

STORAGE NAME: h1807s1.gg

DATE: April 17, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GENERAL GOVERNMENT APPROPRIATIONS
ANALYSIS**

BILL #: CS/HB 1807

RELATING TO: The Florida Land Title Protection Act

SPONSOR(S): Committee on General Government (FRC); Representative Dockery; Representative Putnam and others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIARY YEAS 8 NAYS 1
 - (2) GENERAL GOVERNMENT APPROPRIATIONS YEAS 11 NAYS 2
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

CS/HB 1807 recognizes that it is in both the public's interest and the interest of the private property owners in the State of Florida to equitably resolve the controversy which is related to the ownership of lands that were conveyed by the state to private property owners. This controversy is to be resolved in a manner that equitably protects the private landowners and preserves the public's ownership and right to use waters and lands up to the ordinary high water mark. Therefore, it is in both the interest of the public and of the private landowners to statutorily define an ambulatory "ordinary high water mark".

This bill defines the ordinary high water mark in order to delineate the property boundaries between private and sovereign lands bordering navigable non-tidal waters. This mark is defined as the point up to which the water is so continuous as to destroy the value of the land for the purpose of an ordinary agricultural crop. Such deeds or grants conveyed by the state to private landowners which purport to convey lands above this ordinary high water mark are ratified, confirmed and validated, while the state's title to lands which are below the ordinary high water mark are reaffirmed.

This bill in no way affects, and instead reaffirms, the public's right to use such navigable waters and sovereignty submerged lands up to the ordinary high water mark. No claim of sovereign ownership is to be asserted by or on behalf of the state without prior approval of a majority of the Board of Trustees of the Internal Improvement Trust Fund.

The bill will become effective upon becoming law.

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II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

B. PRESENT SITUATION:

In 1845, the federal government conveyed ownership of all lands which lie beneath the navigable waters in this state, up to the ordinary high water mark, to Florida, upon its statehood. See Coastal Petroleum Co. v. American Cyanamid Co., 492 So. 2d 339, 342 (Fla. 1986). No surveys were required to delineate the boundaries of these sovereignty lands and the title vested in the Legislature to be held in a public trust for the people. The Florida Constitution currently reflects the state's ownership right of such lands. The Florida Constitution provides:

The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Art. X, s. 11, Fla. Const.

After this conveyance, the federal government no longer had title or an ownership interest in these lands. As such, the federal government no longer had the power to re-convey these lands.

Moreover, around the same time, the federal government exercised its authority to convey certain lands that were **not** covered by navigable waters to the state of Florida. *Id.* These lands are called swamp and overflow lands. Swamp and overflow lands are separate and distinct from sovereign lands and their conveyance is not constitutionally restricted. *Swamp lands* are those lands that require drainage to dispose of needless water in order to make them fit for successful and useful cultivation. State v. Gerbing, 56 Fla. 603 (Fla. 1908). *Overflow lands* are those lands that are covered by nonnavigable waters, or are subject to overflows, and require drainage, or levees, or embankments to keep water out and render the lands suitable for successful cultivation. *Id.*

The federal government did have title to the swamp and overflow lands at the time, and as such, had the authority to convey these lands to the state. However, like the previous sovereign lands conveyances, no surveys were required to delineate the boundaries of the swamp and overflow lands. As a result, by mistake or otherwise, the federal government included sovereign lands in their property descriptions of swamp and overflow lands which were conveyed to the state. See Martin v. Busch, 112 So. 274, 283 (Fla. 1927).

The sovereign lands were in essence "reconveyed" by the federal government to the state without proper title. Therefore any conveyances that included sovereign lands, were ineffectual for lack of authority, or, lack of ownership, at least to the extent of the sovereign land.

However, this issue was not brought to light at the time, and as a result, the state then subsequently conveyed swamp and overflow lands to private landowners. Again, by mistake, or otherwise, included in the property descriptions, were sovereignty lands. Of which, the state did not have the authority to convey to private landowners.

There has been litigation between the state and private landowners over which lands purportedly conveyed by the state are sovereignty lands, and therefore not subject to private ownership, and which lands are not sovereignty lands and therefore subject to private ownership. The courts have held that lands above the ordinary high water mark are swamp or overflow lands subject to private ownership and lands below the high water mark are sovereignty lands and subject to state ownership.

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The definition one chooses for high water mark, however, is dispositive since it is defined only in case law. The Supreme Court has defined the ordinary high water mark on several occasions. In Tilden v. Smith, 113 So. 708, 711 (Fla. 1927), the court states:

It is also well settled that government patents of lands bounded by navigable waters convey titles to the *ordinary* high-water mark of such waters, and not to high-water mark existing during flood or freshet or unusually high tides.

