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HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS

BILL #: HB 1807

RELATING TO: Sovereignty Lands

SPONSOR(S): Representative Dockery and others

TIED BILL(S):

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

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

I. SUMMARY:

The bill states that deeds by the Board of Trustees or other state agencies which purported to convey swamp and overflowed land, internal improvement lands, or other non-sovereignty public lands are ratified if two conditions are met. First, the title held by the present landowner is derived from a deed or grant issued by the Board of Trustees of the Internal Improvement Trust Fund or other state agency and it appears on its face to be a valid conveyance of lands that the issuing agency was authorized to convey. Second, the land conveyed has been classified as private property for ad valorem tax purposes.

The bill expresses the Legislature's intent that the controversy arising from the assertion of state sovereignty ownership claims against private landowners who derive their titles from deeds or grants issued by state agencies, should be resolved expeditiously, economically, and in a manner that is equitable to the landowners but preserves the people's right to use the navigable waters with the state.

The bill makes clear that nothing contained in it will affect the public's right to use any navigable waters on the lands for boating, fishing, and swimming.

The bill will become effective upon becoming law.

On April 4, 2000, the Committee on Judiciary adopted a strike-everything amendment that is traveling with the bill. See Section VI. Amendments or Committee Substitute Changes for discussion.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [x]
2.	Lower Taxes	Yes []	No []	N/A [x]
3.	Individual Freedom	Yes []	No []	N/A [x]
4.	Personal Responsibility	Yes []	No []	N/A [x]
5.	Family Empowerment	Yes []	No []	N/A [x]

B. PRESENT SITUATION:

When Florida became a state in 1845, it obtained title to all lands beneath navigable waters up to the ordinary high water mark from the federal government.[1] Such lands are called "sovereignty lands."[2] The state holds title to sovereignty lands.[3] Sale of sovereignty lands can be authorized by law if doing so is in the public interest.[4]

In 1845, the state received lands from the federal government to sell to fund improvements to roads, canals, and navigable streams. These lands were called internal improvement lands.[5]

In the 1850s, the federal government conveyed swamp and overflowed lands to the state.[6] Swamp lands are lands that require drainage to dispose of water to make the land fit for successful cultivation.[7] Overflowed lands are lands covered by nonnavigable waters or are subject to overflows of water such as to require drainage or levees to make them suitable for cultivation.[8] The title to swamp and overflowed lands was vested in the Board of Trustees by the legislature while the title to sovereignty lands remained with the legislature.[9] The sale of swamp and overflowed lands by the state is not limited by the state constitution.

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[1] See Coastal Petroleum Co. v. American Cyanmid Co., 492 So. 2d 339, 342 (Fla. 1986).

[2] See Id.

[3] See Art. X, s. 11, Fla. Const.

[4] See Id.

[5] See The Public Trust Doctrine and Florida's Navigable Lakes and Rivers, published by Robert A. Butterworth, Attorney General, 1999, at pp. 3-4.

[6] See Coastal Petroleum, 492 So. 2d at 342.

[7] See State v. Gerbing, 47 So. 353, 356 (Fla. 1908).

[8] See Gerbing, 47 So. at 356.

[9] See Coastal Petroleum, 492 So. 2d at 342.

Over the years, swamp and overflowed lands have been conveyed by the state to private landowners. The Florida Supreme Court has held that the state cannot convey sovereignty lands, unless there is a specific intent to do so, and that any deeds that purport to do so are ineffective.[10] There has been litigation between the state and private landowners over what lands purportedly conveyed by internal improvement lands deeds and swamp and overflowed lands deeds are sovereignty lands, and therefore not subject to private ownership, and what lands are not sovereignty lands and therefore subject to private ownership. The court has held that lands above the high water mark are swamp or overflowed lands and lands below the high water mark are sovereignty lands.[11]

In determining what land is owned by the state (the land below the high water mark) and what land is owned by landowners (the land above the high water mark), the definition one chooses for high water mark is dispositive. No state statute defines the meaning of "ordinary high water mark." In Tilden v. Smith, 113 So. 708, 711 (Fla. 1927), the court discussed the term:

> 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.

