IN THE SUPREME COURT OF FLORIDA

NOS. 65,755/65,696

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, and COASTAL PETROLEUM COMPANY,

Petitioners,

vs.

AMERICAN CYANAMID COMPANY, and ESTECH, INC.,

Respondents.

On Discretionary Review from the District Court of Appeal, Second District

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

In October of 1982 and February of 1983, Cyanamid and Estech filed quiet title actions in Polk County Circuit Court against the Trustees and Coastal claiming fee simple title to portions of the beds of the Peace and Alafia rivers that course their phosphate mining lands in Polk County. Their ownership claims were premised upon chains of title originating with Trustees' "swamp and overflow lands" deeds (or similar federal patents), issued predominately in the late 1800's to their predecessors in title, that encompass the riverbeds in issue within their boundaries, and contain no reservation for navigable waters. The complaints alleged that sovereignty title claims to these riverbeds by the Trustees, and derivatively by Coastal, in litigation pending in federal court in Tallahassee, placed Cyanamid and Estech in doubt as to their ownership of the lands, and sought decrees confirming title in their favor. RA 1, RE 1; A. 1-14. 1/

The Trustees' answers claimed the disputed lands as sovereignty lands -- lands beneath navigable waters acquired by Florida at statehood by virtue of its sovereignty. The Trustees asserted that though not meandered in the 1855 federal survey of the new state, the portions of the Peace and Alafia rivers in

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1/ Coastal Petroleum Co., et al vs. American Cyanamid Company, No. TCA 77-0975 (Cyanamid I); Coastal Petroleum Co., et al vs. Estech, Inc., No. TCA 77-0972 (Estech I) (Northern District of Florida). Coastal Petroleum Company holds a 1941 sovereignty lands lease from the Trustees, under which it initiated the Cyanamid I and Estech I proceedings as conversion actions which claim that the defendants unlawfully mined phosphate ore from sovereignty lands covered by their 1941 lease.

dispute were navigable in fact in 1845, that the riverbeds passed as a result into state ownership under the equal footing doctrine, and that as sovereignty lands they were reserved by operation of law from swamp and overflow deeds by Florida's Public Trust Doctrine.

The Trustees' title claim was founded upon the historical distinction between sovereignty lands, and swamp and overflow lands. Swamp and overflow lands are those coursed by non-navigable waters, and are characterized as uplands. They were acquired by Florida by patent from the United States after passage of the 1850 Swamp Land Grant Act, and in 1855 the Florida legislature vested title to all such lands in the Trustees, and authorized their sale and disposition. Chapter 610, Laws of Florida (1855). Sovereignty lands, however, are those coursed by navigable waters, and were acquired by the state by operation of law, not by patent, as a privilege of statehood. Unlike swamp and overflow lands, title to Florida's freshwater sovereignty lands was not vested in the Trustees until 1969, after the 1968 Florida Constitution specifically incorporated the public trust doctrine's prohibition against alienation of sovereignty lands without a specific finding of public interest -- and long after the deeds in dispute were issued. Ch. 69-308, Laws of Florida. Accordingly, the Trustees contended that prior to 1969, freshwater sovereignty lands were held by the state in trust for the people of Florida, alienable only by act of the legislature, and accordingly that the early Trustees were without authority to divest the public trust of title to the freshwater sovereignty lands in issue here.

The Trustees' position, therefore, was that the factual navigability of the rivers at statehood was the critical question -- that it determined ownership.

Both Cyanamid and Estech moved for summary judgment. They argued that under Section 197.228(2), Fla. Stat., the question of navigability in fact was foreclosed by the failure of the 1855 federal survey to meander the rivers in the areas in dispute, and the inclusion of the disputed riverbeds within the perimeters of the disputed deeds. Alternatively, they argued that even if the lands were sovereignty in character, the present Trustees were barred from asserting their sovereignty title claim by the doctrine of legal estoppel, and Florida's Marketable Record Title Act, Chapter 712, Fla. Stat., and by the application of these statutes and principles of law by this Court in Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977).

In May of 1983, the trial court granted the motions, and entered identical final summary judgments in favor of both Cyanamid and Estech, quieting title to the disputed lands in their favor. RA 1981, RE 1044; A. 15-36. Following appeal by the Trustees and Coastal, the judgments were affirmed by the Second District Court of Appeal by a single opinion filed on July 13, 1984. A. 37-46 The trial court judgments, adopting respondents' arguments, pretermitted any factual resolution of the navigability dispute, holding that the Trustees' swamp and overflow lands deeds, and the federal swamp land patents, operated to divest the public trust of title to all lands within their boundaries whether coursed by navigable rivers or not. The trial court, and the

District Court, held that under Section 197.288(2), the issuance of the Trustees's deeds without reservation of title to the disputed lands created a conclusive, unrebuttable presumption that the rivers were non-navigable, and thus that the lands were freely alienable; that even if the lands were sovereignty lands, the present Board was barred from asserting a sovereignty title claim by the doctrine of legal estoppel; and finally that Florida's Marketable Record Title likewise barred any otherwise valid sovereignty title claim. Odom was relied upon for the result. Recognizing, however, the "significant impact of [the] decision on the riverbeds" in issue, the District Court certified to this Court as questions of great public importance the three principle issues raised by the title dispute. They are the only issues presented for decision.

Notices To Invoke Discretionary Jurisdiction were timely filed by Coastal on July 30, 1984, and by the Trustees on August 10, 1984, pursuant to Rule 9.030(2)(v), Florida Rules of Appellate Procedure. By order of August 27, 1984, this Court ordered the proceedings consolidated, and directed the filing of Petitioners' briefs on the merits by September 25, 1984.2/

2/ The decision of the District Court of Appeal reviewed here was adopted by the Court in a companion sovereignty lands case, Board of Trustees v. Mobil Oil Corporation, No. 82-2050 (Mobil IV), decided the same day as these appeals. On September 4, 1984, the District Court in Mobil IV likewise certified the same three sovereignty lands issues presented here. Consolidation of Mobil IV and this proceeding for briefing is not appropriate, for Mobil IV contains issues not presented here. However, since the sovereignty lands issues in all three appeals are identical, this proceeding and Mobil IV may appropriately be argued at the same session of the Court.

ARGUMENT

Introduction

The Board of Trustees, consisting of the constitutionally elected members of the Florida Cabinet, challenges the decision below as an unwarranted and unsupported extension of Odom, and the statutes discussed in that opinion, to unmeandered portions of Florida's rivers whose navigability at statehood can be established by competent evidence.

The Board contends that neither the Florida Legislature, nor this Court in Odom, intended that Section 197.228(2) be utilized to strip portions of Florida's historic river system from the public trust if the burden of establishing their navigability can be met. That statute is limited by its own language to unmeandered lakes, ponds, and swamp and overflow lands. It was designed to facilitate the assessment of property taxes on unmeandered lakes and ponds, and remains, 31 years after passage, codified outside the 28 pages of state laws pertaining to state lands. Prior to the enactment of Section 197.228(2), this Court, on four separate occasions, in decisions among its most venerable, applied the common law Public Trust Doctrine to except sovereignty submerged lands from Trustees' swamp and overflow deeds, recognizing that the Board did not hold title to Florida's sovereignty lands, and thus had no authority at the time the swamp lands conveyances were made to divest the public trust of sovereignty lands. In the face of this history, there is no support for the view that the legislature intended by its enact-

ment of Section 197.228(2) to effect a wholesale abolition of the Public Trust Doctrine, and to foreclose sovereignty claims to all navigable but unmeandered rivers and streams in Florida.

The second foundation of the decision below is the doctrine of legal estoppel, or estoppel by deed. The District Court's application of this doctrine, upon these facts, is without support in Florida law. It is applied here, for the first time, to accomplish the alienation of public trust lands by a state agency without title to the lands at the time the deeds were issued, and without authority today to alienate them without a constitutionally mandated finding of public interest in their divestiture. Art. X, §11, Fla. Const.; § 253.115, Fla. Stat. Prior to the decision below, Florida courts have refused to permit the ultra vires or unauthorized acts of state officials to effect a divestiture of public lands. Odom is inapposite, for there the Court specifically characterized the lakes involved as non-navigable as a matter of law, under Section 197.228(2), and their conveyance accordingly lawful. Here, the Trustees could not lawfully convey sovereignty lands.

