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The Public Trust Doctrine And Florida's Navigable Lakes And Rivers

Executive Summary

One of the greatest gifts received by modern-day Floridians has been the bountiful rivers and lakes which make the state unique. These rivers and lakes have been enjoyed by generations of Floridians and visitors alike, in large measure because the Public Trust Doctrine has preserved these resources for public use.

Recently however, the public's ownership of Florida's navigable rivers and lakes has come under attack by those who would prefer to see them converted to private use for the benefit of the few. These attacks, however, fly in the face of a century of Florida Supreme Court decisions which have clearly established the public's right of ownership.

Among the facts supporting the conclusion that navigable lakes and rivers remain public are the following:

- The Florida Constitution mandates that navigable waters shall be held in trust for the people of Florida.
- Public ownership of navigable waters originated in their use as the primary public highways of the 1800s. During this period, the customary modes of water transport ranged from 16-foot cypress skiffs up to 100-foot long steam vessels.
- Although federal public land surveyors were assigned the task of delineating navigable lakes and streams during the mid-19th century, the inconsistency of their performance has led courts to reject the use of these surveys as a valid inventory of navigable waters.
- Grantees of swamp deeds - which often encompassed over one million acres - knew that navigable waters were not conveyed by those deeds.
- Throughout this century, the Florida Supreme Court has held that grantees of swamp deeds have no moral or legal claim to navigable lakes and rivers encompassed in those deeds.
- The boundary between publicly owned navigable waters and privately owned uplands is the "ordinary high water" boundary line. Century-old Florida Supreme Court decisions established that public ownership extends to the ordinary reach of high water and includes marshes and aquatic forests on the low, flat vegetated shores of Florida's lakes and rivers.
- During the late 1980s, the Attorney General successfully defended this long-standing water boundary law against attempts by a small number of major landowners who sought to convert major portions of public navigable waters into private ownership.
- Since 1986, only five lawsuits have been filed where a private landowner sought to exclude the public

from part of a navigable lake or river. Four of those have been won in court by the public or settled on terms favorable to the public, while one is in early stages of litigation.

Decades of history establish that navigable lakes and rivers, up to the ordinary high water boundary, belong to the people of Florida. Any attempt to now reach a contrary conclusion would require an amendment to the Florida Constitution to abandon the Public Trust Doctrine, the foundation of public ownership of navigable waters.

Introduction

For the past twelve years, the Attorney General's Office, on behalf of the public, has litigated cases which involve the public's ownership and use of Florida's navigable waters. Recently, a pamphlet written by an economics professor has been widely distributed which addresses a number of issues raised in these cases.(1) Because the pamphlet contains legal and factual errors, this booklet has been produced to explain the constitutional protections afforded navigable waters in Florida and the historical basis for these protections. This booklet also details how Florida courts, for over a century, have consistently protected the public status of navigable waters despite concerted challenges aimed at converting this public resource into private ownership.

The Public Trust Doctrine: Protection of Navigable Waters

The Public Trust Doctrine is set out in Article X, section 11 of the Florida Constitution. This constitutional provision codified the existing common law, which said title to navigable lakes and streams was held by the state in trust for use by the people. It is an ancient rule and derives from the historical fact that for most of the history of civilization, goods and people moved mainly by water. Navigable waters were public highways, and their inherent public character was recognized and protected by the law of Spain, England and even ancient Rome.

