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Public Trust Doctrine Trims the Butler Act: City of West Palm Beach v. Board of Trustees of the Internal Improvement Fund

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CASENOTES

PUBLIC TRUST DOCTRINE TRIMS THE BUTLER ACT: *CITY OF WEST PALM BEACH V. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND*

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I. INTRODUCTION

Florida's right of title includes the responsibility to hold submerged lands under navigable waters in a "public trust" for the benefit of the people.[1] The meaning of this public trust has evolved over time. Early on, courts focused on navigational improvements, while more modern cases have addressed environmental and conservation concerns.[2] In the late 1800's and early 1900's, the Florida Legislature enacted statutes encouraging waterfront development by creating opportunities for private landowners to vest title to submerged lands adjacent to their upland properties.[3] State agents further stimulated growth by deeding other submerged lands directly to private landowners. Most of these statutes and policies have long since vanished, but lasting effects remain.

Based on those early statutes and grants, many Floridians believe they own submerged lands adjacent to their upland properties. However, as the courts recognize a more modern definition of the public trust, they have questioned whether these early grants are still valid.[4] Still other landowners may not realize that they have vested title to submerged lands adjacent to their upland property. In those cases, the landowners may unnecessarily be leasing the land from the State under the mistaken belief that the land is public trust property.

The stage was set for this modern day land battle many decades ago. In 1921, the Florida Legislature enacted the Butler Act to encourage development and improvement of waterfront property.[5] This law divested the State of all rights and interests in submerged lands that were wharfed[6]

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1. *See* Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957); Broward v. Mabry, 58 Fla. 398, 407, 50 So. 826, 829 (1909); State v. Black River Phosphate Co., 32 Fla. 82, 100-01, 13 So. 640, 646 (1893).

2. *See* National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983) (in bank); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971) (in bank).

> *Editor's Note:* "'En Banc' (in the bench) is interchangeably used in the following forms: '*in bank*,' '*in banco*,' '*in banc*,' and '*en banke*.'" Smith v. County Executive of Anne Arundel County, 47 Md. App. 65, 69 n.4, 421 A.2d 979, 981 n.4 (Md. Ct. Spec. Ap. 1980) (emphasis added).

3. *See* Butler Act, 1921 Fla. Laws ch. 8537 (codified as FLA. STAT. § 271.01 (1997)).

4. *See* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, No. 95-3813 (Fla. 4th DCA Aug. 27, 1997).

5. *See* Butler Act, 1921 Fla. Laws ch. 8537 (codified at FLA. STAT. § 271.01 (1997)). The statute was named for its sponsor, Senator J. Turner Butler of Duval County. *See Hayes*, 91 So. 2d at 800.

6. A "wharf" is

out, "bulkheaded,[7] filled in or permanently improved" by adjacent upland riparian[8] landowners.[9] Consequently, submerged lands, usually held in trust by the State, were transferred to private ownership.[10] Although the Butler Act was repealed in 1957, the Legislature provided for the State to issue disclaimers of title in recognition of bulkheading or improvements that took place prior to the repeal.[11]

Over the last four decades, courts have considered what types of activities qualified as "bulkheading," "filling" or "permanent improvements" under the Butler Act.[12] Most recently, two Florida district courts of appeal addressed whether dredging associated with a larger structural project constitutes a "permanent improvement" under the Butler

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> [a] structure on the margin or shore of navigable waters, alongside of which vessels can be brought for the sake of being conveniently loaded or unloaded, or a space of ground, artificially prepared, for the reception of merchandise from a ship or vessel, so as to promote the discharge of such vessel.

BLACK'S LAW DICTIONARY 1595 (6th ed. 1990); *see also* FRANK E. MALONEY ET AL., WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 122 (1968) (explaining that "a wharf is a structure erected for the purpose of improving access to the water, and as a consequence for improving navigation").

7. A "bulkhead" is "an upright partition separating compartments [or] . . . a structure or partition to resist pressure or to shut off water." WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 110 (1971).

8. "Riparian" denotes "[b]elonging or relating to the bank of a river or stream; of or on the bank." BLACK'S LAW DICTIONARY 1327 (6th ed. 1990). The term can be used as "relating to the shore of the sea or other tidal water, or of a lake or other considerable body of water." *Id.* While the term "littoral" is more appropriate to describe land which makes up the sea shore, *see id.*, for the purposes of this paper, the term "riparian" will be used to describe all land lying along side any water body.

9. *See* Butler Act § 1. "Riparian owner" means "[o]ne who owns land on bank of river, or one who is owner of land along, bordering upon, bounded by, fronting upon, abutting or adjacent and contiguous to and in contact with river." BLACK'S LAW DICTIONARY 1327 (6th ed. 1990) (citing State *ex rel.* Buckson v. Pennsylvania R.R., 228 A.2d 587, 594 (Del. Super. Ct. 1967)).

10. *See* Trustees of Internal Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956).

11. *See* 1957 Fla. Laws ch. 57-362, § 9 (codified at FLA. STAT. § 253.129 (1997)). In 1951, the Legislature vested title to lands under tidal waters in the Trustees of the Internal Improvement Fund, so the Butler Act was repealed at that time by implication. *See* 1951 Fla. Laws ch. 26776; Chiles v. Floridian Sports Club, Inc., 633 So.2d 50, 52 (Fla. 5th DCA 1994); MALONEY, *supra* note 6, at 367. The 1951 act "was an attempt to emasculate the Butler [Act]," and it represented "the first significant move to curb the postwar outbreak of bay fills and strengthen the control and management of sovereignty lands." MALONEY, *supra* note 6, at 367. "Under the provisions of the 1951 act upland owners were required to purchase from the [Board of Trustees of the Internal Improvement Trust Fund] any submerged land they desired to fill prior to erecting permanent improvements." *Id.*

12. *See, e.g., Claughton*, 86 So. 2d at 786 (addressing the subject of filling); Department of Natural Resources v. Industrial Plastics Tech., Inc., 603 So. 2d 1303, 1306 (Fla. 5th DCA 1992) (holding that a wooden dock and boathouse constitute "'permanent' improvements" under the Butler Act).

Act.[13] The Third District found dredging is a permanent improvement under certain circumstances and adopted a "case-by-case basis" test to determine when those circumstances exist.[14] The Fourth District initially followed suit.[15] However, in a curious turnabout, the Fourth District withdrew its previous opinion on rehearing and ruled that dredging did not constitute a "permanent improvement" under any circumstances.[16] The key to the Fourth District's opinion was its use of a modern version of the public trust doctrine to interpret the Butler Act.[17] In addition, the Fourth District certified a direct conflict with the Third District's decision.[18]

The Florida Supreme Court has used the public trust doctrine in the past to interpret deeds and statutes.[19] However, these past cases did not involve a statute that was originally enacted to promote commerce and navigation, a primary focus of the public trust doctrine.[20] The Florida Supreme Court must now resolve a seemingly conflicted doctrine that would support private ownership of submerged lands under the Butler Act with one conception, but deny private ownership with another.[21]

A. *The Public Trust Doctrine*

Lands submerged under navigable waters are held by the government in trust for the use and benefit of the public.[22] When "Florida became a state on March 3, 1845 . . . [it] took title to all sovereignty lands within its

13. *See* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060 (Fla. 4th DCA 1998); State v. Key West Conch Harbor, Inc., 683 So. 2d 144 (Fla. 3d DCA 1996). If dredging constitutes a "permanent improvement," a larger amount of submerged lands will pass to private ownership under the Butler Act because dredging typically covers a larger area of submerged land than the footprint of structural improvements.

14. *Key West Conch Harbor*, 683 So.2d at 146.

15. *See* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, No. 95-3813, slip op. at 2-3 (Fla. 4th DCA Aug. 27, 1997).

16. *See City of West Palm Beach*, 714 So. 2d at 1063.

17. *See id.* at 1063.

18. *See id.* at 1066. Under Florida Rule of Appellate Procedure R. 9.030(a)(2)(A)(vi), the Florida Supreme Court has discretion to review decisions of the district courts that are certified to be in direct conflict.

19. *See* State *ex rel.* Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 343-44 (Fla. 1986) (holding that the Marketable Record Title Act could not operate to divest the State of trust property by implication); Ellis v. Gerbing, 56 Fla. 603, 47 So. 353, 356-57 (1908) (finding that since submerged lands are held in trust for the benefit of the people, a deed could not divest the State of trust lands by implication).

20. *See* DAVID C. SLADE, ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK 170 (1997).

