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The Public Trust Doctrine and Ownership of Florida's Navigable Lakes

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COMMENTARY

THE PUBLIC TRUST DOCTRINE AND OWNERSHIP OF FLORIDA'S NAVIGABLE LAKES

Florida's inland waters[1] include more than 30,000 natural lakes[2] that provide the state with an essential, but limited, natural resource. Extensive economic development, spiralling population growth, new environmental concerns, and increasingly crowded conditions[3] have intensified the controversy concerning the management and control of inland waters.

Resolution of the controversy hinges primarily on the determination whether lakes are privately owned or state owned. For example, in Florida the public retains no right to use privately owned lakes;[4] nor are privately owned lakes subject to state filling restrictions.[5]

In Florida, as in most states, the availability of freshwater lakes for private ownership depends upon classification of the lakes as navigable or nonnavigable.[6] Only lakes that are unsuitable for navigation may be privately owned.[7] Nominally, at least, Florida still adheres to the common law public trust doctrine that requires the state to retain for the benefit of the public title to the beds of navigable lakes.[8] However, consistently negligent ad-

1. The state has 4,424 square miles of inland waters, compared to a dry land area of 54,136 square miles. In addition, there are 8,426 miles of tidal coastline in Florida. BUREAU OF ECONOMIC AND BUSINESS RESEARCH, UNIV. OF FLA., FLORIDA STATISTICAL ABSTRACT 1974 2, 3 (1974).

2. F. MALONEY, S. PLAGER, & F. BALDWIN, WATER LAW AND ADMINISTRATION §127.1, at 396 (1968) [hereinafter cited as MALONEY]. The estimate probably refers to any recognizable self-contained water body, including what might be considered ponds. "Lake," in the legal sense, refers to a watercourse in which the water is at rest rather than in motion. Hardin v. Jordan, 140 U.S. 371, 389 (1891). There is no minimum size for a lake, but a pond is considered "larger than a puddle and smaller than a lake." BLACK'S LAW DICTIONARY 1320 (4th ed. 1968).

3. For a discussion of legal efforts to control population density, see Juergensmeyer & Gragg, *Limiting Population Growth in Florida and the Nation: The Constitutional Issues*, 26 U. FLA. L. REV. 758 (1974).

4. The existence of public rights in privately owned lakes was emphatically denied by the Florida supreme court in Osceola County v. Triple E Dev. Co., 90 So. 2d 600, 602 (Fla. 1956). Navigational and recreational rights, however, are retained by the public in state-owned lakes. *See* Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).

5. Restrictions on filling land and dredging refer only to state-owned navigable waters. FLA. STAT. §253-123 (1975).

6. For a survey of relevant state cases, see cases cited in Annot., 112 A.L.R. 1108 (1938).

7. *See* Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES J. 1 (1967).

8. The key to the public trust doctrine is that the state merely holds legal title to the lands while the public owns the beneficial interest. By the terms of the trust, these lands are inalienable because the trust protecting public use cannot be violated. The lands are not held in a commercial sense, as if the state happened to hold title to ordinary lands. *See* Shively v. Bowlby, 152 U.S. 1 (1894); Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892); State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893).

ministration of public trust land by state agencies, an apparently deliberate legislative intent to make the lands available for private development, and judicial failure to examine closely the issues involved have contributed to the gradual erosion of the doctrine.

The Florida courts have primarily relied on three theories to exempt land from the public trust for purposes of private development:[9] (1) the apparent intent of certain legislative enactments, (2) equitable and legal estoppel, and (3) the application of the Marketable Record Title Act[10] to quiet title in favor of private claimants. This commentary examines the manner in which each theory has been used to defeat the purposes of the public trust doctrine and considers alternative means to protect the public interest in trust lands.

THE PUBLIC TRUST DOCTRINE

English common law[11] established the public trust doctrine to aid commerce by protecting the public's navigational rights from private restrictions. The doctrine was applied to land under navigable waters which originally included only those waters that rose and fell with the tides.[12] Under the

9. One recent case noted that all three theories were applicable although the court did not rely on any specific theory. Title to the navigable waters was quieted in favor of the developer, who was engaged in dredge and fill operations in preparation for a development known as Deltona Lakes. Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976). See text accompanying notes 105-127 *infra*.

10. FLA. STAT. §§712.01-.10 (1975).

11. Most American courts note that the common law doctrine of public ownership of tidal lands was derived from English common law. *But 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. 513 (1975). MacGrady observed that American law regarding the ownership of the shore was largely shaped by the misconceptions of early treatise writers. While English courts were adopting a prima facie rule of sovereign ownership, treatises were announcing a rule of absolute sovereign ownership that was subsequently accepted by nineteenth century state and federal courts.

In the United States, state ownership of all lands beneath navigable waters was settled by the Supreme Court in Martin v. Waddell, 41 U.S. 234 (1842). Justice Taney's opinion cited no authority but apparently relied on Arnold v. Mundy, 6 N.J.L. 1 (S. Ct. 1821), "an obscure case decided by an apologetic and admittedly unprepared state court judge." MacGrady noted that there was no support for the doctrine in English common law at the time of the American Revolution or when Justice Taney wrote in 1842. 3 FLA. ST. U.L. REV. at 609-10.

12. "By the common law, both the title and the dominion of the sea, and of rivers and arms of the sea, where the tide ebbs and flows, and of all the lands below high water mark, within the jurisdiction of the Crown of England, are in the King." Shively v. Bowlby, 152 U.S. 1, 11 (1894); *see* Illinois Cent. R.R. v. Illinois, 146 U.S. 387 (1892). As noted by the Pennsylvania supreme court in an early case, "[t]his definition may be very proper in England, where there is no river of considerable importance as to navigation, which has not a flow of the tide; but it would be highly unreasonable when applied to our large rivers, such as the Ohio, Allegheny, Delaware, Schuylkill, or Susquehanna and its branches." Carson v. Blazer, 2 Binn. 475, 478 (1810). The reasoning applies equally well to nontidal American lakes. More recent English cases have broadened the concept of navigability to encompass public rights in nontidal waters. Briston v. Cormican, 3 App. Cas. 641 (1878).

doctrine all such submerged lands were held in trust by the king for public use; the lands could not be alienated without authority granted by an act of Parliament.[13] Furthermore, even if the land were alienated, the public's use of such waters could not be disturbed.[14]

The American Revolution transferred ownership of the lands beneath navigable waters from the king to the then existing states.[15] Under the equal footing doctrine[16] Florida and other states that were subsequently created out of federal territory acquired similar sovereign ownership upon admission to the Union.[17]

The public trust doctrine was developed initially to facilitate trade by maintaining public access to navigable waters;[18] however, the doctrine has gradually been modified to reflect the public's changing needs for access to watercourses. Because of the increased accessibility of land areas by road in the last century, usage of lakes for personal and commercial transportation has greatly declined. The demand for public access to lakes for recreation, however, has increased in the past century. Consequently, today the public trust doctrine is used largely to retain the public's rights to navigable waters for recreational purposes.[19]

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13. State v. Black River Phosphate Co., 32 Fla. 82, 91, 13 So. 640, 643 (1893) (citing Commonwealth v. Alger, 7 Cush. 65 (Mass. 1850)).

14. The protected interest was navigational use, not ownership of the land. State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893).

15. The state as sovereign assumed control of these lands directly from the deposed king. The powers granted to the federal government by the Articles of Confederation and later by the Constitution did not include ownership of sovereignty lands. U.S. CONST. amend. X.

The problem of defining navigability is well-documented and will not be dealt with here more than superficially. *See generally* 1 H. FARNHAM, WATERS AND WATER RIGHTS §23 (1904). For development of the navigability concept in Florida, see MALONEY, *supra* note 2, §22.2.

16. The constitutional basis of this is not explicit, but the act admitting Florida provides "[t]hat 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, 5 Stat. 742. A discussion of the applicability of the equal footing doctrine to sovereignty lands is contained in Shively v. Bowlby, 152 U.S. 1, 26-28 (1894). *See* Oklahoma v. Texas, 258 U.S. 574, 583 (1922).

17. In states that originated as territories, all other lands that were not privately owned remained titled to the federal government. Subsequent ownership became confused as disputes arose concerning boundaries between federal patents and state sovereignty lands. Conflicting federal-state boundaries and definitions created most of the problems discussed in this commentary.

18. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 435-37 (1892). In contrast to the early English courts that defined navigable waters by reference to tidal action, most American jurisdictions adopted a broader definition based on commercial usefulness. *See generally* 1 H. FARNHAM, *supra* note 15, §23.

