

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2007 CP-07-03212

H. MARSHALL HOYLER

MERRY LAND PROPERTIES, LLC, ET AL.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: BEAUFORT COUNTY MASTER IN EQUITY

Attorney for : Plaintiff Defendant
or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

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NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

THIS CAME BEFORE ME ON PLAINTIFF H. MARSHALL HOYLER'S MOTION FOR RECONSIDERATION PURSUANT TO RULES 52(b) AND 59(e), FILED MAY 5, 2014. AFTER REVIEW OF THE MOTION I HEREBY DENY THE MOTION.

RECEIVED

ORDER INFORMATION

This order ends does not end the case.
Additional Information for the Clerk :

JUN 16 2016

SC Court of Appeals

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

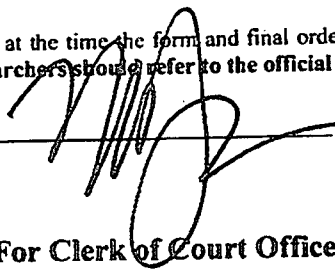
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$N/A
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge



3069

Judge Code

5/19/16
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

JEFF D. GRIFFITH III

ATTORNEY(S) FOR THE PLAINTIFF(S)

MARY D. SHAHID, J. EMORY SMITH JR., STEVEN L. SMITH

ROY W. BOGGS, ADAM N. YOUNT, JAMES A. GRIMSLEY III,

W. MCELHANEY WHITE,

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

H. MARSHALL HOYLER,
Plaintiff,

vs.

The State of South Carolina, Merry Land Properties, LLC, Sherbert Living Trust, Supan Living Trust, Elizabeth R. Levin, Edward McCray Wise Revoc. Living Trust, Carol Ann DeVries Wise Revoc. Living Trust, Amelie Cromer, Philip Cromer, Robert Chiavello, Tocharoen Living Trust, Helen M. Olesak, Lesley Anne Glick a/k/a Lesley Ann Glick, Shirley G. Lackey, Patricia Banfield, Bertrand Cooper, Jr., NHP SH South Carolina I, LLC n/k/a CCP Bayview 7176 LLC, Oyster Cove Homeowners Assn., Shirley Ann Moyer, Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus, Rita Brown, Houston Family Partnership, Joan Taylor Trustee, Michael Bull, Nancy Bull, Marny H. VonHärten, Dianne M. Donaldson, Brian R. Evans, Stephen Durbin, Valerie Durbin, Phillip Marti, Jane Marti, Michael Woodworth, Georgiana M. Cooke, Daniel B. Walsh, Janet E. Walsh,

Defendants.

Appearances:

Counsel for Plaintiff

Counsel for Defendant Merry Land Properties, LLC

Counsel for the State of South Carolina

Court Reporter

IN THE COURT OF COMMON PLEAS

Case No. 2007-CP-07-3212

**ORDER DENYING TITLE TO
MARSHLANDS**

2016 MAY 27 PM 2:16
JEFF A. ROSEHEAD
CLERK OF COURT
BEAUFORT COUNTY, S.C.

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JUN 16 2016
SC Court of Appeals

Jeff D. Griffith, Esq.
Richard L. Whitt, Esq.

Mary D. Shahid, Esq.
Angelica M. Colwell, Esq.

J. Emory Smith, Jr., Esq.

Debra S. Thomas

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STATEMENT OF THE CASE

This action was initiated by the Complaint of Plaintiff, H. Marshall Hoyler, captioned as an "Action to Declare Title to Marshlands," which was filed November 8, 2007. This action arises out of the remedy set forth in S. C. Code Ann. § 48-39-220 which provides that "[a]ny person claiming an interest in tidelands ... may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State." The marshlands at issue, referred to herein as "the disputed marsh," are encompassed in a ± 95 acre tract located in Beaufort County, along the Beaufort River, abutting the Town of Port Royal, S. C. The disputed marsh is identified by the Beaufort County Tax Assessor as R120 007 000 0632 0000. The disputed marsh is contiguous to the existing subdivision known as Spanish Point and to numerous other upland parcels, including those owned by Intervenor/Defendant Merry Land Properties, LLC ("Intervenor" or "Merry Land").

The State of South Carolina filed an Answer to the Complaint asserting the State's prima facie fee simple title in all public trust lands below high water and asserting the rights of the citizens of South Carolina in any navigable waters located within the disputed marsh.

The matter was referred to the Master-in-Equity by Order dated September 13th, 2010.

Intervenor sought intervention in this proceeding based on its ownership of certain upland parcels that abut the disputed marsh identified as parcels R 110 007 000 116A, R 110 009 000 0174, R 110 007 000 116C, and R 110 007 000 116B. Intervenor, a land development company, acquired these upland parcels and other contiguous property at Ribaut Road and Johnny Morrall Circle, in Port Royal, Beaufort County, South Carolina for purposes of constructing a multi-family and mixed use development with deep water access on the Beaufort River. Prior to

commencement of this action, Intervenor had obtained approvals for the planned construction on the parcels adjacent to the disputed marsh, hereinafter the "Port Royal property," which is zoned for general residential development and mixed use. Intervenor had also received permits from the United States Army Corps of Engineers ("the Corps") and the South Carolina Department of Health and Environmental Control ("DHEC") authorizing construction of an 80-slip marina in the Beaufort River for use by residents of the Port Royal Property and by the general public. The permitted plans include a 5' x 848' walkway providing access over a small tributary and the disputed marsh, to the Beaufort River. The permitted plans also authorize a pierhead, six 4' x 30' ramps leading to six 10' by 260' floating docks located on both sides of the pierhead, three per side. In addition, a 5' x 45' ramp leading to a 10' x 25' floating dock will be installed channelward of the pierhead.

Intervenor's interest in this action arises from its development plans and the marina permits issued by the Corps and DHEC. Intervenor was not aware of Plaintiffs' claim of title to the disputed marsh until after it sought and obtained permits and purchased the Port Royal property. Intervenor filed an Answer and Counterclaim alleging that Plaintiff's Grant is insufficient to divest the public of its public trust interest in the marsh, that the plats of the disputed marsh which accompanied the Grant are vague and indefinite, and Plaintiff is barred by principles of Laches and Estoppel from preventing Intervenor from construction of the permitted marina.