Finally, the Court is asked today to resolve the question of whether the Marketable Record Title Act (MRTA) may be utilized to divest the state of title to sovereignty lands. This issue, the Trustees believe, has not been resolved by this Court. Odom, contrary to its construction below, applied MRTA to extinguish the Trustee' title claim to unmeandered lakes and ponds the Court defined under Section 197.228(2) as non-sovereignty in character by operation of law. Odom makes no finding that the lakes were

navigable in fact but nevertheless divested by MRTA from the public trust. There is simply no such holding in the case. This view is supported by the fact that this Court, on two occasions since Odom, has reserved the question of MRTA's applicability to extinguish state title to sovereignty lands. Askew v. Sonson, 409 So.2d 7, 9 (Fla. 1981); City of Miami v. St. Joe Paper Co., 364 So.2d 439, 455, 449 (Fla. 1978).

There is language in Odom, however, which suggests that title to sovereignty lands may be extinguished by MRTA.[3/] It is the basis of respondents' MRTA argument below, and the District Court's application of the statute here. We argue in the text that follows that this language is dicta, since the Odom Court specifically held that the lands in issue there were non-sovereignty in character -- unlike here -- and thus were previously lawfully conveyed. This language from Odom was of sufficient concern, however, that the legislature, in a 1978 special session called in direct response, amended the Act to specifically exclude sovereignty lands from its operation. § 712.03(7) Fla. Stat. (1978). While we believe it clear that the 1963 legislature could not, and did not intend to divest the public trust of

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3/ [T]he claims of the Trustees to beds underlying navigable waters previously conveyed are extinguished by the Act. Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights . . . state officials should not . . . take from the grantee the rights which have been conveyed previously. . . .

Odom, supra, 341 So.2d at 989 (emphasis supplied).

sovereignty lands by the enactment of MRTA, there now exists a specific statutory exemption of sovereignty lands from MRTA clarifying the immunity of sovereignty lands from its operation.

The District Court refused to apply the sovereignty lands amendment as interpretive of the scope of the statute as originally enacted. Though use of the amendment may not be necessary, since fair construction of MRTA's originally enacted exceptions, together with the public trust doctrine, render it inapplicable to sovereignty lands, the 1978 amendment specifically excluding sovereignty lands is a formal legislative interpretation of the scope of the statute that is the only clear legislative expression on this important question.

If MRTA is interpreted to protect sovereignty lands from divestiture only after the 1978 amendment, state title to the entire class of sovereignty lands presented by this case will be extinguished. The navigable but unmeandered riverbeds in issue here are primarily encompassed by Trustees' swamp and overflow lands deeds issued long before the 30 year vesting period provided by MRTA. Some 21 million acres within Florida were the subject of these ancient Trustees' deeds. If MRTA is applied during the 1963-1978 pre-amendment period, to extinguish the Trustees' title to sovereignty lands encompassed by these deeds, state title to all such sovereignty lands will have been lost with the expiration of the Act's savings clause on July 1, 1965. That is eight years before any court in Florida suggested the possibility of such a divestiture, eleven years before Odom, and four years before the Trustees acquired title to the lands!

Such an application of MRTA results in the unconstitutional divestitute of state title to sovereignty lands without due process of law. If so applied, MRTA extinguishes state title to the class of sovereignty lands in issue without affording the state, or the Trustees, any reasonable time or means to catalogue the subject lands, and preserve state title by proper notice. MRTA's two year savings clause -- expiring four years before the Trustees even acquired title -- accordingly is unconstitutional as applied.

The significance of these issues to the public interest cannot be questioned. There is ample evidence that the meandering of navigable waters in the early survey of Florida was inexact and incomplete, as the surveyors struggled with the water and terrain which today are our valuable heritage. As Petitioners' briefs today demonstrate, there is ample evidence that portions of the waters in dispute here were traveled by the phosphate barges of respondents' predecessors, and other commercial craft. There is ample evidence that respondents and their predecessors were on notice of the navigability of the waters in issue. Thus there is ample evidence, foreclosed by the decisions below, that there is wisdom in the law's preservation of such waters, upon competent proof, for the public trust. The Court is asked today to decide whether such riverbeds may remain presumptively within the public trust, or whether they will forever be characterized as private lands.

A. THE SOVEREIGNTY LANDS ISSUE

Certified Question

Do The 1883 Swamp And Overflowed Lands Deeds Issued By The Trustees Include Sovereignty Lands Below The Ordinary High-Water Mark of Navigable Rivers?3/

Argument

Conveyances by the Trustees of swamp and overflow lands do not include sovereignty lands below the ordinary high water mark of navigable rivers, where the Trustees held no title to such sovereignty lands at the time of the conveyances.

The sovereignty lands issue presents the question, apart from whether the Trustees' title claims may be barred by legal estoppel or extinguished by MRTA, whether the public trust doctrine initially preserves sovereignty title to the riverbeds in issue from alienation by virtue of their location within the boundaries of the Trustees' deeds relied upon by respondents. The District Court said no, relying upon Section 197.228(2), Fla. Stat., and the lack of meandering, to hold that the lands are non-sovereignty in character as a matter of law, thus without the protection of the public trust doctrine. Accordingly, the Court held that the deeds were effective to convey title to all lands within their boundaries to respondents. Neither Odom, nor the statutes upon which it relies, is authority for this result.

3/ Neither of the cases reviewed here involves only swamp and overflow deeds issued by the Trustees in 1883. Many separate Trustees' deeds are involved, issued at varous times, though predominately in the later part of the 19th century.

1. The Public Trust Doctrine

The differences between swamp and overflow lands and sovereignty lands, and the title consequences that follow from these differences, are important to an understanding of Florida's Public Trust Doctrine, and its significance to the sovereignty lands issue presented for decision.

First, the swamp and overflow land patents issued by the United States to Florida after 1850 conveyed only uplands -- -swamp and overflow lands, beneath non-navigable waters -- not sovereignty lands. Sovereignty lands were acquired by Florida in 1845 by admission to the Union, under the Equal Footing Doctrine, not by patent. Thereafter, the federal government was powerless to include these lands in any conveyance, swamp and overflow or otherwise. Accordingly, it is clear that the sovereignty lands in issue were not included in the federal swamp and overflow patents to Florida that respondents and the Circuit Court mistakenly identify as the root of title to the sovereignty lands in dispute. The root of title to these lands is the Act of Statehood.

State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908), makes this clear. There the Attorney General brought a quo warranto proceeding to halt Gerbing's staking and use of portions of the beds of the Amelia River for oyster farming. The State argued that Gerbing's use extended below the ordinary high water mark into the channel, and thus trespassed on sovereignty land. Gerbing defended the action by claiming, as respondents do

here, that he owned the land by virtue of a swamp and overflow deed issued by the Trustees that included the farmed area within its boundaries, and was preceded by a federal swamp and overflow patent of the lands to Florida.

Justice Whitfield rejected Gerbing's argument in unmistakable terms. In holding that a Trustees' deed to swamp and overflow land did not convey title to any sovereignty land within its perimeter, 56 Fla. at 612, 47 So. at 356, the Court relied in part upon the fact that no sovereignty lands were included in the original swamp lands patents to Florida from the United States:

> The act of Congress of September 28, 1850, granted to the state "the whole of the swamp and overflowed lands therein." This grant did not include lands the title to which was not then in the United States. As the admission of the state of Florida into the Union "on equal footing with the original states, in all respects whatsoever," gave to the state in trust for the people the navigable waters of the State and the lands thereunder, including the shores or space between ordinary high and low water marks, the title to such lands was not in the United States when the act of 1850 was passed granting swamp and overflowed lands to the state. A patent issued by the United States to the state, purporting to convey swamp and overflowed lands under the act of 1850 covering lands under the navigable waters of the state, does not affect the title held by the state to the lands under navigable waters by virtue of the sovereignty of the state.

56 Fla. at 614, 47 So. at 357 (emphasis supplied).

Since it is clear, therefore, that sovereignty lands were not included in the swamp and overflow land patents to Florida, it follows that when the Florida legislature, in 1855, vested the Trustees with title to swamp and overflow lands acquired from the United States, and empowered them to sell such lands, Ch. 610, Laws of Florida (1855), they did not receive title to sovereignty

lands. Indeed, the Board did not obtain title to freshwater sovereignty lands until 1969, long after the issuance of the swamp and overflow deeds relied upon by Cyanamid and Estech here. Ch. 69-308, Laws of Florida; Section 253.12, Florida Statutes.[5/] Thus, the Trustees were wholly without authority to convey sovereignty lands by swamp and overflow deed. This lack of authority is an important part of Florida's Public Trust Doctrine, and an unbroken line of decisions of this Court applying it to preserve sovereignty lands from alienation by swamp and overflow lands deed.