21. The Florida Supreme Court will hear oral arguments on this case on June 9, 1999. *See supra* note 18.

22. *See* State *ex rel.* Buford v. City of Tampa, 88 Fla. 196, 102 So. 336, 340 (1924); MALONEY, *supra* note 6, at 354.

jurisdiction" in accordance with the equal footing doctrine,[23] and those lands were subject to federal rights of navigation under the Commerce Clause.[24]

Florida's common law public trust doctrine is reflected in article X, section 11 of the Florida Constitution.[25] This Florida Constitutional provision allows the sale or private use of these submerged lands if the sale is not contrary to the public interest.[26] Chapter 253 of the Florida Statutes gives the Board of Trustees of the Internal Improvement Trust Fund (BOTIITF) the "authority to hold sovereign land and sell it or grant private uses subject to certain standards provided within the statute."[27]

Courts historically considered the public trust to include ensuring the rights of the public to navigate and fish in waters.[28] These rights could not be impaired except for an overriding public purpose.[29] However, courts have more recently expanded their recognition of the public trust to include conservation and environmental values.[30]

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23. Richard Hamann & Jeff Wade, *Ordinary High Water Line Determination: Legal Issues*, 42 FLA. L. REV. 323, 328 (1990). The equal footing doctrine is expressed in both common law and the language of the statute providing for Florida's admission to the union: "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, [t]hat the State[] . . . [of] Florida be . . . declared . . . [a state] of the United States of America, and [is] hereby admitted into the Union on equal footing with the original States, in all respects whatsoever." Act of Mar. 3, 1845, ch. 48, § 1, 5 Stat. 742.

24. *See Buford*, 88 Fla. 196, 102 So. at 340; MALONEY, *supra* note 6, at 354.

25. *See* Krieter v. Chiles, 595 So. 2d 111, 111 (Fla. 3d DCA 1992); Hamann & Wade, *supra* note 23, at 324. The Florida Constitution provides that "[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people." FLA. CONST. art. X, § 11; *see also* State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 645 (1893) (stating that "[t]he control of the state for the purpose of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining").

26. *See* FLA. CONST. art. X, § 11.

27. Terry E. Lewis, et al., *Sovereign Lands*, in 2 FLORIDA ENVIRONMENTAL AND LAND USE LAW 21-1, 21-5 (2d ed. 1994).

28. *See* Illinois Central R.R. v. Illinois, 146 U.S. 387, 452 (1892); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 608-09, 47 So. 353, 355 (1908).

29. *See Ellis*, 56 Fla. at 609, 47 So. at 355.

30. *See* National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 719 (Cal. 1983) (in bank). In Marks v. Whitney, 491 P.2d 374 (Cal. 1971) (in bank), the Supreme Court of California commented:

> There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

In understanding the public trust doctrine, it is important to note that the title to submerged lands is bifurcated.[31] The dominant title is known as the "*jus publicum*."[32] This is "the bundle of trust rights of the public to fully use and enjoy trust lands and waters for commerce, navigation, fishing, bathing and other related public purposes."[33] The subservient title is known as the "*jus privatum*."[34] This portion of the title is made up of the private proprietary rights in the use and possession of submerged lands, and it is the portion of the title which the state conveys or passes to private owners by operation of statute.[35] The *jus publicum* is rarely terminated.[36] Therefore, in most cases, the state retains trust responsibilities over all submerged lands.

The leading U.S. Supreme Court case regarding the public trust doctrine is *Illinois Central Railroad v. Illinois*.[37] In *Illinois Central*, the Illinois Legislature enacted a statute which granted ownership and control of Chicago Harbor to a railroad company, but the statute was later repealed.[38] The issue at bar was whether the original grant of ownership and control was valid.[39] The Court concluded that the public trust doctrine imposes restrictions on conveyances of sovereign lands so that the transactions are voidable unless they are conveyed to facilitate a public purpose.[40] More specifically, the Court found that:

> [T]he abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake . . . is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. . . . The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without substantial impairment of the public interest in the lands and waters remaining.[41]

Id. at 380.

31. *See* SLADE, *supra* note 18, at 6.
32. *Id.*
33. *Id.*
34. *Id.*
35. *See id.*
36. *See id.* at 8.
37. 146 U.S. 387 (1892).
38. *See id.* at 452-53.
39. *See id.* at 452.
40. *See id.*
41. *Id.*

Significantly, the *Illinois Central* case dealt primarily with the right of the state to grant *actual* control of a lake harbor, and not with the state's power to alienate title to the lake bottom.[42] However, the case still served as the foundation for public trust caselaw in Florida.

Only one year after *Illinois Central*, the Florida Supreme Court decided its first major case dealing with the public trust doctrine in *State v. Black River Phosphate Co.*[43] In *Black River*, a phosphate company claimed ownership to a riverbed pursuant to the Riparian Rights Act of 1856 because it had conducted phosphate mining activities in those lands.[44] The Florida Supreme Court found that because the statute divested the State of trust lands, courts must look to the public purpose served by the mining activities and determine if that purpose is consistent with a strict construction of the public purpose aims of the statute.[45] The court's use of strict construction limited the phosphate company's ability to argue that the statute contemplated phosphate mining. The court concluded that because phosphate mining did not fulfill a public purpose consistent with the statute, the land had not vested in the phosphate mining companies.[46]

The Florida Supreme Court later recognized, in *State ex rel. Buford v. City of Tampa*,[47] that the public trust doctrine arose out of the common law and could thus be modified or refined by the legislature.

> There is no provision in the Constitution of this state

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42. *See* MALONEY, *supra* note 6, at 354-55. There also are federal cases which approve of a state's ability to transfer ownership of submerged lands to private landowners. *See id.* (citing Shively v. Bowlby, 152 U.S. 1, 6-7 (1894)).

43. 32 Fla. 82, 13 So. 640, 645 (1893).

44. *See id.* at 106, 13 So. at 640. The Riparian Rights Act of 1856, which was later amended by the Butler Act, vested title of submerged lands beneath navigable waters to riparian landowners. *See* 1856 Fla. Laws ch. 791, § 1.

45. *See Black River Phosphate*, 32 Fla. at 82, 13 So. at 648.

46. *See id.* The court found that the statute had been enacted to promote navigational development along Florida's waters. *See id.* at 648-49. The court described the public trust as follows:

> [T]he navigable waters of the state and the soil beneath them . . . were held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use and enjoyment of the same by all of the people of the state for at least the purposes of navigation and fishing and other implied purposes; and the lawmaking branch of the government of the state, considered as the fiduciary or representative of the people, were, when dealing with such lands and waters, limited in their powers by the real nature and purposes of the tenure of the same, and must be held to have acted with a due regard for the preservation of such lands and waters to the uses for which they were held.

Id. at 648.

47. 88 Fla. 196, 102 So. 336 (1924).

> expressly or impliedly forbidding the Legislature to dispose of submerged lands lying between high and low water mark, nor declaring any trust in the state in its tidewaters, nor the submerged lands that may be subject to overflow at high tide. *Whatever trust was imposed was that of the common law* which the state through its Legislature assumed, and the state accepted, with reference to such lands, when it was admitted to the Union.
>
> That portion of the trust, in so far as it affects the right to navigation, was completely taken over by the national government under the Commerce Clause of the Constitution. *Beyond that, the control rests with the state* and the riparian owner.[48]

Based upon the language in the *Buford* opinion, one might conclude that a state legislature could impact the public trust through legislation. However, courts would later limit the legislature's ability to modify the public trust doctrine by strictly construing legislative enactments which provided for private ownership of sovereign submerged lands.[49]

B. *History of the Butler Act*

The Butler Act reenacted the earlier Riparian Rights Act of 1856, which vested title of submerged lands beneath navigable waters to riparian landowners and provided those riparian landowners with the ability to maintain an action in trespass.[50] The Riparian Rights Act provided that riparian landowners could "build wharves" or "erect warehouses or other buildings" on the filled land.[51] However, when the Butler Act was passed in 1921, the Legislature included a provision that the submerged lands would not vest in the riparian landowner unless the riparian landowner "bulk-headed or filled in or permanently improved" the submerged land.[52] The Butler Act further provided that nothing in the Act should prevent a person "from boating, bathing or fishing in water covering the submerged lands of [the] State or from exercising any of the privileges . . . allowed by

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48. *Id.* at 207, 102 So. at 340 (emphasis added); *see also* MALONEY, *supra* note 6, at 356; FLA. STAT. § 2.01 (1997) (stating that "[t]he common and statute laws of England which are of a general and not a local nature . . . down to the fourth day of July, 1776, are declared to be of force in this state; provided the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state").

49. *See* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, No. 95-3813, slip op. at 3 (Fla. 4th DCA Jun. 10, 1997).

50. *See* 1856 Fla. Laws ch. 791, § 1.

