Laying the Foundation for Sophisticated Environmental Strategies:

A Florida Case Study

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Long has Florida's boom been driven by the lure and beauty of its coasts and wetlands and the abundant marine life that they support. If Florida busts, it will be because these values were exploited beyond their endurance by human greed. Today in Florida two potentially explosive controversies are brewing. One has to do with drilling for oil off Gulf and Atlantic beaches. The other has to do with an unprecedented population expansion that threatens to overwhelm the state's beaches and wetlands with equally unprecedented developments. All over Florida opposing forces are joining issue in many fora. Nevertheless, most of the open talk is about how to do something to change present trends and protect those aspects of the state that make it a desirable place to be. Doing so will require more restrictions on the use of privately held lands than the state has exercised before.

In the main it is now clear that either one or both of two basic routes must be followed to increase the scope of existing environmental protections. The first approach is litigation on the basis of some theory of public interest or public right vis-à-vis the development rights of private persons that happen to hold legal title to environmentally important lands at the time it becomes profitable to develop them. Presently, in Florida two suits are being pressed with the avowed purpose of claiming prescriptive rights[1] for the public in the sandy portion of Florida's beaches that lies shoreward

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1. Prescription has been defined as "the effect of lapse of time in creating or extinguishing property interests." These interests are created by "such use of land, for the period of prescription, as would be privileged if an [interest] existed, provided the use is (1) adverse, and (2) for the period of prescription, continuous and uninterrupted." 3 Powell on Real Property ¶ 413 (1966) (quoting *Restatement, Property*).

of mean high tide and the title of which is vested in private ownership. *City of Daytona Beach v. Tona Rama, Inc.*,[2] an east coast action brought by taxpayers and Florida's attorney general, has been successful in asserting prescriptive rights where the public has gained an easement by virtue of the prevailing prescriptive law. Although the court discussed far-reaching new theories of public dominion in beaches purportedly prevailing in California and Oregon,[3] it carefully noted that in Florida, at least, "[N]ot all use of beaches or shorelines gives rise to a prescriptive easement."[4] Nevertheless, the court upheld an order to remove a structure that interferes with the public use of the portion of the beach impressed with the prescriptive easement. The case now resides in the supreme court of Florida for clarification.

Pursuing the same point in a west coast suit against a United States Steel Corporation development, a citizens' group was denied standing to litigate in the public interest because the members alleged no special rights beyond those enjoyed by the public at large. Reversing earlier "archaic" decisions, a Florida district court of appeals ruled that "a bona fide non-profit organization may sue for and on behalf of some or all of its members who have been or will be directly and personally aggrieved in some manner relating to and within the scope of interests represented and advanced by such organizations."[5] The case was remanded for trial under the *Tona Rama* theory of prescriptive easement. If these successes are sustained in the supreme court, then the judicial process of itself will have been employed successfully in expanding the reach of a judicial rule of law that the public has a protectable interest in maintaining irreplaceable natural amenities that some private person happens to have title to.[6] Such an expanded realization

2. City of Daytona Beach v. Tona Rama, Inc., 271 So. 2d 765 (Fla. App. 1972), *rev'd*, 294 So. 2d 73 (1974).

3. Gion v. Santa Cruz, 2 Cal. 2d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); State *ex rel.* Thornton v. Hog, 254 Or. 584, 462 P.2d 671 (1969).

4. City of Daytona Beach v. Tona Rama, Inc., 271 So. 2d 765 (Fla. App. 1972), *rev'd*, 294 So. 2d 73 (1974).

5. Save Sand Key, Inc. v. U.S. Steel Corp., 281 So. 2d 572 (Fla. App. 1973), *rev'd*, ___ So. 2d ___ (1974).

6. Both the cases were acted upon by the Florida supreme court while this article was being prepared for publication. In its rulings the court severely blunted the progress made by the district courts of appeal. While the supreme court in City of Daytona Beach v. Tona Rama, Inc., 294 So. 2d 73 (1974), *rev'g* 271 So. 2d 765 (Fla. App. 1972), did acknowledge the power of the public to obtain prescrip-

attained in one day will serve as the foundation of the next, much as one year's growth of a tree supports the larger concentric circle laid down in succeeding growing seasons.

The second approach to increasing the scope of protective regulations is through legislation. While judicial theories can be enlarged and newly applied to novel situations, the pace of movement is slow and always reactive. Moreover, only through legislation can affirmative rather than negative burdens be placed upon the behavior that is sought to be controlled. In wetlands protection, for example, positive control could be achieved through a comprehensive permit system that would be completely unworkable as a judicially created procedure.

Great pressures are building in Florida to develop comprehensive wetlands protection legislation. This is in recognition of the vital importance of wetlands to the state[7] and of the realization that existing modes of judicial and legislative controls do not adequately protect wetlands, particularly those lying under non-navigable waters and those lying above the line of the mean high water.[8] Proponents of wetlands control legislation are working hard to encourage the legislature to act quickly. In March of 1973 the Florida Defenders of the Environment, a citizen action group, recommended that the State of Florida "prohibit incompatible de-

tive rights in privately owned portions of dry sandy beaches, the court held in that instance that the public's use had not been adverse to the owner's interest. Therefore, no easement had been perfected. Moreover, even if such an easement had been obtained, "the erection of the sky tower was consistent with the recreational use of the land by the public and could not interfere with the exercise of any easement the public may have acquired by prescription . . . ." So in a stroke, the Florida supreme court dashed the hopes of protecting the state's beaches against further intrusions and destruction by unprincipled developments.

Having in *Tona Rama* undermined the substantive interests of the public in beach property that had been recognized by the lower appellate court, the Florida supreme court "resolutely" adhered to the special injury criterion in determining standing in United States Steel v. Save Sand Key, Inc., ___ So. 2d ___ (1974), *rev'g* 281 So. 2d 572 (Fla. App. 1973). Thus, in Florida the newly-won right of citizen groups to represent the public's interest in environmental and consumer litigation was quashed in its infancy. Apparently, the old public nuisance requirement of showing a special injury different from that suffered by the public at large will be the test each public interest litigant must satisfy.

7. *See, e.g.*, J. Gosselink, et al., The Value of the Tidal Marsh, Report of the Urban and Regional Development Center, University of Florida, May 1973.

8. These include dunes, which are a vital element in a beach system. *See* R. Dolan, et al., *Man's Impact on The Barrier Islands of North Carolina*, 61 AMERICAN SCIENTIST 152 (1973).

velopment in certain environmentally sensitive areas,"[9] including especially wetlands. Then in September of 1973 the Florida Wildlife Federation called together leaders from across the state to study wetlands protective legislation. That conference concluded that "it should be the declared policy of this State to protect our wetlands, to prevent their despoliation and destruction, to encourage their restoration and to manage their economic uses in a manner consistent with preserving the integrity of wetlands."[10] Following on the heels of these recommendations, the Governor of Florida convened a growth conference in October, which also called for comprehensive wetlands protection legislation.[11] It is extremely important that each of the bodies issuing these statements saw wetlands as a resource of the state, and not just as pieces of land that somehow relate to government.

These policy pronouncements are not without opponents. Developers, the land sales industry, and some land owners are much threatened by them and will set up a hue and cry of confiscation in the legislature. Plainly, a great many scientists[12] believe the public interest requires the total preservation of most remaining wetlands, salt and fresh, whether they are in private or public hands and whether or not some historic sovereign servitude attaches. They believe these lands are necessary to provide areas of ground water recharge, natural filtration and purification systems, flood control buffers, and nursery areas for most of the creatures in the seas.

The central issue in the coming struggle over wetlands protection is whether the public interest supports the exercise of the state's police powers in regulating uses of wetlands to the extent in some instances of prohibiting uses other than those that do not disturb the natural systems. Assuming the legislature believes that it has the power and so exercises it, the issue will then shift to the

9. Consequences of Growth in Florida, Florida Defender of the Environment Conference Report, March 31, 1973.

10. A Statement on Wetlands Protection, Florida Wildlife Federation Wetlands Legislative Conference, September 6-8, 1973.

11. Policy Statement, Florida 2000: Governor's Conference on Growth and the Environment, Kissimee, Florida, October 13, 1973.

