakers should not rely too heavily on *Gulf Oil Corp.* when they weigh the possibility of a special interpretive act.

Florida courts have given credence to interpretive statutes as one factor to consider in deriving legislative intent.²⁴⁰ However, the courts have said a retrospective declaratory act may not be employed to take away certain rights.²⁴¹ Thus, the Florida courts' receptivity to an act suggesting that MRTA be reinterpreted to prevent extinguishment of state claims is problematic at best. Given the line of unequivocal court decisions holding that MRTA can extinguish the state's claims, such an act would come perilously close to colliding with the separation of powers doctrine embodied in the Florida Constitution.²⁴²

There are other options, however. The Florida Supreme Court itself has hinted at them. The court has observed that the provision protecting state claims reserved in a patent or deed was "[o]ne important exception for governmental entities."²⁴³ Implicitly, other exceptions must be available to the state. One inviting exception protects "any person in possession" of the property at issue.²⁴⁴ The state is a person under the Act,²⁴⁵ so it may avail it-

235. *Gulf Oil Corp.*, 317 So. 2d at 581-84, 588-89.

236. FLA. CONST. art. X, § 11.

237. *Gulf Oil Corp.*, 317 So. 2d at 591.

238. *Id.*

239. *Askew*, 409 So. 2d at 15.

240. *Williams v. Hartford Accident and Indem. Co.*, 382 So. 2d 1216 (Fla. 1980); *Gay v. Canada Dry Bottling Co.*, 59 So. 2d 788 (Fla. 1952); *Overstreet v. Pollak*, 127 So. 2d 124 (Fla. 3d DCA 1961).

241. *Quality Lime Prod., Inc. v. Acme Paving Co.*, 134 So. 2d 42 (Fla. 2d DCA 1961); see also *Roberson v. Florida Parole & Probation Comm'n*, 444 So. 2d 917 (Fla. 1983); *Special Disability Trust Fund v. Motor and Compressor Co.*, 446 So. 2d 224 (Fla. 1st DCA 1984).

242. FLA. CONST. art. II, § 3.

243. *Askew*, 409 So. 2d at 14 (emphasis added).

244. FLA. STAT. § 712.03(3) (1983).

245. *Id.* § 712.01(1).

self of this exception to MRTA just like anyone else. Should the state be found to be in possession in any given case, MRTA will not have extinguished its claim. MRTA will have been neutralized, and any dispute over lands claimed by the state and a private litigant will most likely shift to the other legal theories available to private litigants. Those theories—notably the doctrines of equitable estoppel and legal estoppel—have been used to defeat state claims in several state lands cases.²⁴⁶

In *Taylor v. Johnston*,²⁴⁷ the North Carolina Wildlife Resources Commission defeated an attempt to use that state's marketable title act to extinguish its claim to 4,500 acres of marshland. It did so by invoking a possession exception. The Act required present, actual, and open possession. Significantly, the North Carolina Supreme Court determined that the character of possession that would meet the statute's stringent requirement was merely that which was consonant with the character of the property.²⁴⁸ The state met the test by virtue of having erected dikes, water-control impoundments and pumping sheds on the property. In other states, possession has been a principal defense for public bodies seeking to defend public claims from being extinguished by marketable title acts.²⁴⁹

Unlike the North Carolina Act, Florida's MRTA does not describe the kind of possession that will preserve claims predating the root of title.²⁵⁰ When a similar statute was enacted in Indiana, the initial commentary concluded that the state's interests would be protected by constructive possession even though the state's claims were not expressly exempted.²⁵¹ The initial commentary in Florida urged a judicially imposed requirement for present, actual, open, and exclusive possession.²⁵² This proposed construction was based upon decisions of courts in other states prior to 1963; it may be that MRTA's drafters were aware of this possible requirement

246. *E.g.*, *Trustees of the Internal Improv. Fund v. Lobeau*, 127 So. 2d 98 (Fla. 1961) (legal estoppel barred trustees' claims); *Trustees of the Internal Improv. Fund v. Claughton*, 86 So. 2d 775 (Fla. 1956) (equitable estoppel barred trustees' claims). However, the proposal before the Senate in 1985 would have precluded application of the doctrine of legal estoppel in sovereignty lands cases. *See supra* note 168.

247. 224 S.E.2d 567 (N.C. 1976).

248. *Id.* at 579.