19. The expansion of the doctrine to cover recreational uses of lakes has been accomplished in several cases by adoption of a broader definition of the term "navigable." *See, e.g.*, Pigorsh v. Fanner, 22 Mich. App. 108, 177 N.W.2d 466 (Ct. App. Mich. 1970) (any valuable boat or vessel use indicates navigability); Lamprey v. State, 52 Minn. 181, 53 N.W. 1139 (1893) (adopting a pleasure boat test); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937) (availability of water for public purposes determines navigability). *See*

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Limited grants to private individuals of lands within the public trust have been permitted when the public interest in navigation, recreation, or other uses of the navigable waters is not adversely affected. Thus, private grants are frequently made to permit construction of wharves, docks, and other structures necessary for commercial use.[20] In considering grants of public trust lands, the courts usually allow an encroachment on the trust if it operates to advance the public's interest in the lands. Conveyance without public benefit, however, or any conveyance of an entire body of water is usually considered a violation of the trust and is therefore held void.[21] Furthermore, grants of sovereignty lands generally are strictly construed against the grantee[22] and must state specifically that sovereignty lands are being conveyed.[23]

Florida courts have applied with little difficulty the public trust doctrine to protect lands under navigable waters from private ownership. In *State v. Black River Phosphate Co.*,[24] the Florida supreme court held that the public

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generally Johnson & Morry, *Filling and Building on Small Lakes — Time for Judicial and Legislative Controls*, 45 WASH. L. REV. 27 (1970); Maloney & Plager, *Florida's Lakes: Problems in a Water Paradise*, 13 U. FLA. L. REV. 1 (1960).

20. States have permitted grants for varied navigational purposes; mining the bottoms; constructing dams, flood control devices, and bulkheads; and any purposes consistent with the trust. *See* FLA. STAT. §253.115 (1975) (providing for notice and hearings for sale); *id.* §253.124 (regulating filling of submerged lands); *id.* §253.47 (permitting mineral leases of submerged lands); *id.* §309.01 (regulating filling of tidewater lands).

The purpose of the trust is only to protect the public's right to use the lands. As long as this right is preserved, the trust is not violated regardless of ownership. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452-53 (1892).

21. State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893). Since the lands are owned by the public, any disposition without public benefit would be inconsistent with trust purposes. Similarly, alienation of an entire body of water would preclude the state's general control of the lands under the navigable waters. "It is grants of parcels of lands under navigable waters that may afford foundations for wharves, piers, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are . . . sustained in the adjudged cases . . . . [T]hat is a very different doctrine from the one which would sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of . . . [the trusts.]" *Id.* at 98-99, 13 So. at 645.

22. The Florida supreme court has noted that "[n]o authority need be cited for the proposition that a grant in derogation of sovereignty must be strictly construed in favor of the sovereign." Trustees of the Internal Improvement Fund v. Claughton, 86 So. 2d 775, 786 (Fla. 1956).

23. The court has held that a grant of swamp and overflowed lands could not contain sovereignty lands. Pierce v. Warren, 47 So. 2d 857 (Fla. 1950), *cert. denied*, 341 U.S. 914 (1951).

24. 32 Fla. 82, 13 So. 640 (1893). Defendant, owner of land bordering on the Black River, claimed title to part of the bed under the Riparian Act of 1856, which provided in part that "the state of Florida for the considerations above mentioned, divest themselves of all right, title, and interest to all lands covered by water lying in front of any tract of land, owned by a citizen . . . as far as to the edge of the channel, and hereby vest the full title . . . unto the riparian proprietors." 1856 Fla. Laws, ch. 791. The court interpreted the statute to grant rights to build structures useful to commerce but not to permit use of the land for any other purposes. The court did not consider phosphate mining

trust prohibited a riparian owner[25] from holding exclusive mineral rights to the bed of a navigable river. The court noted that the state could not relinquish control over the river bed unless no public interest would be impaired.[26]

Broward v. Mabry[27] was the first case in which the Florida supreme court applied the public trust doctrine to negate a riparian owner's claim of title to a navigable lakebed. Lake Jackson, a meandered lake with an average depth of two feet, periodically drained dry through subterranean outlets. At the time of the meander surveys, the lake was navigable only by boats drawing less than six inches and could be crossed in several places by horse and buggy. Adopting a broad definition of navigability, the court held that title to the lakebed remained vested in the state and that the riparian owner's claim of title to the lakebed was invalid.[28]

While *Black River Phosphate Co.* and *Broward* recognized that the state's title to navigable water beds was superior to the claims of riparian owners, the Florida courts also had to confront the problem of an inadvertant state conveyance of trust lands to private owners. In an early case, *State v. Gerbing*,[29] the supreme court voided the apparently mistaken conveyance of portions of a river bed and held that if the lands in dispute "are lands under the bed of navigable waters below the normal high-water mark[30] of the particular navigable waters, the state holds them in trust for all the people of the state, and the defendant has no exclusive right as claimed."[31] A later case, *Martin v. Busch*,[32] reinforced this position in reaching the conclusion that a

to be a commercial use of the waters, and, therefore, found that defendant's title did not extend to that use.

25. A riparian owner is "one who owns land on the bank of a river." BLACK'S LAW DICTIONARY 1490 (4th ed. 1968).

26. Florida recognized that commercial use of the waters would require that state interests be relinquished for the construction of facilities. The first bulkhead act, entitled "An act to benefit commerce," provided for the "right and privilege to build wharves into streams or waters of the bay or harbor as far as may be necessary to effect the purposes described. . . ." 1856 Fla. Laws, ch. 791, §§1, 27. The Act also provided for permission to fill, as long as a channel was not obstructed. *Id.*

27. 58 Fla. 398, 50 So. 826 (1909).

28. *Id.* at 411-12, 50 So. at 831. The court emphasized that the meander lines were evident on the plats, and that the riparian land was purchased with reference to the frontage on the lake. *Id.*

29. 56 Fla. 603, 47 So. 353 (1908). Defendant had staked off certain areas of a river bed and claimed the exclusive right to harvest the oysters growing in the areas. Defendant claimed title to the lands under a deed from the state by the Trustees of the Internal Improvement Fund. The court held that the survey and issue of patents had no effect on the character of the state's title. "[S]ubmerged lands not within the exterior lines of the river may be disposed of by legislative authority, if such disposition does not impair the rights of the people to the use thereof for any purpose expressed or implied by law." *Id.* at 613, 47 So. at 357.

30. For a discussion of the high-water mark concept, see Gay, *The High Water Mark: Boundary Between Public and Private Lands*, 18 U. FLA. L. REV. 553 (1966).

31. 56 Fla. at 615, 47 So. at 357.

32. 93 Fla. 535, 112 So. 274 (1927). The Trustees of the Internal Improvement Fund had deeded to defendant's predecessor in title unsurveyed swamp and overflowed lands bordered by Lake Okeechobee. The official meander survey of the lake was not made

state conveyance could not alienate lands under navigable waters even if the lands were included in the record description. "If by mistake or otherwise, sales or conveyances are made . . . [of] lands under navigable waters in the state, or tidelands, . . . such sales and conveyances are ineffectual for lack of authority from the state."[33]

The decisions in these cases indicate that the public trust doctrine is firmly entrenched in Florida with regard to navigable lakes.[34] The difficulty lies in determining which of Florida's lakes are navigable. Erroneous initial determinations of navigability have led to administrative problems in identifying navigable lakes.[35] Furthermore, confusion over the relationship of meandering to navigability has frequently prevented judicial application of the public trust doctrine to protect public rights in navigable lakes.

MEANDERING AND NAVIGABILITY

Inaccuracies in the original government surveys of the Florida territory have made identification of sovereignty lands difficult. The surveyors hired to chart the land were instructed[36] to indicate the boundaries of significant lakes by meandering, a process of drawing the exact outline of a lake based on observations of its contours made while walking around the shore.[37] Pri-

until 14 years after the deed was granted. During that time, the lake had receded, and defendant claimed title to the land to the new high-water line. The court noted: "A conveyance of . . . [a] section of swamp and overflowed lands which borders on a navigable lake . . . carries title to the true line of ordinary high-water mark . . . and, if the acreage stated in the conveyance of swamp and overflowed lands is less than the true acreage . . . such deficit does not . . . give the grantee any sovereignty land. . . . The grantee takes with notice that the conveyance of swamp and overflowed land does not in law cover any sovereignty lands. . . ." *Id.* at 570, 112 So. at 285.

33. *Id.* at 570, 112 So. at 285.

34. *See* Osceola County v. Triple E Dev. Co., 90 So. 2d 600 (Fla. 1956). The court in *Osceola* denied the county's right to condemn a right-of-way to a privately owned lake because the public had no right to use the lake. *Id.* at 602-03. *See* Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976).