Before these decisions are reviewed, a brief history of Florida's "Public Trust Doctrine" is helpful. Ownership by the sovereign of lands beneath navigable waters arose under the common law as a vehicle to ensure the protection of public rights to the free use of these waterbodies. In order to make certain these rights remained intact, the common law required the sovereign to hold title to lands beneath navigable water in trust for the people, and thus the doctrine protecting public rights in these lands became known as the "Public Trust Doctrine." This doctrine was applicable to the English colonies, the original thirteen states, and to all new states as a "trust . . . imposed [by] . . . common law . . . which the state . . . assumed . . . when it was admitted to the Union." State ex rel. Buford v. City of Tampa, 88 Fla. 196, 102 So. 336, 340 (1924).

4/ Respondents concede that the Trustees did not hold title to freshwater sovereignty lands until 1969. However, for the Court's review, a historical perspective of the Trustees' authority over these lands is included at RC 912-917; A. 47-51.

By virtue of its admission to the Union on March 3, 1845, upon "Equal Footing" with other states, Florida acquired title to all lands beneath navigable waters within the State under the Equal Footing Doctrine. Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Broward v. Mabry, 58 Fla. 398, 50 So. 826, 829-30 (1909). These lands became known as "sovereignty lands." During the territorial period, all sovereignty lands within Florida's boundaries were held by the United States in trust for the use and benefit of the people of the State to be formed, Martin v. Busch, 93 Fla. 535, 112 So. 274, 283 (1927), and none were conveyed by the United States into private ownership.5/ Thus, the only lands under navigable waters within Florida that did not pass to the State upon admission to the Union were those few parcels conveyed to private individuals by Spanish grants issued prior to the 1821 Treaty of Cession. See Note, Florida's Sovereignty Submerged Lands: What are They, Who Owns Them and Where is the Boundary, 1 Fla. St. L. Rev. 596 (1973).

When Florida acquired title to its sovereignty lands at statehood, "a concomitant public trust devolved upon the State to protect and preserve these sovereignty lands . . . [the] primary

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5/ "Grants by Congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high water mark, and do not impair the title and dominion of the future state when created; but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the Constitution in the United States." Shively v. Bowlby, 152 U.S. 1, 58 (1894).

purpose [of which] . . . is to restrict alienation and use of sovereignty lands." Id. at 598-99. The earliest Florida decision to explain the Public Trust Doctrine is State v. Black River Phosphate Co., 32 Fla. 82, 106, 99, 13 So. 640, 648, 645 (1893):

> The navigable waters of the state and the soil beneath them . . . were the property . . . of the people of the state in their united or sovereign capacity, and were held, not for the purposes of sale or conversion into other values . . . but for the use and enjoyment of the same by all the people of the state.
>
> [A]bdication [of control over sovereignty lands] is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the state for the use of the public . . . cannot be relinguished by a transfer of the property. The control of the state for the purpose of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein . . . .

In State v. Gerbing, 56 Fla. at 609, 47 So. at 355, this Court again expressed the State's duty to preserve its sovereignty lands from alienation:

> The States cannot abdicate general control over such lands and the waters thereon, since such abdication would be inconsistent with the implied legal duty of the States to preserve and control such lands and the waters thereon and the use of them for the public good.

Federal and Florida cases recognized early that the trust could be modified in the public interest to permit some alienation of sovereignty lands, but strict requirements were imposed before such conveyances would be validated. The strictest construction was imposed upon claims to private ownership of public lands, a clear presumption against alienation of sovereignty lands was recognized, and those alleging conveyances of sovereignty lands into private ownership were required to demonstrate that the conveyances were based upon lawful authority.

In Shively v. Bowlby, 152 U.S. 1, 10 (1894), the United States Supreme Court noted the rule of strict construction for governmental grants of sovereign lands:

> All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives . . . are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.

This rule of construction has long been followed in Florida, and applies

> a fortiori, to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also a portion of that public domain which the government held in a fiduciary relation for general and public use.

State v. Black River Phosphate Co., 32 Fla. at 107, 13 So. at 648. Accord: Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775, 786 (Fla. 1956).

The significant requirement of the Public Trust Doctrine that any conveyance of sovereignty land be supported by proof of an express legislative grant of authority to convey has been repeatedly emphasized. As stated in Brickell v. Trammell, 77 Fla. 544, 563, 82 So. 221, 228 (1919):

> [T]hose claiming ownership below high-water mark must show the sources and muniments of title from competent authority to make such a grant against the rights of the public in the shores. . .of navigable waters in this state.

Similarly, Apalachicola Land & Development Co. v. McRae, 86 Fla. 393, 431, 98 So. 505, 518 (1923), requires that

> Where private ownership is asserted in property that under the law is a subject of common or public use, the claimant must clearly show that the private exclusive right that is asserted was lawfully acquired through competent authority. . . .

See generally Note, Conveyances of Sovereign Lands Under the Public Trust Doctrine, 24 U. Fla. L. Rev. 285, 288 (1972).

2. Application of the Public Trust Doctrine in Florida

Because of the protection afforded sovereignty lands by the Public Trust Doctrine, and the fact that the Trustees did not hold title to freshwater sovereignty lands when they issued the swamp and overflow land deeds, this Court has held, without exception, that conveyances of swamp and overflow lands by the Trustees do not carry title to sovereignty lands.

The seminal decision in Florida is State v. Gerbing. There, the Court held that the swamp and overflow deed under which Gerbing claimed did not convey title to the sovereignty lands in issue, relying upon the Trustees' lack of authority over sovereignty lands for its holding:

> The title to lands under navigable waters, including the shores or space between ordinary high and low water marks, is held by the state by virtue of its sovereignty in trust for the people of the state for navigation and other useful purposes afforded by the waters over such lands, and the trustees of the internal improvement fund of the state are not authorized to convey the title to the lands of this character.

56 Fla. at 612, 47 So. at 356 (emphasis supplied).

This holding was expanded in the following year in Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909). There a riparian landowner claimed title to portions of Lake Jackson near Tallahassee by virtue of a swamp and overflow deed issued by the Trustees.

In rejecting Mabry's claim, the Court noted the character of swamp and overflow lands, and the nature of the Trustees' authority over them:

> It appears from this record . . . that the lands under the lake belong to the state in its sovereign capacity in trust for all the people of the state . . . This being so, the patent to the state under the . . . [swamp and overflow land act] conveyed no title to lands under the navigable waters . . . .
>
> The trustees of the internal improvement fund, who have the disposal of the swamp and overflowed lands of the state, have no authority to convey the title to lands under navigable waters that properly belong to the sovereignty of the state.
>
> . . . .
>
> [The] trustees of the internal improvement fund of the state, appear to have no title to or authority to sell the lands in controversy, and the appellee does not appear to have title to the land under the navigable waters of the lake.

58 Fla. at 412-13, 50 So. at 831.

The next decision of this Court construing swamp and overflow conveyances is Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927). There the Court addressed the issue of whether swamp and overflow deeds issued by the Trustees in 1904 included lands below the ordinary high water mark of Lake Okeechobee. The deeds to Busch's predecessors conveyed unsurveyed sections of a township that bordered the lake, and contained no reservation for sovereignty lands lying within the boundaries of the deed. Subsequent drainage operations by the State caused the waters of the lake to recede, and Busch claimed title to the land exposed. In holding that Busch's deed did not include the sovereignty submerged lands that became exposed through artificial reliction, the Court announced the now-accepted rule:

> Conveyances of uplands, including swamp and overflowed lands, do not include sovereignty lands below the ordinary high-water mark of lands under navigable waters, unless authority and intent to include such sovereignty lands clearly appear.

112 So. at 285 (emphasis supplied). The Court determined that such authority was not present, finding that "[t]he state trustees had no authority in 1904 to convey sovereignty lands below highwater mark on the navigable lake, and did not attempt to do so." 112 So. at 284.

The result is the same, the Court concluded, regardless of the intent of the conveyance:

> If by mistake or otherwise sales or conveyances are made by the trustees of the internal improvement fund of sovereignty lands, such as lands under navigable waters in the state or tidelands, or if such trustees make sales and conveyances of state school lands, as and for swamp and overflowed lands, 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.

