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April, 2005



The oceans are vast commons. That precept developed historically as a result of mankind's limited ability to exercise domination over the sea. Except near shore, the land under the sea has been too remote for any use or claim. People cannot rightly claim what they do not hold and control. As a corollary, travel on and harvest from the sea have been free. Commerce and adventure on the high seas have tied the world to common understandings about use and needs among disparate people. Such understandings have crystallized into mores, conventions, institutions, treaties and ultimately international law.

A common sense developed about territory. Laws of countries extended roughly to the range of cannon shots and control from shore. Such an international understanding existed while Florida was a possession of Spain, Great Britain, and the United States of America. In 1845 Florida became a state. As an adjunct of sovereignty under a public trust doctrine, the state became the owner of all of the lands then submerged below navigable waters within its territory. Florida's ownership of the submerged land and its regulatory jurisdiction over the waters, air and natural resources extend out to three nautical miles from the Atlantic coast and out to nine miles on the shallower coast of the Gulf of Mexico.

A state's inherent police power applies within its territory subject to the supremacy of federal laws. Recognizing that traditional trade and travel over the water is a common need among people, states and countries, a federal navigational servitude preempts the State of Florida from exercising its ownership of submerged land and its police power regulation to burden navigation and interfere with interstate commerce. The federal authority arises from the Commerce Clause of the United States Constitution. The servitude protects the right of private parties to access and use navigable waters.

Just as the use of deep seas and the continents merge concepts of control and international commons, use of the near shore waters and land merge concepts of private and public. Like the high sea, those things cannot be controlled, except as reduced to possession by capture and use, are not subject to ownership. Water is not owned, but it belongs to everyone and flows all over the land, falling from the sky. The institution of property, "land ownership", recognizes the private demands of certainty and stability, but balances them against the fluidity of water and the commonality of navigation.

Developed as a matter of common sense and common law, land bordering upon navigable waters



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has certain rights. Those rights, called riparian (on oceans, bays, rivers and streams) and littoral (on lakes), include the rights of view, ingress to and egress from the water and over the submerged lands (including wharfing out), and boating, bathing and fishing. The exercise of riparian and littoral rights is subject to state regulation and to some proprietary control and approval for the use of the submerged bottoms. The border between private upland and sovereign submerged land is the ordinary high water mark, which on tidal waters is based upon an average of a full 19-year cycle. A violent and sudden change to the border between land and water, such as in a hurricane, is called an avulsion, and it does not change the ownership lines. Such a change occurred on North Captiva Island as Hurricane Charley cut a new pass. Other slow natural changes of erosion, reliction and accretion change the boundaries, as is evident on the ever moving barrier island beaches.

Private ownership of submerged land is possible. All land ownership arises and must be deraigned from the sovereign. Such proof and chain of ownership may arise from a Spanish or other grant ratified by the United States Congress, from patent out of the United States prior to the date Florida became a state, or upon a valid conveyance out of the State of Florida. The law presumes that land under navigable waters is owned by the state. Navigability means subject to use for commercial transport in 1845. The conveyance of otherwise sovereign submerged lands to private ownership must have been international. The navigational servitude for the public health, safety and welfare overlay the private ownership of submerged bottoms. Here private dominion and common interest blend in a muddy mix.

Waterfront property is becoming more and more valuable. Environmental controls are becoming more restrictive. Proprietary interests in submerged bottoms are becoming more important to both the state and to private parties. With these trends and in such a culture, understanding the principles underlying the complex processes and laws affecting waterfront boundaries and rights becomes critical to rational decision making about waterfront land acquisition and use.

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