Florida Law Review

Volume 24 | Issue 2 Article 7

January 1972

Conveyances of Sovereign Lands Inder the Public Trust Doctrine: When Are They in the Public Interest?

Stephen D. Rees

CONVEYANCES OF SOVEREIGN LANDS UNDER THE PUBLIC TRUST DOCTRINE: WHEN ARE THEY IN THE PUBLIC INTEREST?

> Of all the difficult questions which have arisen in the application of the law to questions involving water rights, there is none which has produced more uncertainty, caused greater conflict of opinion, or produced more diverse results than that relating to the title to the land under the waters.[1]

This statement is especially true in Florida where the common law is modified by Spanish civil law, numerous statutes, and the actions of various administrative agencies. Generally, beds of navigable waterbodies[2] are considered to be owned[3] by the state for the public good unless validly conveyed

---

1. 1 H. FARNHAM, THE LAW OF WATERS AND WATER RIGHTS §36, at 165 (1904).

2. After the American Revolution the original thirteen colonies became distinct, independent sovereignties owning the navigable waters and the lands beneath. The concept of navigability became the key to determining the ownership of submerged lands, for without navigability there could be no sovereign land. Sovereignty is composed of two rights: *imperium* (political control) and *dominium* (ownership of the title). Since American courts have interpreted these two as inseparable, upon admission to the Union in 1845 Florida received both from the federal government. *See* Leighty, *The Source and Scope of Public and Private Rights in Navigable Waters*, 5 LAND & WATER L. REV. 391 (1970).

Title to submerged lands could only pass to a newly-formed sovereign state if the waters were *navigable in fact* and if the federal government had not already lawfully disposed of them. The Daniel Ball, 77 U.S. 557, 563 (1870), most clearly defines this navigability test: "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 on water."

Each new state received title from the federal trustee solely because of the concept of "equal footing" (U.S. CONST. art. IV, §3) which declares that Florida's admission into the Union was on "equal footing" politically with the other sovereign states. *See* Broward v. Mabry, 58 Fla. 398, 408, 50 So. 826, 829 (1909).

To determine what waters are navigable and thereby protected by the public trust doctrine, Florida has modified slightly the federal test. In Florida the *capacity* for navigation, and not actual usage, determines the navigable character of waters. Martin v. Busch, 93 Fla. 535, 563, 112 So. 274, 283 (1927).

3. Such state ownership of submerged beds almost always guarantees that the public shall have the right to the surface use of navigable waters for both commercial and recreational purposes. However, the sources of state control over navigable waters is measured by bed ownership, which in turn is limited by the federal test of navigability. It may be that in order to conform more closely to the public trust doctrine and the concept of *jus publicum*, the federal navigation servitude should no longer always control the extent of public and private rights, or both, in navigable waters within a sovereign state, but should be determined to a greater extent by state law.

It may be more advisable to allow the states to develop their own standards for determining public rights in navigable waters in conjunction with commercial use of these same waters. And in a state such as Florida, where recreational use of waters is the basis for the tourist industry, recreation may be the "new commerce." Instead of more restrictive federal legislation the state can control such public and riparian surface uses by an intelligent, comprehensive, fair enforcement of the public trust doctrine. For a discussion of the need for expanding state controls *see* Leighty, *supra* note 2, at 433.

to the private sector pursuant to proper legislation. This doctrine of state trusteeship of sovereign lands[4] is judicial and is not a product of statute or constitution.[5] Not until Florida adopted its present constitution in 1968 did the trust theory, with its restrictions on alienability of submerged lands, find constitutional expression.

Article X, section 11, of the Florida constitution incorporates the public trust doctrine by providing that "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." Additionally, "sale or private use of portions of such lands may be authorized by law, but only when not contrary to the public interest." Even stronger language followed in an amendment to article X, section 11, providing authority for the sale or use of sovereign submerged lands only when affirmatively shown to be in the public interest.[6]

This note will examine Florida cases and statutes to determine what elements comprise the "public interest."[7] The rationale by which the state justifies transfers of sovereign lands will be explored, and suggestions made concerning limits to the application of the trust doctrine.

The note will also examine the possibility of utilizing the public trust doctrine to restrain state governmental activities concerning state sovereign lands, when such activities are detrimental to the public interest. Although traditionally applied to determine title to submerged lands under navigable waters, the doctrine may be an effective deterrent against both governmental and private parties whose activities jeopardize public recreational and conservational rights in state trust lands.

Implicit in the public trust doctrine is a judicial recognition of a fiduciary relationship between the state and its citizens.[8] Florida courts will find a

---

4. Sovereign lands may be designated as submerged lands that the State of Florida acquired upon admission into the Union in 1845. The act of admission specifically stated that Florida was to enter on "equal footing" with the other sovereign states. The courts have interpreted this to mean that Florida acquired ownership of these submerged lands upon admission, not by virtue of an express grant from the United States but as an attribute of sovereignty or political parity. Broward v. Mabry, 58 Fla. 398, 408, 50 So. 826, 830 (1909).

5. "There is no provision in the Constitution of this state expressly or impliedly forbidding the Legislature to dispose of submerged lands lying between high and low water mark, nor declaring any trust in the state in its tidewaters, nor the submerged lands that may be subject to overflow at high tide. Whatever trust was imposed was that of the common law which the state through its Legislature assumed, and the state accepted, with reference to such lands, when it was admitted to the Union." State *ex rel.* Buford v. Tampa, 88 Fla. 196, 207, 102 So. 336, 340 (1924).

6. Fla. H.R.J. Res. 792 (1970).

7. *See* Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249 (1933) (discussing the state's obligation under the trust doctrine to protect the public interest). *See also* Lohrmann, *The Environmental Lawsuit: Traditional Doctrines and Evolving Theories To Control Pollution*, 16 WAYNE L. REV. 1085, 1123 (1970).

8. The Florida decisions have not expressly recognized a fiduciary relationship but rather have delineated facts and circumstances suggesting the existence of a judicially enforceable trust obligation to protect and promote the public interest in sovereign lands.

trust whenever, in their determination, the public's best interest requires its application to protect the title to beds of navigable waterbodies.[9] The underlying rationale of the trust doctrine is, therefore, the state's recognition of its obligation to act in the best interest of the public.

The public trust imposes basic restrictions on alienability. The state has an affirmative duty to conserve public lands for public use and to restrain private landowners from detrimental uses to the public well-being.[10] However, Florida traditionally has allowed the Trustees of the Internal Improvement Fund (IIF) to sell or lease portions of sovereign lands when the grantee remains subject to the trust restriction.[11] The grant, however, cannot be implied, and the alleged grantee bears the burden of showing an express legislative intent to divest the state of title to its trust properties. Unfortunately, the grantee, forgetting the fiduciary obligation, has instead often regarded the lands solely as private and immune from any servitude favoring the public.[12] Recent decisions indicate increased awareness of the necessity of protecting the state's natural resources and insuring that the various uses made of sovereign lands are in the public interest.

To understand the restrictions the trust doctrine imposes on the use of sovereign lands, this note will examine conveyances to promote the general public welfare, conveyances to riparians, legislation to regulate fishing, and the dredging and filling of submerged lands.

THE HISTORICAL PERSPECTIVE OF THE TRUST DOCTRINE

Florida's interpretation and application of the public trust doctrine is best understood by examining the doctrine's origins under English common law and Spanish civil law.[13] At common law,[14] the title to land under navigable

---

Hayes v. Bowman, 91 So. 2d 795, 799 (Fla. 1957); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 608, 612, 47 So. 353, 355, 356 (1908); State v. Black River Phosphate Co., 32 Fla. 82, 99, 108, 13 So. 640, 646, 648 (1893).

9. It appears that the public derives its rights to these lands not solely from the fact that originally these were sovereign lands but from judicial realization that, since the public interest is being jeopardized, the public "rights" to be upheld cause these lands to become trust lands.

10. *See* State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893).

11. FLA. STAT. §253.12(2) (Supp. 1970).

12. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473 (1970). *See also* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); Coastal Petroleum Co. v. Secretary of the Army, 315 F. Supp. 845 (S.D. Fla. 1970).