51. *Id.*

52. 1921 Fla. Laws ch. 8537, § 1.

law as to such submerged land and water covering the same."[53] In *State ex rel Buford v. City of Tampa*,[54] the Florida Supreme Court found that the Butler Act was a constitutional divestment of State trust lands to private owners because the divestment was consistent with the public purpose of improving commerce.[55]

Due to concern for the rights of the public in submerged lands, the Butler Act was repealed in 1957.[56] However, the repealing statute provided that landowners who had previously "filled or developed" submerged lands could request the BOTIITF to issue a disclaimer indicating that rights to the submerged land had already vested in the landowner.[57] Therefore, even at this writing, landowners may claim ownership under the Butler Act as long as they can prove that bulkheading, filling or other permanent improvement occurred before the Act was repealed.[58]

II. JUDICIAL APPLICATION OF THE PUBLIC TRUST DOCTRINE: INTERPRETING SWAMP AND OVERFLOWED LANDS DEEDS AND THE MARKETABLE RECORD TITLE ACT

Florida courts have used the public trust doctrine to interpret deeds as well as statutes that purportedly transferred title to submerged lands from the government to private landowners. These courts placed submerged lands in a separate category of property that the legislature must specifically devise. However, whether the public trust was recognized as protecting commerce or environmental values was not dispositive. The result was merely elevated status for sovereign submerged lands.

A. *History of Swamp and Overflowed Lands Deeds*

Florida did not gain title to its sovereignty lands through an express grant from the Federal government.[59] Instead, the sovereign lands, described as lands under navigable[60] waters, passed to Florida by operation

53. *Id.* at § 8.

54. 88 Fla. 196, 102 So. 336 (1924).

55. *See id.* at 207, 340.

56. *See* 1957 Fla. Laws ch. 57-362, § 9 (codified at FLA. STAT. § 253.129 (1997)); Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Assoc., Ltd., 512 So. 2d 934, 938 (Fla. 1987).

57. *See* FLA. STAT. § 253.129 (1997).

58. *See* FLA. ADMIN. CODE ANN. R.18-21.019 (1998).

59. *See* Michael L. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 FLA. L. REV. 561, 581-82 (1982).

60. The thorny issue of navigability has been heavily litigated in Florida. *See generally, e.g.*, Baker v. State, 87 So. 2d 497 (Fla. 1956) (en banc) (discussing whether the waters of Cromartie Arm—a part of Lake Iamonia—were navigable in law and fact); Broward v. Mabry, 58 Fla. 398, 402, 50 So. 826, 888 (discussing whether a Leon county lake was a navigable body of water);

of law when it became a state.[61] Therefore, there was no official designation of which lands were sovereign submerged lands.[62] "This uncertainty was complicated by the subsequent federal grant to the state in 1850 of swamp and overflowed lands.[63] Swamp and overflowed lands included the beds of non-navigable waterbodies as well as uplands which bordered on the navigable rivers, lakes and tidal waters."[64] The status of the submerged lands adjacent to the uplands was ambiguous. It was not clear which lands were sovereign lands, which the State owned as a result of its entry to the Union in 1845, and which lands were swamp and overflowed lands, granted to the State in 1850.

Approximately "two-thirds of the land area of Florida was ultimately transferred to the State pursuant to the 1850 Federal Swamp and Overflowed Lands Act."[65] The Florida Legislature delegated responsibility for the swamp and overflowed lands to the BOTIITF.[66] To encourage growth and generate revenue, the BOTIITF began to sell the swamp and

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Board of Trustees of the Internal Improvement Trust Fund v. Florida Pub. Utils. Co., 599 So. 2d 1356, 1357 (Fla. 1st DCA 1992) (discussing whether a body of water not meandered in a federal survey will still be considered navigable). Essentially, navigability is a question of fact based on whether the water, in its ordinary and natural condition, as of the time Florida became a state, is of sufficient size and permanence to be useful as a highway for public commercial transportation. *See* Rosen, *supra* note 59, at 584. If a water body is found navigable, the state holds the submerged lands under those waters pursuant to the public trust, up to the ordinary high water line in non-tidal waters and up to the mean high water line for tidal waters. *See id.*

61. *See* Rosen, *supra* note 59, at 581.

62. *See id.* (citing United States v. 2,899.17 Acres of Land, 269 F. Supp. 903, 907-08 (M.D. Fla. 1967)).

63. *Id.* at n. 582, 140 (citing Act of Sept. 28, 1850, ch. 84, 9 Stat. 519 (codified at 43 U.S.C. §§ 981-994) (1976)).

64. *Id.* The Florida Supreme Court, in State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908), defined swamp and overflowed lands as follows:

> Within the meaning of this act of Congress, swamp lands, as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation. Overflowed lands are those that are covered by non-navigable waters, or are subject to such periodical or frequent overflows of water, salt or fresh (not including lands between high and low water marks of navigable streams or bodies of water nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters), as to require drainage or levees or embankments to keep out the water and thereby render the lands suitable for successful cultivation.

Id. at 615-16, 47 So. at 357.

65. Joseph W. Jacobs & Alan B. Fields, *Sovereignty Lands in Florida: Lost in a Swamp of Ambiguity*, 38 FLA. L. REV. 347, 353 (1986).

66. *See id.* at 354-55 (citing FLA. STAT. §§ 253.001-.83 (1985)). The BOTIITF is made up of the Governor and Cabinet. *See id.* at 355.

overflowed lands.[67] However, due to surveying discrepancies between the State, and federal government, some of the deeds issued by the BOTIITF did not reference whether the conveyances transferred submerged lands under navigable or non-navigable waters, or whether the conveyances contained exceptions stating that sovereign lands had not been transferred.[68] The significance of this was that if the transfer included submerged lands under navigable waters, the lands would be sovereign and subject to the public trust.

Courts ultimately had to interpret the BOTIITF deeds.[69] For example, in *State ex rel. Ellis v. Gerbing*,[70] the Florida Supreme Court addressed whether a BOTIITF deed for swamp and overflowed lands to a private landowner conveyed sovereign submerged lands because it did not expressly except the sovereign submerged lands.[71] The court recognized that the State took title to all sovereign submerged lands in Florida when it became a state in 1845, and that these lands were not the same lands transferred pursuant to the Swamp and Overflowed Lands Act of 1850.[72] The court further noted that the sovereign submerged lands are held by the State pursuant to the public trust doctrine.[73] The court reasoned that because the lands are held in trust for the benefit of the people, they could not be divested by implication.[74] Therefore, the deed from the BOTIITF which purported to grant swamp and overflowed lands, but did not expressly except sovereign submerged lands, did not convey any sovereign submerged lands because the lands had not been specifically described.[75]

The court in *Ellis* thus used the public trust doctrine to interpret a deed. Even though the deed did not expressly except sovereign lands, the court afforded additional protection to the lands because of their trust status. In addition to deeds, courts would later use the public trust doctrine to interpret statutes that had been used to divest the state of trust lands.

B. *Marketable Record Title Act*

The Florida Legislature enacted the Marketable Record Title Act (MRTA)[76] for the express purpose of "simplifying and facilitating land title

67. *See id.*
68. *See id.* at 356-57.
69. *See id.* at 357.
70. 56 Fla. 603, 47 So. 353 (1908).
71. *See id.* at 606, 47 So. at 354.
72. *See id.* at 614-15, 47 So. at 357.
73. *See id.* at 612, 47 So. at 356.
74. *See id.* at 612-14, 47 So. at 356-57.
75. *See id.*
76. *See* FLA. STAT. §§ 712.01-.10 (1997).

transactions by allowing persons to rely on a record title."[77] Prior to MRTA, title examiners had to review decades of title records to ensure that a landowner had proper legal title. MRTA shortened this review period to thirty years.[78] Under MRTA, a landowner must show: (1) the owner has the legal capacity to own land; (2) a title transaction purporting to create or transfer the estate claimed; and (3) the title transaction apparently vesting the claimed interest in the owner appeared of record for thirty years.[79] If an owner can show each of these elements, all title transactions, acts, and claims predating the thirty year period are declared "null and void,"[80] and the owner is declared to have a marketable record title.[81]

The MRTA was subject to several exceptions for certain lands; however, actions filed prior to October 1, 1986 involving sovereign lands were not excepted.[82] Consequently, several lawsuits ensued over whether the State could be divested of trust property by operation of the MRTA based upon land deals which took place before October 1, 1996.[83]

Public trust concepts were evident in the Florida Supreme Court's decision in *Coastal Petroleum Co. v. American Cyanamid Co.*[84] In *Coastal*, the Florida Supreme Court addressed three questions certified as having great public importance. The two questions of relevance to this Casenote were: "(I) Do the . . . swamp and overflowed lands deeds issued by the trustees include sovereignty lands below the ordinary high water mark of navigable rivers? [and] . . . (III) Does the marketable record title act . . . operate to divest the trustees of title to sovereignty lands . . .?"[85]

The *Coastal* court's approach to the swamp and overflowed lands deeds was straightforward. The federal government had no authority to convey Florida's sovereign submerged lands when it enacted the Swamp and Overflowed Lands Act in 1850. Therefore, no sovereign lands were conveyed by the Act, and any subsequent deeds for swamp and overflowed lands did not include sovereign submerged lands.[86]

With regard to the MRTA question, the court first noted that sovereign submerged lands are held in trust for the people, so they cannot be divested

77. 1963 Fla. Laws ch. 63-133, § 10.