Plaintiff claims title to the disputed marsh by way of a Grant from the State of South Carolina that was conveyed to Plaintiff's predecessor in interest, J. M. Crofut, in 1891. The disputed marsh was conveyed to Plaintiff in 1979. The 1891 Grant is a Form Grant signed by Governor B. R. Tillman, referencing a "Plantation or Tract of Vacant Land, situate in Beaufort

County and State aforesaid containing ninety five and 27/100 acres more or less, Being a parcel or tract of land on the Beaufort River in County and State aforesaid and lying between high and low water mark on river above mentioned ... having such shape, form and marks as are represented by a Plat of said land on file in the office of the Secretary of State in Book 2 of Public Land Plats, Page 16.” The plat referenced in the Grant was prepared in 1891. There is an earlier plat, prepared in 1882, that depicts 114.12 acres. The difference in the two plats is that the 1882 plat references a grant of 114.12 acres to Mrs. Ellen A. Crofut and the 1891 plat reflects a conveyance of the southern portion of the area depicted in the 1882 plat, described as 95.27 acres conveyed to I. M. Crofut. Plaintiff asserts that the authority for the Grant is derived from Chapter VI, Article 1 of the Civil Statute Laws of South Carolina, 1894, which provided for “redemption, lease, and sale” of “forfeited and vacant lands.” See Section 82 of Article 1, Chapter VI.

APPLICABLE LEGAL AUTHORITY

In considering an action filed pursuant to S. C. Code Ann. § 48-39-220, this Court is guided by the principles of common law set forth in precedent. “Land lying between the usual high water mark and the usual low water mark on a navigable watercourse enjoys a unique status since it is held by the State in trust for public purposes. One asserting title to this land must prove a specific grant from the sovereign which is strictly construed against the grantee.” Hobonny Club, Inc. v. McEachern, 272 S. C. 392, 252 S. E. 2d 133 (1979). “Title to land between the high and low water marks remains in the State and is held in trust for the benefit of the public.” State v. Hardee, 259 S. C. 535, 539, 193 S. E. 2d 497, 499 (1972). “A grant of tidelands by the State or a predecessor sovereign is construed strictly in favor of the State and the general public against the grantee.” Grant v. State, 395 S. C. 225, 717 S. Ed. 2d 96, 98 (2011).

“An action to determine ownership of tidelands pursuant to section 48-39-220 is an action at law. See Query v. Burgess, 371 S. C. 407, 410, 639 S. E. 2d 445, 456 (Ct. App. 2006). In an action at law, tried without a jury, our scope of review extends to the correction of errors of law. Barnacle Broad, Inc. v. Baker Broad, Inc., 343 S. C. 140, 538 S. E. 2d 672, 675 (Ct. App. 2000). Furthermore, the trial court’s factual findings will not be disturbed on appeal unless a review of the record discloses that there is no evidence which reasonably supports the [court’s] findings.” Id., citing Grant v. State of South Carolina, 395 S. C. 225, 717 S. E. 2d 96 (2011). “Despite the special status accorded tidelands, the government, and specifically the King of England, had the power to grant, and did in fact grant, tidelands to subjects, who exercised private ownership.” State v. Holston Land Co., 272 S. C. 65, 68, 248 S. E. 2d 922, 924 (1978). “Traditionally, South Carolina has granted private rights to tidelands through acts of the Legislature. ... Because tidelands are held in public trust, a grant of private ownership must contain ‘specific language, either in the deed or on the plat, showing that [the grant] was intended to go below high water mark’” Lowcountry Open Land Trust v. State of South Carolina and James Atkins, 347 S. C. 96, 552 S. E. 2d 778 (2001).

Additionally, as relates to an assertion of private ownership of navigable tributaries, this Court is guided by the legal principles set forth in State ex rel. Lyon, Atty. Gen. v. Columbia Water Power Co. et al. 82 S. C. 181, 63 S. E. 884 (1909) quoting from the treatise “1 Farnham on Waters, 130.” “Navigable water is a public highway which the public is entitled to use for the purposes of travel either for business or pleasure. ... The public is entitled to the free, uninterrupted, and unobstructed use of every part of the stream from bank to bank and throughout the length of the channel, which at the ordinary stage of the water is of such depth and of such accessibility with respect to the current or main body of the stream as to be capable

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of navigation by boats, or of valuable floatage in connection with the main body of the stream, either up and down or across, or from the main stream on to any particular part in question, or thence on to the body of the stream and this whether such part has never been used, and whether there is any present or anticipated necessity for using it." In accordance with S. C. Code Ann. § 49-1-10, "All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of all accidental obstructions and all navigable water courses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly."

As noted above, Plaintiff filed this action in accordance with S.C. Code Ann. § 48-39-220:

SECTION 48-39-220. Legal action to determine interest in tidelands.

(A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the coastal zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the Secretary of the State Budget and Control Board.

(B) Any party may demand a trial by jury in any such action by serving upon the other party(s) a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977, relative to the right, title, or interest in and to such tidelands, except as set forth in this section.

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(D) The Attorney General shall immediately notify the department upon receipt of any private suit made under this section, his response to that suit, and the final disposition of the suit. The department will publish all such notifications in the state register.

In addition to the procedures of § 48-39-220, DHEC promulgated a regulatory process to address private claims of ownership of public tidelands. In accordance with S. C. Code Reg. 30-

2(1) the following procedures are applicable:

I. Applications Involving Adjoining Landowners Claiming Ownership of Critical Area

(1) All permit applicants must provide information in writing concerning the ownership of critical area in or over which a project is to be constructed.

(2) The alleged adjoining landowner of critical area must be notified pursuant to the provisions of Section 48-39-140(C) and R.30-2.

(3) If the alleged adjoining landowner of critical area files a written objection to the permit application within the period prescribed in Section 48-39-140 (15 days for minor and 30 days for major permits) based upon a claim of ownership and indicates an intention to file a court action pursuant to Section 48-39-220, the application will be deemed incomplete and further processing of the permit will not take place until a final judicial decision is rendered by a court of competent jurisdiction. However, written proof of filing a court action pursuant to Section 48-39-220 must be received by the Department within 30 days of the date of the expiration of the comment period. If no such written proof is timely received, the permit will be processed pursuant to law.

(4) If the final judicial decision determines that the critical area in question is owned by the adjoining critical area landowner and that the critical area landowner has a right to exclude others as part of the title, the permit will not be issued unless the applicant presents the Department with a copy of a deed, lease, or other instrument from the adjudicated critical area landowner that would allow construction of the proposed project, or written permission from such owner to carry out the proposal as provided for in Section 48-39-140(B)(4).

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(5) Permit applicants who are vested with the power of eminent domain shall be exempt from the provisions of paragraphs (3) and (4) of R.30-2(I).

Intervenor argues that had Plaintiff initiated this action under S. C. Code Ann. § 48-39-220, in accordance with the procedures set forth in part 220(D), DHEC and the State of South Carolina would have a record of Plaintiff's claim and under the regulatory procedures set forth in R. 30-1(I) Intervenor could have learned of this claim prior to purchase of the Port Royal property.

PROCEDURAL HISTORY

The trial of this matter initially commenced on January 31, 2011. At that trial, Plaintiff moved to dismiss Intervenor from this action, which was denied by this Court. Plaintiff also moved for Summary Judgment and the ruling on the motion was postponed while Plaintiff presented his case. During the presentation of testimony from Plaintiff's first witness, Georgianna V. Coates, a title examiner, this Court had opportunity to review a depiction of the disputed marsh in relationship to surrounding properties. The disputed marsh abutted multiple surrounding residential lots in the Spanish Point subdivision. At least two of these properties already had docks constructed through the disputed marsh. Since the effect of any ruling in this case could impact adjoining owners' rights of access through the marsh and to the River, this Court determined that all property owners adjacent to the claimed tidelands were entitled to notification of the civil action and that the trial could proceed only after such notification was accomplished and adjoining owners had time to respond.