35. There is little direct evidence to support this contention, but the circumstantial evidence is strong. For example, in the deeds granting swamplands no reservations were made of lands under nonmeandered lakes. The record conveyance of these lands has left Florida with only 182 of its 30,000 lakes clearly and legally identified as belonging to the public trust. MALONEY, *supra* note 2, §127.1.

36. The federal surveyors' manual of instructions stated: "You are also to meander, in manner aforesaid, all *lakes* and deep ponds of the area of 25 acres and upwards; also navigable bayous; *shallow* ponds, readily to be drained, or likely to dry up, are not to be meandered." Kean v. Calumet Canal & Improvement Co., 190 U.S. 452, 496 (1902) (instructions dated 1855). Earlier instructions for surveyors in Florida provided that: "You will accurately meander, by course and distance, all navigable rivers which may bound or pass through your district; all navigable bayous flowing from one or into such rivers; all lakes or deep ponds of sufficient magnitude; and all islands suitable for cultivation." Lopez v. Smith, 145 So. 2d 509, 511 (Fla. 1962) (instructions dated 1846). Problems of incorrect surveys, which include tales of plats drawn up over bottles of rum, pervade the recording of titles in Florida. The changing shorelines, which can be drastically altered over a person's lifetime or even in a few days, further add to the difficulties. For an example of the problems involved in determining boundaries of an island, see Ford v. Turner, 142 So. 2d 335 (2d D.C.A. Fla. 1962).

37. MALONEY, *supra* note 2, §22.2(b), at 40.

marily because of difficulties in obtaining access to many lakeshores, the surveyors meandered only 190 lakes in Florida.[38] Although the omission of lakes from the federal surveys did not alter the state's ownership of the underlying lands,[39] it did create problems of identifying sovereignty lands and led to erroneous inclusions of navigable but unmeandered lakes in state grants of adjacent nonnavigable waters and partially inundated lands.[40] Frequently, title to these unmeandered sovereignty lands passed from the state before the lands were ever identified.

The cause of this unintended alienation of sovereignty lands can be better understood when placed in its historical context. Simultaneously with statehood, Florida obtained title to the land under navigable waters but was required to hold this land in trust for the public use.[41] By enactment concurrent with the state's admission to the Union, Congress granted to Florida numerous other parcels of land, including land in every township for school and governmental purposes.[42] A subsequent congressional enactment, the Swamp and Overflowed Lands Act of 1850,[43] granted to the state all unsold swamplands that were unfit for cultivation.

In 1855 the Florida legislature created[44] the Internal Improvement Fund[45]

38. Maloney & Plager, *supra* note 19, at 10. The article, which contains a list of meandered lakes and their locations, suggests that surveyors failed to meander the majority of Florida's navigable lakes because of their reluctance to walk around swampy and snake-infested lake shores. *Id.* at 77-82.

39. In Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909), the court mentioned but did not exclusively rely on evidence of navigability. Nevertheless, the Florida supreme court in Odom v. Deltona Corp., 341 So. 2d 977, 988-89 (Fla. 1976), cited *Broward* as confirming the statement that "[i]n Florida, meandering is evidence of navigability which creates a rebuttable presumption thereof." Until *Deltona*, complete reliance was not placed on meandering for determination of navigability. See text accompanying notes 106-109 *infra*.

40. This factual situation created conflicts in Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), and Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976).

41. For a discussion of the public trust doctrine, see text accompanying notes 11-35 *supra*.

42. Act of Mar. 3, 1845, ch. 76, 5 Stat. 788.

43. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519. The Act, which was directed to Arkansas, provided that "to construct the necessary levees and drains to reclaim the swamp and overflowed lands . . . made unfit thereby for cultivation, which shall remain unsold at the passage of this act . . . [such lands] are hereby granted to said State." *Id.* §1. Section 4, apparently a Congressional afterthought, extended the provisions to other states in which such swamp and overflowed lands were situated. *Id.* §4.

44. 1855 Fla. Laws, ch. 610, §1. Originally the fund consisted of only the 500,000 acres granted under the 1845 congressional act, plus swamp and overflowed lands. The Florida supreme court has noted that "[s]wamp lands . . . are such as require drainage to dispose of needless water or moisture on or in the lands in order to make them fit for successful and useful cultivation. Overflowed lands are those that are covered by non-navigable waters or are subject to such periodical or frequent overflows of water, salt or fresh . . . as to require drainage or levees or embankments to keep out the water and thereby render the lands suitable for successful cultivation." State v. Gerbing, 56 Fla. 603, 615, 47 So. 353, 357 (1908). Swamp and overflowed lands could thus be defined as those lands under nonnavigable waters.

45. The Florida legislature in 1961 changed all statutory references from "Internal Improvement Fund" to "Internal Improvement Trust Fund." 1961 Fla. Laws, ch. 61-119,

and authorized the Trustees of the fund to sell lands obtained under both federal grants. The legislature eventually extended the Trustees' title to include certain tidal sovereignty lands and islands,[46] certain reclaimed lands in the Everglades,[47] and other dredged wetlands.[48] Finally, in 1969 the legislature extended the Trustees' control to navigable freshwater lakes, rivers, and streams.[49]

Lack of authority, however, had not kept the Trustees from conveying years before paper title to lands under most navigable lakes.[50] Largely by grants to railroad companies,[51] the Trustees had conveyed almost all of the approximately twenty-five million acres of land[52] that had come within their control. These early conveyances of swamp and overflowed lands often included unwittingly the beds of navigable lakes. Apparently assuming that all navigable lakes had been meandered, the Trustees failed to include a reservation of sovereignty lands in these deeds. The magnitude of the problem becomes apparent when one considers that an estimated 750 lakes of more than 150 acres each were not meandered by the federal surveyors[53] and were thus susceptible to conveyance without reservation by the Trustees.

The determination of what waters are in fact navigable and thus included in the public trust has been the subject of much dispute.[54] The federal definition of navigability determined the initial boundaries between the state's sovereignty lands and other lands within the state to which the

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§17. Both titles, as well as occasional references to the "Trustees," are used throughout this commentary.

46. 1917 Fla. Laws, ch. 7304. The act vested in the Trustees title to all islands, sand bars, and banks made by dredging or without prior conveyance. All areas where the water was less than three feet deep at high tide were included. Sale of these lands was authorized after publication, but if there was an objection to the sale a hearing was required.

47. 1919 Fla. Laws, ch. 7861, gave the Trustees title to all submerged, wet, or low lands reclaimed by the drainage works of the Everglades Drainage District.

48. 1919 Fla. Laws, ch. 7891, gave the Trustees title to all other reclaimed lowlands in the state. The lands could be sold in the same manner as swamp and overflowed lands.

49. FLA. STAT. §253.12 (1975) (originally enacted as 1969 Fla. Laws, ch. 69-308). The statute vested the Trustees with title to all submerged sovereignty lands. Submerged lands previously conveyed by deed or statute were excepted. The Board of Trustees of the Internal Improvement Trust Fund may sell such lands if in the "public interest." First, the Trustees must publish notice of their intent to sell; if objections to the sale are made, the Trustees must hold a public hearing. Provisions for environmental considerations and qualifications of purchasers are established by FLA. STAT. §253.12(2)-(5) (1975).

50. This later authority supports the application of legal estoppel. See text accompanying notes 78-84 *infra.*

51. 1879 Fla. Laws, ch. 3166, provided for a conveyance to railroad companies of swamp and overflowed lands on either side of railroad tracks upon completion of each six-mile section of track.

52. Maloney, *supra* note 2, §122.2, at 357 (quoting Degrove, *Administrative Problems in the Management of Florida's Tidal Lands* 20, in U. OF FLA. PUB. ADMIN. CLEARING SERV., STUDIES IN PUBLIC ADMIN. No. 18, (1959).

53. Maloney & Plager, *supra* note 19, at 75 (quoting Interview with Ney C. Landrum, Consultant for W. Turner Wallace and Associates, Water Resources Consultants in Tallahassee, Fla. (Mar. 16, 1960)).

