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Sovereignty Lands in Florida: Lost in a Swamp of Ambiguity

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SOVEREIGNTY LANDS IN FLORIDA: LOST IN A SWAMP OF AMBIGUITY†

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I. INTRODUCTION

> Much of the Anglo-American law of land is explicable only in the light of man's search for title security. No great problem with chattels, since possession normally indicates ownership . . . [but] assured ownership of the vendor still plagues the real property lawyer.[1]

Man's search for title security in real estate has long been conducted in a climate of warm hospitality in Florida. Land transactions are a key ingredient of the state's economic vitality. The legislature has passed many laws aimed at improving the reliability of the vast array of recorded documents affecting property ownership, commonly referred to as "the record."[2] Ideally, the record should reveal quickly and clearly who owns each and every square foot of land in Florida.

This ideal, however, has not and cannot be realized. Since the emergence of dower as a means of protecting a dead landowner's family, policy considerations have moved both courts and legislatures to recognize the validity of certain property interests not appearing of record. Today, courts generally hold homestead rights and rights of persons in possession, two interests which are not on the record, to be of sufficiently great societal benefit to trump adverse interests in property that appear, from a search of the record, to be invulnerable.

1. J. CRIBBETT, PRINCIPLES OF THE LAW OF PROPERTY 263 (2d ed. 1975).

2. A significant example of legislative attempts to improve record reliability is the passage of the Marketable Record Title Act in 1963, ch. 63-133, 1963 Fla. Laws 257 (codified at FLA. STAT. §§ 712.01-.10 (1985)).

Title searchers grumble as additional, non-record categories emerge. Their job becomes more difficult because they must now look beyond the record to extrinsic circumstances, if they are to insure marketable title.

A recent decision of the Florida Supreme Court, *Coastal Petroleum Co. v. American Cyanamid Co.*,[3] radically expands the universe of protected, non-record real property interests. *Coastal* holds that facially absolute deeds issued by the government to the public in the nineteenth century failed to divest the state of its title to "sovereignty lands."[4] The supreme court found the strong public interest in maintaining public ownership and use of rivers and lakes to outweigh the interest in title security. The State of Florida, therefore, has title to sovereignty lands, even those lying within the legal description of and purportedly conveyed by earlier, validly executed deeds. Thus, the record may show title to these lands vested in *X*, a private deedholder, while in reality, title is in the state.

Florida now confronts the task of identifying these sovereignty lands. The formula for identification is easily stated: sovereignty lands are those lying beneath waters which were navigable on March 3, 1845,[5] and the line separating them from privately-owned uplands is the ordinary high water line.[6]

This article suggests that application of the apparently simple formula will involve factually intensive disputes of inordinate complexity. A sharp distinction should be drawn between the *allegation of sovereignty* and the *proof of sovereignty*. Alleging that a parcel contains sovereignty lands is easy. Proximity to any waterbody will do. Proof, on the other hand, is difficult and quite expensive. This is true whether one is trying to prove that a parcel contains sovereignty lands or to prove that it does not.

In theory, *Coastal* could trigger a flood of quiet title actions by the Department of Natural Resources (DNR)[7] seeking judicial affirmation of the state's title to some three million acres[8] of alleged sovereignty lands throughout the

3. 492 So. 2d 339 (Fla. 1986).

4. *Id.* at 342. "Sovereignty lands" include those "lands beneath navigable waters, up to the ordinary high water mark." *Id.*; *see infra* text accompanying notes 17-21. Sovereignty lands are distinguished from other state-held property because the former "are for public use, 'not for the purpose of sale or conversion into other values, or reduction into several or individual ownership.' " 492 So. 2d at 342 (quoting State v. Gerbing, 56 Fla. 603, 608, 47 So. 353, 355 (1908)).

5. Florida was admitted to the union on this date. Act of Mar. 3, 1845, ch. 75, 5 Stat. 788, *reprinted in* 25 FLA. STAT. ANN. 349 (West 1970).

6. *See* Howard v. Ingersoll, 54 U.S. (13 How.) 379, 427 (1851) (Curtis, J., concurring); *see also infra* text accompanying notes 197-226.

7. The Division of State Lands, Department of Natural Resources, is charged with the administration and sale of state lands. Presumably, the Division would spearhead action taken with regard to ownership and title of state lands. The Department of Natural Resources was authorized by the Florida Governmental Reorganization Act of 1969, ch. 69-106, § 25, 1969 Fla. Laws 491, 543 (codified at FLA. STAT. § 20.25 (1985)), and substantially modified by the Florida Environmental Reorganization Act of 1975, ch. 75-22, 1975 Fla. Laws 42. The Division of State Lands was created in 1979. Act of Oct. 1, 1979, ch. 79-255, § 2, 1979 Fla. Laws 1402, 1404 (codified at FLA. STAT. § 20.25(2)(g) (1985)).

8. Department of Natural Resources Memorandum from Douglas A. Thompson, Assistant Bureau Chief, to Kevin Crowley, General Counsel, entitled Miscellaneous Sovereign Land Statistics

state. This result, however, is unlikely because an attempt by government to simply take back ten percent of the total Florida land mass would be political suicide.[9]

Instead, the sovereignty lands issue will likely be raised reactively in a wide variety of transactions. DNR, for example, might raise it in denying a permit to build; a purchaser might raise it in justifying his refusal to close; and a mortgage company might raise it in justifying its refusal to fund. The predictable outcome is that the reactor will prevail, regardless of the merits. The cost to the actor of litigating the sovereignty lands issue will make most challenges uneconomic, even if the actor was ultimately successful in defeating the sovereignty lands allegation. The actor will simply abandon the project or seek some negotiated accommodation with the reactor. For those cases large enough to merit litigation, this article argues the case-by-case outcomes will, by reason of their factual intensity, be inconsistent from parcel to parcel. Finding no justification for such a process of dispute resolution, the article concludes that legislative intervention is necessary and proposes a statutory solution to the problem.

II. Historic Development in Florida Land Title

The sovereignty lands controversy arises within the interstices of the larger matrix of Florida land title history. A review of the process by which the state acquired and subsequently transferred its title to Florida lands is necessary to fully understand the dimensions of this controversy.

A. *Spain Cedes to the United States*

On February 22, 1819, the King of Spain granted and ceded by treaty to the United States the territories known as East and West Florida.[10] Under the grant, the United States formally acquired fee simple title to all of the lands in present day Florida, including submerged lands and navigable waters. The treaty excepted those lands conveyed by prior Spanish land grants which were "ratified and confirmed to the persons in possession . . . to the same extent

(Apr. 9, 1985) (including acreage and litigation cost computations) [hereinafter cited as DNR Cost Memo].

9. Aside from the political considerations, a comprehensive effort would require financial and human resources which the legislature may be unwilling to fund. After *Coastal*, however, the state has the luxury of time. The "implied reservation" is perpetual, and a private claimant cannot perfect his title except by formal adjudication. State officials thus may react to attempts to quiet title on a parcel-by-parcel basis without incurring the political cost inherent in a more active approach.

10. The treaty was ratified in 1821, and ceded the territory "in full property and sovereignty." In other words, the United States received both title to the lands and the right to establish a legitimate government over the territory. The treaty expressly included "the adjacent islands dependent on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks, and other buildings, which are not private property . . . ." Treaty of Amity, Settlement, and Limits, Feb. 22, 1819, United States-Spain, art. II, 8 Stat. 252, 254, T.S. No. 327 (ratified Feb. 22, 1821), *reprinted in* 25 Fla. Stat. Ann. 281, 282 (West 1970).

that the same grants would be valid if the territories had remained under the dominion of his Catholic Majesty."[11] Title to these privately held lands was independently confirmed by Acts of Congress and written patents.[12]

Nine days after ratification, Congress authorized the President to take possession of the territories of East and West Florida.[13] Andrew Jackson was appointed Florida's first Territorial Governor.[14] During the territorial period only a few 160 acre tracts were actually patented,[15] one to the territorial government and one tract to each of the then existing counties.[16]

B. *Florida Becomes a State*

Florida became a state on March 3, 1845. Subsequently, the federal government transferred great amounts of land to the state using four separate and distinct techniques.

1. Sovereignty Lands

Under American jurisprudence, states hold certain lands by virtue of their sovereignty rather than by traditional property conveyances. These lands include those which lie either beneath tidal waters or beneath navigable waterways up to the ordinary high water line (OHWL).[17] When Florida became a state in 1845, it immediately and automatically succeeded to all right, title and interest in the sovereignty lands by virtue of both the common law "equal footing" doctrine,[18]

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11. *Id.* art. VIII, 8 Stat. at 258, T.S. No. 327, *reprinted in* 25 FLA. STAT. ANN. at 284.

12. *See* Act of Jan. 23, 1832, ch. 10, 4 Stat. 496; Act of May 26, 1830, ch. 106, 4 Stat. 405; Act of Feb. 8, 1827, ch. 9, 4 Stat. 202; Act of Apr. 22, 1826, ch. 29, 4 Stat. 156. The procedures Congress authorized for establishing claims are outlined in Act of Mar. 3, 1825, ch. 83, 4 Stat. 125; Act of Mar. 3, 1823, ch. 29, 3 Stat. 754; and Act of May 8, 1822, ch. 129, 3 Stat. 709.

13. Act of Mar. 3, 1819, ch. 93, 3 Stat. 523.

14. Instructions and Commissions for Occupation of East and West Florida, from the Secretary of State to Major General Andrew Jackson (Mar. 12, 1821), *reprinted in* 25 FLA. STAT. ANN. 294 (West 1970).

15. A "patent" is a document equivalent to a private deed by which the federal government transfers title to its lands. BLACK'S LAW DICTIONARY 1013 (5th ed. 1979).

16. *See* Act of Mar. 2, 1829, ch. 39, 4 Stat. 357; Act of Feb. 8, 1827, ch. 9, 4 Stat. 202; Act of May 24, 1924, ch. 137, 4 Stat. 30. These tracts were for use as seats of government. The United States reserved, but did not patent, two entire townships, one in East and the other in West Florida, for the use of "a seminary of learning." Act of Mar. 3, 1823, ch. 29, § 11, 3 Stat. 754, 756.

17. Shively v. Bowlby, 152 U.S. 1 (1894). *Shively* expresses the prevailing American view that the sovereign owns all submerged bottoms under navigable waterways including both inland and tidal waters. *Id.* at 57. In contrast, English common law provides that the riparian owners own the beds of all fresh-water rivers above the ebb and flow of the tide regardless of navigability. *Id.* at 31. Private ownership of fresh-water rivers was tempered by a "public interest, or *jus publicum*, of passage and repassage." *Id.* at 12. The historical dimension of the sovereignty lands controversy is thoroughly examined in Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561, 564-69 (1982).

18. Although the notion that new states be admitted on an "equal footing" with prior states was not expressly required by the Constitution, *see* U.S. CONST. art. IV, § 3, or, for Florida specifically, by the Spanish treaty of acquisition, *see supra* note 10, courts have long construed an

and the express "equal footing" language of the admission statute.[19] The equal footing doctrine accords states admitted to the Union subsequent to the original thirteen colonies equal footing with all other states.[20]

Upon the signing of the Declaration of Independence, the original thirteen states acquired sovereignty (and sovereignty lands) from Great Britain. The original states retained their sovereignty (and interest in sovereignty lands) upon admission to the United States. Since the original thirteen states retained their sovereignty lands, the new states (including Florida) had to receive title to sovereignty lands if they were to be on an equal footing.[21] No grants or patents were necessary to accomplish this transfer and none were issued. Thus, no catalog or other list of sovereignty lands was made contemporaneously with statehood. This lack of a certain property description gives rise to the modern sovereignty lands controversy.

2. Government, Education and Section Sixteen Lands

By a separate act, passed on the day of Florida's statehood, the United States granted to the state

> eight entire sections of land for purpose of fixing their seat of Government; also section number sixteen in every township . . . for the support of public schools; also, two entire townships of land, in addition to the two townships already reserved, for the use of two seminaries of learning — one to be located east, and the other west of the Suwannee river . . . .[22]

"equal footing" requirement for all new states. *See* Escanaba & Lake Mich. Transp. Co. v. City of Chicago, 107 U.S. 678, 688-89 (1883) (once admitted to the union, Illinois was on an equal footing with the original states and could exercise the same power over navigable waters as the original states); Pollard v. Hagan, 44 U.S. (3 How.) 212, 228-30 (1845) (Alabama succeeded to the same sovereignty and jursidiction over nagivable waters and the soils underneath them as the original states); *see also* Coyle v. Smith, 221 U.S. 559, 573 (1910) (once admitted to the Union, states become entitled to equal rights of dominion and sovereignty as those enjoyed by the original states).

> The plain deduction from this case is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away . . . .

Coyle, 221 U.S. at 573; *see* Mayor of Mobile v. Eslava, 41 U.S. (16 Pet.) 234, 253-54 (1842) (Catron, J., concurring) (Alabama admitted into the Union on an equal footing with the original states, and as a result retains sovereignty over the lands beneath navigable tidal waters from the low to high water mark).

19. The admission statute provided:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the States of Iowa and Florida be, and the same are hereby, declared to be States of the United States of America, and are 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, 742 (emphasis added).

20. *See supra* note 18.

21. Oklahoma v. Texas, 258 U.S. 574, 583 (1922); Pollard v. Hagen, 44 U.S. (3 How.) 212, 228-29 (1845); Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842).

22. Act of Mar. 3, 1845, ch. 75, § 1, 5 Stat. 788, 788 (supplementing the act for the

The lands referred to for "fixing their seat of Government" were not lands in and about Tallahassee but were eight sections in Columbia County[23] to be sold to provide funds for the construction of a suitable state capitol.[24] The University of Florida (Gainesville) and Florida State University (Tallahassee) are the successors of the "two seminaries of learning — one to be located east, and the other west of the Suwannee river."[25]

3. Internal Improvement Lands

In 1841 Congress passed a statute which granted each state subsequently admitted to the Union five hundred thousand acres of land for purposes of internal improvement.[26] This one-half million acres was to take into account lands granted to the territorial government,[27] but would exclude sovereignty lands and lands granted for governmental and educational purposes.[28]

4. Swamp and Overflowed Lands

Two-thirds of the land area of Florida was ultimately transferred to the state pursuant to the 1850 Federal Swamp and Overflowed Lands Act.[29] The act

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admission of Florida and Iowa into the Union). The "two townships already reserved" refers to those reserved to the Territory in 1823. *See supra* note 16.

No separate patent was required to pass title to these lands. The filing and approval of the lists of selections by surveyed descriptions perfected title. In areas where section sixteen lands had previously been conveyed or were fractional sections, other lands were granted to make up the deficiency. *See* Act of Feb. 28, 1891, ch. 384, 26 Stat. 796 (codified as amended at 43 U.S.C. §§ 851-852 (1982)); Act of Feb. 26, 1859, ch. 58, 11 Stat. 385.

23. 3 FLA. STAT. 231 (1941) [hereinafter cited as *Whitfield's Notes*]. Volume III of the 1941 *Florida Statutes* contains a summary of many legal and historical documents related to Florida compiled by James Bryan Whitfield, a former Florida Supreme Court Justice.

24. *Id.*

25. Although under article XI of the 1838 Florida Constitution the General Assembly was responsible for lands conveyed to the state, much of the section sixteen lands was improperly conveyed by the Governor and Cabinet acting as the Board of Education. The Legislature retroactively validated these conveyances. Act of May 22, 1901, ch. 4999, § 2, 1901 Fla. Laws 149, 149 (codified at FLA. STAT. § 694.06 (1985)).

26. Act of Sept. 4, 1841, ch. 16, § 8, 5 Stat. 453, 455.

27. *Id.*

28. Governmental and education lands were conveyed by a separate act four years later. Act of Mar. 3, 1845, ch. 75, § 1, 5 Stat. 788, 788. Had such lands been included as part of the five hundred thousand acres, the subsequent act would have been a nullity as it applied to land and land transfers. Sovereignty lands could not count against the total because their quantity was unknown.

29. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519. The act was "to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein . . ." *Id.* § 1, 9 Stat. at 519. Any proceeds received by Arkansas from its resale of the land "shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains." *Id.* § 2, 9 Stat. at 519. Almost as an afterthought, section 4 of the Act extended the benefits of the Act to other states in which swamp and overflowed lands might be situated. *Id.* § 4, 9 Stat. at 520. A total of 20,438,253.17 acres was eventually patented to the State of Florida under this Act. DEPARTMENT OF AGRICULTURE, LAND & FIELD NOTE DIVISIONS, TWENTY-THIRD BIENNIAL REPORT 26 (1934) [hereinafter cited as BIENNIAL REPORT].

provided that "all legal subdivisions [quarter quarter sections or government lots], the greater part of which is 'wet and unfit for cultivation' " should be transferred to the state.[30] The Secretary of the Interior was directed to make an accurate list of the lands to be conveyed and, upon the request of the Governor of the state, to cause a patent for the swamp and overflowed lands ("S&O lands") to be issued.[31]

To discharge the statutory mandates, the federal government commissioned a complete survey of the state.[32] The surveyors' duty was to subdivide the state into a grid starting from imaginary north-south and east-west axes intersecting in Tallahassee. The surveyors divided the land into townships, squares of land six miles by six miles. The townships were then subdivided into 36 one mile square sections. As they traveled about the state surveying the lands, the surveyors kept detailed field notes indicating swamps, streams, and rivers, and the width of waterbodies at the point they crossed section lines. These field notes were compiled into a series of very detailed township maps, which reflected the checkerboarding of each township into sections and the location of small streams, ponds, trails, cultivated fields, and towns.[33] The surveying process was conducted with such precision that sections and parts of sections were measured to the nearest 1/100th of an acre.[34]

When the federal surveyors encountered navigable waters, the survey process and checkerboarding procedure were modified. First, the surveyor would compute a description of the line along the edge of the water, the meander line. The meander line was shown on the map itself and formally described in the marginal notes. Second, the surveyor would complete the section by laying out and describing a series of fractional sections or government lots, each measured to the nearest 1/100th of an acre.[35]

Contemporaneously with the federal survey, the General Assembly, pursuant to its constitutional authority,[36] delegated responsibility for the S&O lands to

30. Act of Sept. 28, 1850, ch. 84, § 3, 9 Stat. 519, 519. Section 1 of the Act describes these lands as "swamp and overflowed lands . . . made unfit thereby for cultivation." *Id.* § 1, 9 Stat. at 519.

31. *Id.* § 2, 9 Stat. at 519.

32. Act of May 24, 1824, ch. 137, § 4, 4 Stat. 30, 31; Act of Mar. 3, 1823, ch. 29, § 7, 3 Stat. 754, 755. The methodology to be employed in federal surveys is set forth in U.S. REV'D STAT. § 2395 (1898). *See* Off. of Surveyor General, General Instructions to Deputy Surveyors (Nov. 3, 1842), *reprinted in*, C. WHITE, A HISTORY OF THE RECTANGULAR SURVEY SYSTEM 321-28 (1982) [hereinafter cited as C. WHITE].

33. These field notes and township maps are on file with the Department of Natural Resources in Tallahassee.

34. Given the inhospitable terrain and the state of measuring technology in the nineteenth century, some surveying errors inevitably resulted. With the advent of improved technology, the various "long," "short," and "kinked" sections were identified. However, the existing topography is surprisingly close to the original surveys. *See infra* note 53.

35. This is seen clearly in Township 38 S., Range 23 E., where the meander line on the Peace River (called Peace Creek on the 1855 Township map) stops. North of the meander line, the sectioning follows a strict checkerboarding pattern. South of the line, government lots abut the river; the sectioning begins only well upland.

36. FLA. CONST. of 1838, art. XI.

the Trustees of the Internal Improvement Fund (which consisted of the Governor and Cabinet).[37] Because of the state's obvious self interests, the Trustees were concerned both with the accuracy and diligence of the surveyors and, perhaps more importantly, with maximizing the area which would be designated swamp and overflowed and patented to the state.

To achieve this end, the Trustees entered into contracts with at least six agents.[38] These agents were employed to "select" lands and convince the Secretary of the Interior that the "greater part" of these lands was "wet and unfit for cultivation" and thus should be patented to the state.[39] The agents were paid with conveyances of land, based on the number of acres they caused to be patented to the state.[40]

The acumen of these land agents was evidenced by the Secretary of the Interior's designation of virtually all of peninsular Florida as being the "greater part . . . 'wet and unfit for cultivation,' "[41] despite the fact that most of the state lying north of the Everglades had been sectioned by federal surveyors, whose township maps and field notes indicated a considerably drier land mass. In the final analysis, over 20 million acres were patented to Florida as S&O lands.[42]

C. *The State of Florida Sells the Land*

In order to generate revenue, get the land on the tax rolls, and stimulate reclamation,[43] the Trustees began selling off the S&O and Internal Improvement lands on a per acre basis.[44] The early deeds expressly recite a consideration of

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37. FLA. STAT. ch. 610 (1854-1860) (current version at FLA. STAT. §§ 253.001-.83 (1985)).