13. In 1821 Spain ceded all Florida holdings then owned to the United States. The Treaty of Cession provided that all grants of land made before Jan. 24, 1818, by lawful Spanish authority "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under [Spain]." 3 Fla. Stat. 103 (1941) (Whitfield's Notes, *Legal Historical Background of the State of Florida).*

Spanish grants are one major source of title to water bottoms in Florida. Consequently, the status of the civil law as it applied to the Floridas is important, since only the title and rights to which private landowners were entitled under civil law were accorded landowners deriving ownership through these confirmed grants. Brickell v. Trammell, 77

tidal waters and to the seashore was in the King as the representative of the sovereign power. This distinct property right, *jus publicum,*[15] was a royal prerogative, entitling the King to hold such lands in trust for the common use and benefit of the people. This right could not be alienated by transfer by a royal grant.

The doctrine of *jus privatum,*[16] however, did allow the King to grant property with all the privileges and benefits that could be enjoyed without infringing upon the *jus publicum.*[17] Florida inherited the common law rule requiring that private rights in public lands must exist by express legislative grant and remain subject to the public's rights of navigation, fishing, and bathing.[18]

A similar distinction existed under civil law between these two property rights in the Crown.[19] The United States Supreme Court has stated that the King of Spain held dominion over navigable waters and the soil below the high water mark and that any claim of private ownership necessitated proof of an express legislative grant.[20]

Early Supreme Court decisions[21] reflect concern over preserving the basic concept of a trust doctrine while expanding and adopting it to meet the exigencies of a rapidly growing industrial society. In the landmark decision, *Shively v. Bowlby,*[22] the Court settled a title dispute to lands under the Columbia River by upholding a state statute granting title to plaintiff. The Court concluded the statute was a proper exercise of state governmental

---

Fla. 544, 82 So. 221 (1919).

14. The common law adopted the underlying rationale of the Roman law trust doctrine. This doctrine recognized that although governmental sovereignty extended over the sea and seashore, the rights of fishing, navigation, and the taking of water were illimitable and incapable of individual, exclusive appropriation. *See* Comment, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine,* 79 YALE L.J. 762 (1970).

15. *See* State v. Black River Phosphate Co., 32 Fla. 82, 92, 13 So. 640, 643 (1893); Leighty, *supra* note 2, at 408.

16. State v. Black River Phosphate Co., 32 Fla. 82, 92, 13 So. 640, 643 (1893).

17. "[T]he title, *jus privatum,* in such lands, as of waste and unoccupied lands, belongs to the King, as the sovereign; and the dominion thereof, *jus publicum,* is vested in him as the representative of the nation and for the public benefit." Shively v. Bowlby, 152 U.S. 1, 11 (1894).

18. State v. Black River Phosphate Co., 32 Fla. 82, 96-97, 106, 13 So. 640, 645-46, 648 (1893).

19. "The King has the property, but the people have the use necessary. The free and uninterrupted enjoyment of these is deemed an inherent privilege. The rights thus denominated are of navigation and fishery, and classed among those public rights known as *jura publica* or *jura communia* as contradistinguished from *jura coronae,* the private rights of the Crown." Geiger v. Filor, 8 Fla. 325, 337 (1859). *See* New Orleans v. United States, 35 U.S. 662 (1836).

20. City of Mobile v. Eslava, 41 U.S. 234 (1842). Such strict construction against the grantee is also imposed by Florida courts when a private party claims rights in public trust lands. *See, e.g.,* Apalachicola Land & Dev. Co. v. McRae, 86 Fla. 393, 98 So. 505 (1924); Sullivan v. Richardson, 33 Fla. 1, 14 So. 692 (1894).

21. *E.g.,* Martin v. Waddell, 41 U.S. 367 (1842) (upholding the power of a state to allocate the use made of submerged lands for the best interests of the public).

22. 152 U.S. 1 (1894). Defendant claimed title under an act of Congress while Oregon

authority over lands beneath navigable waters, but reaffirmed that state regulation remained subject to the paramount federal commerce power.[23]

In *Illinois Central Railroad v. Illinois*[24] the Supreme Court established another significant condition to guide states in disposing of trust lands. It held that a state may not divest itself of control over a "whole area" of submerged lands,[25] for such abdication results in a breach of the state's fiduciary duty to regulate navigation for the general public.[26]

Three basic judicial limitations have been placed upon the power of a state to dispose of trust property:[27]

> (1) In construing grants by a sovereign to private persons, a court will observe a presumption against the separation from the sovereign power of title or dominion to navigable waters and the lands beneath.[28]
>
> (2) Grants by a state to a private person remain subject to the paramount federal commerce power.[29]
>
> (3) Grants of submerged lands must not interfere with private riparian rights[30] or valid public uses.[31]

The standard becomes one of degree in which the state must maintain its sovereign control over enough of the trust lands so as to protect all public interests; the state may relinquish control over a portion only when such

---

was still a territory, and plaintiff claimed title under an Oregon state statute.

23. *Id.* at 9.

24. 146 U.S. 387 (1892).

25. The Illinois Legislature in 1869 had made an extensive grant of submerged lands in fee simple to the railroad, including all land underlying Lake Michigan for one mile out from the shore and extending one mile in length along the central business district of Chicago. In 1873 the legislature repealed the grant and brought action to have it declared invalid.

26. 146 U.S. 387, 437-39, 460 (1892).

27. Nelson, *State Disposition of Submerged Lands Versus Public Rights in Navigable Waters*, 3 A.B.A. NATURAL RESOURCES LAW. 491, 497 (1970).

28. United States v. Oregon, 295 U.S. 1 (1934).

29. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); U.S. CONST. art. I, §8, cl. 3.

30. A riparian proprietor is one whose lands abut and adjoin a watercourse in which the law recognizes certain rights relating to the water, its use, and ownership of the soil beneath. Generally, riparian rights include: the use of the water for common purposes as bathing and other domestic uses; the right to wharf out from the land so long as there is no impediment to navigation and commerce; and the right of access to navigable water and to the view thereof. *See* Mobile Docks Co. v. City of Mobile, 146 Ala. 198, 205-11, 40 So. 205, 207-09 (1906).

31. As the uses of Florida's navigable waters have increased and altered in character, the historical restriction of the trust doctrine to navigation, commerce, and fishing as the only public rights to be enforced has been broadened. Nelson, *supra* note 27. Today, the public trust doctrine can be utilized to compel the state or private landowners and lessees to recognize and protect vital conservation and recreation values inherent in sovereign lands. The Florida courts continue to recognize that boating, fishing, and swimming are major components of the state's tourist industry, and their opinions reflect a conscious balancing among conflicting uses of public waters. *E.g.*, Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919).

reallocation does not jeopardize the public interest in the remaining trust property.[32]

Restrictions on Uses of Sovereign Lands Imposed by the Public Trust Doctrine

Ideally, the trust doctrine would operate to allow the state, in the interest of promoting the public welfare, to grant limited rights in portions of sovereign lands. Such conveyances would foster the enjoyment and development of natural or artificial resources, aid navigation and commerce, and encourage development of new industry.[33] However, by allowing public use of these lands for "the purposes implied by law"[34] the state would remain obligated to administer them in the public interest. Such use of the doctrine is difficult to achieve, however, due to myriad factors influencing disposition of trust properties.

State Action To Promote the Public Welfare

The transfer of title of trust lands to municipalities or private persons to promote the general welfare and to satisfy local interests has frequently been questioned. Of concern to the courts is whether such conveyances divert these lands from more traditional uses to the impairment of the public rights.[35]

In 1899 the Florida Legislature undertook to grant certain lands to the City of Tampa;[36] in 1924 Tampa contracted to convey these to a private residential developer. The state sought to invalidate the contract.[37] The city had granted the trust properties in return for the developer's promise to build a bridge to them, with a public park included in the development. The court held the grant did not violate the trust theory, since the conveyance involved mud flats having little value for navigation.[38] A presumption of legislative correctness[39] in disposing of trust lands was followed, since the

---

32. *See generally* Sax, *supra* note 12.

33. Merrill-Stevens Co. v. Durkee, 62 Fla. 549, 558, 57 So. 428, 431 (1928).

34. *Id.*

35. A recurrent theme in this note is the judiciary's growing realization that the state will continue to transfer sovereign lands to local groups in order to meet changing public interests. The traditional uses of trust properties should not negate the validity of new and different uses that are shown not to be inimical to the broad public interest.