12. Every statement was supported by panels of recognized natural and physical scientists from across the state. *See generally* J. Gosselink, et al., The Value of the Tidal Marsh, *supra* note 7.

courts. Although the number of states[13] enacting comprehensive wetlands legislation is fast expanding and some recent cases[14] have upheld application of these laws, the historic trend of Florida courts has been to find an invalid taking when lands were zoned to preclude every economic use.[15] While those cases can be distinguished in respect to the nature and purpose of the regulations involved,[16] it is not the job of this article to make those arguments. Nevertheless, in passing over this vital point, it is worth noting that a recent comprehensive study of the "taking" cases concluded, in part, that:

> There is little historic basis for the idea that a regulation of the use of lands can constitute a taking of the land . . . [and] the most recent court decisions, those of the '70's, strongly support land use regulations based on overall state or regional goals . . . .[17]

13. Among important wetlands statutes are the following: CAL. GOV'T CODE, §§ 66600-66661 (West Supp. 1972); CONN. GEN. STAT. ANN., §§ 22a-28 to 22a-45 (Supp. 1973); GA. CODE ANN., §§ 45-136 to 45-147 (Supp. 1972); ME. REV. STAT. ANN., tit. 12, §§ 4701-4709 (Supp. 1972); MD. ANN. CODE, art. 66C, §§ 718-731 (Supp. 1972); MASS. LAWS ANN., ch. 130 §§ 27A, 40A, 105 (Supp. 1972); N.H. REV. STAT. ANN., §§ 483-A:1 to 483-A:45 (Supp. 1972); N.C. GEN. STAT., §§ 113-229 to 113-230 (Supp. 1971); R.I. GEN. LAWS, §§ 11:46.1-1, 2-1-13 to 2-1-24 (Supp. 1972); VA. CODE, §§ 62.1-13.1 to 62.1-13.20 (Supp. 1972); WASH. REV. CODE ANN., §§ 90.58 to 90.930 (Supp. 1972).

14. *See, e.g.,* Just v. Marinette County, 56 Wis. 7, 201 N.W.2d 761 (1972); Potomac Sand & Gravel Co. v. Governor, 266 Md. 358, 293 A.2d 241, *cert. denied,* 409 U.S. 1040 (1972).

15. *See, e.g.,* Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So. 2d 597 (Fla. 1965). *See also* C. Harris, Environmental Regulations, 25 FLA. L. REV. 635, 649 (1973).

16. A Florida appellate court recently rejected the argument that the state's water pollution control law gives the authority to prevent the filling of wetlands. Hillsborough County Environmental Protection Commission v. Freindorson Properties, 283 So. 2d 65 (Fla. App. 1973). Importantly, however, the court did not disagree with the concern for the environment represented by the position of the pollution control commission and added:

> [N]or do we doubt either petitioners' contention that, as a matter of fact, the destruction of the red mangroves has a severe adverse ecological effect upon the tidal waters involved here . . . or the fact that the legislature possesses the *power,* in order to promote the quality of our environment, to forbid the destruction of the mangrove area even by a landowner upon his own property [emphasis in the original].

Id. at 67-68. The court cited Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910 (1971), and Just v. Marinette County, 56 Wis. 7, 201 N.W.2d 761 (1972).

17. F.P. BOSSELMAN, THE TAKING ISSUE, U.S. Gov't Printing Office, 1973, at 328.

The foregoing introduction indicates that public interest proponents have attained a high degree of sophistication in their efforts to expand the scope of awareness and, ultimately, public control over matters that were once thought the sacrosanct prerogatives of private interests and of the government itself. While litigation and legislation are not the only strategies they employ, they are the most newsworthy and frequently culminate a series of preparatory steps. For example, conferences are clearly footstones to the legislature. But it was not always so straightforward for protectors of the public interest to plot out a course and follow it through. Indeed, in earlier days they were often ignored and sometimes derided. While those days are not wholly gone and environmentalists still sometimes find themselves cast as villains and scapegoats,[18] the public nowadays is sensitive to public interest organizations and by and large has been well served by them.

As a consequence of greater environmental awareness and acceptance of public interest groups, legal strategies for achieving environmental goals have crystallized into discernible patterns over the past few years and will continue to do so until generally acceptable and effective goals are attained. Hence, one's legal strategies must be strongly time and circumstance oriented. The bulk of this article is a description of how the law was molded in a specific way through litigation in the pre-sophistication, pre-strategy days of environmental law suits. It is upon the firm base that has been formed by this and many other environmental campaigns that post-sophistication sallies now operate. In assessing this story and others like it, one is struck by certain essential pervasive characteristics that are symbolic of the people that involve themselves in it. They are dogged determination, tenacity, durability, intelligence, and courage.

Before turning attention to the details that follow, one may well be warned that law is but one means of achieving any particular goal, and quite often it is a limited one. The law, being merely society's compelling tool for regulating human behavior, can in the main do no more than truncate undesirable modes of behavior at whatever extreme the majority lays down as the tolerable limit.

18. For example, the Florida chapter of the Audubon Society was recently sued by trade unions and civil rights groups for challenging the validity of an environmental impact statement in a dredge and fill case. The complaint alleged loss of jobs.

Although creative legislation and litigation can do much to define goals and limits of acceptable behavior, experience has shown over and over again that successful legal regulations reinforce public mores and do not create them. In the context of environmental control, this means that those people looking to the law as the savior of the environment must use it creatively, never edging too far ahead of the public's contemplation of the need for regulating a particular environmentally abusive behavior and ever pulling the limits of tolerable behavior toward a more protective curtilage by whatever means are at hand. Therefore, in mapping out a strategy for achieving any given environmental goal one needs to test carefully the prevailing public sentiment and the current posture of the law vis-à-vis the unwanted behavior. One may then find his task to be easy in that existing legal controls can adequately bring the offensive behavior into line; or, more frequently at present, one may find that either public sentiment or existing laws or both thwart the immediate achievement of one's goals.

A FLORIDA CASE HISTORY

In selecting a Florida case history for demonstrating the presophistication development of environmental legal strategies, three important situations compete for treatment. One is the Dade County jetport battle that saw the Everglades hanging in the balance.[19] A second is the still unsettled Cross-Florida Barge Canal controversy that pits the remains of the pristine Oklawaha River ecosystem against vested interests in Florida and the minions of the U.S. Army Corps of Engineers.[20] Third is the dredging and filling of estuarine areas, a practice that threatens to destroy not only a vital link in the chain of life for most of Florida's fish and marine creatures but also an irreplaceable element of the natural charm and

19. *See* M. Kessler and L. Teply, *Jetport: Planning and Politics in the Big Cypress Swamps*, 25 MIAMI L. REV. 713 (1971).

20. The still-unfinished saga of the Cross-Florida Barge Canal may be the most fascinating of all environmental controversies. It includes the strange spectacle of the Corps of Engineers first being sued by environmental groups to halt the canal, and then once that was done by executive order, being sued by vested interests to start it up again. While this case has had tremendous influence upon the environmental attitude of the Corps of Engineers and many important policy decisions, it cannot claim the tremendous influence upon organic law exerted by the case detailed herein.

lure of the state. Dredging and filling has been selected for several reasons.

First, despite the fact that the battle for gaining control over indiscriminate dredging and filling has been going on longer than the other two controversies (at least if one lays aside the "ancient" pre-1962 history of the canal), it is probably the one the public is least aware of. It deserves to be better known both for its significant advancement for environmental protection and also to acknowledge a debt of gratitude to the people that achieved an important environmental goal. Furthermore, in terms of creating definite, substantial changes in the law, both legislative and judicial, it has been by far the most productive of the three situations to date. To every important extent, this situation is the first one of major consequence in which the public interest, being protected by an aroused group of ordinary citizens, prevailed over the vested economic interests of rich Florida developers. After decades of submergence, the public interest has surfaced in what portends to be a massive assertion of dominance over private exploitation.

Today in Florida powerful legal controls exist for regulating dredge and fill operations on the basis of environmental factors alone, whereas only a few years ago no controls existed. Moreover, as indicated in the introduction, new developments in this field are fast unfolding. The remainder of this article will first lay down the background of the dredge and fill controversy; it will then trace through the process that led to change; and, finally, it will attempt to assess the importance of what has occurred. Whether a strategy really existed, and what it was, are questions which the reader must answer for himself.

In setting the stage for the discussion one should imagine himself as a 1950 resident of St. Petersburg. Having been attracted to the area by the balmy climate and by the beauty, felicity and productiveness of the nearby Gulf of Mexico and salt water bays, he has become alarmed at the indiscriminate dredging and filling of Boca Ciega Bay, lying between mainland St. Petersburg and the islands comprising the St. Petersburg beaches. In terms of the title of this article, the first question he would be asking, would be: "How does the law protect against exploitative development projects?" The answer, which will be explained shortly, would have been that it does not. His next question would be, "What can be

done to change the law?" That answer is contained within the events described in the bulk of this article.

DREDGING AND FILLING

Dredging and filling is the process of making dry land out of submerged and tidal wetlands by scooping earth from one portion of the water's bottom and piling it on another. Usually, but not always, people dredge and fill to make money. Waterfront sites for homes, commercial ventures and now condominiums bring in a return to developers many times greater than the total cost of the finished land fill. The venture is extremely lucrative for the few individuals fortunate enough to control the tidal land bottoms being filled.

On the other hand, dredging and filling is an extremely costly process to a great many people who cannot claim any direct personal ownership of the lands involved. Dredge and fill projects occur on the margin of the sea. Those who fill and build on seafront sites claim for themselves the sole right to view the sea from one part of the world and oftentimes they obliterate adjoining beaches, robbing the rest of the population of its right to be present there and enjoy nature's bounty. Thus, indiscriminate dredging and filling levies a very heavy price against the public's aesthetic and recreational treasury.

