

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/CS/SB 1824

SPONSOR: Natural Resources Committee, Judiciary Committee, Senator Campbell and others

SUBJECT: Land Conveyances

DATE: April 25, 2000 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Johnson</u>	<u>Johnson</u>	<u>JU</u>	<u>Favorable/CS</u>
2.	<u>Gee</u>	<u>Voigt</u>	<u>NR</u>	<u>Favorable/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

## I. Summary:

This bill provides legislative intent to preserve all riparian rights of private waterfront land owners and to preserve the public's ownership of and right to use sovereignty submerged lands for all lawful purposes.

The bill ratifies private waterfront landowners' title to swamp and overflowed lands, internal improvement lands, or other nonsovereignty lands down to the ordinary high water boundary of navigable waters. This includes all riparian rights held by private waterfront landowners.

Title is reaffirmed in the state for sovereignty submerged lands under navigable waters up to the ordinary high-water boundary. This ownership includes the public's right to use the lands for all public trust purposes. The bill then defines the ordinary high-water boundary by adopting language from relevant case law.

This bill creates s. 253.90 of the Florida Statutes.

## II. Present Situation:

When the thirteen colonies formed the United States, those original states granted certain powers to the federal government but reserved many powers and rights to themselves. Among the rights reserved was ownership of sovereignty lands, including the navigable waters in the state and the land under those waters.<sup>1</sup> These lands are the property "of the people of the state 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 state respectively, for purposes of navigation, commerce, fishing, and other useful purposes afforded by

<sup>1</sup>State v. Gerbing, 47 So. 453 at 355 (Fla. 1908)

the waters in common and for the people of the states.”<sup>2</sup> This is referred to as the public trust doctrine. Any conveyance of sovereignty lands must be based upon clear intent and authority and where a conveyance is authorized and intended it had to retain public use of the waters.<sup>3</sup>

As new states were brought into the union, they were given all the rights and powers of the original states including ownership of sovereignty lands.<sup>4</sup> When the United States took possession of Florida from Spain in 1819 all the properties of the state were given over to the United States Government except specific grants of land made by Spain.<sup>5</sup> When Florida was admitted as a state in 1845, the ownership of sovereign lands came with statehood. The United States retained ownership of all other land granted to the United States by Spain including what are referred to as swamp and overflow lands.<sup>6</sup>

In addition to granting the sovereign lands to Florida in 1845 Congress also granted to Florida and other states every sixteenth section in every township for educational purposes. This grant of land was made to the Florida Department of Education.<sup>7</sup>

In 1850 Congress granted many of the states ownership of the swamp and overflow lands. These lands were given to the states “[to] enable the several States to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein -- the whole of the swamp and overflowed lands, made unfit thereby for cultivation, . . .”<sup>8</sup> In Florida these lands covered approximately 20 million acres. Although the 1850 act conveyed ownership of the lands, the state had to apply for and receive a patent before taking actual possession. In most cases, prior to issuing the patent the federal government conducted a survey of the land. These surveys at times included identification of the sovereign lands by the use of meander lines around navigable bodies of water but these lines were not dispositive of what were sovereign waters.<sup>9</sup> Only after receiving the patent could the state then convey the property into private ownership.

Between 1850 and 1920 the state conveyed almost the entire 20 million acres to private owners with the conveyances often made in very large tracts. During the period of these transfers, litigation arose as to who owned the land below the lakes, rivers and tidal areas where the deeds issued by the Board of Trustees of the Internal Improvement Trust Fund for swamp and overflow lands appeared to include such lands within the description of the property granted.

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<sup>2</sup>Id at 355.

<sup>3</sup>*Coastal Petroleum Co. v. American Cyanamid Co.*, 492 So. 2d 339, at 343 (Fla. 1986)

<sup>4</sup>*Supra*, Gerbing at 355.

<sup>5</sup>Id at 355.

<sup>6</sup>Id at 355.

<sup>7</sup>*State v. Jennings*, 35 So. 986 at 993 (Fla. 1903).

<sup>8</sup>43 USCA s. 982.

<sup>9</sup>*Supra*, *Coastal Petroleum* at 342

In early cases the courts declared that the Trustees of the Internal Improvement Trust Fund were not authorized to convey the title to the lands of this character.<sup>10</sup> Further, the courts found that where sales of swamp and overflow lands included sovereignty lands or school lands that had otherwise been granted to the state by the federal government, the sales and conveyances of those lands were ineffectual for lack of authority from the state.<sup>11</sup> In fact the courts have found that a “grantee takes with notice that the conveyance of swamp and overflowed land does not in law cover any sovereignty lands.”<sup>12</sup>

This was confirmed in *State v. Jennings* supra where the court confirmed the prior grant of education lands even though they had been included in the swamp and overflow grant and in *Florida Towns Co v. Bigalsky* 330 So. 450 (Fla. 1902) where the Florida Supreme Court upheld a reservation of land on Amelia Island to the U.S. Government for military purposes even though those lands were within a patent granted pursuant to the swamp and overflow lands grant.

