

**NEGOTIATING THE MAZE: TRACING HISTORICAL
TITLE CLAIMS IN SPANISH LAND GRANTS AND SWAMP
AND OVERFLOWED LANDS ACT**

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I. INTRODUCTION

Two of the authors of this article previously published an article in this *Journal* describing the Public Trust Doctrine as applied to Florida’s submerged sovereignty lands.¹ That article addressed a commonly addressed dichotomy in federal and Florida law: first, what are the public rights and government duties in submerged sovereignty lands? Second, what are those rights and duties in the lands that Florida received from the federal government under the Swamp and Overflowed Lands Act (“Lands Act”)?² This article addresses a related issue, one which directly affects public and

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1. Sidney F. Ansbacher & Joe Knetsch, *The Public Trust Doctrine and Sovereignty Lands in Florida: A Legal and Historical Analysis*, 4 J. LAND USE & ENVTL. L. 337 (1989).

2. Act of Sept. 28, 1850, ch. 84.

private title throughout Florida: Spanish land grants. Particularly, what are the issues when a private person claiming title under a Spanish land grant has a boundary or title dispute against the State, which claims title under a Lands Act patent?

II. THE HISTORY OF TITLE CLAIM LAW

Spanish Civil law, of course, governed transactions in Spanish Colonial Florida. The United States' acquisition of Florida did not include lands Spain conveyed to private landowners, subject to conditions discussed below.³ Lands Act conveyances from the United States to Florida, or from Florida to private grantees, were quitclaim transactions. If Spain had not conveyed those lands, then the United States took title to them upon its acquisition of Florida. Of course, if Spain had earlier conveyed the parcel, then the United States did not take title.

A. *The Swamp and Overflowed Lands Act*

The very nature and source of Lands Act title dictate the significance of this issue. A significant dichotomy exists between the State's original public trust duties in submerged sovereignty lands and in Lands Act lands. In *Coastal Petroleum Co. v. American Cyanamid Co.*,⁴ the Florida Supreme Court clarified that the State's public trust title in submerged sovereignty lands is so paramount that such lands could be conveyed under Lands Act patents or deeds only if they were specifically and expressly included in the instruments of title. This is consistent with Article X, Section 11 of the Florida Constitution, which provides that submerged sovereignty lands are held in the public trust, and may only be conveyed when the transaction would be in the public interest.⁵

Conversely, Congress passed the Lands Act to facilitate conversion and development of designated swamp and overflowed lands.⁶ In 1841, congress granted 500,000 acres of land to certain states, as well as each new state on entry into the Union, for "internal improvement."⁷ Florida acquired its 500,000 upon statehood in 1845 as a result of the Great Pre-emption Act of 1841.⁸

3. PAUL W. GATES, PUBLIC LAND LAW REV. COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 87-105 (1968).

4. 492 So. 2d 339, 343-44 (Fla. 1986).

5. FLA. CONST. art. X, § 11.

6. Act of Sept. 28, 1850, *supra* note 2; ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776-1970, 154-56 (2d ed., Univ. of Neb. Press 1976) (1942).

7. 43 U.S.C. § 857(1994).

8. I. B. Hilson, *Minutes of the Proceedings of the Board of Trustees of the Internal Improvement Fund of the State of Florida*, vol. 1, at VIII-XI (1902).

In 1850, Congress granted swamp and overflowed lands to various states under the Lands Act for that same purpose.⁹ The U.S. Supreme Court directed that proceeds from conveyances of swamp and overflowed lands were to be applied to aid reclamation of those lands.¹⁰ The state could use the proceeds otherwise *only* if the proceeds were not necessary to further reclamation.¹¹

The methodology of selecting Swamp and Overflowed lands was fairly flexible and poorly administered from the national level, at the General Land Office, ("GLO"). The federal government allowed the states two main methods in order to select the lands to be designated Swamp and Overflowed. The most common, especially in the midwestern states, was to use the field notes of the Deputy Surveyors, in conjunction with the official plats, to choose the lands desired.¹² The second method, which Florida chose, was to appoint selecting agents to visit the lands, with field notes in hand, to make on-site selections and report them to the Governor and the Surveyors General.¹³ In Florida, the first two surveyors asked to take on this task were Arthur M. Randolph and Henry Wells.¹⁴ These men had been recommended to the Governor and sent into the field to make the appropriate selections. Randolph and Wells, prior to the Civil War, selected and approved to the State well over a million and one half acres.¹⁵ The process for selecting such lands lasted from the 1850s through the turn of the Twentieth Century. The lands were selected by the agents, passed through an examination process by the Surveyors General's office and finally approved or rejected by the General Land Office.¹⁶

After the Civil War, the State again had agents in the field; however, as time went on, the lands selected were investigated by other surveyors, usually the County Surveyor from a neighboring county. Thus, in St. Johns County, the County Surveyor from Duval or Putnam County might have verified the selections of the agents of the State. Once these were approved by the Surveyors General's office, the selections were sent to the General Land Office and

9. 43 U.S.C. §§ 982-983 (1994).

10. *United States v. Louisiana*, 127 U.S. 182, 191-92 (1888).

11. JOE KNETSCH, *THE HISTORY OF FLORIDA SURVEYING* 56-61 (2001).

12. *Id.* at 59.

13. *Id.*

14. *Id.*

15. See Rectangular File Box, *State Land Locations by Henry Wells and A. M. Randolph: File note, Wells' Long List* (on file with the Florida Department of Environmental Protection: Land Records and Title Section, Division of State Lands, Tallahassee, Fla.); Rectangular File Box, *Swamp Lands: Copy of Contract and Final Settlements Wells & Randolph* (on file with the Florida Department of Environmental Protection: Land Records and Title Section, Division of State Lands, Tallahassee, Fla.).