38. BIENNIAL REPORT, *supra* note 29, at 26-29. These agents received large tracts of land in payment for their services:

Sydney I. Wailes	224,562.80 acres
John A. Henderson	164,124.68 acres
Wells & Randolph	100,000.00 acres
Williams & Swann	44,318.25 acres
Williams, Swann & Corley	28,706.17 acres
L.G. Dennis	5,800.27 acres
S.W. Teague	5,778.37 acres

Id.

39. Act of Sept. 28, 1850, ch. 84, §§ 2-3, 9 Stat. 519, 519.

40. *See supra* note 38.

41. Act of Sept. 28, 1850, ch. 84, § 3, 9 Stat. 519, 519.

42. *See supra* note 29.

43. Arguably, the federal patents under the Act granted a fee simple determinable to the state, imposing on the state an affirmative duty of reclamation under possibility of reverter to the federal government. *See supra* note 29.

44. There was a series of sales involving large tracts of land which did not fit this pattern. In 1854, the legislature authorized the Trustees to pledge the Internal Improvement Fund assets to guarantee the interest on bonds issued by certain railroad companies. *See* FLA. STAT. ch. 610 (1854-1860). Guarantees were made; due to the depressed conditions in the wake of the Civil War, the bonds went into default. The Trustees foreclosed on the railroad assets and began repurchasing and retiring outstanding bonds. In some cases the Trustees acquired the bonds in exchange for land. For example, transfers of land were made to E.N. Dickerson in 1867 and Wm. E. Jackson

so much per acre and describe the property conveyed in terms of sections, or parts of a section, with the total land conveyed computed and described to the nearest 1/100th of an acre. That acreage multiplied by the going price per acre was the amount paid by the purchaser.

These original deeds show a clear going rate for land. The going rate was ninety cents to one dollar per acre in the 1870's,[45] rising to about two dollars per acre in the early 1900's.[46] In the late 1910's, when the large scale land sales came to an end, the going price had risen above ten dollars per acre.[47] The Trustees did not adjust the descriptions or acreage totals in the deeds to reflect lands then shown by the approved maps[48] to include unmeandered rivers;

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in 1868 for railroad bonds which fell due before the war. BIENNIAL REPORT, *supra* note 29, at 26. The cash assets of the fund were quickly depleted, and a receiver for the Internal Improvement Fund was appointed in federal court. In 1881, the Trustees negotiated and consummated the sale of four million acres of S&O lands to Hamilton Disston for $1 million, which would be used to pay off the remaining bond debt and thus end the receivership. *See* 2 TRUSTEES OF INTERNAL IMPROVEMENT FUND, MINUTES 280, 498 (1905) [hereinafter cited as MINUTES]; *see also Whitfield's Notes*, *supra* note 23, at 233.

In the years after the Disston sale, the state chose a different method of encouraging the development of transportation and canal facilities. Instead of guaranteeing transportation company debts as had been done in the past, the legislature provided that, upon completion of segments of a railroad or canal, the alternate (odd-numbered) sections of land within six miles on either side of the railroad or canal were to be conveyed to the railroad or canal company. Act of Mar. 12, 1879, ch. 3166, 1879 Fla. Laws 119, 119. When there were insufficient lands lying within six miles to constitute the requisite number of acres, the Trustees were to grant enough alternate sections lying within twenty miles of the railroad or canal to make up any shortfall. *Id.* This authority had been specifically reserved to the legislature in FLA. STAT. ch. 610, § 29 (1854-1860), which granted general authority over state lands to the Trustees. By July 1, 1934, 9,070,156.56 acres had been deeded to railroads for internal improvement. BIENNIAL REPORT, *supra* note 29, at 24.

In the wake of the bond default and the Disston purchase, the voters enacted a constitutional prohibition against pledging the state's credit for the benefit of private corporations. *See* FLA. CONST. of 1868, art. XII, § 8. This prohibition has survived to the present day. *See* FLA. CONST. art VII, § 10.

45. *See* Deed Nos. 4000 to 9074 (located in Department of Natural Resources archives). The going rate dropped as low as 80 cents. Isolated sales occurred at $3 per acre, presumably for particularly desirable land. *See, e.g.*, Deed No. 7963 (Mar. 17, 1877) (conveying 40 acres for $3 per acre). The Disston Deed, *see supra* note 44, sold 4 million acres for 25 cents per acre. *See* 2 MINUTES, *supra* note 44, at 280, 498.

46. *See, e.g.*, Deed No. 15,900. At about this time, the Trustees changed the Standard Form of the Trustees' Deed (1) to add an express reservation to enter and erect canals, cuts, sluices, and dikes, to facilitate the "drainage and reclamation" of the conveyed properties, and (2) to reserve expressly a profit à prendre in gravel needed for dikes. *See* 6 MINUTES, *supra* note 44, at 82.

47. In the 1910's, prices were less stable. The per acre charge varied from an average low of about $5 per acre, *see, e.g.*, Deed No. 16,726, to an average high of $100 per acre, *see, e.g.*, Deed No. 16,777 (conveying 40 acres in Palm Beach to F.L. Tatum for $4,000).

48. The Trustees relied on the surveys and detailed maps prepared by the federal surveyors and used these descriptions when conveying the property to private landowners. *See supra* note 32 and accompanying text. The 1842 instructions to the Florida Surveyors stressed the importance of accurate meandering work. C. WHITE, *supra* note 32, at 326.

nor did the Trustees reserve any interests in the land lying beneath small ponds or streams.[49]

Conveyances of land abutting meandered waters were treated differently. The property was described as either a fractional section or government lot,[50] or by a metes and bounds description expressly referring to and excluding the water body.[51] A purchaser receiving such property stood in a different position from one receiving a section or smaller piece of a section. First, he paid the going rate per acre only for the number of acres actually contained in the purchased lot; "[m]ost settlers would not buy land containing a lake, thereby paying $1.25 per acre for areas they could not farm."[52] Second, he took title with actual notice that the land abutted navigable waters.[53]

III. The Marketable Record Title Act and its Impact on the Sovereignty Lands Problem

The sale of state lands to private owners, without mention of potentially navigable waterways either by excluding them from the description or by an express reservation, laid the foundation for the subsequent sovereignty lands controversy. The next stone was set in 1963 with the passage of the Marketable Record Title Act.[54]

A. *Applying the Marketable Record Title Act to State Lands*

The legislature enacted the Marketable Record Title Act (MRTA)[55] for the

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49. The land remaining in the hands of the United States was likewise conveyed piecemeal to individual deedholders. *See* U.S. Rev'd Stat. §§ 2209-2317 (1895) (homesteading); *id.* §§ 2353-2379 (sale of public lands, also without reference to arguably navigable waters). These conveyances are generally free of the sovereignty lands controversy because (1) most of the lands sold by the United States, not being S&O lands, were presumably higher and farther from water, and (2) the federal government had no claim to sovereignty lands, thus the estoppel and contemporaneous determination arguments discussed below are inapplicable. *See infra* text accompanying notes 74-78.

50. "Fractional section" refers to a section of land, a portion of which is covered by navigable waters. U.S. Rev'd Stat. § 2407 (1898). Government lots were described and delineated on the official township plat and identified by lot number. *See generally* C. White, *supra* note 32, at 82-127.

51. *See* Patent No. 137 (the Everglades Patent), *reported in* Everglades Sugar & Land Co. v. Bryan, 81 Fla. 75, 94-95, 87 So. 68, 73-74 (1921); *see also* Martin v. Busch, 93 Fla. 535, 554-58, 112 So. 274, 280-81 (1927) (detailing conveyance to Col. Henderson).

52. C. White, *supra* note 32, at 82.

53. Not all government lots abutted navigable waters. Often the sections bordering the north and west edges of a township (Sections 1 through 6, and Sections 7, 18, 19, 30 and 31) will contain a series of government lots largely because the township measured out either "long" (that is, as originally laid out the township was more than one mile on a side, thus containing too much acreage) or "short" (including less than one mile on a side). In other cases, the official survey did not reflect the problem, and years passed before a subsequent surveyor determined the section was "long," "short," or even "kinked." Act of May 24, 1824, ch. 141, 4 Stat. 34.

54. Marketable Record Title Act, ch. 63-133, 1963 Fla. Laws 257 (codified at Fla. Stat. §§ 712.01-.10 (1985)).

55. For an excellent review of the passage of the Marketable Record Title Act, see Powell,

express purpose of "simplifying and facilitating land title transactions by allowing persons to rely on a record title."[56] The goal was to reduce the need to examine a century or more of title records and to cure many of the all too common conveyancing and scrivener's errors which had accumulated over the years. Before MRTA, an exhaustive title examination and error-correcting process were necessary incidents of any substantial property transaction. Prior legislation had addressed these problems piecemeal.[57] Due to their limited scope, these earlier legislative efforts were only partially effective. MRTA's purpose was to provide a self-effectuating and comprehensive corrective system.

Three elements must be shown to perfect title under MRTA: (1) an owner must have the legal capacity to own land;[58] (2) an owner must be able to show a "title transaction" purporting to create or transfer the estate claimed;[59] and (3) the title transaction apparently vesting the claimed interest in an owner or predecessor in title must have appeared of record for 30 years.[60] If an owner can show each of these elements, all title transactions, acts, and claims predating the 30 year period (subject to certain exceptions)[61] are "declared to be null and void"[62] and the owner is declared to have "a marketable record title."[63]

Although the exceptions to MRTA are significant, they do not swallow the

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Unfinished Business — Protecting Public Rights to State Lands from Being Lost Under Florida's Marketable Record Title Act, 13 FLA. ST. U.L. REV. 599, 600-05 (1985).

56. MRTA, ch. 63-133, § 10, 1963 Fla. Laws 257, 262 (codified at FLA. STAT. § 712.10 (1985)).

57. The legislature has passed several curative acts to reduce the need for quitclaim deeds from distant heirs of past owners and quiet title actions. Such acts included legislative validation of certain conveyances by married women, *see* FLA. STAT. §§ 694.03-.04 (1985); by the Board of Education during periods they lacked authority, *see id.* § 694.06; by any party where witnesses, validation, seals, or acknowledgments were lacking, *see id.* § 694.08; and by any party where the names of corporate parties were misspelled or misstated, but their identities were obvious from the instrument, *see id.* § 694.12.

58. FLA. STAT. § 712.02(1) (1985).

59. *Id.* MRTA defines "title transaction" as "any recorded instrument or court proceeding which *affects title* to any estate or interest in land and which describes the land *sufficiently to identify its location and boundaries.*" *Id.* § 712.01(3) (emphasis added). This definition embodies two separate concepts. First, the claimant must show some writing recorded in the public records. It need not be in the nature of a traditional deed or conveyance; the writing need only be a facially effective conveyance of the claimed interest. Courts have liberally defined the scope of "title transaction" and what "affects title." *See, e.g.*, Marshall v. Hollywood, Inc., 224 So. 2d 743, 749 (4th D.C.A. 1969) (word "affecting" in MRTA does not carry narrow meaning of "changing or altering," but rather carries broader meaning of "concerning or producing an effect upon"), *aff'd*, 236 So. 2d 114 (Fla.), *cert. denied*, 400 U.S. 964 (1970). Second, the definition of title transaction contemplates a specific legal description, presumably one sufficiently definite to convey legal title.

60. FLA. STAT. § 712.02(1) (1985). The thirty-year-old title transaction is known as the "root of title." The effective date of the root of title is the date of recording. *Id.* § 712.01(2); *see also id.* § 695.11 (instruments conveying interests in real estate deemed recorded from time of filing).

61. *See id.* § 712.02(2) (MRTA not applicable to actions filed prior to Oct. 1, 1986, to quiet title to sovereignty lands, lands granted for school purposes, and section sixteen lands); *id.* § 712.03 (listing exceptions to marketability).

62. *Id.* § 712.04.

63. *Id.* § 712.02(1).

rule.[64] As originally proposed, MRTA would have expressly excluded all state lands from its applicability, but during the deliberative process the exclusion was omitted.[65] For purposes of MRTA, "person" was defined to include parties, "private or governmental, including the state and any political subdivision or agency thereof."[66] The apparent applicability of MRTA to the state is reinforced by MRTA's declaration that affected interests shall be void "whether such estates . . . are or appear to be held or asserted by a person . . . private or *governmental* . . . except . . . any right, title, or interest of the United States, Florida or any of its officers, boards, commissions or other agencies *reserved in the patent or deed by which the United States, Florida, or any of its agencies parted with title.*"[67] Thus, as originally passed in 1963, MRTA was on its face applicable to state lands, unless an interest was expressly reserved in the original patent or deed.[68]

B. *Impact of Pre-*Coastal *Cases*

The potential application of MRTA to sovereignty lands was not widely recognized until the Florida Supreme Court addressed the issue in *Odom v. Deltona Corp.*[69] in 1976. Lower courts read the *Odom* decision as a determination that MRTA would confirm sovereignty lands in the hands of deedholders.[70] *Odom*, like many subsequent cases, involved two claimants to the same parcel of land. The first claimant (the deedholder) showed a chain of title back to the

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64. The original exceptions to the applicability of MRTA were:

A. Defects and reservations revealed in the root of title. *Id.* § 712.03(1).

B. Claims preserved by the filing of notice within the thirty-year period. *Id.* § 712.03(2).

C. Rights of persons in possession of the land, for as long as that person remains in possession. *Id.* § 712.03(3).

D. Estates, interests and claims arising out of title transactions within the thirty-year period. *Id.* § 712.03(4).

E. Recorded or unrecorded easements of servitudes which are at least partially in use. *Id.* § 712.03(5).

F. Rights of any person in whose name the land is assessed for tax purposes. This protection is preserved for three years after the land is last assessed to the person. *Id.* § 712.03(6).

G. Interests reserved in the patent or deed by which the United States, Florida, or any of its agencies parted with title. *Id.* § 712.04.

65. Powell, *supra* note 55, at 612.

66. FLA. STAT. § 712.01(1) (1985).

67. *Id.* § 712.04 (emphasis added).

68. *But see* Powell, *supra* note 55, at 612-14 (suggesting that, in light of the evidence supporting a contrary legislative intent, the "strict construction against the state was extraordinary").

69. 341 So. 2d 977 (Fla. 1976). Prior to *Odom*, the issue had been raised in the Fourth District Court of Appeal between two private litigants. *See* Sawyer v. Modrall, 286 So. 2d 610, 612-13 (4th D.C.A. 1973) (MRTA quiets title to state agency's grant of submerged lands), *cert. denied*, 297 So. 2d 562 (Fla. 1974).

70. *See* State v. Contemporary Land Sales, Inc., 400 So. 2d 488, 492 (Fla. 5th D.C.A. 1981) (MRTA perfects title in a private owner to lands which would otherwise be owned by the state as sovereign); City of Miami v. St. Joe Paper Co., 347 So. 2d 622, 625 (3d D.C.A. 1977) (MRTA precludes city's claim to certain lands submerged under navigable waters), *aff'd*, 364 So. 2d 439 (Fla. 1978); *see also* Starnes v. Marcon Inv. Group, 571 F.2d 1369, 1370 (5th Cir. 1978) (state claim to sovereignty lands extinguished under MRTA).

Trustees. The deedholder argued that the original deed was clear. The Trustees conveyed and the predecessor in interest had paid for every acre in the parcel at issue. Thus, the deedholder concluded that he owned the land, free and clear, because he could trace his title back to the Trustees' deed and had paid taxes on the land for years.

The second claimant (the sovereignty claimant) raised the sovereignty lands issue in defense. The sovereignty claimant alleged that the Trustees' conveyance contained a tacit or implied reservation of sovereignty lands. Thus, although the deed was absolute on its face, the Trustees had retained title to sovereignty lands. Moreover, prior to 1919, the Trustees lacked authority to sell sovereignty lands.[71]

C. *Disposing of the Sovereignty Lands Claim Without Trial*

In cases litigated before *Coastal*,[72] courts faced with these conflicting claims consistently found ways to rule without addressing the fact-intensive questions of historic navigability and the landward extent of the waterbody.[73] In *Odom* and the cases which followed, the courts set forth three separate rules of law, each independently determinative of the sovereignty lands issue.[74]

1. Contemporaneous Finding

Courts deemed the factual issue of navigability to have been considered and decided by the executive branch of government when the Trustees delivered

71. Act of June 5, 1913, ch. 6451, 1913 Fla. Laws 122. The original conveyances were generally drawn with great deliberation. The nineteenth century Trustees clearly knew how to write in express reservations of sovereignty claims; they had developed a refined vocabulary for just this purpose, and used it on numerous occasions, both to reserve mineral interests (by express reservation) and sovereignty interests (by exclusion).

72. *E.g.*, Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976); Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6 (2d D.C.A. 1984), *quashed*, 492 So. 2d 339 (Fla. 1986); Board of Trustees v. Paradise Fruit Co., 414 So. 2d 10 (5th D.C.A. 1982), *petition for review denied*, 432 So. 2d 37 (Fla. 1983). An exhaustive discussion is found in MARKETABLE RECORD TITLE ACT STUDY COMMISSION, FINAL REPORT & RECOMMENDATIONS 254-55 (Feb. 15, 1986) (citing cases) [hereinafter cited as FINAL REPORT].

73. The applicability of MRTA to sovereignty lands involves two questions: (1) whether on Mar. 3, 1845, the waterbody in question was capable of supporting navigation, as defined under the federal title test; and (2) where the OHWL would have fallen had there been no avulsive changes in the water level over the past 140 years. Under the federal title test, navigability "is based on the water body's potential for commercial use in its ordinary and natural conditions." *Odom*, 341 So. 2d at 988.

74. *See infra* text accompanying notes 75-79. Some commentators are highly critical of *Odom* because the issue was appealed from the trial court's summary judgment determination that the waters in question were non-navigable. *See* Powell, *supra* note 55, at 610-12. This objection appears to assume that the *Odom* court's reference to Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), amounted to an implicit determination of navigability. *See also* Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6 (2d D.C.A. 1984), *quashed*, 492 So. 2d 339 (Fla. 1986). The counterargument is that the issue of navigability in 1845 could never be decided on summary judgment because navigability is a question of fact. Thus, the only way the supreme court could properly address and decide the issue was by applying one of the summary bases of decision. *See* Rosen, *supra* note 17, at 603-10.

the original deed to private landowners. In other words, the Trustees' deed was the government's official written determination that any waterbodies contained within the lands conveyed were non-navigable.[75]

2. Estoppel

Under the property law doctrine of legal estoppel, a grantor conveying by warranty deed is prohibited from later denying that he had the authority to convey the land described in the deed.[76] This doctrine applies to remote grantees on both sides of the conveyance. The courts have thus held the state is estopped from denying that the nineteenth-century Trustees had authority to convey submerged lands[77] even if the lands were in fact sovereignty lands by reason of the navigability of the surface water.[78]

3. MRTA

If the landowner can show a clean patent or deed out of the sovereign, an uninterrupted chain of ownership deriving from a recorded root of title, and that none of the MRTA exceptions are applicable, then MRTA vests title to the submerged lands in the record owner regardless of navigability or sovereignty.[79]

In recent years the sovereignty lands controversy has been actively addressed by the fourth estate.[80] The issue was often phrased in terms which were both general and emotionally laden. Should MRTA be the basis for a land grab by the phosphate industry or, alternatively, should the amendment of MRTA be a pretext for a land grab by the DNR? The much narrower reality of the controversy was lost in a cloud of misinformation and shallow analyses. MRTA became the villain; the two other independent bases were overlooked.

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75. *E.g., Odom*, 341 So. 2d at 984; *see also* Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6, 8 (2d D.C.A. 1984), *quashed*, 492 So. 2d 339 (Fla. 1986).

76. *See* Trustees of Internal Improvement Fund v. Lobean, 127 So. 2d 98 (Fla. 1961). Lobean purchased a government lot, stipulated to be submerged sovereignty lands, by Murphy Act deed in 1946. The Trustees proposed to sell the same governmental lot to another in the late 1950's, alleging that the 1946 deed to Lobean was void. The court held that the Trustees were legally estopped from denying the validity of the earlier deed. *Id.* at 104.

Lobean was not required to prove "special and exceptional circumstances" to establish a case of *equitable* estoppel against the Trustees. *Id.* at 101-02; *see also* Trustees of Internal Improvement Fund v. Claughton, 86 So. 2d 775, 792 (Fla. 1956) (when state agency has consistently treated owners of island as though title included submerged lands, by acquiescing in grantees' acts of ownership, state agency is estopped from questioning title to these lands).