But more than temporal pleasures are involved. Most destructive dredge and fill operations occur in estuarine areas, which include "tidal rivers, marshes, bays and river mouths, the inshore edge of the ocean, and the land areas which interact with [them]."[21] It is this rich area at the "edge of the sea and its estuarine waters . . . upon which most marine life depends. Here is where to find mussels and clams, shrimps, lobsters and crabs, sea ducks and shore birds, plus almost all of the fish we catch from the sea."[22]

These natural facts translate into several conclusions of vital concern to the public interest of Florida. One is that the joy of fishing which is claimed by countless Floridians is jeopardized by continued destruction of life spawning estuaries. The second is

21. Developing and Managing Estuaries, Statement adopted by the Atlantic States Marine Fisheries Commission, October 7, 1966, Portland, Maine.

22. Estuaries—America's Most Vulnerable Frontiers, Report of the National Wildlife Federation, 1959, at 4.

that the lure and charm of the state as a retreat for visitors who are attracted by plentiful fish will be sharply diminished if the good fishing fails. Finally, Florida's commercial fishermen will find themselves deprived of their chosen livelihood if dredging and filling continue unabated.

Attempts have been made to cast dredge and fill losses in monetary terms. Taking Boca Ciega Bay as their example, two scientists concluded that the destruction of marine life caused by fills embracing 20% of the bay (3,500 acres) resulted each year in a loss of $1.40 million.[23] This estimate was predicated upon an annual loss of $300 per filled acre for eliminated fishery production and an annual loss of $100 per filled acre for ruined recreational value. Capitalized at 5%, the estimated annual losses stemming from the filled bottomlands of Boca Ciega Bay represent a public investment of $28 million. Although I do not know what income was received by the state in exchange for the filled acreage, I am confident that it was much less than that sum. Other estimates of the potential economic damage caused by dredge and fill have been made. Taking a different analytical approach, in 1965 an economist "conservatively" estimated the annual value of "good fishing" to Florida to be not less than $1.75 billion.[24] Thus, Florida's economic future is clearly tied to the preservation of estuarine and other fish breeding areas.

Exactly how much of Florida's estuarine areas could be filled before heavy economic losses would be measured is hard to say. To a large extent, however, cold economics is beside the point to the people trying to protect the environment. To their way of thinking each spoiled acre subtracts one from the diminishing limited supply that remains. They know that man can destroy in mere days what nature toiled for thousands of years to create. In essence, estuaries are non-regenerative resources. When we have destroyed them, they and the life they support will be no more. Therefore, man must be regulated, if not stopped in his pillage of this important part of nature, whatever the economic consequences to the privileged few may be.

Before moving on to achieving control over that form of abusive

23. J. Taylor and C. Sploman, 67 FISHERIES BULLETIN 213, 237 (1968).

24. J. McQuigg, The Economic Value of Preserving the Natural Shoreline, Address to the Bulkhead Seminar, Stuart, Florida, May 21, 1965.

behavior, the discussion should bring out another economic factor. Bottomlands frequently contain rich lodes of oil and other minerals (such as limestone in the bottom of Lake Okeechobee). The question—Who controls their exploitation?—is extremely important both in determining who takes the profits and also in deciding what consideration is to be given to environmental protection while they are being extracted. In the course of the situation to be explored here these factors receive little attention. As shall be seen, however, they are strongly affected by the outcome.

BACKGROUND TO THE STRUGGLE

Dating back to origins in the common law of England, lands lying under navigable waters along with those lying in the margin between the line of mean low tide and that of mean high tide were known as sovereignty lands, meaning that their ownership resided in the sovereign or state. Although sovereignty lands could in some circumstances be put to private uses, they were impressed with an inalienable servitude in favor of public uses such as navigation, fishing and bathing. In protection of the inalienable public servitude, a "public trust" doctrine was devised by American courts, stemming mainly from a U.S. Supreme Court opinion holding[25] that Illinois' conveyance of the submerged lands fronting the City of Chicago to a private developer was invalid because it violated an inalienable trust. Unfortunately, Florida developed an emasculated public trust doctrine that not only let sovereignty lands fall into private hands but also relinquished the state's right to control uses made of them, including dredging and filling.

As a result of this peculiar legal posture and its confluence with Florida's post-World War II development boom, dredging and filling began in earnest in the late 1940's. Boca Ciega Bay, lying between the mainland of St. Petersburg and the St. Petersburg beaches, was a favorite target. As one fill after another struck beauty and life from the bay, conservationists of all likes became alarmed. Before their eyes the natural bounty that they had assumed to be unassailable by man was being gobbled up. How, they asked, can this devastation be brought under control?

Taking 1950 as a watershed date, one can say confidently that

25. Illinois v. Illinois Central Ry. Co., 146 U.S. 387 (1892).

it could not be. As early as 1856, the Florida legislature conveyed certain sovereignty lands to riparian owners in order to encourage the building of docks and wharves for commerce.[26] In 1917 the Florida legislature conveyed most of the sovereignty lands of the state to the Trustees of the Internal Improvement Fund (TIIF) (now composed of the governor and other elected members of the Florida cabinet) to be held and disposed of "as they see fit."[27] Then in 1921 the legislature purported to convey further large chunks of sovereignty lands to riparian owners, allowing for dredging and filling as did the earlier grants, so long as commerce was not obstructed.[28]

As a result of these grants and of TIIF's power to sell sovereignty lands, much of the bottom of Boca Ciega Bay, as well as huge tracts of sovereignty lands throughout the state, fell into the hands of large speculators.[29]

Inevitably as use was made of the bottomlands, the question was raised as to whether the state could legally convey away public trust lands. In a 1924 opinion,[30] since reconfirmed,[31] the Florida supreme court held that the public trust could be abrogated by statute. In short, the sovereign creates the trust; the sovereign can eliminate it. The Florida supreme court's abrogation of the public trust doctrine was pushed to the extreme in 1946, when the supreme court said:

> [I]f the grant of sovereignty land to private parties is of such nature and extent as not to substantially impair the interest of the public in the remaining lands and waters, it will not violate the inalienable trust doctrine.[32]

26. Riparian Act of 1921, FLA. LAWS 1856, ch. 791.
27. FLA. LAWS 1917, ch. 7304.
28. Riparian Act of 1921, FLA. LAWS 1921, ch. 8537.
29. St. Petersburg Independent, November 29, 1966, at 1A, col. 3.
30. State *ex rel.* Buford v. City of Tampa, 88 Fla. 196, 102 So. 336 (1924). A dissenting judge disagreed, saying:

> Tide lands and lands covered by all navigable waters in a State are called sovereignty land as distinguished from ordinary public lands, the latter being subject to sale and private ownership in fee simple absolute, while the former have the limitations of tenure and uses for public purposes.

Id. at 214.
31. Pembroke & Pembroke v. The Peninsular Terminal Co., 108 Fla. 46, 146 So. 249 (1933).
32. Holland v. Ft. Pierce Financing and Const. Co., 157 Fla. 649, 657-58, 27 So. 2d 76, 81 (1946).

Presumably under that rationale the whole east coast of the state could have been sold, dredged and filled because the public interest in remaining areas, meaning the state's west coast, could not have been impaired.

With the coming of the financial crisis of the late 1920's and the 1930's came also fractionation of the ownership of the land. By 1950 many private owners were readying to "improve" their lands by dredging and filling. The law was on their side: the inalienable public trust had been supplanted by the inalienable private right to dredge and fill.

In terms of environmental integrity (not to mention governmental integrity) this state of the law was intolerable. What follows is an account of the quest for change that has in large measure returned public interest to its rightful place in making decisions involving the use of sovereignty lands.

Sometime around the middle 1950's two men named Zabel and Russell purchased about 15 acres of bottom of Boca Ciega Bay with the intention of extending their 15 acre upland trailer court out onto a landfill in the bay. The price they paid is disputed. Opponents of the fill say about $100, whereas the landowners' lawyers say maybe $6,000. Either price would be a bargain. The land was originally sold by TIIF in 1925 under the authority of the 1917 law. Accordingly, the title carried with it the right to dredge and fill to the channel.

After having lost a skein of dredge and fill battles conservationists were finally able to arouse sufficient public support in 1955 to cause the Florida legislature to create an authority to regulate dredging and filling of submerged lands within Pinellas County.[33] The Pinellas County Water and Navigation Control Authority (PCA) was to consider eight factors in issuing permits. Among the eight were the effects on natural beauty and recreation and conservation of wildlife, marine life and other natural resources. This was a first step in attempting to bring dredge and fill projects under control.

The next significant step was taken in 1957. In that year the Florida legislature enacted the Bulkhead Act,[34] which authorized the setting of a line, seaward of which filling would not be permitted.