16. KNETSCH, *supra* note 11, at 59.

approved in the usual way.¹⁷ The definition of Swamp and Overflowed lands was never clearly delineated by the federal government. Much confusion and many lawsuits resulted from this imprecision.¹⁸

Instructions to the Deputy Surveyors on the delineation of Swamp and Overflowed lands were often vague and nearly impossible to perform. The first instructions given in the General Instructions for 1855 declared:

It may be that sometimes the margin of bottom, swamp or marsh, in which such uncultivable land exists, is not identical with the margin of the body of land 'unfit for cultivation;' and in such cases a separate entry must be made for each opposite the marginal distances at which they respectively occur.¹⁹

Thus, the surveyor was personally required to segregate between lands into water, unfit for cultivation, and those that were high and dry. Such detailed work was not possible for surveyors under pressures of time, mileage, and low costs. In some cases, the selecting agents asked for guidance as to the type of lands to be included in their lists, including lands in such areas as flat woods, where clay soils often held water for extended periods of time.²⁰ These, the General Land Office held, were proper for selection.²¹ Also, most of the northern portion of the state had been surveyed by the time of the passage of the Lands Act, thus making the selection process more personal. All surveys were conducted in the dry season, so few of the areas surveyed reflected the actual High Water Line of navigable waterbodies.²² Vague instructions, highly variable selection criteria and the impracticalities of many bureaucratic dictates made the administration of the Lands Act a difficult proposition at best.

17. GLO Circular to Surveyors General (Nov. 21, 1850).

18. See discussions of the Swamp and Overflowed Lands Act in GATES, *supra* note 3, at 334-35; KNETSCH, *supra* note 11, at 56-61; ROBBINS, *supra* note 6, at 154-56.

19. KNETSCH, *supra* note 11, at 60 (quoting 1855 MANUAL OF INSTRUCTIONS FOR SURVEYORS).

20. Letter from A.M. Randolph & H. Wells, agents for the State of Florida, to B.A. Putnam, Surveyor General of Florida (July 5, 1852), in Letters and Reports for Surveyors General, Vol. 2:1847-56, at 831-32 (on file with the Florida Department of Environmental Protection: Land Records and Title Section, Division of State Lands, Tallahassee, Fla.).

21. Letters from Commissioner, Volume 6: 1850-52 (on file with the Florida Department of Environmental Protection: Land Records and Title Section, Division of State Lands, Tallahassee, Fla.).

22. KNETSCH, *supra* note 11, at 58.

Florida originally shared the Congressional intent to facilitate conversion and development. The first Florida Constitution expressly confirmed this:

A liberal system of internal improvements, being essential to the development of the resources of the country, shall be encouraged by the government of this State; and it shall be the duty of the general assembly, as soon as practicable, to ascertain, by law, proper objects of improvement, in relation to roads, canals and navigable streams, and to provide for a suitable application of such funds as may be appropriated for such improvements.²³

B. Internal Improvement Fund

The 1854 Florida Legislature created the Internal Improvement Fund to facilitate drainage and conversion of those lands the federal government conveyed to Florida.²⁴ The State used the term “swamp and overflowed lands” to justify the disposal and conversion of those lands.²⁵ That public interest argument contributed to the underlying rationale for the term “internal improvement trust fund.”²⁶ The original act creating the Board of Trustees specifically designated three railroads and one canal company to be the immediate beneficiaries of the Internal Improvement Act.²⁷ This act, designed by David Levy Yulee and his allies in the Florida Legislature, was designed to make it easy for these ventures to acquire land from the State.²⁸ The rationale for this generous act was to attract people and money to Florida. In a state having over 35,000,000 acres and fewer than 200,000 people, this attitude was understandable. This was the same mentality that created the 1856 “Riparian Rights Act” to facilitate the development of commerce along Florida’s navigable waterways.

Florida’s Governor and Cabinet were appointed as, first, the Trustees of the Internal Improvement Fund, and, as later renamed, the Board of Trustees of the Internal Improvement Trust Fund

23. FLA. CONST. art. XI, § 2 (1838, repealed 1868).

24. Fla. Laws 1854, ch. 610 (codified at FLA. STAT. § 253.001 (2001)).

25. Ansbacher & Knetsch, *supra* note 1, at 348 n.91 (citing J. ROTHCHILD, UP FOR GRABS: A TRIP THROUGH TIME AND SPACE IN THE SUNSHINE STATE 26-27 (1985)).

26. *Id.*

27. Fla. Laws 1855, ch. 610.

28. *Id.*

("Trustees").²⁹ Until 1913, the Trustees fostered management and sale of swamp and overflowed lands that they owned:

Railroad development was the first phase, beginning with the very statute that created the Internal Improvement Fund [S]ome 1,100 miles of railway were built, for which the Trustees granted land premiums totalling slightly more than 9,000,000 acres. In addition, the federal government granted as further encouragement 2,220,000 acres from the Public Domain. These various grants combined amounted to a full third of all the land area in the state [which is about 34,000,000 acres], an average of about 10,000 acres for each mile of railroad constructed.

By the 1880's [there was] a shift of interest to the second broad phase of Trustee operations: drainage and land reclamation. . . . [I]n 1881 . . . 4,000,000 acres were sold into private ownership for reclamation purposes In addition . . . the Trustees conveyed some 2,780,000 acres of land to private companies as a premium for various waterway improvements.³⁰

Many counties, prior to the passage of the 1913 Act, also incorporated many corporations for the exploitation of Florida's natural resources.³¹ These were frequently granted extensive powers such as the building of tramways, deepening of navigable waters, dredging out swamps, creating canals, constructing roads, etc. In many of these incorporations, the counties were acting in direct violation of State powers and recent Florida Supreme Court

29. Glenn J. MacGrady, Note, *Florida's Sovereignty Submerged Lands: What are They, Who Owns Them and Where is the Boundary?*, 1 FLA. ST. U. L. REV. 596, 603 (1973).