77. The Trustees would deny their authority to convey by claiming that the surface water was navigable, and thus the subjacent lands were sovereignty lands not alienable by the Trustees.

78. *Odom*, 341 So. 2d at 977, 987-89; Trustees of Internal Improvement Fund v. Lobean, 127 So. 2d 98, 103-04 (Fla. 1961); *see* Rosen, *supra* note 17, at 596-600.

79. *See* Department of Natural Resources v. Bronsons, Inc., 469 So. 2d 214 (Fla. 5th D.C.A. 1985); Board of Trustees v. Paradise Fruit Co., 414 So. 2d 10 (5th D.C.A. 1982), *petition for review denied*, 432 So. 2d 37 (Fla. 1983). In both these cases MRTA was the sole summary ground used by the court in holding for the deedholders.

80. *See, e.g., MRTA: Protective Plan Merits Passage*, Tallahassee Democrat, Jan. 31, 1986, at 10A, col. 1.

Inevitably the controversy focused on the legislature as the original author of MRTA. In 1978, the legislature was called back into a special session by the Governor to consider "legislation for the protection of the State's lands."[81] During the special session, the legislature passed a bill which added a seventh MRTA exception.[82] Under this new exception, MRTA cannot be used to extinguish sovereignty lands claims.[83] Although requested to do so, the legislature refused to address the question of retroactivity,[84] and the courts, when called upon to interpret the effect of the exclusion, ruled that its effect was prospective only.[85] The status quo ante was maintained for a number of years; only those titles which "matured" after the 1978 amendment were affected.

The legislature also appointed a State Lands Study Committee to address the issue.[86] This Committee issued its report in March, 1979.[87] Subsequently, the staff of the Senate Committee on Natural Resources and Conservation,[88] and the staff of the House Committee on Natural Resources[89] presented additional reports. The legislature, however, took no further action until 1985 when it passed a bill temporarily suspending the application of MRTA to sovereignty lands and section sixteen school lands.[90] The bill also created a Marketable Record Title Act Study Commission to further study the issue.[91] This

81. Proclamation of Governor (June 2, 1978), *reprinted in* FLA. H.R.J. 1 (Spec. Sess. 1978). The session began June 7, 1978. On June 6, the Trustees passed a resolution urging the legislature to except sovereignty lands from MRTA's application.

82. Act of June 15, 1978, ch. 78-288, § 1, 1978 Fla. Laws. 820, 820 (codified at FLA. STAT. § 712.03(7) (1985)).

83. "Such marketable record title shall not affect or extinguish the following rights: . . . (7) State title to lands beneath navigable waters acquired by virtue of sovereignty." FLA. STAT. § 712.03(7) (1985).

84. *See* Powell, *supra* note 55, at 613-14.

85. *See* Askew v. Sonson, 409 So. 2d 7 (Fla. 1981); Board of Trustees v. Paradise Fruit Co., 414 So. 2d 10 (5th D.C.A. 1982), *petition for review denied*, 432 So. 2d 37 (Fla. 1983); Laney v. Board of Trustees, No. 79-1192 (16th Cir. Ct. June 30, 1980) (final summary judgment), *aff'd*, 399 So. 2d 408 (Fla. 3d D.C.A. 1981); American Cyanamid Co. v. Board of Trustees, No. GCG-80-290 (Fla. 10th Cir. Ct. July 27, 1981). In other respects, the bill was narrowly construed. *See Sonson*, 409 So. 2d at 15 (holding the bill did not apply to section sixteen school lands); State v. Contemporary Land Sales, Inc., 400 So. 2d 488, 492 (Fla. 5th D.C.A. 1981) (holding the bill did not apply to sovereignty lands no longer under navigable waters).

86. Act of June 16, 1978, ch. 78-301, § 1, 1978 Fla. Laws 866, 866.

87. STATE LANDS STUDY COMMITTEE, FINAL COMMITTEE REPORT (Mar. 1979).

88. STAFF OF SENATE COMM. ON NATURAL RESOURCES & CONSERVATION, A REVIEW OF THE MARKETABLE RECORD TITLE ACT (CHAP. 712, F.S.) AND ITS OPERATION AGAINST STATE OWNED LANDS (Jan. 1983).

89. HOUSE COMM. ON NATURAL RESOURCES, OVERSIGHT REPORT ON THE MARKETABLE RECORD TITLE ACT (Feb. 5, 1985).

90. Act of June 7, 1985, ch. 85-83, § 1, 1985 Fla. Laws 578, 578 (codified at FLA. STAT. § 712.02(2) (1985)). The subsection was to be automatically repealed on Oct. 1, 1986. *Id.* During the period of its applicability, the Circuit Court in Brevard County declared this section unconstitutional. Saunders v. Board of Trustees, No. 85-5910-CA-B (Fla. 18th Cir. Ct. Dec. 3, 1985). No other cases had an opportunity to challenge the moratorium prior to the Florida Supreme Court's *Coastal* decision.

91. Act of June 7, 1985, Ch. 85-83, § 2, 1985 Fla. Laws 578, 579. The 1985 legislature thus postponed wrestling with the tough political issue of the retroactivity of the 1978 amendment. *See supra* text accompanying notes 82-85 and *infra* text accompanying notes 238-39

Commission met on a number of occasions, and ultimately, in a 9-8 split, jointly issued majority and minority reports, with attached recommended legislation. The majority report offered a complex bill which would have granted limited retroactive effect to the 1978 sovereignty lands exception.[92]

The report and the two bills were forwarded to the legislature. However, going into the final days of the 1986 session, the legislature still showed no sign of resolving the issue. When the supreme court handed down the *Coastal* decision, holding that MRTA did not divest the state of sovereignty lands, the legislature breathed a collective sigh of relief, took no action on MRTA, and adjourned.

IV. THE *Coastal* DECISION

A. *Background — A Tale of Two Companies*

The Florida Supreme Court's decision in *Coastal* is an intermediate resting point along an unfinished highway of litigation begun a decade ago. The dispute began as a squabble over money between two companies. After early flashes of brilliant tactical legal manuevering, the litigation underwent a metamorphosis and became a vehicle for arguing a major public law issue — ownership of Florida's lakes and rivers. Following the supreme court's resolution of the public law issue, the private litigation will continue, probably as protracted trench warfare in circuit court.

As one small part of the overall sale of 20 million acres of S&O lands, the Trustees deeded out 80 acres of land located in Polk County through which the Peace River flowed.[93] The deed followed the customary form in that sections or parts of sections were conveyed for the going rate of one dollar per acre.[94] The deed contained no express reservation of the state's interest in the land beneath the Peace River even though the river's location was plainly evident on existing maps and surveys.[95] Subsequently, title passed to Mobil Oil Corporation which mined phosphate from portions of the land near the river.[96] This deed was merely one of many similar transactions involving lands in Polk and Hillsborough Counties and along the Peace and Alafia Rivers.[97]

92. *See* FINAL REPORT, *supra* note 72.

93. *See* Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 421 (11th Cir.) (describing the original deed under which Mobil claimed title), *cert. denied*, 459 U.S. 970 (1982).

94. *See* Deed No. 3,191 (Nov. 20, 1862).

95. *Id.; see also* Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 421 (11th Cir.) (describing contents of deed), *cert. denied*, 459 U.S. 970 (1982). The surveyors' notes, made in May, 1855, when the section lines were run, indicate the existence of the Peace River, and further note "gigantic live oaks" along the section line near the river. *See* 200 SURVEYORS' NOTE 208 (1855). It seems that part of the land now alleged to be navigable bore these gigantic oaks.

96. The phosphate operations did not involve mining the rivers, but rather the adjacent dry lands.

97. The most notable transfers were the 1883 deeds from the Trustees to American Cyanamid Co. and Estech, Inc., which were at issue in *Coastal*. These are discussed in Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6, 7 (2d D.C.A. 1984), *quashed*, 492 So. 2d 339 (Fla. 1986).

In 1941, having sold off the bulk of the S&O lands,[98] the Trustees set off in a new direction. They were convinced that oil could be found beneath Florida's coastal and inland waters, which would lead to handsome royalties for the state.[99] They entered into exploration contracts granting private companies the right to explore for oil, gas, or other minerals[100] beneath sovereignty lands. If the companies satisfied certain diligence requirements, they were granted full-blown oil and gas leases.[101]

That same year, 1941, Exploration Contract No. 224 was granted to Coastal Petroleum Company[102] covering the Gulf coast from Port Charlotte to Apalachicola[103] together with certain bays and named river bottoms. Almost immediately, Coastal and the Trustees fell into the first of a series of disputes. Prior to granting the actual lease, the parties disagreed about whether Coastal had satisfied the diligence requirements under the original exploration contract[104] and about the potential environmental impact of oil slicks in the Gulf.[105] Drilling Lease No. 224-B was ultimately awarded to Coastal in 1946.[106]

The record does not show what Coastal paid for the lease. Whatever the price, it probably paid too much because a year later the lease of Gulf waters became essentially worthless. In 1947 the United States Supreme Court held that the federal government has "paramount rights in and power over" the lands extending three miles seaward from a coastline.[107] Lease No. 224-B was modified to reflect this decision.[108]

Round two occurred in 1954 when the Trustees took the position that the grant of "other minerals" was limited to minerals which came from wells, not mines. This triggered another flurry of litigation.[109] Having battled through two

98. *See supra* text accompanying notes 28-42.

99. Burns v. Coastal Petroleum Co., 194 So. 2d 71, 72 (Fla. 1st D.C.A. 1966), *cert. denied*, 389 U.S. 913 (1967).

100. *See* Drilling Lease No. 224-B (as modified) between Trustees of the Internal Improvement Fund Book and Coastal Petroleum Co., § 2, at 6 (Feb. 27, 1947) (filed Apr. 9, 1954, at Deed Book 980, p. 418, of the Public Records of Polk County, Fla.) [hereinafter cited as 1947 Lease]. The lease focuses almost exclusively on oil and gas. The "other minerals" were an afterthought. *See* Collins v. Coastal Petroleum Co., 118 So. 2d 796, 798-801 (Fla. 1st D.C.A. 1960) (discussing interpretation of contract).

101. *See* Burns v. Coastal Petroleum Co., 194 So. 2d 71, 73 (Fla. 1st D.C.A. 1966), *cert. denied*, 389 U.S. 913 (1967).

102. Coastal Petroleum Co. was then named "Arnold Oil Explorations, Inc." The corporate name was changed in 1946. *See* 1947 Lease, *supra* note 100, at 2.

103. The tidewater leases ran from the mean low water mark out 10.36 statute miles. 1947 Lease, *supra* note 100, at 2; *see also* Burns v. Coastal Petroleum Co., 194 So. 2d 71, 72 (Fla. 1st D.C.A. 1966), *cert. denied*, 389 U.S. 913 (1967).

104. *See* Burns v. Coastal Petroleum Co., 194 So. 2d 71, 73 (Fla. 1st D.C.A. 1966), *cert. denied*, 389 U.S. 913 (1967).

105. *Id.*

106. *Id.* at 75.

107. United States v. California, 332 U.S. 19, 38 (1947). United States v. Texas, 339 U.S. 707 (1950), predictably extended this principle to the waters of the Gulf of Mexico. The Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (1982), later transferred title to these lands to the states.

108. *See* 1947 Lease, *supra* note 100.

109. *See* Collins v. Coastal Petroleum Co., 118 So. 2d 796 (Fla. 1st D.C.A. 1960). The court affirmed the chancellor's decree holding that the 1947 Lease included phosphate ores, notwith-

trials and two appeals over what minerals were covered by Lease No. 224-B, they next fought over what lands were included in it. In the 1960's Coastal filed suit to determine whether the lease included the bottom of Lake Hancock, a meandered lake forming the headwaters of the Peace River.[110] Coastal prevailed at trial, only to lose on appeal.[111]

In the meantime, Coastal had hired Mobil Oil Company to perform certain drilling work. Pursuant to a sublease agreement, Mobil was to receive an interest in Lease No. 224-B production as compensation. A dispute arose over interpretation of the sublease.[112]

Mobil sued Coastal, seeking a declaration of its rights.[113] Coastal counterclaimed, raising a far broader question than the interpretation of the sublease. It claimed that Mobil, in its capacity as a riparian landowner and phosphate extractor, had converted huge quantities of phosphate ore belonging to Coastal. Mobil later filed a reply counterclaim, seeking a declaratory judgment to remove the cloud cast on Mobil's title to the submerged land. The Trustees were brought into the case as a necessary party to the quiet title action.[114] After years of fighting,[115] Coastal and the Trustees found themselves on the same side of a lawsuit.

Resolution of the conversion counterclaim turned on which corporation had the right to extract phosphate from lands bordering a ten mile stretch of the Peace River. Mobil claimed title to the fee interest under deeds from the Trustees. Coastal argued that the deeds, while facially absolute, were ineffective to convey submerged bottoms. It argued that the Peace River was navigable and

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standing the Trustees' contrary resolution passed March 23, 1954. It added that the Trustees were entitled to a 10% royalty on such ores. *Id.* at 802-03. Coastal first made an abortive attempt to have the entire question litigated in federal court. *See* Coastal Petroleum Co. v. Collins, 135 F. Supp. 203 (N.D. Fla. 1954), *modified*, 234 F.2d 319 (5th Cir. 1955).

110. *See* Burns v. Coastal Petroleum Co., 194 So. 2d 71, 72 (Fla. 1st D.C.A. 1966), *cert. denied*, 389 U.S. 913 (1967).

111. *Id.* at 75. The opinion contains some curious inconsistencies which foreshadow the problem in *Coastal*. The government surveyors meandered the Peace River from Port Charlotte north to the boundary between Townships 38 and 39, a distance of less than 10 miles. Lease No. 224-B covers "Peace River to Township 29/30," a distance over 54 miles north of where the meander line stopped. *Id.* at 74. This grant implies that the Trustees had authority to convey the submerged bottoms of the Peace River north to that point; and so by implication, that these were sovereignty lands. Yet the court states in the same paragraph: "Peace River north of Township 38/39 is not meandered and does not belong to the State. That is, Peace River for a distance 40 miles [sic] south of Lake Hancock is in private ownership." *Id.*

112. Mobil's sublease was a traditional farm-out arrangement. Mobil was to pay the royalties to the landowner (the Trustees) and perform the specified drilling work. It would earn a one-half interest in the lease. The agreement stipulated that if the acreage covered by Coastal's lease was diminished, Mobil's obligations would be proportionately reduced. It was this feature of the lease that triggered Mobil's action against Coastal in Leon County Circuit Court.

113. *See* Board of Trustees v. Mobil Oil Corp., 455 So. 2d 412, 413 (2d D.C.A. 1984) (discussing 1976 action in Leon County), *aff'd in part, rev'd in part*, 492 So. 2d 339 (Fla. 1986). Counterclaims in the Leon County case are still pending.

114. *Cf.* FLA. STAT. § 253.02(5) (1985) (Board of Trustees is a necessary party in actions seeking to acquire submerged lands); *id.* § 65.041 (persons not parties to a quiet title action not bound by adverse judgment).

115. *See supra* text accompanying notes 102-12.

thus the bottoms were, at the time of conveyance by the Trustees in 1862, inalienable sovereignty lands. The 1946 Drilling Lease was the first and only *effective* conveyance of these lands by their rightful owner, the State of Florida.

The resulting situation was ironic. Coastal, as lessee under Lease No. 224-B, in effect, bought the Brooklyn Bridge when it leased thousands of square miles of land under the Gulf of Mexico from someone other than its rightful owner.[116] Thirty years later it sought to turn the tables and argue that Mobil had also bought the Brooklyn Bridge from the same vendor, the Board of Trustees of the Internal Improvement Fund.

Coastal next took the initiative by bringing multiple actions in federal court against the five major phosphate companies (other than Mobil) who had conducted mining operations on land near the Peace and Alafia Rivers.[117] Coastal used the same theory it used in the Mobil counterclaim, arguing that each of the defendants had converted phosphate ore belonging to Coastal under the 1946 lease.

A brushfire thus grew into a major conflagration. Lease No. 224-B became potentially very valuable. Although oil and gas had never been produced, a lot of phosphate had been mined along the Peace River. Coastal claimed the phosphate was all mined for its benefit because it alone was the true owner of the minerals.[118] Counsel to Coastal, now on the offensive, had formulated a $3 billion case.[119]

Coastal also persuaded the Trustees to join as voluntary plaintiffs in some of the federal court actions.[120] The alliance made sense. If Coastal prevailed, the Trustees would be entitled to a ten percent royalty[121] on $3 billion of phosphate ore allegedly converted. From Coastal's perspective, the presence of

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116. *See supra* note 107 and accompanying text.

117. *See* Coastal Petroleum Co. v. U.S.S. Agri-Chemicals, 695 F.2d 1314 (11th Cir. 1983) (consolidation of four cases); Coastal Petroleum Co. v. American Cyanamid Co., 673 F.2d 1343 (11th Cir.) (vacating trial court decision without opinion). These five cases, together with Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir.), *cert. denied*, 459 U.S. 970 (1982), dissolved injunctions granted by the trial court prohibiting the deedholders from prosecuting quiet title actions in the state courts.

118. Any interest the state once had in the phosphate ore was transferred to Coastal by Lease 224-B. Collins v. Coastal Petroleum Co., 118 So. 2d 796, 802-03 (Fla. 1st D.C.A. 1960).

119. Counsel had, at least temporarily, succeeded in getting the issue of who owned land in Polk County away from the local courts, where they may have expected adverse trial court judgments followed by nonappealable *per curiam affirmed* decisions by the Second District Court of Appeal. *See* FLA. CONST. art. V, § 3 (Florida Supreme Court has no jurisdiction over *per curiam affirmed* judgments).

120. The Trustees are listed as "involuntary plaintiffs"in the litigation against Estech (formerly Swift Agricultural Chemicals Corp.) and Grace. Coastal Petroleum Co. v. U.S.S. Agri-Chemicals, 695 F.2d 1314, 1314 (11th Cir. 1983). They joined voluntarily in Coastal's actions against the other four: Mobil, American Cyanamid, U.S.S. Agri-Chemicals, and International Minerals & Chemical. No explanation is found in the reported cases to explain the Trustees' differing postures. The Trustees were joined by Mobil in its reply counterclaim because the Trustees were a necessary party. *See supra* note 114 and accompanying text. The federal court actions were for conversion, not to quiet title, so the Trustees were not indispensable parties in those suits.

121. 1947 Lease, *supra* note 100 (as interpreted in Collins v. Coastal Petroleum Co., 118 So. 2d 796 (Fla. 1st D.C.A. 1960)).

the Trustees added legitimacy to its claim and permitted it to pose as the defender of the public interest in an attack on the phosphate industry.

A classic procedural skirmish followed. Coastal fought to preserve federal jurisdiction; the deedholders sought to get the issue before a Polk County Circuit Court. The deedholders ultimately prevailed.[122] Beginning in late 1980, seven phosphate companies filed thirteen quiet title actions covering some 50,000 acres of Polk County.[123] In each case the trial court held for the plaintiff phosphate company.[124] The Trustees' deeds trumped the 1946 lease.

The Trustees or Coastal appealed seven of the thirteen actions. The Second District Court of Appeal summarily affirmed four of the actions, and affirmed the other three actions in a written opinion which largely restated *Odom*.[125] The deedholders prevailed on three familiar independent summary grounds: (1) by issuing the deed, the Trustees contemporaneously determined that the included portions of the Peace River were not navigable; (2) even if navigable, the Trustees are now legally estopped to deny either their ownership of the lands on the date of sale or their authority to convey; and (3) in any event, MRTA

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122. Coastal sought to establish federal jurisdiction on both federal question and diversity grounds. Coastal argued the case presented a substantial federal question because whether the disputed lands were sovereignty lands depended upon the navigability of the Peace River on March 3, 1845. Lands received by the state from the United States under the equal footing doctrine would be sovereignty lands and not subject to alienation. After determining it had federal question jurisdiction, the district court enjoined the prosecution of state court quiet title actions begun by the deedholders. Coastal Petroleum Co. v. U.S.S. Agri-Chemicals, 695 F.2d 1314, 1317 (11th Cir. 1983).

The deedholders appealed, arguing both that the trial court's order violated the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), and that the district court lacked jurisdiction. In a previous case, Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419 (11th Cir.), *cert. denied*, 459 U.S. 970 (1982), the Eleventh Circuit had held that the navigability issue presented no federal question, because under Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977), state law determines the extent of sovereignty lands retained in the state. *Mobil Oil*, 671 F.2d at 424.

