Florida State University Journal of Land Use and Environmental Law

Volume 4
Number 2 *Winter 1989*

Article 7

April 2018

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THE PUBLIC TRUST DOCTRINE AND SOVEREIGNTY LANDS IN FLORIDA: A Legal and Historical Analysis

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I. INTRODUCTION

The State of Florida holds the power to regulate all navigable waters within its borders for the benefit of the public in the public trust.[1] Members of the public may use navigable waters for commerce, travel and recreation.[2] Coincident with Florida's navigational servitude is the state's sovereign title to beds underlying navigable waters.[3] The state may not convey such submerged sovereignty lands unless the conveyance would be in the public interest.[4]

Florida received more than twenty million acres from the federal government under the Swamp and Overflowed Lands Act (the "Lands Act").[5] The state took title to these lands to reclaim and facilitate the development of swamp and overflowed lands.[6] Florida deeded most of these lands to private railroad companies and other developers who promised to drain them for reclamation and development.[7] Nevertheless, the state held limited public trust responsibilities concerning the swamp and overflowed lands. Therefore, to protect the public interest, the state had to protect the sovereignty lands lying within the conveyed swamp and overflowed lands.

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1. *See* Bucki v. Cone, 25 Fla. 1, 6 So. 160, 161-62 (1889).

2. *See* Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914). Florida treats a stream as navigable only if it overlies a navigable bed. Florida public rights have been described as "navigation, commerce, fishing, bathing and other easements." Broward v. Mabry, 58 Fla. 398, 407-08, 50 So. 826, 829 (1909).

3. Lands which lay under navigable waters were considered sovereignty lands as of March 3, 1845 when Florida achieved statehood pursuant to the Act of March 3, 1845, ch. 75, §1, 5 Stat. 788.

4. FLA. CONST. art. X, § 11 (1968, amended 1970).

5. Act of Sept. 28, 1850, ch. 84, 9 Stat. 519 (codified at 43 U.S.C.A. § 982-984 (West 1986)). Although the official short title is the Swamp Land Act of 1850, it is commonly referred to as the Swamp and Overflowed Lands Act.

6. L. CARTER, THE FLORIDA EXPERIENCE: LAND AND WATER POLICY IN A GROWTH STATE 60-62 (1974).

7. *Id.* at 63-64.

Florida case law originally favored preserving sovereignty lands lying within the deeded swamp and overflowed lands.[8] However, the public trust in sovereignty lands suffered a devastating setback as a result of a recent line of cases led by *Odom v. Deltona Corp.* in 1976.[9] In *Odom*, the Florida Supreme Court decided that the state's Marketable Record Title Act ("MRTA")[10] barred Florida from claiming as sovereignty lands the bed of a non-meandered waterbody that had been previously conveyed in a swamp and overflowed land deed.[11]

The Florida Supreme Court implicitly overruled *Odom* in 1986, in *Coastal Petroleum Co. v. American Cyanamid Co.*,[12] when the court reasoned that the public trust in sovereignty lands was more valuable than the private title rights protected under MRTA.[13] Swamp and overflowed lands deeds, therefore, did not convey sovereignty lands. In response to the *Coastal Petroleum* decision, the Division of State Lands of the Florida Department of Natural Resources[14] is doing an historical analysis of navigable waterbodies in the state. Although the Division of State Lands has not decided what steps it will take to protect the public rights in any sovereignty lands under these waterbodies, identifying navigable waterbodies will enable Florida to protect the public interest in previously undetermined navigable waters and sovereignty lands.

This article traces the history of the Public Trust Doctrine as it applies to Florida and discusses the problems associated with determining ownership of land under and around tidally-influenced and non-tidally-influenced navigable and non-navigable waters. The focus is on the varying case holdings and legal definitions that control this area of the law, and on scientific methodology that might better resolve the issues. In particular, scientific methods for determining navigability and the ordinary high water line are suggested as alternatives in response to the *Coastal Petroleum* decision. The article then concludes with a survey of the historian's role in and the historical sources avail-

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

9. 341 So. 2d 977 (Fla. 1976).

10. Ch. 63-133, 1963 Fla. Laws 257 (current version at FLA. STAT. §§ 712.01-.10 (1987)). MRTA renders marketable, as a matter of law, the interest of any landowner who can trace title from a recorded "root of title," or title transaction that has appeared of record for at least thirty years. FLA. STAT. § 712.02 (1987). Prior claims are thereby made void. *Id.* § 712.04.

11. 341 So. 2d at 989.

12. 492 So. 2d 339 (Fla. 1986), *cert. denied*, 107 S. Ct. 950 (1987).

13. *Id.* at 344.

14. The Division of State Lands, a division of the Department of Natural Resources, administers the purchase, maintenance and conveyance of state lands, and also serves as the staff to the Governor and Cabinet of Florida, sitting as the Board of Trustees of the Internal Improvement Trust Fund.

able for determining and proving navigability as of 1845 when Florida became a state.

II. NAVIGATIONAL SERVITUDE

A. Federal Navigational Servitude

1. Regulatory Powers

The Commerce Clause of the United States Constitution grants Congress the power to regulate all navigable waters.[15] In *Gibbons v. Ogden*,[16] the United States Supreme Court stated that navigation is a form of transportation that is subject to commercial regulation. Further, the Supreme Court held in *United States v. Appalachian Electric Power Co.*[17] that Congress' power to regulate is paramount over all competing rights in navigable waterbodies:

> The state and [private riparian landowners], alike, . . . hold the [navigable] waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e., to 'prescribe the rule by which commerce is to be governed.' This includes the protection of navigable waters in capacity as well as use. . . . The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.' Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.[18]

The Supreme Court established the test for navigability, and therefore federal regulatory rights in waterbodies, in *The Daniel Ball*:[19]

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15. U.S. CONST. art. I, § 8, cl. 3. *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. 511, 593 (1975) (citing cases holding that the power to regulate navigable waters is derived from the: Treaty Clause, U.S. CONST. art. II, § 2; War Powers Clause, U.S. CONST. art. I, § 8; General Welfare Clause, U.S. CONST. art. I, § 8; and Public Property Clause, U.S. CONST. art. IV, § 3).

16. 22 U.S. (9 Wheat.) 1, 189 (1824).

17. 311 U.S. 377 (1940).

18. *Id.* at 423-24 (footnotes omitted).

19. 77 U.S. (10 Wall.) 557 (1870). Although the case primarily considered admiralty issues, the issue of navigability was a determinative factor in the holding.

> [R]ivers 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.[20]

The Supreme Court in *Appalachian Electric*[21] expanded this definition by stating that waters subject to federal navigability regulation are those which are used in navigation or are available for such use either in their natural or improved condition.[22] "A waterway, otherwise suitable for navigation, is not barred from that classification merely because artificial aids must make the highway suitable for use before commercial navigation may be undertaken."[23]

The Supreme Court also expanded the federal government's power to regulate in *United States v. Rio Grande Dam and Irrigation Co.*[24] The federal government contended that an irrigation project in the non-navigable upstream Rio Grande was prohibited by a federal law barring any obstacle to the navigable capacity of any jurisdictional waters.[25] Holding for the United States, the Court determined that federal navigational servitude may extend to non-navigable waters:

> [The statute] is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition.[26]

Therefore, where an obstruction destroys navigable capacity, even if in non-navigable waters, the federal government has authority to regulate.

2. *The Impact of Navigability on Submerged Land Titles*

Although Congress has the power to regulate all navigable waters, and in some cases non-navigable waters, the individual states hold title in the public trust to the submerged lands below the navigable waters.

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20. *Id.* at 563.
21. 311 U.S. 377 (1940).
22. *Id.* at 407.
23. *Id.*
24. 174 U.S. 690 (1899).
25. *Id.* at 707.
26. *Id.* at 708. *See also* United States v. Grand River Dam Auth., 363 U.S. 229 (1960) (discussing the extent of federal rights in non-navigable waterbodies).

Conversely, title to submerged lands below non-navigable waters generally passes to the adjoining riparian landowners.[27] Thus, navigability affects title to submerged lands.

An important consideration in determining navigability is time. The United States Supreme Court distinguished the time for determining navigability for regulatory purposes from the time for fixing navigability for title purposes in *Appalachian Electric*.[28] Navigability for purposes of title to submerged beds is determined as of the date of formation of the Union for the original thirteen states or the date of admission to statehood for the other states.[29] In contrast, navigability for regulation under the Commerce Clause may arise at a later date over waters that have artificially been rendered navigable or over non-navigable waters that have been artificially altered to hinder navigability after statehood.[30] To support the fixing of regulatory jurisdiction, the Court analogized to admiralty jurisdiction, "which may be extended over places formerly non-navigable."[31]

The first major Supreme Court case determining ownership of navigable streambeds was *Martin v. Lessee of Waddell*,[32] in which a riparian landowner holding grants which originated from the British Crown and the State of New Jersey claimed title to submerged lands in a navigable river. Focusing on the common law doctrine that the Crown held the lands underlying navigable waters in the public trust, the Supreme Court ruled that New Jersey held title to the submerged lands, having been vested in them upon statehood.[33] Then, in *Pollard v. Hagan*,[34] the Court extended the Public Trust Doctrine to all subsequently admitted states under the Equal Footing Doctrine[35] because

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27. A riparian landowner is one who owns land which is bounded by a natural watercourse or through which a stream flows. As such, the landowner owns the land up to the ordinary high water line or the mean high tide line and has certain rights in the water. In most states, a riparian landowner may use the water in a reasonable fashion as determined by the interests of that riparian owner, any other riparian owner harmed by that use and society as a whole. *See* RESTATEMENT (SECOND) OF TORTS §§ 849, 850A (1979). *See, e.g.*, Osceola County v. Triple E Dev. Co., 90 So. 2d 600 (Fla. 1956).

28. 311 U.S. at 408.

29. *Id. See* Pollard v. Hagan, 44 U.S. (3 How.) 212, 230 (1845) (holding that the Equal Footing Doctrine gave all states entering the Union equivalent sovereign powers with the original thirteen states).

30. 311 U.S. at 408.

31. *Id.*

32. 41 U.S. (16 Pet.) 367 (1842).

33. *Id.* at 412-15. The original thirteen states took title at statehood to the beds underlying navigable waterbodies subject to the public interest.

34. 44 U.S. (3 How.) 212 (1845).

35. The equal footing principle grants to all states the sovereign interest in submerged lands underlying navigable waters as the original thirteen states. *Supra*, note 29 and accompanying text.

the United States held title to submerged lands under navigable waterbodies and conveyed that title to all of the states subject to the public trust.