54. *See generally* Johnson & Austin, *supra* note 7, MacGrady, *supra* note 11.

federal government retained title after the granting of statehood.[55] Thus, the federal test controlled the initial determination of the inclusion of lands in the public trust. The United States Supreme Court has noted that federal navigability should be determined by the condition of the watercourse at the time of admission as a state[56] and that any water useful as a channel for commerce should be deemed navigable.[57] Furthermore, a waterway could be deemed navigable even if improvement were necessary in order to make actual navigation practical.[58]

Some authorities[59] and courts[60] imply that navigability has remained a federal question. However, since the Swamp and Overflowed Lands Act gave the states title to most remaining waters, arguably, a state can set its own navigability standards to determine what waters will be retained for the public trust. The Supreme Court has recently indicated an unwillingness to apply federal common law based on the equal footing doctrine to override state real property law.[61] Previously, the Court had applied federal common law to protect a federal grantee of swamp and overflowed lands that were not patented to the state.[62] The most significant limitation on state control of sovereignty lands is the federal prohibition against alienation of waters useful in interstate commerce.[63] Aside from this restriction, a state legisla-

55. The United States gained title to all Florida lands under the 1819 Treaty with Spain, 8 Stat. 254. The cession included, under article 2, all territories in Florida belonging to the Spanish King. Article 8 provided that "All the grants of land made before the 24th of January, 1818, by his Catholic Majesty, or by his lawful authorities, in the said territories ceded . . . shall be ratified and confirmed to the persons in possession of the lands . . . [as] if the territories had remained under the dominion of his Catholic Majesty. . . . All grants made since the 24th of January, 1818 . . . are hereby declared, and agreed to be, null and void." *Id.* at 258. Spanish law was similar to the common law in that rights of private ownership in lands bounded by navigable waters extended only to the high-water mark, unless more was specifically included in the grant. Apalachicola Land & Dev. Co. v. McRae, 86 Fla. 393, 98 So. 505 (1923). "[T]he public navigable waters and submerged and tide lands in the provinces were held in dominion by the crown as res communes and used as res omnium, and sales and grants of such lands to individuals were contrary to the general laws and customs of the realm." *Id.* at 433, 98 So. at 518. Thus, unless it can be shown that sovereignty lands were expressly included in the grant made under Spanish law, the land grantee has title only to the high-water mark. *Id.* at 430, 98 So. at 517. For a general discussion of the history and status of Spanish land grants, see MALONEY, *supra* note 2, §121.2(b).

56. United States v. Utah, 283 U.S. 64, 83 (1931).

57. United States v. Holt State Bank, 270 U.S. 49, 55-56 (1926).

58. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 407-09 (1940). For a discussion of federal navigability, see MALONEY, *supra* note 2, §22.2(c).

59. *See, e.g.*, Johnson & Austin, *supra* note 7, at 9.

60. Broward v. Mabry, 58 Fla. 398, 412, 50 So. 826, 831 (1909) (applying federal criteria to a lake by examining the permanency, size, location, character, and condition of the lake to determine whether the lake could be used for purposes of common utility).

61. Oregon v. Corvallis Sand & Gravel Co., 97 S. Ct. 582, 592 (1977).

62. Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). It is unlikely that many federal grants of swampland within Florida were made before Florida attained statehood. The federal government obtained the land in 1819, 26 years before Florida was admitted to the Union. At that time most of the land was unsurveyed. See notes 36, 55 *supra*.

63. United States v. Holt State Bank, 270 U.S. 49, 54 (1926).

ture could abolish the common law public trust doctrine and sell all of its public trust lands except those suitable for interstate commerce.[64]

SPECIFIC CURATIVE LEGISLATION

The Florida legislature first recognized the problem of private ownership of navigable nonmeandered lakes by enacting curative legislation in 1953.[65] Although the legislative intent is not clear, the statute purported to change the state's definition of navigable waters to exclude any nonmeandered lakes that had been conveyed by the state more than fifty years ago. The unusual legislative history of the act, however, cast doubt upon the applicability of the statute to private versus state ownership questions. The statute was passed with taxation provisions and was included in the tax section when compiled in the Florida statutes.[66] The Florida supreme court interpreted the placement to indicate that the statute was only a guide for county tax assessors.[67] Subsequently, the statute was recompiled with material dealing with riparian rights[68] but was placed under a provision stating that nothing in the statute should be construed to apply to lakes other than tidewater lakes. Later the compilers changed that restriction, and the statute presumably became applicable to freshwater lakes.[69]

The Second District Court of Appeal in *Adams v. Crews*[70] considered

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64. Shively v. Bowlby, 152 U.S. 1, 40 (1894).

65. FLA. STAT. §197.228 (1975). When enacted as 1953 Fla. Laws, ch. 28262, §1 provided in part that "[n]avigable 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 of America or by the State of Florida without reservation of public rights in and to said waters. Furthermore the submerged lands of any non-meandered lake shall be deemed subject to private ownership where the Trustees of the Internal Improvement Fund of Florida conveyed the same more than fifty (50) years ago without any deductions for water and without any reservation for public use and when taxes have been levied and collected on said submerged lands since conveyance by the State."

66. FLA. STAT. §192.61 (1953). The chapter was entitled "Taxation, General Provisions." For details of the strange history of the statute, see MALONEY, *supra* note 2, §22.3. The compiled statutes are revised every two years and enacted into law as a whole two years later at the beginning of the next legislative session. When the most recent compilation is enacted, all previous compilations are repealed. Thus, the act was effective as passed until 1955, when the 1953 compilation placing the act under the tax section was enacted. *Id.* §22.3, at 45 n.76.

67. McDowell v. Trustees of the Internal Improvement Fund, 90 So. 2d 715 (Fla. 1956). "This subsection was originally part of Chapter 28262, Laws of Florida 1953, which pertained to tax matters. . . . In the 1953 Florida Statutes, the subsection was appropriately included in the chapter on taxation, and it was apparently intended by the legislature to provide a guide for the benefit of tax assessors." *Id.* at 717.

68. FLA. STAT. §271.09 (1955). Section 271.06 precluded the application of anything in the chapter, entitled "Grants to Riparian Owners," from applying to other than tidewater lakes.

69. FLA. STAT. §271.09 (1957). The 1957 compilation without legislative authority changed the wording of §271.06 to read "Nothing in §§271.02-271.08 shall be construed to apply to lakes, except tide water lakes."

70. 105 So. 2d 584 (2d D.C.A. Fla. 1958). The court in *Crews* relied on the supreme court's decision in *McDowell*. *McDowell* was decided before enactment of the 1955

the applicability of the statute to ownership issues when the state sued to stop a filling operation of Lake Maitland. The act had not yet been recompiled into the section dealing with riparian rights, and the court held the act to be applicable only as a guide to tax assessors. With the repeal of the other riparian matters in 1972, the compilers again placed the statute in a chapter under the tax heading.[71] Thus, the statute remains unclear in intent and effect.

ESTOPPEL

Modern courts have placed less reliance on the confusing navigability and meandering concepts in determining whether lands may be alienated from the public trust; instead, they have applied the doctrines of legal and equitable estoppel to determine the validity of state conveyances of public trust lands. Equitable estoppel can result from the state's acquiescence in the private possession and improvement of the property, collection of taxes, or failure to offer to refund the taxes collected.[72] The doctrine was used to prevent the Trustees from maintaining title to sovereignty lands in *Trustees of the Internal Improvement Fund v. Claughton.*[73] The Trustees had conveyed title to submerged lands and an island in Biscayne Bay and were attempting to quiet title to the adjacent filled half of the island which was not contained in the record description of the grant. The court noted that estoppel may arise against the state if necessary to prevent manifest injustice to individuals and if the sovereign powers of the state are not impaired.[74]

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compilation taking the section out of the taxation provisions, and *Crews* was decided while the section was compiled under riparian rights but considered not to apply to freshwater lakes. In other words, the court in *Crews* relied on the supreme court's interpretation of the section as a tax matter to invalidate the section even though it had been moved to riparian rights by enactment of the 1955 compilation. See note 67 *supra.*

71. 1957 Fla. Laws, ch. 57-362(9) repealed FLA. STAT. §271.01. and 1971 Fla. Laws, ch. 71-355(77) repealed FLA. STAT. §§271.02-.03, .05-.08 as obsolete. In the 1971 compilation, the lakes section was renumbered FLA. STAT. §197.315(3) (1971), under the title "Tax Collection, Tax Sales, Tax Liens." The tax portions of the section were amended by 1972 Fla. Laws, ch. 72-268, and were placed in FLA. STAT. §197.226 (Supp. 1972). The lakes portion was placed at FLA. STAT. §197.228 (1975), where it remains today under the title "Tax Collections, Tax Sales, Tax Liens."

72. *See* Daniell v. Sherrill, 48 So. 2d 736, 740 (Fla. 1950). Both equitable and legal estoppel were applied in *Sherrill* to prevent the state from denying the validity of a tax deed to lands which, in fact, were owned by the federal government. When the federal government elected to sell the lands, which were simply held for sale and were not public trust lands, the state entered a bid against the tax deed grantee and exercised preferential rights to buy the land despite a higher bid by the grantee. The court held that the state was estopped from denying the validity of the tax deed.

73. 86 So. 2d 775 (Fla. 1956).

74. *Id.* at 790. The court based the estoppel not on the conveyance, but on the long-standing assumption by the parties that all of the island was included within the grant. *Id.* at 792. The owner, however, was not permitted to bulkhead out to nearby channels leading to the Miami river since the tract owned was not riparian, but former sovereignty lands. *Id.* at 789.