In *Agri-Chemicals*, the Eleventh Circuit ruled that diversity jurisdiction did exist, because the Trustees are a body separate from the State of Florida and thus citizens of Florida for diversity purposes. *Agri-Chemicals*, 695 F.2d at 1317-18. Although the district court had jurisdiction, the Eleventh Circuit held that the district court had abused its discretion in issuing the injunction. The district court had issued the injunction under one of the exceptions to the Anti-Injunction Act to protect its jurisdiction. The Eleventh Circuit determined that the case presented no federal question, only state law would apply, and no compelling need for federal jurisdiction existed. *Id.* at 1318-19.

The Mobil litigation began in state court. Coastal successfully removed to federal court under 28 U.S.C. § 1441 (1982) on the ground that a substantial federal question was involved. *Mobil*, 671 F.2d at 420. This litigation was subsequently dismissed for lack of jurisdiction by the Eleventh Circuit, and remanded to the state courts. *Id.* at 426. Coastal also sought unsuccessfully to remove the quiet title actions to federal court in Tampa.

123. This is approximately 5% of the total land area of Polk County, a county encompassing some 40 townships, each containing 36 square miles.

124. *E.g.*, Mobil Oil Corp. v. Coastal Petroleum Co., No. GCG-82-3250 (Fla. 10th Cir. Ct. May 24, 1983).

125. Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6 (2d D.C.A. 1984), *quashed*, 492 So. 2d 339 (Fla. 1986).

extinguishes any claim that the state might have had, including any sovereignty lands claim.[126]

The district court found that the issues it addressed were of great public importance, and certified three questions to the Florida Supreme Court:

> 1. Do the 1883 swamp and overflowed lands deeds issued by the Trustees include sovereignty lands below the ordinary high water mark of navigable waters?[127]
>
> 2. Does the doctrine of legal estoppel or estoppel by deed apply to the 1883 swamp and overflowed deeds barring the Trustees' assertion of title to sovereignty lands?
>
> 3. Does the Marketable Record Title Act . . . operate to divest the Trustees of title to sovereignty lands below the ordinary high water mark of navigable rivers?[128]

B. *The Court Decides*

The three questions were certified on July 13, 1984. The court heard oral argument on May 6, 1985. In the year between argument and the court's ultimate decision, the sovereignty lands question became the subject of scrutiny in the legislature and the editorial pages.[129] On May 15, 1986, the court answered all three certified questions in the negative, a complete victory for Coastal

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126. *Id.* at 8-9.

127. The court's formulation of the first question does not expressly mention the contemporaneous findings aspect of its analysis. This proved to be important, given the Florida Supreme Court's treatment of the first question. *See infra* text accompanying notes 130-34.

128. Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6, 9-10 (2d D.C.A. 1984), *quashed*, 492 So. 2d 339 (Fla. 1986).

129. An uncommon delay followed oral argument, and speculation grew as to its cause. One member of the court who heard oral argument, Justice Alderman, retired from the court. A special MRTA commission headed by former Speaker of the House Hyatt Brown was appointed. The commission convened, heard testimony, and filed a report nearly evenly-divided on what the legislature should do to cure the MRTA problem. *See* FINAL REPORT, *supra* note 72. The 1986 legislative session began with several bills pre-filed on the MRTA question.

On Wednesday, May 14, 1986, with the waning legislative session having reached no consensus on MRTA, a Tallahassee radio station reported that the *Coastal* decision would be handed down on May 22, and that it would be in favor of the state. The radio report proved correct, except as to timing. The opinion was published the next day.

The political fight is not without irony. Coastal and the Trustees gained the high moral ground, casting their position as one prompted by environmental concerns. However, the more liberal advocates of the Coastal/Trustees position might be surprised to learn that their efforts, if successful, would inure to the benefit of the family of William F. Buckley, Sr., which controls Coastal. *See* S. Miller, UPI wire story (Feb. 7, 1982).

The irony was not lost on the Chief Justice:

> Contrary to the various suggestions that the present cases pertain to issues of environmental protection, it should be made known that what these cases involve is money. . . .. [T]here is no showing that if the board prevails, phosphate mining will cease. . . . [A]ny lingering notions that these cases concern ecology should be dispelled.

Coastal, 492 So. 2d at 349 (Boyd, C.J., dissenting).

and the Trustees. Justice Shaw's majority opinion moved briskly through the three questions.

1. The Contemporaneous Determination Issue

The first question received the most ink. The court treated the question certified — does a S&O lands deed include any sovereignty lands that happen to lie within the deed's legal description — literally. The majority presupposed the Peace River was navigable at statehood and that the case, therefore, involved true sovereignty lands.[130]

The court's analysis was logical and straightforward.[131] Title to all sovereignty lands was automatically vested in the legislature on March 3, 1845 under the equal footing doctrine. Title to S&O lands was vested in the Trustees piecemeal as they received federal patents under the Swamp and Overflowed Lands Act. At the time of the original conveyance into private hands, the Trustees had title to S&O lands, but did not have title to the sovereignty lands. Under general rules of property law, a grantor cannot convey that which he does not own. Therefore, the Trustees' deeds could not and did not convey title to the sovereignty lands. Even if the Trustees fully intended to convey the submerged bottoms, and even if the grantees believed in good faith that they were receiving title to all the acreage they paid for, the result was the same.

One can hardly quarrel with this logic. Case law has long distinguished between S&O and sovereignty lands, traditionally on the basis of how easily these lands could be sold to private parties. S&O lands have always been freely alienable by the Trustees. One can even argue that the federal patents naming the state as grantee impose on the state an affirmative duty of prompt retransfer to private hands, so as to implement the underlying congressional policy of reclamation.[132] Conveyances of sovereignty lands have been upheld by the courts, but only after scrutiny of the transaction to determine whether the conveyance was both deliberate and pursuant to some finding of an attendant public interest.[133] The novelty in *Coastal* is one of emphasis. The traditional policy-based

130. *Cf. Coastal*, 492 So. 2d at 342-43. Nowhere in the prior course of the litigation is the Peace River characterized as navigable. All prior cases treated navigability as the issue to be decided. The Trustees used this as the basis of their claim of federal question jurisdiction: "[W]hether a river is navigable so that the submerged lands pass to the state at statehood is a federal question supporting federal jurisdiction." Mobil Oil Corp. v. Coastal Petroleum Co., 671 F.2d 419, 423 (11th Cir.), *cert. denied*, 459 U.S. 970 (1982).

131. *See* 492 So. 2d at 342-43.

132. The Swamp and Overflowed Lands Act of 1850, 43 U.S.C. §§ 981-994 (1982), contemplates reclamation by private interests. The Trustees were hardly dilatory in their conveyancing to private hands. No occasion existed for a developer to pursue an action in mandamus against the Trustees to compel more rapid sale of the S&O lands.

133. The rules here have shifted over time. The earliest case, State v. Black River Phosphate Co., 32 Fla. 83, 13 So. 640 (1893), construed a statute which arguably extended all riparian titles along navigable rivers from the OHWL down to the edge of the channel. The court narrowly construed the statute, holding that only those riparian landowners who built wharves connecting the OHWL and the channel edge received title to the sovereignty bottoms, and then only to a limited extent. 32 Fla. at 114-15, 13 So. at 650.

The *Black River Phosphate* court began by distinguishing between S&O and sovereignty lands.

distinction — the notion that greater deliberation must attend the sale of sovereignty lands — was overwhelmed by a new, mechanical distinction. During the nineteenth century, the executive branch owned the S&O lands and the legislative branch owned the sovereignty lands. Based solely on this mechanical distinction, the majority concluded that the 1883 Trustees' deeds did not convey sovereignty lands. The precise question certified was answered: No.

The supreme court, like the first gravedigger in *Hamlet*,[134] was perhaps too literal in its treatment of the first question. The lower court saw this question as an evidentiary one. The dispute it addressed was the navigability *vel non* of an unmeandered ten mile stretch of the Peace River on March 3, 1845, an issue of fact. The issue of law was the weight to be given various governmental actions taken (or not taken) during the nineteenth century. These acts and omissions include the failure of the official surveyors to meander this stretch of the Peace River; the failure of the Trustees to make either an express grant or an express reservation of sovereignty lands in their standard form S&O lands deeds; and the effect of the language of the patents from the federal government to the Trustees. The court below held that the sum of these prior governmental actions amounted to a conclusive determination that the deeds contained no sovereignty lands.[135]

Chief Justice Boyd's dissenting opinion adopts the lower court's view:

> The official surveys containing no meandering showing navigable rivers, the federal patents issued pursuant to congressional authorization under the Swamp and Overflowed Lands Act of 1850, the official state requests for such patents, and the Trustees' deeds of the lands in question as swamp and overflowed lands, taken together, constitute official, contemporaneous determinations that the lands in question were swamp and overflowed lands and that any waters lying thereon were not navigable. The Trustees' determination that land is of a character that gives them the authority to sell it is not subject to collateral attack.[136]

Id. at 84, 13 So. at 641. The opinion first holds that sovereignty lands came to "the state" on March 3, 1845. *Id.* at 93-94, 13 So. at 644. It later suggests that legal title to sovereignty lands is held by the legislature in trust for the people. *Id.* at 98, 13 So. at 645. Since the legislature clearly intended to deed sovereignty lands to private hands — the only ambiguity lay in the extent of the intended grant — the court was forced to conclude that "the state's" title was held by the legislature. *Id.* at 98-99, 13 So. at 645. Otherwise, the purported conveyance would be wholly *ultra vires*, and the entire act unconstitutional.

In 1917, the legislature conveyed title to lands under tidal waters to the Trustees. Act of May 21, 1917, ch. 7304, § 1, 1917 Fla. Laws 116. Title to freshwater sovereignty lands was conveyed in 1969. Act of July 5, 1969, ch. 69-308, 1969 Fla. Laws 1112 (codified as amended at FLA. STAT. § 253.12(1) (1985)). In 1969, the voters added article X, § 11 to the Florida Constitution, expressly conditioning future sales of sovereignty lands upon a finding of public purpose. The addition of article X, § 11 has been interpreted as "a constitutional codification of the public trust doctrine contained in our case law" rather than a substantive change in the law. *Coastal*, 492 So. 2d at 344.

134. "How absolute this knave is! we must speak by the card! or equivocation will undo us." *Hamlet, Prince of Denmark*, act V, scene i, COMPLETE WORKS OF W. SHAKESPEARE 1106 (1975).

135. *See* Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6, 8 (2d D.C.A. 1984), *quashed*, 492 So. 2d 339 (Fla. 1986).

136. *Coastal*, 492 So. 2d at 345 (Boyd, C.J., dissenting).

The majority opinion, on the other hand, devotes only a single sentence to this issue. Meander lines run by the federal surveyors have presumptive effect, but are not conclusive.[137] The majority opinion does not mention the other governmental acts, presumably because they have no evidentiary weight. The chief justice would give the ancient governmental acts conclusive weight. The majority holds that these acts create, at best, a rebuttable presumption against navigability.

2. The Estoppel Issue

The next certified question raised two separate issues, one concerning the doctrine of legal estoppel, completely ignored in the majority opinion, and the second, the related doctrine of estoppel by deed. The majority opinion emphasized the *legislative* ownership of sovereignty lands and the *executive* ownership of S&O lands. The general rule is that one may not sell that which one does not own.

A corollary to this rule presented a serious obstacle for Coastal and the Trustees. If a grantor *does* purport to convey that which he does not own, and then later acquires title to the property in question, the after-acquired title inures immediately to the benefit of the original purchaser. The *Coastal* facts offer a textbook case for application of this doctrine of estoppel by deed.[138]

Here the majority restricts its earlier analysis. The you-can't-sell-what-you-don't-own rule operates whether or not the Trustees intended to sell the sovereignty lands. The intent which was earlier irrelevant now becomes crucial. The court stresses that the Trustees in fact did not intend to convey sovereignty lands in their nineteenth century deeds. Because they lacked the requisite intent, the court concludes their subsequent acquisition of title to the lands does not trigger estoppel by deed.[139]

3. The Role of Precedent in the First and Second Certified Questions

The chief justice in his dissent, observes:

> Much has been written and spoken, in the communications media and elsewhere, concerning the legal issues in this case and the related political issues. Many have suggested that the courts are being asked to give away state-owned lands. The truth is that the lands in question

137. *Id.* at 342. In a footnote, the court states that a "meander line creates a rebuttable presumption of navigability." *Id.* at 342 n.1. Presumably the obverse is true, that is, a failure to meander creates a rebuttable presumption of non-navigability.

138. *See* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 278 (2d ed. 1975).

> [T]he better view is that the doctrine [of estoppel by deed] operates to 'feed the estoppel', i.e., it transfers the title automatically to [the grantee under the defective deed], rather than furnishing him with an equitable defense if sued by [the grantor] or his privies. This is the better view because it allows the title examiner to rely on this after-acquired title as a link in the chain of title.

Id.

139. *Coastal*, 492 So. 2d at 343.

> here, as well as other lands, were legally conveyed by authorized state officials.[140]

Through the barriers of judicial restraint, one senses that the chief justice is accusing his brethren of rendering a political decision.

The implicit charge cannot be ignored. The majority opinion, while structured in good legal form, pays but passing attention to the first certified question and wholly ignores one half of the second question. Most of the text is merely a statement of the obvious: you cannot sell what you do not own. A more substantial defect, however, is the majority's treatment of precedent in addressing the first two questions.

The opinion contains a number of citations, but only to ancient cases. The most recent case cited for substance was decided a half century ago,[141] and *Martin v. Busch*,[142] the primary case relied on by the court, was handed down in 1927. Reliance on old precedent, of course, is not bad. Indeed, the process may enhance the notion of the continuity and stability of the law. The problem is that the majority opinion simply ignores the last 50 years of Florida case law.

The omission of two recent supreme court cases is especially troubling. *Odom* presented the court with the same three issues ten years earlier and arose in a factually and procedurally similar fashion.[143] A trial court ruled that certain facially absolute deeds failed to convey submerged bottoms and granted the deedholder's motion for summary judgment against the Trustees.[144] The other sovereignty lands case, *Trustees of the Internal Improvement Fund v. Lobean*,[145] holds legal estoppel is applicable against the Trustees' claim of prior mistake and lack of authority to convey.[146] *Lobean* is completely ignored in the majority opinion, thus raising the question of whether *Coastal* overrules *Lobean* entirely or only in river cases. The majority discusses *Odom* later in its opinion; *Lobean* appears only in the dissent.

4. MRTA, Notice of Navigability and the *Odom* Case

The third certified question involved the operation of MRTA on sovereignty lands. MRTA is an independent means of resolution, totally divorced from the contemporaneous determination and estoppel arguments. The deedholders ar-

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140. *Id.* at 349 (Boyd, C.J., dissenting).

141. *See* Borax Consol. Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) (cited in *Coastal*, 492 So. 2d at 342).

142. 93 Fla. 535, 112 So. 274 (1927).

143. *See supra* text accompanying notes 69-71.

144. *See* Odom v. Deltona Corp., 341 So. 2d 977, 979-87 (Fla. 1976) (quoting trial court opinion in full).

145. 127 So. 2d 98 (Fla. 1961). "Certainly it seems unconscionable for the state, which should set a prime example in integrity to its citizens, to sell land to one of its citizens and then several years later attempt to sell it again on the excuse that it had acted illegally in issuing the first deed." Lobean v. Trustees of Internal Improvement Fund, 118 So. 2d 226, 230 (1st D.C.A. 1960), *aff'd*, 127 So. 2d 98 (Fla. 1961).

146. 127 So. 2d at 104.

gued that MRTA extinguished the state's title to sovereignty lands. Specifically, MRTA extinguishes any non-record interest in land in favor of a deedholder who can show an unbroken thirty-year chain of title.[147] The state's sovereignty lands claim, by its very nature, does not appear of record; thus, according to the deedholders, MRTA vests fee simple title to the alleged sovereignty lands in them.[148]

At this point in its analysis, the majority first addresses *Odom*. The court states:

> Respondents and the courts below rely on [*Odom*] for the proposition that the state's title to navigable water beds previously conveyed as [S&O] lands is extinguished by MRTA. This reliance is misplaced. In *Odom* we rejected the state's argument that the notice of navigability concept applied to the grantees of [S&O] lands under certain trustees' deeds because 'it seems absurd to apply this test to small, non-meandered lakes and ponds of less than 140 acres and, in many cases, less than 50 acres in surface.' The ground on which *Odom* rests is this factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands. Unfortunately, even though this factual determination controlled and resolved the case, we went on to answer irrelevant arguments put to us by the parties . . . . The statements concerning the effect of MRTA on navigable waterbeds were dicta and are nonbinding in the instant case inasmuch as there were no navigable waterbeds at issue in *Odom*.[149]

Thus, the court treats the MRTA issue as one of first impression.

In deciding this point the court turns to the same logical technique it used in analyzing the first certified question. Here, the syllogism of silence runs: (1) sovereignty lands have always been an important asset of the state; (2) MRTA as passed by the 1963 legislature did not make "special reference" to sovereignty lands; therefore, (3) the 1963 "legislature did not intend to make MRTA applicable to sovereignty lands."[150] Significantly, this conclusory analysis contains neither citation to the previous case law developed by the lower courts in the ten-year wake of *Odom*,[151] nor reference to the text or legislative history of either MRTA as enacted in 1963 or the 1978 amendment to MRTA.[152]

Finally, without deciding the issue, the court implies that the legislature could not constitutionally convey sovereignty lands, even if MRTA, as passed

147. FLA. STAT. § 712.04 (1985).

148. *Coastal*, 492 So. 2d at 344.

149. *Id.* (citations omitted). While the court suggests the largest lake in question was 140 acres, an examination of the state maps for Hernando and Volusia Counties indicates some of these lakes are considerably larger. *See* State Topographic Office, General Highway Map of Hernando County (Dec. 1974) (Hunters Lake in Hernando County occupies the greater part of Section 32, Township 23 South, Range 17 East); State Topographic Office, General Highway Map of Volusia County (July 1973) (Lake Dupont, Theresa Lake, and the Lake Butler Chain each appears to be considerably larger than 140 acres).

150. 492 So. 2d at 344.

151. *See supra* note 70 and accompanying text.

152. *See supra* text accompanying notes 54-68 and 79-92.

in 1963, had specifically indicated a legislative intent to do so, "without explicitly basing [the conveyance] on the public interest."[153]

5. Distinguishing Precedents

Coastal may fairly be criticized for its apparent indifference towards precedent. The majority opinion engages in disingenuous descriptions of the two controlling precedents, *Martin* and *Odom*. The court reads *Martin* as establishing an abstract rule of law that Trustees' deeds were subject to an implied notice of navigability.[154]

The later case, *Odom*, is treated as an exception to the *Martin* rule. *Odom* is confined to narrow facts. Ponds of less than a quarter section are apparently non-navigable *per se*. The court dismisses the rest of the opinion as dicta.[155] A fair reading of *Odom* reveals a clear decision that title to unmeandered waterbodies passed to private interests upon conveyance by the Trustees.[156] Accordingly, the state would not be given a day in court to prove that a particular waterbody was navigable at statehood. Thus, regardless of whether the waterbodies were navigable, and the submerged bottoms were therefore sovereignty lands, the deedholder should prevail against the state.

In fairness to the majority, however, the opinion is demonstrably faithful to a deeper level of precedent. The opinion adheres to an established judicial technique for avoiding an unjust result seemingly compelled by precedent. For convenience, this technique is referred to as Birkett's Technique, in honor of the justice of the King's Bench whose opinion is the paradigm.[157]

Professor John Cribbet's casebook on property[158] has long introduced stu-

153. 492 So. 2d at 344. Although the conveyance predated the passage of article X, section 11 of the Florida Constitution, the court found that provision "is largely a constitutional codification of the public trust doctrine contained in our case law." *See generally* SAVE OUR HOMES & LANDS, INC., AN ANALYSIS OF THE IMPACT OF FLORIDA'S MARKETABLE RECORD TITLE ACT ON PUBLIC AND PRIVATE RIGHTS 14-34 (presentation to MRTA Study Commission Aug. 15, 1985) (analyzing public trust doctrine in context of sovereignty lands).

154. *See Coastal*, 492 So. 2d at 342 n.1. *Martin* is a very complicated case, frequently miscited because of its complex facts, the sheer volume of Justice Whitfield's opinion, and errors made in its abstracting and headnoting. The decision is based on a boundary line issue. The Trustees' deed conveyed land, one boundary of which was the OHWL of a stretch of Lake Okeechobee, a navigable but then unsurveyed waterbody. The OHWL changed avulsively between the date of the Trustees' deed and the eventual survey. *Martin* simply holds that the earlier OHWL established the public/private boundary line. Any discussion of an implied notice of navigability is necessarily dicta when, as in *Martin*, the OHWL is an express boundary of land conveyed. *Martin*, 93 Fla. at 571-72, 112 So. at 286.