Subsequently, the discussions regarded the extent of property included within the definition of sovereign lands. In *Broward v. Mabry* the Florida Supreme Court determined that the Board of Trustees of the Internal Improvement Trust Fund never had title or right to transfer the lands under the water. In that determination the Court defined navigable waters as:

Where a stream or body of water is permanent in character, and in its ordinary natural state is in fact 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, such water may be regarded as being of a public character and the title to the land thereunder, including the shore or space between ordinary high and low water marks, when not included in the valid term of a grant or conveyance to private ownership, is held by the state in its sovereign capacity.<sup>13</sup>

For lands under rivers, lakes or ponds not subject to tidal changes, the line between the riparian owner and the sovereignty land is the “ordinary high water mark.” In the case of *Tilden v. Smith*<sup>14</sup> the Florida Supreme Court discussed the distinction between sovereign waters subject to tidal changes and lakes and rivers not subject to tides. For purposes of non-tidal bodies of water, *Tilden* provides the following definition of “ordinary high water mark”:

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 of time, except that they are periodical, recurring with the wet or dry seasons of the year -- high-water mark, as a line between a

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<sup>10</sup>*State v. Gerbing*, 47 So. 353 (Fla.1908).

<sup>11</sup>*Id. Martin* at 285.

<sup>12</sup>*Id* at 285.

<sup>13</sup> *Broward v. Mabry*, 50 So. 826 at 829(Fla. 1909).

<sup>14</sup>113 so. 708 (Fla. 1927).

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 the 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. *Minnetonka Lake Improvement*, 56 Minn. 513, 58 N.W. 295, 45 Am. St. Rept. 494.<sup>15</sup>

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.' *Dow v. Electric Co.*, 69 N.H. 498, 45 A. 350 (1894)

Much of this definition was taken from a Minnesota case, *In Minnetonka Lake Improvement*.<sup>16</sup> In the discussion of agricultural uses the Minnesota court referenced the growing of hay as the type of agricultural crop considered an "ordinary agricultural crop."

The expanse of a freshwater lake included in the definition of navigable waters was addressed in *Martin v. Busch*.<sup>17</sup> In *Martin* the court found that a body of water was "navigable or not in all its parts" or "whether it was navigable during the entire year or not."<sup>18</sup> Thus when any part of a lake is determined to be navigable, even the shallow areas along the shore or areas in the lake which may be out of the water during the dry season will be considered to be navigable waters for purposes of determining the area of sovereignty lands.

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<sup>15</sup>*Tilden v. Smith*, 113 So. 708(Fla. 1927)

<sup>16</sup>*Supra*, *In Minnetonka Lake Improvement*

<sup>17</sup>*Martin v. Busch*, 112 So. 274 (Fla. 1927)

<sup>18</sup>*Id* at 283

In determining where the edge of the lake should be located *Martin* used the *Tilden* definition but explained the difficulty in identifying the ordinary high-water boundary:

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.<sup>19</sup>

In 1976 the Florida Supreme Court again addressed whether lakes, ponds, and rivers had been placed into private ownership when swamp and overflow lands were transferred by the Board of Trustees in the case of *Odom v. Deltona*.<sup>20</sup> In *Odom* the court found that where the ponds and lakes were small and did not meet the definition of navigable waters ownership was transferred to the private property holder. The court defined these as lakes of less than 140 acres. The Court then went on to state that where the navigable waters had not been surveyed or meandered the Marketable Record Title Act should apply to foreclose claims of title by the state.<sup>21</sup>

In 1986 the Florida Supreme Court clarified its opinion in *Odom* by stating that the opinion only applied to the transfer of title to small lakes and ponds which were not navigable. The dicta regarding the applicability of the Marketable Record Title Act was rescinded and the court once again clarified that the Board of Trustees of the Internal Improvement Trust Fund had no authority to transfer sovereign land as part of the swamp and overflow lands because the board did not hold title to those lands.<sup>22</sup> The court held:

Sovereignty lands cannot be conveyed without clear intent and authority, and conveyances, where authorized and intended, must retain public use of the waters. The fact that a deed of swamp and overflowed lands does not explicitly exempt sovereignty lands from the conveyance does not show that the Trustees intended to convey sovereignty land encompassed within the swamp and overflowed lands being conveyed. Further, because grantees of swamp and overflowed lands took with notice that such grants did not convey sovereignty

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<sup>19</sup>*Id* at 283

<sup>20</sup>*Odom v. Deltona*, 341 So. 2d 977 (Fla. 1976)

<sup>21</sup>*Id*

<sup>22</sup>*Supra*, *Coastal Petroleum*

lands, neither they nor their successors have any moral or legal claim to these lands.<sup>23</sup>

In 1988 in response to an inquiry from the former Department of Natural Resources, the Florida Attorney General's Office issued an opinion discussing the definition of the ordinary high water mark.<sup>24</sup> The opinion discusses the history of attempts to establish the ordinary high water mark in terms of *Tilden*, *Martin*, and *Dow v. Electric Co.*; supra.

