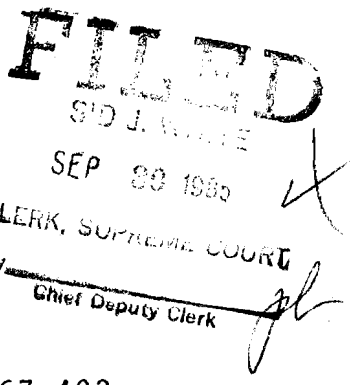
IN THE SUPREME COURT
STATE OF FLORIDA



BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioner,

v.

CASE NO. 67,402
DCA NO. 84-719

CHARLES R. STEVENS, ET AL.,

Respondents.

_____/

APPELLANT'S REPLY BRIEF

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POINT I

THE TRUSTEES CONVEYED ONLY UPLANDS; THEREFORE, A MRTA ROOT OF TITLE DID NOT ATTACH TO SOVEREIGN LANDS APPURTENANT TO UPLANDS

POINT II

THE SOVEREIGNTY LAND EXCEPTION OF 1978 MERELY DECLARED WHAT WAS ALREADY THE LAW

ARGUMENT AS TO POINT I

POINT I: THE TRUSTEES CONVEYED ONLY UPLANDS; THEREFORE, A MRTA ROOT OF TITLE DID NOT ATTACH TO SOVEREIGN LANDS APPURTENANT TO UPLANDS.

In a 1974 case involving the question of whether Michigan's MRTA applied to land underlying a navigable bay, Michigan's Court of Appeals held that the State's MRTA did not apply against the State of Michigan.[1] Gazlay v. Murray, 221 N.W.2d 604 (1974); See copy of Gazlay as Appendix 1 and copy of Michigan's current MRTA as Appendix 2. (Note under Appendix 3, the former version of Michigan's MRTA, under "Historical Note," that an exception for state land was added in 1947, two years after the original enactment.)

The Michigan Gazlay case arose from an injunction against Murray from filling a parcel of submerged land located in Mallard Bay. The defendant claimed ownership of the submerged parcel through a patent from President Benjamin Harrison.

The trial court found that the patent covered neither Mallard Bay nor the submerged land in particular claimed by the defendant. Title had never vested in any individual. On page 606, the Gazlay Court agreed with the trial court by quoting the rule that, "A patent from the government was intended to carry title to the water's edge."

By careful attention to the kind of land conveyed (uplands) and boundary law, the Michigan court stated, ". . . the

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[1] See also Gulf Oil Corp. v. State Mineral Board, 317 So.2d 576, 592 (La. 1974) (". . .patents conveying state property. . .are ineffective insofar as they purport to alienate the beds of navigable waters.")

patent involved in this case did not transfer title to the land in question."

Similarly, in the case sub judice, the State's swampland deed to Appellees' predecessor did not convey the bed of Hurricane Bay.

For when lands below the mean high water mark of a sovereign waterbody are claimed, the right thereto should be specifically shown, since such ownership is exceptional. Martin v. Busch, 112 So. 274, 285 (Fla. 1927); Brickell v. Trammel, 82 So.221 (Fla. 1919); Apalachicola Land and Development Co. v. McRae, 98 So. 505 (Fla. 1923); Williams v. Guthrie, 137 So. 682 (Fla. 1931).

Justice Whitfield, in Apalachicola Land and Development Co. v. McRae, supra, declared that:

> "Even if in this state lands below high-water mark may be the subject of ownership by private parties, such a right would be a most unusual and extraordinary one that should be particularly shown when claimed in a suit."

Appellees have not demonstrated how they can claim sovereign lands, below the mean high water mark, through a deed of uplands. A surveyor's drawing upon an aerial photo is the only means by which the Appellees have "shown" title to Hurricane Bay. In other words, a deed of uplands and a surveyor's drawing which ignores the rule against projecting survey lines over the water, constitute the "sleight of hand" used by Appellees to claim MRTA's curative effect upon submerged or filled lands lying adjacent to them.

As supported by the affidavit of Captain Trowbridge (R: 135), Hurricane Bay existed when Mr. and Mrs. Stevens received

title to the uplands now a mobile home park. Their predecessors in title also took title with notice of Hurricane Bay's existence and navigability. It is ludicrous to suggest that the bay was ignored by all upland titleholders. Notice of the bay's navigability-in-fact also gave notice of the waterward limit of the upland ownership.