The Tilden court further states:

In the case of fresh water rivers and lakes--in which there is no ebb and flow of the tide, but which are subject to irregular and occasional changes of height, without fixed quantity or time, except that they are periodical, recurring with the wet or dry seasons of the year--high-water mark, as a line between a riparian owner and the public, is to be determined by examining the bed and banks, and ascertaining where the presence and action of the water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as respects the nature of the soil itself. 'High water mark' means what its language imports--a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. Ordinarily the slope of the bank and the character of its soil are such that the water impresses a distinct character on the soil as well as on the vegetation. In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks.

In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian owner and the public. **It is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop.** Tilden, 113 So. at 712 (quoting Minnetonka Lake Improvement, 56 Minn. 513, 58 N.W. 295, 45 Am. St. Rept. 494).

The Tilden court continued to state that:

The high-water mark on fresh water rivers is **not** the highest point to which the stream rises in times of freshets, but is **'the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.** Tilden, 113 So. at 712 (quoting Dow v. Electric Co., 69 N.H. 498, 45 A. 350, 76 Am. St. Rep. 189).

The Florida Supreme Court also addressed the issue of the true ordinary high water mark in Martin v. Busch, 112 So. 274, 283 (Fla. 1927), where the court stated:

In flat territory or because of peculiar conditions, there may be little if any shore to navigable waters, or the elevation may be slight and the water at the outer edges may be shallow and affected by vegetable growth or other conditions, and the line of ordinary high-water mark may be difficult of accurate ascertainment; but, when the duty of determining the line of high-water mark is imposed or assumed, the best evidence attainable and the best methods available should be utilized in determining and establishing the line of true ordinary high-water mark, whether it is done by general or special meandering or by particular surveys of adjacent land. Marks upon the ground or upon local objects that are more or less permanent may be considered in connection with competent testimony and other evidence in determining the true line of ordinary high-water mark.

The lower court in Macnamara recognized that the ordinary high water mark may in certain circumstances lack clarity. Macnamara v. Kissimmee River Valley Sportsmans' Ass'n, 648 So. 2d 155, 159 (Fla. 2d DCA 1994).

Flat banked water bodies **lack a clear line of demarcation, ... the boundary for those water bodies at the point where the presence of water prevents the cultivation of an ordinary agricultural crop.** Id.

An attorney general opinion, Op. Att'y Gen. Fla. 88-22, gave the following definition:

The ordinary high water line (OHWL) has been defined as **“the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop.”** It is an ambulatory line, shifting in response to long term changes in the water level. The primary indicators of the OHWL have been vegetation, soil and geomorphology. In addition, corroborating evidence such as historical records, old surveys, hydrology, and eyewitnesses, have been used in establishing the OHWL.

The landowners purchased these swamp and overflow lands from the state, and paid taxes on these lands which they may not legally own. Therefore, it is equitable to ratify the title to their lands that exists above the high water mark while reaffirming the state's title to lands below the high water mark.

Prior to ratification, the legislature would have to more clearly define where the ordinary high water mark lies.

C. EFFECT OF PROPOSED CHANGES:

The Legislature recognizes that it is in the public interest to resolve the controversy arising from the assertion that the state owns certain lands that were purportedly conveyed by the state as swamp and overflow lands to private landowners. This issue is to be resolved in an equitable manner that protects the interests of private landowners who purchased and paid taxes on such lands, while simultaneously preserving the public's ownership of and right to use the lands. In doing so, it is in the public's interest to define the ordinary high water mark which separates the riparian lands from state lands.

In order to equitably protect the private landowners, and protect the public's use and ownership, any title that is derived from a deed or grant by the Board of Trustees of the Internal Improvement Trust Fund, or any other state agency, that appears to be valid on its face, and purports to convey swamp or overflow lands or sovereignty lands, and includes sovereignty lands, is ratified, confirmed and validated to the extent that the lands are located above the high water mark as defined in this bill. This does not alter the public's right to use such sovereignty lands.

This bill provides that claims are not to be asserted on or behalf of the state regarding ownership of such lands, unless it is first approved by a majority of the board of trustees.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Creates s. 253.90, F.S., which sets forth the legislative intent of this bill. The Legislature recognizes that it is in the public interest to resolve the controversy arising from the assertion of state ownership to lands that were purportedly conveyed by the state as swamp and overflow lands to private landowners. This issue is to be resolved in an equitable manner that protects the interests of private landowners who purchased and paid taxes on such lands, while simultaneously preserving the public's ownership of and right to use the lands. In doing so, it is in the public's interest to define the ordinary high water mark which separates the riparian lands from state lands. A private landowners deeds or grants which may have included sovereign lands are to be statutorily ratified, confirmed and validated to the extent that the land that lies above the ordinary high water mark as defined in this bill.