36. The grant conveyed lands "'in trust or otherwise, and lying and being within the corporate limits of . . . Tampa, whether said lands are covered, or partly covered by the tide, or other waters, and including all sawgrass and marsh lands, as well as the bottom of Hillsborough Bay . . . .'" State *ex rel.* Buford v. Tampa, 88 Fla. 196, 198, 102 So. 336, 337 (1924).

37. *Id.*

38. *Id.* at 208, 102 So. at 340. The court stated that the action of the city was valid, since there was no constitutional provision expressly forbidding the legislature from disposing of submerged beds. Only the common law trust theory was applicable, and it was not being violated in this instance. *See* note 5 *supra.*

39. *See* text accompanying notes 62-63 *infra.*

grant served to benefit the public welfare by reclaiming "waste lands" for badly needed residential purposes.

A recurring judicial concern has been that the trust doctrine mandate against total abdication of control over sovereign lands not be disobeyed.[40] The courts have had to decide whether the issuing of franchises[41] and permits created exclusive privileges inimical to the public welfare.[42] *Quo warranto* proceedings have been brought to test their validity under the trust theory.[43] For instance, one party[44] was granted the sole and exclusive franchise to erect and operate toll bridges for the use and benefit of the citizens of Monroe County.[45] This franchise was struck down as an ultra vires act of the board of county commissioners.[46] The fatal defect in this particular grant rebutting the presumption that normally upholds legislative enactments under judicial review was the lack of statutory authorization to issue an exclusive franchise, which would have meant total loss of control by the state in regulating navigation. However, the court has upheld permits granting only a limited use to exist so long as the premises should be used for purposes promoting public convenience, where at any time the permit could be revoked when in the best interests of the general public to confer the permit upon another.[47] The permit was interpreted to come within the trust doctrine's objective of preserving while promoting the most effective use of sovereign lands.

The state has also regulated use of its beaches in the interest of promoting and protecting the public welfare. In *Adams v. Elliott*[48] the supreme court had to determine whether recreational pursuits such as sunbathing and swimming were paramount to use of the beach as a public highway. Such use had been authorized by special law.[49] The court recognized that while

40. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892).

41. A franchise is a special privilege to do something that cannot be done of common right, which is conferred upon one or more individuals or a corporation by governmental authority. *See* Leonard v. Baylen St. Wharf Co., 59 Fla. 547, 52 So. 718 (1910).

42. Hicks v. State *ex rel.* Landis, 116 Fla. 603, 156 So. 603 (1934); State *ex rel.* Landis v. Rosenthal, 109 Fla. 363, 148 So. 769 (1933).

43. Paradoxically, one branch of state government has exercised its authority under the trust theory only to be challenged by another branch for violating this trust. The potential for tension created by the separation of powers doctrine provides the impetus for a re-examination of the powers bestowed upon the state as trustee.

44. State *ex rel.* Landis v. Rosenthal, 109 Fla. 363, 148 So. 769 (1933).

45. Fla. Laws 1925, ch. 11640 (Extraordinary Session).

46. "If the legislative power to grant franchises may be delegated when the franchise directly affects the rights and prerogatives of the state, such delegation of authority should be accompanied by appropriate limitations within which the delegated authority may be exercised, in order to enforce controlling law and to conserve public policy and the general welfare." State *ex rel.* Landis v. Rosenthal, 109 Fla. 363, 364-65, 148 So. 769-70 (1933).

47. Hicks v. State *ex rel.* Landis, 116 Fla. 603, 156 So. 603 (1934) (the permit had been granted from the Trustees to the Board of Trustees of Road and Bridge District No. 1, Alachua County, to occupy the lake bed for the purpose of erecting, maintaining, and operating a dock, wharf, bathhouses and boat landings along with anchorages, all for public use).

48. 128 Fla. 79, 174 So. 731 (1937).

49. Fla. Laws 1925, ch. 10486 (Special Acts).

the foreshore is held by the state in trust for the public primarily for navigation, commerce, fishing, and bathing, the beach is also held in trust for other uses.[50] However, use of the beach for a highway was "subject to the paramount right of the public to use [it] for bathing and recreation."[51] In *White v. Hughes*[52] the court determined conclusively that bathing and recreation were the primary uses of the state's beaches.[53] Moreover, the court emphasized the importance to Florida's tourist industry of public rights to bathing and recreation in the ocean waters, especially because the foreshore is held in trust by the state.[54]

It would appear that the trust doctrine is more readily applied to protect recreational activities directly associated with Florida's beaches than those upon and under navigable waters. The distinction is probably attributable to the traditional concern to promote navigation and commerce; only recently has the trust doctrine begun to be enforced to promote and preserve recreational activities and scenic natural areas in the state's submerged lands and navigable waters. Moreover, the title or use conveyed by the state does not violate the trust doctrine so long as the courts can find express retention of control by the state over the uses of trust lands.

Legislation Under the "Police Power" Creating Riparian Rights in Sovereign Lands

Several legislative acts passed under the "police power" have been contested by both the state and private landowners as violative of the trust theory. Before the Riparian Act of 1856[55] riparian owners were prevented by the state's title to lands beneath navigable waters from improving their upland lots. By this Act, however, the state released to the riparian owner the right to these lands with the avowed purpose of promoting the erection of wharves and piers to encourage commerce.[56] Immediately after enactment, the state and private parties sued to enjoin the activities of riparian owners, as being in violation either of the Act's objectives or of the trust obligation now reserved in the grantee for the state.[57]

A significant example is *State v. Black River Phosphate Co.*[58] in which

50. Adams v. Elliott, 128 Fla. 79, 87, 174 So. 731, 734 (1937).

51. *Id.*

52. 139 Fla. 54, 190 So. 446 (1939). The issue decided was whether bathers, like plaintiff, who had been struck by an automobile driving on the beach, had a superior right to the use of the beach.

53. *Id.* at 58, 190 So. at 448.

54. *Id.* at 61-62, 190 So. at 449-50.

55. Fla. Laws 1856, ch. 791.

56. Ever since the Riparian Act of 1856 it has been a requirement that before a private landowner can claim title to or make use of submerged lands he must fill out to the bulkhead line. This line is the farthest extension of land fill permitted by law out into a navigable waterbody. *See* Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); Bulkhead Act of 1957, Fla. Laws 1957, ch. 57-362.

57. *See, e.g.*, Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957); State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893).

58. 32 Fla. 82, 13 So. 640 (1893).

the court determined that a grant under the Riparian Act of 1856 did not give the riparian owner an unqualified or exclusive right to mine phosphates from the bed of a navigable river as a private enterprise.[59] The company claimed that the Act vested it with title to lands extending under a tidal stream that was, in fact, navigable. The Florida supreme court observed that under the historical tradition of *jus publicum* in the sovereign, the state could grant parcels of submerged lands to improve navigation and commerce by the erection of wharves, but that the grants were a valid exercise of legislative power only if the public interest was not substantially impaired.[60] The court emphasized that trusts connected with public property or property of a special character, as lands under navigable waters, cannot be placed wholly beyond the control of the state.[61] Judicial notice was taken of a presumption that the legislature, considered as the fiduciary or representative of the people, must be held to have acted with due regard for the preservation of such lands and waters to the uses for which they were held.[62] This presumption clearly seems to be a convenient judicial fiction to alleviate the need for a case-by-case challenge to legislative authority.[63] In construing the Riparian Act, the court stated: "The effect of such a grant, considering the fiduciary nature of the holding, would be nothing more than a transfer of the title subject to the public trust."[64] Therefore, the use of trust lands for the mining of phosphates was not within either the expression or implication of the Act on the purposes or intent of the state.[65]

---

59. *See also* Coastal Petroleum Co. v. Secretary of the Army, 315 F. Supp. 845, 849 (S.D. Fla. 1970).

60. State v. Black River Phosphate Co., 32 Fla. 82, 99, 13 So. 640, 646 (1893).

61. This statement reiterates the express holding of Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). *See* text accompanying notes 24-26 *supra*.

62. *See* Hayes v. Bowman, 91 So. 2d 795, 802 (Fla. 1957).