Estoppel traditionally requires some element of knowledge and a duty to act – a problem that apparently has not been considered by the Florida courts.[75] The most obvious action by the state is often collection of taxes, but this alone has been considered insufficient to work an estoppel and may be negated by an offer to refund.[76] The public's loss of sovereignty lands hardly seems equitable; therefore, the courts' use of estoppel reflects more a decline in judicial reliance on the public trust doctrine than an extension of equitable principles.[77]

In addition to equitable estoppel, legal estoppel has been used to accomplish similar results. Rather than focusing on the inducing conduct of the grantor, legal estoppel simply prohibits the grantor from denying his own title to the grantee.[78] A title acquired by a grantor subsequent to conveyance will inure to the benefit of the grantee.[79] Thus, the authority given the Trustees in 1969 to sell lands under navigable freshwater lakes[80] arguably gave retroactive validity to the titles previously granted without authority such that the Trustees are legally estopped from asserting an invalid earlier conveyance. Legal estoppel is determined by the intention of the parties as expressed in the deed, and it is questionable to presume that a grant of swamp and overflowed lands was intended to include sovereignty lands.[81]

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75. 3 J. Pomeroy, Equity Jurisprudence §807 (5th ed. 1941). Pomeroy lists six requirements for estoppel: (1) conduct, (2) facts known or imputed knowledge by the party to be estopped, (3) facts unknown to the other party, (4) conduct with expectation of reliance, (5) reliance, and (6) action by the other party to his detriment. *Id.* §805.

76. *See* Daniell v. Sherrill, 48 So. 2d 736, 741 (Fla. 1950) (Chapman, J., concurring). "Equity and good conscience require a return of the value of the improvements or betterments and the amount paid over the years for taxes, with the legal rate of interest. These two items, with any other lawful item flowing from the transaction, should . . . be decreed to be paid as conditions precedent to obtaining a cancellation of the deeds as prayed for." *Id.*

77. It is difficult to separate the application of equitable and legal estoppel since most cases have considered and held both to be conclusive. In *Claughton* equitable estoppel was determinative, and the compilation of the actions of the state resulting in the estoppel was stated in such general terms as to lead to the conclusion that equitable estoppel will prevent the state from denying any long-standing invalid deeds. As the Florida supreme court said in Trustees of the Internal Improvement Fund v. Lobean, 127 So. 2d 98, 103 (Fla. 1961): "We twist words to emphasize our objective, to glorify our purpose or to condemn that of our opponent, but it had not occurred to us that we were enthroning semantics or dethroning law to determine the doctrine of estoppel."

78. *Id.* at 102.

79. *Id.* Another problem with the application of estoppel is the invalidity of the conveying deeds. In denying estoppel to the issuer of invalid bonds who was attempting to escape the bond obligation, the Florida supreme court observed that "we do not overlook the defense of estoppel and laches . . . . [C]omplaints moved to invalidate the excess coupons as soon as they had knowledge of sufficient facts. . . . Then the law seems to be well settled that laches and estoppel cannot be raised against an act invalid ab initio as was the case here." State Bd. of Administration v. Pasco County, 156 Fla. 37, 43, 22 So. 2d 387, 391 (1945); *see* Weinberger v. Board of Pub. Instruction, 93 Fla. 470, 112 So. 253 (1927).

80. See text accompanying notes 50-52 *supra*. For a discussion of the enabling legislation, see note 49 *supra*.

81. In Hillsborough County v. Dana, 20 Fla. Supp. 177 (Cir. Ct. Hillsborough County 1962), the court stated that "legal estoppel or estoppel by deed is 'determined by the

Nevertheless, the Florida supreme court held in *Trustees of the Internal Improvement Fund v. Lobean*[82] that the Trustees were legally estopped from denying the validity of the grantee's title. This holding superseded earlier decisions that had upheld the public trust doctrine.[83] The court noted that estoppel does not apply

> against the state or its subdivisions as freely as against individuals, but it may be invoked even against exercise of governmental powers where it appears necessary to prevent manifest injustice and wrongs to private individuals, provided that the restraint placed upon a governmental body to accomplish such goals does not interfere with the exercise of governmental powers.[84]

The difficulty with either theory of estoppel is contained in the court's own definition. Under the public trust doctrine, lands are held in a governmental sense, and the use of estoppel is precluded by the court's own guidelines since the estoppel would interfere with the exercise of governmental powers.[85] When initially applied against the state, estoppel involved lands held for sale.[86] The estoppel was properly applied in those cases be-

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intention of the parties as expressed in the deed. . . . [Application] is dependent entirely upon the language used in the deed or which appears on the face of the instrument.'" *Id.* at 184. Since the deed specified that swamp and overflowed lands were being given, the intention expressed in the deed did not indicate inclusion of sovereignty lands. *Dana* presumably was overruled by Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976), in which the intent on the face of the deed to grant swamp and overflowed lands was ignored.

82. 127 So. 2d 98 (Fla. 1961).

83. *See* Adams v. Crews, 105 So. 2d 584 (2d D.C.A. Fla. 1958). The court in *Lobean* based its jurisdiction on a conflict between the appealed holding of the First District Court of Appeal and the Second District Court of Appeal's holding in *Adams*. The court observed "[i]t may be that as to these opinions it is more accurate to say that they are confusing than it is to say they are in conflict. Nevertheless we find them to be in direct conflict . . . ." 127 So. 2d at 101. Since the *Lobean* use of estoppel was accepted as controlling, *Adams*, although not subsequently mentioned in the opinion, presumably was overruled.

84. 127 So. 2d at 101-02. The court cited its own decision in Trustees of the Internal Improvement Fund v. Claughton, 86 So. 2d 775 (Fla. 1956), as authority for the statement. The seemingly contradictory sentence is repeated from *Claughton* and appears to be a restatement of 19 AM. JUR., *Estoppel* §166 (1939), also cited in *Claughton*. The original quote refers to the estoppel of acts in a governmental capacity not interfering with sovereign powers. The distinction between the two phrases, if any, is unclear. A possible construction of the statement is that estoppel is precluded against those functions which are peculiarly governmental in nature, but permitted against those actions which, though performed by government, are indistinguishable in nature from similar actions by a private party. The Florida courts, however, have not relied on this construction because the construction would not permit estoppel to be used to defeat the governmental trust holding sovereignty lands, as was done in *Lobean* and *Deltona*.

85. This assumes that the court meant to except governmental powers from estoppel and that the holdings in *Lobean* and *Deltona* resulted from the court's understanding that the public trust lands are no longer held in governmental capacity. Use of estoppel to prevent exercise of governmental powers probably would render governmental authority too unpredictable for effective protection of any public interest.

86. *See* Florida Livestock Bd. v. Gladden, 76 So. 2d 291 (Fla. 1954) (state administrative board estopped from enforcing regulation before advertised effective date); Gay v. Inter-

cause no reason existed to insulate the state from estoppel involving lands held in a proprietary sense. The court failed to recognize that public trust lands are different; they are held in a governmental trust rather than for sale.[87] Even if the conveyance of public trust land is valid, the public trust for use of the waters cannot be alienated.[88]

THE MARKETABLE RECORD TITLE ACT

Florida courts have had little difficulty applying the Marketable Record Title Act[89] to quiet title to sovereignty lands in favor of erroneous grantees. The Act was first applied to sovereignty lands in *Modrall v. Sawyer*,[90] a dispute involving submerged coastal marsh conveyed without authority by the Trustees. The titleholder attempted to prevent boat traffic from passing near his riparian property adjacent to the Intracoastal Waterway. The Fourth District Court of Appeal noted that the 1890 deed from the Trustees was outside the owner's thirty-year chain of title; therefore, all other interests arising from the deed were void. The court interpreted the Act's liberal construction provision to dictate that an explicit reservation by the state would be necessary for any rights to be retained.[91]

Dissenting from the Florida supreme court's denial of certiorari in *Sawyer*, Justice Ervin thought it unlawful for the mere passage of time to invalidate public land ownership and noted that the conflicting private titles to the land were void from the beginning.[92] Justice Ervin suggested that the dispute

County Tel. & Tel. Co., 60 So. 2d 22 (Fla. 1952) (in absence of special circumstances, state not estopped from execution of tax warrant for stamp taxes allegedly due); City of Winter Haven v. State, 125 Fla. 392, 170 So. 100 (1936) (state estopped from denying validity of municipal corporation after years of legislative recognition). *Sherrill* dealt with ordinary tax lands, while *Claughton* concerned extension of legally conveyed sovereignty lands. In *Lobean*, the court extended estoppel still further to divest the state of trust lands.