The test for determining navigability for title purposes is contained in the Supreme Court's definition of navigability in *The Daniel Ball*. One commentator lists five major factors comprising the federal "title test."[36] First, the waterbody need only be susceptible to navigation; it need not have ever been actually used for navigation. Second, the waterbody must be susceptible for use in commerce. Third, unlike the test for navigability for regulatory purposes, the waterbody must be susceptible to navigation in its natural and ordinary condition. Fourth, the commercial navigation must be possible by any customary mode of trade or travel.[37] The fifth factor, and by far the most difficult to ascertain, is that navigability for title purposes must have existed as of the date that the specific state entered the Union.[38]

The Supreme Court first used *The Daniel Ball* test in *United States v. Holt State Bank*[39] and set a crucial standard in holding that federal, rather than state, law determines navigability for title purposes when a state enters the Union.[40] The Court also more fully explained what constitutes "a customary mode of trade or travel:"

> [N]avigability does not depend on the particular mode in which [trade or travel on water] is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be a fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.[41]

Utah v. United States[42] illustrates the dichotomy between federal navigability tests for regulatory purposes and for title determination. In *Utah*, the United States government argued the Great Salt Lake was not subject to federal regulation because its traffic was not "part of a navigable interstate or international commercial highway."[43] The

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36. *See* MacGrady, *supra* note 15, at 592-93, n.424. The first four factors are determined by *The Daniel Ball* definition and the fifth factor is derived from *Utah v. United States*.

37. *Id.* at 592-93 (citations omitted).

38. *Id.* at 593. The difficulties inherent in this requirement relate to the necessity of discovering and relying on contemporaneous notes. In addition, the process requires expert historical, archeological, and other analysis, as well as legal study.

39. 270 U.S. 49 (1926).

40. *Id.* at 55-56.

41. *Id.* at 56.

42. 403 U.S. 9 (1971).

43. *Id.* at 10.

Court determined this irrelevant for determination of state title, the only question being whether the lake was navigable. The ownership of the shoreland and mineral rights, however, hinged on the determination of navigability at the time Utah became a state.[44] The Supreme Court concluded that historical evidence that a rancher had transported livestock across the lake showed navigable traffic at the time Utah entered the Union.[45] Therefore, even if the lake was not navigable for regulatory purposes it could be navigable for title purposes based on wholly intrastate commerce.[46]

In *Montana v. United States*,[47] the Supreme Court exhibited the paramount nature of the Public Trust Doctrine as applied to submerged lands underlying navigable waterbodies. In *Montana*, both the Crow Indian Tribe and the State of Montana claimed the exclusive right to regulate hunting and fishing by non-Indians on Crow reservation lands.[48] The Crow Tribe claimed the sovereign right to regulate under the Second Treaty of Fort Laramie and the state claimed the sovereign right to regulate pursuant to its grant of statehood. The Court held that both parties had sovereign rights that were derivative from the federal government. Based on the Second Treaty of Fort Laramie the Tribe claimed beneficial ownership of the portion of the riverbed of the Big Horn River which flowed through their reservation and had been held by the federal government in trust for the Crow Tribe.[49] The state, on the other hand, alleged the federal government held title to the riverbed in the public trust until Montana became a state. Montana therefore obtained title to the submerged lands at statehood.

The Court found a strong presumption against conveyance by the federal government of submerged lands underlying navigable waters.[50] The federal government held those lands as a sovereign right and would not have surrendered that right absent a clear showing of intent. Thus, because the Tribe failed to prove that the United States "definitely declared" that it was conveying those lands to the Tribe and failed to rebut the presumption, the Court concluded the state held title to the submerged lands.[51] Therefore, absent a showing of

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44. *Id.*
45. *Id.* at 11-12.
46. *Id.* at 11.
47. 450 U.S. 544 (1981).
48. *Id.* at 547, 549.
49. *Id.* at 548.
50. *Id.* at 552.
51. *Id.* at 553-54.

public exigency, Congress is presumed to hold public trust title to navigable beds, subject only to grants to future states.

B. *Florida Sovereignty Lands Determinations*

Federal law determines which submerged lands pass to the states. Once the land passes to a state then that state's property law controls to determined what rights are covered by navigable waters. A state may establish a navigability test to determine title that is equivalent to, broader than, or narrower than the federal test.[52] The Supreme Court stated in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*[53] that a state may make sovereignty land definitions more restrictive after it achieves statehood. Further, a state is free to retain title to certain sovereignty beds, but may convey other sovereignty beds to private grantees.[54]

Florida law is comparable to federal law in determining modes of water transportation navigability. In *Bucki v. Cone*,[55] the Florida Supreme Court held that a waterbody may be deemed navigable if it:

> [M]ay be conveniently used at all seasons of the year with vessels, boats, barges, or other water craft, for purposes of commerce. . . . A stream of sufficient capacity and volume of water to float to market the products of the country will answer the conditions of navigability. . . . [I]t is not essential to the easement that the stream should be continuously, at all seasons of the year, in a state suited for such floatage.[56]

In *Bucki*, the court found that log-floating constituted commerce sufficient to prove navigability.[57] The Florida Supreme Court further defined navigability, in *Broward v. Mabry*,[58] to include susceptibility to commerce, as opposed to actual use in commerce. In *Clement v. Watson*[59] the court followed the federal title requirement that the wa-

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52. *See* F. MALONEY, S. PLAGER, R. AUSNESS AND B. CANTER, FLORIDA WATER LAW 694-95 (1980) [hereinafter FLORIDA WATER LAW].

53. 429 U.S. 363, 378-80 (1977).

54. Barney v. Keokuk, 94 U.S. 324, 334 (1876). Nonetheless, a new state may treat lands acquired under the Lands Act as subject to the public trust. *See* FLORIDA WATER LAW, *supra* note 52, at 694-95 (indicating that the state could deem such lands navigable for title purposes).

55. 25 Fla. 1, 6 So. 160 (1889).

56. *Id.* at 19, 6 So. at 161-62.

57. *Id.*, 6 So. at 162. *See* FLORIDA WATER LAW, *supra* note 52, at 696 (stating that even though *Bucki* dealt with regulation, rather than title, Florida court tests for navigability for title and regulation seem to be identical).

58. 58 Fla. 398, 412, 50 So. 826, 831 (1909).

59. 63 Fla. 109, 112, 58 So. 25, 26 (1912).

terbody be navigable in its natural condition. Thus, a cove that was navigable by virtue of an artificially created channel was not navigable in fact, a factor necessary to establish sovereign title to the underlying lands.[60]

One commentator states that the only possible distinction between the federal and Florida tests for navigability is that Florida courts may give greater weight to the "sawlog" test.[61] The federal courts have used sawlog floatage as evidence of title navigability. The Florida Supreme Court determined sawlog flotage alone can constitute navigability.[62] Therefore, Florida's equivalent navigability tests for regulation and title indicate that the "sawlog" test also applies to determine sovereign title.[63]

C. *Non-navigable Rights*

Unlike title to beds of navigable waters, which are held by the state in the public trust, title to submerged lands below non-navigable waters generally passes to the adjoining riparian landowners.[64] Florida common law apparently is more limited than federal law in establishing public rights in non-navigable waterbodies. When the use of non-navigable waterbodies impairs the use of navigable waters then the federal servitude can be extended to non-navigable waterbodies.[65] However, the federal government does not have power to open a non-navigable waterbody to public use.[66] Similarly, in *Osceola County v. Triple E Development Co.*, the Florida Supreme Court held that a county may not condemn land to access a non-navigable lake.[67] One commentator interprets *Osceola* to "indicate [that] there is no general public right to use non-navigable waters in Florida."[68]

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60. *Id.* at 113, 58 So. at 27.

61. *See* FLORIDA WATER LAW, *supra* note 52, at 702. *See also* MacGrady, *supra* note 15, at 593, n.423 (pointing out the importance of the test in expanding the definition of commerce to determine navigability).

62. Bucki v. Cone, 25 Fla. at 19-20, 6 So. at 162.

63. FLORIDA WATER LAW, *supra* note 52, at 702-03.

64. *See, e.g.*, Osceola County v. Triple E Dev. Co., 90 So. 2d 600, 602 (Fla. 1956). Each adjoining riparian owns a proportionate share of the bed, extending to the center of the waterbody. All of the adjoining riparian owners generally are held to possess reasonable rights to use the surface of the non-navigable waters.

65. United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899).

66. Kaiser Aetna v. United States, 444 U.S. 164 (1979) (holding the federal government could not require the owners of a marina, which had become navigable as a result of dredging, to open the marina to the public).

67. 90 So. 2d at 603.

68. FLORIDA WATER LAW, *supra* note 52, at 706.

III. THE PUBLIC TRUST DOCTRINE

A. Background

The Public Trust Doctrine obligates a state government to act as trustee of the public interest in all public lands and waters in that state.[69] Some commentators assert that all lands that the United States government conveyed to the states were transferred subject to the public trust, and conclude that all subsequent grantees, public and private, must use the lands in the public interest.[70]

Most cases involving the Public Trust Doctrine have dealt with public rights in navigable waters and underlying lands.[71] Professor Joseph Sax of the University of California-Berkeley, in his seminal public trust law review article, provides the following analysis of the general impact of the Public Trust Doctrine on state government grants of public lands and waters: "[N]o grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses."[72]

The leading case on the Public Trust Doctrine is *Illinois Central Railroad v. Illinois*,[73] in which the Supreme Court determined title to certain reclaimed lands and adjoining submerged lands under navigable waters along the Chicago waterfront. The Illinois legislature had granted most of the submerged lands in the Chicago harbor to the railroad,[74] but subsequently repealed the act by which the state had conveyed those lands.[75] The Court held that the state could convey lands underlying navigable waters if the conveyance did "not substantially impair the public interest in the [submerged] lands and water remaining . . . ."[76] However, the Court concluded that the state's prior conveyance of lands underlying an entire area of a navigable

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69. *See* Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452-54 (1892). *See also* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473-91 (1970).

70. *See* Sax, *supra*, note 69. *See also* R. EISENBUD, AN EXAMINATION OF THE LAW RELATING TO THE WATER RIGHTS OF THE EVERGLADES NATIONAL PARK: A CASE STUDY IN LEGAL PROBLEMS OF THE COASTAL ZONE (Sea Grant Technical Bulletin No. 21, 1971).

71. *See, e.g.*, State v. Public Serv. Comm'n, 275 Wis. 112, 81 N.W.2d 71 (1957). *See* Sax, *supra* note 69, at 509-23.

72. Sax, *supra* note 69, at 488-89.

73. 146 U.S. 387 (1892).

74. *Id.* at 398-99, 405 n.1.

75. *Id.* at 410-11.