63. It appears that in many cases the Florida courts do not always uphold this presumption but overcome it when confronted with an issue that demands court intervention by judicial review to preserve the public's last chance to hear and review the issue more thoroughly. *E.g.*, Perky Properties v. Felton, 113 Fla. 432, 151 So. 892 (1934).

64. State v. Black River Phosphate Co., 32 Fla. 82, 108, 13 So. 640, 648 (1893).

65. The Riparian Act of 1856 purported to divest the state of title to certain submerged lands lying between privately owned upland and the nearest navigable channel. However, the Act neglected to provide for the development of islands, sandbars, and the like, which were not separated from privately owned upland by navigable waters. Legislation supplemental to the Riparian Act of 1856 also engendered extensive litigation; this was especially true of the Act of 1917, vesting in the Trustees of the Internal Improvement Fund the title to islands, sandbars, and shallow banks of tidal waters. Fla. Laws 1917, ch. 7304. The Trustees were empowered to sell and convey these submerged lands. *Id.* §2. However, if the riparian owner could prove impairment of his riparian rights the lands were to be withdrawn. *Id.* §4. If the state failed to do so, the riparian could bring an injunction. *Id.* §3. *See* Watson v. Holland, 155 Fla. 342, 20 So. 2d 388 (1945) (suit to enjoin the Trustees from executing oil leases on sovereign lands under §§253.12, .13 of the Florida Statutes was denied on grounds that the statute was a legally beneficial promotion of the public welfare); Deering v. Martin, 95 Fla. 224, 116 So. 54 (1928) (deed conveying submerged lands in Biscayne Bay held invalid because of improper description not within the requirement of the 1917 Act specifying that only land covered by waters less than three feet deep could be conveyed by the state without violating the public trust doctrine).

In summary, Florida courts passing upon legislation disposing of submerged lands under the "police power" observe two important distinctions. First, there is a presumption favoring legislative enactments, which is rebutted whenever the public interest demands that the courts as final arbiters protect the public's use of the trust lands by invalidating the legislation or its authorized activities. Second, the courts recognize that commercial pursuits upon navigable waters must be safeguarded and always considered in deciding whether the trust doctrine has been violated by legislation.

Rights of Riparians in Use of Their Lands Concurrent with and Subservient to the Public Rights Under the Trust Doctrine

The common law held that a riparian owner's rights to navigable waters emanated from his ownership of the uplands extending to the high water mark only, since the shore is a part of the bed owned by the state in trust for the people.[66] It became a matter for judicial determination, nevertheless, as to what extent the rights of riparians were subject to the superior rights of the public under the trust doctrine. In several cases the supreme court was asked to grant a riparian plaintiff full use of navigable waters to the *complete exclusion* of other riparian owners as well as the public.[67]

In 1909 a riparian owner who conducted a logging business sought to enjoin another riparian owner in the same business from using the opposite river front, alleging that the defendant had denied him free access to the river to conduct his business.[68] The court answered that the state would implement the trust doctrine to prevent a riparian owner from impeding unreasonably or from exercising exclusive rights to navigation or commerce upon a navigable river.[69] Further, both riparians and the public could also use these trust properties for recreational pursuits, but the court would determine a proper balance between these uses of navigable waters should the proper state body fail to enforce the trust on behalf of the public.[70]

A riparian's title to land beneath navigable water is at best qualified or restricted, a bare technical title, always subordinate to such uses of submerged lands and waters above as would be consistent with or demanded by the public right to navigation.[71] This public right of navigation entitles the public generally to the *reasonable use* of navigable waters for all legitimate purposes of travel or transportation and for pleasure boating in any watercraft, the use of which does not inhibit others from enjoying the common

66. Broward v. Mabry, 58 Fla. 398, 407, 50 So. 826, 830 (1909).

67. *See, e.g.*, Silver Springs Paradise Co. v. Ray, 50 F.2d 356 (5th Cir. 1931); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Ferry Pass Inspectors' & Shippers' Ass'n v. White River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909).

68. Ferry Pass Inspectors' & Shippers' Ass'n v. White River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909).

69. *Id.* at 404-05, 48 So. at 645.

70. *Id.*

71. United States v. Chandlar & Dunbar Water Power Co., 229 U.S. 82, 89 (1912).

right.[72] The fact that a waterway is navigable will thus prevent a riparian from exercising exclusive rights.

Riparian owners have also sued to prevent a conveyance of submerged lands in front of their uplands. Their rights depend upon a finding that the waters are non-navigable, thereby allowing private ownership free from any trust obligation. In *Broward v. Mabry*[73] complainant sought to enjoin the trustees from selling lands beneath Lake Jackson.[74] Upon a finding of navigability,[75] the court held that although the riparian owner did not have vested title, his riparian rights would be enforced.[76] The court determined that the appellant Trustees had no authority or title to sell the lands, since they were sovereign lands held in trust and not swamp or overflowed lands.[77]

A riparian cannot exercise any exclusive right to the shore or submerged lands, since these remain in trust held by the state for the public's use. However, the courts may determine what uses have priority as the most beneficial in navigable waters.

Protection and Regulation of Fishing Rights

Fishing has traditionally been recognized as a primary purpose afforded by navigable waters for which the state holds title to submerged lands in public trust.[78] However, there may be "limited disposition of portions of such lands, or of the use thereof in the interest of the public welfare, where the rights of the whole people as . . . to other uses of the waters are not materially impaired."[79] Litigation has arisen over whether the state in making such dispositions has surrendered control over a whole area[80] so as to violate its implied duties under the trust doctrine. The courts have had to decide whether legislation has created invalid exclusive rights in state-held water bottoms and whether the legislature can impose any regulations on the public right of fishing in state waters.[81]

---

72. Silver Springs Paradise Co. v. Ray, 50 F.2d 356, 359 (5th Cir. 1931). This decision settled the competing uses of two riparian owners by affirming that a riparian can have no exclusive right to operate sightseeing boats in navigable waters. The court would not tolerate any infringement of the reasonable exercise of the public right of navigation.

73. 58 Fla. 398, 50 So. 826 (1909).

74. The case is also significant because of the unique shallowness of the lake held navigable and because of the dictum indicating that in view of the state's absence as a party in its sovereign capacity, the court would implement the trust to deny plaintiff his relief. *Id.* at 411-12, 50 So. at 830-31.

75. The "navigable in fact" test is the standard for judging which waterbodies in their ordinary state come within the trust doctrine. Broward v. Mabry, 58 Fla. 398, 412, 50 So. 826, 831 (1909). *But see* Martin v. Busch, 93 Fla. 535, 540, 112 So. 274, 283 (1929).

76. 58 Fla. 398, 413, 50 So. 826, 831 (Fla. 1909).

77. *Id.*

78. *See, e.g., Ex parte* Powell, 70 Fla. 363, 375-76, 70 So. 392, 396 (1916).

79. State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 609, 47 So. 353, 355 (1908).

80. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). *See also* text accompanying notes 24-26 *supra.*

81. FLA. STAT. §370 (1969) represents a thorough administrative framework by which the Board of Conservation and the Department of Natural Resources can effectively regu-

Much litigation has arisen over the use of submerged beds to cultivate oysters, sponges, and other shellfish; frequently Florida courts have applied the trust theory whether the state was a party or not.[82]

The traditional requirement that a claimant to trust lands demonstrate positively his right or title has been reaffirmed continually.[83] The supreme court has reiterated that any state disposition of submerged lands is valid only by specific legislation,[84] and such land continues to be subject to state regulation of its uses. Special legislation will be invalidated whenever the granting of exclusive rights in sovereign lands infringes upon the public's rights to coextensive use.[85]

Florida courts have often resorted to Spanish civil law to uphold the state's authority to regulate fishing rights in trust waters. An early Florida case[86] challenged the authority of the state to require by statute[87] that commercial fishermen and wholesale fish dealers pay a fee to operate their boats upon public waters. Reviewing the cession treaty with Spain, and the concept of "equal footing"[88] and its effect upon Florida as a sovereign state, the Florida supreme court concluded that the cession by Spain to the United States of the Florida territory involved *no* reservation to persons collectively or severally of any fishing rights in public waters.[89] As a result of the obligations imposed by the trust doctrine, such public waters and fish therein were held for the benefit of all, subject to lawful regulation of their use as "the lawmaking power may provide. The right to fish is subject to State regulation for the general welfare. This regulation may be of any character and to any

---

late commercial fishing in navigable waters.

