IN THE SUPREME COURT OF FLORIDA

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, etc. Petitioners, vs. AGRICO CHEMICAL COMPANY, Respondent.	:	CASE NO. 66,565

DISCRETIONARY PROCEEDING TO REVIEW THE
DECISION OF THE DISTRICT COURT OF
APPEAL, SECOND DISTRICT OF FLORIDA,
CERTIFYING QUESTIONS OF GREAT PUBLIC IMPORTANCE

PETITIONER COASTAL PETROLEUM COMPANY'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The opinion of the District Court is a radical departure from the basic property law of Florida as is evidenced by the decisions of this Court to the contrary. If this Court were to accept the reasoning of the lower courts and adopt this change in Florida property law, havoc would be caused with the expectations of both public and private parties throughout all of Florida. Almost all sovereign waterbodies would be impacted and many would cease to exist any longer as the property of the people of Florida. Many private parties who never believed they owned such waterbodies could claim them nevertheless, as a windfall without any showing of reliance or equity.

There has never been a case where this Court has held that a swamp and overflowed lands' deed issued by the trustees of those lands included sovereignty lands below the ordinary high water marks of a navigable river. Not one. This Court has always held to the contrary. Sovereignty lands became the property of the People at statehood in 1845 as an incident of sovereignty. Later, after statehood, pursuant to Federal laws, other lands including swamp and overflowed lands, were conveyed to Florida for specific purposes. Unlike sovereignty lands, swamp and overflowed lands were patented to be used to reclaim lands by levees and drains. These swamp lands were designated by the State and its agents who were in the position of electing not to designate waterbodies that may or may not be navigable or electing to designate them to be sure the State received them. In interpreting such later conveyances this Court recognized this situation and held consistently that such deeds conveyed no sovereignty lands, but only the uplands. The People, the transferees and the Court have recognized this rule of law, made necessary because of the absence of formal conveyances of

sovereignty lands. The phosphate companies prevailed upon the courts below to change this rule of property law.

The case relied upon for making this radical departure in the property law of Florida is Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977). In that case however, this court recognized this basic property law and cited Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), thus continuing the protection of the sovereignty waterbodies of Florida. In fact in the Briefs in that case rivers were distinguished from the Odom waterbodies.

The certified question relating to MRTA is easily disposed of since whether MRTA applies to sovereignty lands or not, here there were two recorded documents on file in Polk County. Coastal's Leases were recorded in 1954 and a judgment affecting the Leases was recorded in 1961, two years before MRTA became law. Furthermore, there was actual notice of the ownership by the phosphate companies at least before 1961.

To ignore the special status of sovereignty lands and apply MRTA would render most Florida rivers either nonexistnet or a patchwork of private and public ownership. Even the Suwanee River which is intermitantly nonmenandered along its course would be impacted. Here however, the exceptions by recordings require reversal of the decisions below even if MRTA applies. There are other reasons why the decision should be reversed.

STATEMENT OF THE CASE

(a) Nature of the Case. This case is a discretionary proceeding to review the decision of the District Court of Appeal, Second District of Florida, affirming a quiet title summary judgment rendered in Polk County, Florida, and is brought pursuant to Rule 9.120, Florida Rules of Appellate Procedure. This Court has jurisdiction pursuant to Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure, and Article V, Section 3(b)(4), Florida Constitution (1980), to review decisions of district courts of appeal that pass upon a question certified to be of great public importance. The District Court, on rehearing, certified three questions:

> "1. DO THE 1883 SWAMP AND OVERFLOWED LANDS DEEDS ISSUED BY THE TRUSTEES INCLUDE SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS?
> 2. 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?
> 3. 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? (A 2)

Companion proceedings raise these same certified questions. Cases 65,755 and 65,696.

(b) The course of proceedings. It is difficult to understand the course of proceedings in the lower court here without considering the context of related litigation. The District Court in the companion proceedings stated:

> "In 1977 Coastal Petroleum filed several suits in the United States District Court in Leon County, Florida, against plaintiffs. Coastal sought to recover damages for the alleged conversion of phosphate from these lands. Coastal Petroleum claimed the lands were state owned sovereignty lands subject to a lease between it and its lessor, the Trustees, entered into in 1946. We are advised that these federal cases are now pending.

> After Coastal initiated the litigation in the federal court, plaintiffs, in 1982 and 1983, filed quiet title suits in the Polk County Circuit Court seeking to confirm their ownership of the lands at issue. They also sought to remove the cloud created by Coastal's claim that the lands were state owned sovereignty lands subject to Coastal's lease." (A 7,8)

This entire litigation arose from a controversy started when Mobil Oil Corporation sued Coastal Petroleum Company in 1976 (R 1126-1139). In discovery in that case, evidence of the deceitful conversion by Mobil and others (A 118, 126) was found and this phosphate litigation commenced. The federal cases were filed in 1977 against Agrico, and five other phosphate mining companies (R 346). In January of 1979, upon the phosphate mining companies' request, the federal court entered a pretrial memorandum on certain legal issues (R 346-358) to govern the course of the litigation (R 357). After the first trial date was scheduled in the federal cases, the phosphate mining companies began filing quiet title suits in Polk County, Florida (A 8). The federal cases are presently stayed pending this Court's resolution of certified questions.

In this 1982 quiet title case, Coastal suggested that the trial court judge disqualify himself pursuant to Section 38.02, Florida Statutes, because he had an interest in the litigation by a warranty of title to affected land in a mesne conveyance to one of the related phosphate mining companies (A 197). Unlike the conveyances here, where the descriptions are simply by section or subsection, the conveyance by the trial judge was by metes and bounds description and left no doubt as to the intention to intrude into lands below the ordinary high water mark of the Peace river. The trial judge never even considered or denied the suggestion as required by Florida law. Although the case was not originally assigned to this trial judge, Agrico's motion to transfer, without notice or opportunity to be heard by Coastal, was

granted assigning the case to him (A 189). Coastal's subsequent motion to transfer was denied (A 202). Subsequently, again without notice or opportunity to be heard, another special order was entered reassigning the trial judge to this case (A 206). Coastal filed a motion to dismiss premised upon Mabie v. Garden Street Management Corp., 397 So.2d 920 (Fla. 1981), and the earlier cases in Leon County, Florida, federal court (R 1124-1139). The motion to dismiss was denied (R 1161). When the trial court refused to dismiss the case because of the earlier cases, Coastal sought to include the discovery efforts in the earlier cases or conduct discovery to defend the claim (R 1175, 1164). The trial court again did not consider or rule upon Coastal's motion.

Agrico then filed a motion for summary judgment essentially arguing that the existence of sovereignty lands, although disputed, could be ignored for argument (R 1497-1608). Coastal (A 26-137) and the Trustees (R 1187-1188) opposed the motion including affidavits on navigability (A 128, R 1189-1496) and defenses (A 207).

(c) Disposition in the lower tribunal The trial court granted summary final judgment against the Trustees and Coastal, ignoring the existence of sovereignty lands for purposes of its legal conclusions (A 147). Coastal and the Trustees appealed the cases to the District Court of Appeal, Second District (R 1911-1912). On September 14, 1984, after prior certifications to this Court in related cases, the District Court affirmed the trial court's summary final judgment without opinion (A 1). On rehearing, on January 23, 1985, the District Court certified the three questions presented.

STATEMENT OF THE FACTS

The river systems involved here are the Peace and Alafia Rivers (A 127). The Peace River rises north of Bartow, Florida, and flows southwestward to Charlotte Harbor, a distance of approximately 100 miles. The Alafia River flows from Polk County west to Tampa Bay. Portions of both river systems are claimed by Agrico (R 1, 401). The public use and characteristics of these navigable river systems, however, have been addressed in Coastal's affidavits in opposition to summary judgment (A 127, R 1189-1496). These are two of Florida's major river systems and enjoy a long involvement in Florida history (A 127, R 1189-1496). A statement of facts which ignored their historical background would be incomplete.

Rivers have existed from time immemorial dating back to the river which flowed out of Eden. Rivers have never been subject to man. Even as people began to assert control over rivers, the ownership was in the Crown or sovereign, as this Court has stated in tracing the history of such waters:

> "Under the common law of England, the crown in its sovereign capacity held the title to the beds of navigable or tide waters, including the shore, or the space between high and low water marks, in trust for the people of the realm, who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law in the waters. This rule of the common law was applicable in the English colonies of America. After the Revolution resulting in the independence of the American States, title to the beds of all waters, navigable in fact, whether tide or fresh, was held by the states in which they were located, in trust for all the people of the states respectively. When the Constitution of the United States became operative, the several states continued to hold the title to the beds of all waters within their respective borders that were navigable in fact without reference to the tides of the sea, not for purposes of disposition to individual ownerships, but such title was held in trust for all the people of the states respectively, for the uses afforded by the waters as allowed by the express or implied provisions of law, subject to the rights surrendered by the states under the federal Constitution.

> New states, including Florida, admitted 'into the Union on equal footing with the original states, in all respects whatsoever,' have the same rights, prerogatives, and duties with respect to the navigable waters and the lands thereunder within their borders as have the original thirteen states of the American Union." Broward v. Mabry, 58 Fla. 398, 50 So. 826, 829 (1909).

This ownership included the beds and minerals beneath the beds of the rivers, as this Court has stated in considering the nature of ownership of such waters:

> "Before the act any citizen of the state had the right to go upon these waters, including the shore when the tide is down below high-water mark, and to take fish from such waters and shore, and neither these nor any other of the uses to which they were subject then have been taken away by the statute so long as the riparian owner has omitted to make any of the improvements contemplated by the statute; but he could not go there and dig up the soil independent of the control and regulation of the state, and convert it to his own use or gain, nor can he do so now, nor has the statute given the riparian owner the right to do so. Gould, Waters, §24." State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 644, 650 (1893).