This section defines the ordinary high water mark as the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes, preventing the growth of vegetation, constituting what may be an ordinary agricultural crop. This mark is ambulatory and shifts in response to long-term changes in the water level.

The high water is not the highest point to where the water rises in time of floods or rains, but instead it is the line in which the water impresses upon the soil and covers it for such periods so as to deprive it of vegetation and destroy its agricultural value.

In addition, this section clarifies that lands that are subject to such periodical overflows so as to require drainage, levees or embankments to keep the water out in order to render the land suitable for cultivation are not sovereignty lands, below the ordinary high water mark.

Furthermore, this water-mark does not include: nonnavigable creeks, sloughs, swamps, canals, and low and overflowed lands that are adjacent to the navigable water body.

In order to equitably protect the private landowners, and protect the public's use and ownership, any title that is derived from a deed or grant by the Board of Trustees of the Internal Improvement Trust Fund, or any other state agency, that appears to be valid on its face, and purports to convey swamp or overflow lands or sovereignty lands, and includes sovereignty lands, is ratified, confirmed and validated to the extent that the lands are located above the high water mark as defined in this bill. This does not alter the public's right to use navigable waters and sovereignty submerged lands.

No claim is to be asserted regarding sovereignty ownership of lands, unless it is first approved by a majority of the board of trustees.

Section 2: This section provides that this act is to take effect upon becoming law

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

This bill will more clearly define the property boundaries between state and private lands. This may effect the value of state lands. As such, there may be an indirect fiscal impact on the state government. That impact is indeterminate at this time, as surveys have not been conducted.

2. Expenditures:

In conducting the necessary actions to redefine the property boundaries, the state may incur certain expenses. However, any expenses are indeterminate at this time.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill will more clearly define the property boundaries between state and private lands. This may effect the value of private lands. As such, there may be an indirect fiscal impact on the private sector. That impact is indeterminate at this time, as surveys have not been conducted.

In addition, the private sector may incur the expense of surveying the land. However, at this time, these expenses are indeterminate.

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

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A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of any funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of any city or county.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the amount of state tax shared with any city or county.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Committee on Judiciary:

On April 4, 2000, the Committee on Judiciary adopted a strike-everything amendment.

Section 1 of the amendment declares the Legislature's intent to define the ordinary high water mark to clearly define the boundary between private property and sovereign lands on lands bordering navigable non-tidal waters. The Legislature further intends to ratify deeds that purported to convey lands above the ordinary high water mark.

The amendment defines the ordinary high water mark on non-tidal waters. The definition is derived from Florida Supreme Court cases and authorities cited by the Court. The amendment defines the ordinary high water mark as "the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."

This language is from Tilden, 113 So. 2d at 712. In Tilden, the court quoted Minnetonka Lake Improvement, 56 Minn. 513, 58 N.W. 295, 45 Am. St. Rep. 494.

The amendment's definition continues:

"It is an ambulatory line, shifting in response to long term changes in the water level."

This language is from Op. Att'y Gen. Fla. 88-22. The attorney general cites State v. Florida National Properties, 338 So. 2d 13 (Fla. 1976). That case held that the high water mark can shift over time and that the state cannot set a permanent boundary that does not account for potential shifting.

The amendment continues:

The ordinary high water mark is not the highest point to which the water rises in times of flooding,¹ but is the line which the water impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and destroy its value for agriculture.”

This language is also from Tilden, 113 So. at 712. The court quoted Dow v. Electric Co., 69 N.H. 498, 45 A. 350, 76 Am. St. Rep. 189.

The amendment continues:

Nor is the ordinary high water mark the extreme line which the water reaches in times of high water caused by rains, which are not unusual or extraordinary, but occur annually, or at least frequently, during the wet season.