30. *Id.* at 604 n.51 (quoting Joel Kuperberg, Statement to the ELMS Committee (Sept. 14, 1972)).

31. For an example of one such community, see Joe Knetsch, *The River Town of Chatterton*, AT HOME: CITRUS COUNTY HIST. SOC'Y (Citrus County Historical Soc'y, Inverness, Fla.), Mar./Apr. 1998, at 9.

decisions, such as the 1893 *State v. Black River Phosphate Co.*³² decision.

Florida's water law regulation during this period shows the pervasiveness of the "improvement mindset." The first Florida water regulation laws were the "ditch and drain" laws of 1893.³³ The State originally regulated water to control and impound excess flow.³⁴ The laws authorized counties to "build drains, ditches or watercourses upon petition of two or more landowners."³⁵ The 1901 legislature also authorized counties to reclaim lands on private initiative based on findings that reclamation would benefit agriculture or public health.³⁶

C. Water Law Regulation

Beginning in 1913, however, the legislature incrementally granted the Trustees additional authority to protect sovereignty submerged lands below navigable waters.³⁷ As opposed to swamp and overflowed lands, sovereignty submerged lands have always been subject to the Public Trust Doctrine.³⁸ "The Public Trust Doctrine obligates a state government to act as trustee of the public interest in all public lands and waters in that state."³⁹ While the Trustees originally took title to swamp and overflowed lands subject to a congressional edict to develop them, Professor Joseph Sax summed up the Public Trust title in submerged sovereignty lands as follows:

32. 13 So. 640 (Fla. 1893). In *Black River Phosphate Co.*, the Florida Supreme Court held that the Florida Riparian Act of 1856, which gave riparian property owners the title to lands above the channel, did not convey any associated right to mine phosphates from the beds of those adjacent navigable waters. *Id.* at 653. The court cited *Black River Phosphate Co.* in *West Palm Beach v. Board of Trustees*, 746 So. 2d 1085 (Fla. 1999), in holding that exceptions to public trust title in submerged lands are to be narrowly construed. *See also* the incorporation laws for various counties, e.g. Citrus, Hernando, Marion, etc.

33. *See generally* Act of June 2, 1893, ch. 4178, 1893 Fla. Laws 106; *see also* Sidney F. Ansbacher & Doug Brown, *A Proposal for Regional Water Management Districts to Regulate Consumptive Water Use in Minnesota*, 10 HAMLINE J. PUB. L. & POL'Y 235, 245 (1989).

34. *Id.*

35. *Id.* (citing Act of June 2, 1893, ch. 4178, 1893 Fla. Laws 106).

36. *See* Act effective May 31, 1901, ch. 5035, 1901 Fla. Laws 188.

37. MacGrady, *supra* note 29, at 604. Ironically, the 1913 act authorized the Trustees to convey islands and other property that was not adjacent to any privately owned riparian lands. *See* Act effective June 5, 1913, ch. 6451, 1913 Fla. Laws 122. This act led, unsurprisingly, to further development of, and off of, barrier islands. *Id.*

38. Ansbacher & Knetsch, *supra* note 1, at 346.

39. *Id.*

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.⁴⁰

Even after 1913, the Florida legislature promulgated many water laws that fostered conversion of what are today called wetlands. The General Drainage Act authorized the majority of landowners or the owner of the majority of lands in an area to file a petition, asking a circuit court to declare a drainage district.⁴¹ The only requirement for state notification was the filing of a plan and the circuit court declaration with the Secretary of State's office.⁴² The Trustees, whose sovereign lands might have been affected by the actions of these drainage districts, were not notified of the districts' creation at any time.⁴³ For example, following the federal government's 1956 amendment of the Watershed Protection and Flood Prevention Act of 1954,⁴⁴ the Florida Legislature passed the 1957 Florida Water Resources Act.⁴⁵ The 1957 Florida Water Resources Act created an agency within the Florida Board of Conservation to issue permits for "the capture, storage and use" of excess surface and ground water.⁴⁶

III. FEDERAL STEPS TOWARD WETLAND PROTECTION

Gradually, however, the federal and then the state governments, began protecting wetlands. In 1967, the Secretary of the Interior and the Secretary of the Army signed a Memorandum of Understanding allowing the Department of the Interior to comment on Army activities.⁴⁷ *Zabel v. Tabb*⁴⁸ was the landmark federal case that established Army Corps regulation to block a dredge and fill project even if there was no impact on navigation. In *Zabel*, two landowners sought a dredge and fill permit to build a trailer park, with a bridge or culvert, on their lands along the Boca Ciega Bay on the Gulf Coast

40. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1970).

41. Act effective June 9, 1913, ch. 6458, 1913 Fla. Laws 184, 184-86.

42. *Id.* at 185-86.

43. *See id.*

44. ch. 1027, §§ 2-7, 70 Stat. 1090 (1956) (codified as amended at 16 U.S.C. §§ 1001-1012 (2000)).

45. Act effective June 18, 1957, ch. 57-380, § 8(1)(a), 1957 Fla. Laws 855, 858.

46. *Id.*

47. *See Zabel v. Tabb*, 430 F.2d 199, 210-11 n.21 and accompanying text (5th Cir. 1970).