33. FLA. LAWS 1955, ch. 31182.
34. FLA. LAWS 1957, § 57-362.

The purpose was to restrict the former practice of filling to the channel by setting bulkhead lines shoreward of the channel. The Bulkhead Act also removed TIIF's authority to dispose of sovereignty lands as it saw fit, and replaced it with new authority to sell only in situations that would not be contrary to the public interest. Thus, the noose of regulation on exploitation was beginning to form.

As required by the 1955 legislation, Zabel and Russell applied to PCA to set a bulkhead line across their submerged lands and for a permit to dredge and fill about 15 acres. The application was subsequently amended to reduce the proposed fill to 11.5 acres. As shall be seen, almost 13 years were to elapse while that and related applications were being processed. Out of the multitude of legal skirmishes came a clarification of state law regarding dredge and fill operations, and much protective legislation was influenced. Most importantly came a ruling under federal law that a federal agency, the U.S. Army Corps of Engineers, must consider conservation factors in issuing permits to dredge and fill private lands under navigable waters and may refuse to issue a permit solely on the basis of environmental considerations.

That element of control was not available when Zabel and Russell filed their application in 1950. Its importance must not be discounted, however, because only a meager 11.5 acres were involved in its determination. The ruling has potential nationwide applicability, extending to not less than 27,000 square miles of submerged and tidal coastal lands[35] and to uncounted thousands of square miles of bottoms under fresh navigable waters.

When the case began, two small landowners were claiming the right to dredge and fill. Before it was terminated by the U.S. Supreme Court's refusal to review a decision contrary to their position, the small-timers had been reinforced by large land developing and mining interests from across the country. They all fell together.

The Epic Struggle

Local and State Proceedings

Zabel and Russell filed their application with PCA sometime before fall 1958, asking for two things: that a bulkhead line be set

35. 2 United States Code Congressional and Administrative News 1390 (1953).

across their submerged lands and that a permit be issued to dredge and fill a designated area. The first of several anecdotal events occurred at this time. The council of the Town of South Pasadena, the municipality in which the property lay, voted by a 4-to-1 margin to support the application. This was the council's prerogative under the PCA enabling act, which gave municipalities "the right to be heard." The interesting point is that the membership of the council at that time included a certain Mr. Zabel.

The municipality's recommendation was not binding on PCA, however. Following specified procedures, the latter body appointed a hearing examiner to investigate the proposed project and make a recommendation as to the disposition of the application. During the ensuing months three public hearings were held. Applicants were represented in these hearings by a local lawyer well versed in dredge and fill matters. His tactic was to show that neither the environment nor the navigability of the surrounded area would be harmed by the project and evidence was adduced in support of both contentions. The argument that no damage to the environment would ensue is of particular relevance to what was to follow in later years. In support of it at the PCA hearings, applicants presented expert biological testimony alleging that the area had been made sterile by previous dredge and fill projects; that the area was a biological desert; and that it could not be harmed further by additional filling. This position was taken in 1958 and 1959.

More than two hundred objections to the project were registered with PCA and 15 witnesses testified against it at the hearings. Most of them were local residents who spoke mainly in terms of comparisons, reciting how a formerly beautiful, clean, productive, enticing bay had been spoiled by earlier fills. Leading the opposition at this time were two individuals. One was a local lawyer whose property interests in a nearby tract of land were threatened by the project. His interest was economic; the Zabel-Russell fill would be harmful to any fills he might later plan for his property and could diminish its value as well. The other principal objector, and central protagonist throughout, was a local female resident who represented Boca Ciega Bay. The remainder of this narrative will not have much to say about either of these characters. Nevertheless, judging from the recollections of a number of people closely involved throughout the struggle—some praising her, some condemning her—the work and persistence of that dedicated conser-

vationist was of great importance in reaching the final goal.

On July 23, 1959, the PCA hearing examiner issued his findings with a recommendation that the applications be denied, saying in part, "Applicants have failed to establish that the proposed plan of development will have no adverse effect on the use of the waters of Pinellas County for transportation, recreational or other public purposes, flow of water or tidal currents and erosion and shoaling of channels in the area necessarily affected by the proposed development . . . ." On November 12, 1959, PCA "confirmed" the hearing examiner's report without extended debate and denied the application.

In a practical sense, this was a break from the past. A permit was denied in protection of the public interest. Had the proceedings stopped here, however, later and better supported permits would have continued to come in putting great pressure on the local approval agency. Absent unusual persistence, wisdom and fortitude it would have approved at least some of them that would have damaged the bay. With a somewhat ironic consequence, the applicants' dogged determination assured that the matter would not drop so easily. With their hackles up they pressed through every avenue of legal recourse available to them in pursuing a permit to dredge and fill 11.5 acres of Boca Ciega Bay.

Their next step was to appeal the permit denial to the circuit court for the sixth judicial circuit of Florida. The appeal alleged first that the permit had been erroneously denied on the merits and, second, that in any event, the denial was an unconstitutional action. The constitutional argument went as follows. The land in question had been a part of a large bloc sold by TIIF in 1925 under the authority of the 1917 law which the Florida Supreme Court had ruled carried with it an absolute right to dredge and fill. To deny that right, under the authority of the Bulkhead Act of 1957, or otherwise, would have the effect of denying the property owner the only possible use of his lands. Therefore, a denial would constitute an unconstitutional taking of private property without compensation. Such a taking is forbidden by the Florida constitution.

On November 7, 1961, the circuit court held[36] against Zabel and

36. Opinion and Decree Upon Appeal from the Decree of Pinellas County Water and Navigation Control Authority, Application No. 80, Law No. 14,419 (Cir. Ct., 6th Jud. Cir., Pinellas Cty., Nov. 7, 1961).

Russell on the merits, finding that the hearing examiner's conclusions were supported by the record of the hearings. As for the constitutional argument, the court said applicants were "estopped" to raise them because of having previously relied upon the validity of the statute in saying that the denial was erroneous on the merits.

Appealing to the Florida first district court of appeal, the applicants continued to voice both their contentions: that the denial was erroneous on the merits and that it was an unconstitutional act. In May, 1963 the district court of appeal issued its opinion,[37] again denying the permit. The circuit court's holding on the merits was affirmed, but the constitutional argument was handled differently. In the interim between the rendering of the circuit court's opinion and the issuance of the district court's opinion, the Florida Supreme Court had issued an opinion[38] that the Bulkhead Act of 1957 was constitutional in its application to a case then before that court. In the *Gies* case, as it is called, other landowners had argued that the Bulkhead Act of 1957 could not be applied to restrict their right to fill channel lands that had been purchased long before the Bulkhead Act was enacted. On the particular facts of the *Gies* case, the supreme court held the act to be constitutional. Therefore, relying upon *Gies* as authority, the district court of appeal ruled that the denial of the Zabel-Russell application was not unconstitutional.

At this point two changes occurred. One was that the lawyer who originally led the objectors dropped out of the case. He sold his interest in the nearby lands and professed no continuing interest in the environmental question. The second was that the obtaining of the Zabel-Russell fill permit became somewhat a pure contest of wills with no lingering economic goals. According to the Zabel-Russell lawyer, his clients at this time had determined that the proposal was no longer economically feasible because of advancing costs.

Pressing their constitutional arguments upon the Florida Supreme Court, Zabel and Russell finally hit upon a successful formula. In a split decision[39] with three justices dissenting, the High Court

37. Zabel v. Pinellas County Water & Nav. Control Auth., 154 So. 2d 181 (Fla. Dist. Ct. App., 2d Dist., 1963).

38. Gies v. Fisher, 146 So. 2d 361 (Fla. 1962).

39. Zabel v. Pinellas County Water & Nav. Control Auth., 171 So. 2d 376 (Fla. 1965).

agreed that to deny the permit would be an unconstitutional taking of private property without compensation under the facts of the Zabel-Russell application. Distinguishing the factual situation of the *Gies* case, the court pointed out that the PCA hearing examiner's finding was that the applicants had not shown that the public interest would *not* be damaged by the project. Since the original sale of the bottomlands in question was made under the 1917 legislation, it carried with it the absolute right to dredge and fill in the absence of either a valid exercise of the police power of the state or a retention of some sovereignty servitude in the lands. In order for either limitation to apply, according to the court, the *state* must bear the burden of proving that a "material adverse effect" to the public interest would otherwise occur. Therefore, every decision on the application up to that point had been erroneous because all had depended upon an original finding that had placed the burden of persuasion upon the applicants. Hence, on January 20, 1965, it appeared that the landowners would prevail. His lawyer says that he, the lawyer, was surprised with the result. He had expected to lose in Florida on the basis of the *Gies* case, but to win in federal court.

The Florida supreme court quashed the lower appellate court's opinion and remanded the case for "disposition consistent herewith." An earlier line penned into the opinion created some confusion as to just what such a disposition might be and added a melodramatic twist to this already fascinating tale. In that regard, it should be recalled that almost seven years had elapsed since Zabel and Russell first proposed the project. In the meantime an original opponent had dropped out of sight and the landowners themselves purportedly had abandoned their project, if not their quest for vindication. Laying the basis for more dispute, the supreme court said, "The examiner did not find, nor could he have on the record, that any material adverse effect on the public interest had been demonstrated."

