

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 1369 Line of Ordinary High Water Dividing Sovereign and Riparian  
Ownership in Certain Navigable Freshwater Bodies

**SPONSOR(S):** Seiler

**TIED BILLS:** IDEN./SIM. BILLS: SB 2104

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Environmental Regulation Committee	_____	Lotspeich	Kliner
2) Agriculture & Environment Appropriations Committee	_____	_____	_____
3) State Resources Council	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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**SUMMARY ANALYSIS**

The bill provides a definition of the term “ordinary high water line” as a means to demarcate the property line that separates the sovereignty submerged lands beneath navigable freshwater lakes and rivers (i.e., lands owned by the State of Florida) from riparian uplands (i.e., privately owned lands landward of that line).

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

The bill does not appear to implicate any of the House Principles.

#### B. EFFECT OF PROPOSED CHANGES:

##### Present Situation

The Florida Supreme Court has defined the “ordinary high water line” as the property line that separates the sovereignty submerged lands beneath navigable freshwater lakes (i.e., lands owned by the State of Florida) from riparian uplands (i.e., privately owned lands landward of that line).<sup>1</sup>

##### History of the Ordinary High Water Line

American law on ordinary high water boundary in navigable lakes and streams originated under English common law relating to the tidal boundary. Under this law, only tidally influenced waterbodies were public. Ownership of the submerged lands by the public extended only to those lakes and streams that were subject to the ebb and flow of the tide. The legal boundary between those publicly owned waters and the adjacent private uplands was the “high water line,” meaning the reach of the high tide. America's network of inland navigation routes, most of which were not subject to tidal influence, made that test inappropriate in America.<sup>2</sup>

In principle, the water boundary is intended to locate where the water ends and the land begins. With almost all fresh and salt waters in a state of continuous cyclic change, the root question is which phase in the cycle will be used to define this location. The choice of the “ordinary high water line” as the boundary is the choice of the high phase and has two policies as its foundation. First, some early cases conceptualize the issue as attempting to locate the dominion of the sea and freshwaters. That dominion is discernable when the sea or river is full. Second, adoption of the ordinary high water boundary provides for public status of the shore - the zone that is dry at low water and submerged at high water. This principle originated in Roman law, where the public had a right to use the shore. Uses included mooring, landing of goods, fishing, and recreation.<sup>3</sup>

A few early American cases refer to the high water boundary as the highest reach of water during the whole year - that is, the boundary of the sea is at its fullest point during spring tides. Later cases placed the boundary at the ordinary high water line, meaning not the highest annual reach, but the normal or ordinary reach of the high tide. By adding the qualifier “ordinary,” the extreme high tides of spring are excluded, along with the exceptionally high tides resulting from severe storms. This normal reach of the high tide leaves an imprint on soil and vegetation resulting from the persistent, recurring reach of the high tide. Although the high tide reaches a different point virtually every day, the ordinary high water mark on soil, vegetation, and local objects (i.e., dock pilings), reflects a rough average of high tides. The normal or ordinary high water mark is a soil and vegetative indicator that evidences the reach of the ordinary high tide.<sup>4</sup>

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<sup>1</sup> Trustees of the Internal Improvement Trust Fund v. Florida National Properties, 338 So.2d 13, 19 (Fla. 1976)

<sup>2</sup> “The Ordinary High Water Boundary on Freshwater Lakes and Streams: Origin, Theory, and Constitutional Restrictions,” David Guest, *Journal of Land Use and Environmental Law*, Spring 1991, p. 205.

<sup>3</sup> *Id.* at p. 207

<sup>4</sup> *Id.* at p. 208

## The Ordinary High Water Line in Florida

Florida follows the principles relating to the normal reach of high water in tidal conditions as the framework for developing the common law pertaining to the high water boundary of navigable freshwater lakes and rivers. This law was set forth in two 1927 Florida Supreme Court cases: Tilden v. Smith<sup>5</sup> and Martin v. Busch.<sup>6</sup>

In defining the boundary of freshwater lakes and rivers, the Supreme Court in Tilden adopted a lengthy quotation from a Minnesota Supreme Court opinion:<sup>7</sup>

*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 the 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 to 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 to 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 upon the soil as well as upon the vegetation. In some places, however, where the banks are low and flat, the water does not impress on the soil any well defined marks of demarcation between the bed and the banks. In such case the effect of the water upon vegetation must be the principal test of determining the location of high water mark as a line between the riparian owner and the public. It is the point at 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.*