48. *Id.* at 200-01.

of Pinellas County.⁴⁹ The Fifth District reversed a summary judgment for the landowners holding that the denial was consistent with federal authority to prohibit a project on private riparian submerged lands in navigable waters:

The starting point here is the Commerce Clause and its expansive reach. The test for determining whether Congress has the power to protect wildlife in navigable waters and thereby to regulate the use of private property for this reason is whether there is a basis for the Congressional judgment that the activity regulated has a substantial effect on interstate commerce. That this activity meets this test is hardly questioned. In this time of awakening to the reality that we cannot continue to despoil our environment and yet exist, the nation knows, if Courts do not, that the destruction of fish and wildlife in our estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce Nor is it challenged that dredge and fill projects are activities which may tend to destroy the ecological balance and thereby affect commerce substantially. Because of these potential effects Congress has the power to regulate such projects.⁵⁰

The *Zabel* court held that the Fish and Wildlife Coordination Act⁵¹ and the National Environmental Policy Act⁵² “spectacularly revealed” a “government-wide policy of environmental conservation.”⁵³ The court analyzed the Memorandum of Understanding between the Secretaries of the Army and Interior, along with other evidence, as having “almost a virtual legislative imprimatur . . . to protect estuarine areas”⁵⁴ Finally, the court cited a House of Representatives report, which cited the lower court’s permit denial as an example of the Army Corps’ ability to evaluate ecological factors in review of a River and Harbors Act permit application.⁵⁵ In sum, *Zabel* held that the overwhelming weight of legislative evidence

49. *Id.* at 201-02.

50. *Id.* at 203-05 (citations omitted).

51. 16 U.S.C. §§ 661-666 (2001).

52. 42 U.S.C. §§ 4331-4347 (2001).

53. *Zabel*, 430 F.2d at 209.

54. *Id.* at 211.

55. *Id.* at 214 n.27.

supported the Army Corps' denial of the permit for environmental reasons.⁵⁶

A. Clean Water Act

The Clean Water Act ("CWA") was enacted in 1972 to regulate water pollution.⁵⁷ The CWA has largely superseded the River and Harbors Act as to wetlands regulation. Section 404 of the CWA regulates dredge and fill.⁵⁸ While the CWA's language was ambiguous as to whether its jurisdiction reached beyond navigable waters,⁵⁹ the District Court for the District of Columbia concluded in *Natural Resources Defense Council, Inc. v. Callaway*⁶⁰ that the CWA granted the Corps permitting jurisdiction over wetlands that were contiguous to navigable waterbodies. The United States Supreme Court in *United States v. Riverside Bayview Homes, Inc.*⁶¹ confirmed that expansive interpretation in 1985. While the Supreme Court recently held in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*⁶² that Corps jurisdiction does not extend to isolated wetlands, there is no question that the Corps has extensive jurisdiction to protect contiguous wetlands today.

IV. FLORIDA MOVES TO PROTECT WETLANDS

Florida first attempted to restrain--as versus foment--dredging and filling of wetlands in 1951.⁶³ The legislature repealed a 1917 Act that had rendered all tidelands between the upland and the channel subject to the control of the riparian upland owner.⁶⁴ This did little to restrain the state's conveyance or private dredging and filling of sovereignty lands.⁶⁵

A. The Bulkhead Act

The 1957 Bulkhead Act took a palpable step toward ecological protection by authorizing the Trustees and local governments to set local bulkhead lines beyond which no private riparian landowner

56. *Id.* at 214.

57. Pub. L. No. 92-500, 86 Stat. 816 (1972).

58. 33 U.S.C. § 1344 (1994).

59. The terms "navigable waters" and the undefined term "waters of the United States" expressed jurisdiction.

60. 392 F. Supp. 685 (D.D.C. 1975).

61. 474 U.S. 121 (1985).

62. 531 U.S. 159, 174 (2001).

63. MALONEY ET. AL., FLORIDA WATER LAW 459 (1980) (citing Act effective May 29, 1981, ch. 26776, 1951 Fla. Laws 554).

64. *Id.*

65. *Id.* at 459-60.

could fill.⁶⁶ The Act established permitting, as well as limitations on conveyances of submerged sovereignty lands, by the Trustees.⁶⁷ Under the Bulkhead Act, conveyances of such lands had to be in the public interest.⁶⁸ The Trustees agreed to give the counties power to create bulkhead lines within their jurisdictions subject to their approval.⁶⁹ In this way, local citizens and corporations would have a voice and the public interest would be better served.

As Dean Maloney stated, “the state was constrained in regulating dredge and fill activities prior to 1967.”⁷⁰ Section 253.123(1), Florida Statutes, only allowed the Trustees to regulate submerged sovereignty lands; there was no regulatory authority in wetlands upland of the high water line.⁷¹ The legislature created the Department of Pollution Control in 1967, and delegated to that agency the authority to regulate those previously unregulated wetlands.⁷²

The State faces an interesting conundrum regarding those swamp and overflowed lands it acquired in 1850 under the Lands Act, and which it still owns. *Coastal Petroleum Co. v. American Cyanamid Co.* confirms that the State has established the primacy of sovereignty submerged lands title over swamp and overflowed lands claims.⁷³ Unlike sovereignty lands, though, there exists no presumption in favor of State ownership of swamp and overflowed lands. Nonetheless, the State retains swamp and overflowed lands generally to preserve them as natural resources.⁷⁴ This function has grown with the increased knowledge of how such lands function within the ecosystem and the State has actively pursued purchase or reacquisition of such lands through the Conservation and Recreational Lands program.⁷⁵ This is diametrically opposed to the original purpose of the Lands Act to facilitate filling and development of such lands. It is also inconsistent with the development goals of most private Spanish Land Grant titleholders. Therefore, the State seeks to assert and defend title in swamp and overflowed lands bare of the public trust presumptions it enjoys in its submerged sovereignty lands.