78. *See* FLA. STAT. § 712.01 (1997).

79. *See* FLA. STAT. § 712.02 (1997).

80. FLA. STAT. § 712.04 (1997).

81. *See* FLA. STAT. § 712.02 (1997).

82. *See* FLA. STAT. § 712.03 (1997).

83. *See* Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 341 (Fla. 1986); Odom v. Deltona Corp., 341 So. 2d 977, 985-86 (Fla. 1976); Sawyer v. Modrall, 286 So. 2d 610, 612-13 (Fla. 4th DCA 1973).

84. *See Coastal*, 492 So. 2d at 339.

85. *Id.* at 341.

86. *See id.* at 341-42.

by implication.[87] Second, the court observed that MRTA did not make a specific reference to sovereign submerged lands, as it was first passed in 1963. Therefore, the court concluded that the "legislature did not intend to make MRTA applicable to sovereignty [submerged] lands."[88]

The *Coastal* court interpreted swamp and overflowed lands deeds and the MRTA under the rubric of the public trust doctrine. Yet, the court's decisions did not turn on whether the public trust doctrine of the time recognized navigational or environmental values. The public trust doctrine served to elevate sovereign submerged lands into a special category. However, a later court would apply the modern, conservation-focused public trust doctrine and yield an outcome which was arguably far different from the Legislature's original intent.

III. INTERPRETATION OF THE RIPARIAN RIGHTS ACT AND THE BUTLER ACT

The public trust doctrine also has played a role in courts' various interpretations of the Riparian Rights and Butler Acts. While earlier courts utilized a version of the public trust doctrine which focused on commerce, later courts envisioned a conservation-focused public trust. Even though the latter interpretation of the public trust may be consistent with a modern concept of the government's role to protect the environment, it may be unfair to use a conservation-based public trust standard to interpret statutes which were enacted when the public trust focused more on commerce.

A. *Impact of the Public Trust Doctrine on the Meaning of "Permanent Improvement"*

The phrase "permanent improvement" in the Butler Act has been a primary source of recent litigation.[89] While part of the controversy stems from disagreement over whether the Butler Act should be strictly construed,[90] a review of the cases indicates that the courts still look to the intent of the statute.

The Florida Supreme Court addressed the strict construction issue in

87. *See id.* at 343.

88. *Id.* at 344.

89. *See, e.g.*, City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, No. 95-3813, slip. op. at 1 (Fla. 4th DCA Aug. 27, 1997); State v. Key West Conch Harbor, Inc., 683 So. 2d 144 (Fla. 3d DCA 1996).

90. *Compare City of West Palm Beach*, No. 95-3813, slip. op. at 3 (applying "case-by-case" type test to Butler Act), *with* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060, 1063 (Fla. 4th DCA 1998) (ruling that pursuant to the Public Trust Doctrine, the Butler Act should be strictly construed because it divests the state of trust property).

State v. Black River Phosphate Co.[91] In *Black River*, a phosphate company claimed the right to mine submerged lands adjacent to its upland landholdings, pursuant to the Riparian Rights Act of 1856.[92] The court initially stated that because submerged lands are held in trust for the people by the State, any grant of those lands must be "strictly construed, or be taken most beneficially in favor of the state or public, and against the grantee."[93] The court further stated that any grant of land must be indicated "by express words or necessary implication."[94]

Explaining that the intent of the grant is ascertained from the circumstances, the court reviewed the purpose of the Riparian Rights Act.[95] The court determined that the Riparian Rights Act had the "distinct public purpose of connecting the shore and banks of bays, harbors, and streams with the channel of navigable waters."[96] Since mining the submerged lands would not enhance the public purpose of the Act, the court concluded that mining was not intended as an activity authorized by the Act.[97] Therefore, the court ruled against the mining company.[98]

The Florida Supreme Court also addressed the issue of strict construction of the Butler Act in *Trustees of the Internal Improvement Fund v. Claughton*.[99] In *Claughton*, the owner of an island, which was created over the years by filling submerged lands, claimed he could bulkhead lands adjacent to the island and vest title under the Butler Act.[100] A smaller portion of the island had originally been granted to a former owner by the State, and subsequent landowners later enlarged the island by dredging fill from adjacent submerged lands.[101] The court explained that any grant in derogation of land held in public trust must be "strictly construed in favor of the sovereign."[102] The court stated it could not

> ascribe to the Legislature, in the passage of either the Riparian Act of 1856 or the Butler Bill, the intention of authorizing one acquiring title to sovereignty lands from the Trustees to fill such lands beyond the boundaries conveyed without first

91. 32 Fla. 82, 106-07, 13 So. 640, 648 (1893).
92. *See id.* at 83, 13 So. at 640.
93. *Id.* at 107, 13 So. at 648.
94. *Id.*
95. *See id.*
96. *Id.*
97. *See id.* at 113, 13 So. at 650.
98. *See id.* at 129, 13 So. at 655.
99. 86 So. 2d 775, 782 (Fla. 1956).
100. *See id.*
101. *See id.* at 786.
102. *Id.*

> acquiring the title to such additional lands created by such fill.[103]

Therefore, the court found that the owner of the island did not have the ability to acquire further title to lands surrounding the island by bulkheading.[104]

Based upon the foregoing cases, it is clear that grants in derogation of the public trust must be strictly construed in favor of the State. However, it is not clear whether strict construction requires express language. For example, the court in *Black River* looked to the intent of the statute to determine whether mining was authorized in submerged lands.[105] Similarly, the court in *Claughton* looked beyond the language of the Butler Act to reach its decision.[106] Therefore, strict construction of the Butler Act can be achieved either through express terms or examining whether an interpretation is consistent with the intent of the statute. Moreover, since the intent of the Butler Act was to improve commerce by improving access to navigable waters, activities which improve access may vest title even if those activities are not expressly referenced in the Butler Act.

B. *Dredging as a Permanent Improvement*

Dredged lands were first implicated as permanent improvements under the Butler Act by Florida's First District Court of Appeal.[107] In *Jacksonville Shipyards*, the court addressed the Department of Natural Resource's (DNR's) denial of an application for a disclaimer because the lands had not been filled.[108] The upland riparian landowner applied for the disclaimer based on what the court described as "certain structural additions" to submerged lands in the St. Johns River "including piers, docks, wharves, dry docks, railroad trestles, and dredging."[109] However, the DNR denied the landowner's request for a disclaimer, alleging that submerged lands had to be filled in order to vest title under the Butler Act.[110] The court concluded that title could vest under the Butler Act by filling in as well as by making permanent improvements, such as those

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103. *Id.*

104. *See id.*

105. *See Black River*, 32 Fla. at 106-07, 13 So. at 648.

106. *See Claughton*, 86 So.2d at 786.

107. *See* Jacksonville Shipyards, Inc. v. Department of Natural Resources, 466 So. 2d 389, 390 (Fla. 5th DCA 1985).

108. *See id.* at 391. DNR's rule, promulgated pursuant to section 253.129, Florida Statutes, provided that filling was the only means to vest title under the Butler Act. *See id.* at n.7 (citing FLA. ADMIN. CODE § 16Q-21.14 (1983)).

109. *Id.* at 390. The court also listed periodic dredging of open waters as one of the "improvements" made before the Butler Act was repealed by implication in 1951. *See id.* at 390 n.3.

110. *See id.* at 391.

made to the submerged lands at issue in the case.[111] Therefore, the court found the DNR's rule invalid for being in conflict with section 253.129, Florida Statutes.[112] Moreover, the court remanded the case so that the landowner could be issued a disclaimer to all the submerged lands at issue, including those which had been dredged.[113]

Jacksonville Shipyards has been cited as support for the proposition that submerged lands, dredged as part of an overall project, become the property of the upland riparian landowner pursuant to the Butler Act.[114] Instead of finding that the landowner had title to the lands only directly under the structural improvements in the shipyard, the Fifth District Court of Appeal ruled that title vested in the entire extent of the submerged lands of the shipyard.[115] Thus, the court included the dredged lands by implication. However, some parties argue that the inclusion of dredged lands as part of the vested lands was not even at issue in the case.[116] Citing *City of Miami Beach v. Traina*,[117] they argue *Jacksonville Shipyards* does not speak to dredged lands because the dredged land issue was not properly presented.[118] Even though dredging was not at issue in *Jacksonville Shipyards*, the court did address whether improvements made *throughout the shipyard* were permanent improvements pursuant to the Butler Act.[119] Thus, the ruling in *Jacksonville Shipyards* should apply to whether dredging is a permanent improvement when associated with a larger improvement project.