Together, “ordinary” and “high” water describe the stage of water that is the boundary. The presence of the water over a period long enough to prevent the cultivation of ordinary agricultural crops describes the duration of the water at that stage. Stage and duration are complementary measures. The duration (length of time) that water is at or higher than a particular stage (elevation) can be used to compare stages. Except in droughts, a river's stage is at or above low water all the time; low water has a long stage duration. In contrast, extreme high water occurs only during floods that last a few days and has a very short stage duration.<sup>8</sup>

Stage and duration are complimentary concepts because duration is the essential basis of the prefixes “ordinary” or “extreme” in the description of water stages: “ordinary” denotes a recurring phenomenon of moderate duration, while “extreme” denotes an event of short duration. Stage and duration together identify the hydrologic condition that is “ordinary high water.” The indicators for locating the ordinary high water line are indicators that identify the reach of waters when they are at their ordinary high stage.<sup>9</sup>

The Court in Tilden described those indicators as they evidence the reach of ordinary high water on two distinct types of waterbodies: *steep banked* and *flat banked*. For waterbodies with high, steep banks, the ordinary high water line is found at the point where the water occupies the land sufficiently long and

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<sup>5</sup> [94 Fla. 502, 113 So. 708 \(1927\).](#)

<sup>6</sup> [93 Fla. 535, 112 So. 274 \(1927\).](#)

<sup>7</sup> “The Ordinary High Water Boundary on Freshwater Lakes and Streams: Origin, Theory, and Constitutional Restrictions,” at p. 213.

<sup>8</sup> *Id.* at p.216.

<sup>9</sup> *Id.*

continuously to wrest it from vegetation so as to destroy its value for agricultural purposes. These steep banked lakes and streams predominate in Florida. Controversies rarely erupt over the boundaries of these waters because the steepness of the banks leaves only a narrow zone for argument. Less common are lakes and streams exhibiting the low flat banked profile, although such profiles occur on sections of most major Florida streams. On low flat banked waterbodies, the water does not impress a well-defined mark on the soil, and the ability to cultivate ordinary agricultural crops is the principal test.<sup>10</sup>

In the same year as Tilden, the Florida Supreme Court decided Martin v. Busch, a quiet-title action concerning a portion of the former bed of Lake Okeechobee which had been exposed as a result of government drainage projects. In the course of the decision, the court discussed methods for locating the ordinary high water boundary on low, flat banked waterbodies with swampy vegetated margins:

*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>11</sup>

Thus, "the best evidence attainable and the best methods available" are mandated when locating ordinary high water within vegetated areas. If competent testimony shows permanent marks on the ground or on local objects to be ordinary high water marks, the water itself, when at the level of those marks, will provide the boundary.

### Water Boundary Surveys

In the mid-nineteenth century, portions of a few dozen streams and many lakes were subjected to shoreline surveys. However, these "meander" surveys were not intended to and did not locate the ordinary high water boundary. Modern surveys of Florida lakes and streams rarely indicate the reach of ordinary high water. Instead, they depict only the location of the water's edge on the day of the survey. This may be a consequence of the fact that a commonly used survey manual contains garbled instructions on water boundaries.<sup>12</sup>

The boundary of lakes and streams is the normal reach of water during the high water season. Where the water margins are very flat and shallow, small fluctuations in the water level translate to large lateral changes in the location of the water's edge. This problem, compounded by the irregular pattern of daily, seasonal, and annual fluctuations in water levels, tends to defy efforts to locate a valid, replicable line depicting the exact reach of ordinary high water.<sup>13</sup>

Since the Florida Supreme Court has mandated that "the best evidence attainable and the best methods available should be utilized," technical and scientific advances should be employed as they become available. Such advances include daily water level and flow rate records and high resolution aerial photography. Aerial mapping techniques employing false color infrared photography have become highly sophisticated in depicting and differentiating vegetative, soil, and hydrologic patterns on

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<sup>10</sup> Id.

<sup>11</sup> Martin v. Busch, 112 So.2d at 283.

<sup>12</sup> "The Ordinary High Water Boundary on Freshwater Lakes and Streams: Origin, Theory, and Constitutional Restrictions," at p. 218

<sup>13</sup> Id. at p. 220

the ground. High resolution aerial photos are now available throughout the state.<sup>14</sup>

Some species of vegetation are found only where, during normal or average years, the land is regularly or consistently submerged during the high water season. Scientific research in recent decades has revealed that vegetation patterns correspond closely to normal hydrologic regimes. These vegetative indicators can provide a reliable substitute for long-term average hydrologic data, and are consistently found in bands corresponding to the reach of water during different hydrologic regimes. The boundaries between these bands of vegetative communities are identifiable in detailed aerial photographs, and can be brought into sharp focus in false color infrared aerial photographs.<sup>15</sup> Scientific research also provided advances in the understanding of hydrology, geology, botany, and soils science, all of which are capable of assisting in interpreting aerial maps to identify the reach of hydrologic regimes.<sup>16</sup>

