0/a 5-6-85

IN THE SUPREME COURT OF FLORIDA

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65,913

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioner,

vs.

MOBIL OIL CORPORATION,

Respondent.

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

Amicus Curiae Brief Of The Florida Defenders Of The Environment

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SUMMARY OF ARGUMENT

1. The Public Trust doctrine historically prohibits the conveyance of title to sovereignty lands under navigable rivers and streams absent a clear expression of legislative intent and an express finding that the public trust would be served by the conveyance. This view ought to be steadfastly adhered to as the law of Florida. Otherwise, the capacity of the State to protect vital public interests in historic sovereignty lands will be impaired or lost. Specifically, Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977), pertaining to small, non-navigable lakes and ponds, should not be applied to navigable rivers and streams.

2. In the alternative, if the Court holds that legal title to said sovereignty lands was conveyed by swamp and overflowed lands deeds, then the Court should clearly acknowledge that certain Public Trust property interests were not conveyed by them. The Public Trust property interests include the right to use sovereignty submerged lands and overlying waters for swimming, fishing and boating, as well as the right to protect the public interest through flood control, conservation and similar measures. This theory is presaged by earlier holdings of this Court, such as State v. Black River Phosphate Co., 13 So. 640 (Fla. 1893) and has been forthrightly acknowledged in other jurisdiction, especially California. Moreover, these Public Trust property interests would not be extinguished by the Marketable Record Title Act because, of, among other things, the exemption found in Section 712.03(5), Florida Statutes.

ARGUMENT

A. ISSUES ADDRESSED

Although it may appear from a passing glance that this case

involves only a dispute over money obtained from the sale of minerals already extracted from the earth, the holdings below and arguments made by the parties in their briefs call into question the title ownership of the bottoms of virtually all the rivers and streams of Florida except those that were meandered before the turn of the century. Exactly how many miles of rivers and streams this would comprise and exactly how few miles would remain in public ownership if the decision below is upheld is not recorded in the record of these proceedings, but it is asserted by the Trustees that more than twenty-one million acres of land were conveyed by swamp and overflowed land patents (Petitioner's Brief on the Merits, p. 11). This figure is closely corroborated by a 1934 report of the Florida Department of Agriculture stating that 19,353,539.98 acres of land had been conveyed by swamp and overflowed land deeds as of July 1, 1934 (Twenty-third Biennial Report of the Department of Agriculture of the State of Florida, Land and Field Notes, Nathan Mayo, Commissioner of Agriculture, July 1, 1934). (See Appendix A) These deeds thereby conveyed lands totalling more than one-half of the approximately 39 million acres that make up the State of Florida.

Although only a small portion of the acreage conveyed by swamp and overflow lands deeds would constitute sovereignty lands under navigable waters, the usual swamp and overflow deed apparently described only the area covered, perhaps even by reference to sections or townships, without any specific mention, except for a few meandered water bodies, of the included rivers, streams, lakes or ponds that gave the conveyance its swamp and overflow character. Again, the typical character of these deeds is not recorded in the record.

Nevertheless, it seems highly probable that deeds of the character of that possessed by Respondent, Mobil, cover a substantial portion of the bottoms of rivers and streams found in the State of Florida and, if that is true, that the affirmance of the decisions below could extinguish any right and entitlement of the public of Florida to the use, enjoyment and protection of much of the sovereignty land of the State. In view of this uncertainty and of the grave consequences this litigation may pose to the public of Florida, Amicus Curiae submits alternative arguments to this Honorable Court in succeeding subsections to avoid grave damage to the public interest of the state.

B. SOVEREIGNTY LANDS LYING BENEATH NAVIGABLE WATERS OF RIVERS AND STREAMS OUGHT TO BE HELD TO BE INALIENABLE BY SWAMP AND OVERFLOW DEEDS, UNLESS AN EXPRESS CONVEYANCE OF SOVEREIGHTY LANDS WAS MADE WITH A FINDING THAT THE PUBLIC INTEREST WAS THEREBY SERVED, AND SAID LANDS SHOULD NOT BE DEEMED TO BE AFFECTED BY THE MARKETABLE RECORD TITLE ACT.

1. Introduction

Sovereignty submerged lands are vital environmental assets of all Florida's citizens. These special lands are so important to the public welfare that ancient legal doctrine declared them to be incapable of private ownership. THE INSTITUTES OF JUSTINIAN 2.2.1 (T. Cooper trans. & ed. 1841). The courts later vested title in the sovereign, subject to a trust safeguarding the public interest in using and protecting the resource. See generally, Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970). Recognized public interests include the right of navigation for commerce and pleasure; the right to swim, fish and hunt; the right to use water for consumptive use and waste disposal; and, the right to maintain aquatic ecosystems capable of supporting these public uses.