249. *See, e.g.*, *Ravenna Township v. Grunseth*, 314 N.W.2d 214 (Minn. 1981); *Taylor v. Pennington County*, 204 N.W.2d 395 (S.D. 1973).

250. FLA. STAT. § 712.03(3) (1983).

251. Note, *supra* note 93, at 29.

252. *Boyer & Shapo, supra* note 20, at 116.

for establishing possession and intended a broader definition. Even if actual possession were required, assuming that possession is considered in light of the real property at issue, sovereignty lands still under water could reasonably be deemed to be in the state's possession by virtue of any public use of the waters, such as boating, swimming, or fishing. Invoking the possession exception to protect state claims to uplands, whether sovereignty or nonsovereignty, could be more difficult.

The possession exception seems particularly suited for a special interpretive statute. An act expressing legislative intent that constructive possession by the state would satisfy the possession exception would not conflict with the separation of powers doctrine because the reported decisions do not disclose that this exception has received a deliberate judicial construction.²⁵³ Moreover, this approach would avoid entirely the problem of reconstruing MRTA in a way that would assertedly divest claimants of any rights. Indeed, if the courts follow the rule that the legislature should be presumed to have favored the public interest over private interests when it passed the Act, as the Minnesota Supreme Court presumed in the leading case on such statutes, *Wichelman v. Messner*,²⁵⁴ such an interpretation would be sound.

If state title cannot be protected through the possession exception, the public's use of navigable waters can be preserved even after title to sovereignty lands has passed into private hands. MRTA does not extinguish easements or servitudes in use, whether they are recorded or unrecorded.²⁵⁵ Moreover, any use of an easement or servitude preserves the entire interest. This easement exception is "extraordinarily broad" among marketable title

253. In *ITT Rayonier*, 346 So. 2d at 1011, the supreme court rejected an argument that possession by a life tenant could be attributed to three remaindermen, an argument the litigants called constructive possession. The court's statements can be read as saying either that constructive possession would not satisfy the requirements of FLA. STAT. § 712.03(3) or that the court did not accept the remaindermen's characterization of their relationship to the life tenant as creating constructive possession of the property. *Id.* In either event, the court found the possession exception would not have applied under the facts. *Id.* Certainly, true constructive possession was not at issue. It requires that one be entitled to present possession. 63A AM. JUR. 2D *Property* § 35 (1984). A remainder is, by definition, a nonpossessory future interest. J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 24-25 (2d ed. 1975). Thus, the ambiguous dictum in *ITT Rayonier* at most indicates judicial skepticism toward a constructive possession argument in the absence of compelling public policies.

In another case, Judge Cowart spoke of "actual possession," but possession was not at issue. *Holland*, 438 So. 2d at 469.

254. 83 N.W.2d 800, 811 (Minn. 1957).

255. FLA. STAT. § 712.03(5) (1983).

acts.²⁵⁶ Although the public's residual rights to the water have not been defined with clarity or consistency under the trust doctrine, the Florida Supreme Court has called them "easements" for navigation, commerce, fishing, swimming, and other purposes.²⁵⁷ It has also called them "servitudes."²⁵⁸ This conception of the public's rights to navigable waters is consistent with authority in other states.²⁵⁹ So, even if MRTA is construed as having the power to extinguish the state's title to sovereignty lands, the public's easement to the waters would be exempt from the Act. In 1985, the House Judiciary Committee favorably reported a bill acknowledging these rights. The bill proposed a legislative declaration that any sovereignty lands lost under MRTA would still be subject to a servitude impressed upon the navigable waters.²⁶⁰

If the law of easements were invoked to enforce public rights to navigable waters, the state would have considerable control over the use of any sovereignty lands whose title had fallen inadvertently into private hands under MRTA. The owner of a servient tenement may do nothing to obstruct or interfere with the use and enjoyment of the entire easement.²⁶¹ Although the rights of the owner of the easement and the owner of the servient tenement must be harmonized so that each may enjoy the property,²⁶² both parties must agree to any substantial change that would affect their respective rights.²⁶³ By using only the law of easements, the harsh application of MRTA against submerged sovereignty lands might be ameliorated.

The public trust doctrine under which the easement arose is perhaps the most fertile area for policymakers to explore. However, as

256. Boyer & Shapo, *supra* note 20, at 106.

257. *Ex parte Powell*, 70 So. 392, 396 (Fla. 1915); *Mabry*, 50 So. at 829-830.