82. *See, e.g.*, State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908) (the state successfully brought a *quo warranto* proceeding against the defendant who claimed ownership of a portion of the bed of the navigable Amelia River by a conveyance from the Trustees of swamp and overflowed lands).

83. *See, e.g.*, Symmes v. Prairie Pebble Phosphate Co., 64 Fla. 480, 60 So. 223 (1912). Fla. Laws 1906, chs. 646-51, provided that county commissioners were to grant within designated limits exclusive rights to plant oysters in public waters. Complainant alleged damages to his oyster beds by a wrongful continuous discharge of refuse into a navigable river. The supreme court held his allegation of ownership and possession was insufficient to show a right or title to bring this cause of action.

84. *E.g.*, Symmes v. Prairie Pebble Phosphate Co., 64 Fla. 480, 60 So. 223 (1912).

85. Act of 1897, Fla. Laws 1897, ch. 4564, §1, at 106 (repealed 1899). The Florida supreme court was being asked whether plaintiff had the exclusive right to grow sponges in navigable waters based upon title derived under this Act. This legislation sought to encourage riparian owners to engage in the propagation of sponges on a large scale. "'[T]hey shall have the exclusive right to sponge . . . within such limits.'" Perky Properties v. Felton, 113 Fla. 432, 439, 151 So. 892, 893, *quoting from* Acts of 1897, ch. 4564, §1.

86. *Ex parte* Powell, 70 Fla. 363, 70 So. 392 (1916).

87. Fla. Laws 1915, ch. 6877, §§1-14. The present comparable statute is FLA. STAT. §370.06 (1969). In a habeas corpus proceeding, Powell alleged that the legislature was without authority to tax the people for taking fish from state waters, and that such legislation deprived one of property without due process of law, since under Spanish law the right to fish belongs to the people and cannot be lawfully restricted by a licensing tax.

88. Broward v. Mabry, 58 Fla. 398, 408, 50 So. 826, 829 (1909); U.S. CONST. art. IV, §3. *See also* note 2 *supra*.

89. *Ex parte* Powell, 70 Fla. 363, 373, 70 So, 392, 396 (1916).

extent that does not in effect destroy that right."[90] The fee was a proper exercise of the regulatory sovereign police power, enacted for the protection and regulation of the fishing industry.[91]

In *Apalachicola Land & Development Co. v. McRae*[92] complainants sought to enjoin[93] the state from leasing or using, for planting and cultivating of oysters, certain submerged lands under tidal, navigable waters. Since such waters were *res communes* in the Civil Law,[94] only a showing of express sovereign intent would validate a conveyance.[95] The court determined that "Spain could not conceivably confirm a concession to private ownership of submerged lands that would yield a right to exclude the public from any of the rights of navigation, fishing, bathing . . . ."[96] Such private ownership could only have hindered settlement of these lands. Consequently, since the taking of oysters was a right common to all the public, the state could exercise its right as trustee to lease the submerged lands to promote the oyster business.[97]

The state as trustee of sovereign lands may by legislative act convey portions of submerged beds for the cultivation of fish and may regulate by license use of navigable waters under the sovereign "police power." Public fishing privileges can be exercised only in navigable waters below the high water mark. Thus, the court has properly denied relief to parties denied fishing privileges in tidal waters.[98] Moreover, when private property is opened *artificially* to the sea, these waters are not navigable under the *Broward v. Mabry* test.[99] Only waters in their ordinary, natural state are navigable in fact under the trust doctrine.[100] The lawful exercise of sovereign authority is limited then by this navigability concept defining lands protected as soverign water bottoms.

The Relation of the Trust Doctrine to the Issuance of Dredge and Fill Permits

Recent efforts by ecology groups, concerned citizens, and state legislators have provided new information concerning possible deleterious effects of a proposed bulkhead line or of a dredge and fill permit.[101] As a result, the policies of both the Trustees and the legislature have shifted from virtually

90. *Id.*
91. *Id.* at 373, 70 So. at 395-96.
92. 86 Fla. 393, 98 So. 505 (1924).
93. The claim of title was predicated upon a grant from native Indians to John Forbes & Co., which had allegedly been confirmed by Spain. The supreme court observed that if the complainants had no actual title to these submerged lands they would possess no right to bring the action against the state. *Id.* at 429, 98 So. at 517.
94. *Id.* at 433, 98 So. at 518.
95. *Id.*
96. *Id.* at 436, 98 So. at 519.
97. *Id.* at 437, 98 So. at 520.
98. Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).
99. 58 Fla. 398, 407, 50 So. 826, 830 (1909).
100. *See* Clement v. Watson, 63 Fla. 109, 113, 58 So. 25, 27 (1912).
101. *See, e.g.*, J. SAX, DEFENDING THE ENVIRONMENT—A STRATEGY FOR CITIZEN ACTION (1971).

unlimited largess to a more conscious concern for the conservation and preservation of Florida's natural resources.[102] This is illustrated by examining recent legislation and the continuing effort of the judiciary to limit and narrow the scope of this legislation to conform more closely to the judicial concept of the trust doctrine.[103]

The Riparian Act of 1856[104] granted riparian owners the right to build wharves into the water and to fill from the shore to the channel, and purported to give the riparian owner unqualified title if he owned to the low water mark. However, subsequent litigation established that the riparian had no greater rights than the general public to land below the high water mark until he actually wharfed or filled to the channel.[105] Thus, the apparently complete title of the riparian was merely a qualified right, contingent upon his making improvements to his waterfront for the benefit of commerce.[106]

In 1921 the legislature modified the Riparian Act by enacting the Butler Bill,[107] to bring the 1856 Act in line with previous court interpretations and with basic changes in conditions in Florida since 1856. The Butler Bill expressly recognized the public trust doctrine by inserting the clause "subject to any inalienable trust under which the state holds such lands" preceding the language of the 1856 Act, which purported to divest the state of "all right, title and interest" to submerged sovereign lands.[108] Moreover, an additional paragraph to section 1 of the 1856 Act confirmed court decisions that a riparian had only a "qualified" right.[109]

Litigation arose over the point in time at which the statute vested these rights in riparian owners to bulkhead, fill in, and erect wharves. Although a federal decision[110] had held the intent of the legislature was not to vest title completely in the riparian proprietor to the submerged land until the lands were bulkheaded and filled, the initial Florida decision disagreed. In *Trumbull v. McIntosh*[111] the Florida supreme court held that such statutory rights became vested when the law became effective and could pass with conveyance of the upland. Later Florida supreme court decisions, however, concluded that to be entitled to these "vested rights" they must be utilized.[112]

---

102. FLA. CONST. art. II, §7.

103. *See* text accompanying notes 120-62 *infra*.

104. Fla. Laws 1856, ch. 791; *see* text accompanying notes 55-57 *supra*.

105. Holland v. Fort Pierce Financing & Constr. Co., 157 Fla. 649, 658, 27 So. 2d 76, 80 (1946).

106. Panama Ice & Fish Co. v. Atlanta & St. Andrews Bay Ry., 71 Fla. 419, 71 So. 608 (1916).

107. Fla. Laws 1921, ch. 8537.

108. Fla. Laws 1921, ch. 8537, §1.

109. "[T]he grant herein made shall apply to and affect only those submerged lands which have been, or may be hereafter, actually bulk-headed or filled in or permanently improved continuously from high water mark in the direction of the channel . . . ." *Id.*

110. Commodores Point Terminal Co. v. Hudnall, 3 F.2d 841 (S.D. Fla. 1925).

111. 103 Fla. 708, 138 So. 34 (1931); *accord*, Northwood Inv. Co. v. McIntosh, 106 Fla. 31, 142 So. 649 (1932); *cf.* Bridgehead Land Co. v. Hale, 145 Fla. 389, 199 So. 361 (1940).

112. *E.g.*, Holland v. Fort Pierce Financing & Constr. Co., 157 Fla. 649, 27 So. 2d 76 (1946).