As argued above, the decision below threatens to divest the public of its interest in hundreds of miles of unmeandered navigable waters under rivers and streams included within the bounds of swamp and overflowed lands patents.

Public ownership of sovereignty lands under the bottoms of navigable rivers and streams assures that the state possesses absolute power to protect the public interests in those lands. Although it may be argued that the public's interest in submerged lands can be protected through regulation, it must also be conceded that to attempt to safeguard these essential public interests by regulation alone would be an awesome, if not impossible task. Moreover, where the constitutional limit of police power regulations is to be drawn before a taking ensues is fraught with uncertainty. Vesting fee ownership of sovereignty lands in private owners creates property rights in the owners. These include the right to mine, the right to build structures, and the right to exclude others. The courts have recognized that at some point regulation may so diminish the private rights of use as to constitute a taking of the private property. Denial of the right to mine privately owned submerged lands might be challenged as a taking. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Denial of permission to fill below the ordinary high water mark of privately owned navigable rivers could also give rise to colorable taking claims. Zabel v. Pinellas County Water and Navigation Control Authority, 171 So. 2d 376 (Fla. 1965), as would governmental mandates to ensure public access. Kaiser Aetna v. United States, 444 U.S. 164 (1979). Police power regulation of privately owned submerged lands is thus not sufficient protection of the public rights therein.

It goes without saying that the State treasury is not adequate to protect the public interest in sovereignty lands by purchase. It should also go without saying that no court should hold that those critical public assets were lightly conveyed away without even a mention of their specific conveyance and for a consideration that even at the time amounted to a pittance.

2. The Public Trust Doctrine Prohibits the Conveyance of Sovereignty Submerged Lands Except by Clear, Specific Legislative Intent or Constitutional Authority.

Sovereignty submerged lands were granted to the State in 1845 and are held today as an essential attribute of the State's sovereign powers. Early decisions of this Court safeguarded the property interest of the Trustees in order to protect the public trust in those lands. Alienation of sovereignty submerged lands was prohibited except where the trust interests would be promoted, State v. Black River Phosphate, 32 Fla. 82, 13 So. 640, 645 (1893), or not substantially impaired, Holland v. Fort Pierce Financing and Construction Company, 157 Fla. 649, 27 So. 2d 76 (1946). The responsibility of the Trustees to make such determinations and judicial deference toward their decisions was emphasized in Hayes v. Bowman, 91 So. 2d 795 Fla. (1957). Regretably, later decisions suggest a willingness to treat sovereignty submerged lands like ordinary real estate and the Trustees like private landowners. Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1977). Because of the devastating consequences to the public of simply sweeping streams and rivers under Odom, which pertained only to small lakes and ponds, Amicus Curiae urges this Count to distinguish Odom and limit that case to its facts.

Because of the special character of public trust lands, conveyance to private parties for personal exploitation should not be recognized absent clear authority and intent to alienate them. In addition to decisions of this Court, ably briefed by the parties in this case, Amicus Curiae urges the Court to consider the decisions of the Supreme Court of California, where the effect of conveyances purporting to divest the state of sovereignty submerged lands also been considered.

In People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913), the Supreme Court of California was called upon to decide whether the inclusion of sovereignty submerged lands within swamp and overflowed lands patents terminated the public trust in the lands conveyed. Holding that only bare legal title, subject to the public trust, was conveyed, the court stated,

> It is not to be assumed that the State, which is bound by the public trust to protect and preserve this public easement and use, should have intentionally abdicated the trust as to all land not within the very limited areas of the reservations, and should have directed the sale of any and every other part of the land along the shores and beaches to exclusive private use, to the destruction of the paramount public easement, which it was its duty to protect, and for the protection and regulation of which it received its title to such lands. 166 Cal. at 591, 138 P. at 85.
>
> [S]tatutes purporting to authorize an abandonment of such use will be carefully scrutinized and scanned to ascertain whether or not such was the legislative intention, and that intent must be clearly expressed or necessarily implied. And, if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation. Id., 168 Cal. 576, 597, 138 P. 79, 88

The public trust in sovereignty submerged lands has long been

protected by this court. In view of decisions holding conveyances void for lack of authority, State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908), and for failure to promote trust interests, State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893), it is inconceivable that the Trustees in conveying swamp and overflowed lands, or the Legislature in enacting the Marketable Record Title Act, would have believed it necessary to reserve the sovereign rights of the people of Florida.

In sum, Amicus Curiae asserts that the Public Trust doctrine of Florida restricts the alienability of sovereignty lands under navigable streams and rivers. Title ownership in said lands may not be extinguished by conveyance without expressly stating that the conveyance is being made and expressly finding that such a conveyance promotes the public interest. Amicus Curiae thus requests the Court to reverse the decisions below, and, specifically, urges that Odom not be extended to these facts.