87. See text accompanying notes 20-21 *supra*.

88. See text accompanying note 14 *supra*.

89. FLA. STAT. §§712.01-.10 (1975). The Act was passed in 1963 to provide for the facilitation of land title transactions. Any person holding title alone, or with predecessors, for thirty years has title free from all outside estates or claims. Any other interests are considered void, whether private or governmental. However, interests of the United States or Florida expressly reserved in the patent or deed are not affected. For an analysis of the Act, see P. BASYE, CLEARING LAND TITLES §187 (2d ed. 1970); Boyer & Shapo, *Florida's Marketable Title Act: Prospects and Problems*, 18 U. MIAMI L. REV. 103 (1963).

90. 286 So. 2d 610 (4th D.C.A.), *cert. denied*, 297 So. 2d 562 (Fla. 1974). A dispute between neighbors caused the action, in which the plaintiff sought an injunction for trespass. Defendant asserted the invalidity of plaintiff's title. Initially the court noted that the defendant could not collaterally attack the deed, relying on Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249 (1933). Assuming that collateral attack was available, the court found the Marketable Record Title Act dispositive.

91. The Act mandates that the "law shall be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title." FLA. STAT. §712.10 (1975). The court based the need for an explicit reservation on the purpose of the statute, and noted that the legislation permitting the Trustees' conveyance made no mention of reservations. "Had the state wished to create a reservation, it seems logical that it would have. . . ." 286 So. 2d at 613.

92. 297 So. 2d at 565 (Ervin, J., dissenting). Justice Ervin focused on prior holdings that deeds of areas including sovereignty lands were included. *See* Pierce v. Warren, 47

should be resolved on the issue of factual navigability rather than the length of time since conveyance.

Some enlightenment on the effects of curative legislation on titles void at the inception is provided by examining the reasoning of Louisiana courts. In 1912 the Louisiana legislature enacted provisions automatically quieting title to state patents six years after the conveyance.[93] In determining whether the state or private titleholders were entitled to mineral rights from the bed of a navigable lake conveyed as swamp and overflowed lands more than fifty years before, the Louisiana supreme court in *Humble Oil and Refining Co. v. State Mineral Board*[94] held that the six-year rule applied and rendered moot the state's public trust argument. Although *Humble* involved a small section of a relatively unimportant lake, the same court the next year applied the same principle to a 4000-acre section of an arm of the sea.[95]

Apparently disagreeing with this subversion of the public trust, the Louisiana legislature immediately[96] passed an act repealing the 1912 quieting legislation as it applied to erroneous conveyances of the beds of navigable waters.[97] The Louisiana supreme court, however, ignored the repealing act

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So. 2d 857 (Fla. 1950). "It is an extreme presumption on the part of the Legislature that by that Act it can expressly invalidate State and Federal public land ownerships. . . . Presumably thereunder an illegal government deed to a private person covering a sector of any open waterway or harbor would ripen into private ownership after thirty years." 297 So. 2d at 565. Presumably, under Florida law, that is precisely what would occur as long as the federal interest in interstate commerce is not affected.

93. LA. REV. STAT. ANN. §9:5661 (West 1950), provides that "[a]ctions, including those by the State of Louisiana, to annul any patent issued by the state, duly signed by the governor and the register of the state land office, and of record in the state land office, are prescribed by six years, reckoning from the day of the issuance of the patent."

94. 223 La. 47, 64 So. 2d 839 (1953). The court noted "inasmuch as the bed . . . was unquestionably embraced in the transfer of vacant lands . . . and . . . this property was taken out of the public domain . . . it is a matter of no importance whether the deed of the public officers was beyond the powers vested in them by Act No. 97 of 1890." *Id.* at 53-54, 64 So. 2d at 841. The lake involved was navigable, both at the time of dispute and when Louisiana was admitted as a state in 1812. In Atchafalaya Land Co. v. F.B. Williams Cypress Co., 146 La. 1047, 1067, 84 So. 351, 358 (1920), the court noted that "[c]onceding that the Governor of the state and the register of the land office were without authority to issue the patents, the Legislature had authority to ratify and confirm their acts, as was done by the statute of repose."

95. California Co. v. Price, 225 La. 706, 74 So. 2d 1 (1953). The body of salt water was navigable in 1812 and at the time of suit.

96. The act was passed 11 days after the final decision in *Price*. State v. Cenac, 241 La. 1055, 1057, 132 So. 2d 928, 928 (1961).

97. LA. REV. STAT. ANN. §9:1107 (West Supp. 1962). "[T]he intent of the Legislature of this state at the time of the enactment of Act No. 62 of the year 1912, . . . and continuously thereafter was and is at this present time to ratify and confirm only those patents which conveyed or purported to convey public lands susceptible of private ownership . . . not patents or transfers which purported to convey or transfer navigable waters and the beds of same." *Id.* "Any patent or transfer heretofore or hereafter issued or made is null and void, so far as same purports to include such navigable waters and the beds thereof. . . ." *Id.* §9:1108. "No statute enacted by the legislature of Louisiana shall be construed as to validate by reason of prescription or peremption [*sic*] any patent or transfer issued by the state . . . so far as the same purports to include navigable or tide waters or the beds of same." *Id.* §9:1109.

and continued to uphold private titles.[98] After twenty years of unfavorable review,[99] the court overturned that line of cases in a 1975 case, *Gulf Oil Corp. v. State Mineral Board*.[100] The change in attitude resulted more from a recomposition of the court than from a recognition of the repealing act. The reversal, rather, was based on a more strict interpretation of the 1912 quieting act.

> We hold that the patents conveying state property to private individuals are ineffective so far as they purport to alienate the beds of navigable waters, and that Act no. 62 of 1912 did not have the effect of ratifying such absolutely null transfers. Thus, the state is the owner of the entire property involved in this case.[101]

There are obvious differences between the operation of the Florida and Louisiana legislation, but the logic of exempting public trust lands from any type of curative legislation is equally appealing in either jurisdiction. Navigable waters are held for public use and cannot be conveyed by mistake.[102] General curative legislation applies to state-conveyed lands held in a proprietary sense on which there is no restriction on alienation similar to that affecting trust lands. Similar treatment of public trust lands cannot be accomplished constitutionally by a general judicial extrapolation but only by specific legislative action.[103]

THE *Deltona* CASE

The Florida supreme court in 1976 considered a case arising from the filling of a nonmeandered navigable lake. In *Odom v. Deltona Corp.*,[104] the

98. "It is also a fundamental rule of constitutional law that the interpretation and construction of legislative acts in litigation are matters exclusively within the province of the courts. It does not lie within the domain of the lawmakers to interpret their own laws." State v. Cenac, 241 La. 1055, 1060-61, 132 So. 2d 928, 930 (1961).

99. *See* Doyle, *Ownership of the Beds and Bottoms of Navigable Waters in Louisiana*, 7 TUL. TIDELANDS INST. 28 (1963); Ellis, *Another Look at Louisiana Waterbottom Problems*, 19 INST. MIN. L. 113 (1972); Onebane, *Who Owns the Water Bottoms?*, 6 LA. B.J. 46 (1958); Yiannopoulos, *Validity of Patents Conveying Navigable Waterbottoms—Act 62 of 1912, Price, Carter and All That*, 32 LA. L. REV. 1 (1971); Note, *Civil Law Property—Beds of Navigable Waters—Susceptibility of Private Ownership*, 15 LA. L. REV. 463 (1955); Note, *Civil Law Property—Beds of Navigable Waters—Susceptibility of Private Ownership*, 14 LA. L. REV. 267 (1953).

100. 317 So. 2d 576 (1975). "[W]e conclude that this provision was not intended to ratify the absolutely null conveyances of navigable water bottoms of private individuals and should not be applied as it was in *Price*; rather, we conclude that the legislature intended to do no more by its enactment than cure formal defects in patents that were essentially valid, in that they conveyed alienable property." *Id.* at 585.

101. *Id.* at 592.

102. See note 20 *supra*.

103. The Florida constitution provides that sovereignty lands may be sold subject to legislative authority when in the public interest. FLA. CONST. art. X, §11. The operation of the Marketable Record Title Act upon these lands, as applied by the courts, effectuates a title transfer. Since there has been no determination of public interest or valid sale, it would appear that this title transfer is not authorized by the constitution.

