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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APR 26 2017

SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity

Civil Action No. 2007-CP-07-3212
Appellate Case No.: 2016-001277

H. Marshall Hoyler.....Appellant,

v.

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 Ass., Shirley Anne Moyer, Barry D. Malphrus, Garry D. Malphrus, Donnie Malphrus, Rita Brown, Houston Family Partnership, Joan Taylor Trustee, Michael Bull, Nancy Bull, Marny H. VonHarten, 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.....Respondents.

RECORD ON APPEAL
Volume One

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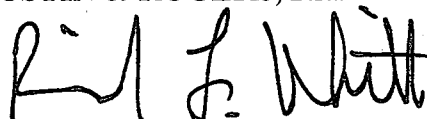
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AUSTIN & ROGERS, P.A.

By:



Richard L. Whitt, S.C. Bar #: 62895,
Jefferson D. Griffith, III, S.C. Bar # 2299,
508 Hampton Street, Suite 300
P.O. Box 15907
Columbia, South Carolina 29211
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Attorneys for Appellant.

March 27, 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT)

CASE NO.: 2007-CP-07-3212

H. MARSHALL HOYLER,)

Plaintiff,)

v.)

THE STATE OF SOUTH CAROLINA,)

Defendant.)

ORDER
GRANTING INTERVENTION BY
MERRY LAND PROPERTIES, LLC

2008 FEB 26 PM 1:03
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

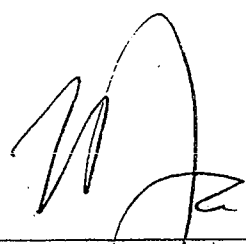
This matter is before me as evidenced by the signatures of counsel below, for entry of an Order Granting Intervention by Merry Land Properties, LLC.

This is an action to quiet title in approximately 95 acres of marshland adjacent to the Beaufort River in Beaufort County, South Carolina, in accordance with S.C. Code Ann. §48-39-220 (Supp. 2006). Merry Land Properties, LLC, filed a Motion to Intervene in these proceedings on November 26, 2007. Prior to a hearing on its Motion, this Court was advised that Plaintiff H. Marshall Hoyler and the State of South Carolina do not object to intervention but reserve any claims and defenses that they may have as to Merry Land Properties, LLC.

THEREFORE, IT IS ORDERED that Merry Land Properties, LLC, is hereby granted leave to intervene as a party in this action, and the caption shall be modified to reflect the participation of Merry Land Properties, LLC.

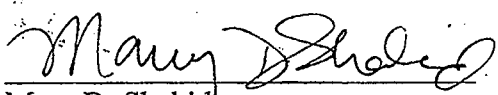
AND IT IS SO ORDERED.

[SIGNATURE PAGE FOLLOWS]

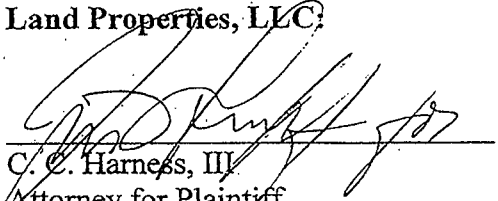

MARVIN H. DUKES, III
MASTER-IN-EQUITY
BEAUFORT COUNTY

2/22, 2008

I so move:


Mary D. Shahid
Attorney for Intervenor
Merry Land Properties, LLC

We do not object to this Motion and reserve any claims or defenses we have as to Merry Land Properties, LLC:


C. C. Harness, III
Attorney for Plaintiff
H. Marshall Hoyler

J. Emory Smith, Jr.
Attorney for Defendant
The State of South Carolina

MARVIN H. DUKES, III
MASTER-IN-EQUITY
BEAUFORT COUNTY

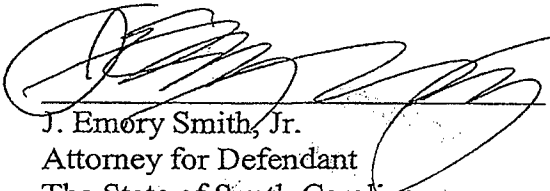
_____, 2008

I so move:

Mary D. Shahid
Attorney for Intervenor
Merry Land Properties, LLC

We do not object to this Motion and reserve any claims or defenses we have as to Merry Land Properties, LLC:

C. C. Harness, III
Attorney for Plaintiff
H. Marshall Hoyler



J. Emory Smith, Jr.
Attorney for Defendant
The State of South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

H. MARSHALL HOYLER,

Plaintiff,

vs.

THE STATE OF SOUTH CAROLINA,

Defendant,

MERRY LAND PROPERTIES, LLC,

Defendant/Intervenor.

IN THE COURT OF COMMON PLEAS

CASE NO.:2007-CP-07-3212

ORDER FOR JOINDER OF PARTIES

11-MAR-17 AM 10:48
JERRI ANN ROSE
BEAUFORT COUNTY, S.C.
CLERK OF COURT

This matter came before me on January 31, 2011, for hearing on the merits of this non-jury action brought by Plaintiff in accordance with S. C. Code Sec. 48-39-220 to determine Plaintiff's legal interest in tidelands situate adjacent to the Beaufort River, Port Royal, Beaufort County, S. C.

BACKGROUND

Plaintiff claims fee simple ownership of a parcel of land located between the mean high water and mean low water marks of the Beaufort River, consisting of approximately 90 acres of lands below mean high water. Plaintiff's claim of ownership allegedly originates with a Grant from the State of South Carolina to Plaintiff's predecessor in title, J. M. Crofut, dated July, 1891, for "95.27 acres of Marsh Land on Beaufort River near the Town of Beaufort."

"The State of South Carolina holds presumptive title to all tidelands within its borders, which are held in trust for the benefit of the public. See *Coburg Dairy, Inc. v. Lesser*, 318 S. C. 510, 458 S. E. 2d 547 (1995); *Hobonney Club, Inc. v. McEachern*, 272 S. C. 392, 252 S.E. 2d

133 (1979). The State may, however, grant private individuals an ownership interest in tidelands. ... A grant from the State purporting to vest title to tidelands in a private party is construed strictly in favor of the government and against the grantee. *See State v. Pacific Guano, Co.*, 22 S. C. 50 (1884).” Lowcountry Open Land Trust v. State and James A. Atkins, 347 S. C. 96, 102-103, 552 S. E. 2d 778, 781-782 (2001).

S. C. Code Sec. 48-39-220 provides a statutory remedy to apply the legal presumptions set forth above and to determine the validity of claims of ownership of tidelands. Actions pursuant to this Section are brought against the State of South Carolina. Here, Merry Land Properties, LLC, (“Merry Land”) intervened based on ownership of upland parcels that abut the marshes of the Beaufort River. Merry Land is in possession of State and Federal permits authorizing construction of a community marina over and through the marsh property claimed by Plaintiff. These permits were obtained prior to Merry Land learning of Plaintiff’s claim of ownership of the marshes abutting the Beaufort River.

THE INTERESTS OF JUSTICE ARE SERVED BY PERMISSIVE JOINDER

At the commencement of the hearing, the parties apprised the Court of the existence of a survey, prepared by Plaintiff’s surveyor, which purportedly re-creates the boundaries of the State Grant. That survey revealed the existence of 32 parcels, including the two parcels owned by Merry Land, that abut the marsh parcel that Plaintiff claims. Plaintiff’s surveyor has identified the owner of each of the parcels abutting the marsh parcel. In addition, the survey revealed the existence of three docks, constructed by abutting property owners whose interests in waterfront access may be affected. Plaintiff’s counsel reported that Plaintiff was unaware of these possible encroachments until he obtained this survey.

Following this discussion, this Court terminated the hearing and discussed with the parties the Court's belief as to the necessity of joining the property owners of the 30 parcels, in addition to the parcels owned by Merry Land, that abut the property that is the subject of this action. It would appear, in accordance with SCRCR Rule 20, that these property owners "may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action."

Here, should this Court declare that the State Grant to J. M. Crofut, Plaintiff's predecessor in title, is a valid conveyance of tidelands in accordance with the applicable case law and legal standards, then the property owned by Merry Land, and Merry Land's ability to construct a community marina, will not be the only property and property rights impacted by the Court's decision. At a minimum, it is possible that the seaward boundary of the 30 additional parcels could change as a result of Plaintiff's re-creation of the boundaries of the Crofut Grant. But, of even greater significance, the owners of the 30 additional parcels could face actions for trespass, based on the construction of docks, or could lose the right of access to the Beaufort River upon a declaration that the Crofut Grant is valid.

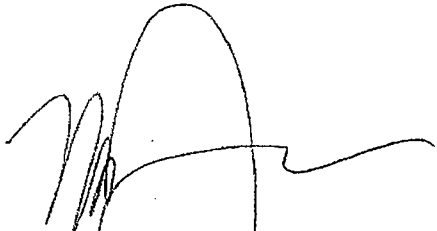
Therefore, this Court finds that all property owners abutting the marsh acreage that is the subject of this action shall be joined as Defendants in this action, and shall be served with copies of the Summons and Complaint in this action. To expedite this, the Court attaches as Exhibit "A" to this Order a chart prepared by Merry Land's counsel which identifies all abutting owners and provides contact information for these property owners.

CONCLUSION

It is, therefore, ORDERED, that the parties identified on Exhibit "A" who have not already intervened in this action or been named as parties to this action shall be served a copy of the Summons and Complaint in this civil action, and joined in this action in accordance with SCRCP Rule 20. Such service of process shall be undertaken by Plaintiff, and shall be accomplished within sixty days of the date of this Order.

It is further ORDERED that the trial in this civil action shall recommence after all property owners identified in Exhibit A have been served with the pleadings, and have had an opportunity to respond to the pleadings. Provided, however, that hearing in this matter shall not reconvene before August 1, 2011, unless all parties are in agreement regarding reconvening before August 1, 2011.

AND IT IS SO ORDERED.



MARVIN H. DUKES, III
MASTER-IN-EQUITY
BEAUFORT COUNTY

3/14, 2011

EXHIBIT

A

MERRY LAND PROPERTIES PROPERTY OWNER LISTING					
	Approx. frontage	Parcel I.D.	Name/Address	Deed Book/Page	Phone No.
1.	400' (already has a dock?)	R120-007-000-0357	Sherbert T. Ray 144 Spanish Point Drive Beaufort SC	2878/1102	
2.	300'	R120-007-000-0359	Ray	2878/1102	
3.	75'	R120-007-000-0360	Ray	Same	
4.	existing dock	R120-007-000-0361	Spanish Point Personal Residence, LLC 152 Spanish Point Drive	2662/6	
5.	100'	R120-007-000-0362	Samai Vranuch Supan 154 Spanish Point Drive	397/1285	843/525-6569
6.	100'	R120-007-000-0363	Larry F. Hamilton 156 Spanish Point Drive	2209/1702	843/379-2370
7.	100'	R120-007-000-0364	Edward & Carol Wise 158 Spanish Point Drive	379/1017	843/524-2031
8.	100'	R120-007-000-0365	Mark Carey, Trustee 160 Spanish Point Drive	1336/1553	843/525-9988
9.	200'	R120-007-000-0366	Arthur and Francis Jenkins (162 Spanish Point Drive) 1624 PARIS AVE APT 118 PORT ROYAL, SC 29935- 2039	130/230	843/524-4363
10.	100'	R120-007-000-0368	Robert Chiavello 166 Spanish Point Drive	1006/2261	
11.	70'	R120-007-000-0369	Tocharoen Living Trust (Ahraya Tocharoen) 168 Spanish Point Drive	2934/1477	843/525-6260
12.	50'	R120-007-000-0370	Helen M. Olesak Andrew?	2658/2295	843/524-5949

			1 TODD DRIVE BEAUFORT SC 29902		
13.	50'	R120-007-000-0371	Raeferd Lackey 3 Todd Drive	616/419	843/986-0986
14.	50'	R120-007-000-0372	Patricia Banfield 5 Todd Drive	2941/1406	
15.	75'	R120-007-000-0373	Bertrand Cooper Jr. 7 Todd Drive	2892/1611	843/524-5761
16.	400'	R120-007-000-0097	NHP SH South Carolina I, LLC 610 NEWPORT CENTER DR SUITE 1150 NEWPORT BEACH CA 09226	2645/2438	
17.	200'	R120-007-000-097A	Oyster Cove Homeowners Assn. PO BOX 1759 BEAUFORT SC 29901-1759	558/1223	
18.	50'	R120-007-000-0099	Sally & John Avery 8528 SOAPSTONE CREEK CIR HIAWASSEE GA 30546- 5414	2286/785	
19.	less than 50' not eligible	R120-007-000-0678	Helen Harwood Trustee 910 OYSTER COVE RD BEAUFORT SC 29902	1092/652	843/522-8787
20.	200'	R120-007-000-0102	South Carolina Bank & Trust 402 D N MAIN ST SUMMERVILLE SC 29483	2978/1577	
21.	50'	R120-007-000-102C	South Carolina Bank & Trust 402 D N MAIN ST SUMMERVILLE SC 29483	2978/1577	
22.	75'	R120-007-000-102A	Rita Brown 2 Pleasant View Lane	2353/836	843/525-9970

			Beaufort SC		
23.	800'	R120-007-000-0190	Beaufort River Development LLC 200 Main Street, Suite 201 Hilton Head Island SC 29926		
24.	200'	R110-007-000-116A	Houston Family Partnership 209 Seventh Street Suite 300 Augusta GA 30901	2233/1806	
25.	less than 50' community dock?	R110-009-00A-0029	Joan Taylor Trustee PO BOX 2241 BEAUFORT SC 29901	1563/1976	
26.	less than 50' community dock?	R110-009-00A-0030	Georgiana Cooke 51 Shipwright Circle Port Royal SC 29935	908/1960	843/524-0883
27.	less than 50' community dock?	R110-009-00A-0031	Michael & Nancy Bull 55 Shipwright Circle Port Royal SC 29935	961/2277	843/524-2855
28.	less than 50' community dock?	R110-009-00A-0032	Marny Harris Vonharten 57 Shipwreck Circle	1311/2244	843/522-9144
29.	less than 50' community dock?	R110-009-00A-0033	59 Shipwright Circle LLC 1 SUTTON PLACE S NEW YORK NY 10022	2684/1296	
30.	less than 50' community dock?	R110-009-00A-0034	Patricia Kelsey 28 TWIN LAKE VILLA RD NEW LONDON NH 03257	2819/504	
31.	less than 50' community dock?	R110-009-00A-0035	Richard & Gwendolyn Meadows 354 EDMERE WAY N NAPLES FL 34105	697/290	
32.	less than 50' community dock?	R110-009-00A-0036	Michael Woodworth 65 Shipwright Circle Port Royal SC	2180/716	843/524-0951

FORM 4

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

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

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
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2007 CP-07-03212

H. Marshall Hoyer

The State of South Carolina, 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

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:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

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:

R110-007-000-116A
R110-009-000-0174
R110-007-000-116C
R110-007-000-116B

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

000013

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

Date

7/27/16

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. VonHarten, 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.

IN THE COURT OF COMMON PLEAS

Case No. 2007-CP-07-3212

**ORDER DENYING TITLE TO
MARSHLANDS**

Appearances:

Counsel for Plaintiff

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

Counsel for Defendant Merry Land Properties, LLC

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

Counsel for the State of South Carolina

J. Emory Smith, Jr., Esq.

Court Reporter

Debra S. Thomas

1434 -

000015

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 $\pm$ 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(I) the following procedures are applicable:

1. 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(1).

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(1) 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.

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).

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

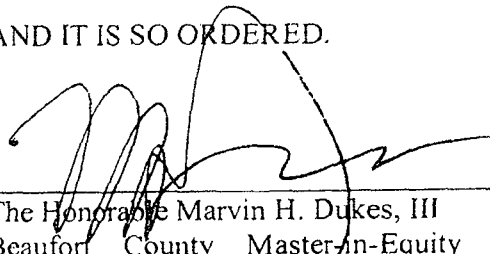
Upon hearing all of the testimony and reviewing the evidence, this Court finds and concludes that:

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

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO: 2007-CP-07-3212

H. Marshall Hoyler,

Plaintiff(s).

vs.

The State of South Carolina, et al.,

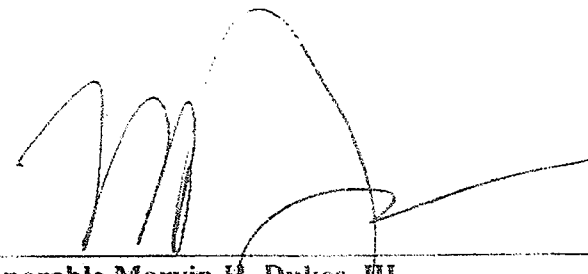
Defendant(s).

ORDER DENYING MOTION
PURSUANT TO RULES 52(b)
AND 59(e), FILED 6/9/2016

This matter came before me on Plaintiff's Motion Pursuant to Rules 52(b) and 59(e). filed on June 9, 2016. This matter was previously ended by Order filed on May 27, 2016. Plaintiff appealed this Order with the South Carolina Court of Appeals to which Defendant's filed a Motion to Dismiss the Appeal. The Court of Appeals denied the Defendant's Motion to Dismiss the Appeal but further ruled to hold the Appeal in abeyance pending my ruling on the Rule 52(b) and 59(e) motion reference above. Counsel has consented to my review of the motion without a hearing.

After review of Plaintiff's motion, and Defendants' Memo in opposition, I hereby deny the Rule 52(b) and 59(e) motions.

IT IS SO ORDERED:



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

October 16 2016
Beaufort, South Carolina

The South Carolina Court of Appeals

H. Marshall Hoyler,

Appellant,

v.

The State of South Carolina, and Merry
Land Properties, LLC,

Respondents.

The Honorable Marvin Dukes, III
Beaufort County
Trial Court Case No. 2007-CP-07-03212

RECEIVED

SEP 28 2011

SC Court of Appeals

ORDER

Appellant appeals from an order joining thirty-two abutting property owners as defendants in the action. After careful consideration of the order and the parties' memoranda on appealability, the appeal is dismissed because the underlying order is not immediately appealable. See Tatnall v. Gardner, 350 S.C. 135, 137, 563 S.E.2d 377, 379 (Ct. App. 2002) ("Absent some 'specialized statute,' this Court is not permitted to hear a case on appeal not comporting with the requirements of [Section 14-3-330 of the South Carolina Code (1976)]."); see Mack Mfg. Co. v. Mass. Bonding Ins. Co., 108 S.C. 163, 93 S.E. 713 (1917) (holding an order that allowed a new party defendant to be brought into the case was not immediately appealable).

IT IS SO ORDERED.

Columbia, South Carolina

FILED

9/26/11

000049

cc: Jefferson D. Griffith, III, Esquire
Richard L. Whitt, Esquire
J. Emory Smith, Jr., Esquire
Mary D. Shahid, Esquire

The South Carolina Court of Appeals

H. Marshall Hoyler, Appellant,

v.

State of South Carolina, Merry Land Properties, LLC,
and Nancy Deering Carey, Respondents.

Appellate Case No. 2013-000647

ORDER

Appellant appeals the master-in-equity's order denying Appellant's motion for reconsideration and granting Respondent Nancy Deering Carey's motion to intervene. Respondents State of South Carolina (State) and Merry Land Properties filed motions to dismiss, arguing the order is not immediately appealable. Appellant filed a return, arguing the order is immediately appealable because the master lacked subject matter jurisdiction. The State and Merry Land filed replies.

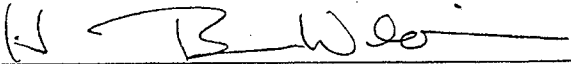
In 2007, Appellant filed an action against the State and sought a declaratory judgment regarding title to marshland. The master issued an order joining thirty-two property owners as defendants in the action because, among other reasons, their property rights would be impacted by the master's decision. Appellant then filed a motion to reconsider and also served and filed a notice of appeal. This court dismissed the appeal as not immediately appealable and subsequently denied Appellant's petition for rehearing. The supreme court denied Appellant's petition for writ of certiorari in 2012. On remand, the master addressed the still-unresolved motion to reconsider the joinder order. The master denied the motion to reconsider and granted Carey's motion to intervene, and this appeal followed.

After careful consideration of the parties' filings and case law, we find the underlying order is not immediately appealable. "[A]n order making a third party a defendant is not immediately appealable." *Duncan v. Gov't Employees Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994) (citing *Edgefield Cnty. Hosp.*

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Trustees v. Cannon Const. & Supply Co., 273 S.C. 500, 501, 257 S.E.2d 501, 501 (1979)). "[A]n order granting a motion to intervene is not immediately appealable." *Id.* at 486, 449 S.E.2d at 580.

In his return, Appellant seeks to argue for the first time that the master lacked subject matter jurisdiction under section 48-39-220 of the South Carolina Code (2008). Although lack of subject matter jurisdiction may be raised at any time, including on appeal, Appellant's argument does not change the nature of the underlying order, which is not immediately appealable. *See* S.C. Code Ann. § 14-3-330(1), (2)(a) (1976 & Supp. 2012) (providing this court has appellate jurisdiction to review final judgments and interlocutory orders (1) involving the merits or (2) affecting a substantial right when the order "in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action"). Accordingly, we grant Respondents' motions to dismiss.



FOR THE COURT

Columbia, South Carolina

cc: Jeff D. Griffith, III
Richard Lee Whitt
J. Emory Smith, Jr.
Mary Duncan Shahid
Stephen Peterson Groves, Sr.
Alysoun M. Eversole

FILED
8/20/13 

STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)
)
H. MARSHALL HOYLER,)
)
Plaintiff,)
)
vs.)
)
THE STATE OF SOUTH CAROLINA,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2007-CP-__ - _____

COMPLAINT
(ACTION TO DECLARE
TITLE TO MARSHLANDS)
(NON-JURY)

2007 NOV -8 PM 2:00
CLERK OF COURT
JANET L. BROWN
CLERK OF COURT
JANET L. BROWN

The Plaintiff alleges:

Identification of Parties and Jurisdiction

1. Plaintiff H. Marshall Hoyler ("Plaintiff") is a citizen and resident of the State of Rhode Island and holds title to certain real estate located in the County of Beaufort, State of South Carolina, and which is the subject of this lawsuit.
2. Defendant is the State of South Carolina, its political subdivisions, agents and officials.
3. Defendant, through the S. C. State Budget and Control Board, holds title to certain real properties as assets of the State of South Carolina. In accordance with Chapter 11 of Title 1 of the S. C. Code of Laws, the Defendant, through the State Budget and Control Board, can acquire, encumber, transfer, and lease real property in the name of the State of South Carolina.

Procedural History

5. Plaintiff, is the owner of fee simple title to ninety-five and 27/100 (95 and 27/100) acres more or less located in Beaufort County South Carolina along the Beaufort River.

The property includes areas described as marshlands, or property below the mean high water mark, with some upland areas. The property is predominantly tidelands.

6. In December 2006, Bill Jones on behalf of The Waters of Beaufort, LLC, applied for a private dock permit which would cross directly over the Plaintiff's property. This permit application, identified as P/N OCRM-06-991, indicates that the proposed dock will extend over the subject property. Plaintiff was not notified of this application as required by the Coastal Zone Management Act. However, Plaintiff was made aware of the permit application and intervened in the proceeding.

7. On May 17, 2007, OCRM issued a critical area permit to construct a private dock to Bill Jones. Plaintiff and Rita Brown appealed to the DHEC Board and on June 28, 2007, it declined to conduct a Final Review Conference and instructed Brown and Plaintiff to file a request for a contested case hearing with the Administrative Procedures Act which Plaintiff did. The permit holder's assignee and OCRM filed appropriate responses to the request for a contested hearing.

8. Upon receipt of the Pre-Hearing statements by all parties and the request by Plaintiff herein to continue the contested case until such time as the Plaintiff could file an action to determine his ownership to the subject property, the Honorable John D. Geathers issued an Order which stated the following:

"In his Prehearing Statement, Petitioner request that this matter be held in abeyance until a Circuit Court action regarding title or ownership can be heard. However, rather than issue a stay, this court will schedule the matter sufficiently in advance for the other matter to be concluded. Either party may appropriately file for a continuance if needed."

This Complaint follows that Order.

9. Upon information and belief, the Subject Properties are part of a conveyance of real property, including tidelands, from the Honorable Benjamin R. Tillman, Governor of South Carolina dated July 27, 1891, and was for 95 and 27/100 acres of marsh land described as being located on the Beaufort River to J. M. Crofut.

10. The deed is accompanied by a plat which depicts a tract of lands containing 95 and 27/100 acres, near the Town of Beaufort, bounded on the South by lands of Moss, on the West by miscellaneous individuals, on the North by Seal Island Chemical Works and on the East by the Beaufort River.

11. Plaintiff can demonstrate an unbroken chain of title to the subject property, which derives from the property encompassed in the deed from Benjamin R. Tillman,

Governor of the State of South Carolina to J. M. Crofut.

Applicability of S. C. Code Sec. 48-39-220

12. Plaintiff can demonstrate alienation of the tidelands included in the subject properties based on the deed from Benjamin R. Tillman, Governor of the State of South Carolina to J. M. Crofut for 95 and 27/100 acres of marsh located on the Beaufort River.

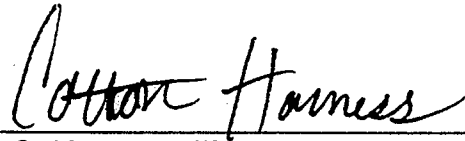
13. A plat accompanies this deed, and depicts lands which include the Subject Properties.

14. Title to these tidelands has not reverted back into the State of South Carolina.

15. Plaintiff can demonstrate an unbroken chain of title to the subject property, which derives from the property encompassed in the deed from Benjamin R. Tillman,

Governor of the State of South Carolina to J. M. Crofut.

WHEREFORE, Plaintiff seeks an Order of this Court, in accordance with S. C. Code Sec. 48-39-220, establishing Plaintiff's fee simple right, title and interest in the Subject Property as being derived from tidelands conveyed from the property encompassed in the deed from Benjamin R. Tillman, Governor of the State of South Carolina to J. M. Crofut. In addition, Plaintiff seeks a declaration of this Court that Plaintiff's right title and interest to such tidelands is superior to the right, title and interest of the State of South Carolina. Finally, Plaintiff seeks a declaration that it possesses all rights of a fee simple property owner including the right to exclude dock construction.



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Mount Pleasant, SC 29464
Attorney for Plaintiff

Dated: 11/6/07
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	CASE NO.: 2007-CP-07-3212
	)	
H. MARSHALL HOYLER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	INTERVENOR'S ANSWER AND
	)	COUNTERCLAIM
	)	
THE STATE OF SOUTH CAROLINA,	)	
	)	
Defendant.	)	
_____	)	

Intervenor, Merry Land Properties, LLC, answers the Complaint of Plaintiff and alleges as follows:

For a First Defense – General Denial

1. Intervenor denies the allegations of Paragraph 1 of the Complaint. Further answering the allegations of Paragraph 1 of the Complaint, Intervenor alleges that while Plaintiff may have a claim of title to lands below mean high water, Plaintiff's title is not established until a court of competent jurisdiction renders a determination in accordance with S. C. Code Sec. 48-39-220, and the applicable legal standard for alienation of public trust lands.
2. Intervenor admits the allegations of Paragraph 2 of the Complaint.
3. Intervenor admits those allegations of Paragraph 3 of the Complaint as relate to alienation of property by the South Carolina Budget and Control Board. However, Intervenor alleges that the Budget and Control Board does not have the authority to alienate lands below mean high water held in trust by the State of South Carolina for the benefit of its citizens. Such authority is vested only in the Sovereign and not in an executive agency.

4. Intervenor denies the allegations of Paragraph 5 of the Complaint.¹ Further answering the allegations of Paragraph 5 of the Complaint, Intervenor asserts that Plaintiff cannot claim fee simple title to the property described in the Complaint, absent an order from a court of competent jurisdiction and upon application of the appropriate legal standard for determining alienation of lands below mean high water. Furthermore, Intervenor specifically denies Plaintiff's allegations that the property described in the Complaint includes any high ground or upland areas, and demands strict proof thereof.

5. Intervenor denies the allegations of Paragraph 6 of the Complaint. Further answering the allegations of Paragraph 6 of the Complaint, Intervenor alleges that Plaintiff was provided notification of the permit application identified as P/N OCRM-06-991. Plaintiff failed to timely object to the application and Plaintiff failed to exercise the opportunity provided under 23 A S. C. Code Reg. 30-2(I) to stay review of the application by timely filing an action to have Plaintiff's title to tidelands declared.

6. Intervenor is without information sufficient to form an opinion as to the allegations of Paragraph 7 of the Complaint, and therefore denies these allegations.

7. Intervenor is without information sufficient to form an opinion as to the allegations of Paragraph 8 of the Complaint, and therefore denies these allegations. Intervenor alleges that the Order of the Administrative Law Court, the Honorable John D. Geathers, speaks for itself and craves reference to said Order.

8. Intervenor denies the allegations of Paragraphs 9, 10, 11, 12, 13, 14, and 15 of the Complaint and demands strict proof thereof.

¹ The Paragraphs of the Complaint are numbered sequentially with the exception of Paragraph 5 which follows Paragraph 3.

For a Second Defense and Counterclaims

Intervenor alleges:

Background

9. Intervenor is a limited liability company licensed to do business in South Carolina, and doing business as a land developer. Intervenor is the owner in fee simple of one tract of property located in the Town of Port Royal, Beaufort County, consisting of an 8.3 acres located adjacent to the Beaufort River, hereinafter “the Beaufort River tract.”

10. Intervenor entered into contracts to purchase the Beaufort River tract in the Spring of 2005.² These contracts provided for a lengthy due diligence term to allow Intervenor the opportunity to investigate the development potential of the property. Intervenor hired a marketing firm, an engineering and surveying firm, and sought legal counsel during this due diligence term to investigate the development potential of the property.

11. Based on this due diligence investigation, Intervenor concluded that the Beaufort River tract was suitable for development of multi-family residential construction.

12. Based on this due diligence investigation, Intervenor concluded that public water and sewer was available for service to the Beaufort River tract with available capacity sufficient to provide service to a multi-family residential development. Intervenor further concluded that the existing roadway system provided adequate access to the Beaufort River tract. Intervenor further concluded that market analysis indicated a strong market for multi-family, waterfront development.

² Intervenor owns approximately 6 acres of the Beaufort River tract. + 2 acres of the Beaufort River tract is under separate ownership, the Houston Family Partnership, LLLP. Tennent Houston, a principal in Houston Family Partnership, LLLP, is also a principal in Merry Land Properties, LLC. Houston Family Partnership, LLLP, and Merry Land Properties, LLC, are co-developers of the Beaufort River tract.

13. Based on this due diligence investigation Intervenor concluded that the Beaufort River tract was a waterfront tract and that land owners and residents of the Beaufort River tract had the right of access to the Beaufort River.

14. Prior to closing on the contract and purchasing the Beaufort River tract, On December 14, 2005, Intervenor submitted a permit application to the South Carolina Department of Health and Control ("SCDHEC") and the U. S. Army Corps of Engineers ("the Corps") seeking authorization to construct a marina on the Beaufort River. Intervenor also participated in pre-application meetings with the Corps and SCDHEC and received sufficient assurances at those meetings that the Beaufort River tract qualified for water access and for a marina.

15. Based on the information obtained during the due diligence term and, in particular, on the representations of the Corps and SCDHEC regarding the right of access to the Beaufort River, Intervenor closed on the purchase of the Beaufort River tract. The purchase price for the Beaufort River tract reflected that the tract had deep water access.

16. On May 19, 2006, SCDHEC issued its permit authorizing construction of a community marina. A copy of this permit is attached as Exhibit "A" to this Answer. On October 17, 2006, the Corps issued its permit authorizing construction of a community marina. A copy of this permit is attached as Exhibit "B" to this Answer. These permits authorized construction of a walkway commencing at the Beaufort River tract and extending 848' into the Beaufort River. At the terminus of the walkway the permit authorized a pierhead, seven ramps leading to seven floating docks, providing approximately 80 wet slips for moorage by owners of residential units at the Beaufort River tract and the general public.