155. *Coastal*, 492 So. 2d at 344.

156. The lower courts concurred in this suggested interpretation of *Odom*. *See supra* text accompanying notes 69-92. The 1978 Study Commission took the same view of *Odom*. *See* Final Report, *supra* note 72. And, *Odom* was the explicit basis for the legislature's enactment of the anti-*Odom* rule of FLA. STAT. § 712.03(7) (1985). *See* Act of June 15, 1978, ch. 78-288, 1978 Fla. Laws 820; *supra* text accompanying notes 79-92 (discussing the debate surrounding the application of MRTA to sovereignty lands); *infra* text accompanying notes 172-74 (pointing out that *Odom* rose on summary judgment, thus there was no resolution of factual navigability).

157. *Cf.* Hannah v. Peel, [1945] 1 K.B. 509 (per Birkett, J.); *infra* text accompanying notes 164-67.

158. J. CRIBBET & C. JOHNSON, CASES AND MATERIALS ON PROPERTY (5th ed. 1984).

dents to the law of property with the so-called Finders cases, a series of three cases decided by the justices of the King's Bench, which illustrate Birkett's Technique. These cases resolve the question of who, as between the finder of lost property and other legitimate claimants, is entitled to possession. The first case, *Bridges v. Hawkesworth*,[159] concerned a bundle of bank notes found by a traveling salesman on the floor of a shop with which he had dealings. The finder was held entitled to possession as against the shopkeeper.[160]

The second case, *South Staffordshire Water Co. v. Sharman*,[161] concerned two gold rings found at the bottom of a minster pool. The fee owner claimed rights to possession of the rings, on the theory that as owner of the fee interest he had legal possession of all things attached to the land. The finder, a man employed by the fee owner to clean the pool, invoked the finder-keeper rule of *Bridges*. The court ruled in favor of the fee owner based on the legal possession theory advanced by the owner.[162] *Bridges* was distinguished on the grounds that the bank notes were found in a public part of the shop, and were thus never in the legal possession of the shopkeeper.[163]

The final case, *Hannah v. Peel*,[164] concerned a brooch found by Corporal Hannah in a house owned by Major Peel. The major's house had been requisitioned by His Majesty's government during the war. Corporal Hannah was stationed in the house, and came across the brooch while adjusting blackout curtains in the sickbay. Justice Birkett's opinion carefully depicts the corporal as a good and honest fellow, whose conduct was "commendable and meritorious."[165] The court's description of the major suggests that he was something of a cad, profiteering from the war. Given the court's gratuitous evaluation of the intrinsic worth of the two litigants, one is not surprised to find the "right" result is reached. Corporal Hannah gets the brooch.[166]

Reaching the "right" result requires judicial dexterity in the handling of precedent. The *Sharman* rule apparently controls the *Hannah* facts. Justice Birkett, however, distinguishes *Sharman* by calling it an agency case, since the finder was employed by the fee owner. He confines *Sharman* to agency situations, despite the *Sharman* court's express statement that the agency relationship was not outcome determinative.[167] *Bridges* is quoted lavishly in the *Hannah* opinion and becomes the general rule that governs the outcome in favor of the corporal.

159. 21 L.J.Q.B. 75 (n.s. 1851).

160. *Id.* at 78. As in all the finders cases, the courts carefully limit the interest of the victor to that of possession, preserving for an absent ultimate owner the right to one day enter the scene and assert his paramount legal title.

161. [1896] 2 Q.B. 44.

162. *Id.* at 46.

163. *Id.* at 47.

164. [1945] 1 K.B. 509.

165. *Id.* at 521.

166. *Id.*

167. "[Counsel argues that *Sharman*] establishes that if a man finds a thing as the servant or agent of another, he finds it not for himself, but for that other, and indeed that seems to afford a sufficient explanation of the case." *Id.* at 519. This can hardly be squared with the statement in *Sharman* that "there was no special contract between the plaintiffs and defendant as to giving up any articles that might be found." [1896] 2 Q.B. at 44.

Justice Shaw's treatment of precedent in *Coastal* is structurally identical to Justice Birkett's in *Hannah*. *Martin*, like *Bridges*, is treated as an abstract rule of law. Its facts are not even mentioned. *Odom*, like *Sharman*, is distinguished from the earlier case on purely factual grounds, with no inquiry into the reasoning. *Odom* is treated as containing, in effect, no rule of law. Finally, Justice Shaw reaches the "right" result. The state's claim to ownership of submerged bottoms survives both the Trustees' deed and MRTA's enactment.

The Birkett Technique has both its costs and its benefits, whatever the context of its application. The cost is, principally, the confusion of prior precedent. An Orwellian revision occurs. The case that used to mean X now means Y. This cost has both aesthetic and real components. The aesthetic component is always present, acting to disturb the symmetry of the law and, consequently, the minds of students and scholars seeking to make sense of the authorities. The real cost is a function of the magnitude of the intervening reliance. One must ask to what extent parties have relied on the second case in the Birkett trilogy in planning their economic affairs. It is unlikely that a generation of finders relied on *Sharman* only to have their right of possession disturbed by *Hannah v. Peel*. It is far more likely that a decade of parties to real property transactions, both sales and mortgage transactions, relied on *Odom* and its apparent holding that a clear chain of title back to a clean patent or deed out was free of any potential sovereignty lands cloud.[168]

The principal benefit of the Birkett Technique is that it achieves a result thought "just" by the members of the court. Justice Birkett likely believed that he did a small justice to Corporal Hannah. Justice Shaw undoubtedly believes that he worked a great justice for the people of Florida. Indeed, the sub silentio determination that the costs are outweighed by the benefits must always be present whenever a court invokes the Birkett Technique; were it otherwise, the court would naturally follow the easier path of "being controlled" by the more recent precedent.

The secondary benefit of the Birkett Technique is that it adheres to the doctrine of stare decisis. Both *Sharman* and *Odom* remain nominally vital. A direct overruling of *Odom* would admit that it existed as controlling precedent for a decade, giving rise to potentially expensive taking claims by landowners who could demonstrate that rights vested in them under *Odom* were obliterated without compensation by *Coastal*.[169]

6. The Role of Logic and the Meaning of *Coastal*

The basis of the *Coastal* decision is logic, not precedent. More particularly,

168. *See infra* text at § V (discussing the likely impact of *Coastal* on Florida real property law).

169. The use of Birkett's technique is not a talisman guaranteed to ward off the taking argument. It does, at a minimum, make the taking argument more difficult. The movant would argue that the third case is a de facto overruling of the second. This argument is likely to succeed, if at all, only by collateral attack; it is highly unlikely that the Florida Supreme Court would later hold that *Coastal* overruled *Odom*. The federal courts would be marginally more likely to take such a step, but even there, such second guessing is unlikely. *See* Tank Truck Rentals, Inc. v. Commissioner, 356 U.S. 30 (1958).

the syllogism of silence is the logical foundation of the entire opinion. One aspect of the decision, however, is illogical. This logical flaw must be examined to help predict how future courts will interpret the law of sovereignty lands.

The lower court relied in part on a statute describing the extent of navigable waters:

> Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.[170]

The lower court found the statute straightforward. Given a "clean" conveyance out to private hands, the statute precludes any subsequent claim that the lands were in part inalienable sovereignty lands.

The supreme court held that this potentially troubling statute was not "pertinent to the issues at hand. We are dealing with *navigable rivers* not 'so-called lakes, ponds, swamps, or overflowed lands.' "[171] This distinction, while not obviously strained or artificial, is trebly flawed.

a. The Statement of the Question Contains the Answer

The supreme court said that "we are dealing with navigable rivers." Yet this is the crux of the dispute between the parties. Coastal wants a day in court to bring in its experts and prove that the Peace River was navigable at statehood. Cyanamid argued that it wins whether or not Coastal is able to prove navigability. The lower courts agreed with Cyanamid, and granted its motion for summary judgment. Procedurally, when the case reached the supreme court there simply had been no factual determination of navigability. The court's statement that "we are dealing with navigable rivers" cannot be a judicial determination of that fact. The majority remanded the case for a trial on this very issue, a pointless exercise if the supreme court has already authoritatively determined that the Peace River was navigable at statehood. The court surely means that "we are dealing with *allegedly* navigable rivers." The absence of the adverb is perhaps a mere oversight or scrivener's error. Absent the second flaw in the court's distinction, this would merit only passing attention.

b. The Characterization of *Odom*

A parallel flaw occurs in the supreme court's analysis of the *Odom* case:

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170. *Coastal*, 492 So. 2d at 343 (quoting FLA. STAT. § 197.228(2) (1981)). In 1985, this statute was renumbered and is now found in chapter 253, dealing with state lands, rather than in chapter 197, dealing with taxation. *See* FLA. STAT. § 253.141(2) (1985); *see also id.* § 253.141(3) (permitting private ownership of lands submerged under non-meandered lakes); *id.* § 253.141(4) (subjecting privately-owned lands submerged under navigable waters to ad valorem taxation).

171. *Coastal*, 492 So. 2d at 344. This "factual determination" refers to the passage of the *Odom* opinion distinguishing between Hog Pond and Lake Okeechobee. *Odom*, 341 So. 2d at 988.

"The ground on which *Odom* rests is this factual determination that the small lakes and ponds at issue were non-navigable, non-sovereignty lands."[172] *Odom*, like *Coastal*, arose on appeal from an order granting the deedholder's motion for summary judgment. There was never a factual determination that the ponds at issue in *Odom* were (or were not) navigable. Again, this is the entire point of a motion for summary judgment; the need for a complex trial on the issue of historic navigability is avoided.

Yet, the *Coastal* court announces that its earlier decision in *Odom* "rests [on the] factual determination that the small lakes and ponds at issue were non-navigable."[173] Procedurally, the sovereignty claimant alleged in its pleadings that Hog Pond was navigable and for purposes of the decision granting summary judgment, the court could *assume* that the allegation was true.[174] But there can be no logical basis for the *Coastal* court to elevate that assumption, made in the course of a summary disposition, to the level of res judicata.

In summary, the *Coastal* court commits parallel errors in its characterization of the state of the facts of both cases. It states that the Peace River is navigable, and that the Hog Pond was not. In truth, the triers of fact made no determination whatsoever as to the complex navigability issues in either case. The apparent confusion may be partially resolved by looking to an implicit distinction offered by the *Coastal* court.

c. The Dimensional Distinction: Round and Straight Waterbodies

There is another, albeit unstated, line of analysis which seems to resolve the perplexing distinction between "navigable rivers" and "so-called lakes, ponds, swamps, or overflowed lands."[175] The three big cases, *Martin*, *Odom* and *Coastal*, each deal with separate species of waterbodies. The *Coastal* dispute does indeed deal with rivers, not ponds — with one-dimensional lines, not two-dimensional circles.

After *Coastal*, the real meaning to be attributed to the cases may be that rivers and other straight waterbodies are to be treated differently from lakes, ponds and round waterbodies. Taken a step further, *Coastal* can be read to hold that, as a matter of law: Lake Okeechobee and other large lakes are navigable per se; small ponds of less than 140 acres are non-navigable per se; and rivers require a case-by-case determination.

The suggested distinction between straight and round waterbodies, coupled with the implicit per se rules of law, could explain the court's statements concerning the non-navigability of Hog Pond. This statement is otherwise unsupportable under traditional methods of interpreting cases. It simply must be a per se rule of law masquerading as a finding of fact.

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172. *See Coastal*, 492 So. 2d at 343.

173. *Id.*

174. If the case had arisen in a code pleading jurisdiction, and the deedholder had entered a demurrer, the assumption as to navigability would have been explicit. In the modern summary judgment context, the proper standard is the absence of a "genuine issue as to any material fact." FLA. R. CIV. PRO. § 1.510(c).

175. *Coastal*, 492 So. 2d at 343.

Second, the notion that ponds are fundamentally different from rivers is supported by the statutory passage quoted above. The legislature arguably distinguished between ponds and rivers when it enacted Chapter 197. The court might have written:

> Ponds and other "round" waterbodies are expressly listed in § 197.228; the omission of rivers and other "straight" waterbodies is purposeful under the *expressio unius* principle of statutory construction. This legislative distinction will be respected by the judicial branch. Rivers are different from ponds.[176]

Since *Coastal* is the first straight waterbody case to reach the court, it is truly a case of first impression. The law of ponds and other round waterbodies seemingly has but marginal precedential value in river cases.

This dimensional distinction is available for use by later courts in harmonizing *Odom* and *Coastal*. The distinction appears novel. The court offers no precedent, nor have the authors found such a distinction in the course of their research. Should this distinction be elevated to a rule of law, the effect on land titles in Florida is probably, on balance, salutary; the underlying question of navigability *vel non* created by *Coastal* would be largely confined to rivers, streams and other one-dimensional waterbodies.[177] Finally, in fairness to the court, there is an unstated logical basis for the distinction. Navigability, it will be seen,[178] depends on susceptibility for use as an instrument of commerce. A river is generally more susceptible to such use in that it permits the transport of goods or people from Point A to Point B; from the headwaters to the Gulf or ocean, and then beyond. A pond or lake, unless it reaches the size of Lake Okeechobee, is of only marginal usefulness for commerce. The alternative of portage around the perimeter is generally available and equally expedient.

The eventual role of *Coastal* in the constellation of case precedent must await further judicial action. Whatever its eventual interpretation, a claimant can no longer use the three summary bases developed over the last decade to resolve a sovereignty claim. Resolution of future sovereignty lands disputes can occur only through a full trial on the merits.[179]

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176. A far more powerful basis for distinguishing section 197.228 of the Florida Statutes was available to the court, but went unmentioned. A year earlier, the court had described that statute as a taxing statute inapplicable to property law determinations. Belvedere Dev. Corp. v. Department of Transp., 476 So. 2d 649, 653 (Fla. 1985). The process begun in *Belvedere* could have been completed in *Coastal*. To apply section 197.228 in *Coastal*, however, would be to concede that it applied to rivers and other "straight" waterbodies.

On the other hand, even if the *Belvedere* rationale were extended, a logical inconsistency would emerge. Deedholders would be paying ad valorem taxes on land they did not own. Moreover, in the 1985 Florida Statutes, section 197.223 was moved from chapter 197 to chapter 253, which deals with ownership of state lands. *See supra* note 170. The court's failure to invoke *Belvedere* thus seems to suggest that it wished to emphasize the rule that small ponds are *per se* non-navigable.

177. The issue of the location of the "true" OHWL would remain for judicial determination in both river and lake cases. The *per se* rule of law would, however, eliminate (or greatly reduce) the import of the navigability issue.

178. *See infra* text accompanying notes 184-96.

179. Some courts have used the doctrine of equitable estoppel to resolve sovereignty land

On remand, the issues before the trial court will be twofold: first, whether the relevant stretch of the Peace River was navigable in fact on March 3, 1845; and second, assuming it was navigable, where the boundary lines between the sovereignty lands and privately owned uplands are located.

V. Looking Forward from *Coastal*

Coastal declares[180] a zone of ambiguity in Florida land titles. After *Coastal*, there is a broad class of deedholders who can show record title to lands which they simply do not own. The ambiguity is an irreducible result of the nature of the transaction vesting title to sovereignty lands in the state. Because no document of title describes by metes and bounds the extent of sovereignty lands, title searchers cannot access a record to determine whether a particular parcel of land is subject to the state's sovereignty ownership claim.[181]

The scope of this zone of ambiguity is unclear. As noted in the chief justice's dissent, the sovereignty lands controversy has both political and legal components.[182] The political elements emphasized the title to currently submerged, currently navigable bottoms. This characterization would have relatively little impact on Florida land titles because a presently dry parcel of land would be free of any sovereignty lands claim.

Unfortunately, rules of property law, rather than the clear-cut political characterizations, will define the operative zone of ambiguity. Sound public policy may call for a rule declaring state ownership of currently navigable waterbodies from riverbank to riverbank,[183] perhaps in conjunction with a claim to a contiguous strip of land sufficient to permit canoeists to rest and picnic even when the waters are high. However, existing rules of property law simply will not produce such a neat, convenient result. They tend instead to operate in a general, gross, mechanical fashion likely to generate great uncertainty and ultimately result in a crazy-quilt pattern of state ownership.

The next portion of this article describes the rules of property law which will establish the boundaries of sovereignty lands and also the likely dimensions of the zone of ambiguity created by these rules.

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disputes. Under this doctrine the deedholder must show: (1) some representation by the state, (2) on which he relied to his detriment, (3) causing substantial harm. Courts have held that equitable estoppel applied against the Trustees. Odom v. Deltona Corp., 341 So. 2d 977, 989 (Fla. 1976); Trustees of Internal Improvement Fund v. Claughton, 86 So. 2d 775, 792 (Fla. 1956); *see* Rosen, *supra* note 17, at 596-600. The *Coastal* court did not discuss equitable estoppel. In view of the "epochal" importance of the sovereignty lands issue, 492 So. 2d at 344, a litigant should not be sanguine as to his chances of prevailing against the Trustees on equitable estoppel grounds.

180. We use "declares" in the Blackstonian sense of announcing the common law as it is now and always has been. If one views *Coastal* as *sub silentio* overruling contrary case law established in *Odom*, the correct verb is "creates."

181. Conversely, the title searcher may be unable to determine whether the state has any claim at all to a currently navigable waterbody.

182. *See Coastal*, 492 So. 2d at 349.

183. This is one of the goals of the legislation proposed in this article. *See infra* text at § IX (Proposed Legislation).

VI. Existence and Scope of Sovereignty Lands

A. *Navigability*

Navigability is the threshold issue. Unless the waters were navigable when Florida became a state in 1845, the state has no claim to ownership of the submerged bottoms. Two facets of the navigability issue must be addressed separately. First, one must determine the applicable rules of law. Only then is it appropriate to address the special evidentiary problems and factual ambiguities likely to be encountered in the application of the rules of law.

1. The Navigability-in-Fact Doctrine

The United States Supreme Court took the lead in the nineteenth century in defining navigable waterways. The issue arose in three different contexts: first, the existence of federal admiralty jurisdiction; second, the respective rights of the federal and state governments to regulate under the commerce clause; and third, the ownership issue involved here. The Court developed slightly differing tests of navigability for each of these three areas.[184] The most commonly-quoted test for title comes from *The Daniel Ball*:[185]

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel over water.[186]

In short, the controlling test is whether, on March 3, 1845,[187] a river was susceptible of use (actual use is unnecessary) "for commerce" by a "customary mode of trade and travel."[188]

The "customary mode" element of the test is subject to some controversy. Commercial log floatage and/or recreational boating have been suggested as

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184. *See* MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 Fla. St. U.L. Rev. 511, 587-605 (1975).

185. 77 U.S. (10 Wall.) 557 (1870).

186. *Id.* at 563. Although *The Daniel Ball* was an admiralty case, its definition of navigability has been adopted in subsequent Supreme Court title cases. *See* MacGrady, *supra* note 184, at 592.

187. Navigability for title purposes is tested on the date of a state's admission to the union. Utah v. United States, 403 U.S. 9, 9-10 (1971).

188. MacGrady, *supra* note 184, at 592. The test enunciated in *The Daniel Ball* includes four important elements:

> First, it is not necessary for the water body to have ever been used for navigation; it is sufficient for the water body to be "susceptible" to navigation. Secondly, it is not susceptibility to any type of navigation that will render the water body navigable; but rather, the water body must be susceptible to navigation "for commerce." Thirdly, the water body must be susceptible to navigation for commerce in its "natural and ordinary condition," although navigability will not be destroyed by "occasional difficulties in navigation." Fourthly, the commercial navigation can be by any "customary mode" of trade or travel.

Id. at 592-93 (quoting *The Daniel Ball*, 77 U.S. at 557).

extreme examples of shallow draft "customary modes" of navigation.[189] The test, however, must be applied at the time of statehood,[190] and, therefore, a recreational boating test is anachronistic. Even a traditional interpretation of the customary mode test involves some difficult issues, such as identifying the customary modes of commercial water travel in Florida (or possibly in surrounding states) in 1845, determining the draft of these vessels, and assessing the weight courts should give to evidence of canopies of riparian vegetation which would tend to obstruct commercial navigation on rivers having a sufficient depth to otherwise support commerce.