112 So. at 285 (emphasis supplied).

The common law concept of "notice of navigability" was also emphasized in Martin v. Busch as a subsidiary basis for its holdings:

> A conveyance of all of an unsurveyed fractional township or section of swamp and overflowed lands which borders on a navigable lake or other body of navigable water, carries title to the true line of ordinary high-water mark that has been or that should thereafter be legally established. . . . The grantee takes with notice that the conveyance of swamp and overflowed lands does not in law cover any sovereignty lands, and that the trustees of the swamp and overflowed lands as such have no authority to convey sovereignty lands.

112 So. at 285-86 (emphasis supplied).

Martin was followed by Pierce v. Warren, 47 So.2d 857 (Fla. 1950), cert. denied, 341 U.S. 914 (1951). In Pierce, the State brought an action to quiet title to property in Dade County that was deeded by the Trustees in 1911 to Pierce's predecessors in title under the belief that the lands included were swamp and overflow lands. Subsequently, however, it was determined that the lands were tidal sovereignty lands, and the State initiated suit to clarify its title. In affirming the Chancellor's decree, which upheld the State's title to the disputed land, the Court held that the Trustees were powerless to convey sovereignty title:

> [T]he basic question . . . is whether the trustees attempted to convey "sovereignty lands," which they could not have done before the enactment of Chapter 7304, Laws of Florida, Acts of 1917 . . . or did deed 'swamp and overflowed lands,' which they were empowered to do.

47 So.2d at 858.

> If the property was in fact tideland in 1911, there was no power in the trustees to convey it, and the deed attempting to do so was void.

Id. at 859-60.

This lack of authority was cited by the Court in Pierce to invalidate the conveyances regardless of the early Trustees' intent:

> If the Trustees . . . actually conveyed "sovereignty lands," believing them to be "swamp and overflowed lands," their mistake, however innocent, would not supply the power they lacked.

Id. at 859.

Each of these cases emphasizes the Trustees' lack of authority to convey title to sovereignty lands into private ownership

as the basis for holding that swamp and overflow deeds do not alienate sovereignty title to these lands. At the time the deeds in dispute here were issued, the Trustees did not hold title to any sovereignty lands. They had no authority, therefore, to convey sovereignty lands to Cyanamid, Estech, or their predecessors. Without such authority, the swamp and overflow deeds upon which they rely were ineffectual under Florida law to convey title to sovereignty land.

3. Odom v. Deltona Corp.

a. Section 197.228(2), Fla. Stat.

The last significant swamp and overflow deed case to reach this Court is Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977). It has been at the center of controversy in this litigation. It has been applied to defeat the Trustees' title claims by both the Circuit and District Courts, an application of its holding and reasoning the Trustees believe is unsupported.

In Odom, the Trustees challenged Deltona's claim of title to the beds of several small, 50-150 acre, unmeandered lakes. Deltona's claim was premised upon a chain of title beginning with swamp and overflow deeds issued by the Trustees at the turn of the century, within the perimeters of which the lakes in issue were located. The Trustees challenged the capacity of these deeds to convey title to the lake beds on the ground that the lakes were navigable, thus sovereign in character, and not subject to transfer by swamp and overflow deed.

The Court's decision is essentially in two parts. First, it quoted the entire memorandum opinion of the Circuit Court. This

was followed by the Court's own comments on the issues presented. Each opinion holds that the swamp and overflow deeds in issue there were effective to convey the lands in question into private ownership.

The basis of Odom was not, however, a rejection of the long-standing common law rule excepting sovereignty lands from swamp and overflow conveyances. Indeed, the opinion reaffirms the rule of Martin v. Busch, that conveyances of swamp and overflow lands do not pass title below the ordinary high water mark of navigable waters:

> It is also recognized that properties acquired by the state under the Swamp and Overflow Grant Act of 1850 do not cover or include lands under navigable waters as such were already held by the state in trust by virtue of sovereignty, . . . and a deed from the Trustees of I. I. Fund purporting to convey lands acquired under the 1850 Act of Congress would not convey sovereignty lands. Martin v. Busch, 93 Fla. 535, 112 So. 274. These principles have been consistently recognized and applied and are not to be doubted. However, whether or not a particular area is that of a navigable body of water and thus sovereignty property held in trust is a question of fact. . . .

341 So.2d at 981 (emphasis supplied).

The basis of the decision in Odom is rather a recognition that the legislature has carved out the submerged lands beneath non-meandered lakes, encompassed by swamp and overflow deeds from the Trustees, as a separate class of state lands to which the Public Trust Doctrine, and the rule of Martin v. Busch, do not apply. The Circuit Court opinion in Odom concluded that statutory provisions in Florida regarding title to unmeandered lakes, included without reservation in swamp and overflow deeds from the Trustees, principally Sections 197.228(2) and 197.228(3), esta-

blish a conclusive presumption against navigability, and a limitation period for actions involving title to these lands. The result, of course, is that such lands are not sovereignty in character, and do not fall within the protection of the Public Trust Doctrine. 341 So.2d at 982.

The Circuit Court relied specifically upon Sections 197.228(2), and 197.228(3):

> Section 197.228(2), Florida Statutes:
>
> Navigable waters in this state shall not be held to extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the state without reservation of public rights in and to said waters.
>
> Section 197.228(3), Florida Statutes:
>
> The submerged lands of any nonmeandered lake shall be deemed subject to private ownership where the Board of Trustees of the Internal Improvement Trust Fund of Florida conveyed the same more than 50 years ago without any deductions for water and without any reservation for public use and when taxes have been levied and collected on said submerged lands since conveyance by the state.

Discussing Section 197.228(2), the Circuit Court noted that

> This statute is at pains to recognize conveyances by governmental authority purporting to transfer to private ownership a described area as effective to include lakes, ponds, swamp and overflow land unless the instrument makes a reservation of them. It also makes a special treatment of nonmeandered lakes when the trustees make conveyance of lands vested in it.

341 So.2d at 982. Similarly, discussing Section 197.228(3), the Court stated that

> [T]he statute does reveal a legislative concept that nonmeandered lakes do have a significance that meandered lakes would not have in the determination of whether or not a particular body of water is navigable.

Id. at 984. Thus, the Court determined that "it is made to appear that nonmeandered lakes and ponds are not to be classified as navigable bodies of water." Id.

The Circuit Court opinion in Odom, therefore, by its very language is limited to the status of nonmeandered lakes and ponds under Florida law. They were the only waterbodies before the Court. They are found to be, under Section 197.228, a separate class of lands legislatively removed from the protection of the Public Trust Doctrine. However, neither Section 197.228 nor Odom is addressed to the status of Florida's navigable but unmeandered rivers and streams which course lands encompassed by swamp and overflow conveyances by the Trustees.

It is also clear that the Circuit Court in Odom made no factual determination of the navigability of the lakes in issue. The Circuit Court determined that Section 197.228 established a conclusive presumption of non-navigability as a matter of law, rendering the factual navigability of the lakes irrelevant.

This Court, in its original portion of the opinion, may have used a different analysis to find the reservation of sovereignty title inapplicable. Noting that "non-meandered lakes and ponds are rebuttably presumed non-navigable," the Court found that since the Trustees had presented no evidence of navigability, non-navigability was established, and summary judgment was appropriate. 341 So.2d at 989.

Each opinion in Odom, therefore, concludes that the lakes in issue were legally non-navigable, and thus non-sovereignty in character. Because this case involves public title to Florida's navigable water courses, particularly its river system, which fall outside the provisions of Section 197.228(2), the Trustees contend that Odom is inapposite, and does not abolish the public trust doctrine's reservation of sovereignty title here. Accordingly, the lower courts' reliance upon Odom, and Section 197.228(2), to bar the Trustees' claim to ownership of the riverbeds in issue, is misplaced.

Any application of Sections 197.228(2) and 197.228(3) to determine substantive property rights in Florida -- even to lakes and ponds -- is highly suspect. Their direct application for this purpose is found only in the Circuit Court opinion in Odom. Otherwise, both before and after Odom, such application has been severely criticized and rejected.