Upon receiving the case on remand from above, the district court of appeal vacated[40] its earlier opinion and ordered the circuit court to comply with the supreme court's ruling. On April 9, 1965, the circuit court in turn ordered PCA to issue the sought permits. At that point, opponents objected strenuously and argued that the

40. Unreported opinion (Fla. Dist. Ct. App., 1st Dist., May 5, 1963).

supreme court's opinion had been misread; that it left open the holding of further hearings in which the public could prove material adverse effect. Challenged on that ground, the circuit court's ruling bounced up to the district court of appeal for review. Foreclosing any prospect of further proceedings on the merits, the appellate court upheld[41] the circuit court's order, saying that it "complies with our mandate and is consistent with the opinion of the supreme court." According to the district court, the supreme court's allusion to the hearing examiner's findings when it said "nor could he have [found any material adverse effect]" ruled out further hearings.

On an uncertain date following that final appeal to the Florida District Court of Appeal, PCA issued a permit "subject to approval of the project by the Trustees of the Internal Improvement Fund." This condition was gratuitously added by PCA as it continued to look for a way to halt the project. While TIIF arguably had a right to review the action, PCA had not been created as a mere fact-finding and advisory body, and in ruling as it did it voluntarily attempted to limit its own authority.

By this time, however, PCA was as thoroughly committed to its position as were the applicants. Taking every opportunity to oppose the permit, it is said that PCA sent off a delegation to urge TIIF to disapprove the conditional permit. This maneuver raised judicial tempers. Hauling the PCA members before the bench, the circuit court judge threatened them with contempt of court in refusing to issue an unqualified permit as they had been ordered to do.[42] Not without argument, the commissioners wilted under the ire of the court and issued therewith a clear permit on May 4, 1966. Eight years after the process began Zabel and Russell had obtained state clearance for their project.

Aside from the massive public interest that had been created, dredge and fill opponents found themselves little better off in 1966 than they had been in 1957. Although the Bulkhead Act of 1957 provided some protection for lands sold after the date of its passage, the supreme court's *Zabel* holding severely diminished public control over lands which seemed to have been established by *Gies*.

41. Pinellas County Water & Nav. Control Auth. v. Zabel, 179 So. 2d 370 (Fla. Dist. Ct. App., 2d Dist., 1965).

42. St. Petersburg Times, May 5, 1966, at 1B, col. 1.

Florida law under *Zabel* continues to be that the public must show "material adverse effect" on its interests in order to apply the Bulkhead Act's restrictions to deny fills in lands sold under the early laws. One later qualification can be noted. In 1970 the powers of TIIF were enlarged to allow for acquisition of submerged lands through condemnation "in the public interest and for a public purpose."[43] Although the way in which this power will be exercised remains to be seen, arguably it provides a means for returning lands such as the Zabel-Russell tract to the public domain.

Federal Proceedings

Exercising its constitutional power[44] to regulate commerce, Congress in 1899 enacted the Rivers and Harbors Act,[45] which forbids erecting obstructions to the navigable capacity of "any waters of the United States," except as affirmatively authorized by Congress under permit issued by the Department of the Army. For years this statute operated mainly as a navigational servitude, and impact upon navigation was the sole criterion to be satisfied in permit issuance.[46] By the late 1950's, however, public reaction to environmentally abusive projects that were otherwise no hindrance to navigation (and, indeed, often enhanced it) created pressures in Congress for widening the scope of consideration given under the "regulation of commerce" rubric. Rather than invest a separate agency with an environmental permit power, Congress enacted the Fish and Wildlife Coordination Act of 1958[47] that imposed an additional duty upon the Army. The Coordination Act requires that an approving agency consult with the Department of the Interior and the head of the pertinent state agency:

> [W]ith a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water resource development [prior to modifying] the waters of any stream or other body of water.[48]

43. FLA. STAT. ANN., § 253.02 (Supp. 1972).
44. U.S. CONST. art. I, § 8.
45. Rivers & Harbors Act of March 3, 1899, 33 U.S.C. § 403 (1970).
46. This is true with very few exceptions. The two cases most alluded to in the Zabel proceedings were United States *ex rel.* Greathouse v. Dern, 289 U.S. 352 (1933), and Miami Beach Jockey Club v. Dern, 86 F.2d 135 (D.C. Cir. 1936).
47. 16 U.S.C. § 661 (1970).
48. 16 U.S.C. § 662(a) (1970).

A stated purpose of the act was to give consideration to "wildlife conservation" *equal* to that given other factors, such as expanding the national economy. This bit of resource philosophy determined to be of profound importance in ensuing decisions; although at the time Congress adopted it apparently little discussion was had of what the future consequences might prove to be. To the end of giving proper attention to wildlife conservation, agencies were enjoined to give "full consideration" to the reports and recommendations made by the various conservation-oriented agencies.

Although a Memorandum of Understanding had been executed by the Secretaries of the Army and Department of the Interior concerning the implementation of the statute, the full scope of its mandates had not been manifested when the Zabel-Russell application came to the Army Corps of Engineers. It is safe to say that navigational servitude was still the principal factor in most permit decisions.[49] As shall be seen, however, the status of that factor changed in the processing of an application to fill a tiny bit of the remaining unfilled bottom of Boca Ciega Bay.

The Zabel-Russell application to the Army Corps of Engineers was accompanied by a flood of protest mail. More than seven hundred objectors registered their complaints from across the country. While this deluge stemmed at least in part from the organized activities of "big conservation," which had now been geared up to join the fray, the brunt of the opposition was still borne by the friends of Boca Ciega Bay. It must also have been about this time that big vested economic interests, alarmed by the potential implications of the case, began coming in on the side of the landowners.

Owing to the storm of controversy, Colonel Tabb, then the Corps' district engineer, called for a public hearing in St. Petersburg, near to the proposed project. This near-situs hearing, as opposed to a district headquarters hearing, is itself said to be extraordinary, owing, no doubt, to the intense public interest.

Before reading further, the reader should be aware of how the

49. The following statement appears in a Corps document entitled Permits for Work in Navigable Waters, U.S. Department of the Army, Corps of Engineers, 1962:

> General policies on issuing permits. The decision as to whether a permit will be issued must rest primarily upon the effect of the proposed work on navigation.

Application of the Fish and Wildlife Coordination Act is described, *infra*, at text accompanying note 54.

Corps of Engineers processed permit applications at the time. The Secretary of the Army is charged by the Rivers and Harbors Act with authorizing projects upon the recommendation of the Chief of Engineers.[50] For efficiency in administration the Secretary has delegated approval of projects

> which are entirely routine and which involve no difference of opinion on the part of engineer authorities, nor doubt as to the law, facts or regulations, nor any opposition or other considerations which should be decided by higher authority

to the Chief of Engineers, who in turn has redelegated approval authority to Division and District Engineers.[51] The Zabel-Russell application was destined for the top, largely because of the furor of public controversy. Two other factors are important. One is that the Corps would not usually issue a permit when state or local authorities declined to consent. The other is that in controversial cases it would hold hearings in which an applicant had a right to present relevant evidence, but no right to cross-examine opposing witnesses. This was the nature of the hearing called in St. Petersburg.

Following its policy of contacting local agencies, the Corps called for comments on the Zabel-Russell application. PCA replied, "no protest," as did TIIF, Central and South Florida Flood Control District (who in fact had no jurisdiction) and the Board of Pilot Commissioners for the Port of St. Petersburg (BPC). According to the main conservation representative in this affair, TIIF held a hearing before filing the no protest position, but without giving any public notice that it was to occur. Making the situation even more difficult for the environmentalists, TIIF had three false starts toward a hearing before it was finally held.

The emergence of BPC supplies another episodic sidelight to this story. Apparently, that body, which was chartered by the statute to undertake certain responsibilities concerning pilotage, had never claimed any interest in dredge and fill applications prior to this juncture in the Zabel-Russell proceedings. At this time, however, one of the landowners' lawyers who had served as secretary of BPC suddenly resigned his position. Thereafter, BPC claimed an interest in the controversy and filed a "no protest" statement and,

50. 33 U.S.C. § 403 (1970).
51. 33 C.F.R. pt. 209 (1974).

later, commissioned a study of the effects of the proposed project upon navigation in the vicinity. According to the BPC study, navigation would be "greatly aided" by the project.[52]

Filing protest against the application were the Florida Board of Conservation on behalf of the State, the County Health Board of Pinellas County and, somewhat courageously, the Board of County Commissioners of Pinellas County. It took courage for the County Commissioners to submit their protest because they as individuals were the *very same persons* who constituted PCA. As members of PCA they were compelled by court order and threat of contempt not to protest; but as members of the Board of County Commissioners they were equally compelled to protest because of their convictions as to what was truly in the public interest. Thus, although officially they were schizophrenic, as individuals they were one-minded. Nevertheless, in issuing the protest some of them must have wondered whether the court's order controlled them as individuals as well as PCA members.