As applied in Florida, the Public Trust Doctrine protects water bodies that were navigable in fact at the time of statehood in 1845. In 1909, the Florida Supreme Court defined the term "navigable in fact" as meaning "navigable for useful purposes common to the public in the locality where the waterbody is located."(2)

The term "navigable for useful purposes" must be understood in the context of the transportation system that actually existed at the time of statehood. In 1845, the only railroad in the state ran from Tallahassee to St. Marks, and operated on wooden rails with carts pulled by mules. Engines didn't arrive until eleven years later. The status of land transportation routes is evidenced by two provisions in an early act of the territorial legislature. The first provision declared that a public road was in satisfactory condition so long as the tree stumps left in the road were less than 12 inches high. The second provision declared that bridges and causeways used in connection with these roads could remain out of repair for as long as 15 days unless repair was "hindered by extremely bad weather," in which case the bridges could be out for even longer.(3) As a result, lakes and streams were by far the most reliable public highways for moving goods and people. An early congressional act recognized the public status of these highways when it declared that all the "navigable rivers and waters in the districts of East and West Florida shall be, and forever remain, public highways."(4)

Disputes over navigability turn on the question of whether the water body was or could have been used for trade and travel by customary means at the time of statehood. Customary modes of waterborne trade and travel in the mid-1800s included steamboats, barges, flat-bottom boats, dugout canoes, and home-made skiffs, all of which were used to transport passengers, products of the country, and produce from local farms. Evidence of navigability includes documented historical use for trade and travel as well as more recent recreational use if conducted in vessels similar to those in use in 1845. For example, in the recent lawsuit over a landowner's attempts to close Fisheating Creek to the public, the Attorney General's Office produced

documentary evidence of an 1842 naval expedition in 30-foot dug-out canoes, evidence of early 20th century navigation to trading posts on the Creek, and evidence that Lykes operated a commercial canoe trail on a major portion of the Creek for many years. Based on this evidence, the jury quickly returned a verdict that the Creek was indeed navigable at statehood in 1845. Photographs and documents illustrating early water transportation in Florida are included as attachments 1 through 8 at the end of this booklet. Attachments 9 and 10 are photographs taken as part of the Fisheating Creek lawsuit. Historical information on all of the attachments is provided in the Descriptive Index to Attachments located behind the divider.

Under the Public Trust Doctrine, Florida became the title-holder of all water bodies "navigable in fact" within its boundaries when the territory attained its sovereign status as a state in 1845. Title vested in the new state by operation of law, *without the necessity of any deed, inventory, patent, or survey*. As explained by the Florida Supreme Court 90 years ago, these navigable waters "passed to the state in its sovereign capacity to be held by it in trust for the people thereof."(5) Because of the inherently public character of navigable waters, the essential feature of the trust is that navigable waters are *not* held for purposes of sale into private ownership, but instead must be held by the state for the use and enjoyment of the public.(6)

Federal Public Lands Surveys

When the United States acquired Florida from Spain in 1821, the federal government established a new territory and began the task of surveying and selling land.(7) Among other things, the surveyors were instructed to approximate the shoreline of navigable waters by surveying a series of straight-line segments called "meander" lines.(8) Lakes and rivers with these "meander lines" surveyed along their shores are referred to as "meandered" water bodies. Surveying conditions, however, were extremely adverse in the wilds of early Florida. Hostile native Americans were a constant threat, as were the large numbers of alligators and snakes that populated the marshy shores of Florida's lakes and streams. These conditions, combined with the complete absence of any standard for determining what was navigable, produced haphazard determinations as to whether any particular water body would be meandered.

In fact, only a very small number of Florida's navigable lakes and rivers were meandered in the federal surveys. For example, large portions of the St. Johns River, the Kissimmee River, the Chipola River, the Oklawaha River, and the Peace River were not meandered, even though all of these rivers bore regular steamboat traffic during the water transportation era. As an illustration, the steamboats depicted in attachments 1 through 5 all navigated non-meandered portions of the above-listed rivers.

Florida courts have recognized that meandering is an unreliable indicator of whether a particular water body was navigable. For that reason, when the question of navigability is tried in court, meandered water bodies are given a weak presumption of navigability. Non-meandered lakes and streams are given a similarly weak presumption of non-navigability.(9) Included as attachments 11, 12 and 13 at the back of this booklet are illustrations of typical meander surveys. These examples show the highly inconsistent manner in which meandering was actually conducted.