258. *Gies*, 146 So. 2d at 363.

259. *People v. California Fish Co.*, 138 P. 79, *passim* (Cal. 1913). Under California law, the public trust easement extends beyond traditional uses like navigation and swimming. It is broad and flexible enough to encompass hunting, recreation, fish and wildlife habitat, open space, environmental preservation, and other nontraditional public uses. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). For a review of California's public trust easement, see *Stevens*, *supra* note 80, at 214-220, 222, 229-230.

260. Fla. HB 1420, sec. 1 (1985). Any future legislation should denominate the public's interest as an easement or a servitude in the nature of an easement to make clear that the public's residual rights in the waters under the trust doctrine should not be confused with or equated to the police power.

261. *Hoff v. Scott*, 453 So. 2d 224, 226 (Fla. 1st DCA 1984).

262. *Costin v. Branch*, 373 So. 2d 370, 371 (Fla. 1st DCA 1979), *cert. denied*, 383 So. 2d 1190 (Fla. 1980).

263. *E.g.*, *Florida Power Corp. v. Hicks*, 156 So. 2d 408, 410 (Fla. 2d DCA 1963), *cert. denied*, 165 So. 2d 177 (Fla. 1964).

Professor Sax so aptly put it: "Unfortunately, the case law has not developed in any way that permits confident assertions about the outer limits of state power."²⁶⁴ The cases do suggest a different basis for protecting the public's easement to the waters. There is even an argument that lawmakers could statutorily reassert state title to sovereignty lands.

An act reclaiming title would be supported by a venerated Supreme Court decision. In *Illinois Central Railroad v. Illinois*,²⁶⁵ the Court adjudicated a legal dispute that arose from "one of the most outrageous schemes" devised during the nineteenth century for private exploitation of sovereignty lands.²⁶⁶ In 1869, the Illinois General Assembly granted the railroad fee title to a parcel of submerged land in Lake Michigan along the Chicago waterfront.²⁶⁷ Four years later, Illinois lawmakers repealed the Act.²⁶⁸ When the resulting litigation reached the Supreme Court, the Court held that title was in the state.²⁶⁹ The Court said a state may not alienate sovereignty lands except for limited parcels that may be conveyed into private ownership when a public purpose would be served or at least when public use of the waters would not be impaired.²⁷⁰ The underlying premise was that public ownership of land beneath navigable water is an incident of statehood,²⁷¹ and no legislature may "give away or sell the discretion of its successors" over such a public resource.²⁷² Unfortunately, the Court did not clarify the precise legal effect of the doctrine in these circumstances. The Court concluded that the nature of the state's title was such that the 1869 grant was nothing more than the equivalent of a license revocable at will²⁷³ upon reimbursement for any im-

264. Sax, *supra* note 80, at 486.

265. 146 U.S. 387 (1892).

266. Stevens, *supra* note 80, at 210.

267. Act of April 16, 1869, 1869 Ill. Laws 245, 246-47.

268. Act of April 15, 1873, 1873 Ill. Laws 115.

269. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 463 (1892).

270. *Illinois Cent. R.R.*, 146 U.S. at 455-56. Professor Sax said the doctrine is that "no grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses." Sax, *supra* note 80, at 488-89.

271. *Illinois Cent. R.R.*, 146 U.S. at 460; *see also* Stevens, *supra* note 80, at 213-14.

272. *Illinois Cent. R.R.*, 146 U.S. at 460. The Court has been criticized for conceptually merging ownership of sovereignty lands with control of the navigable waters. Rosen, *supra* note 61, at 577.

273. *Illinois Cent. R.R.*, 146 U.S. at 455, 461-62. The Court rejected the railroad's defense under the contract clause, U.S. CONST. art. I, § 10, saying: "There can be no irrevocable contract in a conveyance of property by a grantor in disregard of a public trust . . ."

provements.²⁷⁴ But it also opined that Illinois lawmakers had not been empowered to make such an extensive grant in the first place.²⁷⁵ Thus, it is unclear whether the ultimate holding was that the grant was void ab initio or merely revocable.