Such use was first rejected by this Court in McDowell v. Trustees of Internal Improvement Fund, 90 So.2d 715 (Fla. 1956) ("The subsection was appropriately included in the chapter on taxation, and it was apparently intended . . . to provide a guide for the benefit of tax assessors.") The Fourth District Court of Appeal, noting the statute's "checkered history" and codification as a tax statute, has held it to be undeterminative of substantive property rights:

> That statute [Section 197.228(1)] purports to define riparian rights in a fashion supportive of appellants' contentions. However, the historical location of that statute within a chapter on taxation and the major thrust

> of the content of the original legislative enactment of the statute (Chapter 28262, Laws of Florida (1953), leads us to conclude that Section 197.315 (3)(a) and its lineage are taxation statutes rather than statutes that describe substantive property rights. The checkered history of Section 197.228 . . . . and the problems it has created in the determination of water rights is recounted in Maloney, Plager & Baldwin, Water Law, §22.3. Because of the dubious effect of said legislative act . . . . we hold it to be inapplicable.

Belvedere Dev. Corp. v. Div. of Administration, 413 So.2d 847, 849 (Fla. 4th DCA 1982) (Downey, J.). Dean Maloney, in the Water Law treatise referred to in Belvedere,[6/] takes the statute to task, and soundly criticizes any application of its provisions to determine title to public lands as a "subversion of the sovereignty trust." Maloney, supra at 47.

Finally, it may be noted that this Court has questioned the power of the legislature to effect a wholesale divestiture of a class of sovereignty lands. As early as 1893, in State v. Black River Phosphate Company, 32 Fla. at 99-100, 13 So. at 646, the Court interposed this restraint upon wholesale alienation:

> A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instances of parcels mentioned for the improvement of the

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6/ Maloney, Plager & Baldwin, Water Law and Administration -- The Florida Experience (1968) (hereafter Maloney).

> navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police power in the administration of government and the preservation of the peace.

By finding, as the Trustees' have argued, that Section 197.228(2) does not apply to Florida's navigable but unmeandered rivers, the Court may find it unnecessary to revisit the wisdom of Odom's application of the statute to Florida's unmeandered lakes and ponds. If reconsideration is necessary the Trustees would argue for the statute's across the board rejection as a determinant of sovereignty property rights. A far clearer and straightforward legislative mandate should be required before some 30,000 lakes and ponds in Florida are irrevocably titled by legislative fiat in private hands, and public access to them foreclosed.

b. The Absence of Meandering

The trial court judgment and the District Court opinion hold that the absence of meander lines along the portions of the rivers in dispute establishes the non-navigability of the rivers as a matter of law, and thus defeats any sovereignty claim. The District Court, for example, suggested that the "decisions by the government surveyors not to meander any of these watercourses are not now open to question." Thus, a conclusive presumption of non-navigability results.

This conclusion is directly refuted by this Court's specific holding in Odom that the absence of meander lines creates only a rebuttable presumption of non-navigability. 341 So.2d at 989.

Thus, the proper effect of the absence of meandering is to place upon the Trustees the burden of rebutting the presumption and proving the navigability in fact of the rivers in dispute. The trial court judgment, and the District Court opinion, erroneously foreclose the presentation of such evidence.

The trial and district courts also avoid application of the public trust doctrine to preserve the Trustees' title by limiting its application to cases, unlike here, where the lands in issue have never been surveyed. Such was the case in Martin v. Busch, and Pierce v. Warren, supra, and thus the decisions below contend that their application of the public trust doctrine to reserve sovereignty lands from swamp lands deeds as a matter of law is limited to such facts -- that when lands have been surveyed, and their watercourses not meandered, the public trust doctrine does not apply.

This view is erroneous for two reasons. First, it is clear that application of the public trust doctrine has not been limited by this Court to cases where only unsurveyed lands were the subject of swamp and overflow deeds from the Trustees. Gerbing, supra, the seminal decision, held that even though lines of survey were protracted by federal authorities over the bed of the river in issue, and the river was not meandered, these facts did not determine or change the navigable character of the stream, or the application of the public trust doctrine to reserve those sovereignty riverbeds from the swamp lands deeds issued by the Trustees. 56 Fla. at 613, 47 So. at 356.

Second, this limitation upon the public trust doctrine results again in the impermissible attachment of a conclusive presumption of non-navigability to the absence of meandering. The presumption in Florida is not conclusive. Odom, 341 So.2d at 989.

The wisdom of allowing rebuttal to the non-navigability presumption created for non-meandered rivers is discussed at length by Dean Maloney. That discussion is quoted at length here because of its relevance, and the credibility of its author:

> Immediately following the acquisition of Florida by the United States, the federal government began to determine which waterbodies were federally navigable and which were non-navigable. The factual determination of navigability was placed in the hands of federally employed surveyors who were instructed to set aside navigable waterbottoms in the original federal surveys of the area. When the surveyors determined that a lake or stream was navigable, they meandered it -- in other words, they established a line, called a meander line, which followed the sinuosities of the waterbody -- instead of including it in their rectilinear surveys. This generally required that the surveyor actually walk the shoreline of the waterbody rather than simply sight across it with his instruments.
>
> Curiously, only about 190 of Florida's estimated 30,000 named lakes were in fact meandered, despite the seemingly clear instructions contained in the 1855 Manual of Instructions issued by the Land Department, calling for meandering of 'all lakes and deep ponds of the area of 25 acres and upwards.' Possible misunderstandings on the part of the early surveyors concerning the federal definition of navigability may have played a part. Many of Florida's lakes have no navigable water connection with the ocean and might therefore have been considered unusable for interstate commerce, hence not navigable in a federal sense. However, the fact that a number of the lakes that were meandered are land locked leads to a discounting of this reasoning. A more likely explanation is that the process of meandering in Florida was often an extremely difficult one. Shorelines were generally swampy and infested with dangerous snake and other hazards. Given more

> workable shorelines, it seems probable that a considerably greater percentage of them might have been meandered in the original surveys.
>
> How much weight will a court attach to the fact that a waterbody was or was not meandered when called upon to determine whether it is navigable? The Florida Supreme Court has held that meandering on the original state survey is evidence of navigability, although the final test is still whether the watercourse is navigable in fact. The presumption of navigability raised by the fact of meandering can be rebutted: 'if a meandered arm of the lake is not in fact navigable for useful public purposes, the public has no right of access to that area.'
>
> Failure of the original surveyors to meander a waterbody simply leaves the determination of navigability to be established by other competent evidence. The Supreme Court of Florida early held that the fact that a stream was not meandered and that lines of survey were projected over the bed of the stream did not determine or change the navigable character of the stream.

Maloney, 40-41 (emphasis supplied)(footnotes omitted).

What we see, therefore, is that the early members of this Court, closer to the sovereignty lands dispute that began with Black River Phosphate than we are today, by engraining the public trust doctrine in the sovereignty lands cases we discuss here, were unwilling to regard the designation of state-owned sovereignty lands by early federal surveyors as sufficiently reliable to determine forever the size and character of Florida's sovereignty lands.

c. The Construction of Odom in Cyanamid I

If the Peace and Alafia riverbeds in issue are sovereignty lands, they are not alienated by the swamp and overflow deeds in issue, and thus the title issue rests upon a factual determination of the navigability of the river. This is precisely the conclusion reached by the federal district court in Cyanamid I when respondents sought early dismissal of the Trustees' title claims upon authority of Odom. It correctly refused to apply Odom to extinguish the Trustees' title to the riverbeds in issue here. Upon the proper construction of Odom, Martin v. Busch, and Florida's other sovereignty lands cases, Chief Judge Stafford held, by memorandum opinion dated January 10, 1979, that swamp and overflow deeds from the Trustees are ineffective to convey into private ownership any sovereignty submerged lands beneath the ordinary high water line of navigable rivers. A. 52-66. If the portion of the river coursing the lands in issue were navigable in fact at statehood, said the Court, such lands were acquired by Florida as sovereignty lands, and are not alienated by swamp and overflow deeds.

> [T]he . . . "public trust doctrine" precludes the assumption that the rivers . . . passed into private ownership. . . .
>
> * * * *
>
> [A] conveyance by the sovereign of uplands does not include a conveyance of lands below the line of ordinary high water unless both the authority and the intent to convey such lands is clear. Shively v. Bowlby, supra; Martin v. Busch, supra. Thus, a grantee of state-owned lands takes with notice that the conveyance extends only to the

> high water mark and does not include sovereignty lands. Odom v. Deltona Corp., supra, at 988; Martin v. Busch, supra, at 285-86.

A.55-56, 57.