Internal Improvement Lands and Swamp Lands

Through acts of Congress, the United States granted Florida various categories of lands after it became a state.

Internal Improvement Lands: In 1845, the new state received 500,000 acres of land in Florida from the federal government. These lands, known as "internal improvement" lands, were to be sold to fund improvements to roads, canals, and navigable streams in order to promote internal communications. To hold and manage these lands and funds, the Legislature created the Internal Improvement Fund and appointed the Governor and Cabinet as trustees. Thus was established the Board of Trustees of the Internal Improvement Fund.

Swamp Lands: In 1850, the federal government found itself in the position of holding vast areas of swamp lands in many of the new states. Burdened by these unsaleable lands, Congress simply gave them away to the states in which they were located. The expectation was that the states would then convey these lands to large companies, which would take responsibility for drainage and reclamation. Having already created the Internal Improvement Fund to sell land and manage the proceeds, the 1855 Florida Legislature gave the Trustees of the Internal Improvement Fund the additional responsibility of holding and selling the swamp lands received from the federal government.

The Trustees made bulk transfers and sales of these swamp lands to drainage companies, canal companies and railroads. In terms of sheer scale, these transfers were immense. Some railroad companies were granted 10,000 to 20,000 acres of swamp land *per mile* of railroad constructed. Industrial mogul Hamilton Disston purchased four million acres at 25 cents per acre in one single transaction in 1881, and eventually received title to some six million acres.

Included in these bulk swamp deeds were lands that were not swamp at all. The Disston swamp deeds included large portions of the Central Florida Ridge - valuable agricultural lands - as well as all navigable lakes and streams the surveyors had failed to meander. For example, almost all of Fisheating Creek, which a Glades County jury recently confirmed to be navigable, was part of a 900,000 acre swamp deed to Disston.

Shortly after the swamp deeds were issued, the Florida Supreme Court was presented with the question of whether swamp deeds had the effect of removing navigable lakes and rivers from the public trust and conveying them into private ownership. In 1908, a riparian (waterfront) landowner in Nassau County claimed private ownership of part of the bed of the Amelia River on the basis of a swamp deed. In rejecting his claim, the Florida Supreme Court held that a swamp deed "does not affect the title held by the state to lands under navigable waters by virtue of the sovereignty of the state."(10)

In 1927, the Florida Supreme Court reiterated the law that grantees of swamp deeds always understood "that the conveyance of Swamp and Overflowed land does not in law cover any sovereignty lands,"(11) and that the Trustees of the Internal Improvement Fund had no authority to convey navigable waters into private ownership. (12) The rationale of the decision was that the Trustees of the Internal Improvement Fund could not convey what they did not own. Navigable waters were not the property of the Trustees because the Internal Improvement Fund contained only the original internal improvement lands and the swamp lands granted by the federal government. Therefore, it has been the established law of Florida since the turn of the century that a swamp deed does not and cannot convert navigable waters into private property.

These principles have been reaffirmed as recently as 1986 by the Florida Supreme Court's decision in *Coastal Petroleum v. American Cyanamid*, 492 So.2d 339, 342-43 (Fla. 1986), in which the court reiterated that holders of swamp deeds have *never* had "any moral or legal claim" to ownership of navigable waters.(13) This established law is also reflected in standard title insurance policies. Since the early part of this century, these policies have excepted land under navigable waters from coverage.(14) These standard exceptions reflect the title industry's acknowledgment that swamp deeds have never affected the public trust status of navigable waters.