More than 200 objectors appeared at the St. Petersburg hearing in November 1966. Many of them were the same citizens who had testified eight years earlier in the PCA hearings. But this time their intuitive objections were buffered by professional support. The Bureau of Sports Fisheries and Wildlife of the U.S. Fish and Wildlife Service opposed the petition "because of the value of the area encompassed by this permit as a nursery area for marine fishes and the damage . . . which would result."[53] Indeed, instead of being a "biological desert," as claimed by the landowners' biologist in 1958, the area was now seen as one replete in life-supporting flora and invertebrates, making it "one of the last remaining undestroyed nursery areas in central Boca Ciega Bay."

The environmental testimony had changed drastically in the years intervening between 1958 and 1966. Zabel's lawyer recalls now that no legitimate biologist would support their earlier position that no harm to the environment would ensue: "For every biologist we could turn up, they could produce twenty-five." Moreover, under the Corps of Engineers' hearing rules no cross-examination of witnesses was allowable. It became necessary, therefore,

52. Capt. J.W. Winters, Memorandum to Board of Pilot Commissioners, Dec. 7, 1966.

53. Letter of August 3, 1966.

for Zabel-Russell to change their legal stance at the hearing. This they did, adopting a singular position that was to couple with another equally singular one later taken by the Corps to give the case its ultimate vital importance. First, the landowners in essence stipulated that biological damage *would ensue* from the project. Next, relying upon the implications of the Florida supreme court's opinion in the state proceedings, the landowners claimed absolute ownership in fee simple absolute of the bottomlands in question, giving them the right to "sterilize the bottom," if they so chose. Starkly put, Zabel-Russell admitted that environmental damage would occur and denied the existence of any federal authority to stop it.

Although some small amount of testimony was given concerning bad effects on navigation, the bulk of evidence on that point supported the contention that navigation would not be harmed. Consequently, when on November 30, 1966, Colonel Tabb recommended that the permit be denied on the grounds that the project would be contrary to public interest, despite the fact that it "would have no material effect on navigation," the second crucial legal position began to crystallize. On January 11, 1967, the Division Engineer concurred in Colonel Tabb's recommendation, stating "widespread opposition" as his reason. The Chief of Engineers then supported the decisions of his underlings. Finally, on February 28, 1967, Secretary of the Army Resor denied the application, giving as his reasons that the project:

1. Would result in a distinctly harmful effect on the fish and wildlife resources in Boca Ciega Bay;
2. Would be inconsistent with the purposes of the Fish and Wildlife Coordination Act of 1958, *as amended,* 16 U.S.C. § 662 (1970);
3. Is opposed by the Florida Board of Conservation on behalf of the State of Florida, and by the County Health Board of Pinellas County and the Board of County Commissioners of Pinellas County; and
4. Would be contrary to the public interest.

The absence of any exercise of the navigation servitude is prominent. Of equal prominence was the presence of environmental criteria in denying a federal permit under the authority of the

Rivers and Harbors Act. From the point of view of many vested interests, this action represented a dangerous break from past practices. Carte-blanche approval at the state level, so long as navigation was not hurt, now began to pale in importance and the possible ramifications of the new Corps position began to be felt more widely.

Among the wider concerns was the question of whether mineral rights under submerged lands would any longer be exploitable. For example, Coastal Petroleum Company controlled large areas of valuable limestone deposits in the bed of Lake Okeechobee under lease from TIIF and yearned to dig them out. Their claim of right had considerable validity. Florida courts had previously held the leases to be valid, giving the company the state's imprimatur to proceed. Furthermore, navigation was not an issue. Therefore, the only arguments for stopping the project were environmental ones. Because Lake Okeechobee is a vital source of fresh water for south Florida, environmentalists saw grave dangers lurking in the project, including a possible threat of salt water intrusion into the lake's waters. Would the federal government block the project by refusing to allow the mining operations to go on in navigable waters? Whatever was decided in the Zabel-Russell proceeding could control the Coastal Petroleum situation.

On May 10, 1967 the Zabel-Russell interests brought suit against the Corps in the Tampa federal district court, claiming that the permit had been erroneously denied in that the Rivers and Harbors Act authorized denials only when navigation was threatened. During pretrial maneuverings, the two crucial legal positions alluded to above hardened into their final forms. On the one hand, the landowners stipulated that environmental damage would occur, thereby removing that factual dispute as to the propriety of the denial should environmental factors be held legitimate concerns. On the other hand, the Corps of Engineers admitted that "the proposed work would have no material adverse effect on navigation," thereby removing the fact on which the Corps customarily relied to justify the denial of permits. Hence, the issue was joined: Under the Rivers and Harbors Act, is it erroneous for the Corps to refuse to permit dredge and fill operations in privately owned bottoms under navigable waters solely because of adverse environmental effects?

On February 17, 1969, Federal District Judge Krentzman an-

swered that question in the affirmative.[54] The permit must issue. Krentzman was concerned, as had been the Florida supreme court before him, about taking, or denying the use of, private property without a clear legislative authorization. Krentzman carefully studied the history of the Fish and Wildlife Coordination Act of 1958, and though he found it required multiagency consultation about conservation factors, he did not find a clear congressional intention to add to the Secretary's regulatory powers. Said Krentzman,

> [T]he Rivers and Harbors Act of 1899, . . . even if said statute is read in pari materia with the U.S. Fish and Wildlife Coordination Act, . . . does not vest the Secretary of the Army with discretionary authority to deny an application for a dredge and fill permit thereunder where he has found factually that the construction proposed under the application would not interfere with navigation.

Having so decided the legal issues, Judge Krentzman ordered Col. Tabb and Secretary Resor to issue a permit "in accordance with the application of plaintiffs." Krentzman restrained the execution of the order, however, while appeal was made to higher authority.

Before this exposition is continued, it would not be amiss to focus down on the reasoning of the federal court (and that of the Florida supreme court) because it in large measure epitomizes the crux of most truly meritorious environmental controversies. As between private rights of ownership, which, indeed, are rights that civil libertarians might choose to defend, and conceptual and somewhat amorphous public rights, which has the superior call for legal protection? Note that this question is different from asking which *deserves* the greater legal protection. Both courts addressed the former question and gave the reply they thought dictated by existing law: "Property rights are better." As for the answer to the latter question, Judge Krentzman said, "Advocates of conservation are both able and effective. The way is open to obtain a remedy for future situations like this one if one is needed and can be legally granted by the Congress." As shall be seen, Judge Krentzman was wrong as to the existing state of the law. Those who are truly interested in strategies for future conflicts might ponder whether he did a poor job of legal craftsmanship or whether he approached

54. Zabel v. Tabb, 296 F. Supp. 764 (M.D. Fla. 1969).

the task with the wrong state of mind in view of who was to review his opinion.

In appealing the decision to the Fifth Circuit Court of Appeals, Corps lawyers noted that the Rivers and Harbors Act of 1899 forbade any obstruction to navigable waters except as affirmatively authorized and took the position that any fill, whether materially adverse to navigation or not, could not be made until the ban was lifted. Moreover, argued the lawyers, the Fish and Wildlife Coordination Act "set a clear standard that the prohibition was not to be lifted, if to do so would adversely affect fish and wildlife."[55] That was the crux of the government's argument, although two earlier federal cases[56] were cited for the proposition that permits could be denied even in situations where navigation was not to be adversely affected.

Countering the government's contention, the Zabel-Russell lawyers brought in a new line of argument that was to tangle the fate of the 11.5 acres of Boca Ciega Bay in what was intended to have been the solution to an earlier even more tumultuous dispute over the control of sovereignty lands. Stated simply, the earlier fight was over which sovereign—the federal government or the states—controlled the exploitation of minerals, notably oil, lying beneath sovereignty lands at the margin of the oceans. Texas, California and Louisiana, where oil had been found in plentiful supply, were the hot spots. Although the grant of statehood to these states was commonly assumed to have carried ownership of the bottoms, subject to the commerce servitude, the United States government contested that assumption in several law suits, including one involving bottomlands off the California coast. Coming like an earthquake upon the coastal states and all holders of interests in sovereignty lands deriving from the states, a 1947 opinion of the United States Supreme Court sustained a complaint alleging that "the United States of America is possessed of paramount rights in and powers over, the lands, minerals, and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California . . . ."[57] Although the ruling applied directly

55. Brief of the U.S. Government, filed with the Fifth Circuit Court of Appeals, Case No. 27555, at 34.

56. United States *ex rel.* Greathouse v. Dern, 289 U.S. 352 (1933); Miami Jockey Club, Inc. v. Dern, 86 F.2d 135.

57. United States v. California, 332 U.S. 19, 22 (1947).

only to California, the U.S. Attorney General announced plans to press the theory everywhere in protection of the interest of the United States.[58] Throughout the country grave uncertainties shrouded title to lands valued in terms of fabulous fortunes.