Failure to perfect such rights meant later deprivation of all title and interest to adjacent submerged lands by a subsequent alienation of these lands by the state.[113] In *Holland v. Fort Pierce Financing & Construction Co.*[114] plaintiff, owner of uplands fronting the Indian River, procured a permit from the Corps of Engineers to bulkhead and fill 700 feet out into the river and to construct piers. Subsequently, the legislature vested the Trustees of the Internal Improvement Fund with title to this bulkhead area for purposes of sale by them.[115] Plaintiff's suit was for an injunction claiming the Butler Bill vested him with title; the trial court found the 1941 Act an unconstitutional deprivation of his property rights.[116] In affirming, the supreme court held that his qualified title would become absolute when he actually bulkheaded and filled, but the court emphasized that under the trust doctrine the riparian was obligated not to allow his improvements to obstruct the channel or to impede commerce.[117]

The supreme court reaffirmed *Holland* in *Duval Engineering & Contracting Co. v. Sales.*[118] Plaintiff, a riparian owner on the St. Johns River, sought to enjoin construction of a bridge by defendant upon adjacent submerged lands to which a perpetual easement had been granted by the Trustees. Plaintiff sought to require defendant to institute condemnation proceedings before using the submerged lands. Holding that as owner of riparian rights appurtenant to his upland the plaintiff had a "vested interest" to be compensated under the Butler Bill, the supreme court reiterated that his title would have remained qualified until he had actually bulkheaded and filled.[119]

The Bulkhead Act of 1957

Although previous legislation had attempted to delineate the relative rights of the individual property owner and of the state in sovereign lands, very little legislation actually regulated dredging and filling in Florida waters. Consequently, substantial benefits from submerged landfills were offset by the detrimental effects of other fills.[120] The Bulkhead Act[121] was heralded as a significant step to alleviate the situation.

The Bulkhead Act of 1957 represents a conscious effort by the state to create a sensible uniform program to evaluate bulkheading and filling conditions detrimental to the public interest.[122] It represents a step by the state

---

113. *Id.*
114. *Id.*
115. Fla. Laws 1941, ch. 21546 (Special Acts).
116. Holland v. Fort Pierce Financing & Constr. Co., 157 Fla. 649, 27 So. 2d 76 (1946).
117. *Id.* at 657, 27 So. 2d at 81.
118. 77 So. 2d 431 (Fla. 1954).
119. *Id.* at 433.
120. *See* F. MALONEY, S. PLAGER, & F. BALDWIN, WATER LAW AND ADMINISTRATION — THE FLORIDA EXPERIENCE §125.1 n.142 (1968).
121. Fla. Laws 1957, ch. 362. *See* FLA. STAT. §253 (Supp. 1970) for important 1969 and 1970 changes in the terminology and coverage of the Act.
122. "The Law was enacted in response to an aroused public interest and alarm con-

to honor its obligations under the public trust doctrine. Florida Statutes, section 253.12, reaffirms the vesting of title to all state-owned sovereign lands in the Trustees of the Internal Improvement Fund.[123] The most important feature of the Bulkhead Act is section 253.122, providing for the establishment of bulkhead lines in tidal state waters to separate areas suitable for selling and filling from unsuitable areas. This bulkhead line is the maximum limit of solid fill; it represents the future shoreline. Before locating a bulkhead, certain criteria are to be considered by the local authorities[124] to insure that the public interest is safeguarded and promoted.[125] The purposes to be served are clearly to regulate use of sovereign lands.[126]

The constitutionality of section 253.122 was upheld in *Gies v. Fischer*[127] as a reasonable exercise of the "police power" and as an effective exercise of the state's retained power under its inalienable trust obligation. Defendants, the Pinellas County Water and Navigation Control Authority, had established a bulkhead line over a portion of plaintiff's privately-owned submerged lands. Their title derived from a valid conveyance from the Trustees. Plaintiffs alleged that the Authority's action deprived them of property without just compensation and that the statute was an unconstitutional delegation of legislative authority. The court answered: "[T]he intention of the act was to authorize establishment of bulkhead lines on lands *privately* as well as publicly owned at any point where further extension of fill *would impair the inalienable public rights specified . . . .*"[128] *Gies* settled affirmatively the question of whether a bulkhead line could be established legally upon privately owned submerged lands, and seemed to indicate that Florida's extensive waterfront lands would undergo a more orderly development with both public and private interests being equally weighted.

---

cerning the great number, promiscuity and adverse effects of fills already made in coastal offshore waters . . . . The Legislature recognized that unregulated and uncontrolled filling of submerged lands threatened the economy of the state and its growing communities, impaired the scenic beauty and utility of our coastal lands and waters and adversely affected the enjoyment and utilization of these areas by our citizens and visitors to a degree inimical to the public welfare." Zabel v. Pinellas County Water & Navigation Control Authority, 171 So. 2d 376, 387 (Fla. 1965) (Ervin, J., dissenting).

123. Although the Butler Bill was expressly repealed, the title to all lands heretofore filled or developed was confirmed in the upland owners and the trustees upon request must issue a disclaimer to each such owner. FLA. STAT. §253.129 (1969).

124. FLA. STAT. §253.122 (3) (1969).

125. "Of primary importance in the location of a bulkhead line *is the overall consideration of the public interest.*" Establishing Bulkhead Lines in Florida at 4 (1965) (prepared by the Staff of the Trustees of the Internal Improvement Fund with cooperation of the Board of Conservation, Att'y General, and Game & Fresh Water Fish Comm'n) (emphasis added).

126. These purposes are to: (1) protect the coastal and intracoastal waters of the state in the interest of navigation and commerce; (2) regulate and control developments in public waters; (3) conserve the natural resources of public waters and the submerged bottoms; (4) protect public and private rights in lands running with such waters; and (5) provide for and encourage improvement of land and water areas suitable for developments. *Id.* at 2.

127. 146 So. 2d 361 (Fla. 1962).

128. *Id.* at 363 (emphasis added).

The Bulkhead Act has engendered litigation concerning possible infringement of procedural and substantive due process. The courts have particularly been asked to determine who shall bear the burden of proof and who shall have standing to litigate.

The court has held that the denial of a dredge and fill permit amounts to a taking of property without just compensation when the state cannot prove the filling would materially, adversely affect the public interest.[129] It has indicated that the bulkhead and fill determination by the local governing body need not be upheld on the basis of the evidence. The administrative agency bears the burden of proof and must establish to the satisfaction of the appellate court that such filling would be detrimental to the public interest. By placing the burden of proof upon the administrators, the case of *Zabel v. Pinellas County Water & Navigation Control Authority*[130] makes it somewhat more difficult to enforce a submerged land policy, since the courts apparently may substitute their judgment for that of the local authority.

An indication of the necessary standing requirements to raise an illegal use of trust lands appears in *Sarasota County Anglers Club, Inc. v. Burns.*[131] Plaintiff sought to have submerged lands it used for fishing and swimming impressed with a "public easement." The district court dismissed the complaint for lack of standing[132] and held that although such lands are held in trust, this trust "does not go to the extent of requiring that every part of public bottoms must be forever maintained in a state of nature for use in that condition by any citizen who would prefer that no change be made."[133] The court pointed out that for reasons of economic development, public health, and safe navigation the state often requires the draining of marshes, dredging of channels, and filling of some areas to produce firm land.[134]

The court spoke of the necessity of general criteria by which competing uses of navigable waters could be compared to determine the use most beneficial to the public interest. Some agency (IIF) must determine " 'when, under what circumstances, and to what extent the public interest demands or permits the construction of wharfs . . . piers . . . the dredging of channels and the filling of . . . bottoms.' "[135] Although the court heard the

129. Zabel v. Pinellas County Water & Navigation Control Authority, 171 So. 2d 376 (Fla. 1965).

130. *Id.* This conclusion seems to indicate that the court no longer lends as much credence to the presumption that the Trustees, being public officials, will comply with their duty under law to regulate sovereign lands. *But cf.* Morgan v. Canaveral Port Authority, 202 So. 2d 884 (4th D.C.A. Fla. 1967), which declared: " 'This presumption is to all intents and purposes a conclusive one when attempted to be put in issue . . . .' " *Id.* at 886.

131. 193 So. 2d 691 (1st D.C.A. Fla. 1967).