The District Court further held that the constitutional and statutory provisions relied upon by Odom were inapplicable upon these facts:

> [T]he constitutional and statutory provisions applied in Odom do not foreclose the claims made here by Coastal and the State of Florida. Unlike the lakes and ponds in Odom, the rivers involved in the present cases have not been determined to be non-navigable. Thus, defendants' title to the neighboring uplands does not in itself give them any claim to lands lying below the ordinary high water mark; title to all sovereignty land is impliedly reserved to the state, and the grantee of uplands takes with notice that the conveyance does not pass title to trust properties. Martin v. Busch, supra. Thus, the factual question of navigability remains . . . Plaintiff and the State of Florida are entitled to present evidence, as they say they are prepared to do, showing that the presumption is unwarranted and that the rivers are navigable-in-fact.

A. 58-59. (emphasis supplied).

B. THE LEGAL ESTOPPEL QUESTION

Certified Question

> 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?

Argument

> The doctrine of legal estoppel or estoppel by deed cannot be applied to prevent the Trustees from asserting title to sovereignty lands where the early Trustees lacked authority to alienate those lands.

Notwithstanding whether the Peace and Alafia were navigable, the Court below determined that the Trustees were barred from asserting a sovereignty title claim by the doctrine of legal estoppel.

In applying legal estoppel, or estoppel by deed, to the swamp and overflow deeds in issue, the Circuit Court relied upon three decisions of this Court -- Odom v. Deltona, Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961), and Daniell v. Sherrill, 48 So.2d 736 (Fla. 1950). This reliance is misplaced, however, for these decisions are factually inapposite to this case. In Odom, as we have noted, the lands involved were found to be non-navigable as a matter of law. Legal estoppel was thus invoked in Odom to bar the Trustees' claim to swamp and overflow lands -- not to sovereignty lands -- which they were empowered to convey. In Lobean, legal estoppel was applied to bar the Trustees' claim that a 1946 Murphy Act deed, which they issued, was void. While the Murphy deed was void, as it was later found to cover sovereignty lands, the sovereignty lands were tidal submerged lands to which the Trustees held title, and were empowered to convey. 127 So.2d at 103. Likewise, in Daniell v. Sherrill, the Trustees eventually obtained valid title to uplands, which they previously conveyed as tax lands when title was in the United States. Later the lands were acquired from the United States, by purchase, and since the Trustees had full authority over them, they were later estopped to deny the validity of the earlier conveyance.

In each of these cases, the Trustees were lawfully empowered to alienate the lands in issue. Thereafter, they were subsequently prevented from denying the validity of the conveyances. None of those cases, however, applied legal estoppel to bar a Trustees' claim to sovereignty submerged lands which the Trustees were not empowered to alienate. Legal estoppel is likewise inapplicable here because the deeds relied upon by Cyanamid and Estech are not lawfully effective to convey sovereignty lands. Florida courts have long held that void deeds cannot support an estoppel,7/ Phillips v. Lowenstein, 91 Fla. 89, 107 So. 350 (1926), and this requirement was emphasized in Odom:

> Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable.

341 So.2d at 989 (emphasis supplied).

7/ Respondents have suggested that this rule has been weakened by Zofnas v. Holwell, 234 So.2d 1, 3 (Fla. 1970). In Zofnas, the court held that a married woman was legally estopped from attacking the validity of certain deeds on the basis that they had been executed without the joinder of her husband, where the deeds described her as a single woman. The court's holding was limited on its facts to deeds "executed by a married woman without the joinder of her husband." 234 So.2d at 3. There is absolutely no indication that the holding of Zofnas should be applied to deeds from State officials who lacked authority to convey the lands in issue out of the public trust.

That the swamp and overflow deeds in issue here were not effective to convey sovereignty lands cannot be doubted.

> If by mistake or otherwise sales or conveyances are made by the trustees of the internal improvement fund of sovereignty lands, such as lands under navigable waters in the state or tidelands, or if such trustees make sales and conveyances of state school lands, as and for swamp and overflowed lands, 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.

Martin v. Busch, supra, 112 So. at 285. See also Hillsborough County v. Dana, 20 Fla. Supp. 177 (Fla. 13th Cir. Ct. 1962)(legal estoppel cannot be applied against the Trustees where they did not have the authority to alienate the lands).

Florida courts thus have uniformly required the existence of lawful acts of State officers as conditions precedent to the invocation of legal estoppel. See Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So.2d 517, 524 (Fla. 1st DCA 1971); 22 Fla. Jur.2d 426, Estoppel and Waiver § 11 ("[A]n estoppel does not arise from a deed. . .which is invalid in that it is contrary to public policy or to some statutory prohibition, and is therefore null and void in contemplation of law.")

The application here of estoppel by deed to bar the Trustees' assertion of title to sovereignty riverbeds results again in the abandonment of Florida's Public Trust Doctrine, and should be rejected.

C. APPLICABILITY OF THE MARKETABLE RECORD TITLE ACT

Certified Question

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?

Argument

The Marketable Record Title Act, Chapter 712, Florida Statutes, does not operate to divest the Trustees of title to sovereignty lands below the ordinary high-water mark of navigable rivers.

The District Court held finally that the Marketable Record Title Act, Chapter 712, Florida Statutes (A. 67-68), operates to divest the Trustees of any sovereignty lands which may lie within the perimeters of the deeds in issue. The Court relied again principally upon Odom, and also upon Sawyer v. Modrall, 286 So.2d 610 (Fla. 4th DCA 1973), cert. denied, 297 So.2d 562 (Fla. 1974); Starnes v. Marcon Inv. Group, 571 F.2d 1369 (5th Cir. 1978); and three recent District Court of Appeal decisions -- State v. Laney, 399 So.2d 408 (Fla. 3d DCA 1981), State v. Contemporary Land Sales, Inc., 400 So.2d 488 (Fla. 5th DCA 1981), and Board of Trustees v. Paradise Fruit Co., 414 So.2d 10 (Fla. 5th DCA 1982), review denied 432 So.2d 37.

The issue presented is whether MRTA applies to divest the public trust of sovereignty lands. It is clear that the debate is not foreclosed. Since Odom was decided, the question has been reserved by this Court on two occasions. Askew v. Sonson, 409

So. 2d 7, 9(Fla. 1981); City of Miami v. St. Joe Paper Co., 364 So. 2d 439, 445, 449 (Fla. 1978). Neither has the Court considered the effect of the 1978 amendment to MRTA specifically excepting sovereignty lands. Only Paradise Fruit, of the decisions relied upon by the District Court here, has considered the 1978 amendment, and its prospective only application does not address the interpretive nature of the amendment.

Starnes and Contemporary Land Sales rely upon Odom to hold that MRTA may operate to divest the state of title to sovereignty lands. Odom, therefore, is again the principal authority for the District Court's application of MRTA. Laney must be set aside, for it involved only swamp and overflow lands, not sovereignty lands, and thus is inapposite here.

1. Odom and Sawyer Are Not Dispositive

Before addressing the provisions of MRTA, discussion of Odom and Sawyer is required. This Court's opinion in Odom, and the opinion of the Fourth District in Sawyer v. Modrall, cited with approval in Odom, suggest that MRTA extinguishes the Trustees' claims to "beds underlying navigable waters previously conveyed. . . ." Odom, 341 So.2d at 989. See Sawyer, 286 So.2d at 614. The language from Odom is, however, significantly restricted in the following sentence of the opinion to "lawfully executed land conveyances."

> Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights . . . state officials should not . . . take from the grantee the rights which have been conveyed previously. . . .

Id. (emphasis supplied).

Concededly, the Trustees were without authority to convey sovereignty lands at the time the deeds in dispute were issued. The Trustees held no title to sovereignty lands. Without title, the Trustees' deeds could not "lawfully" convey the lands in issue.

We suggest, therefore, that the discussion in Odom of the application of MRTA to sovereignty lands is dicta. The lands in issue in Odom were non-navigable as a matter of law and fact. Sovereignty riverbeds clearly were not involved, and clearly were not previously lawfully conveyed.

Sawyer v. Modrall is a clear example of sovereignty lands that were previously lawfully conveyed, and thus it and Odom are entirely consistent. The lands in issue were tidal sovereignty lands along the intracoastal water way in Boca Raton that the Trustees were required to convey to the riparian landowner by Florida's early bulkhead law. 286 So.2d at 613. Sawyer thus involved an intentional, lawful conveyance of sovereignty land that is not an appropriate subject of the protection of the public trust doctrine.