C. IF SWAMP AND OVERFLOW DEEDS ARE HELD TO HAVE CONVEYED LEGAL TITLE TO SOVEREIGNTY LANDS, THIS COURT SHOULD HOLD THAT SAID DEEDS DID NOT CONVEY THE PROPERTY INTEREST OF THE SOVEREIGN IN SAID LAND TO PROTECT THE PUBLIC TRUST IN SWIMMING, BOATING, FISHING, FLOOD CONTROL, CONSERVATION AND SIMILAR PUBLIC CONCERNS.

In the alternative, Amicus Curiae asserts that if this Court holds that swamp and overflow lands deeds silently conveyed sovereignty lands under navigable streams and rivers without express mention and without an express finding that the public interest is served thereby, then those same conveyances should be deemed to have conveyed only legal title but not those property interests that are inherent to the sovereignty interests in the lands.

1. In General

As this Court well knows without citation of authority, an essential characteristic of the common law as it applies to property is divisibility. Property is a bundle of interests. Conveyances of land may convey away all or some of the interests possessed by the conveyer. Amicus Curiae asserts that an essential quality of sovereignty lands is restricted alienability of the Public Trust property interests. If this Court holds, contrary to the arguments asserted in part B supra, that the legal title to sovereignty lands is alienable, then it should also hold that the Public Trust property interests in sovereignty lands are alienable only if the public trust is not adversely affected. These Public Trust property interests would include the power to protect the right of the public in swimming, boating, fishing, flood control, conservation and similar concerns.

Although the loss of bare legal title to sovereignty lands would still be a major loss to the people of Florida, the loss would be moderated substantially if this Court clearly and expressly holds that the swamp and overflow deeds did not convey away those non-title property interests that are the essence of the Public Trust in the sovereignty lands. In this action, for example, if Mobil is held to have acquired legal title, it should be held to have acquired title subject to the property interests in sovereignty lands that are peculiar to the Public Trust.

This argument is consistent with the actual holding of the trial court in this case, as twice quoted by Repondent, Mobil, in its answer brief (Repondent's brief pp. 3 and 20). The trial court explicitly stated:

> This final judgment does not extinquish any rights of the public to use the waters of the Peace or Alafia Rivers for boating, fishing, swimming, or other public purposes, nor does it establish any right in Mobil, or those claiming by, through, or under it, to prevent or interfere with any such public use. It is not necessary in this case to now decide how the deeds and other past conduct of the State affected public use or other governmental rights in the Peace and Alafia Rivers because Mobil has excluded any such rights from the clouds it has sued to remove, and because the State has not alleged that Mobil has invaded such rights and has not sought affirmative relief from this Court (whose jurisdiction it denies) to declare or enforce such rights.

(Respondent's brief, p. 3.)

This trial court holding was apparently affirmed by district court and is also apparently accepted as proper law by the Respondent. If this Court holds that legal title of these lands was conveyed to Mobil, it should accept the reservation of State rights statement of the trial court and raise it to the status of reserved property interests in the nature of a public trust in sovereignty lands. This status is critical to the capacity of the State to protect sovereignty rights of the public in swimming, boating, fishing, flood control, conservation and similar public trust concerns. <u>Recognizing that these are retained property rights avoids later questioning of the limits of the police power that will arise if they are not deemed to be property interests</u>. In short, the trial court's purported reservation of rights amounts to nothing at all <u>unless</u> these interests are acknowledged to be property interests. Without such a holding, the reserved powers statement does nothing more than acknowledge the obvious fact that the State possesses the power to regulate those lands using the police powers, just as it has the power to regulate every square inch of privately owned land in the State. Thus, if the

trial court's caveat is to mean anything at all, this Court should plainly hold that bare legal title to sovereignty lands does not convey away those property interests that are inherent aspects of the Public Trust in sovereignty lands.

This theory is suggested by prior decisions of this Court. For example, in State v. Black River Phosphate Co., 13 So. 640, 645 (Fla. 1893), this Court said:

> [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 relinquished 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 interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.
>
> Quoting from Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892).

See, also, Gies v. Fischer, 146 So.2d 361 (Fla. 1962), for a general proposition that legal title to proprietary interests are separate and distinct from both Public Trust property interests and the police power regulatory interest.

Other states, particularly California, have acknowledged a similar public trust doctrine. For example, in National Audubon Society v. The Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983), the California supreme court held that water rights (which are private property under California law) are subject to the public trust in boating, swimming, fishing, conservation and similar public interests. Thus, water rights could not be exercised by private owners without consideration of the effect on the public trust.