In support of its claim that navigable waters are private property, the recently issued pamphlet places great reliance on a 1977 Florida Supreme Court holding that small lakes are not navigable and are therefore subject to private ownership.(15) No navigable waters were at issue in that case, but the court suggested that public title to navigable waters must appear in the official county record in order for the waters to be preserved for public use. However, the Florida Supreme Court itself recognized the problems inherent in this suggestion and reversed itself on this narrow point less than a decade later, reconfirming in its *American Cyanamid* decision the

long-standing law on the subject. Unfortunately, considerable confusion prevailed in the period between the two rulings, and some private litigants were able to obtain title to public rivers and lakes. The *American Cyanamid* decision in 1986 finally ended the confusion by adhering to the Florida Constitution and the long line of public trust cases it codified.

The pamphlet also contends that land titles are now in such confusion that title to some three million acres of land is in doubt and that 140,000 landowners have clouded titles. These breathtaking statistics originated in arguments raised by attorneys who *lost* the *American Cyanamid* case. After losing the appeal, those attorneys argued for rehearing on the basis that the result of the *American Cyanamid* decision would be 40,000 new lawsuits costing the state \$900 million. Thirteen years of experience have shown just how unreliable these "scare-the-world" estimates were. Just five cases have been litigated over this time period, two of which are currently pending. The three million acres/140,000 landowners claims were unsubstantiated at the time they were made, and they remain unsubstantiated well over a decade later.

The Ordinary High Water Boundary

The boundary between publicly owned navigable waters and adjacent privately owned uplands is the ordinary high water boundary. Two seventy-two year-old Florida Supreme Court decisions definitively addressed how the ordinary high water boundary is located in Florida. The first case states that the ordinary high water boundary represents just what the words suggest: the ordinary reach of high water during the year. Thus, the boundary is, in general, the normal or average reach of water during the high water season.(16) The term "ordinary" excludes floods and other unusual high water events but includes the average high water of each year.(17) In determining the location of the boundary, Florida Supreme Court cases recognize the state's unique topography and differentiate between steep-banked and flat-banked water bodies. On steep-banked water bodies, the boundary is located where the presence and action of water has wrested the bank of vegetation and left a visible mark. However, on low, flat-banked water bodies - most lakes and streams south of Orlando - there is no well-defined mark, and the boundary is located where the presence of the water prevents the cultivation of ordinary agricultural crops. In 1927, the Florida Supreme Court also ruled that where the shore of a water body is low, flat, and vegetated, ordinary high water can be determined by locating water marks on local objects such as dock pilings and trees.(18)

The *American Cyanamid* Case and Its Aftermath: Attempts At Redefining The Boundary

After the 1986 Florida Supreme Court ruling in the *American Cyanamid* case, the case was sent back for trial on whether the Peace River was navigable and if so, where the ordinary high water boundary was located.

In a few short months, the Attorney General's Office produced compelling evidence of historic navigation.(19) On the matter of the ordinary high water boundary, Mobil Mining and Minerals (one of the phosphate companies which owned land bordering the Peace River), proposed a new legal theory that the *ordinary high water* boundary should be located at the *extreme low water* line. Because the boundary that it produced was inconsistent with every previous ordinary high water determination made on the Peace River, the *Mobil* theory was given short shrift, and the phosphate companies soon abandoned their claim that the Peace River was private property.

Less than a year after the Peace River settlement, a group of attorneys representing several major landowners met with the chairman of the Board of Professional Land Surveyors and provided him with draft surveying rules. The draft rules closely followed the *Mobil* theory of the ordinary high water boundary,(20) and the Board of Professional Land Surveyors ultimately proposed them as administrative rules governing the conduct of ordinary high water boundary surveys in Florida.

When the Attorney General challenged the rules, Mobil Mining and Minerals, Agrico Chemical Company, and International Minerals & Chemical Corporation,(21) as well as the Florida Land Council, Lykes Bros. Inc., Florida Citrus Mutual, the Florida Farm Bureau, the Florida Sugar Cane League, the Florida Forestry Association, and the Florida Cattleman's Association intervened in support of the *Mobil* ordinary high water theory. Under this novel legal theory, the boundary between public and private ownership would have been changed from ordinary *high water* to extreme *low water*. The rules accomplished this end by placing the boundary line at the most waterward cypress tree, or where the most waterward cow was able to forage on aquatic vegetation. To see the effect of these rules, see attachments 14 and 15, which are actual exhibits from that case. Under the proposed rules, the boundary dividing public and private ownership in attachment 14 would have been somewhere waterward of the trees and the canoe. In attachment 15, the boundary would have been somewhere in front of the cow in the foreground.