17. As part of the process of obtaining permits for this marina from SCDHEC and from the Corps of Engineers, Intervenor hired a surveying and engineering firm to investigate the location of adjacent properties and the identity of adjoining property owners. Intervenor's surveyors and engineers utilized the tax map records maintained by Beaufort County to locate surrounding properties and identify the owners of these properties. When Intervenor's surveyors and engineers performed their research and investigation for Intervenor in 2005, there was no record at the tax assessor's office that the marsh parcel abutting the Beaufort River tract was subject to a claim of ownership. In fact, when Intervenor's surveyors and Engineers performed their investigation, no parcel id number was assigned to the marsh abutting the Beaufort River tract.

18. Consequently, up until 2005, Plaintiff had provided no record notice of his purported claim of ownership of the marsh abutting the Beaufort River tract. There was no information available in the public domain to alert property owners along the Beaufort River tract of Plaintiff's purported claim of ownership.

19. Moreover, there was no anecdotal information to alert property owners of Plaintiff's purported claim of ownership. Certainly Intervenor's predecessors in title were unaware of Plaintiff's claim, as was the Town of Port Royal, SCDHEC, the Corps, and property owners surrounding the Port Royal property.

20. Intervenor's permit applications were placed on public notice. An advertisement of Intervenor's application was published in the Island Packet, a newspaper of general circulation in Beaufort County. Notification of Intervenor's permit applications was provided on SCDHEC's website. Notification of Intervenor's permit applications was sent to all adjoining property owners and was sent to all persons requesting notification. In fact, SCDHEC retains a

General Public Notice list and provides individual notice of all permit applications to persons who request to have their name on that list.

21. Despite claiming ownership of $\pm$ 95 acres of marsh on the Beaufort River which abuts numerous parcels of high ground, and in addition to providing no record notice of his claim, Plaintiff took no measures to insure that he was notified of activities that triggered an OCRM permit for construction across this marsh.

22. Despite the wide publication of Intervenor's permit application, Plaintiff failed to comment on the application and alert Intervenor as to Plaintiff's purported claim of interest in the marsh abutting the Beaufort River tract.

Insufficiency of Grant

23. Plaintiff's Grant references a Plat of 95.27 acres of marshland on the Beaufort River. However, Plaintiff's Grant includes the following limitation: "reserving nevertheless to the State of South Carolina all mineral and phosphate rights of said State of South Carolina to the exclusive use, control and ownership of all mineral and phosphate deposits on the premises hereby granted."

24. The reservation of rights by the State of South Carolina operates to defeat the alienation of public trust rights in the land described in Plaintiff's Grant. While Plaintiff may have a claim of title to this land, his claim is not superior to the public's right of access through the land to reach navigable waters, nor is it superior to Intervenor's right of access.

Vagueness of Plat

25. The Plat referenced by Plaintiff's Grant contains specific bearings to replicate the metes and bounds of the parcel that is the subject of the grant. Upon information and belief, this parcel cannot be recreated by surveying the bearings as they are shown on the plat. In order for

Plaintiff to demonstrate title to tidelands he is required to present proof in the form of both a grant and a plat that describes the property in the grant. Absent a demonstration of the metes and bounds of the marsh parcel, Plaintiff cannot prevail in asserting his claim of ownership of the marsh abutting the Beaufort River tract.

Estoppel

26. Upon information and belief, Plaintiff has claimed ownership of this parcel of marshland since November 30, 1978. In the thirty years that have elapsed since this parcel of marshland was purportedly transferred to Plaintiff by deed, Plaintiff has taken no measures to insure that owners of the upland property adjacent to the marshland were on notice of Plaintiff's claim to the marshlands abutting the Beaufort River. Plaintiff's interest in this marshland could not be discovered by a search of the real property records in the public domain, until after Intervenor closed on its purchase of land and obtained its marina permits.

27. Plaintiff took no measures to inform SCDHEC or the Corps of Engineers regarding his claim of ownership of tidelands, or to insure participation in the permitting process for docks proposed for construction to the Beaufort River that might cross over tidelands allegedly owned by Plaintiff.

28. Plaintiff took no measures to inform the Town of Port Royal of his purported claim of ownership of $\pm$ 95 acres within the boundaries of the Town, abutting the Beaufort River.

29. Plaintiff knew or should have known of the development pressures impacting the Town of Port Royal and of the numerous real estate transactions within the Town for properties abutting the Beaufort River. Plaintiff knew or should have anticipated that, absent knowledge and evidence of Plaintiff's purported claim, properties abutting the marsh claimed by Plaintiff

were being marketed and sold as waterfront, as is reflected in the values assigned to these properties.

30. Instead, Plaintiff remained silent and anticipated, or should have anticipated that a purchaser of waterfront property, like Intervenor, would be caught by surprise by Plaintiff's alleged ownership of the adjoining marshlands.

31. Plaintiff's conduct is indicative of a plan by Plaintiff to lay in wait until an entity like Intervenor made a significant investment in property, and then to use Plaintiff's purported claim of ownership to obtain leverage over Intervenor in order to participate in Intervenor's investment.

32. Intervenor was induced by Plaintiff's silence to make a substantial investment in the Beaufort River tract. Intervenor's investment far exceeds the value of the Beaufort River tract without water access.

33. Intervenor acted to its detriment in reliance on Plaintiff's silence and utter failure to assert or make known Plaintiff's claim of ownership.

34. Intervenor did everything in its power to determine if there were any limitations on development of the Beaufort River tract and to identify Plaintiff's adverse claim, including the identification of adjacent property owners, the verification of property boundaries, and participation in the public, open process of obtaining marina permits.

Laches

35. The statutory remedy for declaration of private rights in public tidelands, provided for in S. C. Code Sec. 48-39-220, has been in existence since the adoption of the Coastal Tidelands and Wetlands Act by the S. C. Legislature in 1977. Consequently, since the time that

Plaintiff obtained purported title to the subject tidelands, he has had an available statutory remedy for having his claim adjudicated.

36. Upon adjudication of Plaintiff's claim, and in accordance with S. C. Code Sec. 48-39-220(D), the Attorney General for the State of South Carolina is charged with responsibility for notifying SCDHEC of the lawsuit filed by Plaintiff and of disposition of the lawsuit. SCDHEC is charged with the responsibility of publishing the law suit and the disposition of the lawsuit in the State Register. Such notification to SCDHEC and the resulting publication in the State Register of Plaintiff's claim would have insured that Intervenor learned of Plaintiff's claim before closing on the Beaufort River tract.

37. Plaintiff's thirty year delay in having his title declared in accordance with S. C. Code Sec. 48-39-220 constitutes unexplained and unreasonable neglect by Plaintiff of his legal responsibilities. Plaintiff's neglect in this regard has prejudiced Intervenor, in that Intervenor would not have closed on the sale of the Beaufort River tract had Intervenor known of Plaintiff's claim. Plaintiff's neglect in this regard has further prejudiced Intervenor, as Intervenor is in possession of licenses and permits from the United States of America and from the State of South Carolina authorizing construction of a marina on the Beaufort River, and Plaintiff's claim has put in jeopardy these very valuable licenses and permits.

Wherefore, having fully answered Plaintiff's Complaint, Intervenor seeks an Order from this Court:

1. Declaring that title to the $\pm$ 95 acre tract of marshlands located adjacent to the Beaufort River is vested in the State of South Carolina to be held in trust for the citizens of this State; or, in the alternative,

2. Declaring that the Grant from the Honorable Benjamin R. Tillman to J. M. Crofut did not eliminate the public trust in the $\pm$ 95 acre tract of marshlands or in the public's rights and/or adjacent upland owners' rights to utilize the marsh to obtain access to the Beaufort River; or, in the alternative,

3. Declaring that Intervenor is entitled to relief based on the equitable claim of Estoppel, and Plaintiff is estopped from preventing construction and operation of a marina extending from Intervenor's property into the Beaufort River, and from obstructing Intervenor's ingress and egress across the marsh abutting the Beaufort River tract; or, in the alternative,

4. Declaring that Intervenor is entitled to relief based on the equitable claim of Laches, and Plaintiff is barred by the doctrine of laches from preventing Intervenor from construction and operation of a marina extending from Intervenor's property into the Beaufort River, and from obstructing Intervenor's ingress and egress across the marsh abutting the Beaufort River tract.

Along with such other relief as this Court deems appropriate.

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By: Mary J. Shales
Attorneys for Intervenor
Merry Land Properties, LLC

November 20, 2007
Charleston, South Carolina

JUL 19 2006

South Carolina Department of Health and Environmental Control
Office of Ocean and Coastal Resource Management

CRITICAL AREA & WATER QUALITY CERTIFICATION PERMIT

Permittee: Merry Land Properties, LLC

Permit Number: 2005-1W-429-P

Date of Issuance: May 17, 2006

Expiration Date: May 17, 2011

Location:

On and adjacent to the Beaufort River on Johnny Morrall Circle, Port Royal,
Beaufort County, South Carolina.

**SEE SPECIAL
CONDITION(S)**

This permit/certification is issued under the provisions of 25A S.C. Code Ann. Regs. 61-101 (Supp. 2003), *et seq.*, and 23A S.C. Code Ann. Regs. 30-1 through 30-18 (Supp. 2003). Additionally, as required by R.61-101, Department staff have reviewed plans for this project and determined there is a reasonable assurance the project will be conducted in a manner consistent with Certification requirements of Section 401 of the Clean Water Act. We also certify that this project, subject to the indicated conditions, is consistent with applicable provisions of Section 303 of the Clean Water Act, as amended, that there are no applicable effluent limitations under Sections 301(b) and 302, and that there are no applicable standards under Sections 306 and 307.

This permit contains required certification pursuant to Section 401 of the Clean Water Act. Work may not commence under this permit until thirty (30) days after final signature by an OCRM official. No work may be performed under this permit should an administrative appeal be filed within this 30 day period. **PLEASE CAREFULLY READ THE ENCLOSED "NOTICE OF APPEAL PROCEDURE."**

Please carefully read the project description and any special conditions, which may appear on this permit/certification, as they will affect the work that is allowed. If there are no special conditions, then the work is authorized as described in the project description and as modified by general conditions. The general conditions are also a part of this permit/certification and should be read in their entirety. The S.C. Contractor's Licensing Act of 1999, enacted as Section 40-11-5 through 430, requires that all construction with a total cost of \$5,000 or more be performed by a licensed contractor with a valid contractor's license for marine class construction, except for construction performed by a private landowner for strictly private purposes. Your signature on and acceptance of this permit denotes your understanding of the stated law regarding use of licensed contractors. All listed special and general conditions will remain in effect for the life of the project if work commences during the life of the permit. This applies to permittee, future property owners, or permit assignees.

DESCRIPTION OF THE AUTHORIZED PROJECT

The permit has been issued as requested, with some restrictions on the use of the boat slips. The plans submitted by you, attached hereto, show the work consists of constructing a marina. A 5' x 848' walkway, with benches at intervals of 150', will lead to a 20' x 30' fixed pierhead. A total of six 4' x 30' ramps leading to six 10' x 160' floating docks will be located on both sides of the pierhead, three on each side. In addition, a 5' x 45' ramp leading to a 10' x 250' floating dock will be located channelward of the

2

pierhead. The purpose of the proposed activity is to construct a marina with approximately 80 boat slips for use by owners of the adjacent residential development and the general public.

CRITICAL AREA PERMIT SPECIAL CONDITIONS

1. Provided that a maximum of 25 boat slips at the marina may be reserved for the exclusive use of the residents of the adjacent high-ground residential development. All additional boat slips must be made available to the general public. Residents of the adjacent residential development will not be excluded from using these public slips, but cannot be given preferential treatment for using them.
2. Provided that public restroom facilities must be constructed on the adjacent high ground, to include at a minimum two toilets and one lavatory for women, and one toilet, one urinal, and one lavatory for men. The Marina Operations and Maintenance Manual must be revised to include this requirement before a construction placard will be issued.
3. Provided that adequate public parking must be provided at the marina. The number of public parking spaces must be 55, or fewer if the applicant obtains a variance from the Town of Port Royal's parking ordinance that requires one parking space for each public marina slip, but in no case can be fewer than the 18 public parking spaces required under OCRM's regulations. These parking spaces must be clearly marked as dedicated public parking for users of the marina. The Marina Operations and Maintenance Manual must be revised to include this requirement before a construction placard will be issued.
4. Provided that no walkway support pilings shall be placed in the smaller tributary the walkway will cross over. Adequate clearance must be provided during construction.
5. Provided that an as-built survey of the marina must be submitted to OCRM within 90 days of the expiration date of the final construction placard. The survey must be performed by a registered land surveyor, must show all components of the marina, and must list the starting and ending coordinates of the walkway in the SC State Plane Coordinate System, which can be obtained by using survey-grade Global Positioning System equipment.
6. The operations of the marina shall be reviewed by the Department as deemed appropriate, but at least every five years. Based on this review, the Department may require, among other things, changes or additions to the Operations and Maintenance Manual (manual) to address any water quality or other environmental problems, and a reduction in the size of, or a change in the configuration of, the marina. Such action may be taken at any time the Department determines that significant state water quality compliance or other problems exist, at the time the Department enlarges the closure area, or at the time of a review. The manual submitted for this facility is made a part of this permit and must be followed in the operation of this facility unless otherwise amended in writing by OCRM. The manual must be reviewed and revised to keep it up-to-date with existing facilities and operations. The manual must be in accordance with R. 30-12(E)(6) or the Rules and Regulations for Permitting in the Critical Areas of the Coastal Zone and with OCRM's Marina/Commercial Dock Operations And Maintenance Manual Requirements.
7. A stormwater plan for the marina and associated parking area and other facilities including runoff from the permanent spoil disposal area and adjacent highland development, must be submitted to and approved in writing by the OCRM staff before any work is performed under this permit.

8. Any painting, major engine repair, or other maintenance, which may result in a discharge to the water must be performed in a designated upland site and not in or over the waters of the marina.
9. The discharge of any kind of waste into state waters, including, but not limited to, garbage, refuse, trash or debris, will be prohibited at the marina. Any lease agreement used to rent dock space shall include a statement prohibiting the discharge of these items or general garbage or other deleterious substances into the waters of the marina. It will also stress the need to maintain good water quality within the marina.
10. The storage or disposal of new or used batteries, oil or lubrication containers, fuel containers, solvents, toxic cleaners, paint cans, etc., on the marina docks is prohibited.
11. If power washing of boats is to be conducted at the marina then it must be conducted on a designated upland area and is not allowed over the water. Wastewater from this operation must be properly treated and can not be directly discharged into the adjacent waters.
12. Signs must be posted on all docks, piers and areas adjacent to the facility stating the following:
 - i. "It is against both Federal and State Laws to discharge raw, untreated sewage from any description of watercraft into the waters of South Carolina."
13. Signs should be at least 14" by 18" in size so they can be read clearly.
14. Plans for any potable water supplied to the marina docks must be approved in writing by SCDHEC and any below ground fuel storage tanks must comply with SCDHEC Underground Storage Tank Regulations (R. 61-92) and be approved in writing by SCDHEC.
15. The marina must have adequate booms or absorbent pads available to isolate any oil or fuel spill around the fuel dock, a leaking boat, or a sunken boat. These booms must be stored in a location where they are quickly and easily accessible.
16. An experienced operator shall be in charge of the marina and be responsible for compliance with the issued Operations and Maintenance Manual and with all conditions of the permit.
17. The marina lease agreement with boat owners must include a provision requiring that boat owners comply with all applicable State and federal regulations. The marina shall ensure that violations are reported promptly to the proper authorities.
18. A complete copy of the marina permit, including any required marina report, the Operations and Maintenance Manual, all conditions or requirements placed on the permit and copies of all water quality monitoring reports required pursuant to the permit, shall be readily available at the marina.
19. The marina shall prominently display and distribute material pertaining to the maintenance of water quality standards at the marina and report violations of such standards to the proper authorities.
20. A water quality monitoring program must be conducted at this marina as required below. This sampling must be performed by a SCDHEC certified laboratory at the expense of the permittee. The results of this sampling must be supplied to the Department.

Sampling will be conducted at one station: In the Beaufort River, at the center of the facility near the 30' by 20' pierhead.

Fecal coliform bacterial sampling will be conducted both in the morning and in the afternoon on two consecutive days, once during July and once During August. These two sampling periods must be at least 30 days apart. Samples are to be taken one foot below the water surface. Data regarding date and time, general weather conditions, and tidal stage must also be included in the monitoring report.

The following parameter will be sampled once each year during June - August. This sample will be grab sample of surface sediments collected from the station.
PAH's

All sampling and analysis must be performed by a DHEC certified laboratory according to "Standard Methods" or EPA approved methods. All bacterial samples must be analyzed using the 5 tube dilution (Most Probable Numbers) technique.

Sampling results must be provided to the Division of Water Quality and Shellfish Sanitation and to the Office of Ocean and Coastal Resource Management within two weeks after completion of the analysis of the bacterial samples. Results submitted to DHEC must be signed by the laboratory manager and the Harbormaster.

Prior to implementation of this sampling program, the permittee or his consultant is to contact SCDHEC-EQC to insure that the data collected will be acceptable.

21. Provided all parts of the docking structure are used for water dependent purposes only. No food or beverage service, vending machines, T-shirt sales, concessions, etc. are allowed on or across these dock facilities.
22. All facilities and services within the marina are the responsibility of the marina owner/operator (permittee) unless otherwise legally authorized.
23. If dock boxes are allowed at the marina then they should be of a type that is leak- proof so that any material that spills or leaks inside the box will not leak out onto the marina docks and into the waters of the marina.
24. Provided that nonwater dependent structures, including buildings, houses, or offices that float, shall be prohibited at the marina unless specifically authorized by OCRM. OCRM shall at its discretion determine on a case-by-case basis whether or not a floating structure is a boat and thus exempt from the Act or in fact is a nonwater dependent structure. This shall be based upon the primary function of the floating structure. The mere fact that a structure is registered as a vessel or capable of being propelled does not mean it is exempt from the Department regulations.
25. Provided that in the event that archaeological or paleontological remains are found during the course of work, the applicant should notify the South Carolina Institute of Archaeology and Anthropology (Mr. James Spirek at 803-777-8170) pursuant to South Carolina Underwater Antiquities Act of 1991, (Article 5 Chapter 7, Title 54, Code of Laws of South Carolina, 1976). Archaeological remains consist of any materials made or altered by man, which remain from past historic or prehistoric times (ie, older than 50 years). Examples include old pottery fragments, metal, wood, arrowheads, stone implements or tools, human burials, historic docks, structures, or non-recent vessel remains. Paleontological remains consist of old animal remains, original or fossilized, such as teeth, tusks, bone, or entire skeletons.

WATER QUALITY SPECIAL CONDITIONS

1. All necessary measures must be taken to prevent oil, tar, trash, debris, and other pollutants from entering the adjacent waters or wetlands during construction.
2. Litter receptacles must be located near all docks and walkways.
3. Any painting, major engine repair, or other maintenance, which may result in a discharge to the water, must be performed in a designated upland site.
4. Signs must be posted on all docks, piers and areas adjacent to the facility stating the following:

"It is against both Federal and State Laws to discharge raw, untreated sewage from any description of watercraft into the waters of South Carolina."

Signs should be at least 14" by 18" in size so they can be read clearly.
5. No live aboards are allowed at this facility.
6. Anti-fouling paints must not be used below mean high water on any structure such as bulkheads, pilings, docks or dock supports within the confines of the facility.
7. The applicant must implement the spill prevention and clean up plan for this project as listed in the Operations and Maintenance Manual submitted with the application.
8. No fuel pump or fuel storage tank may be installed at any individual or community dock.
9. Access to the project site must be attained from highland, from a portion of the dock already completed ("end on end construction"), or from floating barges or mats (instead of barge canals or causeways).
10. Construction activities must avoid to the greatest extent practicable, encroachment into any wetland/river bank areas not designated as impact areas.
11. The applicant must implement best management practices in disturbed upland areas that will minimize erosion and migration of sediments on and off the project site during and after construction. These practices should include the use of appropriate grading and sloping techniques, mulches, hay bales, silt fences, or other devices capable of preventing erosion, migration of sediments and bank failure. All disturbed land surfaces and sloped areas must be stabilized and sloped with a minimum 3/1 slope upon project completion.
12. Once the project is initiated, it must be carried to completion in an expeditious manner in order to minimize the period of disturbance to the environment. Upon project completion, all disturbed areas must be permanently stabilized with vegetative cover, or other erosion control methods as appropriate.

PERMITTEE'S ATTENTION IS DIRECTED TO GENERAL CONDITIONS NUMBERS FOUR (4) AND (5), BY ACCEPTANCE OF THIS PERMIT, PERMITTEE IS PLACED ON NOTICE THAT THE STATE OF SOUTH CAROLINA, BY ISSUING THIS PERMIT, DOES NOT WAIVE ITS RIGHTS TO REQUIRE PAYMENT OF A REASONABLE FEE FOR USE OF STATE LANDS AT A FUTURE DATE IF SO DIRECTED BY STATUTE.

THE PERMITTEE, BY ACCEPTANCE OF THIS PERMIT, AGREES TO ABIDE BY THE TERMS AND CONDITIONS CONTAINED HEREIN AND TO PERFORM THE WORK IN STRICT ACCORDANCE WITH THE PLANS AND SPECIFICATIONS ATTACHED HERETO AND MADE A PART HEREOF. ANY DEVIATION FROM THESE CONDITIONS, TERMS, PLANS AND SPECIFICATIONS SHALL BE GROUNDS FOR REVOCATION, SUSPENSION OR MODIFICATION OF THIS PERMIT AND THE INSTITUTION OF SUCH LEGAL PROCEEDINGS AS THE DEPARTMENT MAY CONSIDER APPROPRIATE.

2005-1W-429-P

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

Joan E. Green
(PERMITTEE)
Merry Land Properties Inc

MAY 26, 2006
(DATE)

This permit becomes effective when the State official, designated to act for the Office of Ocean and Coastal Resource Management, has signed below.

Curtis M. Joyner
(MANAGER, CRITICAL AREA PERMITTING)
Curtis M. Joyner
or his Designee Other Authorized State Official

6/2/06
(DATE)

PLEASE SIGN AND RETURN

GENERAL CONDITION

This construction and use permit is expressly contingent upon the following conditions which are binding on the permittee:

1. That the permittee, in accepting this permit, covenants and agrees to comply with and abide by the provisions and conditions herein and assumes all responsibility and liability and agrees to save the South Carolina Coastal OCRM and the State of South Carolina, its employees or representatives, harmless from all claims of damage arising out of operations conducted pursuant to this permit.
2. That if the activity authorized herein is not constructed or completed within five years of the date of issuance, this permit shall automatically expire. A request, in writing, for an extension of time shall be made not less than sixty days prior to the expiration date.
3. That all authorized work shall be conducted in a manner that minimizes any adverse impact on fish, wildlife and water quality.
4. That this permit does not relieve the permittee from the requirements of obtaining a permit from the U. S. Army Corps of Engineers or any other applicable federal agency, nor from the necessity of complying with all applicable local laws, ordinances, and zoning regulations. This permit is granted subject to the rights of the State of South Carolina in the navigable waters and shall be subject, further to all rights held by the State of South Carolina under the public trust doctrine as well as any other right the State may have in the waters and submerged lands of the coast.
5. That this permit does not convey, expressly or impliedly, any property rights in real estate or material nor any exclusive privileges; nor does it authorize the permittee to alienate, diminish, infringe upon or otherwise restrict the property rights of any other person or the public; nor shall this permit be interpreted as appropriating public properties for private use.
6. That the permittee shall permit the OCRM or its authorized agents or representatives to make periodic inspections at any time deemed necessary in order to ensure that the activity being performed is in accordance with the terms and conditions of this permit.
7. That any abandonment of the permitted activity will require restoration of the area to a satisfactory condition as determined by the OCRM.
8. That this permit may not be transferred to a third party without prior written notice to the OCRM, either by the transferee's written agreement to comply with all terms and conditions of this permit or by the transferred subscribing to this permit and thereby agreeing to comply.
9. That if the display of lights and signals on any structure or work authorized herein is not otherwise provided for by law, such lights and special signals as may be prescribed by the United States Coast Guard shall be installed and maintained by and at the expense of the permittee.
10. That the permit placard or a copy of the placard shall be posted in a conspicuous place at the project site during the entire period of work.
11. That the structure or work authorized herein shall be in accordance with the plans and drawing attached hereto, and shall be maintained in good condition. Failure to build in accordance with the plans and drawings attached hereto, or failure to maintain the structure in good condition shall result in the revocation of this permit.
12. That the authorization for activities or structures herein constitutes a revocable license. The OCRM may require the permittee to modify activities or remove structures authorized herein if it is determined by the OCRM that such activity or structures violates the public's health, safety, or welfare, or if any activity is inconsistent with the public trust doctrine. Modification or removal under this condition shall be ordered only after reasonable notice stating the reasons therefore and provision to the permittee of the opportunity to respond in writing. When the Permittee is notified that OCRM intends to revoke the permit, Permittee agrees to immediately stop work pending resolution of the revocation.
13. That the OCRM shall have the right to revoke, suspend, or modify this permit in the event it is determined the permitted structure (1) significantly impacts the public health, safety and welfare, and/or is violation of Section 48-39-150, (2) adversely impacts public rights, (3) that the information and data which the permittee or any other agencies have provided in connection with the permit application is either false, incomplete or inaccurate, or (4) that the activity is not in compliance with the drawings submitted by the applicant. That the permittee, upon receipt of the Coastal OCRM's written intent to revoke, suspend, or modify the permit has the right to a hearing. Prior to revocation, suspension, or modification of this permit, the OCRM shall provide written notification of intent to revoke to the permittee, and permittee can respond with a written explanation to the OCRM. (South Carolina Code Section 1-023-370 shall govern the procedure for revocation, suspension or modification herein described).
14. That any modification, suspension or revocation of this permit shall not be the basis of any claim for damages against the OCRM or the State of South Carolina or any employee, agent, or representative of the Coastal OCRM or the State of South Carolina.
15. That all activities authorized herein shall, if they involve a discharge or deposit into navigable waters or ocean waters, be at all times consistent with all applicable water quality standards, effluent limitations and standards of performance, prohibitions, and pretreatment standards established pursuant to applicable federal, state and local laws.
16. That extreme care shall be exercised to prevent any adverse or undesirable effects from this work on the property or other. This permit authorizes no invasion of adjacent or private property, and OCRM assumes no responsibility or liability from any claims of damage arising out of any operations conducted by the permittee pursuant to this permit.

7 of 11

000074

Merryland Properties Vicinity Map

SEE SPECIAL
CONDITION(S)

N325-23-965
W802-40-655

Merryland Properties

ADJACENT PROPERTY OWNERS:

LOCATION: PORT ROYAL
SCAF: Johnny mozzai circle

LINE	QTY	UNIT	PRICE	TOTAL
1	1.00	EA	100.00	100.00
2	1.00	EA	100.00	100.00
3	1.00	EA	100.00	100.00
4	1.00	EA	100.00	100.00
5	1.00	EA	100.00	100.00
6	1.00	EA	100.00	100.00
7	1.00	EA	100.00	100.00
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70	1.00	EA	100.00	100.00
71	1.00	EA	100.00	100.00
72	1.00	EA	100.00	100.00
73	1			

PLICANT: MERRY AND PROPERTIES

ACTIVITY: PRIVATE MARINA

COUNTY: BEAUFORT

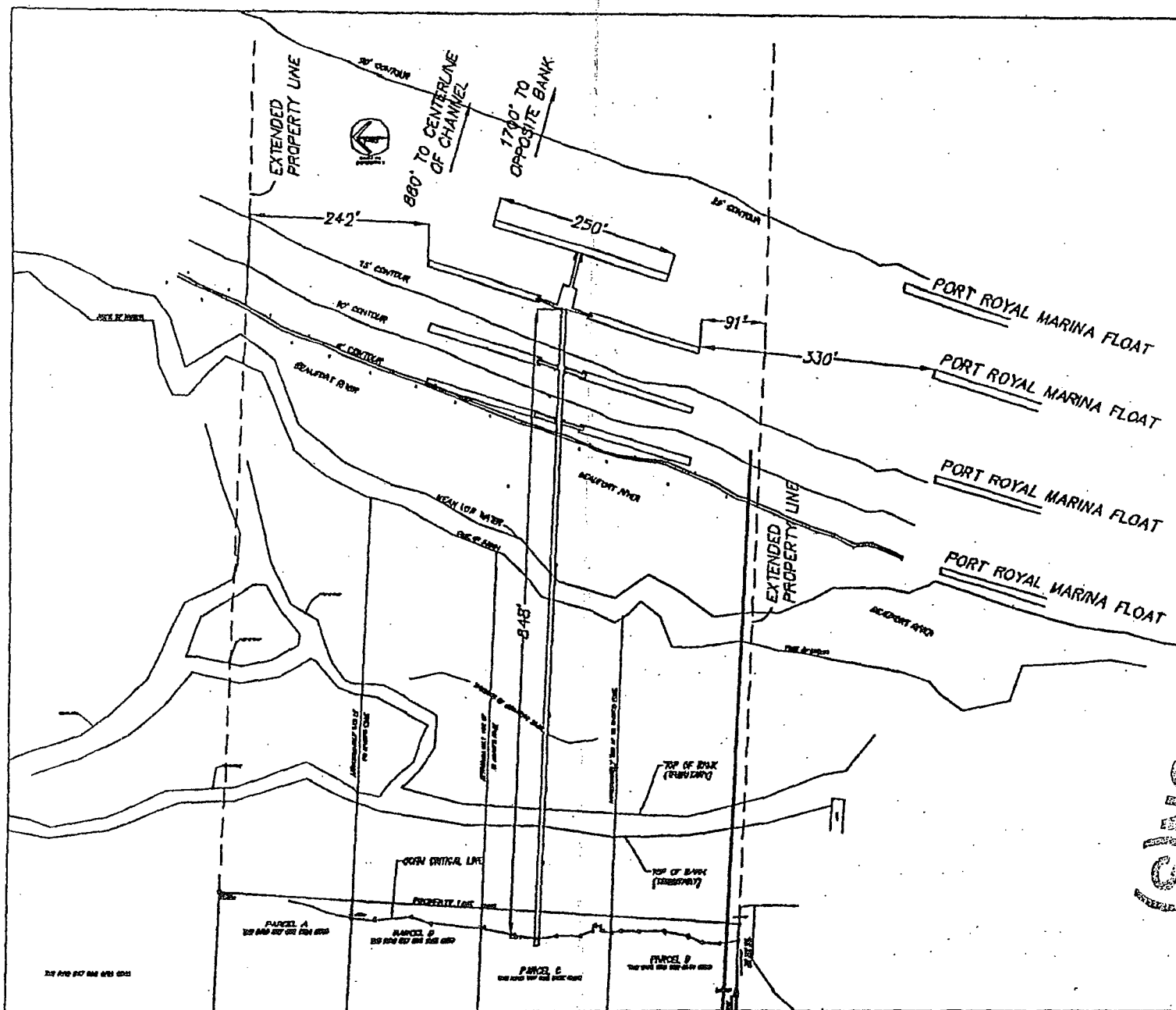
Street Atlas USA® 2004.