By the "Act" referred to in the last quotation, the State authorized the sale of phosphates from the soil beneath the navigable rivers of Florida, but not the sale of such lands. Chapter 4043, Laws of Florida (1891). The People then hold not only the use of the water and shores of such rivers, but also the river bottoms. In this earlier attempt to claim the river bottom phosphates, this Court upheld the People's rights to the river bottoms. In another case at this time involving one of two river systems here, the Alafia River, this Court also described the history of Florida rivers. State ex rel. Peruvian Phosphate Co. v. Board of Phosphate Commissioners, 31 Fla. 558, 12 So. 913, 915 (1893). The early phosphate companies' attempts to exercise ownership or control over navigable rivers was rejected.

In 1941, by act of the legislature, the State did, however, authorize the leasing of such lands for oil, gas and mineral production. Chapter 20680, Laws of Florida (1941). Pursuant to that Act, Coastal Petroleum Company was granted an exploration agreement resulting in three leases, one of which, Lease 224-B (A 160-180), specifically named the river systems involved here:

> "Also the bottoms of and water bottoms adjacent to the rivers hereinafter named which flow through natural channels in the Gulf of Mexico, to wit: Myakka, Manatee, Little Manatee, Alafia, Caloosahatchee (from its mouth to LaBelle Bridge), Peace River to Township 29/30, included within said Drilling Blocks 5, 6, 7 and 8 as shown on said map." (A 163)

In Watson v. Holland, 155 Fla. 342, 20 So.2d 388 (1945), this Court rejected a challenge to the validity of these leases.

Subsequently Lease 224-B was duly and properly recorded in the public records of Polk County, Florida, on April 9, 1954 at Deed Book 980, Page 396 (A 160-180). Subsequent litigation involving the scope of the lease was determined in Coastal's favor. Collins v. Coastal Petroleum Co., 118 So.2d 796 (Fla. 1st DCA 1960), cert. discharged, 125 So.2d 300 (Fla. 1960), and a copy of the final judgment in that litigation was also recorded in the public records of Polk County, Florida on January 30, 1961 (A 106).

In discovery in related litigation in 1977 Coastal found evidence which chronologically should be considered now (A 118, 125). After the recording of the lease in 1954 and judgment in 1961, in June of 1961, Agrico's predecessor was a member of the Florida Phosphate Council (A 120). This Phosphate Council paid an engineer, Mr. Stuck, to represent them in their efforts to resist the stabilizing of the Peace River (A 120-124). In a letter dated August 4, 1961 (A 125,126) between two of the phosphate mining companies in Polk County, Mobil and International Minerals & Chemical

Corporation and Mr. Stuck, relevant material facts appear. In the letter, Mr. Hughes tells Mr. Feigin and Mr. Stuck, by a copy of the letter (A 126), of a visit by a Coastal consultant, Mr. Mayberry:

> "I told Dick Mayberry that the phosphate mineral right in the bed of Peace River, or immediately adjacent, was in thin beds, low grade, and not at present commercially mineable. However, I want to make it clear that this statement does not cover that area of land that is beyond the immediate river bed, and does not in anyway change our own evaluation of the damages we might suffer should the river level be permanently held at an elevated value.
>
> ... ...
>
> The legal bed of the river, or the legal flood plain, has never been determined. Measurements along the river of high stage and low stage water are not detailed enough to describe accurately and legally a flood plain that might belong to the State of Florida, along with the bed of the river. I am assuming that your own position will be essentially the same." (A 125,126)

Now the phosphate mining companies even claim the river bed (R 1, 401)! Thus, before August, 1961, all of these phosphate companies were aware of the navigable status of the river (A 125), that the high water mark defined the limits of their own ownership (A 126); and that if the level of the Peace River were determined, they would be responsible for damages (A 125).1 What is also clear is that Mr. Hughes did not tell Coastal's consultant the truth, and asked Mr. Feigin and Mr. Stuck's clients to take the same position (A 126).

Being met by a similar response from each of the phosphate mining companies in Polk County, Coastal moved on to other exploration work. When

1. Of course, some will disagree with the interpretations and inferences by these letters, but it must be remembered that the final judgment was a summary judgment and all reasonable interpretations and inferences must be made against Agrico. These facts are relevant to Coastal's defenses (A 207) and should have been considered on the merits. Also see A 213-215.

this deceit and conversion was found in 1977 (A 118, 125), Coastal and the Trustees filed claims for the damages which damages had been evaluated by the phosphate mining companies back in 1961 (A 125)!

In 1977, Agrico, when called upon to defend the claims for mining into the river bottoms for long periods continuing after 1961, presented quite a different response than the foregoing facts would lead one to expect. For the first time, they claimed these river systems were conveyed by roughly an equal number of swamp and overflowed lands' deeds from the Trustees and patents from the United States (R 1, 401). These conveyances were by section or subsection and not by metes and bounds descriptions. None of the patents indicated transfer of any navigable river or even a reference to the Peace or Alafia River systems but merely the conveyance of a section or subsection of land. Similarly, none of the swamp and overflowed land conveyances indicated transfer of any navigable river or even a reference to the Peace or Alafia River systems, but merely the conveyances of a section or subsection of land. None of these conveyances indicated the Trustees were acting in any capacity as Trustee of sovereignty lands.

Agrico also relied upon legal estoppel, asserting in part that by an act in 1969 vesting title in the Trustees, the Trustees and Coastal were legally estopped to challenge swamp and overflowed lands conveyances. The Trustees were not even a grantor of these federal patents. It also relied upon the 1963 Marketable Record Title Act enacted less than two years after the record notice, the actual notice, and the deceit related above. It also claimed the recorded Lease description was vague and uncertain.

The Circuit Court rendered a summary judgment and the District Court affirmed, and on rehearing, certified three questions to this Court.

ARGUMENT

POINT I

THE 1883 SWAMP AND OVERFLOWED LANDS DEEDS ISSUED BY THE TRUSTEES DO NOT INCLUDE SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH WATER MARK OF NAVIGABLE RIVERS.2

There has never been a case before this Court in which the Court has held that a swamp and overflowed lands' deed issued by the Trustees included sovereignty lands below the ordinary high water mark of navigable rivers, simply by virtue of that deed. Not one. This is not a case of first impression, however, since the Court has expressly and consistently held to the contrary, that such deeds do not convey sovereignty lands. The decision below represents an attempt to change long-established law of Florida and to overrule the existing case law. There is no change in rationale or public policy to warrant abandonment of this sound established precedent in Florida.

The impetus for suggesting this change was this Court's own decision in Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976). However, Odom dealt with small lakes and ponds less than 140 acres in size, and wholly included within

2. It should first be understood that roughly half of the conveyances relied upon are U.S. patents and not swamp and overflowed lands' deeds from the Trustees. Such U.S. patents do not convey sovereignty ownership below the ordinary high water lines of navigable rivers because the United States had no authority to convey sovereignty lands as is clearly the law. Shively v. Bowlby, 152 U.S. 1 (1893) and Stein v. Brown Properties, Inc., 104 So.2d 495, 499 (Fla. 1958). Federal law governs the scope of these U.S. patents. Borax Consolidated Ltd. v. Los Angeles, 296 U.S. 10 (1935). Thus, even this Court's affirmance on this first certified question could provide no support for the decision below because roughly one half of the deeds are not even swamp and overflowed lands' deeds. This glaring defect in the judgment and decision below requires reversal. Secondly, it should be understood that no one questions the title conveyed by patent or deed above the ordinary high water mark of the navigable river systems involved here. No one is claiming the deeds or patents are void. We are discussing only sovereignty water bottoms of navigable fresh water river systems (A 2).

the perimeters of the deeds, and did not deal with 100 mile long major rivers systems of Florida. Odom relied upon Section 197.228(2), Florida Statutes, but that statute expressly extends only to lakes, ponds, swamps or overflowed lands and does not deal with rivers. Odom determined the nature of the lands to be swamp and overflowed lands, not sovereignty lands below the ordinary high water mark of navigable rivers. In Odom there was no record of any navigation, while in this case the record is full of references to the navigability of the rivers (A 127-136, R 1189-1496). Odom involved lands which the Trustees were authorized by law to sell, but title to the lands in the instant case was not acquired by the Trustees until 1969 and could be sold only in the public interest, as reaffirmed by the People in the Florida Constitution, Article X, Section 11 (1968). Odom involved no recorded interest of the Trustees, while in this case the recorded interest preceded even the Marketable Record Title Act, Chapter 712, Florida Statutes, being recorded in 1954 (A 105, 160-180) and subsequently in 1961 (A 106).

In Odom, equities favored the claimants, while in this case the equities reveal a grasping by the phosphate company (Point IV herein). Despite these and other material distinctions, and despite the established case law of this Court, the courts below held that the swamp and overflowed lands' deeds conveyed sovereignty lands below the ordinary high water mark of navigable river systems, simply by virtue of the deeds.

It is important to see that this first certified question is in a "vacuum." Even the District Court cases relied upon by the courts below reject such a departure from 100 years of case law of Florida. See: State Department of Natural Resources v. Contemporary Land Sales, Inc., 400 So.2d

488, 491 (Fla. 5th DCA 1981), and State Board of Trustees of the Internal Improvement Trust Fund v. Laney, 399 So.2d 408, 410 (Fla. 3d DCA 1981).