66. *Id.* at 460.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 461-62.

71. *Id.* at 461 (citing FLA. STAT. § 253.123(1) (1979)).

72. *Id.*

73. 492 So. 2d 339 (Fla. 1986).

74. *See, e.g.*, FLA. STAT. § 259.101 (2001).

75. FLA. STAT. § 259.032 (2001).

Historical records of the United States Surveyors in Florida are fairly complete regarding field notes, plats, and contracts to individual surveyors. The instructions or special instructions to surveyors, however, are incomplete. Some are missing entirely from both State and national sources. Because of the condition of the documents and their incomplete nature, many Spanish surveys and records are sketchy at best. The records of the earlier Spanish surveys are often worse. Piecing together Spanish land grant titles often requires meticulous, tedious examination of surveys, instructions from the Crown, and more than a little luck. Much the same combination of art and science accompanies any attempt to ferret Lands Act titles. The remainder of this article traces the relationship between Spanish Land Grants and the Lands Act, and provides a primer on how one tries to piece together an historical title and boundary search to determine where Land Grant and swamp and overflowed lands exist.

V. BACKGROUND OF SPANISH LAND GRANTS

Spain ruled Florida through civil law.⁷⁶ The Florida Supreme Court discussed the Spanish colonial law as to waterfront lands at length in *Apalachicola Land & Development Co. v. McRae*.⁷⁷

When Spain acquired territory by discovery or conquest in North America, the possessions were vested in the crown; and grants or concessions of portions thereof were made according to the will of the monarch. While the civil law was the recognized jurisprudence of Spain and its rules were generally observed, yet the crown could exercise its own discretion with reference to its possessions.⁷⁸

Under the civil law in force in Spain and in its provinces, when not superseded or modified by ordinances affecting the provinces or by edict of the crown the public navigable waters and submerged and tide lands in the provinces were held in dominion by the crown . . . and sales and grants of such lands to individuals were contrary to the general laws and customs of the realm.⁷⁹

76. MALONEY, *supra* note 63, at 677-78.

77. 98 So. 505 (Fla. 1923).

78. *Id.* at 518.

79. *Id.*

By the laws and usages of Spain the rights of a subject or of other private ownership in lands bounded on navigable waters derived from the crown extended only to high-water mark, unless otherwise specified by an express grant.⁸⁰

This decision was recently re-examined and reconfirmed in the First District Court of Appeal in Florida in *Board of Trustees of the Internal Improvement Trust Fund v. Webb*.⁸¹

As the *McRae* court noted, Great Britain divided Florida into East and West Florida during British occupancy from 1763 to 1783.⁸² The Chatahoochee and Apalachicola Rivers split East from West Florida.⁸³ Spain retained the East/West split when Florida reverted from Great Britain to Spain in 1783.⁸⁴ Florida became subject to United States law under the cession from Spain to the United States, effective in July, 1821.⁸⁵ The Treaty of Amity, Settlement and Limits Between the United States of America and His Catholic Majesty, the King of Spain (“Adams-Onis Treaty”) established the terms of cession from Spain to the United States.⁸⁶

The pertinent portion of the authoritative Works Projects Administration (“WPA”) work, *Spanish Land Grants in Florida* (November 1940) (“Spanish Land Grants”), states the following regarding the effect of the Adams-Onis Treaty:

By Article VIII of the treaty of February 22, 1819, whereby Spain ceded the Floridas to the United States, all Spanish grants of land made prior to January 24, 1818, the date on which the King of Spain definitely expressed his willingness to negotiate, were to be ‘*ratified and confirmed to the persons in possession of the lands, to the same extent that the said grants would be valid if the territories had remained under the domain of his Catholic Majesty.*’⁸⁷

80. *Id.*

81. 618 So. 2d 1381 (Fla. 1st DCA 1993).

82. 98 So. at 522-23.

83. *Id.*

84. *Id.* at 523.

85. *Id.*

86. *Id.* at 524 (citing the Treaty of Amity, Settlement and Limits Between the United States of America and His Catholic Majesty, the King of Spain, Feb. 22, 1819, U.S.-Spain, 8 Stat. 252 [hereinafter Adams-Onis Treaty]).

87. 1 THE HISTORICAL RECORDS SURVEY, DIV. OF CMTY. SERV. PROGRAMS, WORK PRODUCTS ADMINISTRATION, SPANISH LAND GRANTS IN FLORIDA xxxii (Nov. 1940) (emphasis added).

The WPA book explicates the methods for confirming title.⁸⁸ For example, a petitioner who sought confirmation of a Grant in what is today St. Johns County first obtained confirmation from the federal Board of Commissioners for East Florida if the Grant was under 3,500 acres in size, and, in turn and as appropriate, from Congress.⁸⁹ The principal federal records of United States confirmations of such Grants are in the "American State Papers," particularly, the pertinent American State Papers containing records of Congress relating to disposition of confirmation applications. Other important records include copies of the original documents of confirmation, which are available on microfiche, and the actual proceedings of the board of Commissioners for East (and West) Florida. The original documents often include copies of the original surveys.

The United States agreed to confirm title to valid Spanish Land Grants under the Adams-Onis Treaty. The transfer of Florida was specifically made subject to any pre-existing Spanish land grants:

[A]ll the *grants of land* made before the 24th of January, 1818, by his Catholic majesty, or by his *lawful* authorities, in the said territories ceded by his majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of his Catholic majesty.⁹⁰

The Adams-Onis Treaty also granted an extension of time for grantees who had not yet fulfilled the terms of their grants to do so:

But the *owners in possession of such lands*, who, by reason of the recent circumstances of the Spanish nation, and the revolutions in Europe, have been prevented from fulfilling all the conditions of their grants, shall complete them within the terms limited in the same, respectively, from the date of this treaty....⁹¹

Subsequent to the Adams-Onis Treaty, various acts of Congress were passed for settling private land claims in the ceded territories, pursuant to Article 8 of the Treaty, which provided that "all the

88. *Id.* at xxii, et seq.