Scale 1 : 12,500

$$1'' = 1,066.7 \text{ ft}$$

Data Zc

000075



SEAL
CONDITIONS

APPLICANT:MERRY LAND PROPERTIES

ACTIVITY: PRIVATE MARINA

P/N:

LOCATION: PORT ROYAL

SCALE: Johnny Mozeall Circle
1" = 200'

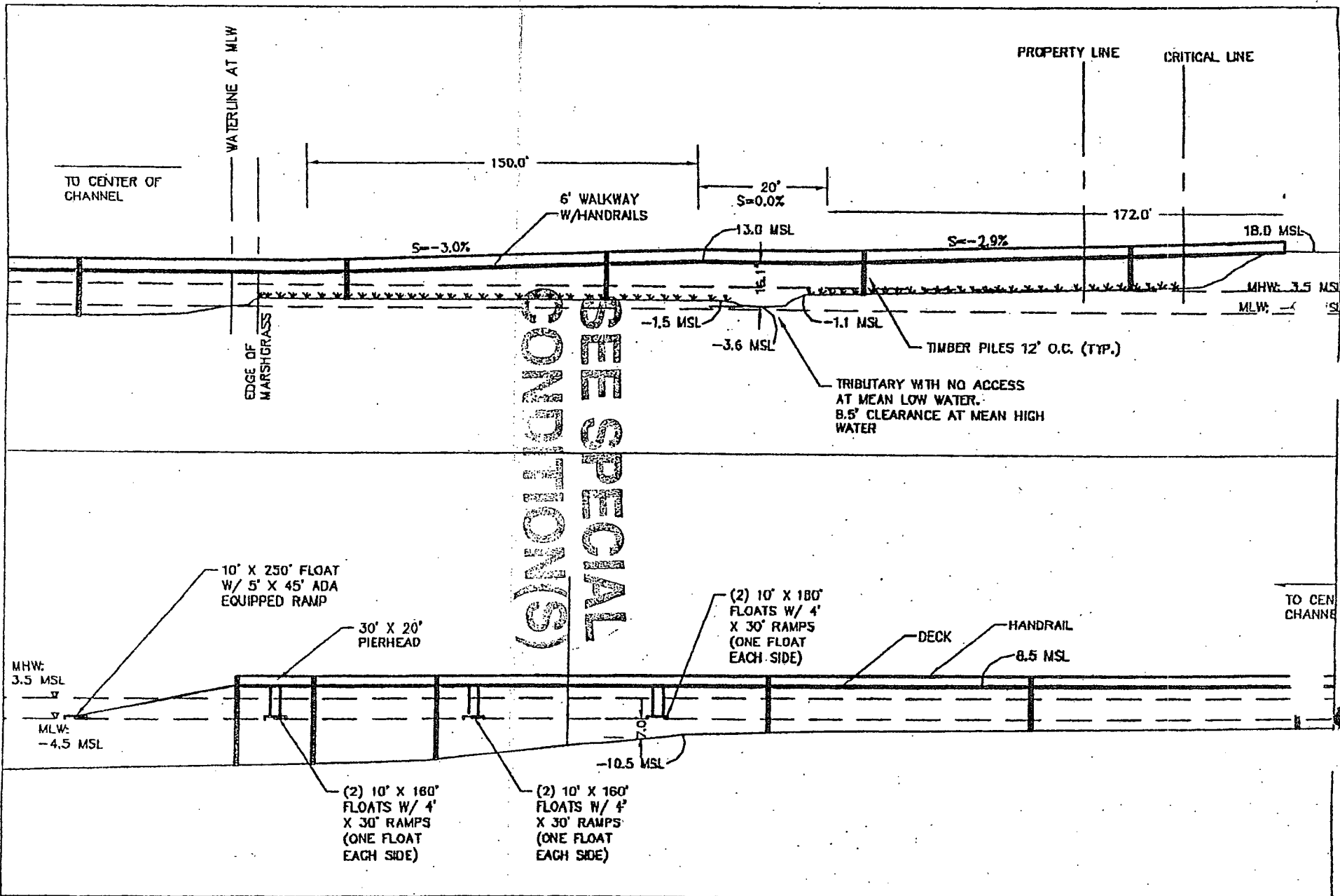
COUNTY: BEAUFORT

DATE: SEPTEMBER 12, 2005

ADJACENT PROPERTY OWNERS:

NORTH OF SITE
1. R110 007 000 0109 0000
2. R110 007 000 0114 0000

SOUTH OF SITE
1. R110 000 00A 0078 0000
2. R110 000 00A 0027 0000
3. R110 000 00A 0028 0000
4. R110 000 00A 0025 0000
5. R110 000 00A 0024 0000
6. R110 000 00A 0023 0000
7. R110 000 00A 0022 0000



APPLICANT: MERRY LAND PROPERTIES

ACTIVITY: PRIVATE MARINA

P/N:

LOCATION: PORT ROYAL

SCALE: 1" = 50'

COUNTY: BEAUFORT

DATE: SEPTEMBER 12 2005

JOHNNY MORRALL CIRCLE

SL 4 of 4

ADJACENT PROPERTY OWNERS:

NORTH OF SITE:
1. R118 007 000 D109 0000
2.0 R118 007 000 R114 0000
SOUTH OF SITE:
1. R118 000 000 0028 0000
2. R118 000 000 0027 0000
3. R118 000 000 0026 0000
4. R118 000 000 0025 0000
5. R118 000 000 0024 0000
6. R118 000 000 0023 0000

0000078



REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

SIGNED COPY

October 17, 2006

Regulatory Division

Merry Land Properties, LLC
c/o Tennent Houston
O'Quinn Marine Construction, Inc.
93 Sheppard Road
Beaufort, South Carolina 29907

Dear Mr. Houston:

This is in response to your application requesting a Department of the Army permit.

Enclosed is your Department of the Army permit 2005-1W-429. It authorizes you to perform the work specified on the attached drawings. This permit is issued under the provisions of the Federal laws for the protection and preservation of the navigable waters of the United States.

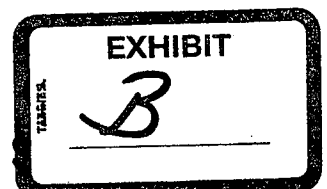
Please notify this office promptly, in writing, when you start and complete the work. The enclosed cards may be used for that purpose. You should also be aware that a special condition has been included in this permit which requires that a copy of the permit and drawings must be available at the work site during the entire time of construction.

Respectfully,

Tina B. Hadden
Chief, Regulatory Division

Enclosures

00007





REPLY TO
ATTENTION OF

DEPARTMENT OF THE ARMY
CHARLESTON DISTRICT, CORPS OF ENGINEERS
69 A Hagood Avenue
CHARLESTON, SOUTH CAROLINA 29403-5107

REGULATORY DIVISION

TO WHOM IT MAY CONCERN:

In issuing this permit, this office has acted with reliance on the plans which you submitted. As you proceed with your project, please exercise every caution to ensure the work is performed exactly as shown on the approved plans and specifications, as deviations of any nature are expressly prohibited without the prior authorization of this office.

With this in mind, you will find this office cooperative in authorizing minor deviations if they are clearly within the scope of the original permit; however, you are placed on any "unauthorized" deviation from the approved plans will be constructed as a violation of Federal law and, at a minimum, you will be required to submit as-built plans of any deviations. These as-built plans will have to be prepared by a registered land surveyor. You will not be required to submit as-built drawings unless an "unauthorized" deviation is detected by this office or such submittals are required by a special condition in the permit (i.e., certified as-built plans are commonly required for utility crossings and structures adjacent to Federal channels.) If, upon demand, you fail to provide this office with such drawings in the requisite format, this office will request the U.S. Attorney to seek appropriate civil or criminal sanctions in order to maintain the integrity of the Department of the Army permit program.

Please be assured that you will find the Corps of Engineers receptive to minor deviations from the approved plans as long as such deviations are approved prior to commencement of work.

000080

NOTICE OF COMMENCEMENT OR COMPLETION
OF WORK AUTHORIZED BY PERMIT

DATE

WORK AUTHORIZED BY DEPARTMENT OF THE ARMY PERMIT

2005-1W-429

DATED

PERFORM WORK IN

(WATERBODY NAME)

WAS COMMENCED

ON

WAS COMPLETED

(DATE)

(check appropriate box)

SIGNATURE

FL 130

5 MAR. 79

NOTICE OF COMMENCEMENT OR COMPLETION
OF WORK AUTHORIZED BY PERMIT

DATE

WORK AUTHORIZED BY DEPARTMENT OF THE ARMY PERMIT

2005-1W-429

DATED

PERFORM WORK IN

(WATERBODY NAME)

WAS COMMENCED

ON

WAS COMPLETED

(DATE)

(check appropriate box)

SIGNATURE

FL 130

5 MAR. 79

000081

DEPARTMENT OF THE ARMY PERMIT

Permittee: MERRY LAND PROPERTIES, LLC

P. O. BOX 1417
AUGUSTA, GA 30903

Permit No: 2005-1W-429

Issuing Office: CHARLESTON DISTRICT

NOTE: The term "you" and its derivatives, as used in this permit, means the permittee or any future transferee. The term "this office" refers to the appropriate district or division office of the Corps of Engineers having jurisdiction over the permitted activity or the appropriate official of that office acting under the authority of the commanding officer.

You are authorized to perform work in accordance with the terms and conditions specified below.

Project Description:

The work consists of constructing a marina to provide a facility for the private recreational use of the residents of the proposed adjacent residential development and the general public in accordance with attached drawings entitled: Applicant: Merry Land Properties; Activity: Private Marina; Location: Port Royal; County: Beaufort. Sheet 1 of 1 thru 4 dated July 7, 2005 and sheets 2 thru 4 of 4 dated September 12, 2005.

Project Location:

The project site is located on the Beaufort River (AIWW) upstream from the McTeer Bridge (SC Hwy. 802) and adjacent to the Port Royal Landing Marina in the Town of Port Royal, Beaufort County, South Carolina.

Permit Conditions:

General Conditions:

1. The time limit for completing the work authorized ends on **30 September 2011**. If you find that you need more time to complete the authorized activity, submit your request for a time extension to this office for consideration at least one month before the above date is reached.
2. You must maintain the activity authorized by this permit in good condition and in conformance with the terms and conditions of this permit. You are not relieved of this requirement if you abandon the permitted activity, although you may make a good faith transfer to a third party in compliance with General Condition 4 below. Should you wish to cease to maintain the authorized activity or should you desire to abandon it without a good faith transfer, you must obtain a modification of this permit from this office, which may require restoration of the area.
3. If you discover any previously unknown historic or archeological remains while accomplishing the activity authorized by this permit, you must immediately notify this office of what you have found. We will initiate the Federal and state coordination required to determine if the remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

e. Damage claims associated with any future modification, suspension, or revocation of this permit.

4. Reliance on Applicant's Data: The determination of this office that issuance of this permit is not contrary to the public interest was made in reliance on the information you provided.

5. Reevaluation of Permit Decision. This office may reevaluate its decision on this permit at any time the circumstances warrant. Circumstances that could require a reevaluation include, but are not limited to, the following:

a. You fail to comply with the terms and conditions of this permit.

b. The information provided by you in support of your permit application proves to have been false, incomplete, or inaccurate (See 4 above).

c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

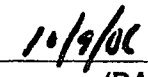
Such a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7 or enforcement procedures such as those contained in 33 CFR 326.4 and 326.5. The referenced enforcement procedures provide for the issuance of an administrative order requiring you to comply with the terms and conditions of your permit and for the initiation of legal action where appropriate. You will be required to pay for any corrective measures ordered by this office, and if you fail to comply with such directive, this office may in certain situations (such as those specified in 33 CFR 209.170) accomplish the corrective measures by contract or otherwise and bill you for the cost.

6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable consideration to a request for an extension of this time limit.

Your signature below, as permittee, indicates that you accept and agree to comply with the terms and conditions of this permit.

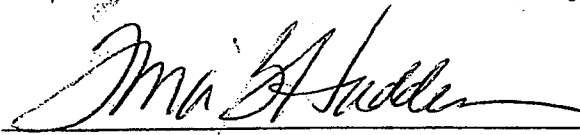


(PERMITTEE)
Tennant Houston
MERRY LAND PROPERTIES, LLC

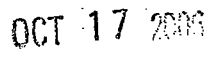


(DATE)

This permit becomes effective when the Federal official, designated to act for the Secretary of the Army, has signed below.



(DISTRICT ENGINEER)
EDWARD R. FLEMING
or his Designee
Tina B. Hadden
Chief, Regulatory Division



(DATE)

When the structures or work authorized by this permit are still in existence at the time the property is transferred, the terms and conditions of this permit will continue to be binding on the new owner(s) of the property. To validate the transfer of this permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.

(TRANSFEREE)

(DATE)

4. If you sell the property associated with this permit, you must obtain the signature of the new owner in the space provided and forward a copy of the permit to this office to validate the transfer of this authorization.
5. If a conditioned water quality certification has been issued for your project, you must comply with the conditions specified in the certification as special conditions to this permit. For your convenience, a copy of the certification is attached if it contains such conditions.
6. You must allow representatives from this office to inspect the authorized activity at any time deemed necessary to ensure that it is being or has been accomplished in accordance with the terms and conditions of your permit.

Special Conditions:

SEE PAGES 4 & 5.

Further Information:

1. Congressional Authorities: You have been authorized to undertake the activity described above pursuant to:

- ☒ Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 403).
- ☐ Section 404 of the Clean Water Act (33 U.S.C. 1344).
- ☐ Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 (33 U.S.C. 1413).

2. Limits of this authorization.

a. This permit does not obviate the need to obtain other Federal, state, or local authorizations required by law:

- b. This permit does not grant any property rights or exclusive privileges.
- c. This permit does not authorize any injury to the property or rights of others.
- d. This permit does not authorize interference with any existing or proposed Federal project.

3. Limits of Federal Liability. In issuing this permit, the Federal Government does not assume any liability for the following:

- a. Damages to the permitted project or uses thereof as a result of other permitted or unpermitted activities or from natural causes.
- b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.
- c. Damages to persons, property, or to other permitted or unpermitted activities or structures caused by the activity authorized by this permit.
- d. Design or construction deficiencies associated with the permitted work.

A. SPECIAL CONDITIONS FOR PERMIT #: 2005-1W-429

- a. That the permittee agrees to provide all contractors associated with construction of the authorized activity a copy of the permit and drawings. A copy of the permit will be available at the construction site at all times.
- b. That the permittee shall submit a signed compliance certification to the Corps within 60 days following completion of the authorized work and any required mitigation. The certification will include:
 1. A copy of this permit;
 2. A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions;
 3. A statement that any required mitigation was completed in accordance with the permit conditions;
 4. The signature of the permittee certifying the completion of the work and mitigation.
- c. The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.
- d. It is recognized that this structure is to be constructed on/or adjacent to an area subject to a prism and/or disposal easement held by the United States in perpetuity in conjunction with a Congressionally authorized project for the maintenance and improvement of the Atlantic Intracoastal Waterway. This permit does not convey any property rights either in real estate or material or any exclusive use privileges; nor does it relinquish any right the United States has for the use of its easement or the maintenance and future widening or deepening of the Atlantic Intracoastal Waterway pursuant to its easement rights.
- e. It is understood and agreed that if the District Engineer determines this structure shall in any way in the future conflict with the improvement, operation, maintenance and widening or deepening of the Atlantic Intracoastal Waterway, the owners themselves, their heirs, successors and assigns will remove said structure within 45 days from the date that written notice is given by the District Engineer, and there shall be no entitlement to compensation from the United States for damage or injury.
- f. Conveyance of this permit applies only to the structure authorized and does not authorize the construction of any permanent structure or any structure suitable for habitation or any utility leading either to permanent structures suitable for habitation or to permanent structures within the bounds of areas on which the Corps of Engineers enjoys easement rights.
- g. That permittee agrees that no permanent structures, beyond those authorized by this document, will be placed on the prism easement or on any adjacent disposal easement without written approval of the District Engineer.
- h. That the Secretary of the Army, representing the United States of America, hereby consents to the herein authorized facilities or structures to be located on or across easement lands vested in the United States of America for the construction and operation of the Atlantic Intracoastal Waterway. The permittee shall not engage in any act which may interfere with or abridge the easement interests of the United States, except those specifically authorized herein.

- i. That the permittee agrees to provide, as a part of the completion notification, as-built drawings which indicate all dimensions of the structure as well as the distance between the centerline of the Atlantic Intracoastal Waterway (AIWW), a Federal channel, and the waterward edge of the authorized structure. These drawings must be prepared by a registered land surveyor and submitted within sixty (60) days of the completion of the structure.
- j. That any Corps of Engineers Waterway Control Monument can not be disturbed without first notifying this office 30 days in advance. After coordination with this office, a decision will be made as to the proper steps to be taken with regard to removing and relocating the monuments(s).

Merryland Properties Vicinity Map

UNITED
PLANS

ADJACENT PROPERTY OWNERS

2005-IW-429-P

LOCATION: FORT ROYAL

SCALE: NO SCALE

COUNTY: BEAUFORT

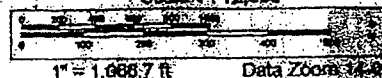
APPLICANT: MERRYLAND PROPERTIES

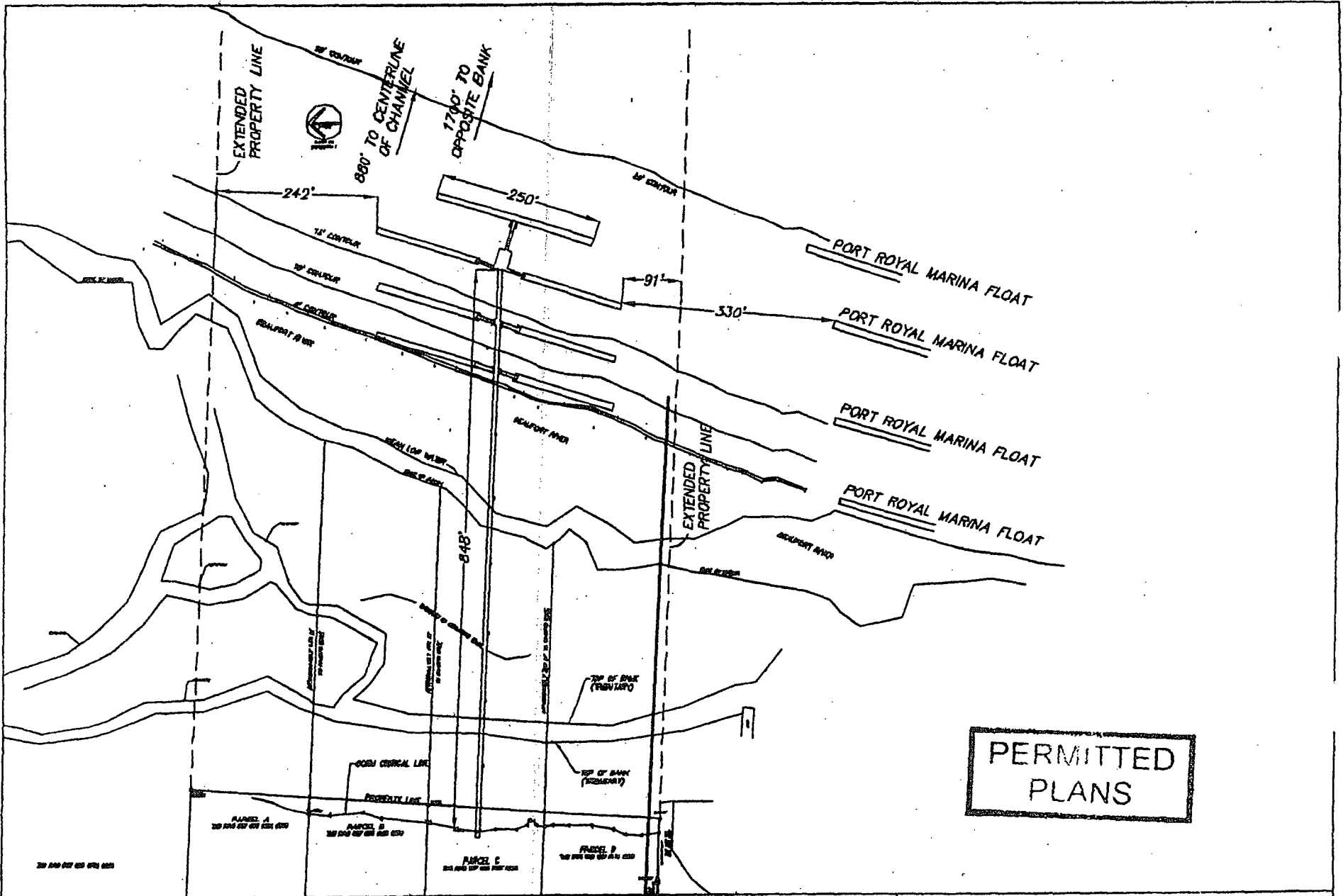
ACTIVITY: PRIVATE MARINA

Street Atlas USA © 2004



000087





APPLICANT: MERRY LAND PROPERTIES

ACTIVITY: PRIVATE MARINA

P/N:

LOCATION: PORT ROYAL

SCALE: 1" = 200'

COUNTY: BEAUFORT

DATE: SEPTEMBER 12, 2005

ADJACENT PROPERTY OWNERS:

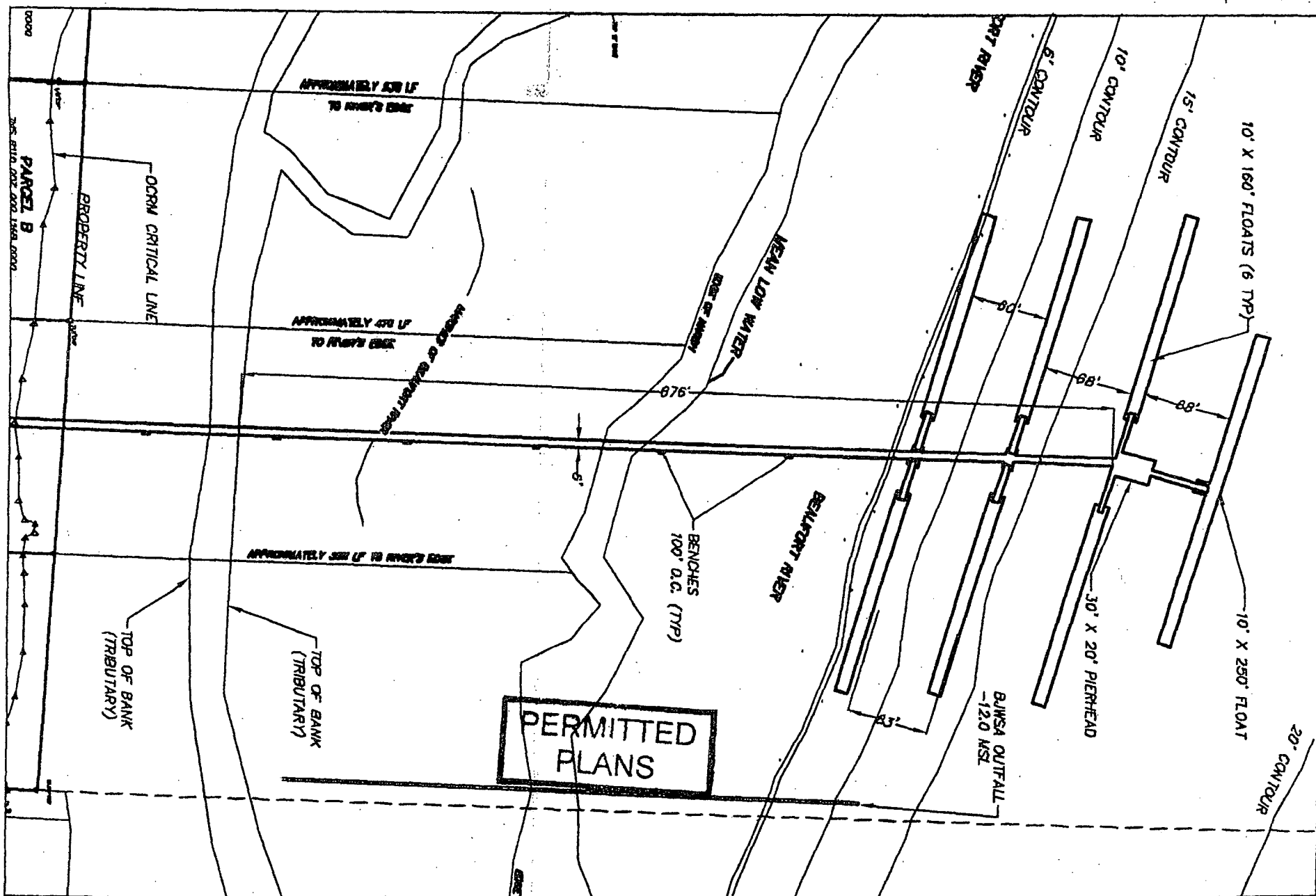
NORTH OF SITE:
 1. R110 007 000 0108 0000
 2. R110 007 000 0114 0000
 SOUTH OF SITE:
 1. R110 006 00A 0028 0000
 2. R110 006 00A 0027 0000
 3. R110 006 00A 0026 0000
 4. R110 006 00A 0025 0000
 5. R110 006 00A 0024 0000
 6. R110 006 00A 0023 0000
 7. R110 006 00A 0022 0000

2005-1W-429-P

Sh. 2 of 4

00000000

4



APPLICANT: MERRY LAND PROPERTIES

ACTIVITY: PRIVATE MARINA

P/N:

LOCATION: PORT ROYAL

SCALE: 1" = 100'

COUNTY: BEAUFORT

DATE: SEPTEMBER 12, 2005

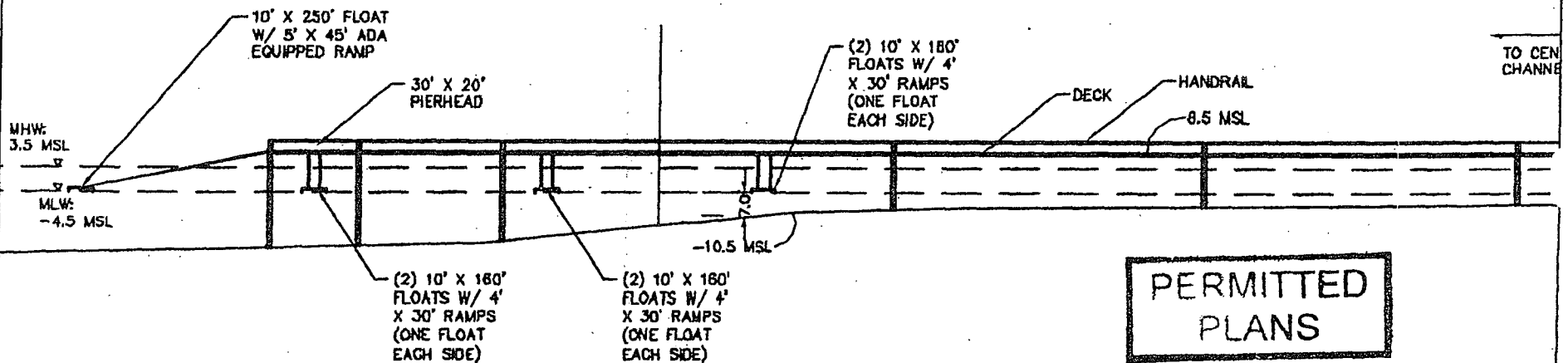
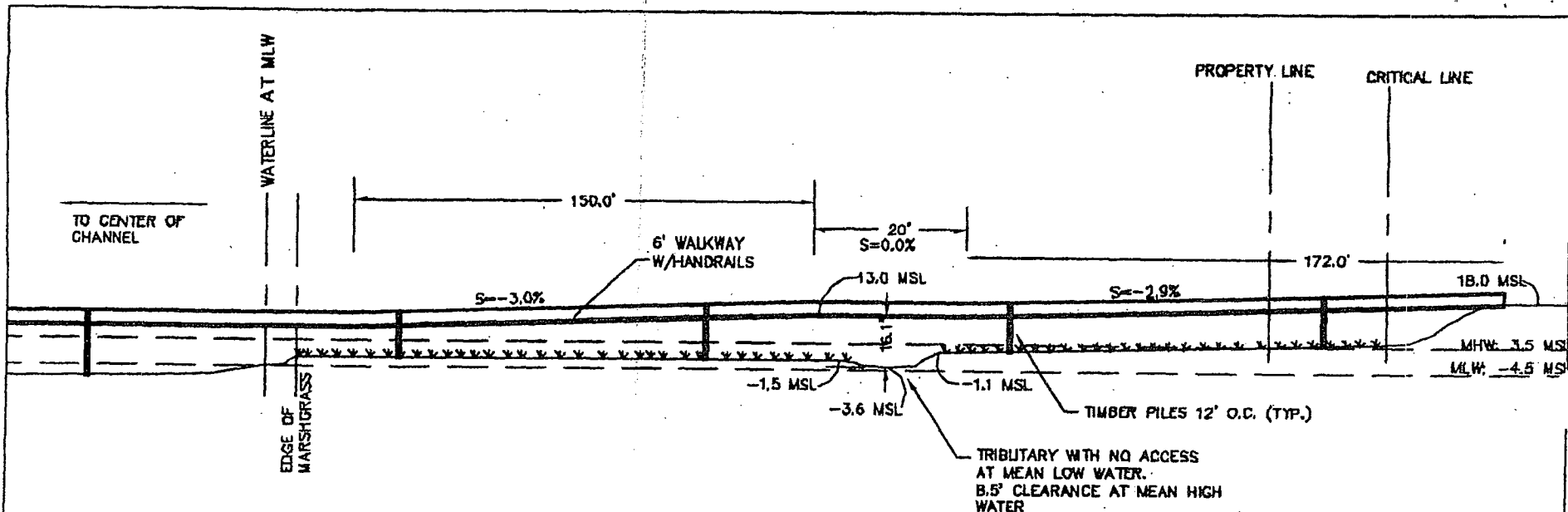
ADJACENT PROPERTY OWNERS:

NORTH OF SITE:
1. R110 007 000 0108 0088
2. R110 007 000 0114 0088

SOUTH OF SITE:
1. R110 009 004 0025 0000
2. R110 009 004 0027 0000
3. R110 009 004 0028 0000
4. R110 009 004 0025 0000
5. R110 009 004 0024 0000
6. R110 009 004 0025 0000
7. R110 009 004 0027 0000

2005-1W-429-P

Sh. 3 of 4



PERMITTED
PLANS

APPLICANT: MERRY LAND PROPERTIES

ACTIVITY: PRIVATE MARINA

P/N:

LOCATION: PORT ROYAL

SCALE: 1" = 50'

COUNTY: BEAUFORT

DATE: SEPTEMBER 12, 2005

ADJACENT PROPERTY OWNERS:

NORTH OF RTE:
1. R110 857 800 0109 0000
2. R118 037 888 6114 0000
SOUTH OF RTE:
1. R110 808 80A 0028 0000
2. R118 038 08A 0027 0000
3. R118 038 08A 0028 0000
4. R118 038 08A 0025 0000
5. R118 038 08A 0024 0000
6. R118 038 08A 0023 0000
7. R118 038 08A 0022 0000

2005-1W-429-P

Sh. 4 of 4

060000

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CASE NO.: 2007-CP-07-3212

H. MARSHALL HOYLER,
Plaintiff,

v.

THE STATE OF SOUTH CAROLINA,
Defendant.

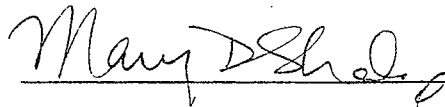
CERTIFICATE OF SERVICE

2007 NOV 26 PM 2:39
BEAUFORT COUNTY
COURT
CLERK
BEAUFORT, S.C.

The undersigned hereby certifies that on the 20th day of November, 2007, that she served a copy of the foregoing **NOTICE OF MOTION AND MOTION TO INTERVENE and INTERVENOR' S ANSWER AND COUNTERCLAIM** via U.S. Mail, postage pre-paid, on the following parties and counsel of record as listed below:

C. C. Harness, III, Esq.
Law Offices of C. C. Harness, III, P.C.
505 Belle Hall Drive, Suite 100
Mt. Pleasant, SC 29464

J. Emory Smith, Esq.
Assistant Deputy Attorney General
Office of the SC Attorney General
Post Office Box 11549
Columbia, SC 29211-1549



November 20, 2007
Charleston, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

H. Marshall Hoyler,

Plaintiff,

v.

The State of South Carolina,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No. 07-CP-07-3212

ANSWER

2007 DEC 18 PM 3:18
BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

The Defendant State of South Carolina, by way of answer to the Complaint herein, alleges as follows:

FOR A FIRST DEFENSE

1. The State denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. The State is without sufficient information and belief to admit or deny paragraph 1 of the Complaint and therefore denies that paragraph.

3. As to paragraph 2, the State admits only that this suit is brought against the State of South Carolina. The State denies that political subdivisions, agents and officials of the State are defendants in this action.