Thereafter, this Court issued a written Order confirming the earlier oral Order for joinder of all adjacent property owners. Plaintiff filed a motion for reconsideration of this Order and a Notice of Appeal with the South Carolina Court of Appeals. After the Notice was filed, the Court of Appeals contacted the parties and requested that each party provide the Court of Appeals with a Memorandum addressing the issue of appealability. The parties complied with

that request. Thereafter, the Court of Appeals issued an Order filed September 26, 2011, finding that the underlying Order was interlocutory and not appealable. Plaintiff filed a Petitioner for Rehearing with the Court of Appeals on October 7, 2011. The Court of Appeals issued an Order on November 17, 2011 denying the requested rehearing. Plaintiff then filed a Petition for Writ of Certiorari with the South Carolina Supreme Court on December 14, 2011. After briefs were filed by both parties, the Supreme Court denied Plaintiff's Petition by Order dated December 20, 2012 and remitted this matter back to this Court by Remittitur dated January 15, 2013.

In the interim, an additional interested party, Nancy Deering Carey, filed a Motion to Intervene. Following the Remittitur, this Court conducted a hearing on February 14, 2013, and granted the Motion to Intervene by Order issued on March 15, 2013. Plaintiff filed a second Notice of Appeal of the March 15, 2013. The State of South Carolina and Intervenor both filed motions to dismiss arguing that the lower court's order was not immediately appealable. On August 20, 2013, the Court of Appeals granted the Motions to Dismiss to end Plaintiff's appeal. Plaintiff's counsel complied with this Court's Order and identified adjoining owners, added them to the caption, and served all adjoining owners with notice of the pending action.¹ The trial in this matter was reconvened on November 19, 2015. This Court allowed the record to remain open after November 19, 2015, for Intervenor to locate the surveyor who had made the initial attempt, on behalf of Intervenor, to examine the plats attached to the Grant and to locate the parcel depicted in those plats.² That testimony was obtained by way of a deposition conducted

¹ In addition to the State of South Carolina and Merry Land Properties, LLC, thirty-six parties were added to the action.

² Counsel for Merry Land solicited testimony from an engineer, Greg Baisch, who worked with the surveyor regarding efforts to locate the property depicted in the Grant, but Plaintiff objected to information regarding the surveyor's investigation being provided by the engineer. This court sustained the objection but determined that no party would be prejudiced by efforts to locate the surveyor and obtain his testimony by way of a deposition.

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on February 26, 2016, with counsel for all parties participating, and a copy of that deposition was provided to this Court to be included with the trial transcript.

Thereafter, on April 21st, 2016, this Court sent an electronic message to counsel, requesting a proposed Order from Defendants. On May 5th, 2016, in response to the aforesaid request for Order, Plaintiff filed a Notice of Motion and Motion pursuant to 52(b) and 59(e), SCRP, which motion was denied by Form 4 Order filed May 19th, 2016.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the trial and closely passed upon their credibility, taking into consideration the burden of persuasion of the parties, I make the following Findings of Fact.

General

1. Petitioner filed his Complaint commencing this action on or about November 6, 2007. Intervenor was granted intervention in the proceeding and filed and served its Answer and Counter Claims. The State of S. C. filed its Answer on December 14, 2007.

2. The trial in this matter initially commenced on January 31, 2011. However, this Court noted the necessity of identifying and joining additional parties who abut the disputed marsh. Following a series of appeals, these parties were joined in and notified of this action. Notice of the time, date, place of the reconvening of the trial was given to the all parties. Plaintiff, Intervenor/Defendant Merry Land Properties, LLC, and Defendant the State of South Carolina were present at the scheduled trial which commenced on November 19, 2016, and were represented by counsel.

3. All parties had an opportunity for discovery prior to reconvening this matter on November 19, 2016.

Due Diligence Investigation of Port Royal Property by Intervenor

4. Tennent Houston is one of three managing partners of Intervenor Defendant Merry Land Properties, LLC. Intervenor is a limited partnership involved in investment and development of real estate, predominantly multi-family developments.

5. Intervenor considered the Port Royal property as a rare opportunity for building a significant mixed-use development on the Beaufort River with deep water access.

6. The Port Royal property consists of 18.43 acres and two tracts - an eight-acre tract that fronts on the Beaufort River and a ten acre tract that fronts on Johnny Morrall Circle and Ribaut Road.

7. Mr. Houston testified regarding the extensive amount of due diligence that was undertaken by Intervenor prior to purchase of the Port Royal property to ensure that the property could support the mixed-use development and the planned marina. The due diligence was performed by several consultants hired by Intervenor including a local engineering firm, a real estate attorney, surveyors, commercial real estate brokers, a marine contractor and an environmental attorney who collectively performed boundary surveys, a title examination, a Phase I environmental study, geotechnical surveys, tree surveys, an ALTA survey, siting and planning for the marina as well as preparation of the permit applications required by DHEC and the Corps for marina construction.

8. Intervenor delayed closing on the Port Royal property until after the permits authorizing marina construction were received. Intervenor paid \$4.5 million dollars to purchase the frontage along the Beaufort River consisting of approximately eight acres. Intervenor purchased the interior tract, consisting of ten acres, for \$1.5 million. Intervenor believes that the higher price of the tract on the Beaufort River was indicative of the expectation of deep water access.

9. Intervenor very publicly pursued its intention to build a marina adjacent to the marsh property at issue as part of the development. Importantly, two newspaper notices and three public notices were published by DHEC's Office of Ocean and Coastal Resource Management ("OCRM") and the Charleston District, U. S. Army Corps of Engineers during the processing of Intervenor's permit applications. In addition, the Beaufort Gazette also ran a front-page article with a diagram of the proposed 80-slip marina in December, 2005, before Intervenor closed on the property.

10. The permits were ultimately issued and it was never discovered through two very public permitting processes with that the disputed marsh, over which a walkway would be constructed for access to the marina, was subject to a private claim of ownership.

11. One of the consultants hired by Intervenor, real estate attorney David Tedder, examined the titles for the parcels comprising the Port Royal property. Mr. Tedder testified on behalf of Intervenor and confirmed his examination of multiple documents to see where the parcels abutted the disputed marsh parcel, including tax records, maps, and deeds. Mr. Tedder did not see indication of any separate tax parcel encompassing the disputed marsh in the documents examined. Mr. Tedder's examination revealed no indication of private ownership of the disputed marsh.