This language comes from Minnetonka Lake Improvement:

But the question is what is “high-water mark,” as the line between the riparian owner and the public, and below which his title is thus qualified by the public right? It seems to us that it is right here where both the trial court and counsel have fallen into error. It seems to have been assumed that “high-water mark” means the **extreme line which the water reaches** (even outside its natural channel or bed) **in times of high water, caused by rains or melting snows, which are not unusual or extraordinary, but occur annually, or at least frequently, during the wet season.** The consequences of any such rule, if applied to our navigable rivers and inland lakes, would be very startling. Take, for example, the Mississippi river. It is subject to periodical, and almost annual, rises, usually in the spring, when the water overflows its banks, and submerges thousands of acres of bottom lands which are, at other seasons of the year, dry and valuable for timber, grass, and even agriculture. The stage of water necessary to overflow these lands is not extraordinary or unusual high water in the popular sense, for it is liable to occur, and does occur, almost every year. **And yet it would hardly be claimed that the title of the owners of these lands is qualified, and that the public might, in aid of navigation, by dams or other artificial means, maintain the water of the river at such a height as to permanently submerge and destroy these lands, without making compensation to the owners.** Any such definition of “high-water mark,” as a line between riparian owners and the public, is clearly inapplicable to inland fresh water rivers and lakes, which are subject to frequent rises causing them to overflow their natural banks.

Minnetonka Lake Improvement, 56 Minn. at 521. (emphasis added).

The language in the amendment codifies this principal.

Finally, the definition concludes:

Low lands, elevated only slightly above the ordinary level of the water, which are more or less subject to periodical overflow at certain seasons of the year, during some years in times of high water caused by rains, but are sufficiently dry when the water subsides to be susceptible of valuable use as pastures and meadows, are not sovereignty submerged lands.

This language also comes from Minnetonka. In that case, the court described Lake Minnetonka:

These changes in the height of the water are irregular, without fixed quantity or time, except that they occur periodically, according as the year or season of the year is wet or dry. The rises of the water, to a sufficient height to overflow, in whole or in part, these low lands, are not infrequent, and are liable to occur any year, usually in the spring; but the water generally subsides later in the season, so as to render the lands capable of use as meadows and pastures.

¹ Tilden uses the word “freshets” instead of “flooding.”

Minnetonka, 56 Minn. at 518.

This language in the amendment makes clear that lands susceptible of valuable use as pastures and meadows are not sovereignty lands.

Once the amendment defines ordinary high water, it confirms deeds or grants that purported to convey swamp and overflowed lands, internal improvement lands, or other lands that may have contained sovereignty lands to the extent that such lands are located above the ordinary high water mark.

Section 2 of the amendment reaffirms the public's right to use sovereignty lands up to the ordinary high water mark.

Section 3 provides an effective date.

Committee on General Government Appropriations:

On April 11, 2000, General Government Appropriations adopted a substitute strike-everything amendment. The committee then passed the bill as a committee substitute. The committee substitute provides the following:

Section 1 of the amendment declares the Legislature's intent to define the ordinary high water mark to clearly define the boundary between private property and sovereign lands on lands bordering navigable non-tidal waters. The Legislature further intends to ratify deeds that purported to convey lands above the ordinary high water mark.

This bill defines the ordinary high water mark on non-tidal waters. The definition is derived from Florida Supreme Court cases and authorities cited by the Court. This bill defines the ordinary high water mark as "the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop." This language is derived from the Tilden case where the Supreme Court adopted this language from Minnetonka Lake Improvement, 56 Minn. 513. See Tilden v. Smith, 113 So. 708 (Fla. 1927).

This bill continues to provide that the ordinary high water mark changes in response to conditions, "it is an ambulatory line, shifting in response to long term changes in the water level." This language is quoted from the Attorney General's Opinion defining the high water mark. See Op. Att'y Gen. Fla. 88-22.

This bill continues to adopt language from the Supreme Court case Tilden which also cited Dow v. Electric Co., 69 N.H. 498. Comparatively speaking:

The bill states:

The ordinary high water mark is not the highest point to which the water rises in times of freshets, floods, or seasonal heavy rains, but is the line which the water impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and destroy its value for agriculture.

Tilden quoting Dow v. Electric Co. states:

The high water mark on fresh water rivers is not the highest point to which the stream rises in times of freshets, but is 'the line which the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.

The bill then ratifies deeds or grants for lands that purported to convey swamp and overflow lands, which included sovereign lands, above the high water mark to private landowners who purchased the lands and paid taxes on the lands. This bill reaffirms the public's right to use sovereignty lands up to the ordinary high water mark. No claim for sovereign ownership is to be asserted without the prior approval of a majority of the Board of Trustees of the Internal Improvement Trust Fund.

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Section 2 provides an effective date upon becoming law.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

L. Michael Billmeier, J.D.

Staff Director:

P.K. Jameson, J.D.

AS REVISED BY THE COMMITTEE ON GENERAL GOVERNMENT APPROPRIATIONS:

Prepared by:

Cynthia P. Kelly

Staff Director:

Cynthia P. Kelly