4. The State admits paragraph 3 on information and belief only to the extent that this paragraph is consistent with the laws of the State of South Carolina. The State craves reference to the statutes and other laws of the State of South Carolina for a complete statement of their provisions.

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5. The State is without sufficient information and belief to admit or deny paragraph number 5 of the Complaint and therefore denies that paragraph. The Complaint does not contain a paragraph number 4 and all references herein to paragraph numbers are to the numbers of the paragraphs as they are stated in the Complaint such as paragraph 5, which is immediately after the heading "Procedural History."

6. As to paragraph 6, the State admits only that Bill Jones made the referenced permit application, but the State is without sufficient information and belief to admit or deny any ownership claims of Plaintiff or the effect that the permit might have on any property claimed by Plaintiff, notice to Plaintiff or awareness by Plaintiff and therefore denies all of those allegations.

7. As to paragraph 7, the State admits only that the permit was issued to Mr. Jones. The State admits on information and belief only that Plaintiff and Rita Brown requested a contested case hearing. The State is without sufficient information and belief to admit or deny the remainder of this paragraph and therefore denies those allegations. The State craves reference to the Public Notice of Appeal in Beaufort River Development, LLC, OCRM-06-991, September 7, 2007.

8. The State is without sufficient information and belief to admit or deny paragraph 8 of the Complaint and therefore denies that paragraph. The State does allege, on information and belief, that the appeal of Rita Brown has been dismissed pursuant to a stipulation of dismissal and the October 10, 2007, Order of the Honorable John D. Geathers.

9. The State is without sufficient information and belief to admit or deny paragraphs 9 through 15 of the Complaint and therefore denies those paragraphs.

10. In each of the following defenses, the State realleges and incorporate all the defenses contained in this Answer as fully as if repeated herein.

FOR A SECOND DEFENSE

11. As an affirmative defense, the State alleges that it has *prima facie* fee simple title, in public trust, of all lands now or formerly lying below the high water mark of all tidal navigable waters in the State, including any such lands in the instant case and any marsh islands situated therein, unless those lands were properly granted and deeded to the Plaintiff under South Carolina law.

FOR A THIRD DEFENSE

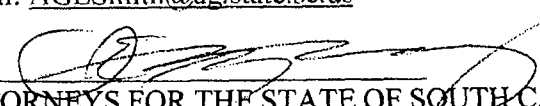
12. To the extent that any navigable waters are on the Subject Property, the Plaintiff lacks the power to exclude the general public from that property, because the public has a right under the Constitution and statutes of South Carolina to make use of navigable waters.

WHEREFORE, having fully answered the Complaint herein, the State prays that it be dismissed, and that title be confirmed in the State to such parts of the Subject Property as now or formerly were intertidal or are now marsh islands.

HENRY D. MCMASTER
Attorney General

J. EMORY SMITH, JR.
Assistant Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Email: AGESmith@ag.state.sc.us

December 14, 2007

By: 

ATTORNEYS FOR THE STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

H. MARSHALL HOYLER,

Plaintiff,

vs.

THE STATE OF SOUTH CAROLINA,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2007-CP-07-3212

) **REPLY TO COUNTERCLAIM**

Plaintiff, Marshall Hoyler, replying to the Answer and Counterclaim of Intervenor, Merry Land Properties, LLC states as follows:

1. Plaintiff denies each and every allegation of the Answer and Counterclaim not specifically admitted or explained hereafter and demands strict proof thereof.
2. Plaintiff is informed and believes that Defendant has mis-captioned and mis-denominated affirmative defenses as Counterclaims and thus they require no Reply.
3. Paragraphs 1, 2, 3, 4, 5, 6, 7, and 8 are general denials and to the extent that an Answer is necessary, Plaintiff denies them except those portions which admit the allegations of the Complaint and those the Plaintiff admits.
4. Paragraphs 9, 10, 11, 12, 13, 14, 15, and 16 are background information and require no denial, but to the extent that they do Plaintiff denies same and demands strict proof thereof.
5. Plaintiff specifically denies the allegations of Paragraphs 17, 18 and 19 and affirmatively alleges that Defendant and any other person or entity had public

record real estate notice as well as tax record notice, as did any citizen interested in this property.

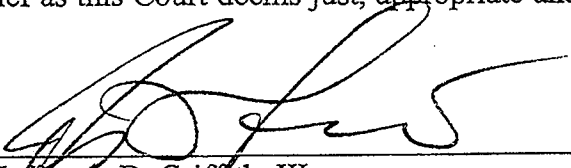
6. Plaintiff denies the allegations of Paragraph 20.
7. Plaintiff denies the allegations of Paragraph 21.
8. Plaintiff denies the allegations of Paragraph 22.
9. Plaintiff admits such allegations of Paragraph 23 as are direct quotations from the deed but craves reference to the deed for the specific language; and denies the remaining allegations of Paragraph 23.
10. Plaintiff denies Paragraph 24 and further alleges that it is a legal conclusion and not an allegation of fact.
11. Plaintiff admits so much of the allegations of Paragraph 25 as allege the plat referenced by the deed contains specific bearings and metes and bounds. Plaintiff denies the remaining allegations of that paragraph. Plaintiff further denies the allegations of Paragraph 25 that contain legal conclusions and not allegations of fact.
12. Plaintiff denies the allegations of Paragraph 26. Defendant had public record real estate notice as well as tax record notice, as did any citizen interested in this property.
13. Plaintiff denies the allegations of Paragraphs 27 and 28. Plaintiff further denies any affirmative duty on his part to notify any person or entity beyond recording his deeds with the appropriate authorities in Beaufort County. Furthermore any entity or person had public record real estate notice as well as tax record notice.
14. Plaintiff denies the allegations of Paragraphs 29, 30, 31, 32 and 33. Plaintiff denies any affirmative duty to notify Defendant or any other person or entity of

his ownership interest in the marshland beyond recording his deeds with the appropriate authorities in Beaufort County. Furthermore any entity or person had public record real estate notice as well as tax record notice.

15. Plaintiff denies the allegations of Paragraph 34.
16. Plaintiff admits the existence of the statute cited by Defendant but craves reference to it for specific language and history and denies the remainder of Paragraph 35.
17. Plaintiff denies allegations of Paragraphs 36 and 37 and demands strict proof thereof.

WHEREFORE, having fully replied to the Answer and Counterclaim of the Defendant Merry Land Properties, LLC, Plaintiff asks that this Honorable Court inquire into the matters set forth herein and grant the following relief:

1. Dismiss the Answer and Counterclaim with prejudice;
2. Award costs and attorney's fees to the Plaintiff; and
3. For such other and further relief as this Court deems just, appropriate and proper.



Jefferson D. Griffith, III
C.C. Harness, III
Law Offices Of C. C. Harness, III P.C.
505 Belle Hall Parkway, Suite 101
Mt. Pleasant, South Carolina 29464
Telephone (843) 856-2627
Facsimile (843) 856-2664

FEBRUARY 6, 2008

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	
H. Marshall Hoyler,	)	C/A No. 2007-CP-07-3212
	)	
Plaintiff,	)	
	)	
v.	)	POST-TRIAL MEMORANDUM OF
	)	STATE OF SOUTH CAROLINA
State of South Carolina, Merry Land	)	
Properties, LLC, et al	)	
	)	
Defendants.	)	
	)	

The Defendant State of South Carolina submits this post-trial memorandum.

BACKGROUND

Plaintiff brought this suit for this Court to declare its title to approximately 95 acres of mostly marshland below mean high water along the Beaufort River in Beaufort County, South Carolina. He claims title in a chain derived from a conveyance of the property on July 27, 1891, to his predecessor in title, J. M. Crofut. The State alleged in its Answer, that it has presumptive title to any land below mean high water unless those lands were properly granted and deeded to the Plaintiff under South Carolina law. Merry Land Properties intervened and its counterclaim alleged, among other claims, that the Crofut grant was insufficient. On March 17, 2011, this Court filed an order joining property owners abutting the marsh. After appeals of that Order by Hoyler and a related Motion to Reconsider were denied, this action proceeded. This Court held trial of this case on November 19, 2015. The Court held the record open until Merry Land could depose Jim Gardner, a surveyor. That deposition was taken on February 26, 2016, in Bluffton.

The Crofut grant was to 95.27 acres of land "between high and low water mark" along the Beaufort River except that it reserved to the State "all mineral and phosphate rights." It

referenced a plat depicting the property. The grant was signed by the Governor, and the Sinking Fund Commission certified that it was issued in conformity with a resolution of the Commission. Plaintiff's surveyor Lorick Fanning, and by deposition, Merry Land's witness Gardner, testified as to the applicability of the Crofut grant to the property claimed by Plaintiff.

Plaintiff Hoyler and Merry Land will probably submit a lengthier procedural history and a factual summary. Because the State's position in this case is that the burden of proof is on the Plaintiff to prove that he has a grant in his chain of title that overcomes the presumption of State ownership, the State will review the summary presented by those parties, and if it believes necessary, request leave to reference any additional facts in the record which this Court may need to consider. The State may also request leave to respond to the legal arguments of those parties.

DISCUSSION

As stated in *McQueen v. South Carolina Coastal Council*, 354 S.C. 142, 149, 580 S.E.2d 116, 119 (2003):

As a coastal state, South Carolina has a long line of cases regarding the public trust doctrine in the context of land bordering navigable waters. Historically, the State holds presumptive title to land below the high water mark. As stated by this Court in 1884, not only does the State hold title to this land in *jus privatum*, it holds it in *jus publicum*, in trust for the benefit of all the citizens of this State. *State v. Pacific Guano Co.*, 22 S.C. 50, 84 (1884)

Also, as set forth in *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 396, 252 S.E.2d 133, 135 (1979): "[T]he area between the usual high water line and the usual low water line remains in the State, unless there is ' . . . specific language, either in the deed or on the plat, showing that it was intended to go below high water mark . . . ' *State v. Hardee*, 259 S.C. 535, 543, 193 S.E.2d 497, 500 (1972)." Accordingly, the State is the presumptive owner of any marsh, beachfront or

other tidelands below mean high water, unless such property was specifically granted by the sovereign. The burden rests upon the claimants to prove that the State had granted title to the lands in question to their predecessors in title. *State v. Yelsen Land Co.*, 265 S.C. 78, 216 S.E. 2d 876 (1975).

The State anticipates that Merry Land will question the validity of the grant because it was not specifically approved or expressly authorized by the legislature. The State does not challenge the validity of that particular grant issued nearly 125 years ago and executed as set forth above; however, the State does not concede that the grant applies to the property at issue and asks that this Court make that determination as set forth below.

Although the Crofut grant expressly conveys land between high and low water and the plat depicts marshland, this Court must determine whether that grant is coextensive with the property claimed by Hoyler. The State respectfully requests that this Court consider the evidence introduced by Hoyler and Merry Land in determining whether Hoyler has met his burden of proof of title under the above precedent. Should this Court determine that the grant did convey the property at issue, the conveyance would be subject to the State's reservation of phosphate and mineral interests noted above. Also, if any of the property of the Plaintiffs at issue in this case is crossed by or bound by navigable waters, the waters remain public highways and subject to a public trust. S.C. Const. art XIV, §4; *State v. Head*, 330 S.C. 79, 498 S. E. 2d 389 (Ct. App. 1997). The State owns the beds of any such navigable tidal rivers absent express legislation. *Heyward v. Farmers' Min. Co.*, 19 S.E. 963, 973 (1894).

CONCLUSION

Accordingly, the State respectfully requests that this Court apply the above law to the evidence in this case.

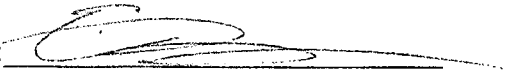
Respectfully,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

J. EMORY SMITH, JR.
Deputy Solicitor General
S.C. Bar No. 5262

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Email: esmith@scag.gov

By: 

March 25, 2016

ATTORNEYS FOR THE STATE

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH CIRCUIT

CASE NO.: 2007-CP-07-3212

H. Marshall Hoyler,

Plaintiff,

vs.

**POST-TRIAL
BRIEF OF PLAINTIFF**

The State of South Carolina,
Merry Land Properties, LLC.,
Sherbert Living Trust, Sherbert Living Trust,
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 Anne Gilck,
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. VonHarten,
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.

The Plaintiff, H. Marshall Hoyler's Post-Trial Brief follows.

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PROCEDURAL HISTORY

Plaintiff, H. Marshall Hoyler, (hereinafter "Hoyler" or "Mr. Hoyler" or "Plaintiff"), filed an action under Section 48-39-220, S.C. Code Ann., (1976, as amended), to determine interest in tidelands. Original litigation was expanded by Order of the Court, to add thirty-seven additional Defendants, along with the two original Defendants, the State of South Carolina and Merry Land Properties, LLC. This matter came on before this Court for final Hearing on November 19, 2015.

INTRODUCTION

Mr. Hoyler, seeks to have title quieted to land between the low and high-water marks along the Beaufort River, pursuant to S.C. Code Section 48-39-220 (1976, as amended). Hoyler's action is one to settle title to real estate and is therefore legal in nature.¹ In South Carolina, the State holds presumptive title to the real estate in question, unless the State of South Carolina or one of its royal predecessors conveyed title to Plaintiff or his predecessors in title.^{2, 3} Any conveyance to a private party is construed strictly against that party and in favor of the State.⁴ Because real property between the high-water and low water marks is held in public trust by the State, the Plaintiff must, as has been shown in this case, show that his deed, or accompanying plat, contained specific language or plat references, conveying that property showing the State's specific intent to divest itself of the property.⁵

¹ Although an action to quiet title generally lies in equity, the main purpose of the complaint in this instance concerns the determination of title to real property. Lowcountry Open Land Trust v. State, 347 S.C. 96,101, 552 SE 2d 778 (S.C. Ct. of App. 2001).

² The State of South Carolina holds presumptive title to all tidelands within its borders, which are held in trust for the benefit of the public. Coburg Dairy, Inc. v. Lesser, 318 S.C. 510, 458 S.E.2d 547 (1995); Hobonny Club, Inc. v. McEachern, 272 S.C. 392, 252 S.E.2d 133 (1979). Lowcountry, supra p. 102

³ "The State may, however, grant private individuals an ownership interest in tidelands". Hobonny, supra, p. 136 "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) ("The law in South Carolina is well settled that a grant conveying 'marshland' can give rise to private ownership of property to the mean low water mark."). Lowcountry supra, p. 102.

⁴ A grant from the State purporting to vest title to tidelands in a private party is construed strictly in favor of the government and against the grantee. Pacific Guano, 22 S.C. 50, 86 ("In all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor...."); State v. Fain, 273 S.C. 748, 259 S.E.2d 606 (1979). Consequently, the party asserting a transfer of title bears the burden of proving its own good title. Pacific Guano, supra, p. 74, Lowcountry, supra, p. 103.

⁵ 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...." Hobonny, 272 S.C. at 396, 252 S.E.2d at 135, (quoting State v. Hardee, 259 S.C. 535, 543, 193 S.E.2d 497, 500 (1972)); State v. Yelsen Land Co., 265 S.C. 78, 82, 216 S.E.2d 876, 878 (1975) ("Under well settled rules of construction ... boundaries [subject to the ebb and flow of the tide] will convey land only to the high water mark in the absence of specific language, either in the grant or upon a plat, showing that it was intended to convey land below the high water mark."). Lowcountry, supra, p. 102.

However, if the State or one of its royal antecedents has, as was done in this case, conveyed tidal property, the State does not hold presumptive title.⁶ Once the State divests itself of property, it "... must prove by positive evidence that it regained title in some manner at a subsequent time."⁷ Neither the State, nor Merry Land, put forth any evidence that the State had regained title to the real property in question.

HOYLER'S CASE IN CHIEF

In his case in chief, Mr. Hoyler presented three witnesses, Georgianna Coates, expert title examiner, Chester Williams, Esquire, an expert in real estate titles, and Lorick Fanning, RLS, an expert in real property surveying (all three witnesses were qualified as experts before this court).

Witness, Georgianna Coates

First, Plaintiff called Georgianna Coates, to the stand. Ms. Coates was offered by Plaintiff, and qualified by this court as an expert in real estate title examination. Ms. Coates stated that she had examined the title to real estate claimed by the plaintiff. Ms. Coates testified that Plaintiff's title to the real property in question could be traced back to a conveyance from the Honorable Benjamin R. Tillman, then Governor of South Carolina, to James M. Crofut.⁸ Ms. Coates also testified to the references made in the deed to a plat which was referenced in the deed from Governor Tillman to Plaintiff's predecessor in title. Ms. Coates then was able to trace an unbroken chain of title from Mr. Crofut to Plaintiff. Ms. Coates also testified to the ready availability of this information in the public record, including the real estate records as well as the tax records of Beaufort County. Ms. Coates affirmed the publicly available nature of this information during the time when Merry Land was having its title examined.

⁶ The rule that the State comes into court with a presumption of title, which is the correct rule when lands have never been granted by the sovereign, does not apply when lands have once been granted, as they were in this case. State ex rel McLeod v. Sloan Const. Co., 284 SC App 491,500, 328 SE 2d 84 (S.C. Ct. of App. 1985), (Internal citations omitted).

⁷ State ex rel McLeod v. Sloan Const. Co., 284 S.C. App. 491,494, 328 SE 2d 84 (S.C. Ct. of App. 1985), (Internal citations omitted).

⁸ Transcript P. 34 P. 21 – P. 35 L. 1

Witness, Chester Williams, Esquire

Second, Plaintiff called Chester Williams, Esquire, to the stand. Mr. Williams was offered by the Plaintiff, and qualified by this court as an expert in real estate title⁹ and the conclusiveness of the information offered by Ms. Coates on the title to Plaintiff's property. Mr. Williams offered his expert opinion that based on the title examination of Ms. Coates, Plaintiff was the owner of the property in question and Plaintiff's property was located between the mean high-water and mean low water marks of the Beaufort River in Beaufort County. Mr. Williams affirmed the easy availability of this information in the public records of Beaufort County, including the real estate records as well as the tax records.

Witness Lorick Fanning, RLS

Finally, Plaintiff called Lorick Fanning. Mr. Fanning was offered by the Plaintiff, and qualified by this court as an expert in real estate surveying.¹⁰ Mr. Fanning had been asked by the Plaintiff to recreate the plat which was incorporated into the deed from the state to Plaintiff's predecessor in interest.¹¹ Mr. Fanning was able to recreate the plat in its entirety based on the plat incorporated into the original deed from the State and create an overlay of the two.¹² Mr. Fanning described the process by which he recreated the plat, including field survey work, historical research relying on publicly filed documents and other publicly available documents and surveying techniques¹³, specifically the land lot and section system¹⁴. Mr. Fanning stated that the plat attached to Mr. Crofut's deed and his recreation of the plat represented intent to convey property between the high and low water marks of the Beaufort River.¹⁵

Mr. Fanning did not have a lot of difficulty in "closing" the plat, i.e. making the plat represent a drawing that started at one point and closed on that same point of reference.¹⁶

⁹ Transcript P. 33 LL 22-25 and P. 34 LL 1-4

¹⁰ Transcript P. 69 LL 22-25, P. 70 LL 1-3

¹¹ Transcript P. 70 LL 8-25, P. 71 LL 1-9

¹² Transcript P. 85, LL 21-25, P. 86, LL 1-6

¹³ Transcript P. 70 LL 8-25, P. 71 LL 1-5, P. 72 LL 1-25, P. 73 LL 1-16, P. 76 LL 24-25, P. 77 LL 1-24, P. 78 LL 24-25, P. 79 LL 1-25, P. 80 1-25, P. 81 LL 1-25, P. 82 LL 1-25

¹⁴ Transcript P. 152 LL 7-13

¹⁵ Transcript P. 87 LL 1-25, P. 88 LL 1-3

¹⁶ Transcript P. 135 LL 16-34

Mr. Fanning's plat did not contain the exact acreage of the original plat, which he explained by noting that the eastern and western boundaries of the plat were "natural monuments" which were the high and low water marks of the marshes of the Beaufort River.¹⁷ Because these were natural monuments subject to the vagaries of the tidal flow and erosion or accretion of soil over the whole of the property the property had obviously been diminished by some natural forces.¹⁸

Witness Fanning's Rebuttal Testimony

Mr. Fanning, Plaintiff's expert, on being recalled to the stand, contradicted Merry Land's Witness, Mr. Basich's testimony and described that by using the plats and the Beaufort County grid system, a surveying tool that was contemporary with the plats, that he was able to locate the southern boundary of the property.¹⁹

Plaintiff's Evidence

Plaintiff introduced through his witnesses and by way of judicial notice, certain exhibits which included the deed from the State to Mr. Crofut, Plaintiff's predecessor in interest in the real property, (i) the plat incorporated in the deed by reference, (both showing the real property in question between the mean high and low water marks) (ii) miscellaneous contemporary statutes showing the right of the Governor and Secretary of State to transfer property as recited in the deed to Mr. Crofut, (iii) the deeds in Plaintiff's chain of title and (iv) a new plat drawn by Mr. Fanning on Plaintiff's behalf.²⁰

¹⁷ Transcript P. 162 LL 3-25, P. 163 LL 1-8, P. 174 LL 24-25, P. 175 LL 1-25, P. 176 LL 1-25, P. 177 LL 1-25, P. 178 LL 1-4

¹⁸ "South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to. Conversely, lands gradually encroached upon by water cease to belong to the former riparian or littoral owner. The rule rests on the impossibility of identifying at any given moment the imperceptible additions to or subtractions from riparian land caused by the constant natural action of water. It ensures that riparian land will remain riparian, whatever changes may take place in the adjacent watercourse or shoreline by accretion or reliction. The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence. The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters shall be entitled also to whatever benefits they bring." Horry County v. Woodward, 282 S.C. 366, 369-370, 318 SE 2d 584 (S.C. Ct. of App. 1984), (Internal citations omitted).

Also see, Gardner Deposition P. 48 LL 15-25, P. 49 LL 1-3

¹⁹ Transcript P. 310 LL 16-25, P. 311 LL 1-25, P. 312 LL 1-6

²⁰ Transcript P. 5-6 Exhibit Index

Mr. Hoyler Met His Burden of Proof

Mr. Hoyler met his burden of proof to show that his title was unbroken from the State of South Carolina to himself and that the plain language of the deed and/or the plat which was referenced in it gave title to property between the high and low water marks. Mr. Hoyler, having met his burden, required the State to present evidence that it had regained title, which the State did not do in this action.

THE STATE'S CASE

The State presented no witnesses. The State presented no evidence. It is therefore uncontradicted that State conveyed marshland to Mr. Hoyler's predecessor in title. If the State or one of its royal antecedents has conveyed tidal property, the State does not hold presumptive title. "... the State cannot rely on alleged defects in (grantee's) chain of title to regain ownership of what was granted. Like any other litigant, the State must recover on the strength of its own title, not the weakness of the defendant's."²¹ Neither the State, nor Merry Land, put forth any evidence that the State had regained title to the real property in question.

INTERVENOR MERRY LAND'S CASE

Merry Land Properties, LLC, presented its witnesses as follows: (i) Mr. Tennant Houston, who is and was at all times relevant to this trial, a member and officer of Merry Land Properties, LLC., (ii) David Tetter, Esquire, (iii) Donald R. Cook, Jr., RLS, (iv) Greg Baisch, P.E. and (v) Jim Gardner, RLS (all qualified as experts by this Court except Mr. Houston).

Witness, Tennant Houston

Mr. Houston testified to the due diligence that went into procuring the upland property adjacent to Mr. Hoyler's. Mr. Houston described the expense and delay that Merry Land Properties, LLC had experienced since learning that Mr. Hoyler owned the adjacent property that was below the mean high water mark. However, Mr. Houston admitted that Mr. Hoyler had done nothing wrong in maintaining his property like anyone else and that Mr. Hoyler was under no obligation to do more to notify the public of Mr. Hoyler's ownership interest than he was doing.²²

²¹ *State ex rel McLeod v. Sloan Const. Co.*, 284 S.C. App. 491,494, 328 SE 2d 84 (S.C. Ct. of App. 1985), (Internal citations omitted).

²² Transcript P. 216 LL 24-25, P. 217 LL 1-11, P. 218 LL 7-25, P. 219 LL 1-7

Mr. Houston further acknowledged that Mr. Hoyler was not obligated to bring this claim in any particular time period under the plain language of the South Carolina Code of Laws.²³ Mr. Houston admitted that if sufficient due diligence had been done that Mr. Hoyler's real estate tax records could have been found.²⁴

Witness, David Tetter, Esquire

Mr. Tetter testified that he had examined the Merry Land Properties' title to its land that abutted Mr. Hoyler's land, had certified title to Merry Land and obtained title insurance for Merry Land. Mr. Tetter further stated that he did not recall seeing any tax record references to Mr. Hoyler's parcel and had he done so, he would have further investigated the property. Mr. Tetter testified that the Beaufort County Assessor's Office had been changing software at about the time that Merry Land's title was being examined and that could have led to Mr. Tetter not seeing Mr. Hoyler's property which appeared on the Beaufort County Assessor's records. Mr. Tetter acknowledged that Mr. Hoyler had, according to the records shown Mr. Tetter (i) been paying taxes on the property since 2000,²⁵ (ii) that Mr. Tetter's title certification and the title policy only extended to the high water mark of the Beaufort River and did not certify anything below that mark,²⁶ and finally (iii) that any errors on the tax maps would have been the fault of the Assessor and not Mr. Hoyler.²⁷

Witness, Donald R. Cook, Jr.

Mr. Cook said that he had "reviewed" the old plat annexed to the deed from the State of South Carolina to Mr. Crofut and that the survey lacked a graphic scale which would make it difficult to read the metes and bounds of the survey which might cause it not "close" and the plat did not have a point of origin which would make recreating the plat impossible. Mr. Cook did not testify that he could not "close" it. On cross examination Mr. Cook acknowledged that the plat could be generally located by other landmarks. Mr. Cook also, under further cross examination, acknowledged that he had only reviewed the old plats and that he had not been asked to recreate them. Mr. Cook also admitted that if he used the Beaufort County Grid System that he could possibly locate the upland parcel but he had not been asked to do that.

²³ Transcript P. 226 LL 9-23

²⁴ Transcript P. 229 LL 7-13

²⁵ Transcript P. 246 LL 12-25, P. 247 LL 1-8

²⁶ Transcript P. 248 LL 3-25, P. 249 L. 1

²⁷ Transcript P. 245 L. 25 - P. 246 L. 20, P. 249 LL 17-20

Mr. Cook also conceded that even if someone owned the marsh that it would not be incorrect to refer to it as marshes of the Beaufort River.²⁸

Witness, Greg Baisch, P.E.

Greg Baisch was employed by Ward Edwards and worked on behalf of Intervenor, Merry Land to do civil engineering, consulting and site development. Mr. Baisch served as the project manager, sort of, for the Merry Land Property development.²⁹ Mr. Baisch's testimony centered around current conditions around and on the surface features of the Plaintiff's property. Mr. Baisch testified that there was a small navigable cut running through the Plaintiff's property, gave testimony about some of the low water features and about an oyster rake. Upon objection of Plaintiff's counsel, Mr. Baisch was not allowed to testify with regard to plats or their ability to "close".

Witness, Michael J. Gardner

Finally, over Plaintiff's objection, Intervenor introduced the testimony of Mr. Gardner from a post-trial deposition. Mr. Gardner had been in the employ of Ward Edwards and worked on behalf of Intervenor, Merry Land, when it became aware that Mr. Hoyler's property lay athwart the eastern boundary of Intervenor's property. Mr. Gardner had been asked to see if the contemporaneous plats to the 1891 deed from the State would "close". Mr. Gardner stated that neither he nor his CAD operator could make the plats "close". Mr. Gardner stated that they could not make the plats "close", because they could not read the calls of the metes and bounds on the old surveys.³⁰ Mr. Gardner further testified that a plat was a representation of land³¹ and that the surveyors that were operating at the time of the 1881-1882 plats creation that there was no licensing³², that the tools used in 19th Century surveying were crude,³³ that there was no, to his knowledge, tolerance of closure rate,³⁴ that in order to determine whether the plats would "close" would have taken field work which he did not do,³⁵ that given sufficient information that a closure of a plat could be "forced"³⁶.

²⁸ Transcript P. 266 LL 17-25, P. 267 LL 1-25, P. 268 LL 1-25, P. 269 LL 1-24

²⁹ Transcript P. 272 LL 17-22

³⁰ Deposition Transcript Gardner P. 24 LL 14-25, P. 25 LL 1-5

³¹ Deposition Transcript Gardner P. 23 9-11

³² Deposition Transcript Gardner P. 30 LL 9-17

³³ Deposition Transcript Gardner P. 26 LL 1-8

³⁴ Deposition Transcript Gardner P. 30 LL 4-9

³⁵ Deposition Transcript Gardner P. 27 LL 1-7

³⁶ Deposition Transcript Gardner P. 29 LL 16-25

Mr. Gardner further admitted that the intent of the deed and the plat was to convey property that was inundated twice a day whether it was to the high/low water mark or to the mean high/low water mark.³⁷

APPLICABLE LAW

In South Carolina there are two different burdens. The burden of persuasion in civil matters is generally one of a preponderance of the evidence and falls on the party pleading the cause whether it is through counterclaim or complaint. The burden of production falls on the party to come forward with evidence to defeat a directed verdict motion.

The Plaintiff, having title to the marshland had no burden other than to prove that he had an (i) unbroken chain of title from the State and that (ii) the deed and/or plat sufficiently described the property as lying between the high and low water marks. Either the deed and/or plat can show the State's intent to divest itself of the marshland, but in this instance both did.

The State

The State came forward with no evidence that it was the true owner of the real estate in question and therefore has not met its burden of production or persuasion.³⁸

Intervenor, Merry Land

The Intervenor finds itself in a different position. After Plaintiff rested, it presented several witnesses and numerous documents to try to prove its counterclaims. Counterclaims are not defenses, but are claims made by a defendant in litigation and should be treated the same as if filed in a Complaint with the Intervenor having the burden of proof.

EQUITABLE ESTOPPEL

Plaintiff interposed at numerous phases of the trial his objection to the Intervenor asserting, as counterclaims the equitable defense of equitable estoppel. The law in South Carolina is clear that this equitable defense may not be asserted offensively but must be used defensively.³⁹

³⁷ Deposition Transcript Gardner P. 51 LL 19-24

³⁸ Pike v South Carolina Department of Transportation, 343 SC 224,231, 540 SE2d 87 (2000).

³⁹ Estoppel and waiver are protective only, and are to be invoked as shields, and not as offensive weapons. Their operation in all cases should be limited to saving harmless or making whole the party in whose favor they arise and should not, in any case, be made the instruments of gain or profit. "While the doctrine of waiver or equitable estoppel may be invoked as affirmative defenses to counterclaims, they may not be asserted in a complaint as offensive weapons." Janasik v Fairway Oaks Villas Horizontal Property Regime. 307 SC 339, 345, 415 SE2d 384 (S.C. Ct. of App. 1992), (Internal citations omitted).

Because Plaintiff made no claim against the Intervenor, this defense *cum* counterclaim is not available to it, because Merry Land is trying to use it in an offensive capacity. This counterclaim should be dismissed out of hand as being improper under South Carolina law.

Assuming *arguendo*, that the Counterclaim is appropriate, the doctrine of equitable estoppel was not proved by a preponderance of the evidence and must fail. The doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury." ⁴⁰

The elements of equitable estoppel as to the party estopped (Hoyler) are: (1) conduct amounting to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention or expectation that such conduct will be acted upon by the other party; and (3) actual or constructive knowledge of the real facts.⁴¹ This cause of action must fail for the simple reason that the Plaintiff made no representations to anyone. Mr. Hoyler acted as any other individual that owns real property in South Carolina. Mr. Hoyler relied on his real estate professionals to properly acquire and record title to his property in the public records in the county files in the county in which the real estate is located, which they did. Mr. Hoyler also paid his taxes, another public statement of ownership, easily attainable to anyone caring to look closely enough. Mr. Hoyler did not know Merry Land or its officers and could make no representation to them.⁴² Absent affirmative conduct intending to mislead, the other two elements are superfluous.