132. *Id.* at 693. The dismissal indicates that state courts have not as readily adopted the federal courts' more liberal rules of procedure as to plaintiff standing. *See* Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir.), *cert. denied,* 384 U.S. 941 (1965).

133. Sarasota Anglers Club, Inc. v. Burns, 193 So. 2d 691, 693 (1st D.C.A. Fla. 1967).

134. *Id.*

135. *Id.*

case because of the importance of the question and the possibility, if not probability, of similar situations in the future and although its decision was adverse to plaintiffs, it did not bar future suits to preserve recreational areas. The court alluded to the failure of plaintiffs to allege the delegation doctrine challenge to the statute as being invalid or that the public bodies had acted ultra vires.[136]

Section 253.124 of the Florida Statutes requires that "[a]ny private person, firm or corporation desiring to construct islands or add to or extend existing lands . . . in the navigable waters of the state . . . shall make application in writing to the board of county commissioners . . . for a permit authorizing . . . such construction . . . ."[137] To aid the board in its determination the statute requires an applicant to provide "a plan or drawing showing the proposed construction and the manner in which . . . [it] will be accomplished and also the area from which any fill material is to be dredged . . . ."[138] Moreover, no construction is permitted until the board of county commissioners is provided with a biological survey, an ecological study, and where deemed necessary by the department of natural resources, a hydrographic survey.[139] These reports are read into the record and are duly considered. Should the county grant a permit the application must then obtain approval of the Trustees of the IIF.[140] Finally, the applicant must complete the proposed work within three years after issuance of the permit.[141]

The rationale for allowing local county commissions to approve bulkhead and dredge and fill permits seems to be their ability, through public hearings and a greater familiarity with local interests, to arrive at equitable determinations. In one action to compel the Trustees to approve a dredge and fill permit[142] the First District Court of Appeal held that if the application had been approved by the county commissioner, the Trustees were required to grant approval for they did not have any "discretion" in granting "formal approval."[143] Even though the Trustees argued that their trust obligations compelled use of their discretion to override the sometimes rash action of a local county board concerning sovereign lands,[144] the court could see no impediment to the trust doctrine once the county board had granted approval

136. *Id.* Perhaps with a proper pleading of the ultimate facts in issue the state courts will relax somewhat more the requirements for standing to allow more cases of this nature to be litigated. A greater extent of positive judicial review over both legislation and administrative agencies would facilitate a clearer understanding of what comprises the public interest.

137. FLA. STAT. §253.124 (1) (Supp. 1970).

138. FLA. STAT. §253.124 (2) (Supp. 1970).

139. FLA. STAT. §253.124 (3) (Supp. 1970).

140. FLA. STAT. §253.124 (2) (Supp. 1970).

141. FLA. STAT. §253.124 (4) (Supp. 1970). However, the permit may be renewed.

142. Burns v. Wiseheart, 205 So. 2d 708 (1st D.C.A. Fla. 1968).

143. *Id.* at 710.

144. *Id.* at 709. Since local pressures for development of navigable waters and submerged lands sometimes override the usually cautious "good sense" of the county commission, the holding may be significant in increasing county authority in the control and development of what are state-held public water beds.

pursuant to statutory regulations. The presumption was used to uphold a legislative enactment and the actions of local governmental officials pursuant to it.

The present requirements, which must be met to have applications determined, present several problems for which some solutions may be suggested. Under the existing Bulkhead Act the sale of land by the Trustees is permitted only if not "contrary to the public interest" and "upon such prices, terms and conditions as it sees fit."[145] Buying the land under section 253.12 and obtaining a permit under section 253.124 to dredge and fill are separate statutory procedures;[146] this can create a difficult position for the applicant. Even though he has purchased land he cannot be certain of its value until the county board acts upon his application.

Applicants can argue that once the submerged land is sold to a private owner he is at liberty to use the land as he wishes, since conservation considerations were resolved by the approval of the sale.[147] To remedy this defect the statute should be amended to provide that conditions precedent to the purchasing, bulkheading, and filling of submerged lands be satisfied before the sale is consummated.[148] Furthermore, there seem to be inconsistencies in the implementation of the statute by the Trustees and local county authorities. It is not clear whether the county commissions use the same criteria for each applicant or whether the commissions' criteria for fill permits differs from that used by the Trustees in authorizing private sales. The solution is adoption of uniform criteria to promote certainty in the administrative process.[149] Finally, although the recent addition of required biological and ecological reports provides some semblance of objectivity to the implementation of chapter 253, a gross defect exists in the lack of quality gradients to determine factors that must be present to allow or disallow the application. The difficulty is the *administrative discretion,* which endangers the applicant's right to a fair and impartial report by the state as to the value of the submerged land. The statute lacks standards to determine the relative weight

---

145. FLA. STAT §253.12(2) (1969).

146. [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 342. The opinion explains that a sale by the Trustees depends first upon the establishment of bulkhead lines that limit the farthest extent of land fills out into navigable waters. The opinion notes that a sale is a separate and distinct event from the issuance of a fill permit.

147. Two recent decisions illustrate the result of the denial of a fill permit after a sale by the Trustees. *Compare* Divosta Rentals, Inc. v. Kirk, No. 69-1219 (2d Judicial Cir. Ct. Fla., filed Nov. 13, 1969) (holding that the right to fill was granted by the Trustees incident to the purchase of the land, since the requirements for a fill permit are nearly identical to a deed of sale from the Trustees) *and* Gables by the Sea v. Kirk, No. 69-984 (2d Judicial Cir. Ct. Fla., filed Sept. 17, 1969) (holding that the right to dredge from adjacent public bottom lands was incident to the purchase of the submerged lands and became a vested right), *with* FLA. STAT. §253.123(4) (Supp. 1970) (a mere sale by the Board of Trustees does not operate to vest any right in the grantee to dredge submerged bottoms unless a construction permit is issued pursuant to FLA. STAT. §253.124(3) (Supp. 1970)).

148. *See* F. MALONEY, S. PLAGER, & F. BALDWIN, *supra* note 120, §125.5.

149. A progressive working model is the legislation enacted in 1955 by the Pinellas County Water Authority. *See* Fla. Laws 1955, ch. 31182, §§8(a)-(e), 9.

to be given to each environmental element in the area as a whole. Consequently, one agency may label the area very biologically productive whereas another might not, and both may be able to substantiate their conclusions. To reduce possibly unfair administrative discretion, section 253 should be amended to incorporate a more complete explanation of the function and components of these reports.

The impact of the newly required reports on litigants is evident in two recent decisions.[150] In *Coastal Petroleum Co. v. Secretary of the Army*[151] a federal district court refused to compel the issuance of a permit to a mineral lessee who sought to mine limestone from navigable Lake Okeechobee. Although conceding the validity of the lease,[152] the court reasoned that "[j]ustice demands that the public's interest be protected . . . ."[153] The opinion alludes to the possible irreversible damage to the Floridian aquifer[154] if salt water should contaminate fresh water due to the mining, and to the detrimental effect that it could have upon Florida agriculture.[155]

In *Zabel v. Tabb*[156] the Fifth Circuit Court of Appeals was asked to decide whether under the Rivers and Harbors Act[157] the Secretary of the Army could consider conservation value as a condition to be met in determining the acceptability of a proposed project. The holding, relying on the National Environmental Policy Act[158] and the Fish and Wildlife Coordination Act,[159] upheld the Secretary's refusal to authorize the issuance of a dredge and fill permit in navigable waters upon factually substantial ecological reasons, even though the project would not have interfered with navigation, flood control, or hydroelectric power production.[160]

---

150. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971); Coastal Petroleum Co. v. Secretary of the Army, 315 F. Supp. 945 (S.D. Fla. 1970).

151. 315 F. Supp. 845 (S.D. Fla. 1970).

152. *See* Collins v. Coastal Petroleum Co., 118 So. 2d 796 (1st D.C.A. Fla. 1960).

153. Coastal Petroleum Co. v. Secretary of the Army, 315 F. Supp. 845, 850 (S.D. Fla. 1970). Although the court found that the lease was a valid property right under which the lessee had a legal right to mine in Lake Okeechobee, it refused to grant an affirmative injunction to compel the issuance of a permit for mining, since the lessee's legal right could be preserved by an award of money damages for lost profits.