It is also important that this certified question be considered on its own merit. To lump it together with others would create an ambiguity in the law necessitating further litigation to resolve the ambiguity. This first certified question before the Court addresses solely the effect of a swamp and overflowed lands' deed upon sovereignty lands below the high water mark of a navigable river. The other certified questions concerning legal estoppel and MRTA can then be added and their effects considered. If the Court's decision represents a change in the law on a particular point of law, a vested right in the past may exist. But without a definitive statement as to any change, these vested rights remain in question. Vested rights may exist before the effective date of MRTA in 1963 if, for example, the Court were to affirm the decision by finding title by virtue of MRTA. If the Court were to affirm the decision by finding that after the acquisition of constitutionally limited title in 1969 legal estoppel could apply, vested rights may exist before that time. This first certified question concerns only the status of sovereignty lands.

A. Sovereignty Lands Have A Special And Distinct Status And Protection In The The Law, Unlike Other State Owned Lands.

To appreciate the significance of the proposed change in Florida law, one must start with the original basis for the precedent. In State v. Gerbing, 56 Fla. 603, 47 So. 353, 355, 356 (1908), dealing with sovereignty lands below the ordinary high water mark of the Amelia River in Nassau County, Florida, this Court traced the history of "sovereignty lands":

> "The original 13 states, that formed the federal Union as the United States of America, were distinct and independent

sovereignties, and as such severally owned and held in trust for the whole people within their respective borders the navigable waters in the states and the lands thereunder, including the shore or land between high and low water marks. Proprietary rights in the lands of this character within the states were not passed to the United States by the federal Constitution, under which the Union was founded, and no power to dispose of such lands was delegated to the United States. Therefore all proprietary rights in and power to dispose of lands under navigable waters in the states, including the shore between high and low water marks, were reserved to the states severally or to the people thereof. The powers of the United States as to matters of navigation, interstate and foreign commerce, post roads, and eminent domain are not pertinent here.

The navigable waters in the states and the lands under such waters, including the shore or lands between ordinary high and low water marks, are the property of the states, or of the people of the states in their united or sovereign capacity, and are held, not for the purposes of sale or conversion into other values, or reduction into several or individual ownership, but for the use of all the people of the states, respectively, for purpoess of navigation, commerce, fishing, and other useful purposes afforded by the waters in common to and for the people of the states. The title to the lands of this character were withheld by the original states of this Union as essential to the sovereignty of the states, to the welfare of the people of the states, and to the proper exercise of the police powers of the states. A state may make limited disposition of portions of such lands, or of the use thereof, in the interest of the public welfare, where the rights of the whole people of the state as to navigation and other uses of the waters are not materially impaired. 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.

. . . . . .

The lands under navigable waters, including the shores, were held by the United States for the benefit of the whole people, to go to the future state for the use of the whole people of the state.

The Constitution of the United States provides that 'new states may be admitted by Congress into this Union.' The territory known as East and West Florida, ceded by Spain to the United States, was by act of Congress approved March 3, 1845 (5 Stat. 742, c. 48), under the name of the state of Florida, 'admitted into the Union on equal footing with the original states, in all respects whatsoever,' 'on the express

> condition that [the state] shall never interfere with the primary disposal of the public lands lying within' it. 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 of Florida all rights and powers as to property and sovereignty possessed by the original states of the Union, except such as were withheld by the act admitting the state.
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> . . . . . .
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> 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. (Emphasis added.)

This Court distinguished "swamp and overflowed lands":

> "Swamp and overflowed lands within the state of Florida, not under navigable or tide waters, that became the property of the United States by the treaty of cession from Spain and had not been previously granted, were by the act of Congress approved September 28, 1850, granted to the state for purposes of drainage and reclamation. Within the meaning of this act of Congress, swamp lands, as distinguished from overflowed lands, are such as require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation. Overflowed lands are those that are covered by nonnavigable waters, or are subject to such periodical or frequent overflows or water, salt or fresh (not including lands between high and low water marks of navigable streams or bodies of water, nor lands covered and uncovered by the ordinary daily ebb and flow of normal tides of navigable waters), as to require drainage or levees or embankments to keep out the water and thereby render the lands suitable for successful cultivation. When the lands are not covered by the waters of navigable streams or other bodies of navigable waters at ordinary high-water mark, and drainage, reclamation, or leveeing is necessary to render the lands suitable for the ordinary purposes of husbandry, they are within the terms of the act of Congress, and the title passed to the state, if the lands were the property of the United States at the date of the act of Congress making the grant to the state." (Emphasis added.) Supra, p. 357.

In Broward v. Mabry, 58 Fla. 398, 50 So. 826, 829 (1909), in considering Lake Jackson in Leon County, this Court reaffirmed this background. Again, in

Martin v. Busch, 93 Fla. 535, 112 So. 274, 283 (1927), this Court noted the special status of sovereignty lands. This status is reflected in the treatment of a claimant of such sovereignty lands. In Shively v. Bowlby, 152 U.S. 1, 10 (1894), the Court noted the rule of strict construction that is applied to claims of sovereignty 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, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.'"

Although there have been inferences that the State's ownership by right of sovereignty does not extend beyond navigational and public usage of the river to include minerals such as phosphate, that was long ago settled by this Court. State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 645 (1893). In fact, this Court has considered one of the rivers involved here, the Alafia River, and the phosphates in it:

> "This statute asserts the state's absolute right of property in the phosphates in the beds of her navigable waters, and her exclusive dominion over the same. State v. Black River Phosphate Co., 27 Fla. 276, 9 South.Rep. 205. Its theory and policy are inconsistent with a property right or ownership therein by others, either under the riparian act of 1856 (sections 454, 455, Rev. St.) or otherwise. The alternative writ recognizes expressly the navigability of the Alafia River; and the relator's application to the board of phosphate commissioners for a contract, as well as its institution of this judicial proceeding, are admissions of the jurisdiction of the board and the property rights of the state over the phosphate interest in dispute." State ex rel. Peruvian Phosphate Co. v. Board of Phosphate Commissioners, 31 Fla. 558, 12 So. 913, 915 (1893).

The title to lands beneath fresh water navigable rivers never even passed to the Trustees until 1969, by Chapter 69-308, §1, Laws of Florida.

But these lands were not the Trustees'. They were subject to the conditions of a trust. (Article X, Section 11, Florida Constitution (1968).) Even today these lands could not be conveyed by the Trustees simply for sale. Thus, at no time has authority to convey resided in the Trustees over these fresh water navigable rivers.

This special status applies to the lands involved here. It is crucial to remember that these rivers were presumed navigable by the courts below in entering the summary final judgment (A 137). We are not dealing with a record devoid of evidence of navigability as in Odom. Affidavits here created the genuine issue as to navigability in fact which can only be determined by the trier of fact.3 Neither the courts below, nor this Court, could conclude that these river systems are other than navigable because navigability here is a factual matter. Odom, supra at p. 988. The sovereignty lands that are involved here have a special and distinct status in the law, unlike swamp and overflowed lands, school lands, Murphy Act lands, or other state lands.

B. This Court Has Consistently Held That Swamp and Overflowed Lands' Deeds Do Not Include Sovereignty Lands Below The Ordinary High Water Mark of Navigable Rivers.

Once the difference between sovereignty lands and other state lands is shown, it is not difficult to understand this Court's express and consistent holding that a swamp and overflowed lands' deed does not include sovereignty lands below the ordinary high water mark of navigable water simply by virtue of that deed. In State v. Gerbing, 56 Fla. 603, 47 So.2d 353, 357 (1908), the Court held:

3. See Bucki v. Cone, 25 Fla. 1, 6 So. 160 (1889).

> "The respondent's claim is grounded on an alleged title deraigned through the act of Congress of September 28, 1850, granting swamp and overflowed lands to the state. If the lands in controversy are not such swamp and overflowed lands as passed to the state under the stated act of Congress, and they are lands under the bed of navigable waters below the normal high water mark of the particular navigable waters, the state holds them in trust for all the people of the state, and the defendant has no exclusive rights as claimed. See Kinkead v. Turgeon, 74 Neb. 573, 104 N.W. 1061, 109 N.W. 744, 1 L.R.A. (N.S.) 762, 7 L.R.A. (N.S.) 316." (Emphasis added.)

The Court reaffirmed this law in rejecting claims to Lake Jackson in Leon County, Florida, in Broward v. Mabry, 58 Fla. 398, 50 So. 826, 831 (1909), citing State v. Gerbing, supra"

> "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. State v. Gerbing, supra.
> The complainant, appellee here, may have riparian rights in the land and waters opposite his riparian holdings that the law will protect; but he appears to have no title to the lands under the navigable waters. It is assumed that the meander line and the ordinary water line of the lake are the same." (Emphasis added.)

In Martin v. Busch, 93 Fla. 535, 112 So. 274, 285 (1927), this Court reaffirmed this law of Florida and both the Gerbing and Mabry cases were favorably cited:

> "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. See Illinois Steel Co. v. Bilot, supra; State ex rel. v. Jennings, 47 Fla. 307, 35 So. 986; Broward v. Mabry, 58 Fla. 3988, 50 So. 826; State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353, 22 L.R.A. (N.S.) 337.) (Emphasis added.)