The elements as to the party claiming the estoppel, (Merry Land) are: (1) lack of knowledge **and** of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) a prejudicial change in position. (Emphasis Added) Here, the Intervenor again fails to make its case on the first element, because the information which would have informed him that Hoyler owned the property was publicly available to him.⁴³ Merry Land's failure to find the publicly available information does not equate to not having the means of acquiring the knowledge which would have prevented Merry Land's predicament.

⁴⁰ Rushing v. McKinney, 370 S.C. 280, 293, 633 S.E.2d 917, 924 (S.C. Ct. of App. 2006).

⁴¹ S. Dev. Land & Golf Co., v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993).

⁴² Transcript P. 220 L. 1 - P. 221 L. 10

⁴³ Transcript P. 215 L. 21 - P. 216 L. 16

Furthermore, because Merry Land and Mr. Hoyler didn't know about each other, it was impossible for Merry Land to rely on Mr. Hoyler's conduct. The Court must find that the Intervenor failed to carry its burden of proof by a preponderance of the evidence and dismiss this Counterclaim.

LACHES

The Intervenor next asserts laches as a counterclaim. Plaintiff asserts that as an equitable defense laches may not be used offensively and must therefore fail.⁴⁴, ⁴⁵ Therefore, Intervenor may not use laches offensively.

The Intervenor has also failed to meet its burden of proof in establishing a claim of laches. Laches is the negligent failure to act for an unreasonable period of time. "Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights. **Delay alone in the assertion of a right does not constitute laches.**" Provident Life and Acc. Ins. Co. v. Driver, 451 SE 2d 924,929 (S.C. Ct. App. 1994), (Internal citations omitted, Emphasis added).

The party asserting laches must also satisfactorily show negligence, the opportunity to have acted sooner, and material prejudice before the bar in equity is complete. As with waiver, laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right. **The lached party (Hoyler) must have had actual knowledge or inquiry notice of the facts forming the basis of Intervenor's claim, and its failure to assert its right is irrelevant until there is a reason or situation that demands assertion.** The burden of proof is upon the person claiming laches."⁴⁶ (Emphasis added).

⁴⁴ Laches is an equitable doctrine which arises upon the failure to assert a known right. The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the "voluntary and intentional relinquishment or abandonment of a known right. Both laches and waiver require a party to have known of a right, and known that the party was abandoning that right. Strickland v. Strickland, 375 SE2d 76, 85, 650 SE 2d 465 (2007), (Internal citations omitted). See, Footnote 12 showing waiver may not be used offensively.

⁴⁵ "Given their derivation from the legal doctrine of waiver, we note that the doctrines of laches and equitable estoppel may be similarly indistinct at times. For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment. Thus, it is possible to assert only one of these equitable defenses—yet have successfully pled both." Strickland v. Strickland, *supra*, p. 86.

⁴⁶ Provident Life and Acc. Ins. Co. v. Driver, 451 SE 2d 924,929 (S.C. Ct. App. 1994), (Internal citations omitted, Emphasis added).

First, Intervenor's position turns laches on its head. It is an equitable doctrine in a law case. Next, Intervenor essentially says that Plaintiff, by failing to assert its claim against a third party (the State) has caused it to change its position. Laches is a theory that exists between two parties who may have had some interaction where there may be some rights between them. Intervenor's position is that a failure to assert a right against a third party somehow affects the rights of the world as to individual or entity.

Second, delay alone does not constitute laches. The intervenor has not shown neglect in failing to act. The applicable law with regard to asserting a claim for tidelands, embodied in the S.C. Code, Section 48-39-220, (1976, as amended) does not require action but merely permits action against the State by a party claiming tidelands. Therefore, there is no neglect in failing to pursue the action against the State. Merry Land's witness Houston acknowledged, when shown the actual language of the statute, that Mr. Hoyler had done nothing wrong.⁴⁷ Finally, as shown in the emphasized language above, the Plaintiff must have had actual knowledge or inquiry notice of the facts forming the basis of Intervenor's claim. Intervenor has proved none. Intervenor's attempt to do so by showing that it gave public notice of its intent to build a marina in the general area of the Plaintiff's property does not show any actual notice to Plaintiff. Additionally, the Intervenor, under the terms of the dock permit application must give individual notice to adjacent property owners.⁴⁸ Intervenor Merry Land, admittedly failed to do that. However, even if Hoyler had received an individual notice he would have not been required to file a claim against the State.

INSUFFICIENCY OF GRANT

Plaintiff's undisputed testimony from his expert witnesses was that Mr. Hoyler owned the property. The further undisputed expert testimony is that the chain of title is unbroken from the State of South Carolina to Mr. Hoyler. The deed and plat both show unequivocally that the property conveyed lies between the high and low water marks. It is further undisputed that the deed was subject to reservation on behalf of the State of South Carolina in any phosphate that might exist of the property and the right to mine it.⁴⁹

⁴⁷ Transcript P. 216, L. 17- P. 217, L. 7; P. 218 L. 12 - P. 219 L. 7.

⁴⁸ Transcript P. 220 L. 25 - P. 221 L. 10

⁴⁹ Plaintiff Exhibit 3-A, Copies of South Carolina statutes showing that the deed complied with the then extant statutes which prohibited the State of South Carolina from divesting itself of any phosphate minerals. The State in conveying the fee property to Mr. Crofut reserved those phosphate mining rights to itself.

Merry Land's position that the grant was somehow insufficient was not addressed by its expert and the State provided no evidence and produced no witnesses.

Mr. Hoyler's position is that he owned the land in fee simple, subject to a *profit a prendre*, in which the state reserved to itself in the phosphate materials. A *profit a prendre* is also "... called a 'right of common'". A right exercised by one person in the soil of another, accompanied with participation in the profits of the soil thereof. The taking (profit) is the distinguishing characteristic from an easement."⁵⁰ South Carolina has recognized the doctrine. "Hunting and fishing rights constitute a *profit a prendre*, giving the holder the right to take the product of the land of another."⁵¹

"In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed. The construction of a clear and unambiguous deed is a question of law for the court. The terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself. When intention is not expressed accurately in the deed evidence *aliunde* may be admitted to supply or explain it. The instrument is not thereby varied or contradicted but is explained or corrected."⁵² (Internal citations omitted).

It is clear from the contents of the deed from the State of South Carolina to Mr. Crofut in 1891, that Mr. Crofut and his heirs and assigns were to be conveyed the property described in the deed as being "a parcel of land on the Beaufort River in County and State aforesaid and lying between high and low water mark on river above mentioned..." and the plat referenced therein. His fee simple absolute was subject to the right of the State to enter the property and mine any phosphate found within the property. No other portion of the Crofut's bundle of rights were affected.

⁵⁰ Black's Law Dictionary 6th Edition, P. 1211

⁵¹ Bedingfield v. McLarty, 283 S.C. 561, 562, 324 SE 2d 312 (1984); Also see, Columbia Water Power Company v. Columbia Electric Street- Railway, Light & Power, 43 SC 154, 20 SE 1002, 1008 (1895). Also see, Exhibit 2 which, prior to reserving the right to mine for phosphates grants Mr. Crofut states that it grants the acreage "... together withal woods, trees, water courses, profits, commodities, appurtenances..." (Emphasis added).

⁵² Gardner v. Mazingo, 293 S.C. 23, 25, 358 SE 2d 390 (1987).

In Intervenor Merry Land's Pretrial Brief, Intervenor asserts that the Governor did not have the authority to convey the property under the Statutes then in existence. Plaintiff objects to the introduction of this new matter as it was not pled nor developed in discovery. Furthermore, Intervenor failed to amend its pleadings and cannot rely on this theory.

Assuming *arguendo* that the theory is available to Intervenor, the Statute plainly states that the Sinking Fund has the right to convey real property that is not in public use subject only to a prohibition against sales of "...held in trust for a specific purpose by the State, or the property of the State in phosphate rocks or phosphatic deposits in the beds of the navigable streams and waters and marshes of the State."⁵³ The Intervenor came forward with no evidence of any specific purpose for which this marsh was being held by the State of South Carolina. The best evidence of what the members of the Sinking Fund thought that it could do is embodied in the terms of the deed which conveyed the marshland but reserved the phosphatic material and the right to mine it to the State of South Carolina.

Intervenor, and the State to a lesser extent goes on to state that somehow the navigable stream beds may not be granted and relies on language in the Pacific Guano case cited hereinabove. The Pacific Guano case was decided in 1884 and Mr. Crofut's deed was given to him in 1891. Presumably the State knew what it could and could not grant by deed. Mr. Crofut's deed specifically refers to all of the "... watercourses..." running through it. Additionally, all of the watercourses that run through the property are above the low water mark of the Beaufort River.⁵⁴ It is unclear when the cuts were made in the bed, it is clear from Mr. Fanning's testimony that they are within the tract conveyed to Mr. Hoyler's predecessors in title.

VAGUENESS OF PLAT

To prove his case, Hoyler only has to show: "(1) (his) predecessor in title possessed a valid grant, and (2) the grant's language was sufficient to convey land below the high water mark."⁵⁵ There is no evidence to the contrary. Clearly, Mr. Hoyler's predecessor in interest had a grant from the State of South Carolina in 1891. That grant in fee simple absolute was subject to a *profit a prendre* in the State to mine for phosphates. The only question which remains for the Plaintiff to make out his case is; was the grant sufficient to convey property below the mean high water mark? The answer to that again is yes.

⁵³ Chapter IV, Article I, Section 85 of the Civil Statute Laws of South Carolina (1894) Exhibit 3-A

⁵⁴ Transcript P. 149 LL 15-24

⁵⁵ Grant v. State, 395 S.C. 225, 228, 717 SE 2d 96 (S.C. Ct. of App. 2011), (Internal citations omitted).

The deed itself is sufficient to convey the real property below the mean high water mark. The words in the deed specifically refer to the parcel as being "... a tract of land on the Beaufort River in County and State aforesaid and lying **between high and low water mark on river above mentioned...**"⁵⁶ The plain language of the deed passes the real estate between the high and low water marks to Hoyler's predecessor in interest.⁵⁷ Hoyler need go no further in his proof.

Additionally, the deed references a plat⁵⁸ which describes the real estate as "... having such shape, form and marks as are represented by a Plat of said land..."⁵⁹ In the Hobonny Club case⁶⁰, there was no reference in the deed to tidelands and the court had to rely on an attached plat. In this case, there is no such need because the deed contains the necessary description. However, because the Intervenor raised the question of the efficacy of the plat, Plaintiff hired a surveyor to try to recreate the survey referenced in the deed.

Hoyler's expert, Lorick Fanning, a Registered Land Surveyor, testified that he took the survey referenced in the deed and tried to recreate it. Mr. Fanning was able to read all of the measurements and calls on the plats and was able to recreate the plats.⁶¹ In addition to using the plats he took his own measurements, from both land and water, and used a grid system which was extant at the time of the original surveys and was able to recreate the plat attached to the deed and to make the plat's boundaries "close".

⁵⁶ Exhibits 2 and 2-A

⁵⁷ It has been further held that where a tidal navigable waterway is given as a boundary in a grant, the area between the usual high water line and the usual low water line remains in the State, unless there is "... specific language, either in the deed or on the plat, showing that it was intended to go below high water mark ..." Hobonny Club, Inc. v. McEachern, 272 SC 392, 396, 252 SE 2d 133 (1979), (Internal citations omitted), (Emphasis added).

⁵⁸ "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 SC 392, 397, 252 SE 2d 133 (1979), (Internal citations omitted).

⁵⁹ Exhibits 2 and 2-A

⁶⁰ Hobonny Club, Inc. v. McEachern, 272 SC 392, 252 SE 2d 133 (1979), (Internal Citations omitted), (Emphasis added).

⁶¹ Transcript P. 133 LL 10-25, P. 134 L. 1 - P. 135 L. 24

The plat contained approximately six (6) fewer acres than the original but those could have been lost to small errors in the original or more likely to accretion or changes to the run of the river which formed the natural monuments of the high and low water mark.⁶² Having recreated the plat to a reasonable degree of engineering certainty Hoyler believes that his expert has shown that the plat compliments the deed and the plat confirms that the intent of the grant from the State of South Carolina that the State intended to convey the lands between the high and low water mark.

Intervenor's Witness, Grant, testified that he was a registered land surveyor and that he had been asked to determine whether or not the plat in question was a good one. At his deposition, he indicated that he had asked a survey technician to try to recreate the plat on a Computer Aided Design (CAD) system. She was unable to do so, and Intervenor's expert was unable to do so either. The main problem was that they were unable to get the plat to "close". The reason that they were unable to get the plat to "close"⁶³ was that they were unable to read the "calls" on the original plat. When asked on cross examination if there were any additional steps that could have been taken to examine the plat further, Merry Land's expert said that the next step would have been field work, which he did not do. Grant also testified (i) that the degree of error found in modern plats did not exist for plats drawn during the 19th century (ii) that the plat showed the intent to describe land between the high and low water marks (iii) that the deed described land between the high and low water mark and (iv) that high and low water marks are natural monuments subject to the pressures of tides and storms.

⁶² "South Carolina recognizes the general common law rule that accretions by natural alluvial action to riparian or littoral lands become the property of the riparian or littoral owner whose lands are added to. Conversely, lands gradually encroached upon by water cease to belong to the former riparian or littoral owner. The rule rests on the impossibility of identifying at any given moment the imperceptible additions to or subtractions from riparian land caused by the constant natural action of water. It ensures that riparian land will remain riparian, whatever changes may take place in the adjacent watercourse or shoreline by accretion or reliction. The law gives the riparian proprietor the benefit of additions to his land caused by accretion or reliction. However, it also requires him to bear the corresponding risk that land will be lost by gradual erosion or submergence. The rule is said to rest on the principle of natural justice that one who sustains the burden of losses imposed by the contiguity of waters shall be entitled also to whatever benefits they bring." Horry County v. Woodward, 282 S.C. 366, 369-370, 318 SE 2d 584 (S.C. Ct. of App. 1984), (Internal citations omitted).

⁶³ "Close" means that starting at a point of origin on the lines on the plat drawing should return to the point of origin creating a two dimensional representation of the real property. Transcript P. 264 LL 9-13

CONCLUSION

The Plaintiff has proved his case by a preponderance of the evidence showing that he had an unbroken chain of title from the State and the deed and referenced plat showed the intent of the state to convey the tidelands referenced therein.

The State provided no Witnesses. The State produced no evidence. While the presumption of title rests in the State, it cannot sit idly by, after the Plaintiff has clearly shown that the State divested itself of title. The State must show that at some point it regained title. The State cannot prevail on any claimed weakness in the Plaintiff's title, but the State must prevail on the strength of its own. In this case the State presented no evidence of the State regaining its title and therefore Plaintiff must prevail.

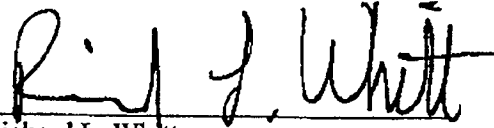
The Intervenor should not be allowed to assert the defenses of laches or equitable estoppel because they cannot be used in an offensive capacity as the Intervenor attempts to do here. Even assuming that they should be allowed, the Intervenor failed to prove them by a preponderance of the evidence.

The Intervenor pointed out no weakness in Plaintiff's title, assuming that it had the standing to do so. It's questioning of the plat is at best a "red herring". The plat incorporated into the deed from the State to Crofut is not necessary to prove the State's intent to divest itself of marshland, the plain language of the deed is sufficient to do that. Additionally, the plats of 1881 and 1882 could be recreated subject to the changes in the natural monuments (high and low water marks) by using contemporary reference material, reading the plats and doing field work. This is undisputed because all three survey experts (Plaintiff and two Intervenor) stated that additional field work would have had to have been done. Only one of them did that additional work and that was Plaintiff's expert who recreated the plats by modern means and showed that the intent of the state was to convey the ninety five and twenty seven one hundredths (95 27/100) acres of land between the low and high water marks on the Beaufort River.

Plaintiff should be confirmed in his title against the State and abutting land owners and the Intervenor's counterclaims should be dismissed.

[Signature Page Follows]

Respectfully Submitted,
AUSTIN & ROGERS, P.A.

A handwritten signature in black ink, appearing to read "R. L. Whitt", written over a horizontal line.

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STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

H. MARSHALL HOYLER,
Plaintiff,

vs.

The State of South Carolina, Merry Land Properties, LLC, Sherbert Living Trust, Sherbert Living Trust, 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. VonHarten, 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.

IN THE COURT OF COMMON PLEAS

Case No. 2007-CP-07-3212

**POST-TRIAL BRIEF OF INTERVENOR
DEFENDANT MERRY LAND
PROPERTIES, LLC**

The following Post-Trial Brief is submitted on behalf of Intervenor Defendant Merry Land Properties, LLC ("Intervenor")¹:

¹ Plaintiff originally filed this action against the State of South Carolina to determine whether his title was superior to the State's pursuant to S.C. Code Ann. Sec. 48-39-220. Merry Land Properties, LLC moved to intervene in the action, respond and interject counterclaims. Though Plaintiff first moved to dismiss the intervention, he later consented to it and the Court ordered the intervention.

PROCEDURAL HISTORY

Plaintiff, H. Marshall Hoyler filed this action seeking to declare title to a parcel of tidelands adjacent to the Beaufort River in Port Royal, South Carolina, hereinafter the "disputed marsh." A portion of the upland property abutting the disputed marsh is owned by Intervenor Merry Land, 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 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 development with deep water access on the Beaufort River.

A hearing on this matter initially commenced on January 31, 2011. At that hearing, Plaintiff moved to dismiss Intervenor from this action for lack of subject matter jurisdiction, which was denied by this Court. Plaintiff also moved for Summary Judgement 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, the hearing was stopped after it was determined by the Court that all property owners adjacent to the claimed tidelands were entitled to notification of the civil action.

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 with a Memorandum addressing the issue of appealability. Both 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.

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Thereafter, 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.

The matter returned to this Court on February 14, 2013, when a second Hearing was held on Plaintiff's previously pending Motion to Reconsider and a Motion to Intervene filed by Nancy Deering Carey etc. An Order was then issued on February 15, 2013 denying the Motion to Reconsider and adding an additional Defendant. Plaintiff then filed Notice of Appeal regarding this Order on 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 subsequently filed a Petition for Rehearing with the Court of Appeals on September 3, 2013 that was denied by the Court on December 9, 2013. Finally, three years after this Court ordered that additional parties be notified of this litigation, Plaintiff's counsel complied with this Court's Orders and forwarded 37 Summons in the action to the Clerk of this Court to be "clocked in." Notice to all adjacent property owners was finally accomplished in 2015, allowing this case to proceed.

FACTUAL BACKGROUND AND EVIDENCE PRESENTED

Intervenor has approvals to construct a multi-family development on the parcels adjacent to the disputed marsh, hereinafter the "Port Royal property," which is zoned for general

residential development and mixed use. Intervenor has 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 (Def. Ex. 53). 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 and total of 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 is planned to be located channelward of the pierhead.

The permits were ultimately issued because Intervenor satisfied the rules and regulations governing both agencies' reviews. There was no indication during the process of obtaining permits from two separate regulatory agencies of any claim of private ownership of the marsh. Nor was any indication of private ownership revealed during a title review performed by an experienced real estate attorney who reviewed various tax records, tax maps, deeds and Beaufort County's GIS records. All of the documents reviewed described the disputed marsh as "marshes of the Beaufort River" or simply "marsh." "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).

Plaintiff filed this action in accordance with S. C. Code Ann. §48-39-220 which provides:

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.

(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.²

Plaintiff claims title to the disputed marsh by way of a purported grant from the State of South Carolina that was conveyed to Plaintiff's predecessor in interest, J. M. Crofut, in 1891. The disputed parcel was conveyed to Plaintiff in 1979. Plaintiff could have invoked the procedures in § 48-39-220 at any point since 1979 which would have resulted in both DHEC and the South Carolina Attorney General's office ~~in~~ having a record of Plaintiff's claim of ownership. Instead, Plaintiff failed to invoke the procedures of § 48-39-220. Further, he failed to take any affirmative action indicating that the disputed marsh was subject to a private claim of ownership including the posting of signs or inspections of the property for trespass. As a consequence of the lack of notice of this claim and Plaintiff's lack of attention to the disputed marsh, residents in an adjacent subdivision, Spanish Point, constructed docks over the disputed marsh without Plaintiff's knowledge.

² History of statute: 1977 Act No. 123, Section 22; 1993 Act No. 181, Section 1235.

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(I) 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).

(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).

Here, Intervenor relied on multiple professionals to identify adjoining property owners for purposes of submitting permit applications to DHEC and to the Corps. As is discussed

geotechnical services. Intervenor retained Billy Keyserling, a local commercial real estate broker. Intervenor performed a Phase 1 Environmental Assessment. A land planner was retained to assess the options for development plans. Intervenor hired O'Quinn Marine, a licensed marine contractor, to aid in the design of the marina and in acquiring the marina permit. After Intervenor submitted an application with DHEC and the Corps for a marina permit, these agencies conducted a public process including a public notice period which resulted in a lengthy article in the local newspaper. Intervenor consulted with the City of Port Royal's administrator and zoning director to determine if there were any impediments to the planned development. The investigation occurred from 2004 until they closed on the property in December, 2006, for a purchase price of \$6,000,000.00. The closing was contingent upon receipt of the marina permit which ensured deep water access for the adjacent development.

Intervenor's attorney David Tedder testified on behalf of Intervenor. Mr. Tedder was hired by Intervenor to handle the assimilation of the Port Royal parcels. Mr. Tedder researched title on all the parcels and coordinated with the various professionals that were involved including the surveyors and title abstractors, and performed all work necessary for title insurance to be issued for the property. With regard to his review of the waterfront properties off of Johnny Morrall Circle, "we went to each of the -- let's focus on the waterfront properties. Each of the different owners there, and looked at the tax records and the tax maps to see where we were, we could see what they were against, compare the abutters. And in this case when we looked we didn't see any indication on the river side that there was a tax parcel out there. When you look at this way that the GIS maps print out, depending on the layers that you have, you see the street address, you see the tax parcel number, all those things there. And in this case we didn't see anything, so we didn't go digging to try and find something because in all the deeds

that we did on the eight, pretty much they all had the same description on that eastern side. ... Bounded on the east by the marshes of Beaufort River or Beaufort River." (Tr. P. 235.)

Intervenor also presented evidence of recorded plats for other properties abutting the disputed marsh parcel. Intervenor provided 13 plats -- all recorded at the Office of the Beaufort County Register of Deeds and all prepared after 1979, when Plaintiff acquired purported title to the disputed marsh. Each of these plats of parcels abutting the disputed marsh describe the marsh as "marsh," or "marshes of the Beaufort River" and do not indicate that the marsh is a parcel or that it is subject to a claim of ownership. See Intervenor's Exhibits 2, 4, 6, 8, 10, 12, 16, 18, 20, 22, 24, 26, and 28. Intervenor also presented evidence of the plats relied upon by Intervenor's surveyor in creating the ALTA survey. These plats, Intervenor's Exhibits 38, 41, and 42 were also created after 1979 and depict the disputed marsh as "Beaufort River State of South Carolina" (Ex. 38), "Marshes of Beaufort River" (Ex. 41 and 42). Mr. Tedder identified the multiple surveyors who had prepared the plats as experienced surveyors with whom he had worked with for decades. (Tr. P. 237.)

Plaintiff's claim to the dispute marsh was disclosed to Intervenor, according to Mr. Houston, "[a]fter we closed the purchase and the permit was issued, we contacted our bank to refinance the loan. And they had an appraiser who in his analysis notice on the local Beaufort County GIS system, the computers, that there seemed to be a tax parcel there." (Tr. P. 223-224.) Mr. Tedder testified regarding development of the County's GIS system. "As we transitioned from paper records that were prevalent up until probably the early 2000s, the Count purchased software systems in order to assimilate all of the paper documents into a more searchable type process and coordinate against -- amongst the various organizations; the assessor, the auditor, et cetera. So sometime I believe it was in the late '90s we started using a Smith data system. Then

it was transferred over to something else, migration of data. Ultimately we went to a Manitron System I think at the time we did this transaction. So there were multiple platforms of software that were tried out and used as -- you know, all governments basically grew into a digitized system at that time. ... [A]t the time we closed this we were trying -- there had been a migration of data from one program to another. And it is my recollection that as with any software, when we change it over we find errors. We report errors. There are programming glitches, those types of things that are worked through. And then every time it was transferred over from the paper to the first, to the second, to the third there were improvements along the way trying to get it so that when you in put data, you would get it. ... In this particular case it's my recollection ... we looked we didn't see any indication on the river side that there was a tax parcel out there." (Tr. P. 232-235.) Mr. Tedder identified the screen shot from a computer that he reviewed at the time he was working with Intervenor to close on the transaction. There was no indication on the data reviewed by Mr. Tedder at the time of closing to show possible private ownership of the disputed parcel. (Tr. P. 242, Intervenor's Ex. 56/58.)

Mr. Tedder did not rely exclusively on information generated by Beaufort County as part of its GIS services. He consulted the "Magellan maps." These maps, used commonly by surveyors, did not reveal at the time Mr. Tedder performed his review the existence of a tax map parcel abutting the properties on Johnny Morrall Circle. (Tr. P. 244.)

Mr. Houston testified that Intervenor learned of the claim to the disputed marsh approximately after contacting a lender to refinance the loan for the property. The lender's appraiser reviewed an updated GIS screen available on Beaufort County's website that indicated a tax map parcel number as assigned to the disputed marsh.

Plaintiff claims to own the entire disputed marsh (95.27 acres) based on a grant and two plats from over 100 years ago. The plats are both free hand drawings depicting property along the Beaufort River. The earlier plat is dated April 19, 1882 and is recorded in the State Archives. The second plat states the date "July 1891" and a reference to being "originally surveyed" in 1882. The second plat is recorded in the Beaufort County public records. It is contemporaneous in date to a form deed recorded in the State Archives. A transcription of the form deed is recorded in Beaufort County Public Records. Plaintiff has alleged that this form deed is a grant from B.R. Tillman Governor and Commander in Chief in and for the State of South Carolina to James M. Crofut, his predecessor in interest ("the Purported Grant").

The deed and plats refer and purport to convey only to the disputed marsh. Since the documents pertain only to the marsh, they are not in the chain of title for any parcel of the Port Royal property purchased by Intervenor. The Purported Grant lacks any specificity in location of the tract of land it allegedly conveys, and the plats contain insufficient information to be mathematically relocatable on the ground and to allow exact determination of the boundaries to substantiate and support Plaintiff's ownership claim.

Intervenor's licensed, professional surveyor Donald Cook testified as an expert witness in land surveying. Mr. Cook testified as to certain deficiencies in the 1882 and 1891 plats that accompany and/or are referenced in the Purported Grant. Mr. Cook noted the absence of a scale and of a point of beginning or point of commencement as "two main deficiencies." These deficiencies materially impacted Mr. Cook's ability to replicate the parcel reflected in the plats. (Tr. P. 263.) Intervenor also presented the testimony of a second surveyor Jim Gardner. Gardner was employed by Ward Edwards Engineering, Intervenor's Engineering Firm, at the time of the discovery of the 1882 and 1891 plats. Ward Edwards' engineer, Greg Baisch,

testified that he worked with other surveyors to attempt to locate the lands reflected in the 1882 and 1891 parcels relative to Merry Land's property. Mr. Gardner was the surveyor employed by Ward Edwards at the time the 1882 and 1891 plats were discovered and reviewed.

Mr. Gardner testified as an expert in land surveying. According to Mr. Gardner, "you're bound ... in the state of South Carolina, you're bound by a mathematical closure of surveys." (Gardner p. 15.)³ When Mr. Gardner received the 1891 Plat he gave it to a computer assisted drafting ("CAD") technician at Ward Edwards who, under his supervision, entered the bearings and distances shown on the plat into the program. When Mr. Gardner reviewed the technician's efforts to plot the bearings and distances into CAD, he concluded that the boundaries could not be closed. (Gardner p. 17) Exhibit 3 (Gardner's testimony) reflects his attempt along with the technician to plot the bearings and distances on the plat. Mr. Gardner indicated the areas of uncertainty on Exhibit 1 (Gardner's testimony) and determined there were 7 areas of uncertainty in re-creating the marsh parcel. With regard to the first area of uncertainty, labeled on the Exhibit as "1, 3, and 4" Gardner testified that the distances and bearings were undiscernible. The uncertainty Gardner identified with "2" was that the call of "1.55 chains" would be shorter than the line shown on the drawing. Gardner testified that the boundary identified as "7" includes no bearings or distances and consequently no direction or distance to locate the boundary line. (Gardner p. 17-22) Gardner described the process of locating the boundary line as "forced closure." (Gardner p. 30.) Gardner relied on the information on the plat and not the reference in the Purported Grant to high water and low water. (Gardner p. 46.) The bearings and distances on the plat were the surveyor's intent in defining and locating the 95.27 acres referenced in the Grant. Gardner further noted that there is a difference between measurement of high water and

3 The Court allowed Intervenor to present the testimony of Mr. Gardner in the form of a deposition taken after the close of the proceedings on November 19, 2015.

low water as referenced in the Purported Grant, and mean high and mean low water as determined by Plaintiff's surveyor, Lorrick Fanning. (Gardner p. 50).

Plaintiff has relied on a "re-creation" plat prepared by a surveyor who interpreted the bearings and distances on the 1891 plat and referred to several subsequent deeds and plats to locate the boundaries depicted on the re-creation plat. Plaintiff's surveyor used the mean high and mean low water marks for the east and west boundaries of the re-creation plat.⁴ He calls these natural monuments and admits that they are not the boundaries that existed when the original plats were drawn. The surveyor arbitrarily extended Plaintiff's claim to acreage at the southern end of the property in order to depict a parcel on the re-creation plat having comparable acreage to the Purported Grant. This extension does not agree with parcel information shown in Beaufort County GIS. The GIS also indicates the entire disputed marsh as a single parcel even though the ancient plats show a part of the marsh parcel conveyed out to an "E.A. Crofut." Finally, Plaintiff's surveyor ignores the presence of multiple water courses and tributaries running through the marshland property, which comprise acres of stream beds that are owned by the state and all have mean high and mean low water marks that could constitute natural boundaries.

LEGAL DISCUSSION

- a) **Intervenor contends that Plaintiff cannot demonstrate a claim to marsh that is superior to State's claim because deficiencies in the original survey prevent determination of exact boundaries of the Purported Grant.**

It has been established in South Carolina that 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

⁴ The Purported Grant refers to lands between the "high and low" water mark. The plat utilizes distances and bearings. There is no reference in any of the documents purporting to convey title or define the parcel to "mean high" and "mean low."

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). In *Hobonny*, the Supreme Court of South Carolina upheld the lower court's finding of valid title based on depiction of the property at issue in two plats that had been incorporated into two (King's) grants relied upon as evidence of ownership. *Id.* at 398. The Court found that the plats were "not mere maps on which boundary waterways are drawn in free-hand to represent directions and conformations of boundaries [but were] carefully scaled and platted so as to delineate the boundaries of the tracts granted with mathematical precision." *Id.* The plats were accurately relocatable on the ground and had been certified by a licensed professional engineer to be accurate during the proceedings. *Id.* at 395. Thus, the Court stated "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.* In other words, the Court allowed rebuttal of the presumption of State ownership by the mathematically precise and accurate plats.⁵

There are two plats in this case. Both plats are free hand drawings depicting property along the Beaufort River. Intervenor considers these plats to be insufficient because expert surveyor consultants cannot get the plat to close by referencing only the information on the plat, expressed in bearings and distances. These experts have testified to difficulty establishing a starting point or some common points from the plats.⁶ The bearings and distances stated on the plat in chains are also very difficult to read. Without established starting or common points, the plat does not close. And, importantly, there is no scale and no "North" arrow to provide direction and relation.

⁵ S.C. Code § 48-39-220(A) provides procedures to determine validity of grant to tidelands.

⁶ In South Carolina, a plat is an accurate graphical representation, neatly lettered and properly dimensioned, report of a survey made by a Surveyor of a finite piece of real property, including pertinent data and appropriate information. SC Board of Registration for Professional Engineers and Surveys, Law and Regulation Reference Manual, Sec. 49-430(C)(29), definition of plat, and 49-450, Plats and Platting.