154. Much of the state is underlaid with a porous and permeable limestone that provides much of Florida's ground water supply. These rock formations are called "aquifers." In Florida the aquifers are under both watertable and artesian conditions. The Floridian aquifer is the source of most of the state's large springs and numerous wells.

155. "[T]he balancing of interests between Coastal, the Trustees, and the People of the State of Florida lends weight to the prevention of such mining operations by a private company." Coastal Petroleum Co. v. Secretary of the Army, 315 F. Supp. 845, 850 (S.D. Fla. 1970).

156. 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

157. 33 U.S.C. §403 (1970). The Act states: "The creation of any obstruction . . . to the navigable capacity of any of the waters of the United States is prohibited." This Act includes the erection of wharves, piers, or other structures and the excavation and filling in of navigable waters; it is a flat prohibition unless the Secretary of Army, after recommendation by the Corps of Engineers, approves the project.

158. 42 U.S.C. §§4331-47 (1970).

159. 16 U.S.C. §§661-66 (1970).

160. The decision clearly discredited appellant's contention that the Submerged Lands

The Bulkhead Act is Florida's most ambitious attempt to develop a comprehensive program for the orderly development and use of sovereignty lands. Although upheld as a constitutionally reasonable regulation,[161] recent decisions indicate that even when private parties and governmental agencies adhere strictly to the Act's provisions, a dredge and fill permit may be denied if the court finds "record" evidence of possibly deleterious effect to the ecology in the local area.[162] The courts no longer blindly follow the presumption that the legislation enacted promotes uses most beneficial to the public interest. Instead, the courts are weighing the equities of conflicting uses of sovereign lands to determine which uses are most productive of the value inherent in such lands and waters.

CONCLUSION

The underlying rationale of the public trust doctrine is the state's recognition of its fiduciary obligation to control, promote, or dispose of sovereign lands in a manner most beneficial to the "public interest." Case law reveals that there is no specific definition for the term. Total reliance upon judicial decisions to define the elements comprising the "public interst" may create a distorted perception of the applicable limits of the trust theory. The inclusion of the theory in the Florida constitution does not necessarily make the term "public interest" more meaningful, since there are no interpretative guidelines, either in article X, section 11, or in chapter 253 of the Florida Statutes, to suggest the effective range of its application regarding sovereign lands.[163]

To prevent numerous direct challenges to legislation, the courts created a presumption that the legislature acts in its capacity as trustee to preserve and promote the "public interest" by determining whether proposed new uses of trust lands would destroy or impair the public's rights in sovereign lands. The presumption is rebuttable whenever a party can show that the legislation itself or the actions of the grantee are in derogation of those obligations imposed by the inalienable trust. Usually the courts apply a strict construction against the grantee to invalidate his interest in the sovereign lands. This presumption has provided both administrative agencies and

---

Act, 43 U.S.C. §§1301-43 (1970), stripped the federal government of any regulatory power over tidelands except as to navigation, flood control, and hydroelectric power. 430 F.2d 199, 204-06 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

161. Gies v. Fischer, 146 So. 2d 361 (Fla. 1962).

162. *See, e.g.*, Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

163. Conservationists considered the trust theory's inclusion in the 1968 constitution as a significant victory, especially because there had been a statewide moratorium on the sale of sovereign lands. The conservationists were fearful that if a statute had been passed containing the present constitutional phraseology, at some future date the legislature would repeal it, thereby possibly reverting to indiscriminate sales of sovereign lands. The conservationists felt more confident that the trust theory would be a more effective device to control the uses of submerged lands, since an amendment to the constitution is much more difficult than the repeal of a statute. *See* FLA. CONST. art. XI. Interview with J. Lewis Hall, Jr. in Tallahassee, Fla., March 22, 1971.

the courts great latitude in formulating subjective definitions of the "public interest." The definition is further confused by the proliferation of statutorily created agencies seeking to increase their authority. The Board of Conservation,[164] the Game and Fresh Water Fish Commission,[165] the Board of Trustees (IIF),[166] and the Air and Water Pollution Control Board[167] are representative of agencies that now implement their policies in favor of the presently dominant political force — ecology and conservation. There is a tremendous struggle occurring among state agencies as to who shall be the guiding light in regulating the uses of state trust lands.[168] There is a conflict at three levels of government between:

(1) independent constitutional commissions such as the Game and Fresh Water Fish Commission;

(2) agencies under the Governor's creation and control such as the Air and Water Pollution Control Board;[169]

(3) agencies under the direction of the Florida State Cabinet such as the IIF or Board of Natural Resources.[170]

The Governor can directly dictate policy to an agency whereas an independent constitutional commission, responsible to neither the Governor nor to his Cabinet, has extensive latitude in promulgating regulations in the public interest. Conflict may also arise from the fact that the Cabinet members themselves constitute both the Board of Trustees[171] and the Board of Conservation.[172]

This interagency conflict can cause a private party to experience a lengthy administrative procedure at excessive cost only to be denied a permit by one of numerous agencies. For example, *X* who has acquired submerged lands under section 253.12 and has obtained a permit from the IIF to dredge and fill, cannot, under section 253.124, file an application with the Corps of

---

164. FLA. STAT. §370.02 (1969).

165. FLA. STAT. §372.01 (1) (1969).

166. FLA. STAT. §253.03 (1) (1969). Their broad powers include "acquisition, administration, management, control, supervision, conservation, protection, and disposition of all lands owned by, or which may hereafter inure to, the state or any of its agencies, departments, boards or commissions . . . ."

167. FLA. STAT. §403.045 (1969).

168. Interview, *supra* note 163.

169. The extent of the Governor's control over the Air & Water Pollution Control Board is evident by the last sentence of the section declaring: "The members . . . shall serve at the pleasure of the governor." FLA. STAT. §403.045 (1969).

170. FLA. STAT. §20.25 (1) (1969).

171. FLA. STAT. §253.02 (Supp. 1970).

172. FLA. STAT. §370.02 (1969). Since the cabinet members do constitute several administrative bodies, it is possible for a division of loyalty to occur when some members believe the action of one administrative agency would jeopardize the policy or programs of another agency, which they administer. However, it should be noted that just as the cabinet members' multiple membership may create discord, it may also create harmony between agencies when the same personnel implement the policy and programs of several agencies toward a common field requiring regulation.

Engineers until the Air and Water Pollution Control Board has certified his proposed project as not violative of the Act's purposes.[173] The action of this one board can veto approval by the Cabinet and other agencies. Even if the certificate is granted, the Army Corps of Engineers may dilute state authority by requiring its own biological reports from various state agencies such as the Department of Natural Resources or the Game and Fresh Water Fish Commission. Any of these reports can lead to denial of an application.

Although this complex administrative system may provide sufficient checks upon the Board of Trustees' authority to sell or allow the private use of sovereign lands,[174] it further clouds a clear understanding of the "public interest" test. Since each state agency makes its decision based upon its own concept of this "public interest," subjective decisionmaking is prevalent in the administrative process. Only the provision in most Florida statutes for public hearings and for subsequent judicial review to challenge the administrative procedure or the competency of the decisionmakers protects an individual from discretionary determinations.

Judicial decisions have revealed that the public trust doctrine is no longer restricted to its historical scope of protecting the navigable waters and lands below solely for commerce, navigation, and fishing. The doctrine now has a broader application whenever the public questions inadequate or improper governmental regulation of public properties. Because of the importance of recreational activities and of the availability of natural resources to Florida's expanding tourist industry, the trust doctrine can be an effective judicial means to test the validity of legislative enactments that appear to endanger the "public interest." Historically, the Florida courts have realized and generally fulfilled their responsibility to be an impartial tribunal evaluating rationally the conflicting interests before it. Intelligent restraint is demonstrated by the court's application of the trust doctrine to allocate commercial and recreational uses in sovereign lands to protect while promoting the "public interest." Although there are apparent dangers as explained in such a subjective term, its value lies in its inherent flexibility, allowing the state to accommodate the public's changing uses of sovereign lands.

STEPHEN D. REES

173. FLA. STAT. §§403.061 (8), (9), (16) (1969).
174. FLA. STAT. §§253.12, .122, .124 (Supp. 1970).