Conveyances of uplands, including swamp and overflowed lands, do not include sovereign lands below the ordinary high-water marks of lands under navigable waters, unless authority and intent to include such sovereignty lands clearly appears. Martin v. Busch, supra, at 285.[2]

Application of MRTA to a private claim of title containing a swamp and overflowed deed, for the purpose of extinguishing the sovereign's title to sovereign lands, is an unconstitutional application. Article X, s. 11 of the Florida Constitution is nothing less than a constitutional embodiment of the common law trust doctrine. Section 11, in part, allows for the sale of public trust lands "only when in the public interest." Thus, the proviso that the public interest be met implies some sort of deliberation upon the part of the Board of Trustees before such a sale is "authorized."[3] Yet MRTA preempts

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[2] The Odom Court quoted with approval from the trial court opinion where Judge Willis said: "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. . ." State v. Gerbing, 47 So. 353 (1908)." 341 So.2d at 981.

[3] The State may grant limited interests in sovereignty lands when the grant is in the people's interest. Watson v. Holland, 20 So.2d 388 (Fla. 1944).

any consideration of the public interest by state officials with regard to the administration of the trust itself. See also Sections 253.03, 253.12(2)(a), 253.111, 253.02(2).

Indeed, MRTA would operate in a random, arbitrary, blind and rote manner against sovereign lands if the Appellees' view of MRTA is adopted. The "sale" or "alienation" of sovereign lands would hinge not upon the public interest but upon the freakishness of those circumstances where muniments of title, an inaccurate federal survey and mistaken case law conspire together.

In one sense, the Appellees have urged this Court to let a federal surveyor of 112 years ago determine the "public interest" by virtue of whether or not he either meandered a waterbody or even showed its presence. On pages 24 and 25 of Appellees' Answer Brief, Odom v. Deltona is quoted with regard to this Court's inability to "evaluate the work of those surveyors of many decades past."[4] Appellant is not now asking this Court to evaluate the original federal survey but merely to acknowledge that waterfront boundaries of uplands are subject to natural change.

Appellees have placed more weight upon the original federal survey than the law can bear.[5] Federal surveyors were

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[4] It is interesting to note that rather than have introduced into evidence a contemporary survey of their property based upon the current metes and bounds legal description, Appellees instead introducted a sketch which retraces the original survey of 1873.

[5] The Public Trust Doctrine and Ownership of Florida's Navigable Lakes, 29 U. Fla. L. Rev. 730, 735-36.

instructed to indicate the boundaries of significant lakes by meandering. Primarily because of difficulties in obtaining access to many lakeshores, the surveyors meandered only 190 out of 30,000 natural lakes in Florida.[6] Yet until Odom, Florida had never held that meandering presumes navigability.

The meander line is not the test of navigability. Navigability-in-fact is the test of navigabiility. State ex rel. Ellis v. Gerbing, 47 So. 353 (Fla. 1908); Bucki v. Cone, 6 So. 160 (Fla. 1889); Baker v. State, 87 So.2d 497 (Fla. 1956).

Under common law, a meander line has no legal effect concerning navigability. As stated in Niles v. Cedar Point Club, 175 U.S. 300, 308 (1899), ". . . there is no such magic in a meandered line."

In Oklahoma v. Texas, 258 U.S. 574 (1922), the Court stated that a meander line may create a "legal inference of navigability," but that "this has little significance," because the surveyors "were not clothed with power to settle questions of navigability." Id. at 585 The court then went on to say, at 586, in Oklahoma v. Texas, supra, that:

> ". . . navigability in fact is the test of navigability in law, and that whether a river is navigable in fact is to be determined by inquiring whether it is used, or is susceptible of being used, in its natural and ordinary condition as a highway for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

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[6] Id. at 746. See also the manual of survey instructions in note 36, page 735, which directs the surveyor to "meander all lakes and deep ponds of the area of 25 acres and upwards.. ."

The U.S. Supreme Court attempted to dispel a "misconception of the authority of the surveyor" in meandering when it said:

> "He was not invested with power to determine the character of the land which he surveyed or left unsurveyed, or to classify it as within or without the operation of particular laws. All that he was to do in that regard was to note and report its character, as it appeared to him, as a means of enlarging the sources of information upon that subject otherwise available." Gautheier v. Morrison, 232 U.S. 452, 458 (1914).