76. *Id.* at 452.

waterbody was an invalid attempt to abdicate the state's public trust duty over those lands.[77] Thus, *Illinois Central* established a rule of law that Professor Sax has called "the central substantive thought" covering the state's public trust responsibility:

> When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.[78]

B. The Public Trust Duty In Swamp and Overflowed Lands

In 1850, Congress granted swamp and overflowed lands to various states in the Lands Act to facilitate conversion and development of those lands. The Lands Act states that "[t]he proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclaiming [of] said lands, by means of levees and drains."[79] Various cases have considered whether this provision creates a public trust in these lands, and if so, how far the trust extends.[80] Some courts have concluded that a state may convey these lands only if such conveyance would be in the public interest.[81]

The statute has been construed to require that all federal laws be met when swamp and overflowed lands are drained.[82] Further, the state where such lands lie may determine whether those lands may be converted.[83] A state shall apply the proceeds that it receives from conveyances of swamp and overflowed lands to aid reclamation of those lands,[84] but the state may use the proceeds otherwise if that money is not necessary to further reclamation.[85]

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77. *Id.* at 452-53.

78. Sax, *supra* note 69, at 490 (emphasis in original). *See also* Comment, *Unfinished Business - Protecting Public Rights to State Lands from Being Lost under Florida's Marketable Record Title Act*, 13 FLA. ST. U.L. REV. 599 (1985) (authored by David L. Powell).

79. 43 U.S.C.A. § 983 (West 1986).

80. *See, e.g.*, Caples v. Taliaferro, 144 Fla. 1, 197 So. 861 (1940). *See* EISENBUD, *supra* note 70, at 126-33.

81. EISENBUD, *supra* note 70, at 126-33.

82. *See, e.g., In re* Crawford County Levee & Drainage Dist. No. 1, 182 Wis. 404, 409, 196 N.W. 874, 877, *cert. denied*, 264 U.S. 598 (1924).

83. *See* United States v. Louisiana, 127 U.S. 182 (1888).

84. *Id.* at 191-92.

85. *Id.*

C. *Public Trust in Florida*

Titles in Florida lands generally originate from one of three sources: Spanish grants to individuals issued prior to January 24, 1818; Spanish grants to the United States; and grants to the territory and state by the federal government.[86] The swamp and overflowed lands and sovereignty lands that Florida acquired were held by the state subject to a limited public trust. The state held swamp and overflowed lands to expedite drainage and conversion pursuant to the perceived public interest.[87] On the other hand, Florida was obligated to preserve sovereignty lands.[88]

The original Florida Constitution stated that conversion of land was necessary to foster development of the state:

> A liberal system of internal improvements, being essential to the development of the resources of the country, shall be encouraged by the government of this State; and it shall be the duty of the general assembly, as soon as practicable, to ascertain, by law, proper objects of improvement, in relation to roads, canals, and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements.[89]

In 1850, the federal government conveyed approximately twenty million acres of land to Florida under the Lands Act because Congress had determined that the lands were wet and unfit for cultivation.[90] Congress anticipated that the conveyance would "facilitate the drainage and reclamation of these lands, primarily for cultivation."[91]

Unlike its limited public trust duty toward swamp and overflowed lands, the State of Florida is held to a strict public trust standard in protecting navigable waters and underlying sovereignty lands.[92] In

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86. FLORIDA WATER LAW, *supra* note 52, at 675.

87. *See* Everglades Sugar & Land Co. v. Bryan, 81 Fla. 75, 87 So. 68 (1921), *error dismissed*, 257 U.S. 667 (1922).

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

89. FLA. CONST. art. XI, § 2 (1838, repealed 1868).

90. *See* Canter and Christie, *Water Regulations and Policies*, in WATER RESOURCES ATLAS OF FLORIDA 130 (Fernald and Patton eds. 1984).

91. *See* FLORIDA WATER LAW, *supra* note 52, at 683-84. In 1855, pursuant to the development policy of the Florida Constitution and in order to drain and convert the lands acquired under the Lands Act, the Florida legislature created the Internal Improvement Fund. *Id.* at 740 n.48. By using the term swamp and overflowed lands, the state could justify its disposal of these lands as serving the public interest which contributed to the underlying rationale for the term internal improvement trust fund. J. ROTHCHILD, UP FOR GRABS: A TRIP THROUGH TIME AND SPACE IN THE SUNSHINE STATE 26-27 (1985).

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

State v. Black River Phosphate Co.,[93] the Florida Supreme Court held that a riparian landowner's acquisition of submerged lands under navigable waterbodies did not carry the right to mine phosphate under those lands. The court cited *Martin v. Waddell*, and concluded that the state would not be presumed to have conveyed an interest in sovereignty lands unless a written instrument states that the interest has been so conveyed.[94] The Riparian Act of 1856, under which the lands had been transferred, did not expressly or implicitly convey mining rights to these lands.[95] Thus, while the landowner retains legal title to the submerged lands, he can not use the property in a manner that obstructs the public in exercising traditional rights.

The court also stated in *Black River Phosphate* that a state grant of sovereignty lands is presumed to be made pursuant to the public interest.[96] However, the state could not abdicate its public trust responsibility over sovereignty lands, unless such abdication either would promote the public interest or would not substantially impair the public interest in remaining sovereignty lands and overlying navigable waters.[97]

In 1968, the legislature set forth the Public Trust Doctrine in the state constitution,[98] which provided that the state held sovereignty lands in the public trust, and that those lands could only be conveyed when *not* contrary to the public interest.[99] Later, the constitution was amended to create a higher standard, and required that such sales be made only when they would be *in* the public interest.[100]

IV. THE FLORIDA MARKETABLE RECORD TITLE ACT

A. Introduction

In 1963, the Florida legislature enacted the Marketable Record Title Act ("MRTA") to "[simplify] and facilitat[e] land title transactions

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93. *Id.* at 107, 13 So. at 648.

94. *Id.*

95. *See id.* at 108-09, 13 So. at 648-49.

96. *Id.* at 106-07, 13 So. at 648.

97. *Id.* at 99, 13 So. at 645.

98. FLA. CONST. art. X, § 11 (1968, amended 1970).

99. *Id. See* Note, *Florida's Sovereignty Submerged Lands: What Are They, Who Owns Them and Where is the Boundary?*, 1 FLA. ST. U.L. REV. 596, 599 n.23 (1973).

100. FLA. CONST. art. X, § 11 (1968, amended 1970). The Florida Supreme Court in *Coastal Petroleum* indicated that the constitutional provision was intended to operate retrospectively. *Coastal Petroleum* reaffirms common law holdings limiting the state's ability to convey sovereignty lands. The court stated that article X was a "constitutional codification of the public trust doctrine contained in [Florida] case law." 492 So. 2d 339, 344 (Fla. 1986), *cert. denied*, 107 S. Ct. 950 (1987).

by allowing persons to rely on a record title . . . ."[101] Previously, title examiners often reviewed chains of title dating back many decades, and thus were forced to deal with many problems such as numerous misidentifications and wild titles. The Real Property, Probate and Trust Section of The Florida Bar lobbied the state legislature to pass MRTA in order to reduce the risks brought by arduous searches and the errors of draftpersons.[102]

MRTA provides that an owner shall be deemed to hold legal title to real property where a "title transaction" or "root of title" has appeared of record for at least thirty years.[103] If the root of title appeared of record, all conflicting title transactions or claims preceding the thirty-year period are "declared to be null and void,"[104] unless they fall within one of the exceptions to MRTA.[105]

B. MRTA: Intended Impact on Sovereignty Lands

One commentator, Leigh Hart, argues that all private parties who took deeds to swamp and overflowed lands were on notice of the state's vested rights to the sovereignty lands; therefore, MRTA should not be held to apply to sovereignty lands.[106] To that effect, Hart cited the following definition of "vested rights:"

> [I]n constitutional law, rights which have so completely and definitely accrued to or settled in a person that they are not subject to be defeated or canceled by the act of any other private person, and that which it is right and equitable that the government should recognize and protect, as being lawful in themselves, and settled according to the then current rules of law, and of which the individual could not be deprived arbitrarily without injustice, or of which he could not justly be deprived otherwise than by the established methods of procedure and for the public welfare. Such interests as cannot be interfered with by retrospective laws . . . .[107]

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101. Ch. 63-133, § 10, 1963 Fla. Laws 257, 262 (current version at FLA. STAT. § 712.10 (1987)).

102. *See* Comment, *supra* note 78, at 600-05.

103. FLA. STAT. §§ 712.01 and 712.02 (1987).

104. *Id.* § 712.04.

105. *Id.* § 712.03(1)-(6). The legislature originally created six exceptions to MRTA: defects and reservations disclosed in the root of title; interest preserved by filing notice within the thirty-year period; rights of parties in possession; estates, interests and claims arising from title transactions within the thirty-year period; recorded or unrecorded easements of servitudes that are at least partially in use; rights of any person in whose name the land has been assessed for tax purposes within the previous three years. In 1978, the legislature added an exception covering sovereignty lands.

106. Hart, *The Marketable Record Title Act: Origins, Underlying Concepts, and Primary Intent* 58 (Monograph Series Policy Studies Clinic, Fla. St. U. College of Law 1985).

107. *Id.* (quoting BLACK'S LAW DICTIONARY 1402 (5th ed. 1979)).

Hart claims the Board of Trustees lacked the authority to convey sovereignty lands until several years after MRTA was passed.[108] Further, if the Board of Trustees conveyed deeds containing sovereignty lands, the title to those lands did not pass unless the Board of Trustees showed a clear intent to convey the sovereignty lands.[109] Finally, she argues that the legislature did not intend for MRTA to affect sovereignty rights in submerged lands. The legislature intended MRTA to provide a tool for proving marketable title, not to change property rights.[110]

The members of The Florida Bar who supported drafting MRTA did not anticipate that the Act would affect sovereignty land titles. One commentator stated that the legislature deleted the proposed exemption of state lands from the MRTA bill when it was introduced only because it knew that the Act could not affect such state's rights.[111] In Professor Barnett's 1967 review of various state MRTAs, he cited the Florida act as excepting all interests of the state from MRTA's operation.[112] In addition, one of the Florida Bar Association proponents of MRTA wrote a letter to the MRTA Commission Chairman in 1985 stating: "I did not believe the Act could affect sovereignty lands unless it expressly said so."[113] Thus, it does not appear as if MRTA was intended to extinguish the state's titles in sovereignty lands.

In some instances deeds of swamp and overflowed lands from the Board of Trustees to private parties failed to expressly refer to navigable waterbody beds. In such cases, some courts have interpreted MRTA as conveying these submerged lands to the private title holder, thereby extinguishing the state's title to the lands.[114]

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108. *Id.* at 59. This, however, is not strictly true. The Board of Trustees received title to tidally-influenced waters' beds under the Act of May 21, 1917, ch. 7304, §1, 1917 Fla. Laws 116. The Florida Supreme Court in Broward v. Mabry, 58 Fla. 398, 407-09, 50 So. 826, 829 (1909) indicated that conveyances of non-tidally-influenced navigable waterbodies' beds could be made when in the public interest. Such sovereign authority to convey presumably would have extended to the Board of Trustees' lands underlying tidally-influenced waterbodies. *See Coastal Petroleum*, 492 So. 2d at 344 (holding that the Florida constitutional authorization under art. X, § 11 for the Board of Trustees to convey sovereign lands codified "the public trust doctrine contained in [Florida] case law").