2. Evidentiary Issues

At the outset, a trial court will confront the rebuttable presumption that non-meandered waterbodies are non-navigable.[191] The sovereignty claimant has the burden of introducing credible evidence sufficient to sustain a finding of navigability.[192] This evidence will likely consist of three basic types.

a. Navigability Today

Suppose the Conch River (a hypothetical river subject to a sovereignty lands dispute) is navigable today, in the sense that everyone agrees that the customary 1845 commercial vessel could comfortably ply the length of the river. The present condition of the river would be logically relevant evidence. The court must then evaluate whether present navigability has resulted from dredging, channeling or other artificial means occurring between March 3, 1845, and the date of the trial. Conversely, if the Conch River were non-navigable today, the deedholder would seek to offer this as evidence of non-navigability in 1845. In this situation, the court must evaluate evidence offered by the sovereignty claimant as to the artificial lowering of the water level since statehood.

Presumably, relatively few Florida waterbodies have not been either dredged, or lowered, or possibly both, since statehood. The trial court, therefore, will face the possibility that this small phase of the trial will turn into a detailed 150 year history of the Conch River, with evidence of the 1897 dredging being countered by evidence of the 1912 diversion for irrigation and a general lowering

189. *See* MacGrady, *supra* note 184, at 593 ("Under such a view there would not be many non-navigable streams for title purposes in the United States") (citing cases); *see also* Bucki v. Cone, 25 Fla. 1, 19-20, 6 So. 160, 162 (1889) (unclear whether log floatage showed navigability for title purposes or merely an easement over the waters: "And this fact of commercial importance . . . furnishes the ground upon which the private rights of owners of the bed of a river are made subject to the right of way in the public.").

190. Utah v. United States, 403 U.S. 9 (1971). The *Odom* court specifically rejected the recreational boating test on similar grounds. *Odom*, 341 So. 2d at 986.

191. The presumption is stated in *Odom*, 341 So. 2d at 989. This facet of *Odom* probably survives the *Coastal* decision. *See Coastal*, 492 So. 2d at 342 n.1. The correlative presumption — meandered waterbodies are presumptively navigable — will generally not be involved since a meander line appears on the face of the chain of title, and has generally been treated as nearly conclusive evidence of navigability. *Id.* at 988-89.

192. *See* FLA. STAT. §§ 90.302(1) & 90.303 (1985).

of all water levels.[193] Faced with the prospect of drowning in a collateral issue, the trial court will probably rule that the present condition should be given little weight, or perhaps, not admitted at all.[194]

b. Ancient Documents

The sovereignty claimant would introduce any available sketches, photographs, diaries or the like which would tend to prove commerce was actually conducted on the river. The availability of such ancient records seems largely a matter of serendipity. The ancient records, if found at all, would probably not reflect the state of affairs on March 3, 1845. The process of compensating for post-statehood, pre-document changes to the waterbody described above would still be necessary, but obviously to a lesser extent the older the document.[195]

c. Indirect Proof by Experts

The sovereignty claimant could offer the following sequence of proof: (i) our first group of experts will establish the location of an historic OHWL along the banks of the Conch; (ii) if a series of horizontal lines were drawn from OHWL to OHWL, the resulting plane would describe the position of the historic, natural surface of the Conch; (iii) this plane is x feet higher than the mean elevation of the existing river bottom (technically this technique would require a determination of the "then existing" river bottom) demonstrating that the Conch was x feet deep; (iv) our second group of experts will then testify that a customary vessel of commerce in 1845 had a draft of y feet; (v) x is greater than y; therefore, (vi) the Conch River was navigable-in-fact under the federal title test.

Although navigability *vel non* is logically the threshold question, the indirect mode of proof draws in the secondary question of the OHWL location. The deedholder faced with a proffer of this indirect proof must evaluate the transaction costs of defending his title. Two separate costs are involved, the cost of litigating the navigability issue, and the cost of proving the location of the boundary line, assuming that he loses on navigability. The boundary line issue is costly because it requires extensive expert testimony. If a claimant can defend on the navigability issue without the cost of hiring experts on the OHWL issue, his anticipated transaction costs are approximately $100,000. If he must hire

193. The history-of-a-river scenario might be inevitable even if the trial court ruled today's condition inadmissible. Very similar evidence would be heard on the location of the natural OHWL. *See infra* text accompanying notes 197-204.

194. A trial court might find that the probative value of today's condition is substantially outweighed by the dangers of confusion of issues or prejudicial impact. FLA. STAT. § 90.403 (1985).

195. One of the few readily and consistently available documents from that era will be the field notes maintained by the original government surveyors (on file in the Archives of the Department of Natural Resources, Tallahassee). These records contain exacting measurements of the width of a waterbody at the points it crosses sections lines and frequently include descriptions of the surrounding terrain. These records are thus relevant to support the surveyor's decision not to meander and as to the issue of the water level in the late 1800's.

experts in order to try the case, his transaction costs might double.[196] A trial court's early ruling on whether evidence of the location of a historic, natural OHWL is admissible on the issue of navigability will likely have a profound effect on the future course of sovereignty lands disputes.

B. *The Scope of the Sovereignty Claim: Locating the Natural OHWL*

The scope of the sovereignty claim cannot be fixed by reference to property descriptions in a document of title. Once navigability is established, the case becomes a boundary line dispute. Under the common law the OHWL is the critical boundary. The sovereign's claim (if any) extends only to the OHWL; the deedholder's title extends upland from the OHWL. At first blush, then, one would assume that the sovereignty claim is limited to the submerged lands and the adjacent bit of shoreline up to the point where "the presence and action of the water are so common and usual, [that it causes a] mark upon the soil."[197] If the sovereignty claimant wanted only this bit of land, it is doubtful that the sovereignty lands issue would be of general interest.

The sovereignty claimants in the reported cases have not been content with an adjacent bit of shoreline. They have invoked two separate bases for expansion of their claim to lands well beyond today's common law OHWL. These bases are the common law rule that avulsive changes do not shift ownership, and a subtle redefinition of how the OHWL itself is determined.

1. Avulsive Changes

A deedholder's boundary is not static. Moving water carries particles of mud, sand, and sediment which may be deposited along one bank of a river. As the sediment gradually builds up, the riparian owner finds more physical land between himself and the water. Title to land formed by this process of accretion vests in the deedholder. Land adjacent to waterbodies may also be extended by the gradual and natural lowering of the water level. Title to land exposed by this process of reliction also inures to the benefit of the deedholder. Natural forces sometimes drive the water in the other direction. The riparian owner loses title to land by the natural processes of erosion. The effect of each

196. *See* DNR Cost Memo, *supra* note 8.

197. Tilden v. Smith, 94 Fla. 502, 512-13, 113 So. 708, 712 (1927). In *Tilden*, the court went to great lengths to clarify the line of demarcation, quoting in full the definition it adopted from the Minnesota Supreme Court:

> [H]igh-water mark, as a line between a riparian owner and the public, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself. "High-water mark" means what its language imports — a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes.

Id. at 512-13, 113 So. 2d at 712 (quoting Carpenter v. Board of Comm'rs, 56 Minn. 513, 522, 58 N.W. 295, 297 (1894)). This definition was largely adopted from Howard v. Ingersoll, 54 U.S. (13 How.) 379, 427 (1851) (Curtis, J., concurring).

of these natural processes, accretion, reliction, and erosion, is to change the OHWL and, thus, the boundary between the land owned by the sovereign and that held by the deedholder.[198]

A vastly different rule, the rule that avulsive changes do not affect land boundaries, applies to sudden or artificial changes affecting the OHWL. The cutting of a new river channel by a single flood usually will not affect existing land boundaries,[199] and the doctrine of reliction will generally not apply to shift title to land exposed where the water level is artificially lowered.[200] For example, suppose that the Conch River is and has always been undisputably navigable. The Trustees hold title to the submerged lands and to that strip of exposed land up to the OHWL. The Conch River suddenly changes course and exposes 1,000 acres of previously submerged lands. Because the change was avulsive, the Trustees retain title to this 1,000 acres of now exposed land. Or, viewed another way, title to this land does not inure to the benefit of the private landowners whose land used to abut the Conch River.[201]

Changes falling into the "sudden natural" category are fairly easy to identify and apply at the time they occur. These changes are obvious in the truest sense of the word. Moreover, courts are well equipped to contemporaneously resolve the issue of suddenness, as witnesses can be found to give first hand testimony. A retrospective determination, looking back over 150 years, is not as easy for the court. There are usually no live witnesses whose testimony would help clarify where the historic OHWL lay or by what physical process the alleged changes occurred. The issue is likely to be resolved either by anecdotal evidence in ancient diaries, maps or surveyor's field notes or, more likely, (and less reliably) by a battle of expert witnesses.

The waters are even murkier when the question is one of causation. Even with the luxury of a contemporaneous determination, so many factors interact in such a complex fashion that determining whether and to what extent a change in the OHWL is attributable to artificial causes is all but impossible. The problem becomes truly unmanageable in situations where the courts are asked to determine whether and to what extent alleged changes in the OHWL over the last 150 years were caused by artificial factors. Yet, it is this retrospective determination with which the courts are faced in *Coastal* and which they will face in future sovereignty lands cases.

Sovereignty claimants will argue that, although they can determine the OHWL today, the determination is meaningless. At the time of statehood, the waterbody may have been far larger and extended hundreds of yards beyond the present OHWL. The Trustees' title extended out to the *original* OHWL as of the date of statehood. Because the waterbody's shrinkage was the result of artificial drain-

198. 5A G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 2560 (Repl. 1978).

199. State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 5th D.C.A. 1976).

200. *Id.; see also* State Dep't of Natural Resources v. Contemporary Land Sales, Inc., 400 So. 2d 488 (Fla. 5th D.C.A. 1981); Padgett v. Central & S. Fla. Flood Control Dist., 178 So. 2d 900 (Fla. 2d D.C.A. 1965).

201. *See* Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).

age or other avulsive changes, the Trustees' title now includes a strip of land hundreds of yards wide running along both sides of the riverbed.

In *Coastal*, the Trustees alleged three separate categories of first-order artificial change: (1) the extensive ground water withdrawal by phosphate companies in surrounding areas,[202] (2) elimination of some fifty square miles of tributary drainage area upriver, and (3) installation of dams on a series of lakes which control flow into the upriver collection areas.[203] These first-order arguments are expected to be typical for any sovereignty lands dispute. Because of the complexity of these arguments and the expense of the expert testimony required to explain their significance and magnitude, the average riparian deedholder may be unable to defend title effectively against a well-funded sovereignty claimant.

Amazingly the changes alleged in *Coastal* only scratch the surface. The case law has set no proximate cause type bounds for second-order contributing factors which might plausibly be raised by imaginative and well-funded litigants. For example, they may argue that increased water pumping from the Green Swamp in northern Polk County lowered the Floridan aquifer, thus lowering the water levels in Lake Hancock and the Peace River. The same argument could be made regarding pumping farther north in Lake City and in the Okeefenokee Swamp. Parties may also question the impact of the incomplete Cross Florida Barge Canal on the aquifer. The potential factors are limited only by the endurance of the courts and the aggressiveness and imagination of the party bearing the burden of proof.

Because the courts decided most prior sovereignty lands cases on summary grounds, or years ago when artificial changes were few and the methods of proof less reliable, the body of law of causation is not well developed. The *Coastal* decision will likely force courts to articulate a proximate cause-like standard to limit the arguments. The only conclusion one can draw is that in a state where over 20 million acres were determined to be "more wet than dry," acquired as S&O lands,[204] and subsequently sold to be drained and improved, uncertainty will persist as to the applicable OHWL. Proofs of the historic OHWL are staggering in their complexity and expense and the outcomes uncertain.

2. Redefining the OHWL

The second way a sovereignty claimant may expand the scope of his claim is by arguing for a subtle redefinition of the manner in which the OHWL is

202. The Trustees alleged that this practice lowers the pressure (potentiometric surface) in the aquifer system, leading to sinkhole formation and a reduction in the flow of ground water into lakes and the river. *See* Trustees' Memorandum of Law on the Issue of Reliction at 3-4, Mobil Oil Corp. v. Coastal Petroleum Co., No. TCA 79-1082 (N.D. Fla. May 6, 1982) [hereinafter cited as Trustees' Reliction Memo].

203. *Id.* In response, Mobil pointed out that for the past 20 years, Central Florida has experienced a dramatic reduction in rainfall and that this has had an impact on groundwater levels. Mobil Oil Corp.'s Response to the Trustees' Memorandum of Law on the Issue of Reliction at 5, No. TCA 79-1082 (N.D. Fla. May 6, 1982).

204. *See* BIENNIAL REPORT, *supra* note 29, at 26.

determined.[205] As evidenced by their assertions,[206] the Trustees are not attempting a clean break from the common law definition, but rather are arguing that the historic OHWL is so obscured by the passage of time that evidence other than a physical "mark" is necessary.

Like the determination of which changes are natural, the question of how to determine the OHWL raises a host of secondary issues. *Tilden v. Smith*[207] is the only Florida appellate court decision which addresses the issue of determining the OHWL. That court adopted the definition contained in the United States Supreme Court case of *Howard v. Ingersoll*.[208] Both cases set forth a "look for a mark" standard:

> [H]igh-water mark, as a line between a riparian owner and the public, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself. "High-water mark" means what its language imports—a water mark.[209]

The "look for a mark" standard is ill-suited for determining old marks. It also fails to establish which of the several possible marks are relevant. The term "ordinary," itself, has several potential interpretations. It could mean the average ordinary high water level, or alternatively, the highest water level water point reached in an "ordinary" year.[210] That difference may be significant. Notwithstanding the admonition in *Tilden* that "the high-water mark . . . is not the highest point to which the stream rises in times of freshets,"[211] the Trustees in *Coastal* claimed that the OHWL extends past a cypress swamp to the upland edge of an area of mixed hardwoods alleged (prior to avulsive changes) to have been affected by the river's waters only two months a year.[212]

The language in *Tilden* suggests a two-part physical state test: look for a

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205. A facial redefinition of OHWL would raise taking claims. If the deedholder owned a parcel of land extending to a line and the state redefined the term so that the boundary was 100 feet further from the river, a compensable taking would occur. A more subtle change in how the OHWL is determined, even though it accomplishes the same result, is less likely to be successfully challenged, especially since the location of the historic OHWL may today be wholly obscured.

206. Trustees' Trial Brief, Mobil Oil Corp. v. Coastal Petroleum Co., No. TCA 79-1082 (N.D. Fla. May 6, 1982).

207. 94 Fla. 502, 113 So. 708 (1927).

208. 54 U.S. (13 How.) 379 (1851).

> This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself.

Id. at 427 (Curtis, J., concurring).

209. 94 Fla. at 512, 113 So. at 712.

210. The latter would seemingly coincide with the annual flood levels.

211. 94 Fla. at 512-13, 113 So. at 712 (quoting Dow v. Electric Co., 69 N.H. 198, 498, 45 A. 350, 351 (1899)).

212. Trustees' Trial Brief, *supra* note 206, at 6.

mark "in respect to vegetation, as well as respects the nature of the soil itself."[213] It further stated "[i]t is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes."[214] This language opens the path for a whole new line of analysis. It allows for consideration of the vegetation along the river as a separate means of determining the OHWL, and potentially for a sovereignty claimant to expand the scope of sovereignty lands.

This line of argument also raises a host of questions unanswered in Florida jurisprudence. For example, what type of vegetative impact is required? *Tilden* refers to both "wrest[ing] it from vegetation,"[215] suggestive of an absence of terrestrial vegetation test,[216] and "preventing the growth of vegetation constituting an ordinary agricultural crop,"[217] which would suggest some vegetation below OHWL is permissible.[218] If the former test is adopted, the resulting line will likely deviate little from the existing OHWL.[219] If the latter test is adopted, the question becomes one of the type of agricultural use the land must be capable of supporting.

Here again, a plethora of separate issues is raised. If "an ordinary agricultural crop" is the standard,[220] what is "ordinary"? Is this a local crop standard? Would ordinary crop include crops that thrive in wet areas, such as rice or sugar cane, or should it, as is hinted by the Trustees, be limited to crops that don't like to get their feet wet? Does the presence of trees suggest agricultural potential? What about the potential for growing seasonal crops during the dry season?[221] Does the grazing of cattle constitute an ordinary agricultural use?[222]

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213. *Tilden*, 94 Fla. at 512-13, 113 So. at 712. The nature of the soil test includes consideration of factors such as erosion, shelving, changes in the character of the soil and accumulated litter. *See, e.g.*, United States v. Cameron, 466 F. Supp. 1099, 1112 (M.D. Fla. 1978).

214. *Tilden*, 94 Fla. at 512-13, 113 So. at 712.

215. *Id.*

216. Several courts have interpreted the test as requiring no terrestrial vegetation. *See, e.g.*, United States v. Chicago B. & Q. R.R., 90 F.2d 161, 170 (7th Cir.), *cert. denied*, 302 U.S. 714 (1937) (action of water sufficient to "destroy vegetation"); *see also* Borough of Ford City v. United States, 345 F.2d 645, 648 (3d Cir. 1965); Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906); Goose Creek Hunting Club, Inc. v. United States, 518 F.2d 579, 583 (Ct. Cl. 1975).

217. *Tilden*, 94 Fla. at 512-13, 113 So. at 712.

218. Other courts conclude that the presence or absence of vegetation is not conclusive on the issue of agricultural suitability. *See, e.g.*, State v. Sorenson, 222 Iowa 1248, 1251, 271 N.W. 234, 236 (1937).

219. The Trustees admitted that the adoption of the absence-of-terrestrial-vegetation test would "substantially eliminate the Trustees' conversion claims." Trustees' Trial Brief, *supra* note 206, at 12.

220. *Tilden*, 94 Fla. at 512-13, 113 So. at 712.

221. This became a relevant inquiry in *Coastal* because the Trustees admitted a portion of the land claimed was dry ten months of the year. Trustees' Trial Brief, *supra* note 206, at 6.

222. *Compare* Goose Creek Hunting Club, Inc. v. United States, 518 F.2d 579, 584 (Ct. Cl. 1975) (holding cattle are sufficient) *with* Heckman Ranches, Inc. v. State, 99 Idaho 793, 799, 589 P.2d 540, 546 (1979) (holding cattle irrelevant to the condition of the land).

This article offers no guidance on the issue of what factors should be considered in determining an historic OHWL, only the caveat that the courts should be on their guard against spurious causal relations being offered as proof. The presence of cypress and other water-adapted species does not prove the extent of the river. Similarly, the absence of past agrarian use does not prove the land is unfit for agriculture.[223] This further illustrates the tremendous difficulty in determining an historic high water mark.[224]

In practice, these two logically distinct arguments, soil condition and vegetation, will be intertwined. The process of establishing the "original" OHWL will involve latent assumptions by the sovereignty claimant's experts, the effect of which is to peg the OHWL at the most remote point where it can be argued that the flora or geologic deposits show signs that the water once exerted influence.

This potential for expanding the scope of the sovereignty claimant's claim is the crux of the sovereignty lands issue. It shifts the controversy from the almost academic question of who owns the naked fee interest beneath rivers and ponds,[225] to the intensely pragmatic question of who owns the land lying hundreds of yards upland from the present OHWL. This creates a zone of ambiguity surrounding title to *all* riparian lands in this state. Deedholders with deeds absolute on their face, who have cultivated and improved their land and who have paid property taxes on the land and improvements for decades, are affected because there is simply no basis for predicting the actual extent of sovereignty lands. While notions of fairness may weigh against the sovereignty claimant when a claim is made in opposition to a deedholder as to "high and dry" lands,[226] property law, rather than abstract notions of fairness, will de-

223. The Trustees' Trial Brief, *supra* note 206, at 13, makes this logical error.

224. Arguments also exist in favor of other methods of determination. *See* United States v. Cameron, 466 F. Supp. 1099, 1112 (M.D. Fla. 1978) (permitting the use of water stage and elevation data).

225. The issue is not purely academic because the owner of the bottomlands can extract user fees, building fees, access charges and other fiscal benefits from the adjacent riparian owner.

226. This deedholder derived title from a clean patent or deed out. The deedholder and his predecessors in title likely received professional assurance that title was secure. Indeed, the land may not border on any water. Yet title is in peril if an expert employed by a sovereignty claimant finds evidence that some nearby body of water once reached — even at flood stages — the contested land.

A recent edition of the monthly newsletter of Attorneys' Title Insurance Fund, Inc. set forth some guidelines which they, as title insurers, believe should be followed:

> 1. If a current inspection of the property or survey reveals no bodies of water or streams and the original government survey shows no meandered body of water, then it may be presumed that the property is free of the sovereignty lands claim. No exception need be made in a Fund policy.
>
> 2. If a current survey or inspection shows a lake or large pond but the original government survey shows no meandered body of water, then determination should be made of the size of the lake. If the lake is smaller than 120 acres, then it is doubtful that the state would make a sovereignty lands claim. No exception need be made in a Fund policy.
>
> 3. If a current inspection or survey reveals a small lake or pond and the original government survey shows a meandered small lake, then the lands lying beneath the ordinary high-water mark should be treated as sovereignty lands and excluded from coverage under a policy.

termine the claim. To this spate of problems, three possible solutions exist: resolution by the judiciary on a case-by-case basis, administrative (executive branch) fixes, or resolution through legislation. This article will next examine each of these potential solutions.