Although there has been considerable argument over the fact that the lands in Martin v. Busch, supra, were unsurveyed, neither the cited cases, nor the general rule of law, have ever been qualified by such a requirement. Sovereignty land, whether surveyed or unsurveyed, is not conveyed by a swamp and overflowed lands' deed. In fact, in a subsequent case where surveyed lands were involved, such deeds were held not to convey sovereignty lands:

> "Since Lake Ariana is a navigable meandered lake, the chancellor correctly ruled that title to its bottom was in the State. Broward v. Mabry, supra; Martin v. Busch, 93 Fla. 535, 112 So. 274; White v. Hughes, 139 Fla. 54, 190 So. 446. In Hicks v. State ex rel. Landis, 116 Fla. 603, 156 So. 603, 604, we said, in an opinion by Mr. Chief Justice Davis:
>
> 'The State holds the title to lands under navigable waters in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have the liberty of fishing therein free from the obstruction and interference of private parties. The trust devolving upon the state for the public, and which can only be discharged by the management and control of the property in which the state has an interest, cannot be relinquished by a transfer of the property, or by the transfer of any special interest therein, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the waters and lands remaining. Pembroke v. Peninsular Terminal Co., 08 Fla. 46, 146 So. 249.'
>
> See also Bucki v. Cone, 25 Fla. 1, 6 So. 160; and State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353, 22 L.R.A., N.S., 337. See also Baker v. State ex rel. Jones, Fla., 87 So.2d 497." (Emphasis added.) McDowell v. Trustees of Internal Improvement Fund, 90 So.2d 715, 717 (Fla. 1956).

In the latest expression of the law of this State, this Court, in quoting the trial court's opinion in Odom v. Deltona Corp., 341 So.2d 977, 981 (Fla. 1976), reaffirmed this long-standing law that a swamp and overflowed lands' deed in and of itself does not convey any sovereignty land. The only question becomes whether the rivers are navigable or nonnavigable:

> "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. State v. Gerbing, 56 Fla. 603, 47 So. 353 (1908) 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 and dependent upon whether or not the body of water is permanent in character and, in its ordinary and natural state, is navigable for useful purposes and is of sufficient size and so situated and conditioned that it may be used for purposes common to the public in the locality where it is located. Broward v. Mabry, supra. See also Bucki v. Cone, 25 Fla. 1 [6 So. 160] and Clement v. Watson, 63 Fla. 109, 58 So. 25." (Emphasis added.)

This Court also cited Martin v. Busch, supra, and Broward v. Mabry, supra, in Odom, supra pgs. 988, 989.

In Odom, this Court was not dealing with rivers, but with small nonmeandered lakes and ponds wholly within the perimeter of conveyances. Deltona's Brief here argued:

"This case does not involve the navigability of tidal areas, coastal regions, rivers, or large freshwater lakes where there is 'notice' of potential navigability. Rather, this case concerns administrative applications of an undefined 'navigability' standard to relatively small, freshwater lakes and ponds, not meandered during government surveys and not of such physical size as to provide notice of navigability. (pg. 6)

. . . . . .

The court noted, for example, that the mere passage of time and normal development make proof or disproof of navigability at statehood difficult, and that determining the navigability of small, freshwater lakes in 1845 was particularly difficult, as contrasted with coastal areas, rivers, or large meandered lakes. (pg. 16)

. . . . . .

This case does not involve clearly navigable areas such as the Atlantic coast, the Gulfcoast, estuaries, rivers, or even large, freshwater lakes such as Lake Okeechobee, Lake Jackson, or even Lake Iamonia. Rather, it involves

administrative attempts to stretch the concept of navigability at law to encompass small, nonmeandered lakes and ponds of less than 140 acres; and, in many cases, less than 50 acres in surface area. The administrative expansions of 'navigability' represented by this case are without precedent in Florida law. (pg. 23)

. . . . . .

Florida's present test of navigability poses no problems in regulating areas where waters are, in fact, navigable and the test will have practical application--i.e., coastal areas, rivers, and relatively large lakes where landowners are 'on notice,' either through the physical size of the water body or its meandering, that the body may be navigable and thereby subject to state ownership and jurisdiction." (pg. 35) (Emphasis added.)

The trial court judgment, quoted in Odom, stated:

"3. The real question involved is the status of such lakes as to whether they are the private property of Deltona or are vested in the state as sovereignty lands in trust for the people. Odom, p. 980.

. . . . . .

13. It is of considerable significance that Section 253.151 singled out 'meandered fresh water lakes' for special treatment, and specified with particularity that same are not to be construed to be of the same character as tidal lands, streams, watercourses or rivers or as lakes attached to tidal waters. Subsection (1) Odom, p. 983.

. . . . . .

16. Considering all of these statutory and constitutional expressions, all of which are consistent, it is made to appear that nonmeandered lakes and ponds are not to be classified as navigable bodies of water.

. . . . . .

As already mentioned, the Court is of the view that nonmeandered lakes are to be regarded as nonnavigable."

Clearly the parties argued and the trial court determined the law regarding small nonmeandered lakes and ponds. In considering the case, this Court said:

> "Appellants also argue for the application of the 'notice of navigability' concept, i.e., that the grantee of swamp and overflowed lands under a Trustee deed takes with 'notice' that the conveyance does not include sovereignty land. In the case of a large lake, such as Lake Okeechobee, a 500,000 acre lake, we agree;9 however, it seems absurd to apply this test to small, non-meandered lakes and ponds of less than 140 acres and, in many cases, less than 50 acres in surface.
> 9. Martin v. Busch, 93 Fla. 535, 112 So. 274, 286 (Fla. 1927)." Odom, p. 988.

Thus, small nonmeandered lakes and ponds within the perimeters of conveyances were the subject and issue in Odom, not long rivers of Florida. Odom's holding was not applied by this Court to rivers. This last quotation of this Court in Odom fortifies the law in Florida that protects sovereignty lands.

Thus, this Court has consistently held that a swamp and overflowed lands' deed does not include sovereignty land below the ordinary high water mark of navigable rivers and waters. There was no intention or authority to convey sovereignty land nor even a reference to either river. Left alone, the first certified question, based upon the cases in Florida, is an unequivocal "no". A swamp and overflowed lands' deed conveys uplands but does not include sovereignty lands below the ordinary high water mark of navigable rivers. Whatever the Court's determination is regarding the second and third certified questions, the answer to this first question should plainly be stated as "no".

Indeed, if this Court were to rule to the contrary, and overrule the settled law of this State, it would mean that these historical long rivers would no longer exist as they have, but would be segmented parcels of private

ownership. Furthermore, other rivers, lakes and bodies of water which are navigable would certainly be similarly affected and cease to exist as the Public's heritage as they have since the beginning of time.

Such a decision overruling or changing the settled property law of Florida would be contrary to the requirements of substantive due process of law guaranteed by Article XIV to the Constitution of the United States:4

> "And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. Joy v St. Louis, 201 US 332, 342, 50 L ed 776, 781, 26 S Ct 478. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a federal grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. Chicago, B. & Q. R. Co. v. Chicago, 166 US 226, 236-241, 41 L ed 979, 984-986, 17 S Ct 581.
>
> . . . . . .
>
> To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all.
>
> . . . . . .

4. Certainly a retroactive judicial application of such an interpretation to property law denies due process of law guaranteed by the United States Constitution. Brinkerhoff-Faris Trust & Savings Company v. Hill, 281 U.S. 673 (1930).

> But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property-without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." (Concurring opinion of Justice Steward) (Emphasis added.) Hughes v. Washington, 389 U.S. 290, 296-298 (1967).

Clearly the reasonable expectations of the property owners involved here, the Trustees and Coastal, were in 1941 that the law protected this property interest leased (A 160-180) and as late as in 1976 when the two parties executed a settlement agreement recognizing the same areas (A 181-188). The phosphate companies knew, let alone expected, that the river systems were owned by the People and leased to Coastal (A 125,126). An affirmative answer to the first certified question would defeat the reasonable expectations of all the parties here, plaintiff and defendant.5

Such a rule of law would further mean that no equity need be shown, for despite the knowledge or recording of the People's ownership, a single paper need be consulted. Supporting the precedent, however, does not preclude a legitimate defense by a grantee who has a legitimate example of equitable estoppel. Equitable estoppel satisfies the necessity for protection of the People's rights in the sovereignty lands, yet protects an innocent party from inequitable conduct or action by the agents of the People. Thus, the swamp and overflowed lands' deed conveys upland to a grantee, but not sovereignty land. If a grantee has been inequitably treated, equitable estoppel prevents

5. Such an interpretation could also impair obligation of contract (A 160-180, 181-188) contrary to Article I, §10 of the Constitution of the United States.

the assertion of any sovereign right to the remaining land. To affirm the decision of the District Court as Agrico suggests would mean that the People's rights would simply be ignored, without a showing of equity. It is because Agrico cannot prove this defense in the related cases that they urged the change in the law here. In any event, such disputed issues of fact should be made at trial, not on summary judgment.6

The swamp and overflowed lands' deeds conveyed uplands, which no one questions. The deeds did not convey sovereignty lands. Beyond question, the federal patents conveyed no sovereignty lands and the decision should be reversed regardless of the effect of swamp and overflowed lands' deeds.

6. Undoubtedly, Agrico will point to the payment of various taxes and other facts to resist Coastal's equitable defenses below. It is sufficient to note that this case was concluded by summary judgment, and inferences including those matters pointed out in Point IV must be drawn in favor of Coastal and the Trustees and against Agrico. The harder Agrico resists Coastal's equitable defenses, the greater the demonstration of the need for factfinding below and reversal here.

POINT II

THE DOCTRINE OF LEGAL ESTOPPEL OR ESTOPPEL BY DEED DOES NOT APPLY TO THE SWAMP AND OVERFLOWED LANDS' DEEDS BARRING THE TRUSTEES' ASSERTION OF TITLE TO SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH WATER MARKS OF NAVIGABLE RIVERS.