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111. *See id.*

112. *See id.* Interestingly, the BOTIITF rules currently only provide for an application for disclaimer to confirm title to former sovereign lands *filled* prior to May 29, 1951. *See* FLA. ADMIN. CODE ANN. R.18-21.019(1) (1998).

113. *See Jacksonville Shipyards*, 466 So. 2d at 393.

114. *See* State v. Key West Conch Harbor, Inc., 683 So. 2d 144, 145 (Fla. 3d DCA 1996); Appellant's Initial Brief at 16, City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060 (Fla. 4th DCA 1996) (No. 95-3813); City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, No. 95-383, slip. op. at 3 (Fla. 4th DCA Aug. 27, 1997).

115. *See Jacksonville Shipyards*, 466 So. 2d at 393.

116. *See* Appellees' Answer Brief at 14, *City of West Palm Beach* (No. 95-3813); *City of West Palm Beach* 714 So. 2d at 1065.

117. 73 So. 2d 860 (Fla. 1954). In *Traina*, the Florida Supreme Court explained that it would not hold a lower court in error for not considering certain statutes in its determination when the statutes were not presented to the court during trial. *See id.* at 861.

118. *See* Appellees' Answer Brief at 14, *City of West Palm Beach* (No. 95-3813); *City of West Palm Beach*, 714 So. 2d at 1065.

119. *See Jacksonville Shipyards*, 466 So. 2d at 391.

C. Key West Conch Harbor: *Dredging Vests Title Under the Butler Act*

Eleven years after *Jacksonville Shipyards*, Florida's Third District Court of Appeal addressed the dredged land issue.[120] In *Key West Conch Harbor*, the court examined whether dredging in connection with construction of moorings and a dock constituted sufficient "permanent improvements" to vest title pursuant to the Butler Act.[121]

The BOTIITF argued that the Butler Act only applies to specific improvements such as wharves and filling.[122] Further, BOTIITF contended that the Butler Act should be strictly construed because the statute divests the State of sovereign lands held in trust for the people of Florida.[123] Therefore, "[a] broader interpretation of Butler Act 'improvements' to include merely dredging in open waters would result in such extensive conveyance of sovereignty lands that the Act would violate the public trust."[124]

However, the Third District Court of Appeal disagreed with the BOTIITF.[125] The court reasoned that since other courts have considered docks and piers sufficient permanent improvements pursuant to the Butler Act in the past,[126] the dredging necessary to access those docks must also be considered a permanent improvement.[127] Therefore, the court concluded that without the dredging, the dock or pier would be useless to the landowner.[128] The court implied that a useless dock would not fulfill the purpose of the Butler Act which was to encourage commerce, so the Legislature must have intended to include dredged lands within the meaning of "permanent improvements."[129]

Additionally, the court cited *Jacksonville Shipyards* as an example of

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120. *See* State v. Key West Conch Harbor, Inc., 683 So. 2d 144, 145-46 (Fla. 3d DCA 1996).

121. *See id.* at 145. In this case, the plaintiff, Key West Conch Harbor, Inc., sought to quiet title to submerged lands, also known as "Key West Bight," which made up part of its marina in South Florida. *See* Appellant's Initial Brief at 1, *Key West Conch Harbor, Inc.* (No. 95-1275). In 1942, Key West Conch's predecessors in title obtained an Army Corps of Engineers permit which allowed dredging 500 feet waterward from a bulkhead and that the dredged material would be deposited behind the bulkhead. *See id.* at 2. By 1948, the predecessor in title completed the dredging and bulkheading and also had constructed two piers. *See id.*; Appellee's Answer Brief at 1, *Key West Conch Harbor, Inc.* (No. 95-1275).

122. *See* Appellant's Initial Brief at 4, *Key West Conch Harbor, Inc.* (No. 95-1275).

123. *See id.*

124. *Id.*

125. *See Key West Conch Harbor*, 683 So. 2d at 145.

126. *See id.* (citing Department of Natural Resources v. Industrial Plastics Tech., Inc., 603 So. 2d 1303 (Fla. 5th DCA 1992)).

127. *See id.*

128. *See id.*

129. *See id.*

where dredging in connection with a permanent improvement was considered sufficient to vest title pursuant to the Butler Act.[130] The court acknowledged that the *Jacksonville Shipyards* opinion did not expressly state that dredging associated with structural improvements vested title.[131] However, the court did find that because the dredged land was found to be vested in the upland riparian owner, the Fifth District Court of Appeal's underlying rationale must have been that the dredging was also a permanent improvement in that instance.[132] Based on the result in *Jacksonville Shipyards*, the court concluded that whether dredging constituted a "permanent improvement" should be determined on a "case-by-case basis" considering "[t]he surrounding land, and other improvements under the [Butler] Act."[133]

Judge Gersten dissented in *Key West Conch Harbor*, arguing that because modern day values about coastal commerce have changed, public policy dictates that submerged land should not be vested in private business pursuant to the Butler Act.[134] Further, he asserted that *Jacksonville Shipyards* did not directly address the issue of incidental dredging, and thus, should not be persuasive.[135] He pointed to the repeal of the Butler Act as a signal of legislative intent with regard to divestment of submerged lands, so the majority exceeded its authority by giving validity to the Butler Act.[136] Characterizing Butler Act claims as a "Great Land Giveaway," Judge Gersten concluded by encouraging judgments which would better protect the State's submerged lands.[137]

Judge Gersten adhered to the concept that the modern day definition of the public trust should be applied to the Butler Act.[138] Judge Gersten's dissent implied that the public trust doctrine could invalidate a state statute.[139] While these arguments did not persuade the other judges in the Third District Court of Appeal, Judge Gersten's words would soon become

130. *See id.* at 145-46.

131. *See id.* at 146.

132. *See id.*

133. *Id.*

134. *See id.* at 146-47 (Gersten, J., dissenting).

135. *See id.* at 147 (Gersten, J., dissenting).

136. *See id.* (Gersten, J., dissenting). Judge Gersten implied that there is no present avenue to claim title pursuant to the Butler Act. *See id.* (Gersten, J., dissenting). Section 253.129 of the Florida Statutes provides that the BOTIITF issue disclaimers for those lands "filled or developed" prior to the repeal of the Butler Act. However, it does not appear that Key West Conch Harbor brought suit pursuant to the disclaimer statute. *See id.* at 144-45.

137. *Id.* at 148 (Gersten, J., dissenting).

138. *See, e.g.*, National Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709, 712 (Cal. 1983); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1974).

139. *See Key West Conch Harbor*, 683 So. 2d at 146 (Gersten, J., dissenting). *But see* FLA. STAT. § 253.129 (1997) (providing that the BOTIITF shall issue disclaimers for those lands "filled or developed" prior to the repeal of the Butler Act).

the basis for a major change of heart for the Fourth District.

D. City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund: *Dredging Does Not Vest Title Under the Butler Act*

While the Third District was grappling with the dredging issue in Key West, a similar case was developing farther up Florida's coast. The City of West Palm Beach (City) filed suit against the BOTIITF to quiet title to submerged lands popularly known as the Palm Harbor Marina.[140] The City claimed it had vested title to the entire marina, including the dredged portions.[141] The BOTIITF counterclaimed seeking to quiet title to the same submerged lands.[142] The trial court found that the City only owned the land directly beneath four concrete piers, and the City appealed.[143]

Upon initial hearing of the appeal, the Fourth District Court of Appeal found in favor of the City.[144] The court began its opinion by stating that the issue on appeal was "whether all the activities of the city in constructing a municipal marina . . . including . . . dredging of the boat basins . . . resulted in a *permanent improvement* so that title vested in accordance with the Butler Act."[145] Relying on *Key West Conch Harbor*, the court explained that dredging was not the issue, but rather the issue was whether all the marina activities together constituted a permanent improvement.[146] The court mirrored the language of *Key West Conch Harbor* and found that the pier and marina would be useless without the dredged area and accompanying boat basin.[147] Therefore, the court concluded that the dredged basin must be considered part of the structural permanent

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140. *See* Appellant's Initial Brief at 1, City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060 (Fla. 4th DCA 1996) (No. 95-3813). This claim arose from the City's construction of the marina which consisted of filled lands, four concrete piers, a dredged channel to the Intracoastal Waterway, and a dredged boat basin. *See id.* at 2-4. The War Department (now known as the Army Corps of Engineers) issued a permit to the City to construct the marina in January 1947. *See id.* at 2.

141. *See id.* at 2.