109. Hart, *supra* note 106, at 59. The issue of executive intent was a determinative factor in *Coastal Petroleum*, decided subsequent to the publication of Hart's work, in which the court held that MRTA did not extinguish sovereign rights. *Coastal Petroleum*, 492 So. 2d at 344.

110. Hart, *supra* note 106, at 59.

111. Catsman, *Function of a Marketable Title Act*, 34 FLA. B.J. 139, 143 n.8 (1960).

112. Barnett, *Marketable Title Acts - Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 77 (1967).

113. Letter from Richard W. Ervin, Esq., Tallahassee, Fla., to J. Hyatt Brown, Chairman, Marketable Record Title Act Study Commission, Daytona Beach, Fla. (Sept. 30, 1985).

114. *See* Sawyer v. Modrall, 286 So. 2d 610 (Fla. 4th DCA 1973), *cert. denied*, 297 So. 2d 562 (Fla. 1974); Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976).

V. DEVELOPMENT OF FLORIDA SWAMP AND OVERFLOWED LANDS LAW

A. Background

The Governor and Cabinet, sitting as the Board of Trustees of the Internal Improvement Trust Fund (the "Board of Trustees") hold the lands conveyed to Florida under the Lands Act in the public trust, subject to reconveyance to private persons.[115] Florida case law has long held that the Board of Trustees' conveyances of the swamp and overflowed lands did not include any sovereignty lands.[116] Deeds from the Board of Trustees were strictly interpreted under a presumption that sovereignty lands were not conveyed under those instruments.[117]

In 1927, the Florida Supreme Court in *Martin v. Busch*[118] considered a Board of Trustees conveyance of land that bordered on the ordinary high water line[119] of an unsurveyed portion of Lake Okeechobee. Between the date that the Board of Trustees deeded away the land in question and the date that the area was surveyed, the water boundary changed through avulsion.[120] The Court held that the binding ordinary high water line boundary was established on the date of the conveyance of the deed, because avulsive changes did not change title to the boundaries of upland owners.[121]

The supreme court stated in dicta that the Board of Trustees could not affect title to sovereignty lands by conveying swamp and overflowed lands.[122] The court based its analysis on the divergent purposes for which the state holds the two types of lands.[123] The State of Florida holds sovereignty lands in the public trust for environmental purposes; whereas the federal government conveyed swamp and overflowed lands to Florida for reconveyance to facilitate reclamation of those lands.[124]

Therefore, pursuant to this dichotomy, the court stated:

> If by mistake or otherwise sales or conveyances are made by the trustees of the internal improvement fund of sovereignty lands, such

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115. *See supra* note 79 and accompanying text.

116. *See* Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927).

117. *Id.*

118. *Id.*

119. The OHWL determines the boundary between uplands and water beds underlying navigable, non-tidally-influenced waterbodies.

120. Avulsion is a sudden shoreline change, such as that which occurs during a severe storm. Generally, avulsion is held not to change the title boundaries of upland owners.

121. 93 Fla. at 571-72, 112 So. at 286.

122. *Id.* at 573, 112 So. at 286-87.

123. *Id.*

124. *Id.*

> as lands under navigable waters in the state or tidelands . . . under the authority given such trustees to convey swamp and overflowed lands, such sales and conveyances are ineffectual for lack of authority from the state.[125]

The Florida legislature passed several early acts declaring certain waterbodies to be navigable,[126] but it has not attempted to define navigability except as to waters overlying swamp and overflowed lands.[127] The 1953 legislature passed the following section covering riparian rights:

> Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States of America or by the State of Florida without reservation of public rights in and to said waters.[128]

Some commentators claim that this statute purported to render nonnavigable, as a matter of law, waters lying over submerged lands previously conveyed to private individuals unless the instrument of conveyance expressly reserved public rights.[129] In 1956, the Florida Supreme Court reviewed this provision in *McDowell v. Trustees of the Internal Improvement Fund*[130] and declined to hold that the language of a deed determined navigability.

Then in 1973, the Florida Fourth District Court of Appeal stated in dicta in *Sawyer v. Modrall*[131] that the public trust duty toward sovereignty lands was superseded by MRTA. The court stated that MRTA purported to extinguish all interests in property if the time requirements of the root of title were met, unless the particular interest was expressly excepted by the statute.[132] The state's sovereignty claim was not expressly excepted, and the court refused to read MRTA to imply such an exception.[133] This language, however, contradicted Florida

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125. *Id.* at 569, 112 So. at 285.
126. EISENBUD, *supra* note 70, at 175.
127. *Id.* at 175-76.
128. FLA. STAT. § 192.61(2) (1953) (current version at FLA. STAT. § 253.141(2) (1987)).
129. F. MALONEY, S. PLAGER & F. BALDWIN, WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE 44-46 (1968).
130. 90 So. 2d 715 (Fla. 1956).
131. 286 So. 2d 610, 613-14 (Fla. 4th DCA 1973), *cert. denied*, 297 So. 2d 562 (Fla. 1974).
132. *Id.* at 613.
133. *Id.*

Supreme Court precedents strictly construing the Board of Trustees' deeds to exclude sovereignty lands.[134]

In 1976, the Florida Supreme Court compounded the ill-considered dicta in *Sawyer*. In *Odom v. Deltona*[135] the court determined that MRTA could extinguish in a conveyance of swamp and overflowed lands sovereignty rights in the beds of non-meandered waterbodies.[136] In deciding *Odom*, the court construed a 1953 riparian rights statute, which provided that submerged lands under a non-meandered lake would be subject to private ownership, where the state had conveyed those lands more than fifty years before without reserving any public rights in the lands.[137] In addition, under Florida law meandering of a waterbody creates a rebuttable presumption of navigability.[138] The court reasoned further that non-meandered waterbodies should be rebuttably presumed to be non-navigable.[139]

Based on the above analysis, the supreme court affirmed the trial court's conclusion that MRTA could confirm private title to lands underlying even navigable waters where those lands were not reserved when conveyed to private parties.[140] The state argued that private grantees of swamp and overflowed lands took title with "notice" that their acquisitions did not include sovereignty lands, and therefore that grantees of non-meandered waterbodies also took with "notice."[141] Rejecting the state's argument, in part based on the small size of the waterbodies in issue, the supreme court refused to apply the "notice of navigability" test to the owners of the non-meandered lakes and ponds in *Odom*.[142]

The dissent in *Odom* argued that MRTA does not act to quiet title to public lands,[143] and that the state holds sovereignty lands in the public trust and cannot divest title to those lands without statutory notice and public hearing.[144] Therefore, because MRTA "is essentially

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134. *See, e.g.*, Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927). *See also* Comment, *supra* note 78, at 609.

135. 341 So. 2d 977 (Fla. 1976).

136. *Id.* at 989.

137. *Id.* at 982, 987-89.

138. *Id.* at 988-89.

139. *Id.* at 989.

140. *Id.* at 989-90.

141. *Id.* at 988.

142. *Id.* Some commentators have interpreted this passage to mean that a navigable lake's or pond's surface must be no fewer than 140 square acres. *See* Jacobs and Fields, *Sovereignty Lands in Florida: Lost in a Swamp of Ambiguity*, 38 U. FLA. L. REV. 347, 374, 389-390, n.226 (1986). This reading, however, belies the court's apparent intent, which was to state that 140 square-acre waterbodies are small enough to raise a question of non-navigability.

143. 341 So. 2d 977, 990 (Sundberg, J., dissenting).

144. *Id.*

a curative act [it] could not have been intended by the legislature to provoke divestiture of public trust lands."[145]

After the *Odom* decision, then-Governor Reuben Askew called a special session of the Florida legislature to protect sovereignty lands from MRTA.[146] The legislature passed into law a bill[147] which stated that "marketable record title shall not affect or extinguish . . . State title to lands beneath navigable waters acquired by virtue of sovereignty."[148] Unfortunately, however, the statute did not state whether it applied retroactively or just prospectively.[149] Florida courts that have considered the issue have failed to interpret the statute as applying retroactively.[150]

Because of the *Odom* decision and the uncertain effects of the 1978 MRTA amendments, the legislature created the State Lands Study Committee[151] to study and report on the applicability of MRTA to sovereignty lands.[152] Because courts interpreted the 1978 amendment to apply prospectively,[153] the legislature passed a bill in 1985 that temporarily suspended MRTA application to sovereignty lands.[154] The bill also authorized the MRTA Study Commission to review applicability of MRTA to sovereignty lands.[155] The Commission determined that MRTA "did not and was never intended to be utilized to deprive the State of ownership of sovereignty lands"[156] and proposed curative legislation.[157] However, the legislation was not enacted. Subsequently, the Florida Supreme Court addressed the issue in the landmark case of *Coastal Petroleum Co. v. American Cyanamid Co.*[158]

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145. *Id.*

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

147. Ch. 78-288, 1978 Fla. Laws 820 (current version at FLA. STAT. § 712.03(7) (1987)).

148. FLA. STAT. § 712.03(7) (1987). *See* Comment, *supra* note 78, at 613-14 (stating that both the Florida House and Senate rejected proposed amendments that would have barred retrospective application of the sovereignty lands MRTA exception. Impliedly, then, the exception applied retroactively).

149. Comment, *supra* note 78, at 616.

150. *See, e.g.*, Askew v. Sonson, 409 So. 2d 7 (Fla. 1981); Board of Trustees v. Paradise Fruit Co., 414 So. 2d 10 (Fla. 5th DCA 1982), *cert. denied*, 432 So. 2d 37 (Fla. 1983).

151. Ch. 78-301, § 1, 1978 Fla. Laws 866.

152. *See* State Lands Study Committee, Final Committee Report (March 1979).

153. *See* State v. Contemporary Land Sales, 400 So. 2d 488 (Fla. 5th DCA 1981).

154. Ch. 85-83, § 1, 1985 Fla. Laws 578. The law suspended MRTA's applicability to sovereignty lands until October 1, 1986.

155. *Id.* § 2.

156. Marketable Record Title Act Study Commission, Final Report and Recommendations 53 (Feb. 15, 1986).

157. *Id.*

158. 492 So. 2d 339 (Fla. 1986).

