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ORDINARY HIGH WATER MARK SAGA CONTINUES

STATE ASKS JUDGE TO REWORD DECISION

David Smith officially has his lakefront land back.

An administrative judge issued an important ruling last summer in a legal case that has implications for anyone owning property bordering Florida's rivers and lakes. At issue was the ordinary high water mark, the legal boundary between private upland property and state-owned beds of navigable waters. In other words, where does the water end and the private property begin?

The State of Florida had sued David Smith, whose family has held title to and paid taxes on a piece of property for more than 60 years, claiming they had been trespassing for all that time on some 230 acres of the property bordering a lake.

On August 25, a Brevard County Circuit Court judge ruled against the state's attempts to oust the Smiths from the land that borders on Lake Poinsett, which the family had bought in 1939, assuming a record title based on a 1906 deed conveyed by the state.

The now 10-year-old suit alleged that much of the land in question lay below the ordinary high

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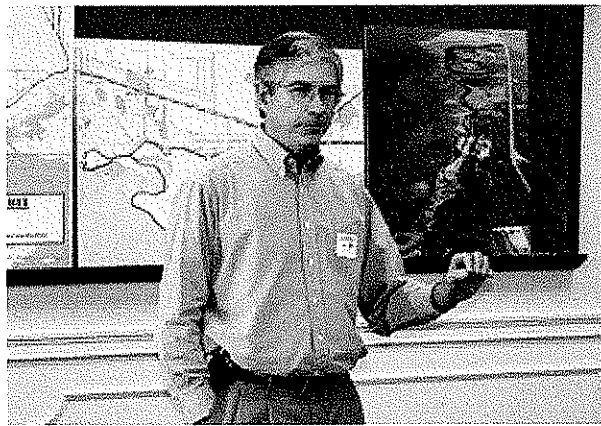
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water mark. In the August ruling, Judge Bruce W. Jacobus ruled the state was wrong in claiming the high water mark extended almost three miles from what "a person of common intelligence would clearly recognize as the boundary of the lake." That was good news.

The governor and cabinet then met in October to discuss the issue to determine whether the state would appeal. "The meeting went well, mostly passing along background information on the issue," said Smith. He added that the prevailing sentiment is that the state isn't inclined to appeal, but the time doesn't start running, in their opinion, until the order becomes final. Smith has requested that it be done.

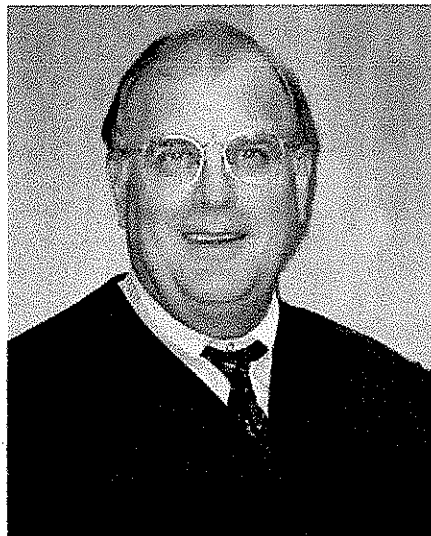


Land owner David Smith explained his precedent-setting court case to the Agriculture Institute of Florida earlier this year.

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"We basically filed a motion requesting the entry of the final judgment and attached proposed wording in which the court says 'Final judgment is hereby entered in favor of Defendant ...' and lists the ruling," said Smith.

STATE CALLS FOR REWORDING OF ORDER



Judge Bruce W. Jacobus issued an important ruling last summer in a legal case that has implications for Floridians owning waterfront property.

Meanwhile, the state filed a motion asking the judge to reword the sentence in which he gave his reason for rejecting their fundamental premise.

"The significance for the state is that if its methodology was based on a statistical test that the scientific community doesn't feel leads to the result they claim, their method would be inherently flawed, according to Judge Jacobus," said Smith. "That would be difficult for them to overcome when they try to apply it to other landowners. If it is merely irrelevant to this ruling they can claim that special circumstances knocked it out, etc. Regardless of this issue, Judge Jacobus ruled that our boundary was where our surveyor put it - that's the key for us."

So how did the state come up with its idea of where the boundary was? It employed a methodology called "stage duration," a statistical way of saying how long a body of water remains at a certain elevation every year. The reason the judge threw out that method lies in the variable used to determine that elevation. That variable is 30 percent. The calculation says that the lake was at a certain level 30 percent of the time, and therefore, that elevation is the ordinary high water mark.

The 30 percent figure is not universally accepted by scientists, a leading surveyor testified at the hearings. He said that studies have shown that there is "absolutely no correlation between the 30 percent 'stage duration' and the ordinary high water mark."

"The one great thing about the ruling is that it gives us, finally, a solid platform from which to explain the truth."

-David Smith.

After hearing from the surveyor, the judge rejected the method and instead stated that the common law definition of the boundary, as determined in an earlier case, would stand.

WATER SPREADS FURTHER ON FLAT LAND

The land in question is fairly flat. This makes the determination of the boundary very important, because water spreads over a greater area if that area is flat. Compare a deep soup bowl to a shallow one. It's much easier to spill the soup when it's in a large, flat dish. It spreads out when on a flatter surface.

The state had determined that the ordinary high water mark was 13 feet NGVD (a term indicating something resembling sea level). Smith said it was 12.1 feet NGVD. Over that flat terrain, the boundary would have been up to several miles different in places than the original deed had indicated.

In the August order, Judge Jacobus ruled that "Based on the greater weight of the evidence that the ordinary high water mark of Lake Poinsett is at 12.1 feet NGVD and the boundary of the Smith property is as defined by the survey ... dated March 3, 2001."

The final judgment is expected to reflect that order. David Smith will once again be master of his land, free to exercise his rights as a property owner in the State of Florida.

"The one great thing about the ruling is that it gives us, finally, a solid platform from which to explain the truth," said Smith.

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