As just seen, no Florida case has ever held that sovereignty lands, consisting of long rivers, were conveyed by general descriptions contained in a swamp and overflowed lands' deed, simply by virtue of the deed. Legal estoppel has been applied, but the theory of legal estoppel or estoppel by deed has never been held to bar Florida's assertion of title to navigable river sovereignty lands. Legal estoppel does not convey title, it bars the assertion of title. No Florida case has ever allowed a person to defend his claim to parts of long rivers using the doctrine of legal estoppel where authority and intention to convey such sovereignty lands were not present. The law in Florida has always been and continues to be that both authority and intention must be present before the doctrine of legal estoppel may be applied to sovereignty lands:

> "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." (Emphasis added.) Martin v. Busch, 93 Fla. 535, 112 So. 274, 285 (1927).

Neither authority nor intention exist here, so the second certified question must also be answered "no." Such a judicial interpretation would violate Article XIV to the Constitution of the United States. See the argument at page 23 and footnotes 4 and 5.

Legal estoppel or estoppel by deed does not bar the ownership of the Trustees of these long rivers. This doctrine that estops one from

contradicting recitals of deeds has never been applied to the land owned by the People by right of their sovereignty, and held in trust by Trustees where they lacked the power to convey such lands. As this Court has said:

> "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 of 'sovereignty lands.'" Pierce v. Warren, 47 So.2d 857, 859 (Fla. 1950).

We do not deal in this point with equities as addressed by any equitable estoppel plea, and which depend on the peculiar facts of a case, but rather with an assertion of a new legal theory which, regardless of equity, would apply to divest the people of their ownership to vast river systems of Florida. The question of equitable estoppel against the Trustees and Coastal was not addressed below or by the trial court because that issue could not be used to establish a title in the quiet title suit, but only to defend title as it is being urged in the Federal cases. Bryant v. Peppe, 238 So.2d 836 (Fla. 1970); Burnham v. Davis Islands, Inc., 87 So.2d 97 (Fla. 1956); and Florida Bank & Trust Co. v. Field, 157 Fla. 261, 25 So.2d 663 (1946). Coastal's answer raised equitable defenses here which require factual evaluation and a reversal for a trial. (See Point IV.)

A. Florida Law Has Been Clear; Legal Estoppel Does Not Preclude The Assertion Of Sovereign Ownership Here By The Trustees or Coastal

The law of Florida on legal estoppel as expressed by this Court is clear. Agrico was successful in urging the trial court and the District Court below to invent a new rule of law in Florida which conveyed title to it of thousands of acres of sovereignty lands of these two large rivers. No reason nor excuse was advanced to change the organic law of Florida, however.

1. Nearly Half of These "Deeds" Were Not Even Deeds by The Trustees, But Were Federal Patents, Making The Application of Legal Estoppel At Once Here Total Error.

As the trial court judgment noted (A 137-146), many, in fact nearly half of the deeds relied upon by Agrico here, were actually not even deeds by the Trustees, but were Federal patents! Yet Agrico and the courts below ignored the fact that neither the Trustees nor Coastal was a grantor of these "patents." The absence of this first indispensable legal estoppel element establishes error in the decisions below.

Legal estoppel stated succinctly is:

> ". . . defined as a bar which precludes a party to a deed and his privies from asserting as against others and their privies any right or title in derogation of the deed or from denying the truth of any material fact asserted therein." 22 Fla.Jur.2d, Estoppel and Waiver, §10, p. 424.

But neither the Trustees nor Coastal were a party or privy to the grantor of the Federal patents. Yet the courts below accepted Agrico's new rule of law and applied legal estoppel to convey the sovereignty lands beneath the Peace and Alafia River systems. Not only is this logically erroneous, but it is clearly contrary to the organic law regarding such Federal patents:

> "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.

> See Edwards v. Rolley, 96 Cal. 408, 31 Pac. 267, 31 Am. St. Rep. 234." State v. Gerbing, 56 Fla. 603, 47 So. 353, 357 (1908).

Federal law is identical; no conveyance of sovereignty lands is made by such patents. Although Florida tempers its own rule of law by the "notice of navigability," see Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927), and Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976), Federal law says no to any conveyance of sovereignty lands:

> "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 of the United States.
> The donation land claim, bounded by the Columbia river, upon which the plaintiff in error relies, includes no title or right in the land below high water mark; and the statutes of Oregon, under which the defendants in error hold, are a constitutional and legal exercise by the state of Oregon of its dominion over the lands under navigable waters." (Emphasis added.) Shively v. Bowlby, 152 U.S. 1, 57 (1893).

Thus, the Federal patents do not form a basis for a bar of legal estoppel, let alone a claim of title. Clearly the courts below were in error in applying collateral estoppel against the Trustees and Coastal on the basis of these Federal patents, which amount to nearly half of the lands involved.

2. Since Neither Authority Nor Intention Exist to Convey The Sovereignty Lands of These Rivers, Legal Estoppel Cannot Be Applied to Vest Title by The Swamp and Overflowed Deeds.

With respect to the other half of the conveyances, that is, the Florida swamp and overflow deeds, the Trustees neither intended to convey sovereignty lands nor had the lawful authority to convey the Peace and Alafia River

systems away. As already seen, both intention and authority must exist before legal estoppel may be applied to the swamp and overflowed lands' deeds.

> "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." (Emphasis added.) Martin v. Busch, 93 Fla. 535, 112 So. 274, 285 (1927).

With respect to the element of "intention," none of these conveyances even mention the Peace and Alafia Rivers, nor traverse the edge of these rivers. On the other hand, Coastal's lease refers specifically to the Alafia River and Peace River to Township 29/30 (A 163). The swamp and overflowed lands' deeds conveyed uplands and no one disputes this. The issue of intention is directed only to the remaining submerged lands that are the bottoms of the Peace and Alafia Rivers.

Intention to convey sovereignty lands must be present:

> "Legal estoppel or estoppel by deed is determined by the intention of the parties as expressed in the deed, whether or not legal estoppel may be applied in a given case is dependent entirely on the language used in the deed or which appears on the face of the instrument." (Emphasis added.) Trustees of the Internal Improvement Fund v. Lobean, 127 So.2d 98, 102 (Fla. 1961).[7]

The intention expressed in the swamp and overflowed lands' deeds was not to convey the sovereignty bottoms of the Peace and Alafia Rivers, but to convey

7. Unlike Lobean, these lands are not a "government lot" specifically described by metes and bounds which leaves no doubt as to intention of the area conveyed to intrude into the sovereignty lands. A doubt as to the nature of the lands conveyed may still exist. Unlike Lobean, where the lands were originally sovereignty lands that the Trustees had authority to sell, here there is no authority. Lobean, at p. 103. Further, unlike Lobean these lands are not lands that are a part of the Murphy Act Trust, but are still sovereignty lands. Thus in Lobean, unlike the present case, both key elements of legal estoppel existed, authority and intention.

swamp and overflowed lands. A general intention is not sufficient to convey sovereignty lands, however. As seen before:

> "'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law on the consideration of grants.'" Shively v. Bowlby, 152 U.S. 1, 10 (1894).

If any intention is to be presumed in the swamp and overflowed lands' deeds, other than to convey swamp and overflowed lands, then it must be against the grantee. The intention to convey sovereignty lands is not supplied by the deeds, so the second element of legal estoppel is also missing.

Authority to convey must also exist to establish legal estoppel. In other words, in order to pass an estate by estoppel, the party must have power to pass it by direct conveyance. (22 Fla.Jur.2d, Estoppel and Waiver, §12, p. 427.) No authority to convey these fresh water bottoms of the Peace and Alafia Rivers had ever been given to the Trustees until 1969, Chapter 69-308, §1, Laws of Florida. Pursuant to Article X, Section 11 of the Florida Constitution (1968), the People reaffirmed the limitation that only sales which were in the public interest are possible. At no time have the Trustees had title to simply sell the lands (R 1187-1188). The related theory of "after acquired title" cannot apply because there still has been no acquisition of title to sell. A trustee can not be said to be estopped by a deed given with regard to one trust, say Trust A, simply because of the acquisition of the same property by another trust, say Trust B, of which he is also a trustee! This issue was long ago put to rest in Martin v. Busch, 93 Fla. 535, 112 So. 274, 286 (1927):

> "When the trustees of the internal improvement fund made the conveyance to the predecessors of complainants in 1904, such trustees had authority to convey the swamp and overflowed lands of the state; but they had no authority to convey

> sovereignty lands under navigable waters or the shores below ordinary high-water mark of navigable waters or tidelands.
>
> . . . . . .
>
> and any authority that may be conferred by the Acts of 1919 does not operate to convey or confirm title to lands not covered by the conveyance made in 1904." (Emphasis added.)

Thus, without any authority, the Trustees' assertion of sovereignty lands here cannot be barred by legal estoppel:

> "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." (Emphasis added.) Pierce v. Warren, 47 So.2d 857, 859 (Fla. 1950).

Again, the strict construction is against the grantee. The third element of legal estoppel, authority, is absent.

B. Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976), Did Not Change Florida Law; Legal Estoppel Does Not Preclude The Assertion Of Sovereign Ownership Here.

Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976), involved small lakes less than 140 acres in size, which were wholly included within the perimeters of the conveyances and did not deal with large river systems like the Peace and Alafia Rivers. Furthermore, Odom dealt with swamp and overflowed lands unlike these cases which deal with sovereignty bottoms of navigable rivers.

In discussing the general law, this Court in Odom, supra, reaffirmed the clear law of Florida. In citing the trial court's decision, this Court held:

> "That the state and its agencies may be estopped to assert claims in lands in which they have a basis of ownership was bluntly stated by the Supreme Court in Daniell v. Sherrill, (Fla. 1950) 48 So.2d 736, and in Trustees of I.I. Fund v. Lobean (Fla. 1961) 127 So.2d 98, which upheld the First District Court of Appeal in Lobean v. Trustees, etc., 118 So.2d 226." (Emphasis added.) Supra, at 985.