B. Coastal Petroleum

Coastal Petroleum arose from two separate quiet title actions to certain submerged lands along the Peace and Alafia rivers.[159] In 1883, the Board of Trustees deeded certain swamp and overflowed lands, which included areas along the Peace River, to predecessors of Mobil Oil Company ("Mobil") and American Cyanamid Company ("Cyanamid"), which ultimately acquired title to the land and mined the lands for phosphate rock.[160] The deeds did not reserve the state's sovereignty rights in the lands underlying the Peace River.[161]

In 1946, the Board of Trustees issued a lease to Coastal Petroleum Company ("Coastal")[162] which authorized Coastal to mine for minerals under state sovereignty lands. Cyanamid and Mobil also mined and processed phosphate rock along the Peace River.[163] As a result of the mining activities and sublease agreements, conflicts arose between the parties, and several lawsuits were filed. In 1976, Mobil sued Coastal in Leon County Circuit Court claiming that Coastal had violated the sublease agreement.[164] In 1977, Coastal brought a federal suit against the phosphate companies that mined in the area, including Mobil, alleging that they converted phosphate belonging to Coastal.[165] Coastal claimed that the lands were state-owned lands and were subject to the lease between the Board of Trustees and Coastal.[166] Mobil and Cyanamid then each filed quiet title suits in Polk County Circuit Court to confirm title to their land and remove the cloud created by Coastal's claim.[167] Each of the trial courts held for the plaintiff deedholders, Mobil and Cyanamid, in the quiet title action. Each court held that the deeds obtained from the Board of Trustees superseded any conflicting interest under the mining lease.[168]

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159. *Id.* at 341. *See* Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6 (Fla. 2d DCA 1984), *quashed*, 492 So. 2d 339 (Fla. 1986), *cert denied*, 107 S. Ct. 950 (1987); Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corp., 455 So. 2d 412 (Fla. 2d DCA 1984), *quashed in part*, 492 So. 2d 339 (Fla. 1986), *cert denied*, 107 S. Ct. 950 (1987).

160. 454 So. 2d at 7.

161. *Id.*

162. Drilling Lease No. 224-B between Trustees of the Internal Improvement Trust Fund and Coastal Petroleum Co. (executed as amended on Feb. 27, 1947) (recorded April 9, 1954, at Deed Book 980, page 418, of the Public Records of Polk County, Florida).

163. Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corp., 455 So. 2d 412, 413 (Fla. 2d DCA 1984), *quashed in part*, 492 So. 2d 339 (Fla. 1986), *cert denied*, 107 S. Ct. 950 (1987).

164. *Id.*

165. 454 So. 2d at 7.

166. *Id.*

167. *See id.*; 455 So. 2d at 413.

168. *See* 454 So. 2d at 7; 455 So. 2d at 413.

Affirming, the Second District Court of Appeal held that the Board of Trustees, by conveying the lands in question, contemporaneously determined that the portions of the Peace River included in the areas deeded away were non-navigable. The court reasoned that even if those areas were navigable, the Board of Trustees was estopped from denying either ownership of the lands when conveyed or its authority to convey those lands because the Board of Trustees reserved no rights therein, and that MRTA extinguished all state claims including sovereignty claims in those deeded lands.[169] Recognizing the potential impact of its holding on navigable riverbeds, the court certified the following three issues to the Florida Supreme Court:

> I. Do the 1883 swamp and overflowed lands deeds issued by the trustees include sovereignty lands below the ordinary high-water mark of navigable rivers?
> II. Does the doctrine of legal estoppel or estoppel by deed apply to 1883 swamp and overflowed deeds barring the trustees' assertion of title to sovereignty lands?
> III. Does the marketable record title act, chapter 712, Florida Statutes, operate to divest the trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers?[170]

The Florida Supreme Court answered all three questions in the negative, finding in favor of Coastal and the Board of Trustees.[171]

1. Reservation of Sovereignty Rights

Florida received title to sovereignty lands under the Equal Footing Doctrine when it achieved statehood in 1845.[172] In 1850, title to swamp and overflowed lands vested in the Board of Trustees pursuant to federal patents under the Lands Act.[173] In its analysis of *Coastal Petroleum*, the majority assumed that the Peace River was navigable, and therefore concluded that the lands underlying it were sovereignty lands.[174] Therefore, because the state, not the Board of Trustees, held title to this submerged land in 1883 when the Board of Trustees

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169. Coastal Petroleum Co. v. American Cyanamid Co., 454 So. 2d 6 (Fla. 2d DCA 1984), *quashed*, 492 So. 2d 339 (Fla. 1986), *cert. denied*, 107 S. Ct. 950 (1987).

170. 454 So. 2d at 9-10.

171. Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 341 (Fla. 1986), *cert. denied*, 107 S. Ct. 950 (1987).

172. *See id.* at 342.

173. *Id.*

174. *See id.* at 343.

deeded away the swamp and overflowed land at issue,[175] the Board could not have conveyed this sovereignty land, regardless of its intent.[176] No reservation was needed by the Board of Trustees to preserve the state's right.

Chief Justice Boyd argued in his dissent that the combination of the failure of the official surveys to meander the stretch of water at issue, the omission of any reference to sovereignty lands in the Board of Trustees' deeds, the existence of federal patents to the state under the Lands Act, and state requests for such patents constituted "official, contemporaneous determinations that the lands in question were swamp and overflowed lands and that any waters lying thereon were not navigable."[177] Thus, argued Boyd, if the waters were not navigable, then the underlying lands were not sovereignty land.

2. *Estoppel*

The majority also decided that legal estoppel did not apply to the Board of Trustees' claim of ownership in the sovereignty land.[178] In other words, the Board of Trustees could not be held, under estoppel by deed, to have conveyed sovereignty lands by prior swamp and overflowed conveyances. Such lands "cannot be conveyed without clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters."[179] The deed at issue did not expressly convey, nor explicitly exempt, the sovereignty lands from conveyance. Therefore, since the grantees and their successors took with notice that the sovereignty lands were excluded from the conveyance, the court concluded that they had no legal claim to the sovereignty lands.[180]

3. *MRTA and Sovereignty Lands*

The issue of whether MRTA applies to sovereignty lands was treated as one of first impression in *Coastal Petroleum*.[181] In deter-

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175. *Id.* at 342. The Florida legislature conveyed sovereignty lands under tidally-influenced waters to the Board of Trustees in the Act of May 21, 1917, ch. 7304, §1, 1917 Fla. Laws 116. The legislature conveyed sovereignty lands underlying non-tidally-influenced waters in the Act of July 5, 1969, ch. 69-308, 1969 Fla. Laws 1112 (current version at FLA. STAT. § 253.12(1) (1987)).

176. *Id.* at 342-43. *See* 454 So. 2d 6; 455 So. 2d 412.

177. 492 So. 2d at 345 (Boyd, C.J., dissenting).

178. *Id.* at 343.

179. *Id.*

180. *Id.*

181. *Id.* at 344. The majority rejected Mobil's and Cyanamid's claim that *Odom* extinguished any sovereignty claims to lands within the swamp and overflowed lands deeds. *Id.* The court reasoned that the *Odom* language discussing the applicability of MRTA to previously con-

mining that MRTA did not apply to sovereignty lands, the majority assumed that the legislature, in enacting MRTA, knew of Florida law holding that prior conveyances to private persons did not convey sovereignty lands merely because they were encompassed within conveyed swamp and overflowed lands.[182] The court stated:

> We are persuaded that had the legislature intended to revoke the public trust doctrine by making MRTA applicable to sovereignty lands, it would have, by special reference to sovereignty lands, given some indication that it recognized the epochal nature of such revocation. We see nothing in the act itself or the legislative history presented to us suggesting that the legislature intended to casually dispose of irreplaceable public assets. The legislative purpose of simplifying and facilitating land title transactions does not require that the title to navigable waters be vested in private interests.[183]

The court mentioned, but did not address an additional issue raised by MRTA's applicability to sovereignty lands, namely, "whether the legislature could constitutionally make such an ex post facto divestment of sovereignty lands without explicitly basing [the conveyance] on the public interest."[184] The court noted, however, that although the Florida Constitution was amended to authorize such conveyances after MRTA was passed, the constitutional provision "is largely a constitutional codification of the public trust doctrine contained in [Florida] case law."[185]

Subsequent to the Florida Supreme Court holding in *Coastal Petroleum*, Mobil Oil and the State of Florida agreed to settle their action.[186] The parties stated that the settlement would be in the public interest because it would assure perpetual public use of the Peace River and North Prong of the Alafia River. It also would prevent the hazards and costs of further litigation.[187] The most important element of the settlement, however, was that the settlement would "make it

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veyed navigable waterbeds was dicta, "and [was] non-binding in the instant case inasmuch as there were no navigable waterbeds at issue in *Odom*." *Id.* *See* Comment, *supra* note 78, at 611 n.107 (claiming that *Odom* did not resolve the issue of whether MRTA can extinguish sovereignty claims).

182. 492 So. 2d at 344.

183. *Id.*

184. *Id.*

185. *Id.*

186. *See* Stipulation for Settlement and Entry of Consent Final Judgment Between Mobil Oil Corporation, as Plaintiff, and the State of Florida, the Department of Natural Resources of the State of Florida, and the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, as Defendants, No. GCG-82-1089 (Fla. 10th Cir. Ct. Nov. 2, 1987).

187. *Id.* at 2.

unnecessary to determine in Polk County the navigability or ordinary high water line ("OHWL") of the Peace and the North Prong of the Alafia Rivers."[188] Although the settlement between the State and Mobil saved both parties much expense and trouble, its terms left open the crucial matter of determining the navigable stretches of the rivers in the lands at issue. Perhaps a bigger issue left unresolved is the appropriate method to ascertain the boundary between sovereignty lands and uplands.

VI. BOUNDARY DETERMINATION

Title to and the extent of sovereignty lands was established when Florida achieved statehood, but the boundaries of many, if not most, of those submerged lands have changed through natural and artificial means.[189] Shorelines may periodically change due to deposits or removal of sand, soil and other materials. A change in the level of the overlying waterbody can also change the shoreline.[190] Legal analysis of the changes is complex and often confusing. As a general rule, upland title boundaries are affected by gradual, natural alterations.[191] However, when changes are avulsive or due to artificial accretion caused by the upland owner, title boundaries remain unaffected.[192]

A. Ordinary High Water Line

In *Coastal Petroleum*, the Florida Supreme Court stated that natural and gradual changes in the water line of a navigable river bordering on previously conveyed lands do not divest the public of its

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188. *Id.* at 1. The settlement would require Mobil to convey to the state certain parts of the lands below Mobil's conception of the OHWL of the Peace River and the North Prong of the Alafia River. Additionally, Mobil would convey to Florida a conservation easement, thereby assuring perpetual public use of the Peace River and North Prong of the Alafia River. Finally, Mobil would convey a 700 acre tract to the state for use as a public park. In return, the state would dismiss its action against Mobil concerning the subject lands. *See* Settlement Agreement by and Among the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida, the Department of Natural Resources of the State of Florida, the State of Florida and Mobil Oil Corporation at 3-4 (Nov. 3, 1987).

189. FLORIDA WATER LAW, *supra* note 52, at 726-27. The major categories of boundary changes are accretion, erosion, reliction and avulsion. *Id.* at 726. Accretion occurs when the force of water causes material to build up on uplands, and causes the uplands to encroach on formerly submerged lands. *Id.* at 726-27. Erosion is the reverse of accretion; it results from the gradual and imperceptible erosion of the uplands. *Id.* at 727. Reliction occurs when submerged lands gradually become uncovered due to receding waters. *Id.* Avulsion occurs due to sudden and perceptible changes in upland boundaries. *Id.*

190. *See id.* at 726.