VII. Solutions to the Sovereignty Lands Problem

A. *Judicial Solution*

At present the only route open to the deedholder is to seek to quiet title against the state.[227] After the decision in *Coastal*, the determination of state ownership requires an initial determination of whether a given waterbody was in fact navigable on the date of statehood, and if navigable, where the OHWL would fall but for avulsive changes. Both of these determinations, by their very nature, will require fact-intensive proofs of ancient history. Twentieth century judges and juries, accustomed to the luxury of live testimony by persons with first-hand knowledge, are not well equipped to deal with these types of issues.

In addition to the inherent difficulties of proof, leaving this problem to judicial resolution creates a number of frightening possibilities. Among these possibilities are the further clogging of an already overloaded court system,[228]

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4. If a current survey and inspection reveals a stream located on the property, it should be determined where the stream terminates. If the stream terminates into a river, a meandered lake or body of water or a lake of more than 120 acres, then the stream should be treated as subject to a potential claim of sovereignty lands and a disclaimer requested out of the state through the Department of Natural Resources. If the stream terminates in an unmeandered lake of less than 120 acres, the stream may be treated as nonnavigable.

5. If a current survey or inspection reveals that lands are near a navigable body of water, it should be requested that the surveyor locate on the survey the original government meader line and the current ordinary high-water mark (fresh water) or mean high-tide line (salt water). . . . Based on this information, if the surveyor advises that lands are upland of both the original government meander line and the current water boundary line, then there is no problem. If the lands lie on the water side of the original government meander line but are upland of the current ordinary high-water mark or mean high tide [line] and there has been no fill, this presents no problem. If the lands are waterward of the original government meander line and there is evidence of filling, a disclaimer should be obtained from the Department of Natural Resources or an exception made in the policy for the filled-in lands.

Guttman, *Claims of State Sovereignty Lands — Pandora's Box Opened?*, 18 The Fund Concept 65, 72-73 (1986).

Although potentially helpful, these guidelines fail to recognize that the OHWL prior to avulsive change, rather than the current OHWL, governs. The pre-avulsive OHWL may lie a great distance upland of the current OHWL. This hiatus must concern the title examiner. As shown in *Coastal*, lands lying completely upland of any body of water may be subject to sovereignty lands claims. Guidelines 1, 3 and 5 each suffer from this deficiency. The choice of 120 acres as the cut-off in guideline 2 is also surprising since *Odom* and *Coastal* both referred to ponds of 140 acres, which is itself smaller than the ponds at issue in *Odom*. *See supra* note 149.

227. A state agency's denial of a permit based on a sovereignty lands claim will likely trigger most early cases.

228. DNR has estimated that there are 11,900 running miles of river, with an average of ten ownerships per mile; 611 lakes larger than 150 acres, each of which has an average of ten riparian owners; and 3125 lakes between 25 and 150 acres, each of which has an average of five riparian owners. DNR Cost Memo, *supra* note 8. Therefore, a group of 140,735 potential litigants exists.

manipulation by state agencies which may selectively grant or deny permits on sovereignty grounds,[229] inconsistent judicial decisions[230] and standards for determination, and prohibitive litigation costs for both DNR[231] and private deedholders.[232]

B. *Executive Solution*

The option of an executive branch solution is also tenuous, given the strict bifurcation of entities implicit in *Coastal*. If the Trustees in the nineteenth century could not determine navigability and have that determination bind the state,[233] DNR certainly cannot do so today. As title to sovereignty lands is now vested in the Trustees of the Internal Improvement Fund,[234] it would seem that the Trustees could independently resolve the problem. Their efforts to do so would require a determination that vesting title to formerly submerged lands

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If only 25% of these sought judicial determination of land boundaries and confirmation of title, Florida courts will be inundated with 40,194 new cases.

These calculations do not consider the potential claims of non-riparian deedholders, who may nonetheless be subject to sovereignty lands clouds. Another possibility, perhaps even likelihood, is that banks and title insurers will begin requiring quiet title actions or state disclaimers on all riparian parcels as a prerequisite to new mortgages and title insurance. Both these factors have the potential to expand the caseload.

229. Given the proscriptions of FLA. CONST. art. X, § 11, and *Coastal's* strict separation of entities within state government, the issuance of a permit will not serve either to confirm title or to preclude a subsequent sovereignty lands claim.

230. Judges are not likely to rule consistently on the issue of navigability, and it is even less likely that consistent decisions on the issue of OHWL would result. Consider two neighboring deedholders, Smith and Jones, each having riparian rights on the same river. Each brings a quiet title action. Their cases are assigned to different judges. Imagine the confusion if the judge in Smith's case ruled that the OHWL, as adjusted for avulsive change, was at one point, while the other judge ruled that Jones' OHWL was lower. A worse scenario would result if the judges delivered inconsistent decisions on the issue of navigability; the river was navigable in front of the Smiths' home but not in front of the Jones' house. The potential for such discrepancies exists between judges of the same county, although, over time, one would hope that they would come to rely on prior rulings concerning the same river. Realistically, discrepancies would probably occur only in contemporaneous cases. A much greater potential for inconsistency exists if Smith and Jones live on different sides of the county line, so that jurisdiction would lie in two different circuit courts.

231. Sovereignty lands litigation is staggeringly expensive. By 1982, the state had spent $3 million in legal fees in *Coastal's* federal court litigation, and sought an emergency appropriation of $800,000 to fund the anticipated trial. S. Miller, *supra* note 129.

During the sovereignty lands controversy, DNR estimated that the costs of defending ownership (without MRTA as a means of summary disposition) would total almost $1 billion. DNR Cost Memo, *supra* note 8. Given the political atmosphere in which it was prepared, one suspects that this estimate is skewed toward the high end. It is predicated on the assumption that every case would go through trial and one appeal. Moreover, the number of miles of rivers is based on an estimate which includes "slough[s], bayou[s], hollow[s], for prong[s], head[s] as well as . . . river[s], creek[s], branch[es], brook[s], [and] run[s]." *Id.* Clearly, many of these smaller waterbodies could, and should, be disclaimed by DNR without trial.

232. Private landowners are "one shot players," and will not gain from their experiences and the opportunity to place experts on staff. Accordingly, their litigation costs are expected to be higher than those of the state.

233. *Coastal*, 492 So. 2d at 342-44.

234. FLA. STAT. § 253.03 (1985).

in the riparian owners was in the public interest.[235] The Trustees now have the authority to issue the appropriate deeds. The only question is whether the Trustees are empowered to make the required determination of the public interest. The logistics of actual deed preparation and delivery are a separate concern. Without legislative approval of an alternative conveyancing method, present law would require individual conveyances.

C. *Legislative Solutions*

1. Ability and Constraints

Given the inability of the judiciary to expediently fashion an appropriate and workable solution, and the questions concerning the executive's independent ability to handle the problem, the duty logically falls to the legislature. The legislature has the authority under the Florida Constitution,[236] and, because the Trustees' title is one in trust,[237] rather than in fee, title is not an impenetrable barrier.

Ironically, prior to the *Coastal* decision, the legislature was *less* able to deal comprehensively with the sovereignty lands problem. There was a significant danger that proposed legislative solutions would either emasculate MRTA, thus calling into question all existing land titles which had previously relied on it,[238] or be an unconstitutional taking, immediately triggering huge numbers of taking claims and a run on the state treasury.

Since *Coastal*, the risk of legislative action emasculating MRTA so as to call into question significant numbers of Florida's land titles has been reduced. So too has the need to risk an unconstitutional taking. If, as the *Coastal* court held, the state still owns all sovereignty lands, there is neither the need nor the incentive to begin litigation to reacquire sovereignty lands.

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235. *Id.* § 253.001 (subjecting the Trustees to the requirements of FLA. CONST. art. X, § 11).

236. FLA. CONST. art. X, § 11 ("Sale of such lands *may be authorized by law*") (emphasis added).

237. FLA. STAT. § 253.001 (1985).

238. In its Final Report, the MRTA Commission proposed a bill which would have amended section 712.04 of the *Florida Statutes* to express the intent of the 1963 Legislature and to effectively reverse the *Odom* court's interpretation of the law. *See* FINAL REPORT, *supra* note 72, at 53-d to 53-f. If the legislature could amend or repeal MRTA at any time, a title examiner would never be able to rely on MRTA to clear title. Even if MRTA was effective to clear title today, the law would be subject to amendment in the future. In light of such a risk, the careful practitioner would be forced to advise against reliance on MRTA in favor of complete title examinations and the clearing of all potential claims.

Equally problematic is the Report's proposed legislative determination of navigability and extent of a given waterbody in 1845. *See id.* at 53-j, 53-*l*. Under the report, the 1986 legislature would have declared that portions of Lake Okeechobee, meandered by the federal surveyors and determined in *Martin v. Busch* to have been sovereignty lands, really were not navigable in 1845. Land titles are not very stable in an environment in which a contemporary legislature may rewrite history in this fashion. If they could do so in 1986, what would prevent further revisionist histories in 1988, 1990 or any time thereafter? Also, the proposed legislative determination would abandon the state's claims to some state lands. The question would then arise whether the abandonment would be effective under article X, section 11 of the Florida Constitution without an express finding of the public interest.

This is not to say that there are no longer any constraints on legislative solutions; there are. These constraints include both of the above considerations and the constitutional restriction on disposition of sovereignty lands unless done in the public interest.[239] The sub-issues surrounding property ownership and the very real need to confirm private land titles are clear. Recognizing the unsatisfactory state of the post-*Coastal* status quo, and the need to clarify land title, the remainder of this article is premised on the need for a legislative solution. The article will discuss the various interests of the state and the individual deedholders, and then summarize the legislative solution being proposed and the considerations which underlie its phrasing.

2. The State's Interests

On close examination, it would seem that the state has essentially four concerns in the sovereignty lands arena. The first is the interest of the people in having access to waterbodies for fishing, boating, and other recreational purposes. This interest is beyond dispute and constitutionally sanctified.[240] During the course of the MRTA controversy, this interest, to the exclusion of others, has been stressed in the political debate. Unfortunately, in the heat of battle, the quality of debate on this important concern denigrated into emotive terms and inaccurate analyses. These tactics, while generating public support, disguised the actual issues.[241] The people's interest in access to waterways is fully satisfied by state ownership of existing navigable waterways, perhaps with a narrow strip of land on which canoeists can rest and picnic.

The state's second interest is in maintaining the stability of land values. As discussed above, the individual deedholder's title is clouded and the value of his land diminished by the market's estimate of the cost of removing the cloud

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239. FLA. CONST. art. X, § 11.

Sovereignty lands. — The 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. Sale of such lands may be authorized by law, but only when in the public interest. Private use of such lands may be authorized by law, but only when not contrary to the public interest.

Id.

240. *Id.*

241. The classic argument was that unless courts recognized the state's claim to absolute ownership of the disputed land, the public would be barred from using the waterway. This attempt to frame the issue in absolute black-and-white terms might have been useful propaganda for attracting public enthusiasm to the cause, but it was an affront to one thousand years of Anglo-American property law. The relevant inquiries should be what estates in the land various parties own, and what their ownership of those estates means? Additionally, a court should ask who, by virtue of any existing easements, equitable servitudes, and covenants running with the land, is entitled to use the land without interference from anyone, including the "owner." Many years prior to *Coastal*, the public trust doctrine negated this simplistic analysis by positing the existence of an easement protecting the public's right to use waters and lands, especially coastal lands, up to the OHWL. *See, e.g.*, Gies v. Fischer, 146 So. 2d 361, 363 (Fla. 1962) (applying public trust doctrine); State v. Black River Phosphate Co., 32 Fla. 82, 95, 13 So. 640, 644 (1893) (defining the public trust doctrine). If a public easement or servitude exists, then the public's right to use these waters and lands is secure, and ownership of the underlying fee is irrelevant.

and of the less than perfect certainty of outcome. While directly impacting on the deedholder, the state is also impacted in that a general decline in property values results in a lower valuation for ad valorem tax purposes. Units of local government can expect a decline in revenues, as would the state itself, since documentary stamp taxes are tied to market values. Moreover, falling land values have a generally corrosive effect on the middle class and correspondingly on the level of overall economic activity, as is seen from the problems in the midwest farm states. The situation would only be exacerbated if the people perceived that the government was behind their declining land values. In the sovereignty lands context, the state's interest is in confirming title to riparian owners above some determinate line.

Florida's third interest is in the restriction of the development, misuse, spoilage and pollution of environmentally sensitive lakes, rivers, streams, and wetlands. The state has, and presently exercises, sufficient police powers to control this risk. Fee ownership of lands above, or for that matter below, the existing OHWL is irrelevant to the state's police power.

The fourth state interest is in increasing revenue to the state. The more land the state can successfully claim as sovereignty land, the more income it can generate, either through user and permit fees, or through actual resale of the land. This revenue source is severely limited if only presently navigable waters are claimed as sovereignty lands. If, however, lands hundreds of yards from the existing OHWL are successfully claimed, the revenue potential is tremendous. The lands potentially claimed include some of Florida's most valuable waterfront properties and personal residences, all of which were long thought to be, and taxed as, private property. Were the state able to successfully assert title to these lands, the Trustees could then resell them and use the profit to fund government operations into the twenty-first century. While conceptually an interesting revenue source, such a funding scheme is neither equitable nor politically and pragmatically supportable.

Only the state's revenue interest supports the ownership claims to significant expanses of land above the existing OHWL. The other goals can be fully accomplished without such ownership. While maximizing government's non-tax revenue is a goal that most taxpayers will abstractly support, this revenue source and the means of collecting it are particularly distasteful and reflect an inherently inappropriate state goal.

3. The Proposed Legislation

This article is premised on the supposition that the *Coastal* decision leaves the law and land titles in an undesirable state. The article has identified various consequences and concerns to be addressed and now offers, in the form of a proposed bill, a potential solution. The specific goals in drafting this proposed legislation were to clearly define the boundary between sovereignty and privately held lands, and to do so in a fashion which coincides with common understandings of the extent of state ownership; to confirm title in the uplands in their respective owners, thus eliminating the sovereignty lands cloud on their title; to confirm title to lands under currently navigable waters, but of uncertain

1845 status, in the state; to stop the perceived DNR abuses of claiming an exceedingly high OHWL and using that determination to generate income at the expense of deedholders; and to do all of the above without constituting a taking of property or running afoul of the constitutional restrictions on transferring sovereignty lands.

Under the proposed bill, DNR would be directed to catalog all lands in which it claimed a sovereignty lands interest and to provide a surveyed legal description for each.[242] These materials would be submitted to the Trustees for their review and approval.[243] Upon the Trustees' approval, as submitted or as modified, a "reverse MRTA" provision would be triggered.[244] Under this provision, unless objection is filed within a specified time, the title to the areas designated as being below the OHWL would be legislatively vested in the state. Lands above the OHWL, together with a statutory riparian easement, would be legislatively confirmed in the riparian owner. In order to survive constitutional scrutiny, the bill will provide a means of challenging determinations of navigability and OHWL, and will provide relatively low cost and summary methods of doing so.

VIII. Conclusion

Given the sales of S&O lands in the mid-nineteenth century and the failure to designate and describe navigable waterways, a latent controversy over sovereignty lands has always been present in Florida. Relatively little avulsive or artificial change in waterways occurred for almost a hundred years after statehood. Thus, the OHWL, as it existed then, was generally reflective of the property boundary. Since the 1940's, man's ability and willingness to dredge, fill, drain, and otherwise affect water tables has increased markedly, as has his ability to measure the effects of such changes. These factors, in conjunction with intensive residential use of small riparian plots, laid the groundwork for the current sovereignty lands problems.

From the state's perspective, the problems came to a head when private landowners began relying on MRTA[246] to confirm their land titles. They relied, built, and paid taxes on this property. The state, largely acting through DNR began asserting claims to land which, although presently high and dry, were at

242. *See* Proposed Legislation § 1(3). These recommendations are incorporated in the Proposed Legislation attached, *infra* text at § IX. This summary of the proposed bill is cross-referenced to specific section numbers. Detailed comments concerning the considerations in drafting the legislation have been included as footnotes to the bill itself.

243. Proposed Legislation § 1(4).

244. This is referred to as a "reverse MRTA" provision because the language of the Proposed Legislation tracks the saving clause of the original MRTA provision in Fla. Stat. § 712.07 (1985) and allows claimants to preserve unrecorded interests by filing.

245. Proposed Legislation §1(6)(a).

246. Fla. Stat. §§ 712.01-.10 (1985). Much of this reliance was implicit because no suit or notice is required for claimants to rely on the provisions of MRTA. Their attorneys and title examiners also relied on the conclusions of *Odom* that contemporaneous determination and estoppel acted independently to confirm title.

least arguably once submerged sovereignty lands. The Florida Supreme Court held in *Coastal* that MRTA and the other summary bases of disposition would not confirm title to sovereignty lands in a private deedholder. The combination of expansive claims by DNR and the absence of summary bases of title confirmation leave the private deedholder in an awkward position. The landowners does not know whether the waterbody abutting his property was navigable in 1845 or, assuming that it was navigable, the location of the line between the property and sovereignty lands. Worse yet, a landowner has no efficient means of confirming title or of locating the OHWL which forms his property boundary.

Any judicial resolution must necessarily address the complex historic issues of fact to determine: (1) whether the waterbody in question was, regardless of its current state and condition, navigable on March 3, 1845; and (2) where the OHWL would be had there been no avulsive changes since the date of statehood. Both questions are extremely complex, requiring extensive and expensive evidentiary proofs. This issue touches *all* riparian lands in Florida, and arguably even some non-riparian lands and raises the spectre of overwhelming caseloads. This potential is accentuated still further by the possibility that banks and title insurers will begin requiring quiet title actions as a prerequisite to new mortgages or title policies.[247] Given Florida's already overburdened court system, the judiciary is ill-equipped to deal with the problem. Legislative action to confirm and articulate the state's interest in presently navigable waterways, to delineate the boundary between sovereignty and privately held lands, and to confirm title to the privately held uplands in the respective owners is urged.‡

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247. DNR claims the huge areas were navigable. *See supra* text accompanying notes 202-21. DNR has indicated that it will soon begin compiling a listing of which waterbodies are navigable and writing a book setting forth the proper principles and techniques to use in determining the ordinary high water mark. While both are admirable undertakings, they will not remove the ambiguity surrounding property boundaries. An administrative listing of navigable waterbodies will not be binding on future administrations, nor will it release state claims to waterbodies which may subsequently be recharacterized navigable. Likewise, a book explaining how to determine the boundary line is utterly useless absent some method for binding the state to the private survey. Unless the state can be bound, commissioning a private survey (other than in a litigation context) is a waste of money. The same uncertainty still exists over where the boundary line falls. Long, *Handbook to Help Florida Define Lake, River Boundaries*, The Orlando Sentinel, Sept. 25, 1986, at D14, col. 1.

‡ Just prior to publication, of this article, the United States Supreme Court denied a petition for a writ of certiorari in the *Coastal* case. *See* Mobil Oil Corp. v. Board of Trustees, 107 S. Ct. 950 (1987).

IX. Proposed Legislation

Declaration of Legislative Intent, Findings, and Purposes —

Whereas, in recognition of the uncertainty regarding precise ownership rights as those rights relate to sovereignty lands, the legislature has determined that there is a need for a comprehensive statutory provision dealing specifically with that issue; and

Whereas, the purpose of this act is to determine ownership rights conclusively by providing a definite and equitable procedure by which those rights shall be established; and

Whereas, the legislature has determined this act and the vesting of title to and rights in certain allegedly sovereignty lands are in the public interests; and

Whereas, the legislature's intent is that expressions of legislative purposes contained in subsection (1)(f), (1)(i), (2), (6)(a), (11) and (14) of section 1 be particularly considered when applying or interpreting this act.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 253.1201, Florida Statutes, is created to read:

(1) Definitions. For the purposes of this section:

(a) "Board of Trustees" means the Board of Trustees of the Internal Improvement Trust Fund.

(b) "Department" means the Florida Department of Natural Resources.

(c) "Meandered waters" means those waterbodies of the state which were meandered in an original United States government survey.

(d) "Ordinary high water line" means the ordinary high water line as defined by common law and shall be determined by examining the bed and banks of a waterbody, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself.[248] The ordinary high water line shall be the ordinary high water line as it currently exists, without adjustment for any changes, whether natural or artificial, occurring prior to the date of enactment.