### Ambulatory Boundaries

The fact that the boundaries of waterbodies are ambulatory (i.e. continually shifting in response to natural processes) also complicates determinations of the ordinary high water line. These processes can be divided into two categories: those which are the result of the action of the water and those which are the result of the raising or lowering of the water level. The current of rivers and the wave action on lakes cause the shoreline to move. These gradual shoreline changes take two forms: *erosion* and *accretion*. *Erosion* is the gradual wearing away of the land by the action of the water, causing the shoreline to retreat. *Accretion* is the gradual accumulation of land by deposition of sediment, causing the shoreline to advance.<sup>17</sup>

These natural processes shift the legal boundary as long as the process taking place is slow and imperceptible. Depending upon whether the waterbody is eroding or accreting, a riparian owner may either lose or gain land. Avulsive changes such as flood events which cut off an oxbow, thereby permanently shifting the course of a river, do not shift property boundaries. The purpose of this common law rule is to prevent sudden massive water boundary changes with inherently inequitable results. On the other hand, inequitable results do not accrue when erosion and accretion progress at glacial speed; for that reason they operate to shift the water boundary gradually.<sup>18</sup>

Natural changes in water levels also shift boundaries. When water levels rise, the shoreline retreats; when water levels fall, the shoreline advances. The former process is "submergence"; the latter process is "reliction." If these changes are the result of natural causes acting slowly and imperceptibly, the boundary will gradually shift accordingly. On lakes, and particularly on landlocked lakes, the boundary aspect of submergence and reliction is sometimes complicated by a hydrologic cycle which combines an annual cycle of low and high water (dry and wet seasons) with a much longer cycle, often extending over decades, related to a regularly recurring climatic cycle of high and low rainfall. The end result is a cyclic pattern of alternating submergence and reliction. The boundary is lower during the dry decades and higher during the wet decades. This process creates a recognizable zone within which the level of the lake is constantly shifting. However, at any given time during this cycle there is always an identifiable place where the water ends and the land begins. This place constitutes the legal boundary line.<sup>19</sup>

### Artificial Manipulation of Water Levels

The law regarding water boundaries has developed over centuries. Its complexity is the result of the courts seeking to provide equitable and practical means to respond to the constant natural changes in the location of the water/land intersection. Equitable results become more difficult when artificial manipulation augments or supplants the natural processes. In Martin v. Busch, the Florida Supreme

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<sup>14</sup> Id. at p. 219

<sup>15</sup> Id. at p. 221

<sup>16</sup> Id. at 222

<sup>17</sup> Id. at 226

<sup>18</sup> Id.

<sup>19</sup> Id. at 227

Court confronted the problem of ownership of exposed lands resulting from the artificial lowering of Lake Okeechobee. The court determined that the lowering of the lake by government drainage projects did not change the public ownership of the exposed lands because the act of artificially lowering the lake could not be legally equated with the slow, imperceptible process of reliction.<sup>20</sup>

The Legislature initially dealt with the problem of lake-bottoms permanently exposed by drainage projects by simply selling the land, yet reserving a right of first refusal to the adjacent riparian owner. The Trustees of the Internal Improvement Fund were charged with deciding whether the exposed lands should be sold. Occasionally, exposed lands were withheld from sale when future water storage needs left open the possibility that the exposed lands would need to be resubmerged. The Trustees randomly sold thousands of acres of exposed lake-bottoms. In 1967, this problem was aggravated when concerns about conservation persuaded the Trustees to adopt a moratorium on such sales. These same concerns undoubtedly played a role in the adoption of [article X, section 11 of the 1968 Florida Constitution](#) which placed public interest restrictions on the sale of sovereignty submerged lands.<sup>21</sup>

Meanwhile, riparian landowners began to assert private ownership claims and construct improvements. In 1970, the Florida Legislature attempted to remedy this problem by permanently fixing the riparian boundary at the ordinary high water line as it existed at statehood in 1845 (Section 253.151, F.S.). This had the effect of preventing the legal boundary from shifting with natural changes in the actual position of the ordinary high water line due to erosion, accretion, reliction, and submergence. However, the Florida Supreme Court declared Section 253.151, F.S., unconstitutional because it could deprive the riparian owner of his most important property right: the right to a boundary contiguous with the water.<sup>22</sup>

### 2000 Proposed Legislation

In the 2000 Legislative Session, bills (HB 1807 and SB 1824) were introduced to address a controversy arising from the state's assertion of ownership against private landowners owning properties riparian to certain navigable waterbodies. The bills would have ratified private riparian landowners' title to swamp and overflow lands, internal improvement lands or other nonsovereignty lands down to the ordinary high water line. Neither bill passed the Legislature.