On the same page, the U.S. Supreme Court observed that the State courts have incorrectly proceeded upon the theory that:

> ". . . the surveyor's action in designating and meandering the 1,200-acre area as a lake operated as an authoritative determination that it was not agricultural land. . . "

Meandering by the surveyor, with nothing more, does not establish navigability under the law. How a particular federal surveyor described, with survey lines, a particular area ought to be considered only one source of authoritative information but not conclusive proof.

In Baker v. State, 87 So.2d 497 (Fla. 1957), the Cromartie Arm of Lake Iamonia, which was meandered, was held by this Court to be a non-navigable area:

> "Two or three small alligator lairs in the lap of a cow pasture could under no stretch of the imagination meet the test of navigability for useful public purposes." Id. at 498.

As noted in footnote six on page five herein, manuals of instruction were issued for government surveyors. But despite the instructions, many navigable waterbodies were not meandered. The most likely reason for such an omission has been advanced by

Dean Maloney in his treatise, Maloney, Plager & Baldwin, Water Law and Administration - The Florida Experience, 40-41 (1968).

Not only have the courts recognized that meandering cannot be relied on as a standard of navigability, but also the latest Manual of Surveying Instructions (ed. 1973) acknowledges the uselessness of meandering in determining navigability:

> "The legal question of navigability is determined by the facts in any particular case and not from any action on the part of the surveyor." A:4.

Counsel for Appellees has argued on pages 24 and 25 of his brief that the Trustees are "foreclosed from challenging the accuracy of the original surveys" and the "classification" made by surveys by government officials are "binding and conclusive." Counsel even goes so far as to say that the "sovereign status in 1846 is legally irrelevant." And further, that "this Court has previously rejected" the Trusteees' argument that the Court should ignore what the government surveyors "had determined."

As demonstrated above, government surveyors were never "clothed with the power" to determine navigability. Moreover, counsel for Appellees is referring to Odom v. Deltona, supra, which was a case involving non-navigable lakes and ponds. The fact issue of navigability had been determined by the trier of fact, the Circuit Court of the Second Judicial Circuit. The trial court, in Odom, did not defer to the judgement of the original federal surveyor but instead made its own determination as to navigability.

For example, Judge Willis, in Odom, cited Section 197.228 (1973) and relied upon its language in subsection three. Judge Willis also found that section 197.228(2) supplied all the authority needed to make a determination of whether a particular parcel was in state or private ownership. Id. at 984.

To begin with, requiring a "deduction for water" in a deed of uplands is not possible where the surveyor did not survey waterbodies but only the lands surrounding them. Hence, there would be no way to estimate an acreage "deduction." Moreover, a state official would also have to make the incorrect assumption that the boundaries of swamplands deeds overlap sovereign waterbodies in order to make "deductions for water." Requiring a reservation for sovereign lands, in a swamplands deed, is like requiring a reservation for apples in a deed conveying oranges.

Also, Appellees in the case sub judice, have not shown that they and their predecessors have paid taxes on Hurricane Bay since the 1880s. (Allowing the mistakes of a tax assessor to operate as a conveyance of land is absurd. The taxpayer can seek a refund.)

But most important of all is Odom's mistaken reliance upon section 197.228 as a property law statute. Only last summer in Belvedere Development Corporation v. DOT, 10 FLW 375 (Fla. 1985), this Court decided, at page 377, that 197.228 is a "tax law."[7]

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[7] The Second DCA has also cited 197.228 as a statute which confers substantive property rights upon a particular owner. See Coastal Petroleum Co. v. American Cynamid, 454 So.2d 6 (Fla. 2nd DCA 1984). Section 197.228 appears in a chapter entitled "Tax Collections, Sales and Liens." For the strange legislative history of 197.228 see Maloney, Water Law and Administration, (1968) §22.3 at 44-51.

And in McDowell v. Trustees of Internal Improvement Fund, 90 So.2d 715, 717 (Fla. 1956), it was said of 192.61(2), the predecessor of 197.228, that "it was apparently intended by the legislature to provide a guide for the benefit of tax assessors." In short, Odom mistakenly relied upon 197.228 as if it were property law which created certain property law presumptions. Id. at 984.

At page 12 of the Answer Brief, counsel surmises that if the property in dispute has been "alienated," then the summary judgment must be affirmed. Of course, this is a correct assessment. The Trustees would not be in litigation over title to the property in question if the Trustees had executed a sovereign lands deed. Back when it was legal to fill sovereign lands, the Trustees executed any number of deeds to submerged lands. But each deed, on its face, was clear as to the kind of land being deeded. Also, the legal descriptions were in metes and bounds and clearly indicated the fact that the description embraced either submerged land or reclaimed lake bottom. (See Appendices 5 and 6 for exemplars of these types of conveyances.)