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248. This definition was adopted from Tilden v. Smith, 94 Fla. 502, 512-13, 113 So. 708, 712 (1927). *Tilden* states that the OHWL does not include the annual flood levels. The interpretation sometimes set forth, that OHWL is the maximum level reached in an "ordinary year," is an erroneous interpretation of the term and of *Tilden*. The correct interpretation of OHWL is the level ordinarily reached during the course of the year.

A great deal of discussion went into the drafting of this section. One of the early drafts proposed using the "dynamic water line" as the line of demarcation between private and public ownership. This standard has the advantage of ready application and easy determination, but it would cause difficulties because it could be applied to privately-owned "swamp and overflowed lands." The use of the dynamic water line would also yield undesired results during extreme flood conditions. Technical trespasses could occur under a dynamic water line standard if a riparian owner used lands lying beneath flood waters.

(e) "Perfection date" means the earliest of the following dates:

(i) the date on which property is voluntarily conveyed to the state pursuant to subsection (7);

(ii) the expiration of the period for filing a notice of claim under subsection (8), if none is filed;

(iii) the expiration of the period for a claimant to file suit for an adjudication of ownership rights, if none is filed; or

(iv) the final disposition in favor of the state of the suit for an adjudication of ownership rights.

(f) "Public trust rights" means those rights to use the navigable waters within this state for boating, fishing, bathing, and other commercial and recreational purposes secured to all persons by the public trust doctrine. These public rights of use constitute an easement in navigable waters and a servitude upon the underlying lands, which exist in perpetuity and may not be extinguished except when in the public interest.

(g) "Qualifying riparian landowner" means any person who:

(i) holds record title to lands lying adjacent to or including what are arguably sovereignty lands; and

(ii) has, or whose predecessors in title have, paid ad valorem taxes on such lands.[249]

(h) "Sovereignty lands deed" means a quitclaim deed granting all rights, title, and interest of the riparian owner and full public trust rights in lands designated navigable pursuant to subsections (3) and (4) to the Board of Trustees of the Internal Improvement Trust Fund in trust for the state, reserving unto the grantor only riparian rights as they may exist at law and the special riparian easement as defined in subsection (1)(i).

(i) "Special riparian easement" means a vested perpetual easement in a submerged fee and in the water standing above it. Such easement is appurtenant to and inseparable from the upland riparian fee. Such easement shall entitle the riparian landowner to make any use of the lands and waters that would be permissible for a person holding valid title to lands under navigable waters, provided such use does not substantially impair or interfere with the public's use of the waters pursuant to the public trust rights, and does not violate then existing land use controls or regulatory restrictions of general applicability. Per-

249. The authors also considered denying the benefits of the special riparian easement and confirmation of upland title to persons who challenged a determination of navigability under subsection 8. A prior definition of "qualifying riparian landowner" included a subsection (iii) which read: "has elected not to seek an adjudication of ownership rights pursuant to subsection 8(b)." Some incentive, in addition to the natural desire to avoid expensive litigation, is desirable; however, that incentive should not take the form of denying either the special riparian easement or the confirmation of upland title to a challenging landowner. Such a denial would create adjacent parcels with different (and unapparent) waterside boundaries and different appurtenant rights. While the triggering litigation would appear of record, the impact on property rights would not be express, nor would MRTA cure the different rights. Accordingly, future title examiners, long after the 30-year MRTA period runs, would have to examine an obscure (and otherwise irrelevant) segment of the record to discover any subsection 8 litigation.

mitted uses of the special ripariain easement, subject to regulatory restrictions, include, but are not limited to the right of a developer to erect pilings to support a marina, and the right of agricultural riparian owners to run a fence into the water a sufficient distance to prevent livestock from migrating onto neighboring lands.

(j) "Swamp lands" means those lands subject to intermittent flooding; or over which water routinely stands, when such water has an average depth during the course of the year of less than ____ feet over a horizontal distance of ____ feet; or on which are growing cypress and other exposed vegetative matter of a type inconsistent with regular navigation.[250]

(2) Public Trust Rights Reaffirmed. It is hereby reaffirmed that the citizens of the State of Florida shall have public trust rights in the navigable waters of this state. The state and its political subdivisions shall have the governmental authority and police power to regulate the uses to which lands and waters impressed with public trust rights may be put. Such authority includes, but is not limited to, the power to prohibit mining of the submerged beds beneath the waters, to restrict pollution sources, to regulate boating, fishing and the withdrawal of water, and any other private use that could substantially impair or interfere with the public's exercise of its public trust rights to use the waters. The rights of the public to use navigable waters pursuant to the public trust doctrine shall be liberally construed.

(3) Designation of Navigable Waters and Ordinary High Water Line. The department shall designate all waterbodies, or portions thereof, within the state which it deems to be navigable, and as to each shall designate the ordinary high water line.[251]

(a) The standard to be used by the department in determining whether waterbodies, or portions thereof, are to be designated as navigable under this

250. This definition responds to the state's expansive claims that the swamp on either side of the Peace River was below the navigable waterline. Trustees' Trial Brief, *supra* note 206. This analysis would subject much of Florida, sold as swamp and overflowed lands, to sovereignty lands claims. By disregarding past changes in the OHWL, subsection (1)(d) will limit the problem; however, only an express exclusion of swampland can truly correct it. Like OHWL, the term "swamp" is confusing. The state land agents estimated that two-thirds of Florida was "Swamp and Overflowed." *See supra* text accompanying notes 38-42. This definition only becomes relevant should someone challenge DNR's OHWL determination.

251. This provision is designed to encourage the creation of a comprehensive list of sovereignty lands. Such a list would solve the problems inherent in determining navigability *vel non*. Given DNR's inherent "vested interest" and its past failure to conduct such a survey when directed by statute, perhaps a separate agency should conduct the surveys and make navigability determinations. DNR's delay may be explicable, in large part, by a lack of appropriations to do the job. *See infra* note 255. Yet, it must be noted that procrastination in conducting the surveys was consistent with DNR's underlying interests. No administrative agency wants to tie its own hands, and DNR benefits more directly than most by the indeterminacy generated. If the agency has not previously made a sovereignty lands determination, when a permit is requested, it must issue a ruling. Then it can use the indeterminacy to extort payments. It can also claim a much higher OHWL (hence more state-owned land and revenue) on a case-by-case, non-litigated basis than it could if a global determination were announced. This bill should get more action than past legislation, because it eliminates some of the incentive to procrastinate.

subsection shall be whether the waters, in their current ordinary state, are navigable as determined under the Federal Title Test of Navigability.[252]

(b) In determining the ordinary high water line, swamp lands shall be deemed to be above the ordinary high water line.

(c) The designations shall be prepared separately for each county, and shall include:

(i) a list identifying each designated waterbody by name and specifying the portions thereof so designated;

(ii) a surveyor's description of the ordinary high water line for each water body designated navigable; and

(iii) a county map on which the designated waterbodies are clearly depicted.[253]

(d) The lists identifying the waterbodies deemed navigable by the department shall be submitted to the Board of Trustees within two years after the effective date of this act.[254]

(e) The maps and descriptions shall be submitted to the Board of Trustees as and when completed and in all cases within four years after the effective date of this act.[255]

(4) Board of Trustees' Approval. The Board of Trustees shall review and

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252. The authors debated whether this provision would trigger a taking, and whether the risk that it would be construed as a taking would outweigh the benefits of avoiding a need to determine historic OHWLs. The suggested solution permits DNR to use this standard for designation purposes, but in the event of challenge under subsection 8, this solution mandates the court utilize a historic navigability standard. This solution should be constitutional given the reverse MRTA provision.

253. Defining in legislation the extent of state ownership serves two primary goals. The first is to publish a readily ascertainable boundary line not subject to DNR redefinition or waffling. The second goal is to define the boundary line in conformity with common notions of the extent of state ownership.

A readily ascertainable boundary line avoids costly litigation to determine some past or hypothetical state, and creates a determinate, surveyed line of demarcation. Again, the authors considered using the "dynamic boundary line where land meets water" as the line of demarcation. *See supra* note 248. However, while creating a wonderfully discernible line, this definition could cause problems during flood stages, when water rises onto clearly private land. This definition also potentially yields undesired results for those swamp and lowlands adjacent to a navigable waterbody. The dynamic boundary line could have treated a great deal of swamp and overflowed lands as sovereignty lands. The authors returned to a more traditional definition of OHWL with some minor modifications. First, we adopted the common law definition of OHWL as set forth in Tilden v. Smith, 94 Fla. 502, 512-13, 113 So. 708, 712 (1927). This definition would assume no prior avulsive changes, and that title is where the OHWL falls today, thus eliminating any need to adjust for past avulsive changes. This approach treats future avulsive changes as they were treated at common law, being deemed not to change the line of demarcation. More careful recording of waterlevels today than in the 1840's facilitates future determinations of the causes of change and their respective impacts. While the boundary line established is not as easily pointed out as the dynamic waterline, it is readily determinable. Perhaps more importantly, it comports with popular notions of the extent of public ownership.

254. The timetables for presenting the lists and the other materials were bifurcated because approval of the designation lists by the Trustees will immediately clear title to most "dubious" waterbodies — small ponds, minor streams and sloughs.

255. A substantial legislative appropriation is necessary for DNR to accomplish this undertaking within the specified time limits.

either approve or modify the navigability designations and ordinary high water line determinations within 180 days after receipt thereof from the department. The designation list, as finally approved by the Board of Trustees, shall be published in a newspaper of general circulation in the respective county at least once each week for six consecutive weeks. Each such publication shall also include notice of the location at which the ordinary high water line descriptions and maps are available for public inspection, notice of the right to contest the designations, instructions as to the method of filing claims under subsection (8)(a), and information concerning the special riparian easement.

The formal approval of such navigability designations and ordinary high water line determinations made pursuant to this subsection shall constitute the Board of Trustees' official determination that the confirmation of title to lands pursuant to this act—regardless of the prior status of such lands—is in the public interest.[256]

(5) Failure to Object or File Notice. If no objection under subsection (8)(a) is filed prior to the perfection date:

(a) The lists, maps and descriptions shall become final and shall constitute a conclusive determination of navigability and of the ordinary high water line. Any lands not appearing on the designation lists or maps on the perfection date shall be conclusively deemed not to have contained any navigable waters on March 3, 1845. The lists, maps, descriptions and proof of publication shall be filed in the public records of the county containing the lands surveyed and in the offices of the department; and

(b) The failure to file a notice of claim or for adjudication of navigability or determination of ordinary high water line under subsections (8) or (9) shall constitute a grant to the state of all right, title and interest in those lands underlying navigable waters, to the extent delineated in the maps and descriptions approved pursuant to subsection (4), which are held or claimed by any person failing to so file. Such grant shall forever bar a claim of ownership interest in lands lying below the ordinary high water line, other than riparian rights and the special riparian easement.[257]

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256. While redundant with the formal legislative determination of "public interest," this section was added to respond to the uncertainty concerning which governmental branch is required to decide under art. X, § 11 of the Florida Constitution. *See supra* text accompanying notes 233-35.

257. This is the "reverse MRTA" provision. The riparian rights preserved above would cause future non-avulsive changes to affect the boundary between public and private ownership under common law rules. While it appears incongruous to "fix" past changes in the OHWL at a current level while expressly permitting future changes to affect the boundary between owners, this is necessary and even desirable. Future changes must be permitted to affect the line of demarcation to assure owners continued access to the waters. If the line were absolutely fixed, a subsequent drop in the waterlevels, or change in course, regardless of its cause, would deprive the owner of access to the waters. Similarly, a natural increase in the waterlevels would permit private encroachments on navigable waters.

This proposed legislation only clarifies present ownership and lines of demarcation. Future changes would be governed by existing rules of avulsion, reliction, and accretion. The difference will be in the existence of a valid and discernible starting point and the modern ability to determine the extent and cause of subsequent changes in water levels with greater accuracy.

(6) Grant of Special Riparian Easement.

(a) The legislature recognizes that many persons have in good faith purchased and paid taxes on lands beneath navigable waters which were purportedly conveyed into private ownership by the state, the United States or a prior sovereign many years ago without reservation or other record notice of the state's claim to sovereignty lands. The legislature recognizes that it is difficult, if not impossible, to determine the true extent of waterbodies as they existed on March 3, 1845, whether such waterbodies were navigable on that date, and whether previously submerged lands were exposed naturally or avulsively. The legislature further recognizes that the costs of litigating the ownership rights in such lands are burdensome to the state and prohibitive to many claimants, particularly since the submerged lands to which the state claims sovereignty title are of limited value for private use due to governmental land use controls, environmental regulations, and restrictions imposed by the common law public trust doctrine. Accordingly, in consideration of the relinquishment of potential claims and title to the lands presently lying beneath navigable waters, there is hereby granted to qualifying riparian landowners and their successors in interest, in perpetuity, (i) a special riparian easement[258] in the lands designated and approved under subsections (3) and (4) and (ii) any right, title or interest in formerly submerged lands now lying above the ordinary high water line as approved under subsection (4), which might be owned by the state, but to which a qualifying riparian landowner has record title. The legislature specifically finds and declares these grants to be in the public interest.[259]

(b) No fee in excess of ten dollars shall be imposed by the state or its agencies for the enjoyment of the special riparian easement by the riparian owner, his successors or assigns. Nothing herein shall be construed to confer a special riparian easement in any meandered waters.

(7) Sovereignty Lands Deeds. Within the period set forth for filing claims in subsection (8), a qualifying riparian landowner may execute and deliver a sovereignty lands deed to the Board of Trustees. The Board of Trustees is obligated to accept and record all deeds so granted and shall be required to furnish the grantor with a valuation and other data needed to claim the conveyance as a charitable contribution for federal income tax purposes.[260]

(8) Challenge to Navigability Determination. Any person or persons who claim an ownership interest in lands to which the state would acquire title under subsection (5) may contest the determination of navigability or allege a prior vesting of title by filing a notice of claim with the Board of Trustees within

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258. The special riparian easement prevents perceived administrative abuses and overcharges for the privilege of making perfectly reasonable and often societally desirable use of the periphery of the waterways. The special riparian easement is expressly subject to state regulatory controls.

259. This section contains both the express grant language necessary to confirm title in riparian deedholders and the public interest finding required by article X, section 11 of the Florida Constitution.

260. This section also encourages voluntary relinquishment of claims to allegedly navigable waterways. As navigability and the extent of sovereignty lands are disputed, such a conveyance has value. Given the nature of the uncertainty, any deed given should resemble a quitclaim deed.

one year after the date of the last publication in the county made pursuant to subsection (4). The notice of claim shall state:

(i) the name(s) of the person(s) claiming the ownership interest;

(ii) the legal description of riparian properties owned and the lands specifically claimed;

(iii) the nature of the ownership interest claimed; and

(iv) the legal basis of the claim.

(a) Upon receiving a notice of claim, the Board of Trustees shall examine the claim and determine whether the ownership interest asserted by the claimant should be confirmed or rejected in whole or in part. The Board of Trustees shall consider, inter alia, the following criteria in evaluating claims:

(i) whether the claimant has apparent record title based on a purported and express conveyance from the United States or a foreign sovereign prior to statehood;[261]

(ii) whether and to what extent title may have been confirmed in the claimant by the operation of law; and

(iii) whether ad valorem taxes have been assessed and paid on the land. Within 120 days after receiving the notice of claim, the Board of Trustees shall notify the claimant, in writing under seal,[262] of its decision to confirm or reject the claim in whole or in part, and shall advise the claimant of the right to seek an adjudication of ownership rights as provided in subsection 8(b).

(b) Any person who files a notice of claim pursuant to subsection (8) and whose claim is rejected in whole or in part by the Board of Trustees may file suit in the circuit court of the county in which the lands are located to obtain an adjudication of ownership rights. Such action must be filed within one year after the date on which the Board of Trustees issued notice to the claimant of its decision pursuant to subsection (8)(a), or shall be forever barred. In suits filed pursuant to this subsection, the claimant shall have the burden of proving that meandered waters are non-navigable, and the state shall have the burden of proving that unmeandered waters are navigable. The standard of navigability used, unless otherwise stipulated by the parties, shall be the federal standard adopted for determinations of title applied to the waterbody as it is found to have existed on March 3, 1845. The court may, in its discretion, award attorney's fees to the prevailing party if it finds that the factual or legal grounds on which the losing party contested the claim were without substantial merit.

(c) No filing of a claim under this subsection shall prejudice a riparian landowner's rights to voluntarily convey property to the state pursuant to subsection (7) or to receive the special riparian easement and confirmation of title to avulsively exposed lands in accord with subsection (6), or otherwise affect his ability to become a qualifying riparian landowner.

(9) Objections as to Determination of Ordinary High Water Line. Any riparian owner who disagrees with the determination of the ordinary high water

261. In either case, title to the submerged lands passed absolutely to the grantee.

262. This determination will affect title and should thus meet the requisites for filing in the public records of the respective counties.

line as it affects his property may file with the circuit court of the county in which the lands are located for an independent determination of the ordinary high water line.

(a) The court may on its own motion, and shall on motion of a party, appoint an unbiased surveyor to independently survey the ordinary high water line as it exists on the date of survey. Costs of such a survey may be assessed against the non-prevailing party. The report of an independent surveyor shall be persuasive evidence of the ordinary high water line.

(b) The court, unless an independent survey is conducted, may adopt the lower of the line described in the department's survey or the line of demarcation between land and water as is shown on the most recent United States aerial survey of the land in question.

(c) The private claimant may choose to claim that the historic ordinary high water line, as adjusted for artificial and avulsive changes, is the true boundary. If the private claimant so chooses and upon satisfactory proof of such boundary line, this method of determination shall be adopted by the court.[263]

(d) Upon judicial determination, the ordinary high water line as determined shall be reduced to a legal description and recorded in the public records of the county in which the land lies and in the offices of the department. Such legal description shall supersede the legal description promulgated under subsection (4) for all purposes under this section.

(e) No filing of a claim under this subsection shall prejudice a riparian landowner's rights to convey property voluntarily to the state pursuant to subsection (7) or to receive the special riparian easement and confirmation of title to avulsively exposed lands in accord with subsection (6), or otherwise affect his ability to become a qualifying riparian landowner.

(10) Effect on State Police and Regulatory Powers. Nothing herein shall be construed to exempt either the unsubmerged fee interest or riparian rights held by the riparian owner or the special riparian easement granted herein from the operation of the state's police and regulatory powers.

(11) Claims Against Landowners. Except as provided in this subsection, qualifying riparian landowners shall not be subject to claims or suits by the state, or by any party claiming through the state, to recover any damages, assess any fees, or impose any penalties for past uses of unmeandered sovereignty lands by the qualifying riparian landowners or their predecessors in interest. Any private parties holding such claims shall have a period of one year from the date of enactment to file their claim in the circuit court of the county in which the lands lie. All claims not filed within that period shall be barred. The legislature hereby finds and acknowledges that prior to the publication of navigability designations under subsection (4), qualifying riparian landowners may have justifiably relied on the public records and the presumption of non-navigability in exercising ownership rights with respect to sub-

263. The private landowner must have the option of selecting the common law determination to avoid constitutional taking claims. *See supra* note 251. This option only becomes relevant in those few situations where someone willing to bear the expense could show that the historic OHWL was lower than the existing OHWL.

merged lands and the adjoining uplands; therefore, it would be inequitable and contrary to the public interest for the state to seek damages, to assess fees, or to impose penalties of any kind against qualifying riparian landowners for conduct which preceded the first official determination that the waters, though unmeandered, are navigable. This subsection shall not be construed to limit claims against or the defenses of any person who is not a qualifying riparian landowner or predecessor thereof as of the date when navigability designations are published pursuant to subsection (4).

(12) Admission of Non-navigability. A determination by the Board of Trustees not to designate a waterbody or portion thereof as navigable or not to contest a notice of claim made pursuant to subsection (8), shall constitute an admission, forever binding on the state, its agencies and political subdivisions, that the lands underlying such waterbody or portion thereof are neither navigable nor owned by the state as sovereignty lands.

(13) Ad Valorem Taxes. No person shall be assessed or required to pay ad valorem taxes on any of the lands to which the state has title or is granted title under subsections (5) or (7). All such lands shall be removed from the county tax rolls as of the perfection date.

(14) Nonseverability of Section. It is the intent of the legislature that the provisions of this section be deemed interdependent and nonseverable. It is also the intent of the legislature that the time periods prescribed herein not be extended, as continued uncertainty as to the ownership of the lands in question is contrary to the public interest.

Section 2. This act shall take effect upon becoming a law.