191. *See* State v. Florida Nat'l Properties, 338 So. 2d 13 (Fla. 1976).

192. *See* FLORIDA WATER LAW, *supra* note 52, at 729-30.

interest in submerged lands.[193] This language in *Coastal Petroleum* has been read by some commentators for the proposition that to determine the boundaries between state-owned and privately-owned lands, it is necessary to determine where the OHWL was when Florida received title to the lands underlying navigable waters.[194] However, an earlier Florida Supreme Court case held a statute that tried to fix the boundaries as unconstitutional.[195]

As a result, some commentators who believe the legislature should "clearly define the boundary between sovereignty and privately held lands"[196] have proposed legislation. The proponents of the legislation believe it would protect the state's legitimate interests in Florida's waterbodies, while quieting title to lands above the current high water line.[197]

The proposed legislation would require the Florida Department of Natural Resources (the "DNR") to catalog all claimed sovereignty lands under currently navigable waters.[198] The Board of Trustees would then review and approve a final listing of those sovereignty lands.[199] Unless a timely objection is filed,[200] the list would confirm the extent of the state's sovereignty land ownership. In effect, the list would also confirm title to uplands vested in private owners.[201] The proposed legislation would also statutorily define OHWL, based on Florida common law precedents, as a basis for determining the boundary between sovereignty lands and privately-owned uplands.[202] The proposed legislation would define the OHWL as: "[OHWL] as it currently exists, without adjustment for any changes, whether natural or artificial, occurring prior to the date of enactment [of the legislation]."[203]

The Executive Council of the Real Property, Probate and Trust Law Section of The Florida Bar also suggested that a similar statutory determination of OHWL would settle the private title effects of *Coastal Petroleum*.[204] A bill introduced in the Senate during the 1988

193. 492 So. 2d at 343.
194. *See* Jacobs and Fields, *supra* note 142, at 390.
195. Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1977).
196. *Id.* at 394.
197. *Id.* at 396.
198. *Id.* at 395.
199. *Id.* at 395, 400-01.
200. *Id.* at 401.
201. *Id.* at 401-02.
202. *Id.* at 397.
203. *Id.*
204. Executive Council Summary Of The Sovereignty Lands Problem (On file at The Florida Bar Headquarters, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 Undated). The Execu-

legislative session[205] would have passed these proposals into law, and thereby abrogated the Board of Trustees' public trust ownership. One result of these proposals would have been that private ownership would have vested in lands lying above the statutorily defined OHWL, while state ownership would have vested in the lands below the OHWL. However, a boundary determination which fails to account for avulsion changes would expand title to privately held uplands, favoring private rights over public rights. Although such theories may be sound, it is very difficult to accurately determine the boundaries in much of Florida's sovereignty lands.

1. Methodology

The OHWL is the boundary between privately-owned riparian uplands and sovereignty lands underlying non-tidally-influenced navigable waters.[206] One commentator states, "the determination of the OHWL is as confused as it is important."[207] One reason for that confusion is that non-tidally-influenced waters do not cyclically flow, as do tidally-influenced waters. Therefore, physical evidence generally must be used to determine the OHWL.[208] Many methods are utilized to demarcate the OHWL, such as water level records,[209] vegetation evidence,[210] geomorphological evidence,[211] and soil classification.[212]

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tive Council's proposition, however, admitted that such legislation would have drawbacks. First, the cost of meandering would be astronomical. Second, the cost involved in increased numbers of leases of sovereignty lands by the DNR would be high. Third, many wetlands would be lost by the state, and those wetlands may not be as well protected by regulations as by sovereignty ownership. Finally, riparian easements benefiting waterfront owners would be harmful to the public interests in navigable waterbodies. *Id.* at 5.

205. Fla. SB 326 (1988). Had the bill passed it would have: (1) required the DNR to determine the boundaries of sovereignty lands under all navigable fresh waters in the state; (2) provided that navigability be determined by "whether the waters, in their ordinary and natural condition, are currently navigable as determined under the federal test of navigability for title purposes;" (3) allowed "public trust rights" to vest in navigable waters, "without regard to whether the lands underlying such waters are sovereignty lands;" and (4) created a "special riparian easement," allowing an adjoining riparian landowner to make any use of the lands and waters which would be permissible for a person holding valid title to lands under navigable waters. *Id.* at 7-20.

Also introduced was House Bill 277, which provided that the sovereignty lands exception to the Florida MRTA would not divest private ownership of submerged lands that are claimed as part of homestead property of one acre or less. House Bill 277 did not pass into law.

At the time of writing this article, the Board of Land Surveyors, Florida Department of Professional Regulation and the DNR were holding hearings on respective OHWL determinations.

206. FLORIDA WATER LAW, *supra* note 52, at 707.

207. *Id.*

208. *See* Maloney, *The Ordinary High Water Mark: Attempts at Settling an Unsettled Boundary Line*, 13 LAND & WATER L. REV. 465, 498-99 (1978).

209. A surveyor examining water level records must review the "stage duration curve" to

2. *Common Law Determination*

The United States Supreme Court established the modern common law OHWL test in *Howard v. Ingersoll.*[213] Justice Curtis' concurring opinion included a physical determination test that "has been the one most frequently cited and appears in Florida's leading case on the determination of boundaries of lands bordering navigable inland waters:"[214]

> [The] line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line . . . will be found above or below, or at a middle stage of water, must depend upon the character of the stream.[215]

The Florida Supreme Court, adopting the definition established by the Minnesota Supreme Court in *Carpenter v. Hennepin County*,[216] established Florida's common law OHWL test in *Tilden v. Smith*:[217]

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piece together the waterbody level's natural period of fluctuation if the level does vary. Sometimes, however, this technique produces skewed results because a waterbody's level may actually change over time rather than fluctuate in a cycle. Interview with Bruce Staskiews, Senior Surveyor, Florida Department of Natural Resources, in Tallahassee, Fla. (Oct. 28, 1987).

210. The vegetation evidence method is used because numerous plant life forms prefer to grow in water, whereas other plants can only tolerate standing water for short periods. Phreatophytes grow in waterbody beds and discharge water through their foliage into the atmosphere. *See* Gilluly, *Wildlife Versus Irrigation*, 99 SCIENCE NEWS 184 (1971). The surveyor examines upland botanical species, to determine how closely to the water line they can safely grow, and water plants, to see how closely they grow in relation to the upland plants in order to discern banding of vegetation along the OHWL.

211. The geomorphological evidence technique involves observation of natural levees that peak beside a waterbody. The surveyor looks for the line along the water side of the levee or escarpment that delineates the water level. *See, e.g.*, Motl v. Boyd, 116 Tex. 82, 286 S.W. 458 (1926).

212. *See* BUREAU OF LAND MANAGEMENT, U.S. DEPT. OF THE INTERIOR, MANUAL OF INSTRUCTIONS FOR THE SURVEY OF THE PUBLIC LANDS OF THE UNITED STATES 180-82 (1973) (discussing soil composition as an aid to surveying techniques).

213. 54 U.S. 381, 414 (1851).

214. FLORIDA WATER LAW, *supra* note 52, at 709.

215. 54 U.S. 381, 427 (1851) (Curtis, J., concurring). *See* FLORIDA WATER LAW, *supra* note 52, at 709. *See also* Borough of Ford City v. United States, 345 F.2d 645, 648 (3d Cir.), *cert. denied*, 382 U.S. 902 (1965) (where the court stated that the soil and vegetation line tests are not separate but must complement each other).

216. 56 Minn. 513, 58 N.W. 295 (1894).

217. 94 Fla. 502, 513, 113 So. 708, 712 (1927) (emphasis in original). *See* Jacobs and Fields, *supra* note 142, at 397 n.248 (recommending the *Tilden* test for proposed legislation defining the OHWL).

> [The] high-water mark, as a line between a riparian owner and the public, is to be determined by examining the bed and banks, and *ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as respects the nature of the soil itself.*[218]

Although the *Carpenter* test provides a neat and concise definition, it was not drafted for the swampy and flat terrain that dominates so much of Florida. Buckingham Smith, a federal surveyor who studied Florida in the mid-nineteenth century, issued a report that contained the following description of the Everglades, which dominates the lower peninsula of Florida southward from Lake Okeechobee:

> The water is pure and limpid and almost imperceptibly moves, not in partial currents, but, as it seems, in a mass, silently and slowly to the southward. The bottom of the lake at the distance of from 3 to 6 feet is covered with a deposit of decayed vegetation substance, the accumulated product of ages . . . .[219]

The difficulties of accurately discerning the OHWL in such areas of Florida were acknowledged by the Florida Supreme Court in *Martin v. Busch*:

> In flat territory or because of peculiar conditions, there may be little if any shore to navigable waters, or the elevation may be slight and the water at the outer edges may be shallow and affected by vegetable growth or other conditions, and the line of ordinary high-water mark may be difficult of accurate ascertainment . . . .[220]

How accurately can one determine the public trust boundaries of navigable waters lying in such areas? Although most of the region described by Buckingham Smith is now in the Everglades National Park, much of the area remains vested in the state and in private parties. Other areas of Florida, such as the Green Swamp, contain many

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218. 94 Fla. at 512-13, 113 So. at 712 (emphasis in original) (quoting Carpenter v. Hennepin County, 56 Minn. 513, 522, 58 N.W. 295, 297 (1894)).

219. Everglades of Florida Acts, Reports, and Other Papers, State and National, Relating to the Everglades of the State of Florida and Their Reclamation, S. Doc. No. 89, 62nd Cong., 1st Sess., 48, 51 (1911).

220. 93 Fla. 535, 564, 112 So. 274, 283 (1927). It has been suggested that the unique nature of Florida's lakes and streams necessitate a reexamination of the use of out-of-state case determinations of OHWL "to ascertain whether and to what extent the reasoning of the court is relevant to Florida waters." FLORIDA WATER LAW, *supra* note 52, at 712.

standing bodies of water that also may be deemed navigable, and therefore subject to such surveying difficulties. Further, the boundaries of river swamps and floodplains throughout the state vary dramatically both hydrologically and biologically from season to season.[221] One surveyor may determine in good faith that the OHWL is far different from the line that another surveyor finds, even though both surveyors use satisfactory techniques and equipment.

B. Mean High Tide Line

1. Determination

Commentators that have considered the issues in *Coastal Petroleum* have given little consideration to claims to sovereignty lands underlying tidally-influenced waters.[222] *Coastal Petroleum* expressly dealt with the OHWL, which applies to non-tidally-influenced waterbodies, but not with the mean high tide line ("MHTL"), which sets boundaries between sovereignty lands underlying tidally-influenced navigable waters and privately-owned uplands.[223] Florida holds sovereign rights to submerged lands underlying coastal and inland tidally-influenced navigable waters under the same authority by which the state holds sovereign rights to submerged lands under non-tidally-influenced navigable waters.[224] Therefore, the state must accurately determine the MHTLs delineating all tidally-influenced waterbodies in title disputes with upland owners.