Earlier decisions of the California Supreme Court had clearly established the continuing applicability of the public trust to submerged lands conveyed into private hands. For example, People v. California Fish Co., 166 Cal. 576, 139 P. 79 (1913) held that a conveyance of sovereignty submerged lands within a swamp and overflowed lands patent gave only bare legal title, which is subject to the interest of the public in fulfilling and protecting public trust uses. More recently, City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P. 2d 362 (1980), addressed the difficult issue of how to treat property owners who might have already developed property, as Mobil has done here, in reliance on paper title. The California court reached a fair result as follows:

> We choose...to balance the interests of the public in tidelands conveyed pursuant to the 1870 act against those of the landowners who hold property under these conveyances....[T]he interests of the public are paramount in property that is still physically adaptable for public trust uses, whereas the interest of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially valueless for those purposes.
>
> ...[W]e hold that submerged lands as well as lands subject to tidal action that were conveyed by board deeds under the 1870 act are subject to the public trust. Properties that have been filled, whether or not they have been substantially improved, are free of the trust to the extent the areas of such parcels are not subject to tidal action. 26 Cal. 3d 515, 534, 606 P. 2d 362, 373, 162 Cal. Rptr. 327, 338

Applying the principles recently employed by the Supreme Court of California would enable this Court to avoid the extreme results in this case. The interest of Mobil in avoiding monetary losses for making proprietary use of lands to which it holds legal title would be protected. To the extent lands have been rendered permanently and

substantially useless for trust purposes, the trust would be lifted. To the extent that lands have not been developed, the Public Trust property interests of the State would be superior to the proprietary interests of the titleholder whenever conflict appears.

2. The Marketable Record Title Act Does Not Extinquish The Public Trust Property Interest In Public Lands

The Marketable Record Title Act (MRTA) does not make explicit reference to the Public Trust property interests in sovereignty lands and should not, for reasons argued above, be deemed to extinquish them. More specifically, however, Section 712.03, Florida Statutes (1983) explicitly states:

> Such marketable record title shall not affect or extinguish the following estates:
>
> ...
>
> (5) Recorded or unrecorded easements or rights, interest or servitude in the nature of easements, rights of ways and terminal facilities, including those of a public utility or of a governmental agency, so long as the same are used and the use of any part thereof shall except from the operation hereof the right to the entire use thereof.

The Public Trust property interests clearly constitute an "interest or servitude in the nature of easements," meaning that the trust's property interests are protected despite the fact that legal title and other proprietary property interests repose in the owner of the deed. Moreover, the Public Trust property interests in lands under navigable streams and rivers must be deemed to be in perpetual use. This is analogous to the general rule that public property may not be taken by prescription or adverse possession and is not presumed to be abandoned. See, e.g., Seaside Properties, Inc. v. State Road Dept., 190 So.2d 391 (Fla. 3d DCA 1966), cert. den. 201 So.2d 464

and app. dismd. 389 U.S. 569. In the case of lands under navigable waters, however, the reasons are even more compelling. The swimming of the fishes and the flowing of the water downstream are perpetual public trust uses in fact that would be obvious to the titleholder. See Commentary, The Public Trust Doctrine and Ownership of Florida's Navigable Lakes, 29 U. FLA. L. REV. 730-51, n. 125 (1977).

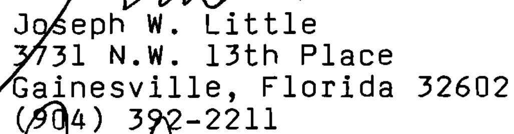
II. CONCLUSION

In view of the foregoing arguments, Amicus Curiae respectfully requests this honorable Court to issue an opinion adopting one of the alternative positions:

A. Reversing the decision below and holding that swamp and overflow deeds did not and do not convey title to sovereignty lands under navigable streams and rivers and that the Marketable Record Title Act does not extinquish it; or,

B. Holding explicitly that public trust interests in sovereignty lands are inalienable property interests that are not and were not conveyed by swamp and overflow deeds and are not extinguishable by the Marketable Record Title Act.

Respectfully submitted,



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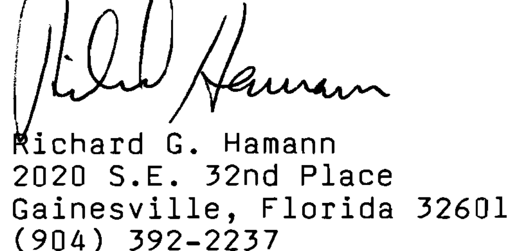

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 26 day of April, 1985 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, Robert J. Beckam, Esq., 3131 Independent Square, Jacksonville, Florida 32202, James R. Hubbard, Esq., 1250 AmeriFirst Building, One S.E. 3rd Avenue, Miami, Florida 33131, William C. Crenshaw, 1400 AmeriFirst Building, Miami, Florida 33131 and Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32301.

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