The resulting doctrinal confusion makes difficult the application of the *Illinois Central* principles in the context of the MRTA controversy. Of great significance, however, was the Court's emphasis on the magnitude of the grant—about 1,000 strategically located acres—and how it might impede government-directed development of Chicago's harbor. In one striking passage, the Court stated flatly: "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation."²⁷⁶

The relevance of *Illinois Central* should be apparent. If Illinois lawmakers were not empowered expressly to grant a fee simple estate in 1,000 acres of lakebed crucial to Chicago's commercial development, could Florida lawmakers have inadvertently conveyed²⁷⁷ an unqualified title to hundreds of thousands of acres of land beneath rivers, lakes, and tidal waters so vital to Florida's economic and environmental health? If Illinois lawmakers could reclaim state title merely by passing a one-sentence statute, could not Florida lawmakers do the same?

Assessing the soundness of such an approach is difficult. *Illinois Central* remains the principal authority for the public trust doctrine.²⁷⁸ One indication of the decision's abiding influence came

Illinois Cent. R.R., 146 U.S. at 460. If the grant was merely a license, then logically the railroad could not have had a vested property right in the lakebed.

274. *Illinois Cent. R.R.*, 146 U.S. at 455.

275. *Id.* at 452-53.

276. *Id.* at 453.

277. As applied against state claims by Florida courts, MRTA has been characterized as a conveyance. *Askew*, 409 So. 2d at 15 (Overton, J., dissenting on motion for rehearing) (MRTA "used as an instrument of conveyance"); *Odom*, 341 So. 2d at 990 (Sundberg, J., concurring in part, dissenting in part) (MRTA "provoke[s] divestiture of public trust lands").

278. See, e.g., *City of Berkeley v. Superior Court of Alameda County*, 606 P.2d 362, 365 (Cal. 1980), cert. denied, *Santa Fe Land Improv. Co. v. City of Berkeley*, 449 U.S. 840 (1980). The Supreme Court recently hinted that *Illinois Central* may no longer have its historic vitality. It said *Illinois Central* merely "supports the proposition that alienation of the beds of navigable waters will not be lightly inferred." *Summa Corp. v. California ex rel. State Lands Comm'n*, 104 S. Ct. 1751, 1756 n.4 (1984). For another example of the Supreme Court's relaxed protection of state sovereignty lands, see *Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273 (1983) (federal statute of limitation bars state from bringing quiet title action against the United States for disputed sovereignty lands).

when the Louisiana Supreme Court said in 1975 that *Illinois Central* would have rendered valid the statute at issue in *Gulf Oil Corp.*²⁷⁹ However, once sovereignty lands have passed to a state under the equal footing doctrine, state law governs their disposition.²⁸⁰ Florida's common law trust doctrine would determine the legislature's power to reassert state title to sovereignty lands.²⁸¹ Although no Florida case is on point, *Illinois Central* should be strongly persuasive because it provided the foundation for the public trust doctrine in Florida.²⁸²

One recurring feature of sovereignty lands cases is the supreme court's weighing of the public policy behind a legislative disposition of sovereignty lands. Even at the trust doctrine's nadir in Florida, the supreme court approved a sovereignty lands conveyance only after determining that it served some public policy, as statutorily expressed by the legislature.²⁸³ Accordingly, the legislature could premise a statutory renewal of state claims to sovereignty lands on the fact that the inadvertent relinquishment of these claims under MRTA was not expressly made to promote a trust-related policy, rendering it invalid or at least subject to reversal. To ensure that such an act did not go further than necessary to protect lands vulnerable to MRTA-backed claims, lawmakers could limit the state's renewed claims by adding exceptions like those adopted by the Senate Committee on Natural Resources and Conservation in Committee Substitute for Senate Bill 673.²⁸⁴ Even if the supreme court should decide that any rights in-

279. *Gulf Oil Corp.*, 317 So. 2d at 591 n.6.

280. *Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co.*, 429 U.S. 363, 377-78 (1977). Although the Court has held that state law governs such issues, *id.*, "it has frequently formulated rules that were perceived, if not intended, as controlling precedent by state court judges." Rosen, *supra* note 61, at 572 (footnotes omitted).

281. The common law trust doctrine should govern most MRTA cases because MRTA was enacted prior to adoption of the 1968 Florida Constitution with its sovereignty lands provision. FLA. CONST. art. X, § 11. In 1969, the legislature implemented that provision with a statutory scheme for the required assessment of the public interest in any proposed grant of sovereignty lands. Ch. 69-308, 1969 Fla. Laws 1112 (current version at FLA. STAT., § 253.12 (1983)). Thus, where a root of title had not been of record for 30 years prior to 1969, any private claims to sovereignty lands under MRTA "may be subject to question." Rosen, *supra* note 61, at 602 n.264.

