

IN THE SUPREME COURT OF FLORIDA

**FILED**

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NO. 65,913

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Chief Deputy Clerk

**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

**PETITIONER'S REPLY BRIEF**

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## ARGUMENT

It would serve little purpose here to continue the debate between the Trustees and Mobil over the proper construction of Odom v. Deltona Corp., 341 So.2d 977 (1977). It is important, however, to emphasize the dramatic change in Florida law that results from the decision below if upheld. It extinguishes the public trust doctrine in Florida, and its long-standing protection of Florida's sovereignty lands from unlawful or unauthorized alienation.

### 1.

The District Court decision affirms a trial court judgment awarding Mobil fee simple ownership of a significant portion of the bed of Florida's historic Peace River, a waterbody that must be considered 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 private title originated by a Spanish land grant.

Until the decision below, an unbroken line of sovereignty lands decisions from this Court, discussed extensively in the Trustees' main brief, 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 by the early Trustees of some 21,000,000 acres of Florida through the swamp lands program, section by section in most cases, at a time when the Board did not hold title to sovereignty submerged lands, to conclusively establish the private character of these lands. The solution is a simply one, but it exacts a high price for efficiency. It is a price no Florida court has heretofore been willing to accept--a balance of private interests over public rights that has heretofore been considered untenable.

Mobil's argument, and the decision below, nullify the public trust doctrine by adoption of two interdependent presumptions as conclusive of the non-sovereignty character of the lands. Each result is contrary to the sovereignty lands decisions of this Court. First, Mobil argues that the failure of the early federal surveyors to meander the Peace River in the area in dispute conclusively establishes its non-navigability, and thus non-sovereignty. Odom makes it abundantly clear, however, that the absence of meandering creates only a rebuttable presumption of non-navigability, not a conclusive one. 341 So.2d at 989.

Second, citing a number of federal decisions,<sup>1</sup> and Pembroke v. Peninsular Terminal Co., 146 So. 249 (Fla. 1933), Mobil argues that classification of the sections of land involved as swamp and overflow lands, and the issuance of the swamp lands deeds, likewise conclusively establishes the upland, non-sovereignty status

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1. United States v. Chicago, Milwaukee & St. Paul Railway Company, 218 U.S. 233 (1910); McCormick v. Hayes, 159 U.S. 332 (1895); Heath v. Wallace, 138 U.S. 573 (1891); French v. Fyan, 93 U.S. 169 (1876).

of the lands in issue. Reliance upon this authority is again misplaced. This Court, subsequent to Pembroke, held that the initial classification of these lands was not conclusive under Florida law:

If the Trustees of the Internal Improvement Fund actually conveyed 'sovereignty lands,' believing them to be 'swamp and overflowed lands,' their mistake, however innocent, would not supply the power they lacked. Assuming that the Secretary of the Interior purposely included the land in his patent, we cannot see how the state would have got any more by the process if the land was actually a part of the 'sovereignty lands,' for it already possessed these. So we attach small importance to these two acts, which amounted to little more than gestures if, in truth, the physical characteristics of the land itself placed it in the classification 'sovereignty lands.'

Pierce v. Warren, supra, 47 So.2d at 859. This profound holding in Pierce has remained undisturbed until the decision below. There can be no question, therefore, that the District Court's decision results in a drastic change in Florida law, and the virtual destruction of the public trust doctrine. Close examination of the opinion, as it addresses the "sovereignty lands issue," reveals direct reliance for its holding only on Mobil's construction of Odom. No effort whatsoever is made to distinguish the prior decisions of this Court emphatically upholding the public trust doctrine.

The federal decisions relied upon by Mobil in its main brief are entirely off the mark. Mobil must concede, when pressed, that state law, not federal law, controls title questions once lands, whether sovereignty lands or swamp lands, pass into state ownership, for this principal was recently reaffirmed in related

litigation between these parties. Mobil Oil Corporation v. Coastal Petroleum Company, 671 F.2d 419 (11th Cir. 1982), cert. denied, 459 U.S. 970. Accord, Shively v. Bowlby, 152 U.S. 1, 58 (1894); State v. Gerbing, 56 Fla. 603, 614, 47 So. 353, 357 (1908). Indeed, even the District Court declined to rely upon Pembroke or the federal authority that Mobil continues to mistakenly emphasize.

2.