### Board of Trustees of the Internal Improvement Trust Fund v. David Smith

In a pending case in Brevard County ([Board of Trustees of the Internal Improvement Trust Fund v. David Smith](#), in the Circuit Court of the Eighteenth Judicial Circuit in and for Brevard County, Case No. 05-1995-CA-01896), the Board of Trustees has pursued an action against David Smith for trespass and ejectment on land bordering Lake Poinsette in Brevard County. The central issue in the case is the location of the ordinary high water line. Testimony in the case showed a wide disparity of opinions as to the location of the line.

On December 8, 2004, in order to establish the ordinary high water mark that will be used to decide the trespass and ejectment issues, the judge issued an order adopting the definition of "ordinary high water line" as set forth in by the Supreme Court in [Tilden](#). The order makes no reference to the Supreme Court's decision in [Martin v. Busch](#).

On March 16th the judge toured the Lake Poinsette property, and closing arguments from legal counsel are expected to occur within two weeks. He is expected to rule on the issues of trespass and ejectment within six weeks.

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<sup>20</sup> Id. at p. 229

<sup>21</sup> Id.

<sup>22</sup> [Trustees of the Internal Improvement Trust Fund v. Florida National Properties](#), 338 So.2d 13, 19 (Fla. 1976)

## **Effect of Proposed Change**

The bill creates a new section in Chapter 253 to provide a definition of “ordinary high water line.” The definition provided quotes directly from the Supreme Court’s decision in Tilden:

*The ordinary high-water line is a water mark that is coordinate with the limit of the bed of a freshwater body; and that only is to be considered the bed that the water occupies sufficiently long and continuously to wrest it from vegetation and destroy its value for agricultural purposes. Any necessary determination of the location of the ordinary high-water mark must be made by examining the bed and the banks of the freshwater body, 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. Ordinarily the slope of the bank and the character of the soil of the bank 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 ordinary high-water mark. Such location 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 that constitutes an ordinary agricultural crop. The ordinary high-water mark on a freshwater river is not the highest point to which the water rises in times of freshets, but is the line that the river impresses upon the soil by covering it for sufficient periods to deprive it of vegetation and to destroy its value for agriculture.*

This bill is not expected to affect the judge’s ruling on trespass and ejection in Board of Trustees of the Internal Improvement Trust Fund v. David Smith and is only intended to codify into statute his order defining “ordinary high water line”.

### **C. SECTION DIRECTORY:**

Section 1. Creates s. 253.024, F.S., to provide a definition for “ordinary high water line.”

Section 2. Amends s. 197.502, F.S., to conform to the new definition.

Section 3. Amends s. 258.39, F.S., to conform to the new definition.

Section 4. Amends s. 258.399, F.S., to conform to the new definition.

Section 5. Amends s. 380.055, F.S., to conform to the new definition.

Section 6. Amends s. 403.813, F.S., to conform to the new definition.

Section 7. Provides an effective date.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable, because this bill does not appear to: require the counties or cities to spend funds or take an action requiring the expenditure of funds; reduce the authority that cities or counties have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with cities or counties.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Department of Environmental Protection has provided the following comments on the bill:

Under controlling case law, aquatic forests and lake marshes that are usually submerged during the wet seasons of ordinary years are part of the navigable river or lake in which they are found and as such are protected as public trust lands. These vegetated shores of navigable waters form some of the most ecologically important and most ecologically sensitive lands in the state. The proposed bill includes the language from *Tilden* that adopts the "agricultural crop test" as a surrogate for the ordinary *high* water boundary. However, it fails to include language from other cases that would require proof that the boundary is at a line of ordinary *high* water and not a low water line or a flood line. By omitting language from other Florida ordinary high water cases, the proposed bill would open the state to the spurious claim that cypress trees growing in the beds of rivers and lakes are "ordinary agricultural crops" because they can be cut and regrown. That would make any land on which the cypress trees are growing subject to a claim that those lands (and the cypress tree forests) are privately owned. Second, when confronted by claims that the foraging

habits of cattle should be the determinative factor in locating the ordinary high water boundary, a recent court decision has made an explicit finding that cattle foraging on native lake or river marsh vegetation is not an “ordinary agricultural crop” and that cattle foraging habits don’t determine the boundary of sovereignty submerged lands. That language, however, is omitted from the proposed bill. As a result, owners of adjacent private uplands could plant invasive species of exotic water weeds that can thrive in as much as four to six feet of water, and then claim that because cattle could forage on these weeds during the dry season, the lands on which they grow have become privately owned lands.

#### **IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**