104. 341 So. 2d 977 (Fla. 1976).

state sought an injunction to prevent filling conducted by a residential developer who claimed title under various deeds issued by the state. The deeds, which conveyed swamp and overflowed lands, included the lake within the description of the conveyed boundaries.[105]

In determining whether the state could stop the filling, the court looked to not only the public or private character of the lake but, more importantly, the navigability of the lake. Still purporting to observe the navigability-in-fact criterion,[106] the court appeared to disregard the actual navigability of the lake and to allow the determination to rest on the fact that the lake had not been meandered in the original surveys. "[I]n Florida, meandering is evidence of navigability which creates a rebuttable presumption thereof. The logical converse of this proposition, noted by the lower court, is that non-meandered lakes and ponds are rebuttably presumed non-navigable."[107] Although some states have held that meandering presumes navigability, neither presumption had previously been applied by the Florida court.[108] Conversely, the court stated that "we are not in a position to evaluate the work of those surveyors of many decades past, and can merely accept their work as correct, particularly since the state itself has relied upon it constantly since it was completed."[109] The court did not indicate how the new presumption of nonnavigability may be rebutted if the court must accept the work of the surveyors as correct. The court apparently meant that nonmeandered lakes are conclusively presumed to be nonnavigable. *Deltona* relied on several grounds for the final decision, however, and the court's dicta regarding navigability stand simply as contradictory until enlightened by reconsideration in a future case.

The court considered that the latest placement of the statute dealing with nonmeandered lakes indicated that the legislative intent was to "recognize conveyances by governmental authority purporting to transfer to private ownership a described area as effective to include lakes, ponds, swamp and overflowed land unless the instrument makes a reservation of them."[110] The statute makes lakebeds that have been conveyed subject to private ownership but does not deal with the fact that navigable lakes, according to earlier Florida decisions, were not conveyed with grants of swamp and overflowed land.[111] This reading of the statute to validate the *Deltona* conveyances conflicts with the court's previous statements that grants in derogation of

105. *Id.* at 980.

106. The court noted that navigability is a question of fact and that sovereignty lands must be determined under federal standards. *Id.* at 988. *See also* United States v. Holt State Bank, 270 U.S. 49, 55-66 (1926); Bucki v. Cone, 25 Fla. 1, 6 So. 160 (1889).

107. 341 So. 2d at 988-89 (emphasis added).

108. Lutesville Sand & Gravel Co. v. McLaughlin, 181 Ark. 574, 26 S.W.2d 892 (1930); Kregar v. Fogarty, 78 Kan. 541, 96 P. 845 (1908). *See generally* Johnson & Morry, *supra* note 19.

109. 341 So. 2d at 988.

110. *Id.* at 982. The quote is from the trial judge's opinion, adopted in entirety by the supreme court. This is in direct conflict with the supreme court's ruling in *McDowell*, which held that inclusion in the tax section, where the act is now located, rendered the act simply a guide for county tax assessors. See note 67 *supra*.

111. See text accompanying notes 24-33 *supra*.

sovereignty are to be construed strictly against the grantee[112] and that such grants contain an implicit reservation of sovereignty lands.[113]

The court also considered other legislation, not as controlling but as indicative of the general legislative intent in this area.[114] Additionally, the court noted that the 1968 constitutional revision provides that the lands under navigable waters "which have not been alienated" remain in the public trust.[115] Interpreting this provision to be a recognition that certain sovereignty lands *have* been alienated,[116] the court concluded that "[i]f a standard other than that which has been expressed by statute and by the constitution is proper, then it is the duty of the people and the legislature, not the courts of Florida, to make this determination."[117] It may be argued with at least equal effectiveness that "alienated" refers to valid title transfers, i.e., those made "in the public interest,"[118] many of which have been made. This view is reinforced by the last part of the constitutional section, which provides for future conveyances by legislative authorization.[119] The court's

112. Trustees of the Internal Improvement Fund v. Claughton, 86 So. 2d 775 (1956). "No authority need be cited for the proposition that a grant in derogation of sovereignty must be strictly construed in favor of the sovereign." *Id.* at 786.

113. "The grantee takes with notice that the conveyance of swamp and overflowed land does not in law cover any sovereignty lands. . . ." Martin v. Busch, 93 Fla. 535, 570, 112 So. 274, 285 (1927).

114. In 1970 the Florida legislature enacted statutes purporting to make clear the distinction between meandered and nonmeandered lakes. The intent was that lands under navigable meandered freshwater lakes should be considered as a separate class of sovereignty lands. "Separate" refers to a class distinct from rivers and tidal waters, and the statute seems to assume that nonmeandered lakes are not navigable. The remainder of the act attempted to set boundaries of sovereignty lands under meandered lakes at the meander lines of the original surveys. FLA. STAT. §253.151 (1975).

Although relied on by the trial court in *Deltona*, the statute has been since held unconstitutional as authorizing a taking of land without compensation. State v. Florida Nat'l Properties, Inc., 338 So. 2d 13 (Fla. 1976). The statute would still be useful to the Florida supreme court as an indication of the legislative intent in separating meandered lakes. "In the trial court's judgment reference was made to Section 253.151, Florida Statutes. Although we have recently held this section of the statutes to be unconstitutional, the trial court's reliance on same does not affect the conclusion and results in this opinion." Odom v. Deltona Corp., 341 So. 2d at 989.

Under more recent federal case law, the constitutionality of section 253.151 is less questionable. State v. Florida Nat'l Properties, Inc., was based in part on Bonelli Cattle Co. v. Arizona, 414 U.S. 313 (1973). 338 So. 2d at 17. *Bonelli* was overturned in Oregon v. Corvallis Sand & Gravel Co., 97 S. Ct. 582 (1977).

115. FLA. CONST. art. X, §11. "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 portions of such lands may be authorized by law, but only when not contrary to the public interest." *Id.* For a discussion of what is in the public interest, see Note, *Conveyances of Sovereign Lands Under the Public Trust Doctrine: When Are They in the Public Interest?*, 24 U. FLA. L. REV. 285 (1972).

116. "[T]he 1968 Constitution, Article X, Section 11, acknowledges, in pertinent part, that certain sovereign lands have been alienated. . . ." 341 So. 2d at 987.

117. *Id.* at 988.

118. FLA. CONST. art. X, §11. See note 115 *supra*.

119. 341 So. 2d at 990.

mandate to the people and legislature of the state tends to shift responsibility away from the court, while permitting the court to avoid a close scrutiny of the statutory and constitutional provisions.[120]

The court briefly considered the application of legal and equitable estoppel and noted that both doctrines could be applied against the state.[121] The only factors supporting application of the doctrines were the state's failure to reserve rights in the original conveyance and local officials' encouragement of the proposed development. Also, possible detriment to the developer was observed in early private contractual obligations.

Finally, the court applied the Marketable Record Title Act to quiet title in favor of the developer:

> It seems logical to this court that, when the legislature enacts a Marketable Title Act, as found in chapter 712, Florida Statutes, clearing any land title having been in existence thirty years or more, the state should conform to the same standard as it requires of its citizens; the claims of the Trustees to beds underlying navigable waters are extinguished by the act.[122]

Justice Sundberg, in his dissent, pointed out that the statutory notice and hearing requirements for sale of trust lands were not met and that an implicit reservation of navigable waters should be presumed to be included in conveyances of other lands: "It is inconceivable to me that a Marketable Record Title Act which is aimed primarily at quieting title to private lands can be used to divest the people of the State of Florida of land held in public trust for them."[123] Justice Sundberg noted that the Act was intended to be curative and cannot provoke a title change of lands not validly conveyed.[124]

The application of the Act by the majority seems predicated on a notion of fairness – the state should subject itself to the same standard it requires of others.[125] This approach does not consider two arguments inherent in

120. The court also ignored the statute which provides for refunds, without interest, to persons who purchased land from the Trustees when title to the land was not vested in the Trustees. FLA. STAT. §253.29 (1975).

121. 341 So. 2d at 989.

122. *Id.*

123. *Id.* at 990-91 (Sundberg, J., dissenting). Justice Sundberg quoted extensively from Justice Ervin's dissent in Modrall v. Sawyer, 297 So. 2d 562 (Fla. 1974).

124. Justice Sundberg also adopted the device, rejected by the court, of assuming an implicit reservation to the state of navigable waters. This presumption would overcome the inclusion of the navigable water areas in the conveyance boundary descriptions. 341 So. 2d at 990.