"It is the actual boundary and not the false representation of it on the plat which must govern." *Clements v. Young*, 310 S.C. 73, 75, 425 S.E.2d 63, 64 (Ct.App.1992). Further, a compiled line, created merely for the convenience of presently avoiding a dispute, is unacceptable as a basis for an order establishing a true boundary line. *Id.* Plaintiff's surveyor expert has claimed ability to close the boundaries, but also admitted that this was only through use of later property records to confirm the boundaries of the plat. The northern boundary of the parcel conveyed to Plaintiff's predecessor (marked on the 1891 plat only) lacks a bearing and a distance. As such, Plaintiff's expert surveyor could not demonstrate that the property Plaintiff claims shares the same boundaries as the property described in the 1891 deed and the 1882 plat by reference to bearings and distances. Rather, he created a plat of the property by reference to "natural monuments," *i.e.*, the mean high water and mark and mean low water mark, to determine an 89.06 acre parcel. Plaintiff's expert is of the opinion that bearings and distances between the 1882 plat and his current plat will differ due to differences in State Plane North in 1882 and 2010/2011 (when he prepared his plat). Or, there may have been an error in someone's traverse of the tract, misreading of a number, drafting error or conversion error in taking the chain measurements, lacking minutes and seconds to feet.

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). 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 necessary because he was unable to get the plat to close, he can only have created a "map" and not a plat suitable for deeding of the property at issue.

Obviously, this property could have been accurately surveyed in 1882 and 1891, if techniques comparable to those used by the surveyors of the *Hobonny Club* property over 100 years earlier (the plats annexed to the two King's Grants at issue were prepared in October, 1736 and May, 1744). See *Hobonny Club*, 272 S.C. at 394. Both plats at issue in *Hobonny Club* were certified in the record by a licensed professional engineer to be accurate with respect to acreage and the boundaries were certified to be accurately relocatable on the ground by contemporary engineering methods without reference to any extrinsic documents. *Id.* at 398. The plats at issue in this case could have been similarly prepared and the boundaries relocatable on the ground, which would have allowed the exact determination of the boundaries that is lacking to substantiate and support Plaintiff's ownership claim.

Intervenor asserts that certainty of location of the disputed parcel Plaintiff claims to own cannot be established. Plaintiff's surveyor has attempted to re-create the 1891 Plat that is referenced in the Purported Grant. However, the Purported Grant is suspect because it lacks any specificity in location of the tract of land it has been alleged it conveys, describing said tract only as "lying between high and low water mark on River mentioned" and lacking any legend confirming direction. Plaintiff's surveyor had to refer to subsequent miscellaneous deeds and

plats and "interpret" the bearings and distances on the 1891 plat to locate the boundaries depicted on his re-created plat.

Moreover, Plaintiff's surveyor had to arbitrarily extend 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 Purported Grant. This southern extension contradicts the parcel information now available on Beaufort County GIS. In addition, the 1882 and 1891 plats clearly show a parcel at the northern end separate from the parcel identified to Plaintiff's predecessor, J.M. Crofut, indicating that the parcel was conveyed out to E.A. Crofut. This depiction also differs from the parcel drawing on Beaufort County GIS, which shows a singular parcel. Plaintiff's surveyor had to manipulate the boundaries of the northern end of the parcel and arbitrarily established a more expansive southern boundary in the re-created plat. South Carolina has long-accepted that boundary disputes are determined generally by first referring to natural boundaries, then to artificial monuments, and last to courses and distances. *Williams v. Moore*, 400 S.C. 90, 102, 733 S.E.2d 224, 231 (Ct.App. 2012), citing *Southern Realty & Investment Co. v. Keenan*, 99 S.C. 200, 207-209, 83 S.E. 39, 41-42 (1914) (other parallel cites omitted). Plaintiff's surveyor referred to natural boundaries to re-create the plat that he admits are not the boundaries that existed when the original plats were drawn. Further, Plaintiff's surveyor ignores the presence of multiple tributaries running through the marshland property, which all have mean low water and mean high water marks that could constitute "natural boundaries."

Presence of the multiple tidal tributaries demands the conclusion that the property at issue is not in fact entirely made up of simply marsh or tidelands. Instead, the property encompasses acres of stream beds in the tributaries that belong to the state. To depict acreage in the re-created

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 re-created plat, ultimately claiming ownership of tributaries, to various recorded settlements and easements that he executed with owners of the adjacent upland property.

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). 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 original Purported Grant.

- b) **Plaintiff is now estopped from asserting title to the marshland property because he knew about and had an obligation to object to the marina permit but failed to timely assert his title or take any measures to give notice of his claim of ownership of the marsh. In addition, or in the alternative, laches should bar Plaintiff's alleged claim of ownership.**

"Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment." *Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct.App.2006), citing *Gibbs v. Kimbrell*, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct.App.1993). "So, if a party stands by, and sees another dealing with property in a manner inconsistent with his right, and makes no objection, he cannot afterwards have relief. His silence permits or encourages others to party with their money or property, and he cannot complain that his interests are affected. His silence is acquiescence and it estops him." *Southern Railway Co. v. Day*, 140 S.C. 388, 138 S.E. 870 (1926). It is a well-

established principal in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence. *Queen's Grant*, 368 S.C. at 358, 628 S.E.2d at 911.

The elements of estoppel as to the estopped party are:

- (1) a misrepresentation or nondisclosure;
- (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and
- (3) actual or constructive knowledge of the true facts.

As to the party claiming estoppel:

- (1) lack of knowledge or means of acquiring knowledge of the true facts;
- (2) reasonable reliance; and
- (3) prejudicial change of position.

See Provident Life and Accident Ins. Co. v. Driver, 317 S.C. 471 (Ct.App.1994); *O'Cain v. O'Cain*, 322 S.C. 551 (Ct. App. 1996).

Plaintiff has claimed ownership of the disputed marsh since 1978 yet over the past 37 years has failed to utilize the remedy provided by S. C. Code Ann. Sec. 48-39-220. By failing to bring his action upon receipt of the Purported Grant in 1978 or at any time thereafter, Plaintiff committed an affirmative misleading act that resulted in the concealment of his ownership claim, in light of the legal presumption of state ownership in the marshlands that has been established in South Carolina as the Public Trust Doctrine. Plaintiff unreasonably delayed compliance with S.C. Code Ann § 48-39-220, enacted in 1977 and therefore effective when the conveyance under which Plaintiff is claiming ownership occurred. Had Plaintiff clarified his claim against the state in 1978 or any time before 2005, DHEC would have received notice of the suit and the final

disposition, which could have stopped Plaintiff's permit at the application stage if Plaintiff had been successful. "Laches is defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" *Queen's Grant, supra* at 921, 359 citing *Gordon v. Drews*, 358 S.C. 598, 612, 595 S.E.2d 864, 871 (Ct.App.2004)(quoting *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999)).

Intervenor is clearly not the only party led astray by Plaintiff's inaction as is evidenced by the settlement agreements executed between Plaintiff and property owners within the Spanish Point subdivision, some of whom have had docks constructed for decades at their property. Moreover, Plaintiff failed to properly object to two docks crossing the marsh to deep water on the north, one in a creek to the south, some floats at Port Royal Marina and possibly the walkway area in front of Plaintiff's purported tract or the installation of an effluent pipe used by Beaufort Jasper County Water Authority underneath the tract. Aerial photography of the site confirms three docks crossing the north and south ends of the property in September, 2005. Before commencing this action, Plaintiff had no awareness of anyone using the marshland and made no effort at any time to give any one notice of his ownership claim. In fact, had Plaintiff pursued his ownership claim against the State at any time prior to when Intervenor contracted to purchase its property and filed its marina permit application, the Department would have had notice of his ownership claim and would have published it in the state register as required by S.C. Code Ann. § 48-39-220(D) to also provide notice to the general public of his claim. Intervenor would not have closed on the property purchase if Plaintiff had followed the procedures set forth in S.C. Code Ann. § 48-39-220(D). While Plaintiff may argue that these procedures are discretionary and not mandatory, Intervenor asserts that when the purported owner of tidelands intends to

assert ownership to block access to adjacent upland properties to the Beaufort River, then the procedures should be invoked.

Without any notice of Plaintiff's claim, Intervenor relied to its detriment on the issuance of the marina permit to move forward with the purchase of the property and plans for construction of a marina to provide water access to residents of the proposed multi-family development and members of the public. Pursuit of the permit required significant expenditures, and the valuation of the property was maximized due to the shared misunderstanding of all parties that deep water access would not be subject to challenge.

- c) **The conveyance by Governor Tillman to James Crofut was not valid because the South Carolina Constitution vests the authority to convey public lands, such as tidelands that are held in trust by the State for the public, with the General Assembly. As such, mere legislative authority to dispose of "vacant lands" is not sufficient authority to grant public tidelands and, in particular, navigable streams.**

Plaintiff relies on Statutes of the State of S. C. -- Article 1 -- "Charge of the Property of the State -- the Sinking Fund Commission" as the authority for the act of Governor Tillman in conveying the marshland to James Crofut. Importantly, however, Sec. 85 of Article 1 of this statute authorizes sales and conveyances of land only if the land was not in actual public use and further stating "[t]his [section] shall not be construed to authorize the sale by the Commissioners of any property held in trust for a specific purpose by the State, or the property of the State in the phosphate rocks or phosphatic deposits in the beds of the navigable streams and waters and marshes of the State." (Emphasis added.)

The disputed marshlands are public tidelands that are held in trust by the State for the public for the specific purposes of "rights of navigation, commerce, fishing, boating, recreation or enjoyment, and other appropriate public and useful purposes ..." 1964 WL 1179 (S.C.A.G.) "Such title to the shore and lands under water is regarded as incidental to the sovereignty of the

state a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery.” *Cape Romain Land & Improvement Co. v. Georgia-Carolina Caning Co. et al. Same v. Shellmore Oyster Products Co.* 148 S. C. 428 (1928). “The space between high and low water mark of the border of the sea is called the ‘shore,’ and belongs by common law to the sovereign, precluding, of course, the claim of any other person, unless acquired by grant from the sovereign. The state, in such cases, holds the fee in trust for the public.” *State v. Pinckney*, 22 S.C. 484, 597 (S.C.1885)⁷.

Intervenor’s position is supported by the decision of the Court of Appeals of S. C. in *LowCountry Open Land Trust v. State and Atkins*, 347 S. C. 96, 552 S. E. 2d 778 (2001): “Traditionally, South Carolina has granted private rights to tidelands through acts of the Legislature. ... ‘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.’ ”

Moreover, if this Court were to find that the Purported Grant effectively conveyed public trust tidelands, this conveyance would exclude all streams and tributaries within the disputed property, which run throughout the marsh as it abuts Intervenor’s property. See *State v. Pacific Guano Co.*, 22 S. C. 50, 83-84 (1884). (“The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum* ... which she held in a fiduciary capacity for general and public use; in trust for the benefit of all citizens of the state ... The absolute rule heretofore referred to, limiting land owners 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,

⁷ After examining the case law, the Court determined that no change had been effected from this common law rule and held that “it is now, as it always has been, the law of the state.” *State v. Pinckney*, 22 S.C. at 509.

subject to grant to settlers in the usual way through the land office. Id. at 84. 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 the citizens; but not being, as it seems to us, subject to a 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." Id. (emphasis added))

PROPOSED FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, taking into consideration the burden of persuasion, 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 Claim. The State of S. C. filed its Answer on December 14, 2007.

2. Notice of the time, date, place, and subject matter of the hearing was given to the Intervenor and Plaintiff and all Defendants. Plaintiff, Defendant Merry Land Properties, LLC and Defendant the State of South Carolina were present at the scheduled hearing which commenced on November 19, 2015 and were represented by counsel.

3. All parties participated in full discovery.

Intervenor Conducted Extensive Due Diligence regarding the Title of Port Royal Property But Saw Nothing Suggesting Private Ownership of the Disputed Marsh

4. Tennent Houston is one of three managing partners of Intervenor Defendant Merry Land Properties, LLC (195:16-17). Intervenor is a limited partnership involved

investment and development of real estate, predominantly multi-family developments (195:20-21).

5. Intervenor viewed the Port Royal property, which is upland located adjacent to the disputed marsh Plaintiff has alleged to own, as a rare opportunity for building a significant mixed-use development on the Beaufort River with deep water access (197:3-6).

6. Mr. Houston established that an extensive amount of due diligence was undertaken by Intervenor on the Port Royal property to ensure that the site could support the mixed-use development and marina being planned before making the actual purchase of the parcel (200:1-25). The consultants included a local engineer, a real estate attorney, surveyors, marine contractors, commercial real estate brokers, a marine contractor and a permitting attorney (200:4-25) who performed boundary surveys, a title examination, a Phase 1 environmental study, geotechnical surveys, tree surveys, an ALTA survey and siting and planning for the marina as well as preparation of the permit applications required by the State of South Carolina for marina construction. Id.

7. Intervenor delayed closing on the Port Royal property until after the permits authorizing marina construction were received (201:20-25). Intervenor paid \$4.5 million dollars to purchase the Port Royal property, which is approximately eight acres (202:9-14). Intervenor purchased a second tract located across the road from the Port Royal property intended for use in the project that was ten acres (197:19-198:8). The purchase price for the second tract, which is not waterfront, was \$1.5 million (202:13-14). Intervenor believes the higher price of the Port Royal property is reflective of its waterfront location (202:9-14).

8. Intervenor very publically pursued its intention to build a marina adjacent to the marsh property at issue as part of the development. Importantly, two newspaper notices and

the records described the eastern side of the Port Royal property as bounded by the marshes of the Beaufort River or "the Beaufort River." (235:24-25).

13. Mr. Tedder then did individual title searches on each of the eight waterfront parcels but still saw no indication of private ownership of the property on the eastern side (236:10-15).

14. Mr. Tedder used the Beaufort County online GIS database to research the Port Royal property and surrounding properties (239:6-9 and Def. Exs. 57 and 58⁹). Beaufort County GIS information did not indicate the disputed marsh as a privately owned tax parcel (242:3-5).

15. Mr. Tedder reviewed Magellan tax maps and saw nothing identifying the disputed marsh as a tax parcel (244:17-20).

16. 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 GIS showed a tax parcel ID on the disputed marsh adjacent to Intervenor's property (223:22-224:2 and Def. Exs. 56-58).

17. Mr. Tedder confirmed that Beaufort County upgraded the GIS system sometime 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 (242:6-12).

18. Intervenor hired Ray Cook to prepare an ALTA survey of the Port Royal properties (252:10-12).

⁹ Def. Ex. 58 was offered into evidence to replace Def. Ex. 56, which was difficult to read (241:9-11). Def. Ex. 56 and 58 are the same database screen shot as shown in Def. Ex. 57 (241:22-24).

19. 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 (254:14-18).

Chain of Title for the Port Royal Property

20. There are two historical plats at issue in this case. The first plat has a date on its face of April 19, 1882 (132:7-8 and Plaintiff's Ex. 3; Gardner transcript 12:9 and Dep. Ex. 1). The second plat states the date "July 1891" and a reference to being "originally surveyed" in 1882 (132:10-13 and Pl's Ex. 2; Gardner transcript 11:25 and Dep. Ex. 1). The date of the second plat is contemporaneous with a deed recorded in the State Archives that is a form deed with information filled in (36:5-16 and Pl. Ex. 2A). Pl. Ex. 2A is a copy of a deed dated July 27, 1891, recorded in the Beaufort County Public Records on August 14, 1891 in Deed Book 17 at Page 562 (34:21-25). This deed is from B.R. Tillman Governor and Commander in Chief in and for the State of South Carolina to James M. Crofut (Id.).

21. Plaintiff has alleged ownership interest of disputed marsh property by way of the grant stated in the Deed (34:21-35:1 and Plaintiff's Ex. 1, and 2). The Purported Grant references a Plat recorded at Book 2, p. 16, which is dated July 1891 and references an original survey in January 1882 (53:18-23). This plat is also recorded with Beaufort County (35:19-36:2 and Pl. Ex. 2).

22. The deed recorded in Beaufort County is a transcription of an original deed that is recorded in the State Archives (36:8-11 and Pl. Ex. 2A). The deed in the Archives has a plat attached to it bearing the recordation date of April 19, 1882 (53:17-23 and Pl. Ex. 3¹⁰).

¹⁰ All of the deeds and documents referred to by Chet Williams were marked as collective Ex. 3-A (180:11-15).

23. Based on the review of Pl. Exs. 1, 2, 2A and several probate files referred to in the chain of title, Plaintiff's title expert, Chet Williams, concluded that Plaintiff held a 79.1667 percent interest in the 95.27 acre property depicted in Pl. Ex. 2, with four of Plaintiff's family members holding the remaining interests (38:5-40:11). After Mr. Williams prepared four quitclaim deeds transferring the family members' interests to Plaintiff, Mr. Williams believes Plaintiff held a hundred percent interest in the property (41:4-15).

24. Mr. Williams does not believe the 1891 deed (Pl. Ex. 2A) conveyed any land lying below the mean low water mark (63:5-7).¹¹

25. Mr. Williams agreed that none of the documents in Pl. Ex. 3-A referred to any property above the mean high water mark (56:5-9). In other words, the plats and deeds concerning the disputed marsh were outside the chain of title of the Port Royal property (55:11-56:9).

Deficiencies in the Original Survey

26. Intervenor presented the testimony of Jim Gardner, a professional surveyor licensed in the states of Georgia and South Carolina (Gardner trans. 4:17-19, 4:22, and 5:4-5), who was employed by Ward Edwards 2003-2008 and personally reviewed the 1882 plat in 2007 (Gardner trans. 11:21-12:4 and 20:10-13).

27. When he received the initial request to review the 1882 plat he initially asked a CAD technician ("CAD tech") at Ward Edwards to enter the calls, or bearings and distances, indicated on the plat (Gardner trans. 14:6-10).

28. He customarily relied on CAD techs to do plats and drawings when employed with Ward Edwards (Gardner trans. 9:16-19).

¹¹ It was clarified during Mr. Williams' testimony that no highland was at issue in this action (47:19-22). It was also confirmed by Plaintiff's counsel that Plaintiff stated no claim to anything below mean low water or above mean high water.

29. The CAD tech could not determine the top or northern boundary of the disputed marsh (Gardner trans. 16:22-25). The CAD tech referred to the 1891 plat for bearings and distances but was unable to read the calls even after creating large copies of the plat in an attempt to better see the handwriting (Gardner trans. 16:12-14). The CAD tech “developed” a northern boundary line using information from the 1891 plat (Gardner trans. 15:23-16:3).

30. Thereafter, Mr. Gardner personally reviewed the plat with the CAD tech (Gardner trans. 20:10-13).

31. Mr. Gardner identified several shortcomings on the 1891 plat that he believes caused the inability to close the survey (Gardner trans. 17:5-6). These included:

- a. Problematic bearing and distance on the left side of the plat [next] to the “95 27/100 acres” label (Gardner trans. 17:12-14; marked “#1” on Gardner Dep. Ex. 1),
- b. Probable inaccurate depictions of boundary line length than shown in light of call [on plat] for 1.55 chains, which would only be a little over 100 feet (Gardner trans. 18:4-5, marked “#2” on Gardner Ex. 1),
- c. Two illegible distances on the plat [left side or western border sections shared with highground parcels] (Gardner trans. 18:9-15, marked “#3 and #4” on Gardner Ex. 1). Because “3” is a non-discernable bearing and distance, the bearings and distances on southern half of the plat are not sufficient to determine where the southern half of the actual parcel is located (Gardner trans. 36:8-13 and 36:15-17),
- d. Boundary sections adjacent to line between parcels labeled “Sea Island Chemical Works” and “95 27/100 acres I.M. Crofut” have corners formed

at the intersections with the line (Gardner trans. 29:1-4, marked “#5 and #6” on Gardner Ex. 1),

- e. 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 (Gardner trans. 29:6-9 marked #7 on Gardner Ex. 1),
- f. Illegible bearing and distance on southernmost boundary of parcel (Gardner trans. 35:16-23, marked “#8” on Gardner Ex. 1)

32. Though there is a line shown on the 1891 plat separating the parcel labeled “Sea Island Chemical” from the parcel labeled “I.M. Crofut,” it lacks any bearing or distance to indicate direction of the line or distance to go (Gardner trans. 21:14-17). The 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” (Gardner trans. 22:13-16).

33. Intervenor’s surveyor of record, Ray Cook, was qualified as an expert in land surveying based on his education, experience, and training (261:17-18).

34. Mr. Cook also noted deficiencies in the 1882 and 1891 plats (Pl. Ex. 2 and 3) 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 (263:14-21).

Due to the Deficiencies, Plaintiff’s Expert Surveyor was not able to Mathematically Relocate Plats in the Chain of Title for the Disputed Marsh and was Ultimately Limited to Re-creating Boundaries Using Natural Monuments and Acreage Calls

35. Plaintiff’s expert surveyor, Lorrick Fanning, believes that Plaintiff should be recognized as the owner of the 95.27 acre marsh parcel referenced in the grant by the state and shown on the 1891 plat (74:10-17). But, Mr. Fanning admitted that he arrived at this conclusion

by relying on other information of record (*i.e.*, outside of the 1882 plat) to verify the accuracy of the 1882 plat and reach this conclusion. (314:3-5).

36. The outside information Mr. Fanning referenced and relied upon included comparing subsequent drawings of adjoining landowners' plats to the 1882 plat to determine the boundary of the marsh parcel at issue (78:25-79:7).

37. Mr. Fanning determined the southern boundary of the parcel using a bearing and distance that he asserted defined the starting point for the boundary (136:7-9 and 137:5-11 and Pl. Exs. 2 and 3).

38. The line drawn on the 1891 plat to represent the northern boundary lacked a bearing and distance and could only be "reestablished" by Mr. Fanning based on an acreage call (136:2-15 and Pl. Ex. 3 and Def. Ex. 30). That is, Mr. Fanning admitted that he located the northern boundary by measuring acreage above and below the line (137:13-15). For this reason, Mr. Fanning referred to the northern boundary as a sliding bearing (138:5-7).

39. Mr. Fanning further admitted to relying upon the land lot and section descriptions for adjoining lots as described on the 1882 plat to determine the northern and southern boundaries (81:13-20).

40. With reference to this outside information, Mr. Fanning prepared a "re-creation plat" in 2010 that Plaintiff has attached to certain documents of record. (142:11-15).

41. Mr. Fanning could not determine the boundaries of the disputed marsh by reference to bearings and distances only.

42. Mr. Fanning defined a plat as a metes and bounds description of a piece of property (135:7-8). He further confirmed that a plat must be defined on all sides (135:12-14).

43. Mr. Fanning used the mean low water mark of the Beaufort River as the eastern boundary of the marsh parcel (87:18-19) and the mean high water mark of the Beaufort River of the western boundary (87:20-22).

44. Mr. Fanning considers the mean high and mean low water marks natural monuments (159:6-10). He admitted that as natural monuments the mean high and 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 (178:2-4). 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 (175:11-16).

45. Using the current mean high and mean low water marks and the land lot and section descriptions for adjoining lots and acreage, 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 (87:5-9 and Pl. Ex. 4).

46. 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 (139:11-14). Mr. Fanning acknowledged this to be a discrepancy between his drawing and the 1882 plat (162:15-25).

47. Mr. Fanning 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 Purported Grant. (141:16-142:2). Mr. Fanning admitted that the southern boundary depicted on his re-creation plat does not agree with parcel information in Beaufort County GIS (140:21-142:2 and Def. Ex. 48). 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. Id.

48. Mr. Fanning also admitted that Beaufort County GIS does not show a separate parcel that is shown as conveyed out to another owner in the 1882 plat (155:11-15, Pl. Ex. 3 and Def. Ex. 48). Merry Land's title expert, Chet Williams, also identified this discrepancy between the GIS record and Mr. Fanning's re-creation plat (66:13-20, Pl. Ex. 3 and Def. Ex. 48).

49. Mr. Fanning's opinion is that Plaintiff owns the parcel depicted in his re-creation plat including the multiple water courses and tributaries (147:19-21).

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

51. Intervenor's surveyor Jim Gardner confirmed that South Carolina requires mathematical closure of surveys (Gardner trans. 14:13-15). He further testified that 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 (Gardner trans. 18:9-15, 18:19-19:1 and 19:2-3).

52. Mr. Gardner's opinion is that the 1891 plat is a representation of 95.27 acres in the marsh between the highland and the Beaufort River (Gardner trans. 32:8-14). Since the plat does not close, it cannot be determined for certain where the corners are located without relying in other surveys (Gardner trans. 35:6-12).

53. According to Mr. Gardner, since the surveyor who created the 1891 plat did not say or show "mean high water" or "mean low water" on the plat, the surveyor intended to

depict a 95.27 acre parcel having boundaries indicated by the bearings and distances (Gardner trans. 46:3-10). From the 1882 survey, the description of the parcel shown in Ex. 1 is what Mr. Gardner believes was intended to be the 95 and 27-hundredths of an acre parcel (Gardner trans. 8-10).

PROPOSED CONCLUSIONS OF LAW

The Court concludes the following as a matter of law:

Jurisdiction and General Principles

1. This court has jurisdiction over this case pursuant to S. C. Code Ann. § 48-39-220.

2. “[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 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). “The State may, however, grant private individuals an ownership interest in tidelands.” Lowcountry, 347 S.C. at 102, 552 S.E.2d at 781. 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.

3. At issue here is not whether the State intended to convey tidelands to Plaintiff's predecessor in title, but instead it is the location of those tidelands in relationship to Intervenor's property.

4. 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).

5. 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).

6. 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).

7. South Carolina courts have held plats to be sufficient to validate a title 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.

8. 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.

9. Here, the Purported Grant evidences intent to convey lands between the high and low water marks but Plaintiff has failed to establish that the 1891 plat is relocatable on the ground without use of reference or other source data outside of the plat.

10. 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). 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.

11. “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. Garrett v. Locke, 309 S.C. 94, 419 S.E.2d 842 (Ct.App.1992). This rule, however, merely indicates the weight generally given to each type of evidence of location. Southern Realty & Investment Co. v. Keenan, 99 S.C. 200, 83 S.E. 39 (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. The rules for determining disputed boundaries are not inflexible, but are subject to modification depending upon the particular facts of each case. Garrett, 309 S.C. at 98, 419 S.E.2d at 845. The facts of a case may therefore require that an inferior means of location be preferred over a higher means of location. Fulwood v. Graham, 30 S.C.L. (1 Rich.) 491, 497 (1845).” Bodiford v. Spanish Oak Farms, Inc., 455 S. E. 2d 194, fn 1. (S. C. App. 1995).

12. The 1891 Grant describes a 95 and 27/100th acre parcel of land lying between high and low water mark on the Beaufort River. The 1891 plat indicates that the land was “originally surveyed” in January of 1882. The plat of 1882 reflects the identical courses and distances as the plat of 1891. While the Grant evinces clear intent to convey tidelands, the survey is necessary to anchor these tidelands between the river and the adjacent upland.

13. Plaintiff errs in replicating the plat by relying on “Mean High Water” and “Mean Low Water” when the Purported Grant only refers to “high” and “low” water. 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. Moreover, high and low water marks on the date of the conveyance are not the same as mean high and mean low water today. The facts

of this case would support use of the courses and distances to replicate the disputed marsh parcel in relationship to Intervenor's parcel.

14. In concluding that Plaintiff owns the 95.27 acre parcel shown on the 1891 plat, Plaintiff's surveyor ignores the presence of multiple tributaries running through the marshland property, which all have mean low water and mean high water marks that could constitute "natural boundaries." In order to calculate an acreage to depict in the re-created 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 re-created plat, ultimately claiming ownership of tributaries, to various recorded settlements and easements that he executed with owners of the adjacent upland property.

15. 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). 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 original Purported Grant.

Intervenor Reasonably Relied on the Due Diligence Conducted by its Consultants and Cannot Be Charged with Constructive Notice of Plaintiff's Claimed Ownership of the Disputed Marsh

16. South Carolina law charges property owners of 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

their money or property, and he cannot complain that his interests are affected. His silence is acquiescence and it estops him.” Southern Railway Co. v. Day, 140 S.C. 388, 138 S.E. 870 (1926).

20. Plaintiff failed to properly object to several crossings of the disputed marsh by others. 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.

21. Plaintiff had never inspected the marshland. He confirmed that he made no effort at any time, such as posting signage, to give general public notice of his ownership claim. Plaintiff’s actions concealed the fact of his ownership. Plaintiff produced no evidence demonstrating that anyone else, whether private landowner or state entity, was aware of his alleged ownership claim at any time prior to Intervenor’s discovery of it.

22. “Laches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Mid-State Trust, II v. Wright, 323 S.C. 303, 474 S.E.2d 421 (1996); Hallums v. Hallums, 296 S.C. 195, 371 S.E.2d 525 (1988); Muir v. C.R. Bard, Inc., 336 S.C. 266, 519 S.E.2d 583 (Ct.App.1999). Laches is an equitable doctrine, which arises upon the failure to assert a known right. All Saints Parish, Waccamaw v. Protestant Episcopal Church in the Diocese of S.C., 358 S.C. 209, 235, 595 S.E.2d 253, 267 (Ct.App.2004). Under the doctrine of laches, if a party, knowing his rights does not seasonably assert them, but by unreasonable delay causes his adversary to incur expenses or enter into obligations or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce those rights. Muir at 296, 519 S.E.2d at

599. The party seeking to establish laches must show (1) delay, (2) unreasonable delay, and (3) prejudice. Hallums at 199, 371 S.E.2d 525, 371 S.E.2d at 528; All Saints at 235, 595 S.E.2d at 267.

23. “Importantly, delay alone in assertion of a right does not, in and of itself, constitute laches. Rather, so long as there is no knowledge of the wrong committed and no refusal to embrace an opportunity to ascertain facts, there can be no laches.” Muir at 296, 519 S.E.2d at 599 (citations omitted); see Brown v. Butler 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct.App.2001); compare Wall v. Huguenin 305 S.C. 100, 406 S.E.2d 347 (1991) (holding the failure to exercise an option to purchase land for thirteen years was not unreasonable and laches did not apply) with Chambers of S.C., Inc. v. County Council for Lee County, 315 S.C. 418, 434 S.E.2d 279 (1993) (finding contractor’s six-month delay in taking action on its objection to a contract awarded by county to another contractor was barred by laches). The inquiry into the applicability of laches is highly fact-specific and each case must be judged by its own merits. Muir at 297, 519 S.E.2d at 599. Thus, the determination of whether laches has been established is largely within the discretion of the trial court. Brown v. Butler, 347 S.C. at 265, 554 S.E.2d at 434 (Ct.App.2001); Gibbs v. Kimbrell, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct.App.1993). The burden of proof is on the party asserting laches. Muir, 336 S.C. at 297, 519 S.E.2d at 599. Finally, laches is an affirmative defense and must be pled. Rule 8(c), SCRPC; Mack v. Edens, 306 S.C. 433, 412 S.E.2d 431 (Ct.App.1991).

24. By failing for 37 years to assert his title against the State of South Carolina, Plaintiff failed to do in law what should have been done, since his intent is to deny public use of the tidelands which are presumed to be public lands for an unreasonable and unexplained length of time.

27. “Traditionally, South Carolina has granted private rights to tidelands through acts of the Legislature. ... ‘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.’” LowCountry Open Land Trust v. State and Atkins, 347 S. C. 96, 552 S. E. 2d 778 (2001).