It should be noted that submerged lands deeds do not recite the Swamp Lands Act of 1850 for the deed's source of authority. The specimen deeds in Appendices Five and Six also illustrate how the Appellees and other MRTA claimants have conveniently glossed over the type of deed which purports to give them title to sovereign lands.

The Trustees assert that Sawyer v. Modrall[8] can be easily distinguished from all other MRTA cases. In Sawyer, land described as submerged coastal sovereignty marshland was conveyed to Florida Coast Line and Transportation Company by the Trustees in an 1890 deed. However, althougth the Trustees did not then have sovereign lands title, it did not matter because the conveyance was really by legislative transfer under Chapter 3641, Laws of Florida 1885 and Chapter 3995, Laws of Florida 1889. At the time, the Florida Legislature held sovereign lands title and could convey sovereign lands by legislation. The Trustees acted in a ministerial capacity or as a kind of "clerk" for the legislature in making out the deeds. Thus, the lands in question were alienated.

Despite the peculiar facts of Sawyer, supra, Odom and all other MRTA cases have dealt with either swamplands or school lands but relied upon Sawyer. Odom, as seen above, did not involve sovereign lands. With no sovereign waterbody and only swamplands conveyances within Deltona's chain of title, it was error to cite Sawyer, supra, as authority in Odom where the two cases concerned two opposing categories of public land.

The Trustees do not deny that much of Appellees' lands are swamp and overflowed lands. The Trustees only take issue with the claim of Appellees to lands underlying a navigable waterbody which, in turn, also limits the extent of Stevens' true swamp and overflowed land.

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[8] Cited at 286 So.2d 610 (Fla. 4th DCA 1973), cert. denied at 297 So.2d 562 (Fla. 1974).

The point about erosion is simply this: one does not go back 100 years or more for a land survey of his property today. Boundaries do not remain fixed or static where waterfront property is concerned. State v. Florida National Properties, Inc., 338 So.2d 13, 18 (Fla. 1976).

Does MRTA supplant the common law doctrines of erosion, reliction and accretion? On page 31, the Appellees cite City of Pensacola v. Capital Realty Holdings, 417 So.2d 687 (Fla. 1st DCA 1982), for the assertion that changes in the location of a waterbody do not affect a MRTA title unless those changes happen after the MRTA root of title date. Thus, Capital Realty, supra, answers the above-posed question in the negative. 417 So.2d at 689. However, when the mean high waterline moves, so does title and boundary. Thus, one cannot gain a root of title to land below the mean high waterline because title moves with the line.

ARGUMENT AS TO POINT II

POINT II: THE SOVEREIGNTY LAND EXCEPTION OF 1978 MERELY DECLARED WHAT WAS ALREADY THE LAW.

The use of the word "retroactive" in relation to the 1978 addition of subsection seven to section 712.03 is the Second DCA's characterization of the nature of the so-called amendment. For ease of reference only, the undersigned will sometimes use the words "retroactive" or "amendment" but it should be emphasized that, strictly speaking, the addition of subsection seven is neither an amendment nor a retroactive provision (the word "retroactive" is often used by some advocates in its pejorative sense to invoke visions of government violating the Due Process Clause).

True, MRTA is to simplify title transactions in the real estate market. But when it comes to sovereign trust property, there is little or no real estate market for such lands.

Subsection seven was meant merely to clarify the 1963 MRTA statute. Florida case law clearly allows for clarifying legislation. Sasso v. Ram Property Management, 431 So.2d 204, 217-18, (Fla. 1st DCA 1983); Sans Souci v. Division of Florida Land Sales, 421 So.2d 623, 630 (Fla. 1st DCA 1982); Speights v. State, 414 So.2d 574, 577 (Fla. 1st DCA 1982); Williams v. Hartford Accident and Indemnity Co., 382 So.2d 1216, 1220 (Fla. 1980); Gray v. Canada Dry Bottling Co., 59 So.2d 788, 790 (Fla. 1952).

Sasso, supra, concerned a Workers' Comp statute enacted in 1979 and amended in 1980. The amendment provided that an injured worker's right to permanent disability benefits terminated when he reached age 65 and became eligible for Social Security. The First DCA opined that:

> "The timing and circumstances of an enactment may indicate it was formal only and served as a legislative clarification or interpretation of existing law, and thus such an enactment may even suggest that the same rights existed before it. [Emphasis added.] 431 So.2d at 217-18.