89. *Id.* at xxii, et seq., and at 1, et seq.

90. *McRae*, 98 So. at 524 (citing the Adams-Onis Treaty).

91. *Id.*

grants of land made before the 24th of January, 1818, . . . in the said territories . . . shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of Spain.⁹² While Spain ceded over East Florida and West Florida, Congress implemented Article 8 of the Treaty by ratifying and confirming Spanish Land Grants made prior to January 24, 1818, according to its terms.⁹³

The United States Supreme Court in *United States v. Arredondo*⁹⁴ addressed at length the great legal weight afforded to Spanish Grants in Florida under the Adams-Onis Treaty and amendments to that Treaty:

Yet, in [Congress'] whole legislation on the subject (which has all been examined), there has not been found a solitary law which directs; [sic] that the authority on which a grant has been made under the Spanish government should be filed by a claimant--recorded by a public officer, or submitted to any tribunal appointed to adjudicate its validity and the title it imparted--*[C]ongress has been content that the rights of the United States, should be surrendered and confirmed by patent to the claimant, under a grant purporting to have emanated under all the official forms and sanctions of the local government. This is deemed evidence of their having been issued by lawful, proper, and legitimate authority--when unimpeached by proof to the contrary.*⁹⁵

The *Arredondo* court explained that the acts of the Spanish Colonial government and surveyor in issuing the grants and supporting surveys were "deemed" presumptively authorized "by the order and consent of the [Spanish] government."⁹⁶ But this was not always the case, and the U.S. Supreme Court at times had refused confirmation on numerous legal grounds, most often for lack of proper survey or vague boundary descriptions.

92. *Id.*

93. *Id.* at 524-25; see *State v. Gerbing*, 47 So. 353, 355, 357 (Fla. 1908).

94. 31 U.S. (6 Pet.) 691 (1832).

95. *Id.* at 723 (emphasis added).

96. *Id.* at 727.

The Florida Supreme Court has held that Lands Act parcels could not contain lands that Spain had granted prior to cession:

Under that treaty, the United States acquired the ownership of all the swamp and overflowed lands in the area now constituting the territorial limits of the state of Florida *that had not previously been granted by Spain . . .*⁹⁷

*Dawson v. Mathews*⁹⁸ addressed a dispute between claims under a Spanish land grant and swamp and overflowed lands. The case involved a suit to quiet title by Dawson, who claimed title to lands in Duval County through the McQueen Grant, a Spanish land grant,⁹⁹ against Mathews, who claimed through a Lands Act patent.¹⁰⁰ The McQueen Grant specified a waterfront eastern boundary.¹⁰¹ Mathews claimed a portion of the McQueen Grant lands under a deed from Florida to certain “unsurveyed or marsh part of Section Twelve (12), Township Two (2) South, Range Twenty Eight (28) East . . .”¹⁰² The official United States survey of Section 12 showed Pablo Creek meandering across the Section 12 line, thereby creating a conflict between the boundary described in the McQueen Grant and the boundary designated by the United States survey.¹⁰³ The *Dawson* Court held as a matter of law that the purported boundary of Section 12 did not affect--let alone limit--the express eastern boundaries of the Spanish Land Grant.¹⁰⁴ The Spanish Land Grant was confirmed easterly pursuant to its terms, and the subsequently developed Government Survey system could not modify or abrogate those preexisting “[d]elineated boundaries of the Spanish Grant [that] speak for themselves.”¹⁰⁵

Conversely, the Florida Supreme Court in *Dumas v. Garnett*¹⁰⁶ determined that a purportedly waterfront Spanish Land Grant stopped short of the high water line. The plaintiff brought an action for ejectment to recover lands along the St. Augustine waterfront.¹⁰⁷ The plaintiff deraigned title through a Spanish Land Grant that was

97. *Trs. of Internal Improvement Fund v. Root*, 58 So. 371, 376 (Fla. 1912) (emphasis added).

98. 338 So. 2d 1086 (Fla. 1st DCA 1976).

99. *Id.* at 1087.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. 13 So. 464, 467 (Fla. 1893).

107. *Id.* at 466.

bounded on the eastern, waterward side by the “zacatel.”¹⁰⁸ The testimony showed that a zacatel in Florida meant the location where marsh grass grows.¹⁰⁹ The court found that the evidence proved that the marsh was therefore the eastern boundary, and the plaintiff’s grant went only to the western marshline.¹¹⁰ Therefore, the Plaintiff could not eject a Defendant off of lands between the marshline and the waterfront.¹¹¹

Dumas shows that it is crucial to know colonial historical and hydrogeological customs and standards when analyzing Spanish Land Grants. Sometimes, even exact knowledge of colonial practices does not suffice. If, for example, a marsh has been drained, how does the modern surveyor ascertain a colonial marshline boundary? The surveying standards in colonial Florida and today might dictate reliance on any distances shown in the metes and bounds in the original Spanish survey. Typically, however, “monuments” such as a river or marshline would control over a distance in a survey.¹¹² One may seek to establish approximate colonial boundaries by the distance, however, where filling or other alterations eliminated or altered the historic marshline.

