

IN THE SUPREME COURT OF FLORIDA

NOS. 65,755/65,969

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

FILED

SID J. WHITE

NOV 9 1984

Petitioners,

CLERK, SUPREME COURT

vs.

By: *pl*
Chief Deputy Clerk

AMERICAN CYANAMID COMPANY, and ESTECH, INC.,

Respondents.

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

PETITIONER'S REPLY BRIEF

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ARGUMENT

It would serve little purpose here to continue the debate over the different constructions placed by the parties upon Odom v. Deltona Corp., 341 So.2d 977 (1977). It is important, however, to focus in reply upon respondents' effort to mitigate the significance and impact of the decision below.

The District Court decision affirms a trial court judgment awarding respondents fee simple ownership of portion of the beds of two of Florida's historic rivers, the Peace and Alafia, waters which are provably navigable in fact for purposes of this review. This result has never before attained in Florida--the private ownership of a sovereignty riverbed--absent a title founded in a Spanish land grant.

Until the present litigation began, Cyanamid and Estech took the position that these sovereignty riverbeds were state-owned. The correspondence and internal memoranda cited by Coastal in its Brief on the Merits makes this abundantly clear. It is equally clear that other phosphate mining companies similarly situated as riparian landowners in Polk County initially regarded the riverbeds in issue as

state-owned.¹ This position apparently changed as respondents defended the conversion cases to which they repeatedly refer.

The early view taken by respondents that the riverbeds in dispute were state-owned is understandable. Until the decision below, an unbroken line of sovereignty lands decisions from this Court (apart from the debate over Odom), has repeatedly reserved sovereignty submerged lands from swamp and overflow deeds. The doctrine is so venerable in Florida that it has not been seriously challenged, until this litigation, since 1950. See Pierce v. Warren, 47 So.2d 857 (Fla. 1950), cert. denied 341 U.S. 914 (1951).

The District Court decision abolishes the public trust doctrine for unmeandered but navigable waters in Florida. It relies essentially upon the wholesale conveyance of some 21,000,000 acres of Florida through the swamp lands program, section by section in most cases, at a time when the Trustees held no title to sovereignty submerged lands, to conclusively establish the private character of these lands.

¹ See Amicus Curiae Coastal Petroleum Company's Brief on the Merits, Board of Trustees of the Internal Improvement Trust Fund v. Mobil Oil Corporation, Case No. 65,913, now pending before this Court, at 8-14.

The solution is a simply one, but it exacts a high price for its efficiency. It is a price no Florida court has heretofore been willing to accept--a balance of private interests over public rights which has heretofore been considered untenable.

There can be no doubt, as respondents properly point out, that government must be fair to all of its citizens, corporate and private. We suggest that fairness is best assured here, however, not by the wholesale alienation of the sovereignty lands in dispute, but rather by a determination that the lands remain presumptively sovereign in character yet subject to any equitable defenses respondents may have to the sovereignty title claim. Thus, if the Trustees' sovereignty title claim is unfair or creates an unjust result, it is likely that the good sense of the trier of fact in this case will reach the proper determination as to whether or not the sovereignty claims may survive.

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. Cyanamid and Estech can point to the inclusion of the sovereignty lands within the perimeters of the deeds, and the absence of any

reservation of sovereignty title. In disputing the Trustees' navigability claim, they can point to the failure of the early surveyors to meander the rivers in the areas in dispute, and the certification of the lands by the state in the swamp and overflow lands program. Thus, respondents may be able to raise equitable and factual defenses to the Trustees' sovereignty claims.

There are, however, compelling equities on the public's side of the question. Before today, the sovereignty lands decisions of this Court announced to all who inquired that sovereignty lands were trust lands, held for the benefit of the public, and reserved as a matter of law from swamp and overflow deeds. Presumably, reliance upon this doctrine by the Trustees has been justified. Further, as Coastal demonstrates, there is significant evidence that respondents and their predecessors regarded the portion of the rivers in issue as navigable and state owned, and thus were on notice of the state's sovereignty claim. There is competent evidence of navigability to support this notice, for indeed phosphate barges plied portions of the waters in issue in the latter part of the nineteenth century. The evidence arguably establishes, therefore, that the Trustees' title

claims, far from being a surprise, are acknowledged by respondents' own records, and that their present claim to fee simple title to the sovereignty lands in issue is newly found.²

The point, of course, is that the equities of this title dispute, and the facts which surround it, should be resolved in a trial court fact finding proceeding which will insure that the result is fair to both the Trustees and the respondents.