Because tides may vary substantially on a daily basis, long-term observation is necessary to accurately set the MHTL.[225] Generally, surveyors use a nineteen-year cycle to establish MHTLs because the lunar phase, declination and distance cycles occur within this period.[226]

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221. *See* Estevez, Hartman, Kautz and Purdum, *Ecosystems of Surface Waters* in WATER RESOURCES ATLAS OF FLORIDA 93 (Fernald and Patton eds. 1984). For example, if a river is low after a series of unusually dry seasons, its vegetative index could indicate an OHWL far waterward of the actual upland boundaries. An understanding of the cyclical nature of Florida's weather is necessary to draw an accurate boundary.

222. *See* Jacobs and Fields, *"Save our Rivers" or "Save our Property": The Costs and Consequences of Coastal,* LXII FLA. B.J. 59, 60 (Jan. 1988).

223. 492 So. 2d 339 (Fla. 1986).

224. *See* FLA. CONST. art. X, § 11 (1968, amended 1970) ("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.").

225. *See* Roberts, *The Luttes Case - Locating the Boundary of the Seashore,* 12 BAYLOR L. REV. 141, 149 (1960).

226. Florida Water Law, *supra* note 52, at 716-17.

The United States Supreme Court in *Borax Consolidated Ltd. v. City of Los Angeles*[227] held that the MHTL sets a technically-sound boundary of tidelands. The Court considered the common law ordinary high water mark, which had been defined as the line of the medium high tide,[228] and held that the scientifically determined MHTL was the modern equivalent of that common law rule.[229]

The Florida Supreme Court first considered the definition of the MHTL in *Miller v. Bay-to-Gulf, Inc.*[230] Landowners contended that erosion of the beachfront had moved the "ordinary high water mark" back so that their originally upland parcel now reached to that high water mark.[231] In finding against the landowners, the court attempted to define the "ordinary high tide line" as "the limit reached by the daily ebb and flow of the tide."[232] However, the *Miller* court's amorphous definition of the MHTL appears to have been replaced by the following definition established in the Coastal Mapping Act:

> [Mean high tide is] the average height of the high waters over a 19-year period. For shorter periods of observation, 'mean high water' means the average height of the high waters after corrections are applied to eliminate known variations and to reduce the result to the equivalent of a mean 19-year value.[233]

Thus, modern Florida law seems to use the MHTL as the boundary of sovereignty lands in tidally-influenced waterbodies.

2. *Phillips Petroleum*

On February 23, 1988, the United States Supreme Court confirmed state sovereignty title to lands underlying tidally-influenced waters in *Phillips Petroleum Co. v. Mississippi*.[234] The Court reaffirmed that

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227. 296 U.S. 10 (1935).

228. *Id.* at 26.

229. *Id.* at 26-27.

230. 141 Fla. 452, 193 So. 425 (1940).

231. *Id.* at 460, 193 So. at 428.

232. *Id. See* FLORIDA WATER LAW, *supra* note 52, at 734-35 (which examines and criticizes the technical determination of tidal determination made by the *Miller* court).

233. FLA. STAT. § 177.27(15) (1987). *See, e.g.*, Florida Board of Trustees of the Internal Improvement Trust Fund v. Wakulla Silver Springs Co., 362 So. 2d 706, 711 (Fla. 3d DCA 1978) (using this definition in determining sovereignty land boundaries). *See also* FLA. STAT. § 177.28 (1987) (defining the "mean high water line" as "the boundary between the foreshore owned by the State in its sovereign capacity and upland subject to private ownership"). *But cf.* Trustees of the Internal Improvement Fund v. Ocean Hotels, Inc., 40 Fla. Supp. 26, 31 (15th Cir. Ct. 1974) (where the circuit court utilized the definition of the OHWL as equivalent to the MHTL).

234. 108 S. Ct. 791 (1988).

the various states, upon entering the Union, received title to all lands underlying tidally-influenced waters.[235] Further, the Court concluded that the State of Mississippi held sovereign title to lands under waters that were tidally-influenced, but not navigable.[236]

In *Phillips Petroleum*, Cinque Bambini Partnership and Phillips Petroleum Company ("Phillips") held record title to forty-two acres of land underlying the north branch of Bayou LaCroix and eleven small drainage streams in southwestern Mississippi.[237] The non-navigable water over the lands lay several miles north of the Gulf of Mexico. Nonetheless, those waters are tidally-influenced tributaries of the Jourdan River, which is a navigable stream. The State of Mississippi claimed sovereign title to the lands under the Equal Footing Doctrine,[238] and to all waters influenced by the tide, both navigable and non-navigable, within the state's borders. As a result, Mississippi issued various oil and gas leases covering the subject lands.[239]

Phillips brought a quiet title action in Chancery Court, where the court held that 140 acres of the lands at issue were public trust lands.[240] The Mississippi Supreme Court reversed as to ninety-eight acres, finding that those tracts were man-made tidal lands, and affirmed as to the sovereignty title of forty-two acres that it found to be public trust lands when Mississippi achieved statehood in 1817. The United States Supreme Court granted certiorari as to question of title to the forty-two acres, and affirmed.[241]

The majority stated that Mississippi became vested in the tidal lands at issue upon attaining statehood.[242] To determine the rights of the state in the lands beneath tidal waters, the court relied on *Shively v. Bowlby*, where the Court had said:

> At common law, the title and the dominion in lands overflowed by the tide were in the King for the benefit of the nation. . . . Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States.
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> . . . .
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> The new States admitted into the Union since the adoption of the

235. *Id.* at 795.
236. *Id.* at 798.
237. *Id.* at 793. Cinque Bambini Partnership and Phillips trace their claims back to prestatehood Spanish land grants.
238. *Supra* note 35 and accompanying text.
239. 108 S. Ct. at 793.
240. *Id.* at 793 n.1.
241. *Id.* at 793.
242. *Id.* at 795.

> Constitution have the same rights as the original States in the tide waters, and in the lands under them, within their respective jurisdictions.[243]

Therefore, the Court concluded that Mississippi had constitutional authority to claim all tidal lands within its borders.[244]

Phillips claimed that the original thirteen States did not hold title to lands underlying non-navigable, tidally-influenced waters.[245] Therefore, they argued, Mississippi had no equal footing rights to claim such lands. The Court stated, however, that *Shively* stands for the rule that each state may define public trust lands within its borders;[246] thus, the subject lands became vested in Mississippi upon statehood.[247]

The Court distinguished between the extent of sovereign title to lands underlying tidally-influenced and non-tidally-influenced waters. Relying on *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*,[248] where the Court acknowledged equal footing for state sovereign title to all tidal lands, the Court concluded that sovereignty title extended "to waters which were nontidal but nevertheless navigable, consistent with [the Court's] earlier extension of admiralty jurisdiction."[249] The Court refused to interpret *Corvallis* and other cases as "simultaneously withdrawing from public trust coverage those lands which had been consistently recognized in this Court's cases as being within that doctrine's scope: *all* lands beneath waters influenced by the ebb and flow of the tide."[250]

Phillips Petroleum supplements *Coastal Petroleum*, which concluded that the State of Florida holds paramount sovereign title to lands under non-tidally-influenced navigable waters within its borders.[251] The United States Supreme Court in *Phillips Petroleum* stated that each state may define the limits of the lands held in public trust after it achieves statehood.[252] Further, the Florida Constitution states: "[t]he title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty,

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243. *Id.* at 794 (quoting Shively v. Bowlby, 152 U.S. 1 (1894)).
244. *Id.* at 795.
245. *Id.* at 794.
246. *Id.*
247. *Id.* at 795.
248. *Id.* at 797.
249. *Id.* (citation omitted).
250. *Id.*
251. 492 So. 2d 339 (Fla. 1986), *cert. denied*, 107 S. Ct. 950 (1987).
252. 108 S. Ct. at 794.

in trust for all the people.'"[253] Thus, Florida law has established that the State holds sovereign title to those submerged lands under navigable waters, whether or not such waters are tidally-influenced. The *Phillips Petroleum* holding, however, has confirmed the extent of the state sovereignty title to tidal lands under non-navigable waters.

VII. HISTORICAL NAVIGABILITY

A. Introduction

Coastal Petroleum has reinforced the state's public trust title to sovereignty lands. Therefore, the State of Florida must accurately determine the extent of sovereignty holdings in order to protect the public interest in those lands. The first step in ascertaining title to the sovereignty lands will entail finding which waterbodies were navigable, or susceptible to navigation, when Florida was admitted to the Union. The following is an analysis of the sources and methodology that the Division of State Lands is utilizing in its historical navigability study.

B. Analysis

For the historian engaged in navigability research, certain difficulties must be recognized immediately. Primarily, the historian must be aware of what constitutes navigability or what makes a waterbody susceptible to navigation. These are legal questions a court must determine in each case; however, the historian must gather information for a party litigant concerning the historical use, or potential use, of a waterbody, so a broad definition may suffice. On the other hand, a broad definition must be sufficiently confined so as to be usable by the historian. An open-ended definition could lead to considerable unnecessary research.

The definition used by the DNR staff follows closely the guidelines set in *The Daniel Ball*.[254] Simply put, the focus is whether the waterbody in question was navigable, used for navigation, or susceptible to navigation at the time Florida entered the Union on March 3, 1845. Actual use of the waterbody for commerce or transportation need not be proved, although this is preferred. What is important in cases

253. FLA. CONST. art. X, § 11 (1968, amended 1970).
254. 77 U.S. (10 Wall.) 557 (1870).

where research does not disclose actual use is that the waterbody be susceptible to navigation for commerce or travel.[255]

The *Coastal Petroleum* holding makes the issue of navigability a crucial question. The state must prove navigability or the susceptibility to navigation before a claim of sovereignty lands can be justified. In order to prove the navigability of a waterbody on or before March 3, 1845, an historian must be knowledgeable about Florida's early history and available historical sources. Without an historian with this knowledge, the state could lose many weeks and months attempting to find, read, and digest the information contained in hundreds of sources, most of which may be irrelevant to the exact needs of a case.

Documentary evidence of actual navigation of Florida waterbodies at statehood does exist.[256] For most of the major waterways, and many relatively minor ones, considerable evidence is available. Florida is fortunate to have a number of commentators on its early features, most notably John Lee Williams who, in addition to helping to locate a suitable site for the territorial capitol, wrote one of the most comprehensive descriptions of the state in 1837.[257]

Next to Williams, the most important source for navigability comes from the accounts of the soldiers of the Second Seminole War. Numerous recountings exist of the major campaigns conducted during this war, which lasted from 1835-1842. Among the more important sources are the writings of Woodburne Potter,[258] John T. Sprague,[259] Jacob Rhett Motte,[260] and M. M. Cohen.[261] Because these sources dis-

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255. The question of historical navigability has not been considered in standard historical analyses of the state. Few historians have ever looked at the question of navigability, and especially, the concept of susceptibility. Therefore, these questions require new approaches to the study of Florida's early history which will bring charges of re-writing history or corrupting the historical evidence. This surely is not the case, but orthodox historians will offer considerable resistance to the new approaches developed to respond to the legal community's new need.