In 1994 the Second District Court of Appeals discussed the definition of the ordinary high water mark in the case of *Macnamara v. Kissimmee River Valley Sportsmans' Ass'n*.<sup>25</sup> The case stated that Florida law of ordinary high water was established in *Tilden* and *Martin*. The court then provided the following definition of ordinary high-water boundary: "[the] ordinary high water boundary on fresh waters is the ordinary or normal reach of water during the high water season."<sup>26</sup>

### III. Effect of Proposed Changes:

This bill provides the intent of the Legislature that because the stability of land titles and the clarity of real property boundaries is essential to a civil society, it is in the public interest to resolve the uncertainty and controversy arising from the assertion of state sovereignty ownership claims and public rights to lands that were purportedly conveyed by state deeds or grants as nonsovereignty lands, in a manner that fairly protects the interests of private landowners whose titles are derived from such state deeds or grants, while preserving the public's ownership of and rights to use the navigable waters and sovereignty submerged lands up to the ordinary high water mark. For that purpose the Legislature expressly finds and declares:

- It is in the public interest that the ordinary high water mark, as the boundary separating riparian lands from sovereignty submerged lands under navigable nontidal waters, be clearly defined, consistent with its common law meaning as historically applied in Florida, and with its intended purpose as an observable physical boundary that landowners and members of the public can readily identify;
- It is in the public interest that titles derived from state deeds or grants which purported to convey nonsovereignty land, but which may have included sovereignty submerged lands within the boundaries described in the deed or grant, be ratified, confirmed, and validated to the extent that the lands purportedly conveyed are located above the ordinary high water mark, as defined in this bill.
- It is in the public interest that the state's title to sovereignty submerged lands under navigable waters, which have not been alienated, and the public's rights to use the navigable waters and sovereignty submerged lands thereunder, be reaffirmed to the extent that such waters and lands are located below the ordinary high water mark, as defined in this bill.

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<sup>23</sup>*Id* at 343.

<sup>24</sup>AGO Opinion 88-22

<sup>25</sup>648 So. 2d 155 (Fla. App. 2 Dist. 1994)

<sup>26</sup>*Id* at 159.

The bill provides that s. 253.90, F.S., (created in this bill) pertains to any title to real property which is derived from a properly recorded deed or grant made before this act takes effect by the Board of Trustees of the Internal Improvement Trust Fund or by any other state agency or official; which conveyed swamp or overflowed lands, internal improvement lands, or other nonsovereignty lands; and which contains a legal description that encompasses sovereignty submerged lands.

Section 253.90, F.S., must be construed to ratify, confirm, and validate private waterfront landowners' title to swamp and overflowed lands, internal improvement lands, and any other nonsovereignty lands down to the ordinary high water mark of navigable waters. The present holders of the deeds or grants to which this section applies shall retain all riparian rights held by private waterfront landowners. This section also reaffirms the state's title to sovereignty submerged lands under navigable waters up to the ordinary high-water boundary pursuant to Section 11 of Article X of the State Constitution. The bill provides that this act in no way alters the public's rights to use navigable waters and sovereignty submerged lands for common law public trust purposes up to the ordinary high water mark as defined in this section, nor does the act affect the ownership by the state of sovereignty submerged lands lying below that mark.

The bill defines the "ordinary high water mark" on nontidal waters as not the highest point to which the water rises in time of freshets, but as the line that the water impresses upon the soil by covering it for periods sufficient to deprive it of vegetation and to destroy its value for agriculture. It is an ambulatory line, shifting in response to long term changes. The ordinary high water mark is to be determined by examining the bed and banks to ascertain 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 and the nature of the soil itself. It is coordinate with the limit of the bed the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes. Where the banks are low and flat and the water does not impress on the soil any well-defined line of demarcation between the bed and the banks, the effect of the water upon vegetation shall be the principal test in determining the location of the line as the boundary between the riparian owner and the public. In such an instance, the ordinary high water mark 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 the agricultural purposes by preventing the growth of vegetation constituting what may be termed as ordinary agricultural crop. 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 ordinary high water mark.

Finally, the bill provides that it is not the intent of the Legislature to supersede any specific grant of submerged lands granted to a governmental entity by special act.

The act will take effect upon becoming a law.

**IV. Constitutional Issues:**

## A. Municipality/County Mandates Restrictions:

None.

## B. Public Records/Open Meetings Issues:

None.

## C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

## A. Tax/Fee Issues:

None.

## B. Private Sector Impact:

The bill is a codification of the current definition of ordinary high-water boundary. As such, the bill should not impact either the rights of the private property holders or the governmental interest in sovereignty lands

## C. Government Sector Impact:

There will be cost related to litigation if new litigation should arise as a result of the codification of this definition.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

The Attorney General has provided its concerns regarding CS/SB 1824. These include:

The bill fails to include important correlative language from *Macnamara v. Kissimmee River Valley Sportsman's Ass'n*, 648 So. 2d 155 (Fla. 2d DCA 1994). Language in this case elucidates the finding in *Tilden* that the ordinary high water boundary encompasses the river or lake when the water body is full, i.e., at the line the water ordinarily reaches during the high water season. The bill also only specifically requires the exclusion of "freshets" in determining the reach of ordinary high water. Language in *Macnamara* makes it clear the boundary should not be located at the line the river or lake temporarily reaches during floods.



**VIII. Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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