282. *E.g.*, *Black River Phosphate Co.*, 13 So. at 645-48.

283. *E.g.*, *Holland v. Fort Pierce Fin. & Constr. Co.*, 27 So. 2d 76, 81 (Fla. 1946) (public policy favoring waterfront development); *Pembroke*, 146 So. at 257 (public policy favoring waterfront development); *City of Tampa*, 102 So. at 340-41 (public policy favoring waterfront development). While policies heavily skewed to development might not seem a proper use of the resource by today's standards, they were deemed prudent at the time.

284. Fla. CS for SB 673, sec. 1 (1985).

advertently vested under MRTA may not be taken without just compensation, the extent of any abridgement ought to take into account that a grantee of sovereignty lands takes bare legal title and only those rights granted by statute.²⁸⁵

Undoubtedly, an unorthodox approach like this one would be risky for the state. There are less daring applications of the trust doctrine possible. For example, Florida law is unequivocal that the state may regulate the use of sovereignty lands in order to protect public rights to the waters.²⁸⁶ These rights may be protected through rules promulgated at the direction of the legislature.

Whether regulation alone would give the public adequate control over the waters would depend upon how stringent the regulation could be. That issue would turn on a judicial determination of the nature of the public's retained rights under the trust doctrine. One view considers these rights as nothing more than the equivalent of the police power.²⁸⁷ Under *Graham v. Estuary Properties, Inc.*,²⁸⁸ the state is allowed considerable latitude for land-use regulation under the police power.²⁸⁹ The conceptual flaw in this view is that it is based on the premise that submerged sovereignty lands are just like any other real property, a notion at odds with established doctrine. Because of their relationship to a valuable resource, these are lands of a "special character."²⁹⁰ As such, the public has an interest in how they are used that surpasses the interest justifying ordinary regulation, such as zoning.

If the residual public rights are considered something more than those protectable through the police power—unique governmental interests that cannot be severed from the fee except in purposeful grants—then they may be the basis for greater protection. This view is more in keeping with the tradition of the trust doctrine.

285. *Zabel v. Pinellas County Water & Navig. Control Auth.*, 171 So. 2d 376, 381 (Fla. 1965) (statutory right to dredge and fill was only property right in submerged sovereignty land); *Gies*, 146 So. 2d at 363 (grantee of sovereignty land prohibited from filling seaward of bulkhead line); see also Note, *supra* note 58, at 608 (grantee has only bare title subject to public rights). For an analysis concluding that grantees have full property rights, see Rosen, *supra* note 61, at 591-96.

286. *Gies*, 146 So. 2d at 363. Of course, this approach might not address the state's concern over sovereignty lands that are no longer submerged.

287. Rosen, *supra* note 61, at 612.

288. 399 So. 2d 1374, 1380-81 (Fla. 1981) (six factors to examine when assessing police regulation for potential taking).

289. For additional discussion on the parameters of police power regulation in Florida, see Siemon, *Of Regulatory Takings and Other Myths*, 1 J. LAND USE & ENVTL. L. 105, 107-10, 124 (1985).

290. See *supra* note 64 and accompanying text.

Under the trust doctrine, the unique character of these lands imposes on the state "special regulatory obligations"²⁹¹ to ensure that the resource is used for overriding public purposes. If regulation is grounded in this conception of the public's rights, "it may make little practical difference whether such titles are held invalid or whether they are held valid but impressed with a public trust obligation that justifies far-reaching restrictive regulation."²⁹²

VI. CONCLUSION

The application of the Marketable Record Title Act to extinguish state land claims represents a failure on the part of the legislature and the courts. Lawmakers inartfully drafted the Act in 1963. When its full effects against state lands became known, they responded ineptly and without effect. For their part, the courts adopted an overly technical reading of the statute that abrogated the common law without a clear legislative mandate to do so. Moreover, in light of the public interests involved, the courts ignored longstanding public policies with which MRTA should have been harmonized. Fortunately, the legislature and the courts still have opportunities to set things aright. Given the profound effect MRTA has on lands held for public benefit today and in the future, they ought not fail again.

291. Sax, *supra* note 80, at 489.

292. *Id.* at 528 n.174.