In Tilden, the court quoted from the Supreme Court of Minnesota:

> 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. 'Highwater 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).

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[10] See Coastal Petroleum, 492 So. 2d at 342-343.

[11] See Gerbing, 47 So. at 356 ("The title to lands under navigable waters, including the shores or space between ordinary high and low water marks, is held by the state"); Martin v. Busch, 112 So. 274, 283 (Fla. 1927)(the state owns "the beds of all navigable lakes to the ordinary high-water mark").

The court continued:

> 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).

Martin v. Busch, 112 So. 274, 283 (Fla. 1927), discussed the problems of establishing the ordinary high water mark:

> 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.

In Macnamara v. Kissimmee River Valley Sportsmans' Ass'n, 648 So. 2d 155, 159 (Fla. 2d DCA 1994), the court gave the following definition:

> The ordinary high water boundary on fresh waters is the ordinary or normal reach of water during the high water season.

The Macnamara court continued:

> Flat banked waterbodies lack a clear line of demarcation, and Tilden places the boundary for those waterbodies at the point where the presence of water prevents the cultivation of an ordinary agricultural crop. Id.

Macnamara, 648 So. 2d at 159.

The court explained that Martin discussed a test for determining the ordinary high water mark of flat banked water bodies:

> The court's method of locating the water boundary on flat, vegetated shorelines calls for using the best evidence and methods available, including identifying the elevation of ordinary high water by reference to water marks on the ground or local objects. This latter method requires corroborative testimony or other competent evidence to support the conclusion that the water marks at issue are in fact ordinary high water marks.

Macnamara, 648 So. 2d at 160. (underlining in original).

An attorney general opinion gave the following definition:

> The 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, corrobative evidence such as historical records, old surveys, hydrology, and eyewitnesses, have been used in establishing the OHWL.

Op. Att'y Gen. Fla. 88-22 (footnotes omitted).

A publication by the Attorney General, The Public Trust Doctrine and Florida's Navigable Lakes and Rivers, defines ordinary high water mark as "the normal or average reach of water during the high water season."[12]

In Board of Trustees v. Land Surveyors, 566 So. 2d 1358 (Fla. 1st DCA 1990), the court held that the Board of Surveyors did not have authority to establish rules defining the ordinary high water mark. The court stated that the "determination of rights of parties to a riparian boundary dispute is instead a matter subject ultimately to judicial resolution under all applicable law." Board of Trustees, 566 So. 2d at 1361. The legislature has not defined "ordinary high water mark."

C. EFFECT OF PROPOSED CHANGES:

Section 1 of the bill provides the legislative intent. The section expresses the Legislature's intent that the controversy arising from the assertion of state sovereignty ownership claims against private landowners who derive their titles from deeds or grants issued by state agencies, should be resolved expeditiously, economically, and in a manner that is equitable to the landowners but preserves the people's right to use the navigable waters in the state.

Section 2 of the bill states that deeds by the Board of Trustees or other state agencies which purported to convey swamp and overflowed land, internal improvement lands, or other non-sovereignty public lands are ratified if two conditions are met. First, the title held by the present landowner is derived from a deed or grant issued by the Board of Trustees of the Internal Improvement Trust Fund or other state agency and it appears on its face to be a valid conveyance of lands that the issuing agency was authorized to convey. Second, the land conveyed has been classified as private property for ad valorem tax purposes.

The bill makes clear that nothing contained in it will affect the public's right to use any navigable waters on the lands for boating, fishing, and swimming.

Section 3 states that the bill will become effective upon becoming law.

D. SECTION-BY-SECTION ANALYSIS:

See Section II.C. Effect of Proposed Changes.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

[12] at page 6.

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

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

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:

On April 4, 2000, the Committee on Judiciary adopted a strike-everything amendment. The amendment is traveling with the bill.

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,[13] 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:

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[13] Tilden uses the word "freshets" instead of "flooding."

> 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.

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.

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:	Staff Director:
L. Michael Billmeier, J.D.	P.K. Jameson, J.D.