125. This argument is quite persuasive insofar as it applies to ordinary lands held by the state. Its application to governmental trust lands, however, was probably not envisioned by the legislature in passing the Marketable Record Title Act. The Act's aim was to simplify title searches by restricing claims to the last thirty years. Sovereignty lands are not within the realm of designation of the title searcher. Any material in land records offices that would aid in sovereignty land determination would be in the form of reservations, which would take the conveyance out of the purview of the Act. Navigability is determined by a factual inspection of the land, and while the navigability of the waters may not be obvious, the possibility of navigability places the titleholder on notice of the state's interest. The Act does not nullify interests or servitudes that are in use and

the application of the Act. First, public trust lands are held by the state in a governmental trustee capacity and are not held for sale.[126] The reasoning of the court implies that the same standard should be applied to state and private sales. The second difficulty is that the Act was designed to correct defects in title, not to grant titles that previously had no validity.[127]

CONCLUSION

Florida courts have used several theories to avoid the application of the public trust doctrine to inland waters. In *Lobean*, the estoppel approach was used to permit alienation of the lands involved. In *Sawyer*, the Marketable Record Title Act was cited with the same result. The Florida supreme court in *Deltona* used both arguments plus general legislative intent, but the court did not rely on any particular approach.[128] The reasons for the court's shotgun approach in *Deltona* may be its recognition of the weakness of each of the arguments when viewed individually and a belief that the whole is greater than the sum of the parts. *Deltona* culminates a remarkable shift from the early cases that had relied on the public trust doctrine to develop the principles that sovereignty lands were inalienable and that any conveyance of sovereignty lands was void from the inception.

All legal systems, whether under the civil law or common law, recognize a difference between property that is susceptible to private ownership and property that is owned by the public in common.[129] The public trust doctrine

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obvious to the titleholder. Navigability would seem to fall into the same general classification, a physical fact that is observable by the record titleholder.

126. There is probably no reason why the land held for tax sales, reclaimed lands, and other freely alienable lands should not be subservient to the Act.

127. Justice Sundberg's dissent in *Deltona* focused on this analysis. See text accompanying notes 123-124 *supra*.

128. The court in *Deltona* adopted the trial court's opinion and included the lower opinion in the report because of its "reasoning and clarity." The supreme court augmented the trial opinion with text, implying that the statute mentioning lakebed conveyances, legal estoppel, equitable estoppel, and the Marketable Record Title Act all would be dispositive of the issue in upholding the developer's title. The holding is thus ostensibly based on all four arguments. The circuit court closed by declaring its opinion a "full and sufficient declaration of rights and liabilities of the parties involved," while the supreme court found "[in]sufficient legal basis to authorize us to modify or quash the trial court's judgment and the opinions stated therein." 341 So. 2d at 987. Differentiating between holding and dicta is difficult.

129. Roman Law first created the distinction between private and public ownership by introducing private ownership of property. "[M]en partitioned among themselves the earth and the greater part of those things which were on its surface. That which fell to each one among them commenced to belong to him in private ownership, and this process is the origin of the right of property. Some things, however, did not enter into this division, and remain therefore to this day in the condition of the ancient and negative community. . . . These [remaining] things are those which the jurisconsults called *res communes*. Marcien refers to several kinds — the air, the water which runs in the rivers, the sea and its shores . . . [and] wild animals. . . ." Geer v. Connecticut, 161 U.S. 519, 525 (1896) (quoting Pothier, Traité du Droit de Propriété, No. 21). For a discussion of the development of civil and common law treatment of public property, see MacGrady, *supra* note 11.

gave common law validity to the natural law concept that no individual owns the air, birds in flight, or navigable waters. As the public's interest in water has changed, so has the public trust doctrine. Once viewed only for their commercial import, waters today are viewed largely as a recreational resource. The public trust doctrine has changed its focus in some states to provide for protection of this new public interest.[130] A few progressive jurisdictions have extended protection to the public interest in coastal lands, including beaches.[131] Environmental legislation operates to protect public interest in the "common" air and water. Zoning and planning regulations seek to effect enhanced conditions of other intangible public interests.[132]

Ironically, with the increasing environmental awareness of recent years, the Florida courts and legislature have shifted emphasis from the conservation-oriented trust doctrine to the development-oriented desire to quiet title to the illegally conveyed lands. The two basic governmental interests involved — the interest in preservation of the lakes as natural resources and the interest in quieting title to lands — are at odds in all of the cases considered. While it is undoubtedly a desirable objective to maintain certainty of title, this goal need not be accomplished at the expense of the public's control of freshwater lakes. Titles can as easily be quieted in favor of the trust, and any improper tax payments can be refunded to the taxpayer. This approach, however, would force the courts to readdress the difficult factual issue of navigability and develop a clearer definition of the term.

The emphasis on land titles and conveyances should not overshadow the fact that the public trust doctrine, as it developed, was not concerned with title to the soil. Rather, the doctrine was intended to protect the public's right to use the waters; a conveyance of land under navigable waters was valid as long as it did not interfere with that right. Thus, sovereignty lands, in a sense, had two elements: the soil, with which the doctrine was not

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130. *See* cases cited note 19 *supra.*

131. The impetus in this direction is usually undertaken by applying theories of implied dedication or easement. In City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73 (Fla. 1974), the Florida supreme court implied the existence of such a concept. "If the recreational use of the sandy area adjacent to the mean high tide has been ancient, reasonable, without interruption and free from dispute, such use, as a matter of custom, should not be interfered with by the owner. . . . [T]he owner may . . . not . . . interfere with the exercise of the right of the public to enjoy the dry sand area as a recreational adjunct of the wet sand or foreshore area." *Id.* at 78. *See generally* Degnan, *Public Rights in Ocean Beaches: A Theory of Prescription,* 24 SYRACUSE L. REV. 935 (1975). A proposal for uniformity of public beach rights is contained in Eckhardt, *A Rational National Policy on Public Use of the Beaches,* 24 SYRACUSE L. REV. 967 (1973).

132. It is not suggested that most of these recognitions of public interest are related to the public trust doctrine. The public trust is only one device used to effect public reservations. The most obvious tool is legislative enactment, although there are difficulties when property rights are involved since state deprivation of property without due process and compensation cannot be maintained. Regulations dealing with air and water quality usually do not have to meet these more stringent criteria. *See generally* Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Government Action,* 25 U. FLA. L. REV. 635 (1973); Juergensmeyer, *The American Legal System and Environmental Pollution,* 23 U. FLA. L. REV. 439 (1971).

concerned, and navigation rights and other public uses of the waters, which the doctrine made inalienable.

A small minority of states currently permit surface use of waters over privately owned beds,[133] but most states, including Florida, permit only an easement for surface use to other adjacent riparian owners.[134] A few states have held that virtually all waters are public and not susceptible to private ownership.[135] Other states have included in their public trust only those waters navigable under the federal definition.[136] This diversity of state response indicates that many possible solutions are available to the Florida legislature or supreme court. Whether the supreme court returns to its own precedents to invalidate the illegal conveyances, as did the Louisiana court,[137] or develops an alternative method of determining public rights in private waters, private ownership of virtually all of Florida's lakes cannot be maintained without great public loss.

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133. *See* Johnson & Austin, *supra* note 7, at 38. Of the states west of the Mississippi River, Johnson and Austin list seven states in which waters over privately owned beds are navigable for public use, citing Bohn v. Albertson, 107 Cal. App. 2d 738, 238 P.2d 128 (Dist. Ct. App. 1951); Johnson v. Johnson, 14 Idaho 561, 95 P. 499 (1908); Elder v. Delcour, 364 Mo. 835, 269 S.W.2d 17 (1954); State v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945); Luscher v. Reynolds, 153 Ore. 625, 56 P.2d 1158 (1936); Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. 1935); Day v. Armstrong, 362 P.2d 137 (Wyo. 1961). In *Deltona*, the Florida supreme court implied that such rights may be enforced by other methods. "[N]either the trial court's judgment nor our observations here considers the issues of private and public prescriptive easements upon the waters. . . ." 341 So. 2d at 990.

134. Duval v. Thomas, 114 So. 2d 791 (Fla. 1959); Johnson v. Seifert, 257 Minn. 159, 100 N.W.2d 689 (1960). The riparian owner's rights seem to include permitting such use for guests also. Maloney & Plager, *supra* note 19, at 67-69.

135. At least three states imply this result. *See* State v. Nichols, 241 Iowa 952, 44 N.W.2d 49 (1950); Flynn v. Beisel, 257 Minn. 531, 102 N.W.2d 284 (1960); Hillebrand v. Knapp, 65 S.D. 414, 274 N.W. 821 (1937). In *Nichols*, the court held that nonnavigable meandered lakes were neither included in public trust lands nor patented to the state as swamp and overflowed lands. Such lakes are then presumably titled to the federal government. The court assumes that patenting by the United States land office was necessary for conveyance as swamp and overflowed lands. *See* cases cited in Annot. 112 A.L.R. 1108 (1938).

136. See text accompanying notes 58-59 *supra*.

137. See text accompanying note 93 *supra*. The Florida precedents are outlined in text accompanying notes 32-34 *supra*. Louisiana's shift was predicted in Yiannopoulos, *supra* note 99, at 18. For a compilation of the state approaches to recreational use, see cases cited in Annot. 57 A.L.R.2d. 569 (1958).