256. It is not necessarily a matter of "serendipity," as some commentators would have us believe. *See* Jacobs and Fields, *supra* note 142, at 383.

257. J. WILLIAMS, THE TERRITORY OF FLORIDA (1837) (Williams' volume, organized by chapters on bays, rivers, lakes, islands, and counties as they existed in 1837, is normally the first historical source consulted.). *See also* B. ROMANS, A CONCISE NATURAL HISTORY OF EAST AND WEST FLORIDA (Reprint 1961) (Romans wrote in the 1770's, and has left as fine an account as was possible for that period.); Hambly, *Visit to the Indian Nations: The Diary of John Hambly*, FLORIDA HISTORICAL QUARTERLY 55 (1976) (Hambly, a trader, often used as an envoy to the Indians, left a number of useful accounts.); J. LOCKEY, EAST FLORIDA, 1783-1785: A FILE OF DOCUMENTS, AND MANY OF THEM TRANSLATED (1949) (Lockey's marvelous collection of East Florida papers is quite valuable for the period 1783-1785.); W. BARTRAM, TRAVELS IN GEORGIA AND FLORIDA, 1773-1774: REPORT TO DR. JOHN FOTHERGILL (1943).

258. W. POTTER, THE WAR IN FLORIDA: BEING AN EXPOSITION OF ITS CAUSES, AND AN ACCURATE HISTORY OF THE CAMPAIGNS OF GENERALS CLINCH, GAINES AND SCOTT (1836).

259. J. SPRAGUE, THE ORIGIN, PROGRESS AND CONCLUSION OF THE FLORIDA WAR (1964).

260. J. MOTTE, JOURNEY INTO WILDERNESS: AN ARMY SURGEON'S ACCOUNT OF LIFE IN CAMP AND FIELD DURING THE CREEK AND SEMINOLE WARS, 1836-1848 (1963).

261. M. COHEN, NOTICES OF FLORIDA AND THE CAMPAIGNS (U. of Gainesville Press 1964).

cuss the campaigns, they often describe the rivers, lakes, streams and other waterbodies encountered in those courses. The transport of troops from one point to another is also presented in a way highly useful to one looking at navigability of waterways.

Territorial reports, petitions and resolutions are also important sources. These frequently indicate what bodies the contemporary leaders considered navigable, needed improvement, or could be used for navigation if certain impairments were removed. These categories are important because they could be used to support a claim of susceptibility. Remember, actual navigation need not be proved to determine susceptibility; indeed, the evidence of actual navigation may not exist.

Regarding southern Florida, where few people lived in 1845, the records are much more difficult to find. The actual reports of military commanders in the field are the most reliable source materials. This is especially true for the Third Seminole War which took place after statehood from 1855 to 1858. This is an important war for descriptions of the southernmost section of the state, where nothing had been done to alter the natural waterbodies' regular patterns, so that they still retained the features of the previous decade when Florida became a state. Though United States Army records are noteworthy, attention should also be given to the militia reports attached to the legislative journals of the State of Florida.

Of the primary source materials available, probably the most useful are the Field Notes of the government surveyors, which are available at the DNR in Tallahassee, Florida.[262] These notes give fairly accurate descriptions of the land surveyed and often detail the width, and occasionally the depth, of waterbodies crossed in the execution of their duty.

Waterways considered navigable by the surveyors were supposed to be meandered, pursuant to general instructions used after 1831. A presumption of navigability attaches to these meandered waterbodies. Meandering, however, may not always give an accurate gauge of navigability.[263] Because of political, physical, contractual and other limita-

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262. An auxiliary source of information related to the Field Notes is the Private Grant Claims, also found at the Florida Department of Natural Resources. The surveys for private claims often note the meandered lines of streams related to the grants.

263. The field surveyor has discretion to decide whether or not to meander. A number of factors often appear to have played a part in mitigating against meandering including: political pressure to get the most marketable land on the market rapidly; Indian hostilities; a surveyor's contractual time limit; and physical problems in reaching rivers and streams which may have had a clear, deep channel but were bordered by swamps or baygalls.

When using the Field Notes, one should not overlook that only when the surveyor is running the section lines does he encounter a river, stream, lake or pond. Therefore, only at this particu-

tions, meandering was not always accomplished. Thus, from the historian's perspective, meandering is not a significant factor in determining if a certain waterbody was actually navigable or was susceptible to navigation.

Local histories and source material may also lead a researcher to information not available in the usual research areas. Frequent use of local libraries, historical societies or commissions is often required to find the type of information needed to determine the navigability of a waterbody. But even the best local history may not aid in the research. As the question of navigability or non-navigability is relatively new, most local histories may have little reference to local use of certain waterways. However, the holdings of many of Florida's local libraries and historical societies are valuable to this type of research.

As navigability may not be discoverable in each and every case, the law does provide for the susceptibility to navigation. This is a true gray area. Factors which may contribute to susceptibility could include width and depth of the waterbody, water flow or volume, type of vegetation noted by observers, and possible historic use or recognition of the waterbody as an important landmark. Each of these "contributing factors" is debatable and normally used as either background information or supporting evidence.

In researching susceptibility, an historian should not ignore the information offered from anthropologists and archaeologists. Indian usage of waterbodies may often be presumed from the evidence found by them. For example, the existence of a large number of shell middens may indicate reliance on a certain variety of fresh water snail that can be harvested in two to three feet of water. If this is the case, then evidence exists as to water depth and the possibility that some form of watercraft was used to retrieve them. This type of evidence is based upon an educated guess and is debated within these fields. If one is arguing susceptibility to navigation, then this information may be useful in building the case. However, it is useful only in this limited context and should be used with caution.[264]

Researchers should take care in choosing historical information. What is navigable to an experienced sailor may not appear so to a surveyor. If an engineer is sent to look for a likely passage for a steamboat, he may not report the existence of several streams which

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lar point on the waterbody is there any notation. In the case of navigable lakes or ponds, this fact may preclude mention of such a body if it is wholly contained within a section or township. *See* Knetsch, *The Aucilla River: Was it Navigable in Northern Jefferson County, Florida in 1845?* (1987) (discussing limitations of the Field Notes for the study of navigability).

264. *See* Knetsch, *A Report on the Historical Navigability of Soldier and Gee Creeks* (1987) (this report shows that findings of susceptibility do not always work for the benefit of the state).

were very navigable by canoe or other smaller vessels. Well-settled or explored areas may have streams that were so commonly used for travel that they simply were not considered worthy of comment; after all, everyone knew and used them. Therefore, an important question a researcher should ask when interpreting these historical sources is: Why is the observer there, and what is he likely to report?

When attempting to analyze why an observer does or does not discuss the characteristics of certain waterways, one must use caution in conjecturing the motives. In many cases, the person simply has no motivation to itemize the characteristics of a stream or river. Describing the chasing of an enemy through a baygall, an excited soldier may have no true idea that he forded Trout Creek or any other waterbody. Many surveyors note the exact width of numerous streams, ponds, branches, etc., but do not mention the depth, perhaps for no other reason than that they did not think it noteworthy. Although some motives appear to be straightforward and simple, check with another contemporary source, since what may appear obvious sometimes belies the truth.

One must also be aware of certain biases on the part of the researcher. Historians do not normally work with legal definitions, and therefore tend to oversimplify the intended meanings of essentially legal terminology. The word navigability itself is an obvious example. Some historians may envision navigability as a fleet of steamboats hauling cotton down a majestic river, but deny that a creek, stream or run which transports logs to a sawmill also is a navigable waterbody, despite legal definitions of navigability. Other historians may have an ideological bias which favors either more private ownership or more state ownership of navigable waterways. Finally, some historians may have their own stake in the outcome of a case and will look for evidence that supports their interest and willingly ignore contrary evidence. They must, however, overcome this if the evidence they produce is to be acceptable and viable. An historian must make a valid attempt to locate and present the available evidence to the legal staff. Through this evidence an historical researcher can make a significant contribution toward convincing a court that a waterbody was or was not navigable or susceptible to navigation, which is a determinative issue for land ownership.

VIII. Conclusion

The State of Florida holds public trust title to all sovereignty lands within its borders that the state has not previously conveyed. The Florida Supreme Court in *Coastal Petroleum* acknowledged and the United States Supreme Court in *Phillips Petroleum* reaffirmed the

preeminence of the state's public trust responsibilities. The state, therefore, is not limited in its ability to protect sovereignty lands.

A legislative determination of the OHWL based on common law precedents might provide a neat legal definition. In application, however, such a definition would be impossible to use in much of Florida. The hydrology, geology and seasonal fluctuations in the state render nearly impossible accurate ascertainment of the boundaries between sovereignty lands underlying non-tidally-influenced waters and uplands. Unfortunately, the topography and the lack of an ascertainable tidal cycle mean that a neat legal definition of the OHWL would be ineffective if universally applied in Florida. Valuable public trust land would be lost through this process. The best analysis remains case-by-case review by qualified surveyors and engineers.

Further, determination of the MHTL necessary to gauge the extent of sovereignty lands underlying tidally-influenced waters is often difficult due to Florida's coastal topography. Vegetation may bar observation of the lower end of many tidal cycles. The Florida Coastal Mapping Act[265] definition is generally accurate due to its arithmetic determination of the tidal cycles, but surveyors often must supplement tidal station data by personal observation and analysis.

Most shorelines in Florida have undergone changes through reliction and avulsion since Florida achieved statehood in 1845. Nonetheless, scientific methodology provides a reasonably accurate determination of the historical topography along those shorelines. This analysis, of course, requires scientific rather than legal interpretation of mean and ordinary water lines. Additional scientific analysis is necessary to ascertain whether physical boundary changes occurred through sudden or artificial means, which generally do not change title boundaries, or through gradual, imperceptible changes, which generally do affect legal boundaries.

The Division of State Lands currently is tabulating the evidence of historical navigability at statehood of various Florida waterbodies. Although the results may not legally bind the state, they will provide data as to which sovereignty lands exist that should be preserved in the public interest. As Douglas A. Thompson, the Assistant Bureau Chief of the Bureau of Survey and Mapping of the Division of State Lands has stated:

> This type research may provide the basis for the State to establish a long awaited inventory of sovereign lakes, rivers and streams.[266]

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265. FLA. STAT. § 177.27(15) (1987).

266. Such an inventory should tabulate evidence as MHTLs in areas not readily susceptible to tidal station analysis.

Riparian owners would then have a better understanding of their boundaries and management of state-owned sovereign land would be greatly enhanced for future generations.[267]

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267. Knetsch, *supra* note 263, at iii.