12. All of the plats of record for properties abutting the disputed marsh, prepared by several different surveyors, referred to or described Plaintiff's claimed property as "marsh," or "marshes of the Beaufort River," or included a symbol for marsh³. None of these plats of record contained any indication that the disputed marsh might be privately owned.

³ Thirteen plats were offered with aerial photographs and/or tax map photographs obtained from Beaufort County GIS to locate the property (Def. Exs. 3, 5, 7, 9, 11, 13, 17, 19, 21, 23, 25, 27, 29). All of the plats were prepared after 1979, when Plaintiff acquired purported title to the disputed marsh.

13. Mr. Tedder identified the multiple surveyors who had prepared the plats as experienced surveyors with whom he had worked for decades.

14. Mr. Tedder did individual title searches on the waterfront parcels purchased by Intervenor but saw no indication of private ownership of the property on the eastern boundary.

15. Mr. Tedder used the Beaufort County online GIS database to research the Port Royal property and surrounding properties. At the time of Mr. Tedder's search Beaufort County GIS information did not indicate the disputed marsh as a privately owned tax parcel.

16. In addition to the GIS database, Mr. Tedder reviewed Magellan tax maps, a collection of maps utilized by surveyors that Mr. Tedder often reviewed, and saw nothing identifying the disputed marsh as a tax parcel.

17. No record identifying the disputed marsh as a tax parcel was discovered until approximately a year after the closing, when Intervenor was advised by a bank appraiser that Beaufort County's GIS data indicated a tax parcel identifier on the disputed marsh adjacent to Intervenor's property.

18. Mr. Tedder confirmed that Beaufort County upgraded the GIS system after he examined the titles of the Port Royal property parcels and apparently corrected an error by which the tax record for the disputed marsh had been previously omitted from the online database.

19. Intervenor hired Ray Cook to prepare an ALTA survey of the Port Royal properties.

20. A boundary survey generally shows property lines, easement and other details mandated by state standards. An ALTA survey is a boundary survey that includes additional information corresponding to a set of minimum standards for survey content jointly prepared and adopted by the ALTA/ACSM ("American Land Title Association" and "American Congress on

Surveying and Mapping”). These minimum standards are national standards adopted to establish a common standard for real estate transactions and include boundary lines, location of any main building including improvements, location of ancillary buildings, identification of easements, zoning setbacks, flood zones, evidence of use by other parties, water boundaries within the property, evidence of cemeteries, and names of adjoining property owners.

21. In affixing the eastern boundary of the waterfront properties Mr. Cook referenced other plats of record which depicted the boundary as the “Marshes of the Beaufort River” with no indication that the disputed marsh was privately owned. These plats were also created after 1979 and depict the disputed marsh as “Beaufort River State of South Carolina” or “Marshes of the Beaufort River.” As is evident from the ALTA survey, Gardner Exhibit 4, the parcels acquired by Merry Land include property corners, as evidenced by monuments that extend into tidelands critical area as identified by DHEC.

22. I find that multiple professionals conducted extensive due diligence on the Port Royal property before purchase without discovering Plaintiff’s claim. It was undisputed that all of the plats for properties surrounding and abutting the disputed marsh described the parcel as “marsh” or “marsh of the Beaufort River” without any reference or indication to possible private ownership.

23. At the time that Intervenor was conducting due diligence on the Port Royal property, there were two docks crossing the marsh to deep water on the north and one in a creek to the south. There were also floats at Port Royal Marina potentially within the disputed marsh. And, the Beaufort-Jasper County Water Authority had installed an effluent pipe underneath the tract.

The State Grant and Contemporaneous Plat

24. There are two historical plats at issue in this case. Both plats are free-hand drawings depicting a marsh parcel adjacent to the Beaufort River.

25. The first plat has a date on its face of April 19, 1882 and references a conveyance of 114.12 acres to Ellen Crofut. The second plat is dated "July 1891" and refers to the earlier (1882) plat. The 1891 plat is contemporaneous with the Grant upon which Plaintiff has based his claim of ownership of the disputed marsh parcel ("the Grant"), which is dated July 28, 1891. The Grant is a form Grant with filled-in blanks and is recorded in the State Archives. It references a Plat also recorded in the State Archives at Book 2, p. 16. A transcribed copy of the Grant was also recorded in the Beaufort County Public Records on August 14, 1891 in Deed Book 17 at Page 562.

26. The Grant appears to state a transfer of a 95.27 acre tract of marsh land from B.R. Tillman, Governor and Commander in Chief for the State of South Carolina to James M. Crofut, Plaintiff's predecessor in interest.

27. The Grant and plats refer and purport to convey only the 95.27 acre parcel which is outside of the chain of title for any parcel of the Port Royal property purchased by Intervenor.

28. The 1882 Plat references 114.12 acres and one parcel, although it appears that the Plat was altered with the addition of a boundary line located in the northern section of the Plat to create two parcels. The contemporaneous Plat of 1891 shows that 114.12 acres as divided between Sea Island Chemical Works (18.85 acres) and I. M. Crofut (95.27 acres.) The depiction of the parcel on Beaufort County GIS, as it appears at the time of the trial, is consistent with the 1882 Plat depicting 114.12 acres but indicates the acreage as 95.27 acres.

29. Both plats show bearings and distances. The bearings and distances on the copy of the 1881 plat are difficult to decipher. The bearings and distances on the copy of the 1891 plat are more visible but not entirely clear.

30. The Grant dated July 28, 1891, describes a tract of land of 95.27 acres "lying between high and low water marks" of the Beaufort River.

31. Based on the review of Grant and plats and several probate files referred to in the chain of title, Plaintiff's title expert, Chester C. Williams, concluded that Plaintiff held a 79.1667 percent interest in the 95.27 acre disputed marsh, with four of Plaintiff's family members holding the remaining interests. After Mr. Williams prepared four quitclaim deeds transferring the family members' interests to Plaintiff, Mr. Williams opined that Plaintiff held a hundred percent interest in the property.

32. Mr. Williams agreed that there was no reference in the Grant or plats to indicate conveyance to Plaintiff of any property above the mean high water mark and that the plats and deeds concerning the disputed marsh were outside the chain of title of the Port Royal property.

33. The Grant originates a chain of title extending to the conveyance to the Plaintiff in 1979, and later quit-claim conveyances resulting in Plaintiff acquiring a 100% ownership interest in the disputed marsh. The Grant is contained in a form utilized by the State of South Carolina and bears the signature of the Governor and other officials. Defendant State of South Carolina acknowledged the validity of the Grant. Intervenor challenged the underlying authority for issuance of the Grant, claiming that marsh lands which are held in trust for the public are not vacant lands as contemplated in the 1894 statute which is cited on the face of the Grant. I find that the Grant was a valid exercise of the State's authority under the statutes of 1894 and specifically Article 1 of Chapter VI which authorized the sale of vacant lands.

Deficiencies in the Contemporaneous Plat and 1882 Plat

34. The Grant from Governor Tillman specifically references the 1891 Plat – “Having such shape form and marks as are represented by a Plat of said land on file in the office of the Secretary of State in Book 2 of Public Lands Plats page 16.”