² If the Trustees' appeal here is successful, it will be interesting to see if the legal advice and title opinions rendered to respondents excepted the navigable water bottoms in issue, and thus acknowledged the public trust doctrine, or rather certified private title to the beds in issue regardless of navigability. The U.S. District Court in Tallahassee, where the Cyanamid I and Estech I conversion actions are pending, and where the Mobil I conversion action was pending before remand, held in Mobil I that the company had waived any attorney-client privilege with respect to such title opinions or advice regarding the sovereignty status of the rivers in issue by alleging that they relied upon the Trustees' deeds, and thus that the Trustees were equitably estopped to deny the conveyance of the riverbeds. Judge Stafford, by order of February 24, 1982, held that the Trustees were entitled to verify this reliance by reviewing title opinions and legal advice regarding the property to insure that it did not conflict with the present claim of private title, and the present claim of reliance upon the Trustees' deeds. This discovery remains.

If the state is not barred as a matter of law from asserting sovereignty title to unmeandered water bodies lying within the boundaries of these swamp lands conveyances, will this result in unfair loss to private parties who can show reliance upon color of title through these deeds? The answer is clearly no. If innocent reliance can be shown, and improvements were made on the land, and if ejectment is sought by the state following proof of sovereignty ownership, the color of title inherent in the inclusion of these lands within swamp and overflow deeds will require payment by the state of betterment--the full value of such improvements. Section 66.061, Fla. Stat. Moreover, since the lands in issue here are inland, freshwater portions of Florida's river system, if not improved today, it is unlikely that they can be dredged, filled, mined or improved in the future. The use of such lands by those who hold color of title is thus not likely to be affected by recognition of sovereignty ownership. Riparian rights will still attain.

On the other hand, the Public Trust is immeasurably benefited by a determination that these lands remain presumptively in state ownership. Unlike private waters, they will remain a valuable part of the public lands of this state to which all Floridians are entitled.

The trial court judgment, drafted by respondents' counsel, attempts to mitigate the consequences of its holding to the Public Trust Doctrine by noting that the state retains regulatory powers over the navigable waters in issue, and by carefully limiting the reach of the decision to proprietary rights of the respondents in the riverbeds. The Public Trust is, however, no less depleted. These proprietary rights include all ownership rights. This Court has repeatedly held that neither the public nor the owner of adjacent lands has a right to boat on, fish in, or otherwise use privately owned bodies of water.

Osceola County v. Triple-E Development Company, 90 So.2d 600, 603 (Fla. 1956). Accord: Odom v. Deltona Corp., 341 So.2d at 989 ("This Court has delineated rather forcefully the absence of public rights, including fishing, in privately owned lakes.").

Florida law, therefore, does not make the distinction between governmental and proprietary rights in public lands that respondents suggest. The fact that the state always retains its authority to regulate waters of the state for the health, safety, and welfare of the people, as it does to regulate any land in the state, simply does not establish any public right to the use of privately owned lands, submerged or otherwise. Thus, if the lands in issue are

conclusively characterized as swamp and overflow lands, it is clear that no navigational servitude or public right of use attaches, and that the land owner is free, if it wishes, to exclude the public.³

There is, as Dean Maloney has suggested in the portions of his treatise cited by respondents, much to be said for adoption of the governmental/proprietary rights distinction in situations where public land is lawfully sold into private ownership. The preservation of public rights of navigation, fishing, and use of the waters likewise would be a far better result here than the complete loss of these lands from the public domain, and the concomitant precedent that such a result would set for similarly situated lands throughout Florida. However, the suggested distinction would require an entire change in Florida law in a case where the issue was not litigated. The trial court did not quiet public rights in favor of the state. It simply held that the issue was not presented. The judgment, therefore, is a one-way street--in respondents' favor.

³ The author of the treatise relied upon by respondents for the governmental/proprietary rights distinction, "Public and Private Ownership Rights in Lands Under Navigable Waters: the Governmental/Proprietary Distinction," is an associate in the firm which represents respondents in this case. The article was published on December 21, 1982, after the complaint in Cyanamid was filed, and just prior to the filing of the complaint in Estech.

It is likely that if the governmental/proprietary rights issue was fully litigated, many owners of private waters would contest the preservation of public rights in the state. It may be also that the governmental/proprietary rights concept is not workable absent a change in the navigability test to one of recreational navigability as opposed to commercial use. Such a change in Florida law, whether meritorious or not, is better considered in the legislative environment which provides a forum for the input of all concerned parties, and the development of a more detailed debate. It is there that such a significant development of water and land use policy should take place.

The final point to be made is that this case involves Florida's invaluable water resources, not phosphate minerals, as respondents attempt to argue. To be sure, the decision will effect the viability of conversion actions pending against respondents. These cases, of course, should continue to judgment for money damages if respondents have mined phosphate minerals from the beds of these rivers without defense or justification--such as good faith reliance upon a belief that the lands were theirs. A jury is well suited to that determination. Today, however, this Court must decide a far more important question, where monetary value cannot be assessed--the fate of the public trust doctrine's historic protection of sovereignty lands.

That is the issue presented, not the validity of a damage award.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th day of November, 1984 to:
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