There is substantial evidence that Mobil's claim to private ownership of a portion of the bed of the Peace River is newly and expediently found. Until Coastal's conversion claims were first presented, Mobil officials in Florida acknowledged quite openly that the riverbed was state-owned. This is made clear by the Mobil internal documents reprinted in full at pages 8-14 of Coastal Petroleum Company's amicus brief in this case. All of these documents are contained in the Record. In that correspondence, C.V.O. Hughes, the senior official in Mobil's Florida mining operations, repeatedly acknowledges ownership of the bed of the Peace by the State, not Mobil. R.430-433. This position apparently changed as Mobil defended the conversion case to which it repeatedly refers.<sup>2</sup>

The fact that Mobil long regarded the riverbeds in issue as state-owned is significant, for much of the debate here has centered upon the equities of the competing public and private

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2. Although Mobil attempts to dismiss the amicus brief filed by Coastal, the arguments set forth there are relevant and helpful, particularly as they emphasize Mobil's knowledge of the sovereignty status of the river.



ownership claims. The equities on the public's side of the question are compelling. The sovereignty lands decisions of this Court have 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. There is significant evidence that Mobil and its predecessors regarded the riverbeds 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, were long recognized by Mobil, and that its present claim to fee simple ownership of the riverbed is entirely contrary to what its own records acknowledge.<sup>3</sup>

There are, however, equities on Mobil's side of the coin as well. The sovereignty lands were not specifically reserved in

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3. If the Trustees' appeal here is successful, it will be interesting to see if the legal advice and title opinions rendered to Mobil excepted the navigable water bottoms in issue, and thus acknowledged the public trust doctrine, or rather certified private title regardless of navigability. The U.S. District Court in Tallahassee 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 river by alleging that it 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.

the deeds, and Mobil has allegedly paid ad valorem taxes on the property. Thus, Mobil may be able to present equitable defenses to the sovereignty title claims. 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 to Mobil. This can be accomplished by what the Trustees view as the proper decision here, a determination that the lands remain sovereignty in character, yet subject to equitable defenses Mobil may assert to the title claim. Thus, if the Trustees' title claim is unfair, or Mobil shows the required innocent and detrimental reliance, it is likely that their equitable defenses will be accepted by the trier of fact.

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, here or in other cases, 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 such lands, 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 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. They are likely to remain, unlike private waters, a valuable part of the public lands of this state to which all Floridians are entitled.

3.

The trial court judgment, drafted by Mobil's counsel, attempts to mitigate the drastic effect of its holding upon the Public Trust Doctrine by suggesting a distinction between "proprietary" and "governmental" rights to sovereignty lands, attempting to limit the reach of the decision to such proprietary rights, and by pointing out that the State retains regulatory powers over the navigable waters in issue. The District Court noticeably declined to rely upon this reasoning. Though Mobil continues to press the argument, these semantics cannot obscure the result. There is no distinction in Florida between proprietary rights and governmental rights in public lands.<sup>4</sup> 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

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4. The author of the treatise relied upon by Mobil 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 Mobil in this case. The article was published on December 21, 1982, while this case was pending in the Second District.

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 Mobil suggests. The fact that the state always retains its police power 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 plenary 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. Mobil's effort to confine the judgment to proprietary rights, to lessen its impact, does little to mask the fact that it vests fee simple title to Mobil in a sovereignty riverbed, and can be used, if upheld, to exclude any public use whatsoever.

There is, as Dean Maloney has suggested in the portions of his treatise cited by Mobil, some merit in the adoption of a governmental/proprietary rights distinction in situations where public land is lawfully sold into private ownership. The preservation of public rights of navigation, fishing, and recreational use of the waters could and should be preserved, at great public benefit, in such situations.

If such a distinction was applied here, however, where no authority existed to alienate the disputed lands, the result would be a complete 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. Further, it is likely that if the governmental/proprietary rights issue was fully litigated, many who hold swamp and overflow lands deeds 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. These changes in Florida law, whether meritorious or not, are better considered in the legislative environment, for it 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 in water and land use policy should take place--not in a case where the issue was never litigated.

5.

The final point to be made is that this case involves Florida's invaluable water resources, not phosphate minerals, as Mobil attempts to argue. To be sure, the decision here will effect the viability of the conversion action pending against Mobil. That claim, of course, should continue to judgment for money damages if Mobil is found to have mined phosphate minerals from the bed of the Peace with knowledge of its sovereignty char-

acter, or with reckless indifference. A jury is well-suited to such a determination. Today, however, the Court decides a far more important question, where monetary value cannot be assessed---the fate of the public trust doctrine's historic protection of sovereignty lands.

Respectfully submitted,

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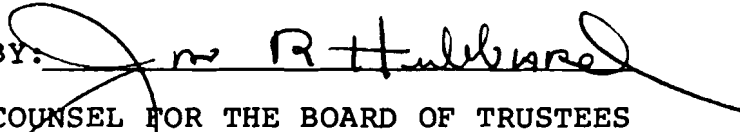
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 6th day of December, 1984 to: Chesterfield Smith, Esq., of HOLLAND & KNIGHT, 1200 Brickell Avenue, Miami, Florida 33030; Hume F. Coleman, Esq., and Julian Clarkson, Esq., 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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