35. Intervenor presented the testimony of Jim Gardner, a professional surveyor licensed in the states of Georgia and South Carolina who was employed by Intervenor’s professional engineering firm, Ward Edwards Engineering, from 2003-2008. Mr. Gardner was offered as an expert surveyor without objection from Plaintiff’s attorney to qualifications, only to relevancy and that the Court allowed testimony to be taken by way of post-trial deposition.

36. In 2007 Mr. Gardner was initially asked to locate the marsh parcel as depicted on the 1891 plat. He was also provided a copy of the earlier (1882) plat. Mr. Gardner testified to his belief that the 1891 plat was a copy of 1882 plat.

37. Mr. Gardner asked a CAD⁴ technician (“CAD tech”) employed by Ward Edwards to enter the calls, or bearings and distances, indicated on the 1891 plat.

38. Mr. Gardner customarily relied on CAD techs to do plats and drawings when employed with Ward Edwards.

39. The CAD tech referred to the 1891 plat for bearings and distances but was unable to read all of the “calls” even after using a magnifying glass and creating large copies of the plat in an attempt to better see the handwriting. The CAD tech also created enlarged copies of the 1882 plat but still was unable to discern the calls. As a result of this initial review, the CAD tech was only able to create a drawing of the parcel lacking any boundary at the top (northern end). (Gardner Ex. 3) Thereafter, Mr. Gardner personally reviewed the documents with the CAD tech.

⁴Computer aided drafting.

40. With regard to whether the description of “between high and low water” in the Grant or the bearings and distances on the plats controlled the location of the disputed marsh, Mr. Gardner relied on the bearings and distances on the plats. According to Mr. Gardner, the specific acreage calculation of 95.27 comes from the “original surveyor thinking that he could read his own writings, bearings, and distances, and do his calculations, and know what was inside the area he surveyed.”

41. Importantly, the Grant is stated in very general terms as a tract of land lying “between high and low water marks of the Beaufort River” with only the accompanying plat to indicate where the Grant may lie. While it is evident that the State, by way of the Grant, intended to convey public trust tidelands, the location of those tidelands is dependent on the ability to re-create the contemporaneous plat. This Court recognizes that the land conveyed by the Grant lies in the vicinity of the area but, as is discussed below, cannot determine the specific location of the Grant.

42. Mr. Gardner identified several shortcomings on the 1891 plat that he believes caused the inability to “close” the survey. These included:

- a. Difficulty in deciphering bearing and distance on the left side of the plat next to the “95 27/100 acres” label;
- b. Probable inaccurate depictions of boundary line length shown in call [on plat] for 1.55 chains, which would only be a little over 100 feet;
- c. Two illegible distances on the plat [left side or western border sections shared with high ground parcels.] This renders the bearings and distances on southern half of the plat as insufficient to determine where the southern half of the actual parcel is located;

- d. Line between parcels labeled "Sea Island Chemical Works" and "95 27/100 acres I.M. Crofut" drawn to connect the two corners but lacking a bearing and distance;
- e. Illegible bearing and distance on southernmost boundary of parcel.

43. Closure of a survey is achieved when a surveyor is able to identify a point of beginning and then, using information included on the survey – calls and identified monuments – establish length and direction of the boundary lines and location of the corners around the parcel to return back to the point of beginning.⁵ This Grant at issue in this case contains only a general description of the parcel lacking any calls but references the 1891 Plat as identifying the parcel being transferred.

44. Both plats show a line drawn that bisects the disputed marsh parcel. The 1891 plat shows acreage calls on the drawing for the parcels created above and below the line: a smaller parcel labeled "Sea Island Chemical Works 18 85/100 acres" and a larger parcel labeled "J.M. Crofut 95 27/100 acres." The 1882 plat does not show any acreage call on the drawing, but refers to "... a tract of marshland containing 114 12/100 acres."

45. The deficiencies in the 1891 plat result in uncertainty as to the eastern boundary of the disputed marsh. Mr. Gardner testified that it is difficult to align the eastern boundary of the Crofut parcel with the adjoining parcels that are depicted on the plat. Moreover, he noted on the ALTA survey prepared by Ward Edwards that monuments were discovered in the marsh indicating the corners of the parcels acquired by Intervenor, not the corners of the Hoyler parcel.

⁵ "Point of Beginning" refers to a well -defined, readily located, and permanent point or monument that is the starting point on a parcel for a metes and bounds description, and also is the final point of such description. S. C. Code Ann. Reg. 49-430(C).

46. Neither plat is labeled with bearing or distance on the bisecting line to indicate direction of the line or distance to go. The 1891 plat also lacks any indication of direction or distance to go from the point lying to the left of this line labeled as "north 30."

47. Mr. Gardner stated that South Carolina requires mathematical closure of surveys.⁶ He stated further "[i]f I can't do a mathematical closure on a survey plat, I can't tell how good the survey is or it isn't." Additionally Gardner noted that if any "call" on the 1892 plat is not discernable it impacts location of the entire tract, not just in the vicinity of the "call." This rendered the southern boundary of the disputed marsh as ambiguous, as with the northern boundary. The southern boundary is the area proximate to Intervenor's parcels.

48. In 2007, Mr. Gardner relied on the information on the plat and not the reference in the Grant to "high and low water mark." He confirmed that "high and low water" mean something different than "mean high and mean low water."

49. Due to the shortcomings Mr. Gardner identified on the 1891 plat and the lack of bearings or distance to locate the bisecting line, Mr. Gardner was unable to mathematically close the survey and described the process of locating the northern boundary line as "forced closure."

50. If a survey cannot be mathematically closed based on the calls it prevents the parcel from being locatable on the ground, or, in other words, leaves the parcel "kind of floating out there." A single indiscernible bearing and distance on a survey is enough to limit the directional accuracy. The inaccurate determination of number of chains corrupts or "breaks" the survey because the chain measurements cannot be continued to see if the survey will close.

⁶ S. C. Code Ann. Reg. 49-430 defines Boundary Survey: "A survey, the primary purpose of which may include, but is not limited to, the determining of the perimeters of a parcel or tract of land by establishing or reestablishing corners, monuments, and boundary lines for the purpose of describing, or platting or dividing the parcel." In accordance with R. 49-440 the tolerable closure error is within hundredths of a foot.

51. Intervenor also presented its surveyor of record, Ray Cook, at the trial. Mr. Cook qualified as an expert in land surveying based on his education, experience, and training without any objection from Plaintiff.

52. Mr. Cook confirmed that he reviewed the title package that he was provided for the Port Royal properties, including other plats of record. He used all the referenced plats to create a boundary survey.

53. Mr. Cook explained that plats are typically used to review boundaries, bearings, distances, and surrounding information such as roads and rights of way to establish the boundaries of a parcel.