28. Such requirement was established in State v. Pacific Guano Co., 22 S. C. 50, 83-84 (1884). (“The state had in the beds of these tidal channels not only title as property, the *jus privatum*, but something more, the *jus publicum* ... which she held in a fiduciary capacity for general and public use; in trust for the benefit of all citizens of the state ... The absolute rule heretofore referred to, limiting land owners 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. Id. at 84. 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 the citizens; but not being, as it seems to us, subject to a 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.” Id. (emphasis added))

CONCLUSION

Intervenor seeks an Order from this Court declaring Plaintiff's title invalid. Plaintiff's title originates with a statute authorizing disposition of vacant lands. Section 85 of the Act which authorized the Purported Grant specifically excludes property held in trust for a specific

**The Purported Grant is not a Valid Conveyance because the South Carolina
Constitution Vests Authority to Convey Public Lands with the General Assembly.**

25. Plaintiff relies on Statutes of the State of S. C. -- Article 1 -- "Charge of the Property of the State -- the Sinking Fund Commission" as the authority for the act of Governor Tillman in conveying the marshland to James Crofut (180:21-181:9). However, Sec. 85 of Article 1 of this statute authorizes sales and conveyances of land only if the land was not in actual public use and further stating "[t]his [section] shall not be construed to authorize the sale by the Commissioners of any property held in trust for a specific purpose by the State, or the property of the State in the phosphate rocks or phosphatic deposits in the beds of the navigable streams and waters and marshes of the State" (emphasis added).

26. The disputed marsh is a public tideland held in trust by the State for the public for the specific purposes of "rights of navigation, commerce, fishing, boating, recreation or enjoyment, and other appropriate public and useful purposes ..." 1964 WL 1179 (S.C.A.G.) "Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state -- a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery." Cape Romain Land & Improvement Co. v. Georgia-Carolina Caning Co. et al. Same v. Shellmore Oyster Products Co. 148 S. C. 428 (1928). "The space between high and low water mark of the border of the sea is called the 'shore,' and belongs by common law to the sovereign, precluding, of course, the claim of any other person, unless acquired by grant from the sovereign. The state, in such cases, holds the fee in trust for the public." State v. Pinckney, 22 S.C. 484, 597 (S.C.1885)¹². Plaintiff submitted no evidence establishing otherwise.

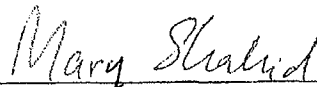
¹² After examining the case law, the Court determined that no change had been effected from this common law rule and held that "it is now, as it always has been, the law of the state." State v. Pinckney, 22 S.C. at 509.

purpose by the State. In accordance with State v. Pinckney, a case decided in 1885, the common law rule that tidelands were held in trust for the public was always the law in the State. Consequently this Purported Grant was excluded from the very statute that Plaintiff claims authorized the Grant.

Alternatively, Intervenor seeks an Order from this Court finding and concluding that Plaintiff has failed to establish the location of the disputed marsh in relationship to Intervenor's property and has failed to demonstrate or prove that Intervenor's proposal to construct a marina will result in a trespass upon the disputed marsh.

Alternatively, Intervenor seeks an Order from this Court finding that Plaintiff is estopped from preventing construction of a walkway extending to the Beaufort River as authorized in Intervenor's DHEC permit, based on Plaintiff's failure to assert ownership of public tidelands or take any action to make his ownership known to abutting landowners seeking water access.

Finally, Intervenor seeks an Order from this Court finding that Plaintiff is barred by the doctrine of laches from preventing Intervenor from constructing a walkway through the disputed marsh to obtain access to the Beaufort River.



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Attorneys for Defendant
Merry Land Properties, LLC

March 28, 2016

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	
H. Marshall Hoyler,	)	C/A No. 2007-CP-07-3212
	)	
Plaintiff,	)	
	)	
v.	)	POST-TRIAL MEMORANDUM OF
	)	STATE OF SOUTH CAROLINA
State of South Carolina, Merry Land	)	
Properties, LLC, et al	)	
	)	
Defendants.	)	
_____	)	

The Defendant State of South Carolina submits this reply to the Post-trial Briefs of Plaintiff and Merry Land. The State addresses the two issues below and otherwise rests on its initial Post-Trial Memorandum

I

THE STATE OWNS THE BOTTOMS OF ANY TIDAL NAVIGABLE WATERWAYS

As stated in the State's opening memorandum: If any of the property of the Plaintiffs at issue in this case is crossed by or bound by navigable waters, the waters remain public highways and subject to a public trust. S.C. Const. art XIV, §4; *State v. Head*, 330 S.C. 79, 498 S. E. 2d 389 (Ct. App. 1997). The State owns the beds of any such navigable tidal rivers absent express legislation. *Heyward v. Farmers' Min. Co.*, 19 S.E. 963, 973 (1894). Plaintiff contends that waterways were conveyed because of language in the Crofut deed referring to "watercourses." This language was rejected as an 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 & Improvement*

Co. v. Georgia-Carolina Canning Co., 146 S.E. 434, 440 (S.C. 1928), as cited in *Fain*. As stated in *Heyward*:

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 principle, however, is different when the land granted 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 from, 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.

The above authority makes absolutely clear that the Crofut deed did not, and could not, convey land below mean low water such as creek bottoms.

II

THE STATE DID HAVE AUTHORITY TO GRANT LAND BETWEEN MEAN HIGH WATER AND MEAN LOW WATER PURSUANT TO THE CROFUT DEED

Merry Land argues that the Crofut deed was not valid because, in its opinion, the General Assembly must specifically authorize such a conveyance. That company contends that the statute at the time did not authorize the sale of public trust property. Merry Land reads the statute and case law at the time too narrowly.

At the time of the conveyance, State law authorized the Commissioners of the Sinking Fund to convey real property not in "actual public use" except "property held in trust for a specific purpose by the State, or the property of the State in the phosphate rocks or phosphatic deposits in the beds of the navigable streams and waters and marshes of the State." (emphasis

added). The General Assembly's specific exclusion of conveyances of phosphate deposits in marshes would have been unnecessary if marshes had been excluded by the exception for trust property held for a "specific purpose." "[T]he General Assembly is presumed not to perform useless acts." *Williams v. Government Employees Ins. Co. (GEICO)*, 762 S.E.2d 705, 715, 409 S.C. 586, 604 (2014). Therefore, the legislature must have excluded phosphate deposits in marsh from the authority of the Sinking Fund to convey vacant land because the General Assembly did not consider marsh property generally to be held in trust for a "specific purpose."¹ Merry Land has not shown any "specific purpose" for the marsh at issue. Therefore, the Sinking Fund and the Governor had the authority to execute the Crofut deed.

Plaintiff also cites case law, but it did not, at that time, prevent the Sinking Fund and the Governor from deeding marsh to Crofut. *Pacific Guano, supra*, did not decide the issue, but *Heyward* treated land between mean and low water mark differently from tidal stream beds below mean low water. The Court said that "[i]f 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." 19 S.E. 963, 973. Moreover, *Hobonny Club, Inc. v. McEachern*, 252 S.E.2d 133, 136, 272 S.C. 392, 396 (1979), stated that "[d]espite 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." Merry Land also cites a Court of Appeals decision in *Lowcountry Open Land Trust*, 347 SC 96, 552 S.E. 2d 778 (2001) regarding

¹ This conclusion is consistent with *Williams* and the general rules of statutory construction. "The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Bryant v. State*, 384 S.C. 525, 529, 683 S.E.2d 280, 282 (2009). However, "[a]ll rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *State v. Henkel*, 774 S.E.2d 458, 461, 413 S.C. 9, 14 (2015).

statutory authorization for grants of tidelands, but that Court relied on a quotation from *Pacific Guano* that applied only to stream beds.²

Regardless of what authority exists for the State to convey marsh above mean low water without a statute today or at other points in time, the State had authority under the vacant land statute in 1891 to convey marsh to Crofut.³ Whether this grant is coextensive with the property claimed by Plaintiff is a matter for this Court to determine. The conveyance is subject to the State's reservation of phosphate and mineral interests noted above, and the State owns the beds of any navigable tidal rivers on the property.

CONCLUSION

Accordingly, the State respectfully requests that this Court apply the above law to the evidence in this case.

Respectfully,

ALAN WILSON
Attorney General

ROBERT D. COOK
Solicitor General
S.C. Bar No. 1373

[Signature block continues next page]

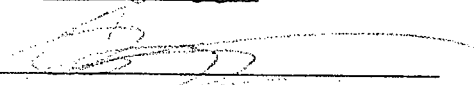
² "There seems to be no doubt, however, that the state as such trustee has the power to dispose of these beds as she may think best for her citizens; but not being, as it seems to us, subject to grant in the usual form under the provisions of the statute regulating vacant lands, it would seem to follow 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" *Pacific Guano Co.*, 22 S.C. 50, 84, 1884 WL 4624, at *22.

³ The State bases its position on authority in existence in 1891. The State reserves its right to take a different position as to its authority to convey marshland at other points in time based upon the case law and statutes in effect then.

[Signature block continues as to foregoing Reply]

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By: 

April 11, 2016

ATTORNEYS FOR THE STATE

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH CIRCUIT

H. Marshall Hoyler,

Plaintiff,

vs.

The State of South Carolina,
Merry Land Properties, LLC.,
Sherbert Living Trust, Sherbert Living Trust,
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 Anne Gilck,
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. VonHarten,
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.

CASE NO.: 2007-CP-07-3212

**NOTICE OF MOTION
AND
MOTION, PURSUANT TO
RULES 52(b) and 59(e), SCRC**

2016 MAY -5 PM 12:52
CLERK OF COURT
SOUTH CAROLINA
COUNTY OF BEAUFORT

**TO: THE STATE OF SOUTH CAROLINA AND MERRY LAND PROPERTIES, LLC
AND THEIR ATTORNEYS, EMORY SMITH AND MARY SHAHID:**

NOTICE

YOU WILL PLEASE TAKE NOTICE that pursuant to Rules 52 (b) and 59(e), South Carolina Rules of Civil Procedure (hereinafter as, "SCRCP"), Plaintiff above, by and through his undersigned attorneys, will move the Court on the tenth day after service hereof, or as soon thereafter as counsel may be heard, for an Order amending this Court's Findings, which were transmitted to Plaintiff and counsel opposite by written notice, by electronic mail, dated April 21, 2016, at 4:13 p.m., pursuant to the Rules cited above, on the following grounds.

 **COPY** 000169

INTRODUCTION

The Plaintiff accepts and is in agreement with this Court's Finding "1", communicated in the electronic mail cited hereinabove. Namely, the Court's Finding, "I accept the Plaintiff's contention that the Tillman to Crofut grant was legally permissible and, although was an alienation of the public trust land, was allowed because the grant of land between high water and low water was specifically described in the grant." **However**, the Plaintiff motions the Court for amendment of this Court's Finding "2", and Finding "3", pursuant to this Motion and the Rules cited by Plaintiff.

MOTION

I. This Court's Finding "2" and Finding "3", **misapprehended** and are in direct conflict with South Carolina Case Law. Specifically,

"It is the actual boundary and not the representation of it on the plat¹ that must control." (Emphasis supplied)
Atkinson v. Anderson, 14 S.C.L. (3 McCord) 223 (1825).

"Where, on the face of a deed, the intention to convey a particular tract of land, is clear, but the description, by metes and bounds, is, upon a survey for the purpose of locating the tract, ascertained to be erroneous, the description by metes and bounds will be rejected as surplusage, and the land located so as to cover the tract clearly intended to be conveyed." Smith v. Du Rant, 113 SE 2d 349 (1960).

"The vital question is the intent² of the grantor at the time the deed is executed." (Emphasis supplied)
Klapman v. Hook, 206 S.C. 51, 32 S.E. (2d) 882 (1945).

"Applying the rule thus laid down to the case at bar, it is quite clear that the description was sufficient to enable a person of ordinary prudence acting in good faith and making inquiries suggested by the description to enable him to identify the land."
Brownlee v. Miller, 208 S.C. 252, 37 S.E. (2d) 658, 662 (1946).

"The construction of an unambiguous deed³ is a question of law, not fact. **The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself.**"
Vause v. Mikell, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct. App. 1986); (Emphasis supplied); (citation omitted); See, Smith v. DuRant, 236 S.C. 80, 113 S.E.2d 349 (1960); Hammond v. Lindsay, 277 S.C. 182, 284 S.E.2d 581 (1981);

¹ This Court's Finding "2", on its face, shows that the Court relied on the representation of the grant on the Plat, to support Finding "2", which misapprehends the Case Law cited by Plaintiff hereinabove.

² The intent of the Grantor at the time the Deed was executed, is clear and Finding "1" of this Court, so finds.

³ The Deed to Plaintiff's predecessor in title, was not ambiguous and Finding "1" of this Court, so finds.

IV. Failure to Allow Post Trial Argument (Cont.)

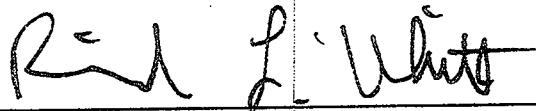
Factually, Plaintiff's counsel specifically asked the Court to allow Post Trial Motions, by electronic mail to the Court, dated **March 1, 2016** at 1:57 p.m., and **March 28, 2016**, at 3:35 p.m., both of which are incorporated herein, by reference.

CONCLUSION

WHEREFORE, based on the foregoing and consistent with the facts, testimony and evidence of this case, the South Carolina Rules of Civil Procedure and South Carolina Case Law, this Court should amend its Finding "2" and Finding "3", and quiet title in the Plaintiff, consistent with §48-39-220, S.C. Code Ann., (1976, as amended), and for such other and further relief that this Court deems just and appropriate.

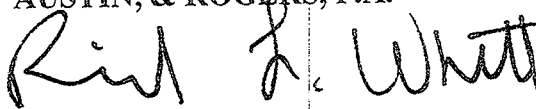
RULE 11(a) SCRCP CERTIFICATION

The Plaintiff's counsel herein, certify that, as to Plaintiff's Motion herein, consultation with opposing counsel was not held, because it would have served no useful purpose.



Richard L. Whitt
Jefferson D. Griffith, III

Respectfully submitted,
AUSTIN, & ROGERS, P.A.



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Attorneys for Plaintiff

II. Permissive Joinder of Merry Land and Other Adjacent Property Owners.

The Court's decision **misapprehended or overlooked** Plaintiff's argument as to the permissive joinder of Merry Land Properties, LLC., (hereinafter as, "Merry Land") and the Court ordered joinder of over thirty (30) additional Defendants.⁴ The case is statutorily based in that the Plaintiff is allowed to pursue a claim of title against the State of South Carolina and no other parties are contemplated by the statute, §48-39-220, S.C. Code Ann., (1976, as amended). Any party other than the State, does not have standing.

Finally, Rule 20, SCRCP does not contemplate Court Ordered Joinder.

III. Allowing Post Trial Testimony.

The Court's decision **misapprehended or overlooked** Plaintiff's objection to the Court allowing Defendant Merry Land, to add a witness at the close of trial.⁵ Defendant Merry Land's calling of this Witness, after the Trial was concluded, over Plaintiff's objection, provided Testimony from a Witness that was not disclosed to Plaintiff, as required by the Rules. Further, Defendant Merry Land called a Surveyor as a Witness during the Trial and allowing testimony from this additional Witness was improper and his Testimony was cumulative.

IV. Failure to Allow Post Trial Argument.

The Court's decision **misapprehended or overlooked** Plaintiff's right to make Post Trial Motions. After allowing the Intervenor Merry Land to add a witness at the close of Trial and directing the filing of Post Trial Briefs the Court did not reconvene the parties as this Court ordered at the end of the Trial in November.⁶ Additionally, the Court agreed in electronic mail to Plaintiff's assistant dated March 1, 2016, that "...I agree that so much time has passed that at least a follow-up conference call if not a supplemental hearing should be held for summation."

⁴ This Court allowed Merry Land to join the above- referenced action with the consent of the Plaintiff by its earlier Order, in which the Court preserved the right of the Plaintiff to raise defenses and his argument that Merry Land should not be joined as a Party. At Trial, Plaintiff made a Motion to Dismiss Merry Land for lack of standing. That Motion was denied by the Court. As the trial progressed the Court determined that all of the adjacent property owners had standing and should be joined as Defendants in the action.

⁵ At the conclusion of the evidence, Intervenor Merry Land asked the Court, and was permitted, over Plaintiff's objection to add additional and cumulative Surveyor testimony to the Trial Record.

⁶ "JUDGE DUKES: All right. So what I'm going to do is hold the record open for 45 days to permit the Defendant to depose a yet to be named surveyor with regard to fact matters only, not as an expert. And 15 days after that I would like post-trial briefs from everyone. And then I would like when you submit those post-trial briefs please coordinate with Heather and let's set a conference call. Heather my assistant. And let's set a conference call roughly two weeks, 15 days, three weeks from the date of submission of the post-trial briefs so we can talk about the post-trial briefs and where we go from then. And we will try to see what we can do." Trial Transcript, P. 310 LL. 11-24.

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
FOURTEENTH CIRCUIT

CASE NO.: 2007-CP-07-3212

H. Marshall Hoyler,

Plaintiff,

vs.

**NOTICE OF MOTION
AND
MOTION, PURSUANT TO
RULES 52(b) and 59(e), SCRCP**

The State of South Carolina,
Merry Land Properties, LLC.,
Sherbert Living Trust, Sherbert Living Trust,
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 Anne Gilck,
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. VonHarten,
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.

**TO: THE STATE OF SOUTH CAROLINA AND MERRY LAND PROPERTIES, LLC
AND THEIR ATTORNEYS, EMORY SMITH AND MARY SHAHID:**

NOTICE

YOU WILL PLEASE TAKE NOTICE that pursuant to Rules 52 (b) and 59(e), South Carolina Rules of Civil Procedure (hereinafter as, "SCRCP"), Plaintiff above, by and through his undersigned attorneys, will move the Court on the tenth day after service hereof, or as soon thereafter as counsel may be heard, for an Order amending this Court's Order, the issuance of which was transmitted to Plaintiff by electronic mail, dated May 27, 2016, pursuant to the Rules cited above, on the following grounds.

2016 JUN -9 PM 1:59
JENNIFER ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

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INTRODUCTION

The Plaintiff accepts and is in agreement with this Court's Conclusion of Law, "1", contained in the Order cited hereinabove. Namely, Plaintiff's accepts the Court's Conclusion of Law, "The Tillman Grant to Crofut was legally permissible and, although [it] was an alienation of the public trust land, [it] was allowed because the intent to grant tidelands between high water and low water was clearly expressed." **However**, the Plaintiff moves this Court for an amendment of this Court's Conclusion of Law "2", and so much of the decretal portion of this Court's Order, denying Plaintiff's request to declare title to tidelands. The grounds for this Motion are the Case Law cited therein, the facts and Record of this case and the Rules cited by Plaintiff.

MOTION

I. This Court's Conclusion of Law "2", and so much of the decretal portion of this Court's Order, denying Plaintiff's request to declare title to tidelands, **misapprehended** and are in direct conflict with South Carolina Case Law. Specifically,

"It is the actual boundary and not the representation of it on the plat¹ that must control." (Emphasis supplied)

Atkinson v. Anderson, 14 S.C.L. (3 McCord) 223 (1825).

"Where, on the face of a deed, the intention to convey a particular tract of land, is clear, but the description, by metes and bounds, is, upon a survey for the purpose of locating the tract, ascertained to be erroneous, the description by metes and bounds will be rejected as surplusage, and the land located so as to cover the tract clearly intended to be conveyed." Smith v. Du Rant, 113 SE 2d 349 (1960).

"The vital question is the intent² of the grantor at the time the deed is executed." (Emphasis supplied)

Klapman v. Hook, 206 S.C. 51, 32 S.E. (2d) 882 (1945).

"Applying the rule thus laid down to the case at bar, it is quite clear that the description was sufficient to enable a person of ordinary prudence acting in good faith and making inquiries suggested by the description to enable him to identify the land."

Brownlee v. Miller, 208 S.C. 252, 37 S.E. (2d) 658, 662 (1946).

"The construction of an unambiguous deed³ is a question of law, not fact. **The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself.**"

Vause v. Mikell, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct. App. 1986); (Emphasis supplied); (citation omitted); See, Smith v. DuRant, 236 S.C. 80, 113 S.E.2d 349 (1960); Hammond v. Lindsay, 277 S.C. 182, 284 S.E.2d 581 (1981);

¹ This Court's Conclusion of Law "2", on its face, shows that the Court relied on the representation of the grant on the Plat, to support Conclusion of Law "2", which misapprehends the Case Law cited by Plaintiff hereinabove.

² The intent of the Grantor at the time the Deed was executed, is clear and Conclusion of Law "1" of this Court, so holds.

³ The Deed to Plaintiff's predecessor in title, was not ambiguous and Conclusion of Law "1", of this Court, so holds.

II. Permissive Joinder of Merry Land and Other Adjacent Property Owners.

The Court's Order **misapprehended or overlooked** Plaintiff's argument as to the permissive joinder of Merry Land Properties, LLC., (hereinafter as, "Merry Land") and the Court ordered joinder of over thirty (30) additional Defendants.⁴ This case is statutorily based in that the Plaintiff is allowed to pursue a claim of title against the State of South Carolina and no other parties are contemplated by the statute, §48-39-220, S.C. Code Ann., (1976, as amended). Any party other than the State, does not have standing.

Finally, Rule 20, SCRCPP does not contemplate Court Ordered Joinder.

III. Allowing Post Trial Testimony.

The Court's Order **misapprehended or overlooked** Plaintiff's objection to the Court allowing Defendant Merry Land, to add a witness at the close of trial.⁵ Defendant Merry Land's calling of this Witness, after the Trial was concluded, over Plaintiff's objection, provided Testimony from a Witness that was not disclosed to Plaintiff, as required by the Rules. Further, Defendant Merry Land called a Surveyor as a Witness during the Trial and allowing testimony from this additional Witness was improper and his Testimony was cumulative.

IV. Failure to Allow Post Trial Argument.

The Court's Order **misapprehended or overlooked** Plaintiff's right to make Post Trial Motions.⁶ After allowing the Intervenor Merry Land to add a witness at the close of Trial and directing the filing of Post Trial Briefs the Court did not reconvene the parties as this Court ordered at the end of the Trial in November.⁶ Additionally, the Court agreed in electronic mail to Plaintiff's assistant dated March 1, 2016, that "...I agree that so much time has passed that at least a follow-up conference call if not a supplemental hearing should be held for summation."

⁴ This Court allowed Merry Land to join the above- referenced action with the consent of the Plaintiff by its earlier Order, in which the Court preserved the right of the Plaintiff to raise defenses and his argument that Merry Land should not be joined as a Party. At Trial, Plaintiff made a Motion to Dismiss Merry Land for lack of standing. That Motion was denied by the Court. As the trial progressed the Court determined that all of the adjacent property owners had standing and should be joined as Defendants in the action.

⁵ At the conclusion of the evidence, Intervenor Merry Land asked the Court, and was permitted, over Plaintiff's objection to add additional and cumulative Surveyor testimony to the Trial Record.

⁶ "JUDGE DUKES: All right. So what I'm going to do is hold the record open for 45 days to permit the Defendant to depose a yet to be named surveyor with regard to fact matters only, not as an expert. And 15 days after that I would like post-trial briefs from everyone. And then I would like when you submit those post-trial briefs please coordinate with Heather and let's set a conference call. Heather my assistant. And let's set a conference call roughly two weeks, 15 days, three weeks from the date of submission of the post-trial briefs so we can talk about the post-trial briefs and where we go from then. And we will try to see what we can do." Trial Transcript, P. 310, LL. 11-24

IV. Failure to Allow Post Trial Argument (Cont.)

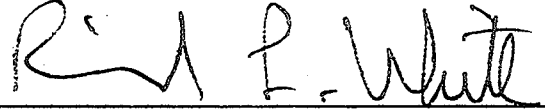
Factually, Plaintiff's counsel specifically asked the Court to allow Post Trial Motions, by electronic mail to the Court, dated **March 1, 2016** at 1:57 p.m., and **March 28, 2016**, at 3:35 p.m., both of which are incorporated herein, by reference.

CONCLUSION

WHEREFORE, based on the foregoing and consistent with the facts, testimony and evidence of this case, the South Carolina Rules of Civil Procedure and South Carolina Case Law, this Court should amend its Conclusion of Law "2" and so much of the decretal portion of this Court's Order, denying Plaintiff's request to declare title to tidelands, and quiet title in the Plaintiff, consistent with §48-39-220, S.C. Code Ann., (1976, as amended), and for such other and further relief that this Court deems just and appropriate.

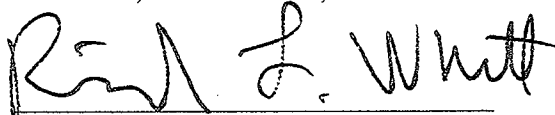
RULE 11(a) SCRCP CERTIFICATION

The Plaintiff's counsel herein, certify that, as to Plaintiff's Motion herein, consultation with opposing counsel was not held, because it would have served no useful purpose.



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Jefferson D. Griffith, III

Respectfully submitted,
AUSTIN, & ROGERS, P.A.



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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

H. MARSHALL HOYLER,

Plaintiff,

vs.

The State of South Carolina, Merry Land Properties, LLC, Sherbert Living Trust, Sherbert Living Trust, 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. VonHarten, 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.

IN THE COURT OF COMMON PLEAS

Case No. 2007-CP-07-3212

**INTERVENOR DEFENDANT MERRY
LAND PROPERTIES, LLC'S RETURN
AND INCORPORATED MEMORANDUM
IN OPPOSITION TO PLAINTIFF'S
MOTION PURSUANT TO 52(B) AND
59(E)**

Intervenor Defendant Merry Land Properties, LLC ("Defendant") hereby submits this Return in Opposition to the Motion Pursuant to Rule 52(b) and 59(e) filed by Plaintiff. Plaintiff filed his Motion seeking "amendment of the Court's Conclusion of Law '2,' and so much of the decretal portion of the Court's Order denying Plaintiff's request to declare title to tidelands."

Plaintiff asserts that the Court's Conclusion and Order misapprehended and are in direct conflict with South Carolina case law.

Though Plaintiff seeks to amend the "Order Denying Title to Marshlands," transmitted to the parties by email on May 27, 2016, Plaintiff's assertion is based on the findings that were transmitted by the Court to all parties by email on April 21, 2016, as indicated by the paraphrasing of the Court's finding included in the motion. Footnote 1 on page 1 of the Motion clarifies Plaintiff's argument as follows: that the Court relied on the representation of the grant on the Plat, to support Conclusion of Law "2," which misapprehended case law cited by Plaintiff in the motion.

Defendant's response to Plaintiff's assertions is set forth below.

I. Response to Case Law Cited by Plaintiff.

Plaintiff's motion contains quotations from five South Carolina cases but fails to explain the "misapprehension" that Plaintiff alleges has occurred. The findings clearly stated in the Court's email confirm the Court's agreement that a grant of marsh parcel was intended by the Form Grant from 1891 and the contemporaneous plat, which is part of the Deed pursuant to South Carolina law. The Court states nothing in the findings contradicting the statement from *Klapman v. Hook*, 206 S.C. 51, 32 S.E.2d 882 (1945) emphasized in Plaintiff's motion, that "[t]he vital question is the intent of the grantor at the time the deed is executed." Plaintiff seems to acknowledge this fact in FN 2 on p. 4 of his motion, where he states "[t]he intent of the Grantor at the time the Deed was executed, is clear and Finding "1" of this Court, so finds."

The Court's findings do confirm, however, the failure of Plaintiff's case in proving actual boundaries to locate the parcel of property that was intended to be conveyed. Plaintiff fails to fully explain his position but states in FN 1 on p. 2 of his motion that "the Court relied on the representation of the grant on the Plat to support Conclusion of Law '2', which misapprehends the Case Law cited by Plaintiff hereinabove." Though Plaintiff provides no further explanation of this statement or his position, he appears to assert that the 1891 Plat should have been disregarded as "outside evidence" in this case, since the Deed contains a clear intention of conveyance and a description the Plaintiff believes sufficient to locate the parcel.

This argument conveniently ignores other case law directly contradicting Plaintiff's position. Specifically, it has been established in South Carolina that 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). "As a general rule, **when maps, plats, or field notes are referred to in a grant or conveyance,** they are to be regarded as **incorporated into the instrument** and are usually held to furnish the true description of the boundaries of land." *Hammond v. Lindsay*, 277 S.C. 182, 284 S. E. 2d 581 (S.C.1981). The 1891 plat was specifically referenced in the Deed at issue¹ so must be considered part of the deed according to South Carolina law. In short, Plaintiff's position is simply incorrect.

¹ The reference contained in the Deed is as follows: "We have granted, and by these Presents do grant, unto the said James M. Crofut his heirs and assigns, a ... Tract of Vacant Land, situate in Beaufort T.S of Beaufort County and State aforesaid ... 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, ..." (see copy of Deed attached as Ex. A).

Plaintiff's motion not only ignores the incorporation of the 1891 Plat into the Deed by operation of South Carolina law but also the ambiguity that results and gives rise to the disagreement between the parties' surveyors in locating the parcel. If the conveyance was truly unambiguous, as Plaintiff's motion appears to suggest, there would be no reason for the surveyors to conflict. Instead, the surveyors clearly disagree about how to properly interpret the Deed (including the 1891 Plat) under South Carolina law.

The second finding in the 04/21/2016 email from the Court, what Plaintiff refers to as Conclusion of Law "2", recognizes the 1891 Plat as "nothing more than a hand drawn sketch, which prevented Plaintiff from proving "no more than a rough approximation of the parcel." Without more detail and accuracy than provided by the plat, the Court agreed that it was unable to accurately find the boundaries of the claimed property, and, therefore, ruled against Plaintiff. The Court did not accept the "re-created" plat proposed by Plaintiff's expert surveyor to locate the parcel because it relied on the current position of natural monuments and a sliding northern boundary to "re-create" a parcel having similar geometric shape but different area than described in the Deed and 1891 plat. Plaintiff's surveyor admitted that these boundaries were re-created based by reference to subsequent drawings of adjoining landowner plats and depend upon the current mean high and mean low water lines. In other words, Plaintiff's own expert referred to "evidence drawn from sources other than the deed itself," in direct contravention of *Vause v. Mikell*, 290 S.C. 65, 68, 348 S.E.2d 187, 189 (Ct.App.1986).

Plaintiff's motion incorrectly attributes a quote to *Smith v. DuRant*, 236 S.C. 80, 113 S.E.2d 349 (S.C.1960) that was actually taken from the syllabus to *Norwood v. Byrd*, 1 Rich. 135 (1844). *Smith*, 236 S.C. at 87. That being said, *Smith* is distinguishable from this case for the fact that the plat at issue in *Smith* was known by all parties to contain a clear error in which the

surveyor had overlooked and omitted an entire lot from the survey. *Id.* at 83. In fact, evidence admitted at the hearing proved that Appellant in the case had discovered the error years before the action was instituted by Respondent. *Id.* at 86. Though informed, Appellant not only made no effort to inform Respondent of the error, but actually requested the surveyor who discovered the error in the prior survey to keep the information quiet and further proposed the surveyor buy the property to sell it to Appellant, to completely conceal the entire situation. *Id.* at 84. There is no clear error with the Plat in this case that is comparable to the situation in *Smith*. Rather, the Plat here is simply too indefinite – due to illegible, missing, and likely inaccurate – depictions of bearings and distances.

Finally, *Brownlee v. Miller*, 208 S.C. 252, 37 S.E.2d 658 (1946), is also distinguishable from the instant case since in *Brownlee* the “surveyors had no trouble locating the land [as described in the advertisement for sale of the property] and they testified that the lines thereof were fairly well established.” *Brownlee*, 208 S.C. at 261. It is simply incorrect to suggest that a person “of ordinary prudence acting in good faith,” as stated in *Brownlee*, could accurately identify an exact location for the parcel that was intended to be conveyed to Plaintiff’s predecessor in interest, J.M. Crofut, based on information included in the Deed and contemporaneous Plat. Defendant’s expert Jim Gardner, the surveyor who originally examined both Plats in this case, provided extensive testimony as to his inability to locate the disputed marsh parcel and problems with the 1891 plat. Plaintiff’s expert confirmed a similar inability, so resorted to “re-creating” a plat depicting a parcel of similar shape and size. Moreover, Plaintiff’s own surveyor admitted that the current mean high and mean low water lines would not be in the same physical location as in 1882 or 1891. And, inclusion of a “sliding” boundary (at the northern end) provides no confirmation of placement of the parcel along the highland

shoreline. As the Court recognized, sufficient information is lacking in this case to accurately locate the parcel.