In Askew v. Sonson, supra, the Court took pains to leave open the question whether MRTA could be utilized to divest the people of the State of Florida of sovereign lands held in public trust for them. 409 So.2d at 9. Accordingly, notwithstanding the interpretations accorded Odom by other courts, this Court, we believe, has yet to make a definitive ruling on the applicability of MRTA to sovereign lands acquired by the State under the Equal Footing Doctrine -- particularly sovereignty riverbeds.

We turn then to an analysis of the constitutional and statutory provisions upon which the merits of the MRTA issue must be decided.

2. The Legislature, by enacting the Marketable Record Title Act, did not intend to divest the Trustees of title to sovereignty lands, and the Act should be so construed.

MRTA was enacted as Chapter 63-133, Laws of Florida. At that time, the Trustees did not hold title to Florida's navigable, freshwater rivers and streams. The Legislature itself still held such sovereignty lands in public trust. MRTA was written and enacted by lawyers, for lawyers, to facilitate resolution of title disputes between private landowners. Every lawyer with the slightest exposure to property law knows of the navigability exception. Certainly in 1963 the lawyers who wrote and enacted MRTA knew Florida's long-enunciated Public Trust Doctrine -- precluding divestiture of sovereignty lands in the absence of a clear intent to convey such lands into private ownership in the public interest. See Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908). See also Pierce v. Warren, 47 So.2d 857 (Fla. 1950), cert. denied, 341 U.S. 914 (1951); Brickell v. Trammell, 77 Fla. 544, 82 So. 221 (1919). The thrust of Florida law, from the date it was admitted into the Union until the date of the enactment of MRTA was clear -- Sovereignty lands were not lost to the people of Florida by inadvertence!

Thus, if the Legislature intended to change this fundamental concept, it may have been expected to do so in explicit terms;

indeed it should have done so -- and its failure in this respect should prevent any construction of MRTA that divests title of sovereignty lands. Addressing a similar situation where legislation was urged, by implication, as having overcome longstanding recognition of an exemption, this Court stated:

> [I]n a situation such as this--with such long standing recognition of such exemption by both the Legislature, this Court, the district court and the circuit court--we are not persuaded that such a catyclysmic [sic] result could be brought about by the application of the principle of implied repeal.
>
> . . . .
>
> Where an act purports to overturn long-standing legal precedent and completely change the construction placed on a statute by the courts, it is not too much to require that it be done in unmistakable language.

State v. Kirk, 231 So.2d 522, 523-24 (Fla. 1970).

It has long been the law of this state that statutes in derogation of sovereignty are to be strictly construed. State ex rel. Davis v. Love, 99 Fla. 333, 126 So. 374, 377 (1930). This rule is particularly significant where sovereignty lands are involved. Where the language of a public land grant is subject to reasonable doubt, any ambiguities are resolved strictly against the grantee and in favor of the government. Tampa & J. Ry. Co. v. Catts, 79 Fla. 235, 85 So. 364 (1920). The fact that this rule is the opposite of the common law rule construing ambiguities in favor of the grantee underscores the importance of sovereignty lands. As the Supreme Court of Louisiana held under similar circumstances:

> [A]ny alienation or grant of the title to navigable waters by the legislature must be express and specific and is never implied or presumed from general language in a grant or statute.

Gulf Oil Corp. v. State Mineral Bd., 317 So.2d 576, 589 (La. 1975) (emphasis supplied).

3. The specific exceptions to marketability provided by Chapter 712 exempt the lands in question from the Act.

Section 712.03(4) excepts interests arising from recorded title transactions. Section 712.01(3) provides that "'[t]itle transaction' means any recorded instrument or court proceeding which affects title to any estate or interest in land." The District Court entirely ignores the fact that a recorded copy of Coastal's lease from the State constitutes a "title transaction" under this provision. It has been held that a wild deed--much less a valid lease--constitutes a "title transaction" and can serve as as "root of title" for purposes of MRTA. In City of Miami v. St. Joe Paper Co., the Court noted its earlier decision in ITT Rayonier, Inc. v. Wadsworth, 346 So.2d 1004 (Fla. 1977), as authority for the proposition that the words "purports" and "affects title" as found in Section 712.01, should be given their usual meaning. "In this broad sense," said the Court, "even a void instrument of record 'affects' land titles by casting a cloud or doubt thereon." 364 So.2d at 447. Thus, there is clear authority for the proposition that the recording of the lease between the Trustees and Coastal, addressed in some detail today by Coastal, is a valid "title transaction" for purposes of MRTA, exempting the lands in issue here from MRTA's operation.

Likewise, Section 712.03(3) protects the rights "of any person in possession of the lands, so long as such person is in such possession." When MRTA was enacted, Florida law properly presumed that the state was in possession of all public lands. While respondents might argue that repeal of the statute specifically exempting the State from adverse possession (Section 95.15, Florida Statutes (1973), was repealed by Chapter 74-382, Laws of Florida, effective January 1, 1975) casts doubt here, we need not debate this point, for at least up until 1975, by the specific provisions of Section 95.13, Florida Statutes (1973), the holder of title to real estate was presumed to be in possession thereof. Concededly, before January 1, 1975, the doctrine of adverse possession did not apply to the State, and therefore the Trustees were presumed to be in possession. As such, it is specifically exempt by Section 712.03 (3) at least until December 31, 1974.

4. The savings clause is inadequate and unconstitutional under the circumstances.

This Court has correctly characterized MRTA as a statute of limitations:

> The Marketable Record Title Act is also a statute of limitations in that it requires stale demands to be asserted within a reasonable time after a cause of action has accrued. It prescribes a period within which a right may be enforced.

City of Miami v. St. Joe Paper Co., 364 So.2d at 442. While the legislature may clearly impose a limitations period where none previously existed, as it did with the enactment of MRTA, such enactment may not constitutionally abolish pre-existing statutory

or common law property rights without providing the holder of such rights reasonable notice, and a reasonable period within which such rights may be asserted. See Overland Constr. Co. v. Sirmons, 369 So.2d 572 (Fla. 1979). Thus, whenever the legislature acts to create a new statute of limitations, or to shorten an existing one, it is required to enact a "savings clause" that affords the holders of rights affected by the new law a reasonable time to protect such rights if the act is to pass constitutional muster. Carpenter v. Florida Central Credit Union, 369 So.2d 935, 938 (Fla. 1979).

MRTA's savings clause, Section 712.09, Fla. Stat., provided a two-year period for the filing of notices to protect title against extinguishment under the Act, until July 1, 1965. As a matter of law and constitutional infirmity, this time is inadequate if the provisions of MRTA are construed to apply to sovereignty lands.

The size of the task is directly related to the reasonableness of the time allowed by a "savings clause." Protection of the State's fresh-water sovereignty lands against the encroachment of MRTA is a practically impossible task. The size and distribution of these holdings make it so. We have argued that boundaries of much of these lands have not been surveyed. There is as yet no comprehensive index of state-owned sovereignty lands. Although no accurate inventory exists of all sovereignty lands, recent estimates furnish some idea of the magnitude of these holdings. For example, the outline of the Florida coastline is estimated to be 1,197 miles long; the detailed tidal

shoreline, including bays, sounds and estuaries, is estimated to be 8,426 miles long.[8]/ Inland waters that are hypothetically navigable are estimated to cover 2.86 million acres.[9]/

While the Trustees are now under statutory directive to inventory all state lands, including sovereignty lands,[10]/ that process had not been begun when MRTA's savings clause expired. Indeed, as we noted earlier, the Trustees' did not acquire title to freshwater sovereignty lands until four years after the savings clause expired! Thus, the application of MRTA below divests the public trust of title to these lands before the responsibility for their protection rested authoritatively with any state agency. No opportunity whatsoever existed before the 1965 expiration of the savings clause for the Trustees to notice and preserve these public lands from the operation of the statute. In these circumstances, it is unfair--and unconstitutional--to apply a limitations provision to these public lands without providing the state with clear and unequivocal notice, and sufficient opportunity to preserve sovereignty lands from wholesale alienation.

8/ Morris, The Florida Handbook 1979-80 (17th ed.) at 400.

9/ Id. at 14. The estimate includes, for example, the bottom lands of lakes greater than 40 acres in size, rivers with an average annual flow greater than 100 cubic feet per second, and canals, embayments, sounds, streams, sloughs, estuaries and other water bodies meeting specified requirements.

10/ Section 253.03(8), Fla. Stat.