142. *See id.* at 1. Leisure Resorts, Inc., which leased the disputed lands from the City, filed suit against the City claiming the City had violated its lease agreement because it did not own the lands. *See id.* Leisure Resorts' suit was consolidated with the suit between the City and the BOTIITF. *See id.*

143. *See id.*

144. *See* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, No. 95-3813, slip. op. at 1 (Fla. 4th DCA Aug. 27, 1997). Judge Polen authored the opinion while Judges Pariente and Gross concurred. *See id.* at 1-4.

145. *Id.* at 2 (emphasis added).

146. *See id.*

147. *See id.*

improvements in the marina.[148]

The court also agreed that the *Jacksonville Shipyards* opinion addressed dredged lands by implication, and it cited that opinion as another example where dredged lands were considered a "permanent improvement."[149] Finally, the court adopted the "case-by-case basis" test enunciated in *Key West Conch Harbor*.[150] It found that because the surrounding improvements to Palm Harbor Marina would be useless without the dredged area, the dredged area must be included as part of an entire permanent improvement.[151] Accordingly, the court reversed the trial court and found title to the entire marina vested in the City.[152] Therefore, in this instance, dredging served to divest the State of title to submerged lands under the Butler Act.[153]

Nearly ten months later on rehearing, the Fourth District Court of Appeal withdrew its previous opinion and found in favor of the BOTIITF.[154] This time the court characterized the issue as whether the City had title to the submerged land "which could give rise to expansion of the existing marina or even to the filling in of the submerged lands for more intensive development."[155] The court's recharacterization of the issue emphasizes its use of the modern day public trust doctrine, an approach which focuses more on the environmental impacts of the statutory interpretation. Relying on *Black River* and *Claughton*, the court found that the "permanent improvement" language of the Butler Act should be strictly construed because the Act divests the State of submerged lands held in trust for the people.[156]

Analyzing the language of the Butler Act, the court found that the general term "permanent improvement" found in paragraph four of section one refers back to the specific improvements, such as building wharves or

148. *See id.* at 2-3.

149. *See id.*

150. *See id.*

151. *See id.* The court further explained that concerns raised in Judge Gersten's dissent in *Key West Conch* could be adequately addressed by the case-by-case basis test. *See id.*

152. *See id.*

153. *See id.*

154. *See* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060, 1060 (Fla. 4th DCA 1998). Judge Gross wrote the opinion while Judge Pariente concurred. *See id.* Judge Polen, author of the previous opinion, dissented. *See id.* at 1066 (Polen, J., dissenting).

155. *Id.* at 1061. The court excerpted a portion of the trial court transcript in which William P. Doney, arguing for the City, was asked whether the City could fill the dredged area if the court found title vested pursuant to the Butler Act. After the court recognized that permits could be a "real problem," Mr. Doney responded that "in theory" the City could fill the lands if it prevailed in this case. *Id.* at n.2.

156. *See id.* at 1063.

filling, referenced in section one, paragraph three of the Act.[157] The court further noted that including dredged lands as "permanent improvements" would be inconsistent with section eight of the Butler Act which "contemplates that title will pass when the public's access to the submerged land has been completely foreclosed by development."[158] Moreover, the court stated that if the Legislature intended dredging to vest title pursuant to the Butler Act, it would have specifically referenced dredging in the statute.[159] Therefore, the court found that dredging does not

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157. *See id.* at 1064 (citing Dunham v. State, 140 Fla. 754, 192 So. 324, 326 (1939) (quoting *Ex parte* Amos, 93 Fla. 5, 112 So. 289, 293 (1927))). The Butler Act provided as follows:

> Sect.1 Whereas, It is for the benefit of the State of Florida that water front property be improved and developed; and
>
> [Paragraph 2]
>
> Whereas, the State being the proprietor of all submerged lands and water privileges within its boundaries, which prevents the riparian owners from improving their water lots; therefore
>
> [Paragraph 3]
>
> The State of Florida, for the consideration above mentioned, subject to any inalienable trust under which the State holds said lands, divests itself of all right, title and interest to all lands covered by water lying in front of any tract of land owned by the United States or by any person, natural or artificial, or by any municipality, county or governmental corporation under the laws of Florida, lying upon any navigable stream or bay of the sea or harbor, as far as to the edge of the channel, and hereby vests the full title to the same, subject to said trust in and to the riparian proprietors giving them the full right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to affect the purposes described, and to fill up from the shore, bank or beach as far as may be desired, not obstructing the channel, but leaving full space for the requirements of commerce, and *upon lands so filled in to erect warehouses, dwellings or other buildings* and also the right to prevent encroachments of any other person upon all such submerged land in the direction of their lines continued to the channel by bill in chancery or at law, and to have and maintain action of trespass in any court of competent jurisdiction in the State, for any interference with such property, also confirming to the riparian proprietors all improvements which may have heretofore been made upon submerged lands.
>
> [Paragraph 4]
>
> Provided, that the grant herein made shall apply to and affect only those submerged lands which have been, or may be hereafter, actually bulk-headed or filled in or *permanently improved* continuously from high water mark in the direction of the channel, or as near in the direction of the channel as practicable to equitably distribute the submerged lands, and shall in no wise affect such submerged lands until actually filled in or permanently improved.

1921 Fla. Laws Ch. 8537, § 1 (emphasis added).

158. *City of West Palm Beach*, 714 So. 2d at 1064.

159. *See id.* The court also implied that since the Florida Supreme Court found that structures such as wooden docks were not sufficient to qualify as permanent improvements, dredging could

constitute a "permanent improvement" under any circumstance.[160]

The court distinguished its decision from *Jacksonville Shipyards*, asserting that the court in that case was not specifically faced with the question of whether dredging constitutes a permanent improvement.[161] Moreover, the court pointed out that while the *Jacksonville Shipyards* opinion included the dredged lands, such lands were not actually permanently improved due to the periodic maintenance dredging conducted in the shipyard.[162] The court then criticized the rulings in *Jacksonville Shipyards* and *Key West Conch* for not recognizing the strict construction rule from *Black River* and *Claughton*.[163] It further stated that the "case-by-case" standard was "too amorphous . . . to decide the issue of title to irreplaceable submerged land within the public trust."[164] Lastly, it certified conflict with *Key West Conch Harbor*, pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(vi).[165]

It is unclear why the Fourth District withdrew its previous decision. The case was assigned to the same three judges, one of whom dissented on rehearing.[166] In addition, the court did not explain its turnabout in its opinion. This author can only hypothesize that the initial opinion applied the earlier form of the public trust doctrine, and the later opinion applied a modern view of the public trust doctrine.

E. *Analysis of* City of West Palm Beach v. BOTIITF

On rehearing, the Fourth District Court of Appeal criticized the ruling in *Key West Conch*, and essentially its own earlier ruling, for not strictly construing the Butler Act, for making a decision which was against public policy, and for applying the "amorphous" case-by-case test.[167] However, the Fourth District's own opinion is not immune to criticism. For instance, even if strict construction is applicable to this case, the Butler Act may still be construed to include dredging. In addition, the threats to the public cited by the court would still be present whether or not it found that dredging of lands vested title in the City. Finally, the case-by-case basis test, while not meticulously applied by the court in its initial opinion and in *Key West Conch*, may still be sufficient to deal with activities which will not alone

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not qualify either. *See id.* at 1065 (citing Williams v. Guthrie, 102 Fla. 1047, 137 So. 682, 686 (1931)).

160. *See id.*

161. *See id.* at 1065-66.

162. *See id.* at 1065.

163. *See id.* at 1065-66.

164. *Id.* at 1066.

165. *See id.*; *see also supra* note 18.

166. *See City of West Palm Beach*, 714 So. 2d at 1060, 1066.

167. *See id.* at 1065-66.

vest title under the Butler Act.

1. Use of Strict Construction and Alternative Interpretations of the Butler Act

At first glance, the Florida Supreme Court's decision in *State v. Black River Phosphate*[168] would seem dispositive with regard to whether dredging constitutes a permanent improvement pursuant to the Riparian Rights Act, and subsequently, the Butler Act. In *Black River*, the Florida Supreme Court held that the Riparian Rights Act did not give riparian landowners the right to "dig up the soil independent of the control and regulation of the state, and convert it to his own use."[169] However, *Black River* only involved dredging to the extent it was necessary to mine phosphate from a river. The dredging did not further the public purpose of waterfront development as required in the Act. Therefore, the Act did not vest title to the submerged lands in the phosphate companies because their dredging was not consistent with the improvements contemplated in the Act. By contrast, dredging as part of larger marina or harbor development does enhance navigation and commerce. Therefore, *Black River* does not apply to dredging associated with larger developments.