The rules were declared illegal on the ground that Florida's established water boundary law "cannot be modified by creation, mischaracterization, addition, omission, or substitution of legal principles by Board rule" which was "precisely" what the proposed rules aimed to accomplish.(22) Thus, the *Mobil* theory was found to be a complete *misstatement* of the law. The pamphlet fails to mention the Land Surveyors case but instead treats the *Mobil* theory as established law.

Recent Cases

The Holcombe pamphlet describes some of the facts in the handful of cases that have developed over the past fifteen years. However, those facts are in many instances incomplete or incorrect. For example, the pamphlet asserts that in the *Macnamara* case, the upland landowners fenced part of their privately-owned *bank* of the Kissimmee River. In fact, after a trial lasting less than two days, the court found that the fence was not on the river *bank* but on a *spoil island* constructed in the river bed when the Kissimmee River canal was dug in 1966. (23) Florida law holds that spoil islands in navigable waters are public property, and the court decided that the Macnamaras had no right to attempt to exclude the public by constructing a barbed wire fence. The pamphlet also claims that much of the land in dispute was never under water. That claim is extremely misleading; the reason the area in dispute was never under water was because it is a spoil island.

The pamphlet also mischaracterizes the *Lightsey* controversy. Mr. Lightsey had a swamp deed that used a 100 year-old meander line in the legal description. Florida law has always held that the true ordinary high water line is the legal boundary and not the rough approximations depicted in the meander surveys of the 1800s. Mr. Lightsey used part of the Lake Kissimmee lake bottom for dry season livestock forage, and was cited by the Corps of Engineers for a dredge and fill violation in the lake bed. Mr. Lightsey filed a lawsuit against the Trustees, claiming ownership of part of the lake bed based on his swamp deed. The pamphlet incorrectly claims that "the state is now trying to "take" the land in dispute." In fact, the case was settled six years ago when the Water Management District purchased part of Mr. Lightsey's waterfront property in order to raise the level of Lake Kissimmee to facilitate the Kissimmee River restoration project.

The pamphlet's description of the facts in the *Smith* controversy on Lake Poinsett is also incomplete. For example, the pamphlet does not disclose that the dikes in controversy were built illegally without permits and lie *below* the average water level of Lake Poinsett - indisputably on publicly-owned lake bed.(24) Nor does it disclose that when the illegal dikes were discovered in 1976, Mr. Smith falsely claimed that the dikes had been there for 25 years. When aerial photographs demonstrated that the dikes had been built illegally in the previous two or three years, Mr. Smith applied for and received a permit to build new dikes at the ordinary high water line.(25) In his permit application, Mr. Smith included an ordinary high water line study that corresponds to the boundary asserted by the Trustees in the pending lawsuit.

Conclusion

The Public Trust Doctrine protects the public status of navigable rivers and lakes in Florida. Throughout the past century, attempts to convert this important public resource into private property have repeatedly been made and have repeatedly been rejected by the Florida Supreme Court. In 1968, the people of the State of Florida raised the protection afforded by the Public Trust Doctrine to constitutional stature. In *American Cyanamid*, the most recent challenge to the Public Trust Doctrine, the Florida Supreme Court relied on this constitutional provision in reconfirming longstanding Florida law that holders of swamp deeds have no moral or legal claim to ownership of navigable waters.