No authority or basis of ownership existed nor exists here. Later in the opinion, this Court held that where there are "valid state grants" which were "lawfully executed" without reservation, title could be shown.

In the memorandum opinion in the related federal cases, the court said:

> "Legal estoppel was also applied in Odom, the court stating, 'If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the Trustees' claim of ownership, subject to rights specifically reserved in such conveyances.' 341 So.2d at 989. Crucial to the application of legal estoppel in Odom was the fact that the lakes in question were non-navigable and that the underlying lands thus were not sovereign in character. Consequently, there was no question of the authority of the Trustees to convey them into private ownership, the court more than once speaking of 'valid federal and state grants of title' and 'lawfully executed land conveyances.' 341 So.2d at 989 (emphasis supplied.)
>
> The existence of lawful authority to convey plainly distinguishes Lobean and Odom from the instant cases. Unlike Odom, it has not yet been determined whether the lands in dispute are non-sovereign and therefore indisputably capable of conveyance to private parties. If sovereign, it is evident that the Trustees were wholly without authority to alienate them until 1969, a date subsequent to the conveyances to defendants' predecessors in interest. The state may not be estopped by the unauthorized acts of its officers. Dade County v. Bengis Associates, Inc., 257 So.2d 291 (Fla. 3d DCA 1972); Greenhut Construction Co. v. Henry A. Knott, Inc., 247 So.2d 517 (Fla. 1st DCA 1971).
>
> There is another, perhaps even more compelling reason why the Trustees' deeds cannot work an estoppel against the State of Florida. The deeds contain no indication that the state intended to convey title to sovereign lands. Estoppel by deed, as indicated in Lobean, 'is determined by intention of the parties as expressed in the deed.' 127 So.2d at 102. Here, the deeds are silent as to whether a conveyance of sovereign title is intended. It is clear, however, that under the public trust doctrine the intent to alienate trust property must be clearly stated. Martin v. Busch, supra. Consequently, the lack of any reference to submerged lands in the deeds from the state to defendants' predecessors in interest negates any possible inference that these lands were meant to be conveyed. Estoppel by deed is therefore inapplicable." (RA 414, 415)

Thus, Odom neither contradicts nor varies the law regarding legal estoppel. A grantor, who has intention and authority to convey, will be

legally estopped. Here authority and intention are absent. As to the federal patents, the Trustees and Coastal are not even a grantor or in privity with the grantor. Because all elements of legal estoppel are absent with respect to the sovereignty lands beneath these rivers, the second question must be answered "no" and the decision reversed.

Again it is important to remember that we are dealing in this point with legal estoppel and not equitable estoppel. Neither of the lower courts dealt with equitable estoppel as pointed out above. Many have urged the flood gate argument, screaming that innocent landowners will have titles upset and disrupted. In fact, no innocent landowners are involved or contemplated; only the phosphate companies with unclean hands who knew what they were plundering (A 116, 117). Landowners who have the equities have the defense of equitable estoppel available. The avenue for equity is still available. Equitable estoppel provides a complete defense. In this case, if on the facts the phosphate companies defeat Coastal's equitable defense to claim what is the People's, then it must be done at a trial on these facts. There is no reason to give up the trust of sovereignty lands without a showing of equity and no basis to do so by summary judgment. See Point IV herein.

If the change in Florida law on legal estoppel is accepted, and the lower courts' decisions approved, Florida's great rivers will be transformed into a fragmented line on a property ownership map. The sovereignty lands held in trust upon admission to statehood would be raided for no reason of public policy or welfare. One hundred forty years of stare decisis protecting sovereignty lands will be overruled against all reason. The decision of the District Court should be reversed.

POINT III

IN THIS CASE THE MARKETABLE RECORD TITLE ACT, CHAPTER 712, FLORIDA STATUTES, DOES NOT OPERATE TO DIVEST THE TRUSTEES OR COASTAL OF TITLE TO SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH WATER MARK OF NAVIGABLE WATERS

In this case, a simple chronology of six relevant events demonstrates the bases for reversal of the decision of the District Court:

A. 1954 Lease Recorded. In 1954, Coastal Petroleum Company's Lease 224-B issued by the Trustees, which specifically named the Alafia River and the Peace River Systems to Township 29/30, was recorded in the Public Records of Polk County (A 105, 160-180).

B. 1961 Judgment Recorded. In 1961, a judgment affecting and confirming Coastal's and the Trustees' interest was recorded in the Public Records of Polk County (A 106).

C. 1961 Actual Knowledge. By 1961, both phosphate companies had not only the foregoing constructive notice from public records, but actual notice of Coastal's and the Trustees' interests, despite which they continued to convert minerals from these rivers (A 118, 125,126).

D. 1963 MRTA. In 1963, the Marketable Record Title Act, Chapter 712, Florida Statutes (MRTA), was enacted with a savings clause expiring on July 1, 1965 (Section 712.09, Florida Statutes).

E. 1978 Amendment. In 1978, MRTA was amended to make clear that sovereignty lands were not within the scope of MRTA. Section 712.03(7), Florida Statutes (1979)

F. 1982-83 Quiet Title Suits. In 1982, Agrico filed this quiet title suit in Polk County, Florida, claiming title by "vested" rights under MRTA before the 1978 Amendment relying upon swamp and overflowed deeds and Federal patents, none of which name the Peace River, Alafia River, or any other waterbody (R 1, 401).

In spite of this chronology of facts, the District Court embraced its earlier conclusion and held:

> "Plaintiff's titles under the 1883 deeds were perfected under MRTA, as enacted in 1963; therefore, retroactive construction of the amendment would unconstitutionally deprive them of rights vested in 1963." (Emphasis added.) (A 13).

The chronology makes clear Agrico had constructive and actual notice by the 1961 notice of the Trustees' and Coastal's interest long before the effective date of MRTA in 1963. No "vested rights"[8] could have existed because the recorded interests of the Trustees and Coastal were exceptions under Section 712.03(4), of MRTA. Furthermore, the actual knowledge would preclude any claim of title as in other recording acts. Even more basic, however, MRTA itself never even contemplated sovereignty lands. When the question was first raised, the Amendment to MRTA in 1978 was made. Suit was not filed by Agrico until 1982 (R 1, 401).

The District Court opinion simply ignored the recordings in Polk County, considered only the third certified question, held that sovereignty lands came within the scope of MRTA in 1963, and that vested rights were thereby created in the phosphate companies before the 1978 Amendment. But, the recordings in Polk County were sufficient to preserve both the Trustees' and Coastal's interests in the Peace and Alafia Rivers, even if the lower courts were correct on the certified question. The courts below were, however, in error in holding MRTA operated upon sovereignty lands of Florida between 1963 and 1978.

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8. Any right, if it were to exist, must be a "vested right" since the 1978 Amendment removed all doubt as to the inapplicability of MRTA to sovereignty lands. Askew v. Sonson, 409 So.2d 7,9 (Fla. 1981). Obviously before the enactment of MRTA in 1963, no such claim could be made.

The special status of the sovereignty lands has already been discussed. Although the certified question is one of first impression to this Court, the Court has consistently held that the State cannot abdicate general control of the sovereignty lands. State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640, 645 (1893), and State v. Gerbing, 56 Fla. 603, 47 So. 353, 355 (1908). The strictest construction is placed on claims to such lands. Again, all such grants are strictly construed against the grantee. Shively v. Bowlby, 152 U.S. 1, 10 (1894). State v. Black River Phosphate Co., supra, p. 648. Not only must intention be shown, but specific authority must be demonstrated. Brickell v. Trammell, 77 Fla. 544, 82 So. 221, 228 (1919), and Apalachicola Land and Development Co. v. McRae, 86 Fla. 393, 98 So. 505, 518 (1924). Thus, any such grant, whether legislative or executive, must be accompanied by specific intention and specific authority and will be strictly construed against the grantee.

No where in MRTA before the 1978 Amendment are sovereignty lands mentioned,9 let alone any authority or any intention to convey any such sovereignty lands by MRTA. It is only by a construction of MRTA in favor of the grantee that one can find any "vested right." To do so, however, is to reject the established law that requires a strict construction against the

9. In Askew v. Sonson, 409 So.2d 7 (Fla. 1981), this Court discussed the definition of "person" in Section 712.01, Florida Statutes (1977), and concluded that the Legislature intended to "affect State properties." Sovereignty lands are not specifically mentioned. Applying a rule of strict construction against the grantee would not allow such affected state properties to include sovereignty lands.

grantee!10 Strict construction of the grants against the grantee phosphate companies renders their claims here defeated.