Also, U.S. Deputy Surveyors “retraced” the survey lines of the Spanish surveyors to the best of their abilities. There is ample evidence, however, to conclude that many surveys in East Florida, specifically those more than fifteen miles outside of St. Augustine or Fernandina, were never performed upon the ground.¹¹³ This meant that the U.S. Deputy Surveyor had to simply reconstruct the survey *in toto* from a plat or verbal description.¹¹⁴ Frequently, such descriptions differed dramatically from the actual geographic features of the land.¹¹⁵ Numerous letters in the series, “Letters and Reports to Surveyor General,” often reflect this frontier reality.¹¹⁶ Surveyors also were required to comply and almost always complied with the rule that local newspapers include advertisements for the land owners or their representatives to show up at a certain place and time

108. *Id.*

109. *Id.* at 465. The testimony regarding the definition of “zacatel” demonstrated the significance of knowledge of colonial Florida, as opposed to other Spanish colonies. A witness for the Plaintiff testified that “zacatel” in Mexico meant the place where the grass grows and indicated a prairie. That witness was unaware of the definition in colonial Florida. *Id.*

110. *Id.* at 466-67.

111. *Id.* at 467.

112. *See generally* Trs. of the Internal Improvement Trust Fund v. Madeira Beach Nominee, Inc., 272 So. 2d 209 (Fla. 2d DCA 1973).

113. *See* Joe Knetsch, *The Spanish Land Grants of Central Florida: Another Problem for Surveyors*, FLA. SURVEYOR, May-July 1997, at 18, 22.

114. *Id.*

115. *Id.*

116. *See id.* at 19, 21-22.

to locate and fix the boundaries for their grants.¹¹⁷ Three weeks was the usual time for the running of these advertisements. U.S. Deputy Surveyors took deliberate pain and caution to relocate the land grants to the grantees' satisfaction. In cases where the boundaries were recently run by Spanish surveyors, the lines were often still quite visible on the ground

A grant's size in acres is also another method used to determine the grant's approximate shape in cases where physical monuments have been destroyed or greatly altered. This, however, is the least favored method used by surveyors in determining grant boundaries.

Spanish settlements were highly regulated affairs. Swamps, marshes, and other lands of perceived marginal use were often designated as "common" lands for all settlers to use to their benefit. Nonetheless, some marshes were used for forage and other agriculture, as well as access to riverine "highways." Swamps were to be typically avoided as places for the erecting of towns. All towns had to conform to the typical Spanish square pattern, with the direction of the prevailing winds of especial note. Land Grants along rivers, navigable streams, and roadways were typically (although not always) required to be two-thirds in depth and one third in frontage, thereby giving equal access to all land owners to these royal highways of commerce and transportation. Rules regarding the layout of the church, royal offices, streets, and other such affairs were also strictly defined in Spanish law. Only lands of practical use, generally farming, were to be granted to individuals. Spain, like England and France of the day, operated under the mercantile system developed by Colbert. This system dictated that colonies existed for the good of the mother country, and only things not produced there could be raised and exported to the homeland. Therefore, colonial development and settlement patterns were highly regulated and controlled.

VI. FLORIDA RECEIVED QUITCLAIM DEEDS UNDER THE LANDS ACT

Florida courts in *Root* and *Dawson* ruled that the United States could not have acquired from Spain title to lands Spain had already transferred into private hands.¹¹⁸ In turn, the United States could not have conveyed good title to such lands to Florida by operation of the Lands Act. The Trustees took title under Lands Act patents from the United States pursuant to 43 U.S.C. ' 982. The Lands Act had the following purpose:

117. *Id.* at 19.

118. *Trs. of Internal Improvement Fund v. Root*, 58 So. 371, 376 (Fla. 1912); *Dawson v. Mathews*, 338 So. 2d 1086, 1087 (Fla. 1st DCA 1976).

§982. Grant to States to aid in construction of levees and drains

To enable the several States . . . to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein B the whole of the swamp and overflowed lands, made unfit thereby for cultivation, *and remaining unsold on or after the 28th day of September, A.D. 1850*, are granted and belong to the several States respectively, in which said lands are situated¹¹⁹

The federal case law shows as a matter of law such patents could not affect *previously confirmed* Spanish Grants. It is instructive to consider dicta in a federal Fifth Court of Appeals case concerning lands within what is now St. Augustine, St. Johns County Airport. In *Mays v. Kirk*,¹²⁰ the old Fifth Circuit, on jurisdictional grounds, reversed and remanded to the United States Middle District of Florida Mr. and Mrs. Mays's judgment removing a federal Swamp Lands patent to Florida as a cloud on their alleged Spanish Grant title. While the Court held that there was no federal court jurisdiction, it noted:

[I]t remains open to [the Mays] to show that the land never belonged to the United States, i.e., *that it belonged to private owners in the period since [the alleged Spanish Grant root of title], and that therefore the United States could not by the Swamp Lands Act convey something it did not own*. See *United States v. O'Donnell* where the Court stated:

'By its terms the Swamp Lands Act did not include swamp lands which the Government had sold, *and it could not include lands which the Government had not acquired or free any of them of obligations to which they were subject when the Act was passed.*'¹²¹

119. 43 U.S.C. § 982 (emphasis added).

120. 414 F.2d 131, 136 (5th Cir. 1969).

121. *Id.* (citations omitted) (emphasis added).