The law of ownership of navigable waters has been definitively resolved by the Florida courts and by the people of Florida. The unsubstantiated statistics concerning so-called "state sovereignty land claims" made by the phosphate mining companies in 1986 have proven to be completely unfounded. The repetition of these same claims thirteen years later reveals merely another attempt to raise arguments that lack any legal or factual basis in a misguided effort to take from the people of Florida that which has always belonged to them.

Footnotes:

- (1) The pamphlet was authored by Randall G. Holcombe, DeVoe Moore Professor of Economics, Florida State University, and was published by the James Madison Institute. The pamphlet was authored with the assistance of Michael Rosen and the Florida Legal Foundation.
- (2) *Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909).
- (3) Page 95, Laws of the Territory of Florida, 1822.
- (4) Act of Congress, March 3, 1823, 3 U.S. Stats. 754.
- (5) *Broward*, 50 So. at 830.
- (6) *Id.* at 829.
- (7) The purpose of surveying and selling the land was to raise money and to populate and develop the territory to the point where it would become a new state.
- (8) *Trustees v. P.U.C.*, 599 So.2d 1356, 1357 n.2 (Fla.1st DCA 1992).
- (9) *Odom v. Deltona*, 341 So. 2d 977, 988-89 (Fla. 1977).
- (10) *State ex rel. Ellis v. Gerbing*, 47 So. 353, 357 (Fla. 1908).
- (11) The term "sovereignty lands" refers to lands beneath navigable waters over which Florida became the trustee by right of its sovereign status as a new state in 1845.
- (12) *Martin v. Busch*, 112 So. 274, 285-85 (Fla. 1927).
- (13) The Holcombe pamphlet is simply mistaken its contention on pages 3-4 that this legal principle first appeared in 1986. In fact, the Florida Supreme Court's 1986 decision in *Coastal Petroleum v. American Cyanamid*, 492 So.2d 339, 342-43 (Fla. 1986) was explicitly based on *Gerbing*, *Broward* and *Martin* - discussed above - all of which date back to the early part of this century.

(14) The pamphlet contends that these exceptions first appeared after 1986, which is when it asserts the state attempted to change the law. In fact, the same exceptions were standard in title insurance policies 75 years ago.

(15) *Odom v. Deltona*, 341 So.2d 977 (Fla. 1977).

(16) The Holcombe pamphlet wrongly asserts that the "ordinary high water" boundary is the mark left on the bank from the average or low water level and not the level of ordinary high water. The Holcombe assertion is contrary to both the term "ordinary high water" itself and long-settled judicial construction.

(17) *Tilden v. Smith*, 113 So. 708, 71 1 (Fla. 1927) (citing 9 C.J. 182, 192, 193).

(18) *Martin v. Busch*, 112 So. 274, 283 (Fla. 1927).

(19) For example, an 1887 newspaper article is included as attachment 7 and a photo of a Peace River steamboat at Fort Meade is included as attachment 5 at the end of this booklet. Both are actual exhibits from the Peace River case.

(20) The phosphate companies were represented by the law firm of Holland & Knight. The administrative law judge found as a matter of fact that a "substantial number of suggestions" and extensive contributions" were made by lawyers for the phosphate mining companies and by lawyers for the Florida Land Council. *Board of Trustees v. Board of Professional Land Surveyors*, DOAH Case No. 88-471 ORP (1989), Final Order, paragraph 6.

(21) Both International Mining & Chemicals and Agrico Chemical owned land which bordered the Peace River.

(22) *Id.* at paragraph 83.

(23) *Macnamara v. Kissimmee River Valley Sportsman's Assoc.*, 648 So.2d 155, 157, 162 (Fla. 2d DCA 1994).

(24) A marine patrol officer erroneously informed Mr. Smith during construction that he believed that no permit was needed. However, a contractor working on the illegal dikes withdrew his equipment from the site and abandoned the project when he discovered that Mr. Smith had no permit.

(25) The permit Mr. Smith received required the original illegal dikes to be breached so as to restore the lake bed to its pre-existing condition.

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