An equally compelling reason to demonstrate why MRTA could not have applied to sovereignty lands between 1963 and 1978 would be the practical implications. While MRTA may not prospectively be applied to sovereignty lands because of the 1978 Amendment, any application between 1963 - 1978 in considering any "vested rights" puts the Trustees in an untenable position. Such a construction of MRTA would have required them to record a notice to sovereignty lands all over Florida before July 1, 1965.11 Such notice would be required because there is no deed from the United States to Florida of sovereignty lands, because these lands were conveyed by Act of Congress, and because the state was admitted under the equal footing doctrine. Even if there had been a deed, it would have been dated in 1845 and would have required the same notice. Section 712.06 requires a specific description to be included in the notice. Specific reference to a meander or other line of demarcation, however, would be unconstitutional. State of Florida v. Florida National Properties, Inc., 338 So.2d 13, 19 (Fla. 1976). Thus, the Trustees

10.In effect, there are two competing constructions. The first is that contained in Section 712.10, Florida Statutes. The other is the strict construction against the grantee who claims sovereignty lands. Shively v. Bowlby, supra. The basis of this latter rule of construction is state and federal constitutions and goes back to English common law. The former rule is legislative in origin. Clearly the constitutional common law rule, favoring sovereignty lands, must prevail in a conflict of the two rules.
11. Section 712.09, Florida Statutes. As the Trustees point out, they did not even obtain qualified title to these lands until 1969. No one was even in a position to record a notice.

would have been put into the position in 1963 of not recording and losing the Public's lands or recording a constitutionally void specific description.12

As already seen, even if MRTA were held to have operated between 1963 and 1978 upon sovereignty lands beneath fresh water rivers in Florida, the two exceptions of record and actual notice pointed out above and ignored by the District Court require a reversal of its decision. While the District Court ignored both the recorded lease and recorded judgment, the trial court considered the recorded lease but ignored the recorded judgment.13

The trial court did consider the recorded lease, however, and held:

> "The attempted[14] recordings of Coastal's Lease in Polk County in 1954 was insufficient as an exception to the marketability of Agrico's title. Not only does the attempted recording of an unexecuted, printed, and conformed copy as an attachment to a royalty deed from Coastal to a third party fail to constitute the recording of an adverse title transaction as contemplated by the Act, but the descriptions of the lands in the lease as 'the bottoms of and water bottoms adjacent to' certain named rivers 'together with all connecting sloughs, arms and overflow lands located in such waters' is too vague and uncertain to enable the land to be identified and thus the lease cannot qualify as an exception to marketability." (Emphasis added.) (A 144)

12. The only other option would be to name whole rivers, for example, which was the case here in Coastal's recorded Lease which referred to the Peace River and Alafia River. While this meets the requirement of Section 712.03(4), Florida Statutes, it may not meet the requirement of Section 712.06, Florida Statutes. Note that Section 712.01(3) was amended in 1981, after the 1978 Amendment, by Chapter 81-242, §1, Laws of Florida, to require a specific description.

13. This judgment was recorded in the records of Polk County in 1961 (A 99). It is decisive here. As a sufficient title transaction, it raises an exception under Section 712.03(4). See Kittrell v. Clark, 363 So.2d 373 (Fla. 1st DCA 1978), cert. denied, 383 So.2d 909 (Fla. 1980), where even a recorded will in an estate that didn't even mention the interest was a sufficient title transaction. This case is much stronger as a judgment in a proceeding that dealt with Lease 224-B and named rivers and other lands (A 99) and was known to Agrico (A 114-130). Collins v. Coastal Petroleum Company, 118 So.2d 796 (Fla. 1st DCA 1960).

14. An finding is made by the trial court that the recording was not completed, but the recording of Lease 224-B in 1954 (A 189) was completed properly and no question has even been raised concerning the propriety of recording of the judgment in 1961 (A 98-104).

As another Court has already reasoned regarding the Polk County recording of Coastal's Lease in 1954:

> "Coastal contends that its and the Trustees' rights are preserved from extinction under the MRTA by virtue of section 712.03(4) of Florida Statutes which provides an exception for '[e] states, interests, claims or charges arising out of a title transaction which has been recorded subsequent to the effective date of the root of title.' The Trustees vigorously argue that sovereignty lands are immune from operation of the MRTA. Both the Trustees and Coastal maintain that the MRTA does not apply to them because such application would violate the Florida and United States Constitutions.
>
> This court is of the view that it does not have to reach the questions whether the MRTA affects sovereignty lands nor if the Act is unconstitutional. Assuming arguendo that the MRTA applies to sovereignty lands, this court finds that the exception set forth in section 712.03(4) of Florida Statutes precludes the extinguishment of Coastal's and the Trustees' rights.
>
> The facts regarding the history of recordation of Coastal's lease interests in Polk County, Florida are uncontroverted, and those facts as set forth in Document 509, Part II, pp. 4-7 are incorporated by reference into this memorandum opinion. The parties, however, disagree on the effectiveness of such recording.
>
> Coastal's lease was properly recorded in Polk County on April 9, 1954. Although an unsigned printed copy of the lease was filed at that time, in 1949 a properly executed original had been recorded in Charlotte County. According to the customary practice in the pre-Xerox era, a non-original was inserted as the record entry supported by the verification of the Clerk that the original was lawfully entitled to be recorded. See Fla.Stat.§695.19 (1979). Thus, Mobil's marketable record title does not affect or extinguish Coastal's and the Trustees' rights because the 1954 Polk County filing of the royalty deeds with leases attached is an effective title transaction recorded subsequent to the date of Mobil's root of title." (Emphasis added.) Mobil Oil Corporation v. Coastal Petroleum Company, et al., Case No. 79-1082, United States District Court, Northern District of Florida, Memorandum Opinion and Order, pgs. 1-3 (1981).

See a copy of the verification at A 180. The recording was proper.

The only other reason for ignoring this second decisive recorded exception was the description was vague or uncertain. The description in Lease 224-B included:

> "Also the bottoms of and water bottoms adjacent to the rivers hereinafter named which flow through natural channels in the Gulf of Mexico, to wit: Myakka, Manatee, Little Manatee, Alafia, Caloosahatchee (from its mouth to LaBelle Bridge), Peace River to Township 29/30, included within said Drilling Blocks 5, 6, 7 and 8 as shown on said map." (A 192).

This description is not too vague or uncertain to enable land to be identified.15 Here all the sovereignty water bottoms of the named rivers were described, not some vague or uncertain part of them. Compare Deering v. Martin, 95 Fla. 224, 116 So. 54 (1928), where only some vague and uncertain part was conveyed. If the lease description here was vague or uncertain, then no other recording description of sovereignty lands could ever be effective, because the boundary of such lands changes in imperceptible degrees as the ordinary high water level changes. To describe the boundary of a total river, one would simply name the river, not try to call out its ordinary high water lines, because those lines are by necessity ambulatory. But if one did fix the location of those lines by description, the recordation would be constitutionally void. As this Court held in 1976 in State of Florida v. Florida National Properties, Inc., 338 So.2d 13, 19 (Fla. 1976):16

15. Coastal Petroleum Company's Lease has been upheld by this and other courts. Watson v. Holland, supra, Burns v. Coastal Petroleum Company, supra, and Collins v. Coastal Petroleum Company, 118 So.2d 796 (Fla. 1st DCA 1960), cert.denied, 125 So.2d 300 (Fla. 1960). No court has said the description is vague or void. In Burns the description was confirmed to the Peace River.

16. In that case, the Court held Section 253.151, Florida Statutes (1975), unconstitutional because it attempted to fix specific and permanent boundaries of navigable fresh water lakes.

> "An inflexible meander demarcation line would not comply with the spirit or letter of our Federal or State Constitutions nor meet present requirements of society."

This Court explained why a fixed demarcation line would be unconstitutional:

> "Upon careful consideration of both the record and arguments of counsel, we conclude that the trial court correctly held the efforts of the State to fix specific and permanent boundaries were improper, and we hold that Section 253.151, Florida Statutes, is unconstitutional.
>
> . . . . . .
>
> Additionally, the ancient common law relating to accretion and reliction prevails in Florida. However, we recognize that the doctrine of reliction is applicable in situations where water recedes by imperceptible degrees from natural causes and that it does not apply where land is reclaimed by deliberate drainage." (Emphasis added.) Supra, p. 18.

Thus, no metes and bounds description could describe the sovereignty lands since their boundary cannot constitutionally be fixed to a specific and permanent line. The legislature is without authority to permanently fix such boundaries, let alone the Trustees or Coastal. The description of Coastal's lease is not vague or uncertain, but is as it constitutionally must be. Furthermore, the description was not considered too vague or uncertain by this Court when it upheld the validity of the leases in Watson v. Holland, 155 Fla. 342, 20 So.2d 388 (1945).

The trial court may have also been trying to apply the 1981 Amendment to the definition of "title transaction." It must be remembered that the Amendment in 1978 exempted sovereignty lands before the restrictive amendment in 1981 of "title transaction." Chapter 81-242, §1, Laws of Florida. The 1978 Amendment to the exceptions left no doubt that sovereignty lands were meant to be excluded:

"(7) State title to lands beneath navigable waters acquired by virtue of sovereignty." Chapter 78-288, Laws of Florida.

The definition of "title transaction" at the time of the 1978 Amendment, however, was:

"(3) 'Title transaction' means any recorded instrument or court proceeding which affects title to any estate or interest in land." Section 712.01(3), Florida Statutes (1977).

Three years after this 1978 Amendment, making clear the exemption of sovereignty lands and any arguable vested rights, the definition of "title transaction" was changed. The 1981 change came too late to avoid the protection of the valid recording of Coastal's Lease and judgment under the old definition of title transaction and too late to affect the Amendment clarifying sovereignty lands status. The new definition in 1981 was:

"(3) 'Title transaction' means any recorded instrument or court proceeding which affects title to any estate or interest in land and which describes the land sufficiently to identify its location and boundaries." Chapter 81-242, §1, Laws of Florida.

Even if the trial court was trying to apply this 1981 definition, and if the 1978 Amendment had not been made, or did not affect Coastal, the whole series of litigation itself would meet the definition. The trial court was clearly in error in finding that the recorded lease was vague and uncertain and did not protect the Trustees and Coastal. Whether MRTA applied between 1963 and 1978 or not, two recorded instruments protected the rivers by exception pursuant to Section 712.03(4), Florida Statutes.