54. Mr. Cook confirmed that nothing in the plats he reviewed for Intervenor's properties indicated private ownership of the disputed marsh.

55. Mr. Cook also noted deficiencies in the 1882 and 1891 plats that he believed affected any ability to replicate the plats into a survey, including the lack of a graphic scale and a point of beginning or commencement to locate the property.

56. Mr. Cook testified that these deficiencies affect the ability for the boundaries to be replicated. In addition, where bearings are not accurate to a certain degree, the property may not close. Here, even if accurate bearings had been provided, Mr. Cook said that without a point of beginning, the disputed marsh parcel could not be located on the ground.

Plaintiff's Re-Created Plat

57. Plaintiff's surveyor, Lorrick Fanning, testified as an expert at the trial. Plaintiff retained Mr. Fanning in 2010 to review the Grant and plats and provide an opinion regarding identification of the area referenced in the Grant. Mr. Fanning recreated the boundaries of the parcel conveyed to I. M Crofut as shown on Plaintiff's Exhibit 4.

58. In recreating the boundaries of the disputed marsh Fanning relied extensively on the 1882 plat, and not the contemporaneous plat of 1891. Fanning established the eastern and western boundaries of the marsh parcel by utilizing the location of mean low water and mean high water, not the bearings and distances shown on the 1882 and 1891 plats.

59. Mr. Fanning testified that he had no trouble deciphering the bearings and distances on the 1882 plat, but apparently did not utilize those bearings and distances to determine the eastern or western boundaries of the disputed marsh.

60. Fanning testified that both the 1891 and 1882 Plats have a starting point for the northern boundary line and a specific acreage call that can be determined mathematically and then connect to the mean high water mark on the side. This contradicts Intervenor's surveyor Gardner's testimony who indicated that there were no bearing and distances for the corners of the northern boundary line and Gardner did not consider the information along the northeastern corner to be the starting point for the northern boundary line. Regardless of whether there is a starting point for the northern boundary line, Mr. Fanning relied on acreage to establish the northern boundary and acknowledged it could be considered a "sliding" boundary.⁷

61. Mr. Fanning acknowledged the existence of tributaries traversing the disputed marsh, but included them as part of the conveyance to Hoyler. He located mean high water and mean low water along the eastern and western boundary, but not in the interior of the disputed marsh⁸. Mr. Fanning also included a "shell rake" which is a familiar feature located in the

⁷ Fanning located the northern boundary line by calculating acreage above and below the line, getting as close as possible to 18.85 and 95.27 acres.

⁸ Intervenor presented the testimony of its engineer, Greg Baisch, who identified photographs of the tributaries that traverse the disputed marsh and that are adjacent to Intervenor's property. According to Mr. Baisch, who has navigated these tributaries in a boat, there is water in sections of these tributaries at or immediately before low tide.

disputed marsh near the Beaufort River as part of the conveyance to Hoyler, although he acknowledged that the shell rake extended above mean high water.

62. Mr. Fanning determined the southern boundary of the parcel using a bearing and distance that he asserted defined the starting point for the boundary.

63. Mr. Fanning considers the mean high and mean low water marks natural monuments. He acknowledged that as natural monuments the mean high and mean low water marks change in location over time due to natural causes such as erosion, accretion, hurricanes, and human activity including the dumping of shells. As such, the bearings and distances on the plat representing where the lines were in the 1800s are different than where the lines on his re-creation plat represent them being currently.

64. Using the current mean high and mean low water marks, a sliding northern boundary, and a fixed southern boundary, Mr. Fanning created an 89.06 acre parcel and depicted it on his re-creation plat in 2010 that he believes supports Plaintiff's ownership of the 95.27 acre parcel because it has a similar geometric shape to the parcel depicted on the 1882 plat. Mr. Fanning could not determine the boundaries of the disputed marsh by reference to bearings and distances only.

65. The parcel as determined by Mr. Fanning and shown on the 2010 plat is 89.06 acres, approximately six acres "short of" (*i.e.*, smaller than) the marsh parcel Plaintiff has claimed to own.

66. While Mr. Fanning defined a plat as a metes and bounds description of a piece of property and confirmed that a plat must be defined on all sides, he ultimately acknowledged that he arbitrarily extended Plaintiff's claim to acreage at the southern end of the property, proximate

to the existing Port Royal Marina, in order to portray a parcel of comparable acreage to that stated in the Grant.

67. Mr. Fanning admitted that the southern boundary depicted on his re-creation plat does not agree with parcel information in Beaufort County GIS. Beaufort County GIS does not extend the southern boundary to include a dock that Mr. Fanning has depicted as within Plaintiff's claimed marsh property.

68. Mr. Fanning also acknowledged that Beaufort County GIS does not show a separate parcel that is shown as conveyed out to Sea Island Chemical Works or some other owner, which resulted in reducing the conveyance to Crofut to 95.27 acres. In fact, Beaufort County GIS shows the combined parcels as 95.27 acres and not 114.12 acres as depicted on the 1882 plat.

69. Mr. Fanning's opinion is that Plaintiff owns the parcel depicted in his re-creation plat including the multiple water courses and tributaries that traverse the disputed marsh.

70. The multiple water courses and tributaries comprise acres of stream beds. The acreage of these tributaries was included by Mr. Fanning in estimating the area of re-creation plat. It is further recognized that each water course and tributary may have its own mean high and low water marks that could constitute natural boundaries.

71. I find that Plaintiff's efforts to re-create the 1882 plat and the conveyance to Crofut are unreliable, particularly in the area of concern, adjacent to the upland property acquired by Intervenor. Plaintiff relies on natural monuments, as they are located today, utilizing mean high and mean low water to reflect high and low water as stated in the Grant. However, the plats do not rely on natural monuments and instead articulate specific directions in express bearings and distances. Plaintiff's claim is based on a moving boundary. I find that the express reference

to the 1891 plat in the Grant, and the specificity of the plat and calculated acreage, override the use of mean high water and mean low water to fix the location of Plaintiff's property.

72. I consider Mr. Gardner's testimony credible regarding the difficulties in locating and creating a finite parcel of property with any precision based on copies of hand-drawn plats with bearings and distances. I acknowledge that there may be difficulty in discerning the handwritten bearings and distances on the plats. And, while Mr. Fanning testified that he could read the bearings and distances, his testimony is assigned little weight since the only bearings and distances he utilized to actually recreate the plat were located near the northern boundary and along the southern boundary. He relied on mean high and mean low water mark for the eastern and western boundaries, and extrapolated the north-westerly property corner.

73. Additionally, I find that Plaintiff failed to demonstrate by a preponderance of the evidence that the recreated plat prepared by Mr. Fanning is an accurate representation of the disputed marsh. Plaintiff's inclusion of potentially acres of stream bed prevents the Court from determining the location of the Grant. Plaintiff's inclusion of the notable shell rake also effects the Court's determination. The 1891 plat is incorporated as part of the Grant, as it is referenced in the Grant, which creates ambiguity between the Grant and the plat for purposes of recreating the property. That ambiguity is amplified by the inclusion of multiple streams which are braided throughout the disputed marsh. Moreover, the use of the sliding northern boundary calls into question the location of Plaintiff's property vis-à-vis Intervenor's property.