In *United States v. O'Donnell*, the United States Supreme Court held that swamp lands in California were subject to a treaty between the United States and Mexico, which addressed preexisting Mexican titles.¹²² Congress passed the Mexican Land Claims Act to confirm title to lands conveyed by Mexico prior to the United States' acquisition of the swamp lands.¹²³ Just like the Adams-Onís Treaty's effect on Spanish Land Grants in Florida, "[t]he primary purpose of the Mexican Claims Act was the performance by the United States of its treaty obligations to quiet the titles of the claimants under Spanish and Mexican grants."¹²⁴ The Supreme Court in *O'Donnell* stated that confirmed Spanish and Mexican Grants rendered void Swamp Lands Act patents of the same lands:

*It is evident that the treaty obligations to quiet the title of claimants under Mexican grants would be defeated and the Mexican Claims Act would fail of its purpose if the finality of the [federal] confirmation of claims under Mexican grants could be challenged by persons claiming under grants of public lands by the United States. For that reason it has been consistently held that . . . confirmation under that act of claims under Mexican grants is conclusive upon all those claiming under the United States. Such is the effect of confirmation . . . of titles set up under Mexican grants, upon claimants under the Swamp Lands Act to lands in the annexed territory.*¹²⁵

The *O'Donnell* Court explained that Swamp Lands Patents were quitclaim deeds subject to superior and preexisting claims:

The Swamp Lands Act of 1850 was effective to transfer an interest in the lands described in the Act, *only so far as they were part of the public domain of the United States and thus subject to the disposal of Congress.* The Act in terms purported to grant to the several states all swamp and overflowed lands located within their respective boundaries "which shall remain unsold at the passage of this Act." [Section 1, 46 [now 43] U.S.C.A. ' 982] . . . By its terms the Swamp Lands Act did not include swamp lands which the Government

122. 303 U.S. 501, 510 (1938).

123. *Id.* at 512-13.

124. *Id.* at 512.

125. *Id.* at 512-13 (citations omitted)(emphasis added).

had sold, *and it could not include lands which the Government had not acquired or free any of them of obligations to which they were subject when the Act was passed.*¹²⁶

VII. RIPARIAN VERSUS WETLANDS BOUNDARIES

In *Borax Consolidated v. City of Los Angeles*, the court held that the mean high water line demarcates the boundary between private uplands and submerged sovereign lands underlying tidally influenced navigable waters.¹²⁷ The *Borax* court also noted that the United States did *not* take title to lands, subject to reconveyance, where title to those lands had previously been granted by Mexico.¹²⁸

Various Florida cases have held that Spanish land grants along navigable water bodies were bounded by the mean or ordinary high water line as applicable, unless the grants otherwise stated. For example, the Florida Supreme Court stated in *Apalachicola Land & Development Co. v. McRae*, “[b]y the laws and usages of Spain the rights of a subject or of other private ownership in lands bounded on navigable waters derived from the crown extended only to high-water mark, unless otherwise specified by an express grant.”¹²⁹

Many Spanish land grants state the lands are bounded by a “bank.” Typically, a bank is deemed to be the high water line. The United States Supreme Court in *Barney v. Keokuk*¹³⁰ held that the bank of a navigable waterbody is synonymous with the ordinary (or mean in tidally influenced waters) high water line boundary. Additionally, the Florida First District Court of Appeal in *Teat v. City of Apalachicola*,¹³¹ stated:

Appellants live along the banks of Huckleberry Creek, a tidal and navigable waterway, and their deed conveys land that runs to the bank of this creek.

126. *Id.* at 509-10 (emphasis added). The portion of the *O'Donnell* opinion cited in *Mays* is instructive. See also *O'Donnell*, 303 U.S. at 514-15 (“Even where the right of the state under the Swamp Lands Act is unqualified, it would perhaps be more accurate to say that the United States is no more than a donor granting without warranty those lands falling within the description and the purview of the statute . . .”).

127. 296 U.S. 10 (1935).

128. *Id.* at 15.

129. 98 So. 505, 518 (Fla. 1923).

130. 94 U.S. 324, 336 (1876).

131. 738 So. 2d 413, 413 (Fla. 1st DCA 1999).

*We hold that . . . property that extends to the shore extends to the ordinary (sic) high water mark, and riparian rights are attached to that property. Under the facts of this case, the banks of Huckleberry Creek are the equivalent of a shore. Therefore, appellants do possess riparian rights.*¹³²

Teat and *Barney* together show that one who owns lands adjacent to the “bank” of a navigable waterbody owns down to the mean or ordinary high water line, as appropriate. (Since *Teat* addressed the boundary of a “tidal and navigable waterway,” the bank ran along the mean, not the ordinary, high water line.)

The Florida Supreme Court in *State v. Black River Phosphate Co.*,¹³³ also held that a “bank” serves as the physical boundary between private uplands and navigable waters. Similarly, the Florida Supreme Court in *Brickell v. Trammell*,¹³⁴ held that federal confirmation of a Spanish Land Grant “on the south side of Miami river” extended to the mean high water line under both Spanish and common law. Compare *McRae*, which states the “shores” of a navigable water are “the spaces between high and low water marks,” and *Teat*, which treated the “banks” as the “equivalent” of a “shore” along the mean high water line.¹³⁵

VIII. CONCLUSION

The determination of boundaries of Swamp and Overflowed lands is generally difficult. The determination of boundaries of Spanish Land Grants, is likewise difficult. The correct result--or even a defensible one--requires a unique knowledge of Spanish Colonial Law, surveying, history, law and more than a little luck. The authors of this article have had good faith disputes based on defensible and wildly divergent interpretations of the same historical documents. While we hope that we have provided a useful template, we council caution. In analyzing these issues, try to follow that hoary old lesson of trial lawyers: Try to determine how the other side might interpret the same records. A final word of caution: If all else fails, and you are still confused, flip a coin.

132. *Id.* at 414 (emphasis added). The court’s citation to the “ordinary high water mark” was an error. Because the court found that the creek was tidal, the mean, rather than ordinary high water line applied.

133. 13 So. 640, 650 (Fla. 1893).

134. 82 So. 221, 229 (Fla. 1919).

135. *Apalachicola Land & Dev. Co. v. McRae*, 98 So. 505, 525 (Fla 1923); *Teat*, 738 So. 2d at 414.