Beyond these statutory exceptions though, as a recording act,[17] MRTA is subject to the exception of actual notice. As stated in 44 Fla.Jur.2d, Records and Recording Acts, §63, pg. 516:

17. City of Miami v. St. Joe Paper Company, 364 So.2d 439, 442 (Fla. 1978).

> "§63. Effect of independent notice.
> Since the object of the recording statute is to protect subsequent purchasers and encumbrancers against prior secret conveyances or encumbrances, subsequent purchasers and encumbrancers are not prejudiced where they have actual knowledge of a prior conveyance or encumbrance that was not recorded; knowledge is equivalent to the recording of the instrument. This rule is applicable to unrecorded conveyances, leases, and encumbrances."

The cases cited support the exception. Moyer v. Clark, 72 So.2d 905 (Fla. 1954); Licata v. DeCorte, 50 Fla. 563, 39 So. 58 (1905); Ullendorff v. Graham, 80 Fla. 845, 87 So. 50 (1920); Lassiter v. Curtiss-Bright Co., 129 Fla. 728, 177 So. 201 (1937); Escambia Properties, Inc. v. Largue, 260 So.2d 213 (Fla. 1st DCA 1972); Ruotal Corporation, N.W., Inc. v. Ottati, 391 So.2d 308 (Fla. 4th DCA 1980). The actual knowledge in 1961 of Coastal's Lease 224-B is unrefuted in the record (A 125). Coastal's and the Trustees' interest would be an exception based upon actual knowledge. See also, Holland v. Hattaway, 438 So.2d 456 (Fla. 5th DCA 1983).

Coastal submits that the Marketable Record Title Act, Chapter 712, Florida Statutes, did not operate between 1963 and 1978 to divest the Trustees or Coastal of title to sovereignty lands. Whether MRTA related to all sovereignty lands between 1963 and 1978 or not, here, instruments have twice been filed in the public records of Polk County and in the Florida

public records[18] before the Act was even effective. Further, Agrico had actual knowledge. The decision below should be reversed.

18. In addition to the public records of Polk County reflecting this ownership, records are kept in Tallahassee, Florida, pursuant to Section 253.031, Florida Statutes, which provides in part:

> "(2) The Board of Trustees of the Internal Improvement Trust Fund shall have custody of all the records, surveys, plats, maps, field notes, and patents and all other evidence touching the title and description of the public domain."

This statute was enacted by the same legislature at the same time as MRTA, Chapter 63-133, Laws of Florida, as part of an overall effort to deal with title to lands. Chapter 63-293, Laws of Florida. The argument to require the recording in the county only is not supported by MRTA. MRTA no where limits public recording only to the public records of a county. The legislature clearly, by enacting both statutes, allowed recording in relevant "public records." Section 712.02, Florida Statutes.

POINT IV

THE DECISION OF THE SECOND DISTRICT IS NOT SUPPORTED BY ANY OTHER POINT OF LAW AND SHOULD BE REVERSED.

Although the certified questions vested this Court with jurisdiction, the entire case is on review here. The decision of the Second District is not supported by any other point of law, however, and none was stated. Two other points, however, demonstrate why the decision and judgment should be reversed. First, the trial court rendered a summary judgment when genuine issues of material fact remained for trial. Second, the final judgment rejected Coastal's defenses of laches and equitable estoppel when evidence existed to support the legal defenses to the quiet title claims.

The law is too well settled to be disputed. Rule 1.510, Fla.R.Civ.P., makes it unmistakably clear that it must appear that there is:

> ". . . no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Only when every genuine issue of material fact has been eliminated may the trial court properly exercise its discretion to enter a summary judgment. Yost v. Miami Transit Co., 66 So.2d 214 (Fla. 1953), Escobar v. Bill Currie Ford Inc., 247 So.2d 311 (Fla. 1971).

This Court has said that:

> "In matters of summary judgment neither the trial court nor the appellate court is justified in weighing facts and meting out justice according to the conclusion reached." Yost v. Miami Transit Co., supra, at 216.

If the slightest doubt remains, a summary judgment cannot be granted. Williams v. City of Lake City, 62 So.2d 732 (Fla. 1953). All doubts as to the existence of a genuine issue of material fact in this case must be resolved against the movant. Williams v. City of Lake City, supra. The

burden must be carried on every possible theory on which the adversary's position might be sustained. Posey v. Pensacola Tractor & Equipment Company, 138 So.2d 777 (Fla. 1st DCA 1962).

Summary judgment is a limited remedy, limited because of the constitutional right to a jury trial. As this Court in Jones v. Stoutenburgh, 91 So.2d 299, 302 (Fla. 1957), stated:

> ". . . [t]he power to enter a judgment summarily should be exercised with a degree of circumspection in view of its potentialities for encroaching upon our traditional processes for determining the rights of parties to a cause."

The "traditional processes" referred to are, of course, Coastal's and the Trustees' rights to trial by jury:

> "We are fully conscious of the great benefit of the rule authorizing summary judgments in expediting litigation and we wish to foster its use, but we must at all times realize that the process is circumscribed by the guaranty of trial by jury." Yost v. Miami Transit Co., supra, at 216.

That right is protected not only by the Federal Constitution, but by Article I, Section 22 of the Florida Constitution (1968), which requires:

> "Trial by jury. - The right of trial by jury shall be secure to all and remain inviolate." (Emphasis added.)

Rather than the benefit of the doubt going to Coastal or the Trustees, the courts below construed the facts in favor of Agrico. Perhaps the best example of the trial court's construction of facts in favor of Agrico is its failure to even address or deal with Coastal's defenses. (The trial judge did not even enter an order on Coastal's suggestion of recusal as required by Section 38.02. Refusal to consider or act upon suggestions of recusal is inconsistent with the protection of the requirement of procedural due process of law guaranteed by Article XIV to the Constitution of the United States. See Ward v. Village of Monroeville, 409 U.S. 57 (1972); Gibson v. Berryhill,

411 U.S. 564 (1973), and In The Matter of Lee Roy Murdison and John White, 349 U.S. 133 (1955).) Coastal's defenses were laches and equitable estoppel (A 207). Both defenses are grounded upon cases decided by this Court.19 Documents form the basis for these defenses and reveal that the phosphate companies had actual knowledge of Coastal's and the Trustees' ownership in 1961 (A 118, 125). Agrico merely denied the defenses and offerred no affidavit on them (A 203). These documents must be construed against summary judgment.

In June of 1961, Agrico's predecessor was a member of the Florida Phosphate Council (A 120). This council paid an engineer, Mr. Stuck, to represent them in their efforts to resist the stabilizing of the Peace River (A 121-124).

One of the "smoking guns" of this phosphate litigation is an August 4, 1961 letter between two members of this council, Mobil Oil Corporation and International Minerals & Chemical Corporation (IMC) (A 118, 125). A copy of this letter went to Mr. Raymond Stuck, the engineer (A 119) who was an agent for the council, including Agrico. The letter from Mobil's Mr. Hughes relates to a visit by a Coastal retained geologist, Mr. Mayberry. The letter is quoted in full in the Statement of Facts at page 8 herein. Thus, despite recognition of the navigability of the Peace and Alafia Rivers, and recognition of the Trustees' and Coastal's lease, judgment and property interest, and the fact that Coastal's lease has been noted as an exception to such company title, the phosphate companies, without conscience, come forward

19. The strategy is to change the longstanding law of Florida because under the facts and law as it exists, Agrico cannot avail itself of equitable estoppel as a defense in the conversion case. Even if the Court changes the longstanding law of Florida as requested by Agrico, these equitable defenses are available to Coastal to defend against the claim by the Agrico. The change would relegate sovereignty lands to an inferior status.

to demand, in expressed innocence, title under various theories of law. Undoubtedly Agrico will reply it has paid taxes of varying kinds and urge other equity. These will only fortify the argument here in Point IV that genuine issues of material fact remain to be tried as to the equities! The District Court's affirmance of the conclusion that there was no evidence of Coastal's defenses is erroneous. These factual disputes should be considered orderly by trial and not by summary judgment.

If the changes in the law urged by Agrico are made, sovereignty lands will be lost despite no showing of equity. Under the law as it has always been, a swamp and overflowed lands' deed did not convey sovereignty ownership by itself. Neither was title conveyed by virtue of legal estoppel where authority and intention were not present. But, equitable estoppel provided a defense in cases of inequity. The change urged by Agrico and accepted by the courts below would modify the law so that though no equity need be shown the claimant still would be entitled to ownership. Again, the only reason that Agrico urges this change in the law is that it cannot successfully use the defense of equitable estoppel, because it has unclean hands. Such a perversion of the public policies that underlie the "public trust doctrine," "equitable estoppel" and "legal estoppel" should not be accepted.

CONCLUSION

Affirmance here would mean this Court would be overruling over 100 years of precedent rooted in law, reason and public policy. Swamp and overflowed lands' deeds have never, of themselves, conveyed sovereignty bottoms of navigable rivers. Legal estoppel has never barred the sovereignty claim to river bottoms, without a grant based upon specific intention and specific authority. Federal patents do not convey sovereignty lands nor can they be the basis of a legal estoppel against the Trustees or Coastal. Even if MRTA were applied to sovereignty lands between 1963 and 1978, two separate recorded title transactions are exceptions under MRTA here, as is the actual notice of Agrico since at least 1961. To affirm will mean whole navigable river systems, much of the wetlands of Florida, will cease to exist as sovereign waters held by the People of Florida. To consider equities, a trial, not summary judgment, is appropriate.

Coastal Petroleum Company respectfully prays that this Court reverse the decision of the District Court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to David G. Hanlon, Esquire, Post Office Box 3324, Tampa, FL 33601, and Bruce Barkett, Esquire, Attorney General's Office, Suite 1501, The Capitol, Tallahassee, FL 32301 this 11th day of March, 1985.

Attorney