74. While the Grant is a valid conveyance, in accordance with the precedent regarding conveyance of public trust tidelands the Grant is strictly construed against the Grantee. Here the 1891 plat is part of the Grant by reference. In strictly construing the Grant, this Court cannot determine the location of the parcel which is the subject of the conveyance. This Court

assigns weight to the testimony of two licensed surveyors who testified as Intervenor's experts regarding their inability to locate the parcel depicted on the 1891 plat on the ground. This Court rejects Plaintiff's expert's attempt to locate the parcel based on different eastern and western boundaries than shown on the 1891 plat and a sliding northern boundary. Moreover, in attempting to recreate the acreage shown in the 1891 plat of 95.27 Plaintiff included the beds of multiple streams traversing the disputed marsh.

Intervenor's Claims

75. Intervenor raised issues of laches and reliance in support of its position that the Plaintiff did not have title to the disputed marsh. Intervenor noted the inaction on Plaintiff's part to assert title since 1979 and the lack of available information regarding Plaintiff's claim. Since the findings regarding the insufficiency of the 1891 plat are dispositive of this case this Court does not need to reach or rule on the additional defenses and claims raised by Intervenor.

CONCLUSIONS OF LAW

The Court concludes the following as a matter of law:

1. This Court has jurisdiction over this case pursuant to S.C. Code Ann. § 48-39-220.
2. In reviewing this matter, the Court serves as the finder of fact. "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." Dixon v. Dixon, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999).
3. With regard to expert testimony, it is generally recognized that "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence" and that "the triers of the facts cannot, and are not required to, arbitrarily or lightly

disregard, or capriciously reject, the testimony of experts or skilled witnesses, and make an unsupported finding contrary to the opinion.” 32A C.J.S. Evidence § 727, at 82-83 (1996). However, the trier of fact may give an expert’s testimony the weight he or she determines it deserves, Florence County Dep’t of Soc. Servs. v. Ward, 310 S.C. 69, 72-73, 425 S.E.2d 61, 63 (Ct. App. 1992), and may accept the testimony of one expert over that of another, S.C. Cable Television Ass’n v. S. Bell Te. & Tel. Co., 308 S.C. 216, 417 S.E.2d 586 (1992). In weighing such expert testimony, the general principles for determining whether evidence warrants a finding remain applicable; accordingly, “an expert’s opinion which is based on guess, surmise, or conjecture has little evidentiary value, and expert opinion evidence lacks probative force where the conclusions are contingent, speculative, or merely possible.” 32A C.J.S. Evidence § 730, at 87 (1996).

4. South Carolina law charges property owners with constructive notice of instruments that are recorded in their chain of title. Binkley v. Rabon Creek Watershed Conserv., 558 S.E.2d 902, 909 (S.C. App.2001). “To afford notice of a provision in a recorded instrument, the language must be so intelligible and significant that it would naturally raise a well-grounded suspicion in the mind of a reasonably prudent person or a person of ordinary diligence and understanding, sufficient to suggest an inquiry that would lead to a knowledge of the facts.” Id.

5. A party will be charged by operation of law with knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed. However, “a party is not held to have notice of [a] matter which lies beyond that range of inquiry and which that diligence might not disclose.” Spence v. Spence, 628 S.E.2d 869, 876 (2006).

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6. “[T]he State holds presumptive title to land below the high water mark.” McQueen v. S.C. Coastal Council, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003). When property is bounded by a tidal navigable waterway “the boundary line is the high water mark, in the absence of more specific language showing that it was intended to go below the high water mark, and the portion between high and low water mark remains in the State in trust for the benefit of the public.” State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972).

7. “The State may, however, grant private individuals an ownership interest in tidelands.” Lowcountry Open Land Trust v. State of South Carolina and James Atkins, 347 S.C. 96, 102, 552 S.E.2d 778, 781 (2001). To establish ownership of tidelands or marshlands, a claimant must show (1) the claimant's predecessors in title possessed a valid grant, and (2) the grant's language was sufficient to convey title to land below the high water mark. Id. at 103, 552 S.E.2d at 782. “A deed or grant by [the State] is construed strictly in favor of the State and general public and against the grantee.” Hardee, 259 S.C. at 539, 193 S.E.2d at 499. Here the Grant evinces clear evidence of intent to convey marshlands located somewhere between high and low water on the Beaufort River, and this Court believes the marsh that was the subject of the Grant is located in the vicinity of the Port Royal property, but the precise boundaries, particularly adjacent to Intervenor's property, cannot be determined based in the insufficiencies of the 1891 plat.

8. South Carolina law defines a plat as an accurate graphical representation ... report of a survey made by a surveyor ... S. C. Reg. 49-450. The law distinguishes “surveys” from “maps,” which are prepared partially or entirely from reference or source data, such as compiled maps. S. C. Reg. 49-460(A)(1)(y). A “Compiled map” is defined as a map drawn from previously recorded or unrecorded documents, photographic material or tax maps which

represent the general configuration of the parcel where partial or no actual surveying has been performed by the land surveyor preparing the map. S. C. Reg. 49-430(C)(17). The regulations deem that maps are not equivalent to land surveys and are unsuitable for deeding of property or recordation. S. C. Reg. 49-460(A)(1)(y).

9. In South Carolina, where a deed describes land as it is shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed. Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (S.C.1979), *citing* Carolina Land Co., Inc. v. Bland, 265 S.C. 98, 217 S.E.2d 16 (1975); Lynch v. Lynch, 236 S.C. 612, 115 S.E.2d 301 (1960).

10. South Carolina courts have held plats to be sufficient to validate a claim of tidelands where the plats were accurately locatable on the ground. In Hobonny, the Supreme Court of South Carolina upheld the lower court's finding of valid title based on two plats that were "carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision." Id. at 398.

11. Where the plats are accurately relocatable on the ground the South Carolina Supreme Court has validated title because "the specificity of the attached plats outweigh, in our judgment, the general terms of the description in the grants in determining the intent of the grantor." Id. at 395. While I recognize that this matter may be in a different posture than certain precedent, as intent to convey lands between high and low water was clearly expressed here, I can't grant Plaintiff the requested relief when the location of the Grant as relates to Intervenor's property cannot be established.

12. "The rules for determining disputed boundaries are not inflexible, but are subject to modification depending upon the particular facts of each case." Williams v. Moore, 400 S.C.