After hot debate, Congress in 1953 enacted legislation[59] to settle the confusion created by the California case. The solution, condemned as a great giveaway by many critics,[60] was to convey to the states "all right, title, and interest of the United States" in sovereignty lands and in the natural resources found in them. The Submerged Lands Act, as it was named, in effect operated as a quit claim deed releasing most of or all of the interests of the United States in the lands, if any existed, to the various coastal states.

Sixteen years after the Submerged Lands Act became law, the Zabel-Russell case came along, testing just how far relinquishment of federal control really went. Arguing from the text of the statute, the landowners asserted that the states had been given full right to manage natural resources and, furthermore, that the federal government retained rights only over navigation, flood control and production of power. Furthermore, relying heavily on Judge Krentzman's earlier opinion, the landowners argued that the Fish and Wildlife Coordination Act had not expanded the scope of federal control. Therefore, according to that argument, regulation of conservation was vested in the State of Florida and not in the federal government through the Army.

Another crucial episode that is not documented in the written records occurred at this point in the case. By then the question of whether or not mining limestone in the bottom of Lake Okeechobee should be permitted under the Rivers and Harbors Act had been presented to the Corps of Engineers. Because Florida authorities had protested, the Corps denied the permit and was subsequently hauled into federal court a second time on charges of erroneously denying a permit. Realizing that the appellate decision rendered in the Zabel-Russell case would control the Okeechobee dispute, Coastal Petroleum requested permission to file a brief as "friend

58. 2 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 1422 (1953).

59. Submerged Lands Act, Pub. L. No. 83-31, 43 U.S.C. §§ 1301-15 (1970).

60. 2 UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 1439 and *passim* (1953).

of the court" in the Zabel-Russell proceedings. Permission was granted.

According to the Zabel-Russell lawyers, this action took place just after they had been informally notified that their case had been placed on the Fifth Circuit Court of Appeals' summary disposition docket without a hearing. In the great bulk of cases this would mean an affirmance—that is, victory for the Zabel-Russell interests. Rarely will a lower federal judge be summarily reversed without hearing arguments. In view of this leak of inside information, the Zabel-Russell lawyers opposed any tampering with the existing status of the case. Nevertheless, the Coastal Petroleum brief was filed. Shortly after, according to the Zabel-Russell lawyers, the case was removed from the summary disposition docket and set for trial.

Whether or not the Coastal Petroleum brief actually changed somebody's mind about the case is not known to the Zabel-Russell lawyers. They think it did. An examination of the brief itself does not reveal any remarkable new arguments. Merely differing in emphasis from that of Zabel-Russell, the Coastal Petroleum brief delved into the history of the Fish and Wildlife Act of 1958 to argue that the Act, when proposed, was virtually non-controversial and received "*no discussion at all in either house.*" "Not one person or one Representative said a *single word* about the purpose or content of the bill." (Emphasis in the original.) Reciting as fact that 16 million acres lie under navigable waters in the State of Florida alone and that the nation has "multi-millions" of acres under navigable waters, Coastal Petroleum argued that:

> [T]his routinized passage of what appeared to be an unremarkable bill, a bill which purported to be nothing but a Federal in-family-housekeeping statute, is eloquent testimony that no single Senator or Representative had any idea that the bill was intended to affect tens of thousands of private persons and multi-millions of acres.[61]

Issue was joined in oral argument before a three-judge panel of the United States Court of Appeals for the Fifth Circuit in Jacksonville on December 5, 1969. Notes made by a non-participating Corps

61. Coastal Petroleum Company's amicus curiae brief in *Zabel v. Tabb*, filed with the Fifth Circuit Court of Appeals, Case No. 27555.

lawyer reveal two impressions conveyed to him by the judges' demeanor. The first was that at least one judge appeared strongly to favor conservation. The other was that the court repeatedly questioned the lawyers about the scope of Congress' commerce power and the extent of its applicability to the dispute. This orientation should have been disquieting to the vested interests.

Beginning its July 27, 1970 opinion[62] saying "It is the destiny of the Fifth Circuit to be in the middle of great, oftentimes explosive issues of spectacular public importance,"[63] the court reversed Judge Krentzman's opinion. Moving rapidly to the most fundamental question, the court examined whether or not Congress had the power to "protect wildlife in navigable waters." Looking for the requisite indicia of authority, which is "effect on interstate commerce," the court found it saying:

> 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 estuarine waters does have a substantial, and in some areas a devastating, effect on interstate commerce . . . . [D]redge 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.[64]

Pressing on to the argument that Congress had relinquished its power to the states in enacting the Submerged Lands Act, the court cited a section of the statute stating that the federal government specifically retained its "powers of regulation and control of said lands and waters for the constitutional purposes of commerce . . ."[65] Therefore, said the court, the right to control activities affecting commerce had not been abrogated and to the contrary remained in federal hands.

Gaining momentum, the court next confronted the argument that Congress in enacting the Rivers and Harbors Act exercised its commerce power only so far as navigation was concerned and no further. In essence, the argument is a somewhat subtle one that

62. Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970).
63. *Id.* at 200.
64. *Id.* at 203-04.
65. 43 U.S.C. § 1314(a) (1970), *quoted* 430 F.2d at 205.

is used by lawyers in differentiating between the existence of a source of power in the Constitution and an exercise of the power through legislation. Without an enabling statute giving it life the constitutional power is dormant and unavailable to the executive in regulating the citizenry. Agreeing with the government's brief, on that point, the federal appeals court held that the Rivers and Harbors Act imposed an absolute ban on obstructions to navigable waters. Furthermore, not only had earlier cases shown that the Corps of Engineers can consider factors other than navigation in denying permits,[66] but the Fish and Wildlife Coordination Act and administrative policies devised to implement it "unequivocally expressed [that t]he Secretary must weigh the effect a dredge and fill project will have on conservation before he issues a permit lifting the Congressional ban."[67] With the utterance of that statement fell not only the claim of Zabel and Russell to be free to "sterilize" the bottom of their lands but also the claim of Coastal Petroleum to mine Lake Okeechobee, no matter what the effect on the water supply of the state. No doubt, as Coastal Petroleum argued, plans to exploit other claims embracing multi-millions of acres of submerged lands elsewhere were blunted as well.

One last forum was to be petitioned before this thirteen-year saga came to an end: the Supreme Court of the United States. In preparation for the final bout, new lawyers familiar with Supreme Court practice were brought in to seek intercession by the high court on behalf of the landowners. Merely obtaining an audience with the Court is always problematical however, since it is literally impossible for nine justices to consider more than a small percentage of the cases pressed upon them. Pleading with the Court to issue a writ of certiorari to the Fifth Circuit Court of Appeals and bring the case up for review, the Zabel-Russell lawyers argued that their case was a good vehicle for resolving the important public issues involved. The argument was unconvincing. On February 22, 1971, the petition for writ of certiorari was denied,[68] putting an end to legal recourse for obtaining a permit to add that particular 11.5 acres to the fills in Boca Ciega Bay. In reaction to the Court's denial of certiorari, Zabel-Russell lawyers are reported to have

66. 430 F.2d at 211.
67. *Id.*
68. Zabel v. Tabb, 401 U.S. 910 (1971) (denying certiorari).

said, "This is the end of the line. There is no more Zabel-Russell fill proposal."[69]

AFTERMATH

Although the full ramifications of *Zabel* have yet to be felt, several direct consequences are clear. Most direct but, ironically enough, perhaps the least important in the total scheme of things: 11.5 acres of Boca Ciega Bay that once were destined for destruction have been rescued. Also, under authority of the reinvigorated federal law, Coastal Petroleum has been halted in its plan to mine the bottom of Lake Okeechobee. Furthermore, the Corps purports to be more rigorously exercising its responsibilities, as redefined in the Zabel-Russell case, to insure that due consideration is routinely given to applications for the removal of the congressional ban against obstructions to the navigable capacity of the waters of the United States. In a tone of some incredulity, the chief conservation protagonist reports that now *she* is asked to comment on the dredge and fill proposals as they are filed for approval.

While from an ecological point of view the *Zabel* denial of an 11.5 acre fill in Boca Ciega Bay is of minor importance, the legal precedent it set as to the criteria which applications must meet is awesome. Even *Zabel* did not deal with the question of what must be done about unpermitted fills, however. This point was soon raised in *U.S. v. Moretti,*[70] a case in which another trailer court developer was dredging and filling without permit in the Florida Keys. Appealing a lower court's order to restore the filled area to its natural condition, the developer argued in the appellate court that the Rivers and Harbors Act did not authorize a district court to remove a land fill as a "structure."[71] Rejecting that argument,

69. COMMERCIAL FISHERIES REVIEW, Feb. 1971.

70. United States v. Joseph G. Moretti, Inc., 331 F. Supp. 151 (M.D. Fla. 1971). *Moretti* contains interesting commentary on the actual policing of environmental regulations and the efficacy of permitting procedures. Two vacationing employees of the E.P.A. observed the operations at issue and reported the violation upon determining that the operator had no permit.