The Fourth District Court of Appeal also found that the First District's references to "dredging" in *Jacksonville Shipyards* were dicta and hence were not dispositive on the question of whether dredging constituted a permanent improvement pursuant to the Butler Act.[170] However, as representatives of Key West Conch Harbor pointed out, the First District stated that the dredging facts were "not at issue" in *Jacksonville Shipyards* because those facts had been stipulated by the parties.[171] The dredging aspect was not dicta merely because the court only made a decision based upon law. Otherwise, such decisions would have no persuasive or precedential value for cases with similar fact patterns. Further, *Jacksonville Shipyards* presents an analogous scenario to *City of West Palm Beach*, namely, dredging associated with a larger harbor improvement project.

While the Florida Supreme Court has applied strict construction to the Butler Act, dredging may still be considered a "permanent improvement" under the Act. In *Black River*, the Florida Supreme Court found that mining in submerged lands was not an activity intended by the Riparian Rights Act because it would not encourage waterfront development and the

168. 32 Fla. 82, 13 So. 640 (1893).

169. *Id.* at 133, 13 So. at 650.

170. *See City of West Palm Beach*, 714 So. 2d at 1065; see also Appellant's Initial Brief at 8, n. 4, State v. Key West Conch Harbor, Inc., 683 So. 2d 144 (Fla. 3d DCA 1995) (No. 95-1275).

171. Appellee's Answer Brief at 4, *Key West Conch Harbor, Inc.* (No. 95-1275).

connection of the channel with the shoreline, the intent of the Act.[172] Similarly, in *Claughton*, the Florida Supreme Court strictly construed the Butler Act by ruling it was not the intent of the Act to allow the owner of an island, created by filling submerged land, to make additional claims to submerged land under the Act.[173] If dredging was contemplated in the Act, the Florida Supreme Court could have dispensed of the case immediately. However, the court instead conducted a lengthy analysis of why mining, an arguably more damaging activity than dredging, was not consistent with the goals of the Act. Comparatively, dredging associated with development of marinas or docks is essential to their operation. In fact, there would be no commerce and no waterfront development without the means for ships to get to the marina or docks. Therefore, dredging in this context is consistent with the intent of the Act.[174]

Further, at the time the Butler Act was enacted, public trust purposes included navigation, boating and fishing.[175] Consistently, the Butler Act authorized public grants of land for the benefit of commerce.[176] The preamble to the Riparian Rights Act provided: "Whereas, It is *for the benefit of commerce* that wharves be built and warehouses erected for facilitating the landing and storage of goods; and whereas, the State being the proprietor of all submerged lands and water privileges, within its boundaries, which prevents the riparian owners from improving their waterlots. . . ."[177] Because the public land grants were authorized for a public purpose, the terms of the Butler Act should be construed to include

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172. *See Black River*, 32 Fla. at 82, 13 So. at 648.

173. *See* Trustees of Internal Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956).

174. Several Florida courts have highlighted the commerce development focus of the Butler Act: "[T]he Butler Act had as its major objective the creation or evolution of commerce in connection with ports of the State. Another purpose was to encourage upland owners to improve their waterfront property as specified in the Act." Jacksonville Shipyards, Inc. v. Department of Natural Resources, 466 So. 2d 389, 391 (Fla. 1st DCA 1985). "It is clear that [the Butler Act] . . . had no other purpose than to stimulate and encourage the improvement of submerged lands and to improve the foreshore in the interest of commerce and navigation." Duval Eng'g & Contracting Co. v. Sales, 77 So. 2d 431, 433 (Fla. 1954). "The purpose of the [Butler] Act . . . [is] to encourage riparian owners to improve their waterfront property as therein specified, but making the full title conditional upon the actual completion of the improvement or development mentioned in the Act." Holland v. Ft. Pierce Fin. & Constructing Co., 157 Fla. 649, 657, 27 So. 2d 76, 81 (1946). Further, the Florida Supreme Court recognized that the legislature intended the Butler Act to encourage riparian owners to improve submerged lands because the state could not afford to perform all such improvements. *See Black River*, 32 Fla. at 110, 13 So. at 649 (explaining that the State, being unprepared "to undertake work of building such wharves or filling the water . . . determined to encourage the riparian owner to do what the state alone could do of itself or authorize another to do").

175. *See Black River*, 32 Fla. at 82, 13 So. at 645.

176. *See* 1921 Fla. Laws ch. 8537.

177. 1856 Fla. Laws ch. 1856 (emphasis added).

improvements consistent with that original public purpose.[178] One interpretation of the Butler Act is that it encouraged development of lands considered without value into areas which would "benefit" the public.[179] Vesting of property rights was an incentive to encourage growth. Harbor development would be impossible without associated dredging. Therefore, the legislature must have intended dredging to be a permanent improvement. Otherwise, riparian owners would only have an incentive to fill out to the edge of the channel rather than dredge, which could possibly impede navigation.

The Fourth District also averred that the more general term "permanent improvement" should take its meaning from the more specific terms found earlier in the Butler Act.[180] This rule of construction would have greater weight if both the general and specific terms were included in the Act at the same time. However, the term "permanent improvement" was added

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178. *See* 3 SUTHERLAND STAT. CONST. § 63.05 (5th ed. 1992), which provides:

> Where a public grant has as its purpose the promotion of great public enterprises and the welfare, prosperity and development of the community, the basic policy behind the rule of strict interpretation is dissolved, and the courts are inclined towards a liberal policy to insure the beneficent operation of the statute . . . . [G]rants opening new lines of communication and transportation, including grants to railroads . . . grants made to encourage reclamation or settlement of otherwise valueless land . . . have been held to come within this category.

179. An excerpt from *State ex rel. Buford v. City of Tampa*, 88 Fla. 196, 102 So. 336 (1918), provides an interesting perspective on courts' view of the utility of submerged land at that time:

> It is well known that in the respective States which lie along the margin of the Atlantic there are many places where the tide ebbs and flows, and which therefore are public, that are of no navigable use and in their original condition without the aid of art and industry afford to the public little or no advantage of any kind. Flats and marshes covered with water only at full tide. In many cases such waste places have been built up, docks or piers run over them to navigable water by the riparian proprietor, and the public have been thereby very considerably the gainers. But that condition in no wise affects the common law, but is one which commends itself to the Legislatures of the respective states for the adoption of such regulations as may be deemed to be for the best interests of the people.
>
> This language is just as applicable to such places as lie along the margin of the Gulf of Mexico and to shoal tide waters where the depth averages from three inches to three or four feet and which lie near to, or within, the limits of municipal corporations, the centers of industry and commerce.

Id. at 202-03, 102 So. at 338 (internal quotations omitted).

180. *See* City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060, 1064 (Fla. 4th DCA 1998).

in 1921.[181] If the Legislature intended the Act to apply only to wharves and filling, it would have repeated those terms later in the statute instead of using the phrase "bulkhead or filled in or permanently improved."[182] It is possible that the legislature intended the Butler Act to expand on the improvements listed in the Riparian Rights Act, considering "bulkheaded" was also added in the Butler Act. The 1856 Act mentioned only filling and construction of a "wharf" which is defined elsewhere as "a structure built along or at an angle from the shore of navigable waters so that ships may lie alongside to receive and discharge cargo and passengers."[183] By contrast, a "bulkhead" is a "retaining structure of timber, steel, or reinforced concrete, used for shore protection and in harbor works."[184]

In opposition to defining "improvements" as modifying an earlier word in the Butler Act is the concept that words in a statute should be given their common meaning unless it appears the words are used in a technical sense.[185] When applied to real property, "improvement" is defined as "bringing into a more valuable or desirable condition as of land or real property; a making or becoming better; betterment . . . something done or added to real property which increases its value."[186] In *City of West Palm Beach*, the City dredged the harbor to increase the value of the marina.[187] Without deep water access, the marina could cater only to very small boats.

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181. *See* 1921 Fla. Laws ch. 8537 § 1.

182. *Id.*

183. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 1014 (2d ed. 1971).

184. City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 714 So. 2d 1060, 1062 n.4 (Fla. 4th DCA 1998) (citing THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 195 (unabridged ed., 1967)).

185. *See* 2A SUTHERLAND STAT. CONST. § 47.28 (5th ed. 1992); *see also* State *ex rel.* Hanbury v. Tunnicliffe, 98 Fla. 731, 735, 124 So. 279, 281 (1929) (holding that a term is presumed to have its ordinary meaning unless it appears the term was used in a "technical or other sense").

186. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 421 (7th Ed. 1971). Black's Law Dictionary defines "improvement" as:

> A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement of waste, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc.

BLACK'S LAW DICTIONARY 757 (6th ed. 1990). In section 713.01(12) of the Florida Statutes, "improve" means to "build, erect, place, make, alter, remove, repair, or demolish any improvement over, upon, connected with or beneath the surface of real property, or excavate any land." Further, section 713.01(13) of the Florida Statutes defines "improvement" to mean "any building, structure, construction, demolition, excavation, landscaping or any part thereof existing, built, erected, placed, made or done on land or other real property for its permanent benefit."