90, 103 (Ct. App.2012), *citing* Bodiford v. Spanish Oak Farms, Inc., 317 S.C. 539, 543, n. 1, 455 S.E.2d 194, 197, n. 1 (Ct.App.1995) (*citing* Garrett v. Locke, 309 S.C. 94, 98, 419 S.E.2d 842, 845 (Ct.App.1992)). “When determining boundaries resort is generally had first to natural boundaries, next to artificial monuments, then to adjacent boundaries, and last to courses and distances.” Id. (*citing* Garrett v. Locke, 309 S.C. at 98, 419 S.E.2d at 845 (Ct.App.1992)). “This rule, however, merely indicates the weight generally given to each type of evidence of location.” Id. (*citing* Southern Realty & Inv. Co. v. Keenan, 99 S.C. 200, 207-209, 83 S.E. 39, 41-42 (1914)). “The rule does not provide an order of admissibility, such that evidence of artificial boundaries is admissible only if there is no evidence of natural boundaries.” Id. “The facts of a case may therefore require that an inferior means of location be preferred over a higher means of location.” Id. (*see also* Fulwood v. Graham, 30 S.C.L. (1 Rich.) 491, 497 (1845)).

13. Plaintiff’s surveyor erred in replicating the plat by relying on “Mean High Water” and “Mean Low Water” when the Grant only refers to “high” and “low” water. The Grant does not identify “high” and “low” water as the boundaries of parcel being transferred but, rather, states only that the parcel is “... lying between high and low water mark. ... [h]aving such shape, form and marks as represented by a Plat of said land on file in Book 2 of Public Land Plats, Page 16.” The contemporaneous 1891 Plat does not use the terms “high” and “low” water or “mean high” and “mean low” water but instead, references a surveyed boundary. Thus, the surveyor intended to depict a 95 27/100 acre parcel having been mathematically determined and, therefore, specific boundaries indicated by the calls. Hobonny Club v. McEachern, 272 S. C. 392, 252 S. E. 2d 133 (1979).

14. Plaintiff’s surveyor erred in replicating the plat by relying on natural monuments and acreage to recreate a parcel of a size comparable to the acreage identified in the Grant and

the 1891 plat. Since the plat references a surveyed boundary, replication of the plat should, in the first instance, be based on the surveyed boundary instead of a natural boundary. The facts of this case support use of the courses and distances to replicate the disputed marsh parcel in relationship to Intervenor's parcel. Since Plaintiff's surveyor could not locate the parcel and accurately relocate the boundaries on the ground without reference to other deeds, plats, maps, tax maps, GIS information and drawings needed because he was unable to get the plat to close mathematically, he can only have created a "map" and not a plat suitable for deeding of the property at issue.

15. Finally, in concluding that Plaintiff owns the 95.27 acre parcel shown on the 1891 plat, Plaintiff's surveyor ignored the presence of multiple tributaries running through the disputed marsh, which all may have mean low water and mean high water marks that could constitute "natural boundaries." In order to calculate acreage to depict in the recreated plat that agreed with the Purported Grant, Plaintiff's surveyor simply included the acreage of the tributaries as part of the acreage purportedly conveyed to Plaintiff. Plaintiff then attached this recreated plat, ultimately claiming ownership of tributaries, to various recorded settlements and easements that he executed with owners of the adjacent upland property.

16. Plaintiff's assertion that the waterways traversing the marsh were conveyed because of language in the deed referring to "watercourses" was rejected as indicative of an intent to include tidelands in State v. Fain, 259 S.E.2d 606, 609, n. 1, 273 S.C. 748, 754 (1979) and by Cape Romain Land & Imp. Co. v. Georgia-Carolina Canning Co., 146 S.E. 434, 440 (S.C.1928) as cited in Fain. As stated in Heyward, *supra*:

If the plaintiff can trace title back to a grant from the state to land covered by tidal, though not navigable, waters, the state would be estopped by its grant. The principal, however, is different when the land is covered by navigable waters, as shown by Mr. Justice

McGowan in *State v. Pacific Guano Co.*, [22 S.C. 50, 84 (1884)] to wit: "The absolute rule heretofore referred to, limiting landowners bounded by such streams to the high-water mark, unless altered by law or modified by custom, accords with the view that the beds of such channels below low-water mark are not held by the state simply as vacant lands, subject to grant to settlers in the usual way through the land office. There seems to be no doubt, however, that the state, as such trustee, has the power to dispose of these beds as she may think best for citizens; but, not being, as it seems to us, subject to grant in the usual form, under the provisions of the statute regulating vacant lands, it would seem to follow that, in order to give effect to an alienation which the state might undertake to make, it would be necessary to have a special act of the legislature expressing in terms and formally such intention."

In accordance with this authority, the Grant could not, and did not, convey the stream beds.

17. It is well-settled in S. C. that "all navigable waters shall forever remain public highways free to the citizens of the State and the United States." S.C. Const. art. 14 Sec. 4 (1976); *State v. Head*, 330 S.C. 79, 498 S.E.2d 389 (Ct.App.1997). And, "[a]ll streams which have been rendered or can be rendered capable of being navigated ... and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to the citizens of the United States ..." S.C. Code Ann. § 49-1-10. Yet, without the acreage of the tributaries, which are clearly public waters held in trust by the State, particularly located in the southern portion of the tract abutting Intervenor's property, Plaintiff's surveyor cannot replicate the acreage of the Grant.

CONCLUSION

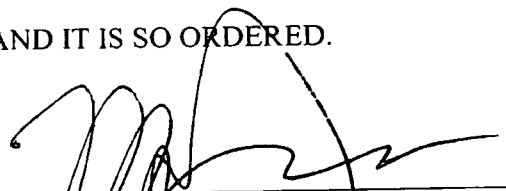
Upon hearing all of the testimony and reviewing the evidence, this Court finds and concludes that:

1. The Tillman Grant to Crofut was legally permissible and, although was an alienation of the public trust land, was allowed because the intent to grant tidelands between high water and low water was clearly expressed.

2. However, the boundaries of the grant remain uncertain. The length and placement of the high-ground (western) boundary is of paramount importance and this Court finds that the Plaintiff can prove no more than a rough approximation. The granting plat is nothing more than a hand-drawn sketch. This Court accepts the testimony that the survey cannot "close" or be accurately placed and is therefore unacceptable. An accurate description of a grant of property between high and low water in an area so interwoven with navigable watercourses and dozens of small marshy knolls must have more detail and accuracy than is given here. This Court would be required to resort to guesswork to accurately find the boundaries of the claimed property.

IT IS THEREFORE ORDERED THAT because of the vague and incomplete survey and description, Plaintiff's request to declare title to tidelands is, hereby, DENIED. With regard to other matters raised by Intervenor's as defenses to Plaintiff's claims, this Court finds that it is not necessary to consider or rule on the issues of estoppel and laches as the Plaintiff was unable to demonstrate by a preponderance of the evidence that the property conveyed by the Grant can be located.

AND IT IS SO ORDERED.



The Honorable Marvin H. Dukes, III
Beaufort County Master-in-Equity and
Special Circuit Court Judge

27 day of May, 2016
Beaufort, South Carolina