Williams v. Hartford and Speights v. State, supra, are cited by the First DCA in Sasso. Because the 1980 amendment was added immediately after the 1979 enactment, the court saw evidence of legislative intent to clarify. The court also characterized the 1980 clarifying language as a "guide."

As noted on pages six and seven of the Trustees' Initial Brief, the timing and circumstances of the 1978 MRTA amendment likewise suggests that subsection seven was an interpretative addition to MRTA following, as the amendment did, on the heels of Starnes v. Marcon, 571 F2d 1369 (5th Cir. 1978).

In Sans Souci, supra, the First DCA saw a 1981 amendment to a 1976 statute against condominium rent escalation clauses as a "formal change only" with the 1981 enactment acting merely as a "vehicle for clarification of existing policy." 421 So.2d at 630.

The original statute in Speights v. State, supra, was enacted in 1879. A 1935 revision was held to clarify the 1879 law by "reforming the operative provision of the statute." 414 So.2d 574.

At page 32 of the Answer Brief, the Appellees say that to treat the 1978 amendment as retroactive would have a "devestating effect on property rights, making it possible that the Trustees could seek to revisit any conveyance."

It should be noted that Sawyer and Starnes, supra, were cases where the Appellant was not a party. In the other cases cited, the Trustees claimed only the submerged beds or lands below the ordinary high water mark of various lakes and rivers.

Nevertheless, as noted on pages 11-14 of the Initial Brief, the prevailing law in Florida, since statehood, has been that upland grantees do not own lands below the ordinary or mean high water mark. Indeed, despite recent MRTA decisions over the

past decade, property law practice in general has not changed.[9] Thus, lower court decisions regarding MRTA's application to sovereign lands have not caused the real estate industry to change its position in reliance upon those decisions.[10] For the question of MRTA's application to sovereign lands remains open to this very day. The argument that some preexisting private right to sovereign lands is being repudiated or abrogated does not make sense upon closer analysis. No one can have rights in public trust property without a conveyance.

If MRTA's 1978 amendment is not a clarifying or interpretative amendment then, in the alternative, subsection seven will pass muster as a retroactive provision where there are no "vested rights" to divest. Neither the Florida nor the Federal Constitution prohibits the passage of retrospective legislation. Such legislation is valid unless invalid for some reason other than because of its retrospective nature, such as the impairment of vested rights. §296 Constitutional Law, 10 Fla. Jur 2d 471. A curative statute is necessarily retrospective and may be enacted to cure errors or irregularities in legal or administrative proceedings, except such as are jurisdictional or affect substantive rights. Id. at 478.

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[9] For example, Title Note 32.02.01 from Attorneys' Title Insurance Fund Title Notes (1977) advises a Schedule B exception for submerged land. A:7. Current title insurance policies typically include a Schedule B exception for "tidelands or lands comprising the shores or bottoms of navigable waters." A:8. Or, under "Conditions and Stipulations," the definition of "land" excludes any interest in "abutting waterways." A:9.

[10] Of course, the law of the case protects those parties to those MRTA cases long since decided before the case sub judice and the phosphate cases have reached this Court.

SUMMARY OF ARGUMENT

Both Michigan and Louisiana have held that one cannot acquire title to sovereign land through MRTA. Where MRTA is applied to sovereign lands it violates Article X, §11 because there is no opportunity for consideration of the public interest before divestment of the public's land automatically takes place.

The importance of a surveyor's meander line has become overblown with the courts. Surveyors were never authorized to decide navigability. Such a decision ultimately rests with the judiciary. Odom mistakenly relies upon a federal survey for navigability. Also, §197.228 is not a property law, but a tax law, and does not provide legal presumptions for deciding matters of navigability or title. Sawyer did involve a conveyance of sovereign lands. All other MRTA cases did not.

State officials relied upon the law of the era to protect sovereign lands when making conveyances of swamplands. MRTA claimants delibertately gloss over the importance of boundary law and the categories of public lands involved. Courts have been inattentive to such details and have also been overly concerned with "stability" of land titles and "fairness" as opposed to public trust considerations.

The 1978 amendment clarified MRTA's non-application to sovereign lands in response to Starnes. Even if the amendment is viewed as retrospective, it does no harm where the prevailing common law has always prevented the accrual of private "rights" in sovereign land.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Purolator to HYWEL LEONARD, Esquire, One Harvour Place, Tampa, Florida 33602 this 30th day of September, 1985.

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