187. *See* Appellant's Initial Brief at 2-4, *City of West Palm Beach* (No. 95-3813).

The Fourth District also referenced *Williams v. Guthrie*[188] to support the proposition that the Florida Supreme Court had ruled that wooden docks were not even permanent enough to qualify as a permanent improvement under the Butler Act.[189] However, *Williams v. Guthrie* did not directly address the issue of whether a wooden dock would qualify as a permanent improvement. *Williams v. Guthrie* involved a suit for ejectment between two private parties to determine who had superior title to a dock.[190]

The issue of docks under the Butler Act was more recently addressed in *Department of Natural Resources v. Industrial Plastics Technology, Inc.*[191] In *Industrial Plastics*, the Fifth District found that wooden docks were permanent improvements pursuant to the Butler Act.[192] Significantly, the Fifth District stated that while wooden docks "may [not] last as long as structures made of steel and concrete, . . . [they] last long enough in the context of human life to be classified as 'permanent improvements.'"[193]

The Fourth District also implied that dredging is not truly permanent because dredged areas must periodically be re-dredged to maintain their depth.[194] However, docks, piers, and bulkheads must be maintained and periodically replaced because of age or weather. The only difference is in the frequency of maintenance. In addition, some areas in Florida required blasting of limestone rock to dredge a channel for access. Even though these channels still need maintenance dredging to remove silt, this type of dredging is arguably more permanent.

The Fourth District also claimed that inclusion of dredged lands associated with structural improvements is inconsistent with the portion of the Butler Act which provides that the public shall not be prohibited from access to the submerged lands for boating, bathing or fishing until the

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188. 102 Fla. 1047, 137 So. 682 (1931).

189. *See City of West Palm Beach*, 714 So. 2d at 1065.

190. *See Williams*, 137 So. at 683-85.

191. 603 So. 2d 1303, 1306 (Fla. 5th DCA 1992). In *Industrial Plastics*, landowners sought a disclaimer from the Department of Natural Resources, pursuant to section 253.129, Florida Statutes, for land lying beneath a wooden dock and boathouse. *See id.* at 1304. The Department refused to grant the disclaimer, arguing that the predecessors in title did not legally own the upland property when they built the dock and boathouse. *See id.* at 1305. The court rejected this argument and found that the Butler Act does not preclude those who have at least a beneficial interest from qualifying for the vesting provision of the Act. *See id.*

Alternatively, the Department contended that the wooden dock and boathouse did not constitute "permanent improvements" for the purpose of the Butler Act. *See id.* The court concluded that the Butler Act was not restricted to commercial property, making this residential property eligible under the Act. *See id.* at 1306. Finally, the court found that while the improvements "may [not] last as long as structures made of steel and concrete, . . . [they] last long enough in the context of human life to be classified as 'permanent improvements'" *Id.*

192. *See id.*

193. *Id.*

194. *See City of West Palm Beach*, 714 So. 2d at 1065.

lands are filled or improved.[195] The court reasoned that since all of these activities are permissible over dredged lands, the legislature must not have intended dredging to be a permanent improvement.[196] However, some of these activities are also permissible under docks or piers which have been adjudged permanent improvements pursuant to the Butler Act.[197] Moorings are another example of a permanent improvement that would allow free access to the public in the overlying waters. Perhaps the statute was just stating the obvious, that is, that the public would not be physically able to engage in boating, fishing or swimming once certain improvements have been made. Another explanation is that if the activities are possible, the statute cannot divest the land of the public right to boat, fish or swim and to the federal right of navigation under the Commerce Clause. Regardless of the explanation, removing dredging from the equation does not harmonize the various sections of the Butler Act.

2. Implications of Allowing Associated Dredging to Vest Title

On rehearing the Fourth District implied that including dredged lands would be against public policy because the City could fill the land.[198] However, ownership of the submerged lands would not exempt the City from any federal or state permitting requirements.[199] While the trial court apparently realized the need for permits regardless of whether the City owned the property, the trial court seemed to imply that permitting to fill lands is an easy process.[200] On the contrary, any mass filling by the City would likely be prevented by federal and state permitting regulations.[201]

The biggest difference between the City owning the property and not owning the property would be that the City would have to pay a lease fee to the BOTIITF. This would probably be a great financial hardship to the City considering the current base lease fee is calculated by the square

195. *See id.* at 1064 (quoting Williams, 137 So. at 686).

196. *See id.*

197. *See Industrial Plastics*, 603 So. 2d at 1306.

198. *See City of West Palm Beach*, 714 So. 2d at 1061.

199. *See* Trustees of the Internal Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956) (stating that the state may grant trust lands to private parties "but not so as to divert them from their proper uses, or so as to relieve the state of the control and regulation of the uses afforded by the land and waters") (quoting State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 612, 47 So. 353, 356 (1908)).

200. *See City of West Palm Beach*, 714 So. 2d at 1060-66.

201. *See* 33 U.S.C. § 1344(c) (1998) (allowing denial of dredge and fill permitting which would result in unacceptable adverse impacts on shellfish beds, fishery areas, wildlife or recreational areas); FLA. STAT. § 373.414 (1998) (requiring applicants who propose activities in surface waters to provide reasonable assurances that the activity is not contrary to the public interest).

foot,[202] and the boat basin in question is over 21 acres.[203] In addition, the BOTIITF has discretion to issue and renew leases, so theoretically, the City could lose a lease in any given year.

The bottom line is that if the City owns the land, it is very unlikely that the City would be able to obtain the necessary permits to fill the land. In addition, there is no indication that the City is interested in filling considering the boat basin's fifty-two year existence.

3. The "Amorphous" Case-by-Case Basis Test

The Fourth District Court of Appeal criticized a "case-by-case" approach to defining a permanent improvement as "too amorphous . . . to decide the issue of title to irreplaceable submerged land within the public trust."[204] However, a case-by-case approach may be the most appropriate. Case-by-case, factor-based, and reason-based tests are not unknown in environmental law. Their use highlights the diversity of the environment. In addition, the case-by-case approach would help identify dredging which is part of a larger improvement project. It seems counter-intuitive to arbitrarily omit the dredging aspect of a project as if the Florida Legislature would not have considered dredging as a necessary incident to waterfront development. A case-by-case test would also provide the basis to evaluate other activities that may be characterized as "permanent improvement."

IV. CONCLUSION

Some argue that the principles of the public trust doctrine should not apply to Butler Act decisions at all because the doctrine was not codified by the Florida Constitution until 1971.[205] Accordingly, improvements made pursuant to the Butler Act, which was passed according to development standards in 1921, should not be evaluated under the "modern" concept of the public trust. However, this concept does not ring true considering the long history of the public trust. The validity of the public trust doctrine was recognized long before it was included in Florida's Constitution. The question which remains, however, is which version of the public trust doctrine should be applied and when.

Therefore, the Florida Supreme Court will have to evaluate whether the Butler Act should be interpreted with the understanding of the public trust doctrine of its era or a more modern understanding of the public trust doctrine. When the Butler Act was enacted, the state enlisted landowners

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202. *See* FLA. ADMIN. CODE ANN. R.18-21.011(1)(b) (1998).

203. *See* Appellant's Initial Brief at 2, *City of West Palm Beach* (No. 95-3813).

204. *City of West Palm Beach*, 714 So. 2d at 1066.

205. *See, e.g.*, Appellee's Answer Brief at 20, State v. Key West Conch Harbor, Inc., 683 So. 2d 144 (Fla. 3d DCA 1995) (No. 95-1275). *See* FLA. CONST. art. X, § 11.

to help improve commerce. Landowners and municipalities responded by taking steps which the landowners and municipalities thought would vest title in submerged land under the Butler Act. The modern conception of the public trust considers the environmental and conservation impacts of statutory interpretation. Therefore, courts today might apply the public trust doctrine to construe "permanent improvement" more strictly. Thus, improvements which the 1921 legislature may have considered appropriate would not be included within the Act. Admittedly, the modern conception of the public trust is consistent with current views of how the government should protect the environment. However, since vesting under the Butler Act took place prior to the evolution of the public trust, it may not be fair to apply the new standard.

Allowing associated dredging to vest title pursuant to the Butler Act under certain circumstances seems more appropriate than an absolute rule that dredging will never vest title. The case-by-case basis test may be a legitimate first step toward the type of principled approach the Florida Supreme Court should adopt. Of course, this approach is not flawless, as it could be applied in a non-uniform manner. However, an absolutist approach could yield more unfair and inappropriate results. Moreover, tests dealing with impacts on the environment are infrequently cast in black and white. In light of the Butler Act's history, the issue of whether associated dredging or any other activity is a "permanent improvement" should be approached with balance.