71. Section 406 of the Act, 33 U.S.C. § 406 (1970), reads in part:

> [T]he removal of any structures or parts of structures erected in violation of [the Act] may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

the Fifth Circuit buttressed its *Zabel* stance by acknowledging that an order to remove a fill is authorized by the Act, subject to ample opportunity for the consideration of an "after-the-fact" permit.[72]

In still another dredge and fill case[73] involving substantial unpermitted alterations of the Weeki Wachi River, a developer argued a removal order might not be validly issued until the government has carried the burden of showing that the process of restoration would not be more harmful than allowing the unpermitted fill to remain. Because at that time the *Moretti* appeal was pending, the court did not give a definitive ruling. It did surmise, however, that "If the outcome of the appeal in *Moretti* is favorable to the government, it may well be that a proper order in the present case would be to compel the defendant to submit further proof of the lack of feasible restoration rather than compelling the government to come forward with solutions."[74] In view of the eventual *Moretti* decision, it seems clear that this proposal should be accepted. The more disagreeable the terms of after-the-fact settlements become, the less prone will developers be to ignore the permitting procedure on the assumption that they can later "buy off" their transgressions by payment of money fines. In this respect, Florida's federal district courts, backed up by the Fifth Circuit, seem bent on using the Rivers and Harbors Act, as invigorated by *Zabel,* to protect wetlands.

Although the whole stew of related environmental measures cooked up by the fires that kept the Zabel-Russell case going so long is too thick to digest here, the more important morsels are worth savoring. In 1967, Florida law was strengthened to require the taking into account of various environmental factors before bulkhead lines are set, before dredge and fill permits are issued and before any of the remaining sovereignty lands are sold.[75] In

72. United States v. Joseph G. Moretti, Inc., 478 F.2d 418 (5th Cir. 1973).

73. United States v. Underwood, 344 F. Supp. 486 (M.D. Fla. 1972).

74. *Id.* at 495. The court also stated, at 494, that

> Where the party causing the injury to navigable waters refuses to remedy the situation or for some other reason the United States is compelled to perform the remedy, the government is entitled to the equivalent cost in damages.

The court cited Wyandotte Transportation Company v. United States, 389 U.S. 191 (1967).

75. FLA. LAWS, ch. 67-393, *amending* FLA. STATS. §§ 253.12, 253.122, 253.124, and 253.126.

1968, the so-called Florida public trust doctrine, which purportedly prohibited sales of sovereignty lands when contrary to the public interest, was raised to constitutional dignity in the State's new constitution.[76]

In view of the meaningless connotation that had previously been larded on the Florida doctrine by the State Supreme Court, the people of the state in 1970 voted to modify the constitutional statement of the doctrine. Sales of sovereignty lands are now authorized only when the sale would be in "the public interest."[77] Hence, there must be a showing of public benefit to be derived from making the sale. Although no court interpretation has yet been given the new doctrine, presumably it requires much more than a mere showing that the public interest in remaining lands is not harmed, which was all the Florida supreme court required for a valid sale under the superseded doctrine.

Also first appearing in 1968, a new section of the Florida constitution proclaimed that it is the "policy of the state to conserve and protect its natural resources and scenic beauty."[78] In a situation involving the construction of a nuclear power reactor on Biscayne Bay the Florida Supreme Court rendered an opinion[79] attaching substantive meaning to that statement. This holding could signal a change in the attitude of the Florida court. What could easily have been passed off as mere froth—policy without sanction—was given substance by the court.

Acting to protect the remains of Boca Ciega Bay, the Florida legislature in 1969 enacted a law designating the bay as an aquatic preserve to be retained, insofar as possible, in an essentially natural condition so that its biological and aesthetic values may endure for the "enjoyment of future generations."[80] The next legislative move was to protect larger stretches of the Florida coast. Noting that "unguided development of [Florida's] beaches and shores coupled with uncontrolled erosive forces are destroying or substantially damaging many miles of our valuable beaches each year," the leg-

76. 1968 FLORIDA CONSTITUTION art. X, § 11.
77. *Id. as amended* November 3, 1970.
78. *Id.* art. XI, § 7.
79. Seadade Industries, Inc. v. Florida Power & Light Co., 245 So. 2d 209 (Fla. 1971).
80. FLA. STATS. § 268.16(1) (Supp. 1972).

islature in 1970 created a construction set-back rule[81] forcing excavation and construction projects away from mean high water on much of Florida's coast. It was also 1970 that saw TIIF given the authority to acquire submerged lands through condemnation and return them to the public domain for public use.[82]

The year 1972 saw a giant step forward in gaining control over land use in Florida. It was then that the citizens of the state voted to approve the issuance of $200 million in bonds to purchase environmentally endangered lands.[83] It was also in that year that the legislature passed the Environmental Land and Water Management Act,[84] requiring that protections be provided "areas of critical state concern" and also imposing controls on "developments of regional impact." Although the details of these programs are not to be examined here, suffice it to say that they could be the springboard for attaining comprehensive, state-wide land use controls.

The same tempest that sculptured so many public interest handholds in the previously obdurate body of private interest Florida law was also working simultaneously on the national level. Of a number of important changes made in federal law during the Zabel-Russell era, the 1969 addition of the National Environmental Policy Act (NEPA) is probably the most important in protecting the natural environment from unthinking exploitation. In enacting NEPA, Congress stated several purposes, including:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . . .[85]

NEPA's operative thrust is a mandate that environmental factors be considered in planning federal actions that significantly "affect the quality of the human environment." Already the law books are brimming with cases in which federal judges have insisted that NEPA's strictures be adhered to. To name but one, the *Zabel*

81. *Id.* § 161.052 (Supp. 1972).
82. *Id.* § 253.02 (Supp. 1972).
83. Land Conservation Act of 1972, FLA. STATS. ch. 259 (Supp. 1973).
84. Environmental Land and Water Management Act of 1972, FLA. STATS. ch. 380 (Supp. 1973).
85. 42 U.S.C. § 433 (1970).

opinion says that issuing dredge and fill permits is a federal action of the sort that must conform to NEPA's requirements.

The dredges have been stilled in Boca Ciega Bay and they have been quieted over much of Florida and, presumably, the whole country—at least temporarily. The qualification is necessary. While it is true that *Zabel* and related happenings have slowed and stopped some dredges, they have not destroyed them. And, while it is true that dredge and fill permits have been made difficult to obtain, they have not been outlawed.[86] Furthermore, thousands of acres of bottomlands remain in private ownership stemming from sales made long ago under the early laissez-faire laws that ignored the environment and pampered economic development. The upshot is that the ingredients for devastation still exist: submerged lands in private ownership under a system of laws that will permit dredge and fill operations given the satisfaction of designated conditions.

The principal effect of this set of circumstances may be to shift the strategic role over to vested economic interests. Driven into regulation by the sword of public interest, vested interests will now turn their wits and resources to "beating" the system. So long as money is to be made in creating dry land out of wet, someone will press to do it. So long as minerals lie under navigable waters, protection of the public's water supply notwithstanding, someone will push to dig them out. And, so long as a system of permitted uses exists without a master plan for environmental use and resource development, abusive projects will be approved. One consequence of *Zabel* is bound to be the generation of much activity directed to securing such approval.

In reiteration of what is implicit throughout this paper, *Zabel* represents an important triumph of the public interest over vested economic interests. The public interest banner for the most part was carried by a doughty band of concerned citizens, joined early by

86. Several deficiencies exist in the Rivers and Harbors Act's permitting scheme. Perhaps the most important is the absence of a clear mandate to the Corps to investigate and report violations. Linked to that is the fact that court action must be instituted by he office of the United States Attorney General, rather than by the Corps. 33 U.S.C. § 406 (1970). Enforcement could be greatly assisted by the Congress' mandating an investigatory function to the Corps and also placing civil enforcement procedures in its hands. Furthermore, close review should be given the Corps' after-the-fact permit regulations. Although not removing an illegal fill may be the better course of action in some instances, the law should be amended to continue the sovereignty easement upon the filled-in land.

a group of local officials and late, under pressure of immense public outcry, by the agents of Congress. One cannot assume, however, that all is now well on the environmental front because federal protectors have been appointed. In a real sense, they did not assume their protective role of their own volition; they were kicked into it. Moreover, regulators are more urgently courted by the regulated than by the countervailing interests and regularly are captured by them, reversing their role from regulator to protector. Who, then, will watch the appointed watchers? Perhaps the answer to this question is the cornerstone of all strategies for achieving environmental goals. The present answer is unsatisfactory, but clear. To the private citizen concerned with protection of the environment falls the duty of ceaseless vigilance.