5. MRTA is Otherwise Unconstitutional as Applied.

Article X, Section 11, of the Florida Constitution of 1968, provides in pertinent part:

> Sovereignty lands--The title to lands under navigable waters . . . which have not been alienated . . . is held by the state by virtue of its sovereignty, in trust for all of the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

MRTA, if applied to divest the Trustees of title to sovereignty lands as a matter of law, is violative of this provision, and the due process guarantee of the Florida Constitution. See State v. Black River Phosphate Co., 32 Fla. at 99-100, 13 So. at 646.

6. The 1978 Amendment to MRTA, Section 712.03(7), is declaratory of the law.

This brings us to the 1978 Amendment to MRTA. In the face of the failure of the original enactment to specifically address sovereignty lands, it is the only clear expression of legislative intent.

The timing of and the circumstances surrounding the enactment of an amendment are to be considered in interpreting the amendment's effect. Sunshine State News Co. v. State, 121 So.2d 705 (Fla. 3d DCA 1960).11/ It has also been recognized that if

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11/ See also Williams v. Hartford Accident and Indemnity Co., 382 So.2d 1216 (Fla. 1980) (holding that underinsured motorist coverage was required, even before a subsequent amendment specified this fact); Foremost Insurance Co. v. Medders, 399 So.2d 128 (Fla. 5th DCA 1981) (in which the court looked to a 1979 amendment in construing a 1977 law pertaining to the question of whether a mobile home was real or personal property).

an amendment is enacted soon after controversies as to the interpretation of the original act arise, the amendment should be regarded as a legislative interpretation of the original act. United States ex rel. Guest v. Perkins, 17 F. Supp. 177 (D.D.C. 1936); Hambel v. Lowry, 174 S.W. 405 (Mo. 1915). In specific response to the attempt by Cyanamid and Estech in Cyanamid I and Estech I to apply Odom to extinguish sovereignty title under MRTA, the Legislature (after the calling by the Governor of a special legislative session) enacted Chapter 78-288, Laws of Florida, providing that "state title to lands beneath navigable waters acquired by virtue of sovereignty" is included among the "exceptions to marketability" listed in Section 712.03, Florida Statutes. As a clear rejoinder to respondents' interpretation of Odom, this legislative pronouncement (now Section 712.03(7) Fla. Stat.) must be characterized as interpretive legislation declaratory of the scope and intendment of the original enactment.[12]/

Florida has long acknowledged the soundness of the principle of statutory construction calling for analysis of all laws having "the same subject, or having the same general purpose . . . as together constituting one law" and that "it is proper to consider, not only Acts passed at the same session of the Legislature, but also Acts passed at prior or subsequent sessions, and even those which have been repealed." Amos v. Conkling, 99 Fla. 206,

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12/ The Governor's Proclamation, and the Resolution of the Trustees pertaining to the issue, are included in the records below, and appear at A. 69-70.

126 So. 283 (1930). Subsequent Supreme Court decisions in Florida utilize this same principle. Gay v. Canada Dry Bottling Co. of Florida, Inc., 59 So.2d 788, 790 (Fla. 1952) (the court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation); Garner v. Ward, 251 So.2d 252, 255 (Fla. 1971) (it is an accepted maxim of statutory construction that a law should be construed together with and in harmony with any other statute relating to the same subject matter or having the same purpose, even though the statutes were not enacted at the same time.) The district courts of appeal have held likewise. Overstreet v. Pollak, 127 So.2d 124, 124-25 (Fla. 3d DCA 1961) (the court cites and quotes from Gay v. Canada Dry Bottling Co., supra).

Specifically applicable to the instant situation, where the Legislature was called into special session by the Governor at the request of the Trustees, and thereafter enacted Section 712.03(7), is this Court's decision in Williams v. Hartford Accident & Indemnity Co., 382 So.2d 1216, 1220 (Fla. 1980). The Court was confronted there with a similar question of statutory construction. The question was whether a 1971 law, which did not expressly require "underinsured motorist coverage," did in fact require such coverage. In 1973, the Legislature specifically amended the applicable law to require "underinsured motorist coverage." This Court held that the original law required the same coverage called for by the later amendment. The Court observed that

> the timing and circumstances of an enactment may indicate it was formal only and served as a legislative clarification or interpretation of existing law, and thus such an enactment may even suggest that the same rights existed before it. See Overstreet v. Pollak, 127 So.2d 124 (Fla. 3d DCA 1961); Gay v. Canada Dry Bottling Co. of Florida, 59 So.2d 788 (Fla. 1952). We believe that the underinsured vehicle coverage provision of chapter 73-180 was intended by the legislature to clarify and secure from doubt a change in our state's automobile insurance laws that had been enacted shortly before through chapter 71-88.

382 So.2d at 1220 (emphasis supplied).

A recent decision acknowledging the function of such legislation is Modern Plating Co. v. Whitton, 394 So.2d 515, 517 n.2 (Fla. 1st DCA 1981):

> After the IRC rendered these decisions, the legislature promptly amended the law . . . . Apparently, the purpose of this amendment was to correct the IRC's misunderstanding . . . .

The purpose of the 1978 amendment was to interpret MRTA in a way that would correct the assumption that the 1963 Legislature, by not explicitly excluding sovereignty lands, meant that these lands were subject to the operation of MRTA. Since the amendment is not inconsistent with the original Act, post-1978 judicial interpretations of MRTA should be consistent with the 1978 amendment. See United States v. Gordon, 638 F.2d 886 (5th Cir. 1981) (in which the court held that where an amendment is not inconsistent with the original statute, the statute should be interpreted consistently with the amendment).

If MRTA is applied to extinguish state title to the riverbeds in issue here, invaluable, irreplaceable watercourses that

rightfully belong in trust for Floridians now and to come would be titled in private hands by an Act that did not provide the present Trustees, as stewards of these lands, reasonable opportunity to classify them, or protect them under the statute. With such an important part of our heritage at stake, the Court is asked today to declare MRTA's savings clause unconstitutional as applied to sovereignty lands, or to interpret the original enactment consistent with the 1978 amendment excluding sovereignty lands from its operation.

CONCLUSION

Much of the debate here has centered upon the equities of the competing public and private ownership claims. There are valid points on each side of the question. The point here, however, is that these equities should be resolved where they are normally resolved--in a trial court fact-finding proceeding. The wholesale abolition of sovereignty lands from the public trust that is accomplished by the decision below, upon technical interpretations of ambiguous legislative enactments, is a poor and costly substitute for the recognized truth-finding process of trial by jury.

The public trust is immeasurably benefited by a determination that these lands remain presumptively in state ownership. If the state's proof is sufficient, they will remain, unlike private waters, a valuable part of the public lands of this state to which all Floridians are entitled. They will remain open for fishing, boating, and recreation, and the preservation of their

environmental integrity will be insured. Otherwise, there is nothing to prevent fences, like that which crosses the Wakulla, from rising to bar Floridians from a part of their most valuable heritage.

The opinion below is wrong, unwise, and disastrous to the public's rights to lands that are provably sovereignty in character. It results in the divestiture from the public trust of sovereignty riverbeds -- a result never before reached by statute or case law in Florida. The views set forth in the opinion should be disapproved, and the judgment reversed.

Respectfully submitted,

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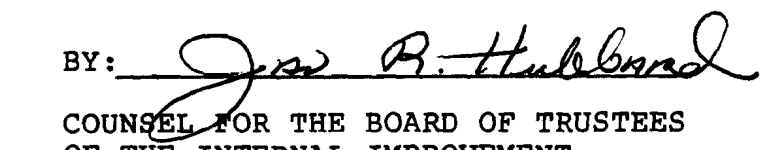
BY: 

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 25th day of September, 1984 to: Chesterfield Smith, Esq., of HOLLAND & KNIGHT, 1200 Brickell Avenue, Miami, Florida 33030; Hume F. Coleman, Esq., and Julian Clarkson of HOLLAND & KNIGHT, Post Office Drawer 810, Tallahassee, Florida 32302; Robert J. Angerer, Esq., of the Law Offices of Robert J. Angerer, Post Office Box 10468, Tallahassee, Florida 32304; Joseph C. Jacobs, Esq., of ERVIN, VARN, JACOBS, ODOM & KITCHEN, Post Office Box 1170, Tallahassee, Florida 32302; C. Dean Reasoner, Esq., of REASONER, DAVIS & VINSON, 800-27th Street, N.W., Washington, D.C. 20006 and Daniel J. Wiser, Esq., of ROBERTS, MILLER, BAGGETT, LaFACE, RICHARD & WISER, 202 East College Avenue, Tallahassee, Florida 32302.

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