II. Response to Plaintiff's Argument Regarding Permissive Joinder of Merry Land and Other Adjacent Property Owners.

Plaintiff has argued against permissive joinder of Defendant and other owners of property located adjacent to the disputed marsh parcel. Plaintiff reads S.C. Code Ann. § 48-39-220 as contemplating inclusion of no parties other than the State in any legal action filed pursuant to the statute to determine interest in tidelands. Plaintiff cited no legal authority for his interpretation of § 48-39-220. Moreover, Plaintiff's interpretation ignores the plain language of the statute, which authorizes "any person" claiming an interest in tidelands to institute an action against the State of South Carolina but does *not* expressly prohibit participation of other parties.

S.C. Rule Civ. Pro. 21 allows the court to drop or add parties to an action by order "of its own initiative at any stage of the action and on such terms as are just." Here, the Court perceived a right to relief for the adjoining landowners in respect to or arising out of the same transaction, occurrence, or series of occurrences and recognized that questions of law or fact arising from the action for Defendant would also be common to the adjoining landowners. *See*, Order for Joinder of Parties attached as Ex. B. Such circumstances are sufficient to justify joinder of the adjoining landowners under S.C. Rule Civ. Pro. 20.

Moreover, as stated in the Order, the Court discussed with the parties the "Court's belief as to the necessity of joining [the adjoining landowners]" before announcing the decision to hold the hearing in abeyance to allow for notification. S.C. Rule Civ. Pro. 19 states that

a person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the

action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of his claimed interest. **If he has not been so joined, the court shall order that he be made a party** (emphasis added).

This rule appears applicable in the absence of any legal authority to establish that joinder of the adjoining landowners to the action would deprive the court of jurisdiction. The interests of the adjoining landowners related to the disputed parcel were obvious and would have gone completely unprotected, as the Court quickly realized, if they were absent from this action.

Defendant sought participation in this action in order to protect the interest it has in the marsh as an adjacent property owner and permittee that had obtained authorization from the State through SCDHEC-OCRM and from the United States Army Corps of Engineers to construct a marina over the disputed marsh. There were three other property owners who had constructed docks over the disputed marsh and were, therefore, similarly situated. All the adjacent property owners who were joined in this case, including Defendant, can establish legal standing.

It is well settled that establishment of standing requires satisfaction of three elements. Carnival Corp., d/b/a Carnival Cruise Lines, South Carolina State Ports Authority and City of Charleston v. Historic Ansonborough Neighborhood Assoc., Charlestowne Neighborhood Assoc., the Coastal Conservation League, and the Preservation Society of Charleston, 407 S.C. 67, 753 S.E.2d 846, 850 (S.C.2014). First, it must be demonstrated that an injury-in-fact which is a concrete, particularized and actual or imminent invasion of a legally protected interest has been suffered by the party. Id., citing Sea Pines Ass'n for the Prot. of Wildlife v. S.C. Dep't of Natural Res., 345 S.C. 594, 600-01, 550 S.E.2d 287, 291-92 (2001). Second, a causal connection

must exist between the injury and the challenged conduct. Id. Third, it must be likely that a favorable decision will redress the injury. Id.

It is inarguable that Defendant has sustained an injury-in-fact as a result of Plaintiff's claim of ownership in the disputed marsh, since it has been prevented from moving forward with development of its property and construction of the permitted marina. Plaintiff alleged that the other owners had wrongfully built their docks in violation of his ownership rights. Had Plaintiff succeeded in proving ownership of the disputed marsh, it would have resulted in the permanent loss of all parties' rights, including Defendant's, to use the marsh for access to the Beaufort River. Thus, a causal connection exists since all of these injuries-in-fact were the direct result of Plaintiff's ownership claim, and the parties who participated in this action did so with the goal of obtaining a favorable decision from this Court – denial of title to Plaintiff – which would immediately redress their injuries. As such, Defendant and all the parties who participated in this case can establish the required elements of standing.

In short, S.C. Code § 48-39-220 contains no language prohibiting joinder, and the South Carolina Rules of Procedure specifically authorize it, not only on a motion by a party but also by the court's own initiative, when it would promote justice, expediency and avoid duplicity of litigation. Thus, Plaintiff has failed to establish any error by the Court in allowing Defendant to intervene or in joining the adjoining landowners in this action.

III. Response to Plaintiff's Argument Regarding Post-Trial Testimony.

The record clearly establishes that this Court allowed Plaintiff to state his objection to the request by Defendant's counsel to allow additional testimony from Defendant's surveyor fact witness, if that person could be located. As established by the record, this Court considered the objection voiced by Plaintiff's counsel, allowed Plaintiff to then consult with his expert surveyor

regarding the testimony he had given earlier regarding his ability to close the survey, and then considered again Plaintiff's objection to Defendant's request. (Tr. p. 306-308). The testimony was not cumulative. Defendant's witness, Mr. Gardner, was the surveyor who had originally examined the plats for Defendant in 2007 and his testimony pertained solely to this examination and his findings. No other surveyor examined the plats with Mr. Gardner at the time and the CAD technician who assisted Mr. Gardner with the examination could not be located to appear at the hearing. Mr. Gardner was the only witness capable of establishing the facts involved with his original examination of the plats and the problems that were detected with 1882 plat that prevented him from closing it at that time.

IV. Response to Plaintiff's Argument Regarding His Right to Make Post-Trial Argument.

Plaintiff's motion asserts that the parties were deprived of having a conference call suggested by the Court after submission of the Post Trial Briefs. Plaintiff is ignoring the fact that the parties were permitted to state their positions and make arguments to the Court in the Post Trial Briefs and then, upon the request initially made by counsel for the State, all parties were permitted to file Replies to the Post Trial Briefs. No limitations were placed upon the parties regarding content of any of those briefs, so Plaintiff actually was provided a full and fair opportunity to consider all the evidence, including the Post Trial Testimony of Defendant's Fact Witness Jim Gardner and make any arguments he desired to the Court including any arguments that Plaintiff may have presented in a summation. While the conference call may not have happened as contemplated or requested, it is simply incorrect to suggest that Post Trial Arguments were not allowed.

CONCLUSION

In accordance with the foregoing, Merry Land, LLC respectfully requests that this Court deny Plaintiff's Motion Pursuant to 52(b) and 59(e).



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Attorneys for Defendant
Merry Land Properties, LLC

June 13, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

NOV 16 2016

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

SC Court of Appeals

Marvin H. Dukes, III, Master-In-Equity

Civil Action No. 2007-CP-07-3212
Appellate Case No.: 2016-001277

H. Marshall Hoyler.....Appellant,

v.

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. VonHarten, 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.....Respondents.

APPELLANT'S ADDENDUM TO NOTICE OF APPEAL

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INTRODUCTION

Appellant, H. Marshall Hoyler herein, filed his Notice of Appeal with this Court on June 16, 2016, which made reference to the Lower Court's then extant, Orders of May 19, 2016, and May 27, 2016.

- Thereafter, Respondents filed a Motion to Dismiss with this Court on July 25, 2016.
- This Court then denied Respondents' Motion to Dismiss by its Order filed September 28, 2016. Also, by this Court's Order of September 28, 2016, jurisdiction was returned to the Lower Court to rule on Appellant's Motions then pending before the Lower Court.
- On October 26, 2016, the Lower Court issued its decision denying Appellant's pending Motions, (see, Order of October 26, 2016, attached hereto as, *Exhibit "A"*), and Appellant's counsel notified this Court by hand-delivery on October 26, 2016, of the Lower Court's decision.
- This Court then issued correspondence on November 9, 2016, to all counsel of record indicating that this Appeal was no longer held in abeyance.
- Because of the procedural history set forth above, Appellant's original Notice of Appeal of June 16, 2016, **could not, and did not**, make reference to the Lower Court's Order later issued on October 26, 2016.

BASIS FOR APPELLANT'S ADDENDUM TO NOTICE OF APPEAL

Therefore, consistent with this Court's Orders and the procedural history outlined herein, Appellant hereby files the Lower Court's Order of October 26, 2016, with this Court, as an Addendum to Appellant's original Notice of Appeal, which made reference to the Lower Court's Orders of May 19, 2016, and May 27, 2016, and which now will also include reference to the Lower Court's Order of October 26, 2016.

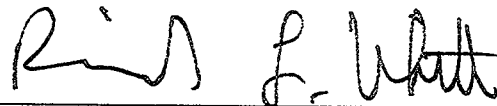
This filing is made *nunc pro tunc* and it relates back to Appellant's Notice of Appeal as filed on June 16, 2016.

CONCLUSION

Based on the foregoing, the Lower Court's Order of October 26, 2016, (see, Order of October 26, 2016, attached hereto as, *Exhibit "A"*), should be included, along with the Lower Court Orders of May 19, 2016 and May 27, 2016, to be appealed by the Appellant herein, as if referenced in Appellant's original Notice of Appeal filed June 16, 2016.

AUSTIN & ROGERS, P.A.

By:



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November 16, 2016
Columbia, South Carolina

000190

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

H. Marshall Hoyler,

Plaintiff(s),

vs.

The State of South Carolina, et al.,

Defendant(s).

IN THE COURT OF COMMON PLEAS

CASE NO: 2007-CP-07-3212

RECEIVED

NOV 16 2016

SC Court of Appeals

ORDER DENYING MOTION
PURSUANT TO RULES 52(b)
AND 59(e), FILED 6/9/2016

RECEIVED

OCT 26 2016

SC Court of Appeals

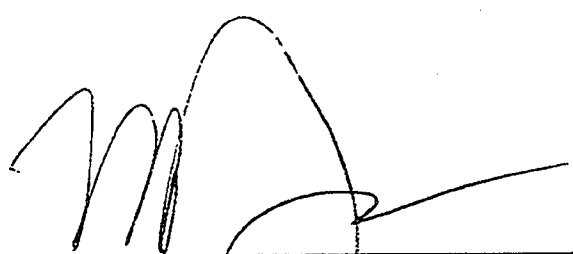
JERRI ANN ROSENE
CLERK OF COURT
BEAUFORT COUNTY, SC

2016 OCT 26 AM 11:11

This matter came before me on Plaintiff's Motion Pursuant to Rules 52(b) and 59(e), filed on June 9, 2016. This matter was previously ended by Order filed on May 27, 2016. Plaintiff appealed this Order with the South Carolina Court of Appeals to which Defendant's filed a Motion to Dismiss the Appeal. The Court of Appeals denied the Defendant's Motion to Dismiss the Appeal but further ruled to hold the Appeal in abeyance pending my ruling on the Rule 52(b) and 59(e) motion reference above. Counsel has consented to my review of the motion without a hearing.

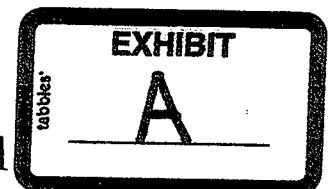
After review of Plaintiff's motion, and Defendants' Memo in opposition, I hereby deny the Rule 52(b) and 59(e) motions.

IT IS SO ORDERED:


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

October 16, 2016
Beaufort, South Carolina

000191



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT) CIVIL ACTION NO:2007-CP-07-3212

H. MARSHALL HOYLER,)
Plaintiff,)
versus.)
THE STATE OF SOUTH)
CAROLINA,)
Defendant.)
and)
MERRY LAND PROPERTIES,)
LLC.,)
Intervenors.)

Reference hearing held before the
Honorable H. Marvin Dukes, III, Master in
Equity and Special Circuit Judge for Beaufort
County in his chambers at the Beaufort County
Courthouse, Beaufort, South Carolina
commencing at approximately 11:00 a.m. on the
31st day of January, 2011.

APPEARANCES

For the Plaintiff: Jefferson D. Griffith, III
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For the Defendant
State of South Carolina James Emerson Smith, Jr.
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For the Intervenors: Mary Duncan Shahid
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1 MR. GRIFFITH: Your Honor, we would like
2 to argue the Motion for Summary Judgment. We
3 don't believe - First of all, Merry Land may
4 not have standing. And the -- if they do have
5 standing, their counterclaims are not - there
6 are a number of counterclaims and their
7 counterclaims can be resolved as a matter of
8 law.

9 COURT: Okay. Happy to hear from you.

10 MR. GRIFFITH: Your Honor, we don't
11 believe that - We've raised standing as an
12 issue because we believe that it hinges on the
13 jurisdiction of the Court. The Merry Land
14 Properties intervened with the permission of
15 the Plaintiff, but the Plaintiff reserved all
16 of its rights and upon reviewing and upon the
17 depositions and the questions put to the
18 court, there is no standing. They are simply
19 strangers to this piece of property. Merry
20 Land, we initially believed, were going to put
21 forth some claim to the marsh land property.
22 All they assert is a claim to the upland
23 property. Therefore, they have no injury,
24 they have no connection between that injury
25

1 and the conduct which is complained of which
2 is our bringing this suit, and it cannot be
3 addressed by a favorable decision of this
4 Court. And we believe that standing is a
5 limiting factor of the subject matter
6 jurisdiction of this Court.

7 COURT: Okay. Happy to hear from you.

8 MR. SHAHID: Thank you, Your Honor, just
9 a little bit of background to preface my
10 argument. I represent Merry Land Properties,
11 a land development company, and Merry Land in
12 2005 began a due diligence investigation of
13 two parcels in Port Royal for the purchase and
14 development of multi-family residential
15 development. One of these parcels - They're
16 not contiguous; they are divided by a road.
17 One of these parcels is a parcel that we refer
18 to as the Beaufort River Parcel and it is 715
19 plus or minus linear feet of water frontage on
20 the Beaufort River. As part of their
21 development, Merry Land went through a highly
22 public permit process to obtain a permit for a
23 community marina. And they in 2006, perhaps
24 2007, I may have my years wrong, were given

1 mountain that a claimant has to climb to rebut
2 the presumption, the State's presumption of
3 ownership of title. I don't think it's proper
4 to resolve that on summary judgment. And I
5 don't think summary judgment is proper against
6 Merry Land, who really is standing in the
7 shoes of another defending party who received
8 licenses and permits from state and federal
9 agencies to use this marsh. They went through
10 a very public process of both inquiring and
11 then getting permits for this marsh and who
12 was caught by surprise. So, we would like to
13 see the case move forward and allow us to put
14 up our evidence on what we believe are claims
15 that would prevent either a declaration of
16 title of this specific parcel in the Plaintiff
17 or would adjudicate that we still have an
18 interest that survives.

19
20 MR. SMITH: Your Honor, if I may, for the
21 State, we oppose summary judgment for reasons
22 in part by what was stated by Ms. Shahid. We
23 don't think it's appropriate in this type of
24 case against the State of South Carolina, and
25 there needs to be testimony on the record and

1 opportunity to examine the witnesses as to
2 their conclusions about this property. And
3 that is for several reasons including the
4 burden is on the Plaintiff to establish title.
5 This is set forth in the Hobard case. "In
6 asserting title a party must prove a specific
7 grant from the sovereign which is strictly
8 construed against the grantee." With regard
9 to plats, the case, Hobonny Club, referred to
10 the plat in that case and it said, "These
11 plats are carefully scaled and platted so as
12 to delineate the boundaries of the tracts
13 granted with mathematical precision and which
14 referred to boundaries that were accurately
15 locatable on the ground by contemporary
16 engineering standards." And it refers again
17 to the specificity of the attached plats in
18 that case. If you read Mr. Fanning's
19 affidavit attached to the Motion for Summary
20 Judgment, he had to rely on downstream
21 documents and other information in order to
22 locate the property that's described in the
23 grant from the State. And so therefore, we
24 don't have the same mathematical precision
25

1 within the grant and the plat that The Bonnie
2 Club references. Whether they are able to
3 establish title is a matter this Court will
4 need to determine. But that should only be
5 determined after an opportunity for us to
6 examine their surveyor and any other witnesses
7 they present on the stand. And that they
8 cannot by way of a Motion for Summary Judgment
9 establish proof so as to meet these burdens
10 required of a party claiming against a State
11 in Tidelands cases.

12 MR. GRIFFITH: Your Honor, first, let me
13 say that there are a number of claims that
14 Merry Land has asserted as counterclaims. We
15 are not asking for summary judgment against
16 the State of South Carolina. We understand
17 that we have the burden of proof against the
18 State. Merry Land has asserted four
19 counterclaims, one of which is an
20 insufficiency of a grant. And in particular
21 in Paragraphs 23 and 24 of their Answer and
22 Counterclaim, they talk about in the Grant
23 from the State of South Carolina to Mr.
24 Hoyler's predecessor in interest a particular
25

1 clause which says, "Reserving nevertheless
2 unto the State of South Carolina all mineral
3 and phosphate rights of said State of South
4 Carolina to the exclusive use and control and
5 ownership of all mineral and phosphate
6 deposits on the premises hereby granted."
7 Your Honor, the question of what a deed
8 conveys is a question of law. A reservation
9 of rights, which is not repugnant to the fee-
10 simple title, does not defeat fee-simple as
11 against the rest of the world. As a matter of
12 fact, in our Motion for Summary Judgment there
13 is a term of art, profit a prendre which is a
14 French term which specifically refers to the
15 ability of an individual or entity to remove
16 mineral rights from land which has been
17 conveyed to another. In this instance, the
18 State of South Carolina merely reserve the
19 right to mine the phosphate minerals which may
20 have been on this piece of property, but it
21 does not defeat fee-simple title as to the
22 rest of the world. A profit a prendre is more
23 in the lines of an easement and an easement,
24 the only difference is instead of the ability
25

1 to cross or go onto a piece of property a
2 subservient tenant is the right to remove
3 these minerals. And, therefore, Your Honor,
4 as to counterclaim number 1 under Merry Land's
5 Counterclaim, we believe that summary judgment
6 is appropriate.

7 I'll be happy to go address the others as
8 we go or happy to have Ms. Shahid respond or
9 however she pleases or the Court pleases.

10 COURT: We've got here, of course, the
11 entire group, for what was scheduled as the
12 hearing itself. Certainly, I suppose what we
13 could do is have testimony -- You've already
14 submitted, I am guessing, the affidavits which
15 are in the file to the Motion for Summary
16 Judgment and the various documents with regard
17 to summary judgment. The standing issue needs
18 to be rule upon immediately if we are going to
19 proceed to trial, but probably, I suppose, and
20 let me know if there are any objections or
21 problems with this, we could simply proceed
22 with the testimony and I could hold the
23 various summary judgment motions under
24
25

1 advisement, pending the conclusion of
2 testimony.

3 MR. GRIFFITH: We are prepared to go
4 forward.

5 COURT: Any objections or anything else?
6 With regard to the standing issue, I am going
7 to deny the Plaintiff's Motion on standing.
8 Call your first witness.

9 MR. GRIFFITH: We'd call Georgianna
10 Coates.

11 GEORGIANNA V. COATES,
12 after being duly sworn, testified as follows:
13

14 BY MR. GRIFFITH:

15 Q Ms. Coates, could you give the Court your full
16 name, please, ma'am?

17 A Georgianna V. Coates.

18 Q And Ms. Coates, do you live in Beaufort?

19 A I do.

20 Q And what do you do for a living?

21 A I do title research.

22 Q And what does title research involve?

23 A It involves the history of land and any adverse
24 aspects of the land.
25

Q And where do you go typically to do title research?

1 objections could be raised at the time the
2 opinion questions are asked.

3 COURT: Maybe so because I will probably
4 find that she is an expert and has probably
5 been found so dozens of times in the subject
6 of title examinations, certainly with leave to
7 bring up whatever you'd like to way of
8 objections or comments during the testimony.

9 MS. SHAHID: I won't object to her
10 qualifications. I guess my objections will be
11 to opinion testimony.

12 COURT: Okay. But I do find that she is
13 an expert.

14
15 BY MR. GRIFFITH:

16 Q Ms. Coates, were you asked to examine a chain of
17 title for Hamilton Marshall Hoyler?

18 A I was asked by Mr. Chet Williams.

19 Q And did you do so?

20 A I did.

21 Q And did you provide to Mr. Williams and to me a
22 document entitled "Chain of Title".

23 A I did.

24
25 MR. GRIFFITH: May I approach, Your
Honor?

COURT: Yes.

1 BY MR. GRIFFITH:

2 Q Is this a copy of that document?

3 A It is.

4
5 MR. GRIFFITH: I'd like to mark this as
6 Plaintiff's 1?

7 COURT: Any objection?

8 MS. SHAHID: No, Your Honor.

9 (WHEREUPON, PLAINTIFF'S
10 EXHIBIT NUMBER 1 WAS
11 MARKED AND ENTERED INTO
12 EVIDENCE.)
13

14 BY MR. GRIFFITH:

15 Q Ms. Coates, if you will refer to Plaintiff's
16 Exhibit Number 1. Can you tell me how you began to
17 determine this chain of title.

18 A I had to begin by using the tax maps -

19 Q Where are the tax maps located?

20 A -- of Beaufort County.

21 Q Where are the tax maps located?

22 A Well, they're located in several places. In the
23 assessor's office, in the ROD's office and I have a copy
24 in my office of tax maps copied by the Magellan Firm.
25

1 Q And did you find any reference to Mr. Hoyler on
those tax maps?

2 A I found a parcel number on the tax maps that
3 indicated that he was being taxed for the subject
4 property.

5 Q All right. And the subject property contains,
6 according to the tax maps, how many acres?

7 A Ninety-five acres, 95.27 -- Let me make sure.

8 Q And what did you do after you made the
9 determination that Mr. Hoyler was being taxed for the
10 property in order to search Mr. Hoyler's title?

11 A Well, I proceeded searching Mr. Hoyler and the
12 chain of title backwards.

13 Q In searching the title backwards, where did the
14 chain of title end? Where did you end your chain of
15 title?

16 A It ended with a deed from Governor and Commander in
17 Chief for the State of South Carolina in Deed Book 17,
18 page 562 dated July 7, 1891 and recorded August 14,
19 1891.

20 Q And do you have a copy of that deed?

21 MR. GRIFFITH: Your Honor, can we go off
22 the record for a minute?

23 COURT: Certainly; Off the record.

1 COURT: All right. But nevertheless, any
2 objection to marking it 2(A)?

3 MR. SMITH: No, Your Honor.

4 COURT: Okay 2(A). Without objection,
5 but with some questions.

6 (WHEREUPON, PLAINTIFF'S EXHIBIT
7 NUMBER 2(A) WAS MARKED AND
8 ENTERED INTO EVIDENCE.)

9 BY MR. GRIFFITH:

10 Q And if you'll identify this for me, please, ma'am.

11 A Do you want me to read the caption?

12 Q Can you tell me what that is, please?

13 A It appears to be a plat of the 95.27 acres.

14 Q Can you look at the plat, please, and tell me where
15 it came from?

16 A The records of The Secretary of State recorded
17 instruments, public land plat books, volume 2, page 16.

18 Q Okay. Thank you.

19 MR. GRIFFITH: Plaintiff's 3?

20 MS. SHAHID: No objection.

21 COURT: Without objection.

22 (WHEREUPON, PLAINTIFF'S EXHIBIT
23 NUMBER 3 WAS MARKED AND
24 ENTERED INTO EVIDENCE.)
25

1 Q Now, I think you testified that you did not see any
2 ambiguities other than the intestate estate and the
3 interest of Hamilton Hoyler, Jr.; is that correct?

4 A That's correct.

5 Q And you said James Crowfoot died intestate. So,
6 did you find any kind of a document as to what would
7 have been conveyed as a result of his dying intestate?

8 A No document; no.

9 Q So, the next entry is George Augustus Crowfoot's
10 probate filed?

11 A Yes, sir.

12 Q Was that the filing of his Will? What did that
13 represent; that entry there, the George Augustus
14 Crowfoot?

15 A Georgia, Georgena --

16 Q I am talking about the George Augustus Crowfoot
17 probate file. How do you know that as a result of James
18 Crowfoot's death that George Crowfoot inherited the
19 property?

20 A By reading the Will.

21 Q By reading the Will from George Crowfoot?

22 A From James Crowfoot to George Crowfoot.

23 Q I am sorry. I thought you said James Crowfoot died
24 intestate.

1 A James Alonzo Crowfoot. This is James M. Crowfoot.

2 Q Oh, I'm sorry; I apologize. Well, you don't have
3 an entry for James M. Crowfoot died 6/19/1915.

4 A Correct.

5 Q And is that because he died intestate?

6 A No, his entry is next to George Augustus Crowfoot
7 because that is who inherited under that Probate File.

8 Q So it was James Alonzo -- which one died intestate?

9 A James Alonzo -- The one in the big black --

10 Q I am sorry. James Alonzo Crowfoot, 1970. And then
11 how did you determine that his heirs were Rhoda,
12 Margerite and Georgena?
13

14 A From the Whereas Clause in Deed Book 289, Page
15 1351,

16 Q All right. Then what is the interest of Hamilton
17 Hoyler, Jr.?

18 A At what time; at what period?

19 Q Well, you said you referred to an interest, a
20 possible interest. What is it that you are talking
21 about? The ambiguity or gap that you found?
22

23 A Under the Will of Elizabeth Crowfoot Waterhouse, he
24 inherited -- Hamilton M. Hoyler, Jr. inherited under
25 that Will and again, he is the grantee in Deed Book 289
at Page 1351, Hamilton Marshall Hoyler, Jr. The 2007

1 COURT: How many adjoining property
2 owners are there?

3 MR. GRIFFITH: It would be Merry Land.
4 There may be another LLC and I don't know -

5 COURT: All right.

6 MR. GRIFFITH: There are a number of
7 additional property owners, Your Honor.

8 COURT: Before we get into that, I think
9 Ms. Coates might want to be excused.

10 MS. SHAHID: No objection.

11 COURT: As I understand the case, the
12 file, of course, I have here doesn't really
13 have the -- at least a plat or an exhibit
14 that really indicates that which has caused me
15 to ask the question. My understanding from
16 the Complaint is it seeks to establish,
17 basically a title clearance action of this
18 marsh with the boundaries of it established by
19 metes and bounds. Those metes and bounds
20 boundaries adjoining pieces of property owned
21 by parties who are not a party to this action
22 in essence seeking, if I am reading the
23 Complaint correctly, to establish that the
24 Plaintiff owns to the high water mark on a
25

1 variety of parcels of property owned by
2 persons who do not have a seat at the table
3 here today. I mean, is that an accurate
4 assessment of the lawsuit?

5 MR. GRIFFITH: The suit is, Your Honor,
6 to establish ownership of this particular
7 piece of lawsuit [sic] against the State of
8 South Carolina. And to the extent that the
9 State of South Carolina owns up to the high
10 water mark, that's the -- We are not trying to
11 get outside of that box, the high water mark.
12 Anything above the high water mark would
13 belong to those individuals who own above the
14 high water mark.
15

16 COURT: No, I understand that, but by
17 confirming this plat you are seeking to
18 establish that high water mark.

19 MR. GRIFFITH: That's correct.

20 COURT: And your version of the high
21 water mark, which may very well be accurate,
22 but is this plat. Some adjoining property
23 owners may have an entirely different idea of
24 where the high water mark is and it may extend
25 far into what the Plaintiff seeks to own.

1 That concerns me and I'd like to hear
2 everyone's thoughts on that.

3 MR. GRIFFITH: My thought is this, Your
4 Honor, the statute requires us to establish
5 against the State of South Carolina. It does
6 not require us to establish against adjoining
7 property owners. We are seeking up to the
8 high water mark so if an individual comes
9 forward and says, we believe that your high
10 water mark is not the right high water mark,
11 then that individual could have a claim
12 against Mr. Hoyler. But as against the State
13 of South Carolina, that is the only entity
14 that we are trying to establish this against.
15 This is the high water mark, we own this
16 property as against the State of South
17 Carolina.
18

19 COURT: So to be clear, you are not
20 seeking to establish the high water mark based
21 on a plat? You are seeking almost as if in a
22 declaratory judgment action, as opposed to a
23 title using a plat. Is that --
24
25

1 MR. GRIFFITH: Well, Your Honor, the deed
2 calls for the high water mark -- from the
3 high water mark to the low water mark.

4 COURT: I saw that.

5 MR. GRIFFITH: The plat is attached to
6 the deed. The plat shows those boundaries.
7 We are going to confirm those boundaries as
8 they existed in 1891, based on the calls on
9 that plat and we anticipate showing where the
10 mean high water mark and the low water mark
11 are now. We are prepared to go forward on
12 that. We don't claim anything above the high
13 water mark and if anybody tests where the high
14 water mark is located, presumably that
15 individual could come forward and do so. But
16 our intention here is to only determine that
17 high water mark, the low water mark versus the
18 State of South Carolina and establish our
19 title as against the State of South Carolina
20 and no one else.

21 COURT: I guess I understand that. I
22 guess my concern is where the high water mark
23 and the low water mark are subject to a
24 massive change over time, surveying
25

1 modifications, errors, changes in science,
2 changes in the title range, a variety of
3 things, so I guess I'm concerned about these
4 adjoining property owners who may conceivably,
5 at the conclusion of this case, could end up
6 with a judicial ruling that a piece of their
7 waterside property is actually owned by
8 someone else.

9 MR. GRIFFITH: I don't see, Your Honor,
10 how we could establish that against any person
11 who is not a party to this action. We are
12 establishing the high water mark and the low
13 water mark as to the State of South Carolina.
14 If any individual thinks that they are injured
15 by that determination of a Circuit Court's
16 ruling, I don't believe would be binding on
17 them since they weren't a party to this
18 action. We're just trying to determine what
19 the State of South Carolina gave to Mr.
20 Hoyler's predecessor in interest, Mr.
21 Crowfoot, as against the State of South
22 Carolina. If Merry Land hadn't intervened,
23 they wouldn't be here either. The Statute
24
25

1 calls for a suit against the State of South
2 Carolina.

3 COURT: I agree. On the other hand, it
4 doesn't exclude the possibility of naming all
5 interested parties. It does say exactly what
6 you said. It requires a lawsuit against them,
7 but it's silent on the issue of who must be
8 named, other than the State, of course. So, I
9 guess that, without ruling on it, just
10 pondering that for a moment. It concerns me
11 though. I'd love to hear from cancel if you
12 have any thoughts on it. If you don't -

13
14 MS. SHAHID: Your Honor, I am looking at
15 it less from a property right/boundary point
16 of view and more from the assumption that most
17 water front property owners have, when they
18 purchase their property, they have the right
19 to reach the water. In fact, the evidence
20 will show that all three different individuals
21 constructed docks without Mr. Hoyler's
22 permission. He didn't even know about those
23 docks at the time I took his deposition. So,
24 I look at it a little differently. I believe
25 once -- If you were to confirm his ownership

1 of the marsh, the validity of the State Grant
2 plat then he has satisfied the burden or
3 rebutting the State's presumption of
4 ownership, that everybody else is going to be
5 collaterally estopped from ever challenging
6 whether than marsh is public tideland or
7 privately owned marsh. That's a different
8 question than you posed. I think you were
9 concerned about boundaries shifting and our
10 focus has been a use of the marsh.

11 COURT: Now, I am concerned about the
12 owners of the three docks. What about those
13 individuals?
14

15 MR. GRIFFITH: Your Honor, once we
16 establish ownership, what we believe is our
17 title, then presumably Mr. Hoyler is going to
18 be able to say to those individuals -- I
19 don't know what his intention is as to those
20 individuals, but if they are on his property,
21 presumably he could bring an action for
22 trespass. Your honor, let's go back just a
23 minute. As far as the boundaries moving, as
24 far as the high water mark and the low water
25 mark moving, while it's from a public's

perspective that's a significant event, I've
got 10 more feet one way and 5 more feet that
way. What we are establishing here is the
Eastern boundary is the Beaufort River. The
Western boundary is the highland, and there is
a substantial piece of property in between.
I'm getting ahead of myself, but certainly
counsel has heard this already. In Mr.
Fanning's deposition, the property has
actually shrunk in the last hundred and ten
years, so there is less of it there, at the
current high tide, low tide. But there is
something there, whether the boundary is at 5
feet, 10 feet, 20 feet closer, there is some
portion of the marsh where that boundary line
exists that Mr. Hoyler, according to our case,
Mr. Hoyler owns that. And so, the question
is, Mr. Hoyler owns a piece of property there
in the marshes of the Beaufort River and the
boundary line I don't think that the parties
who owned the upland would be bound by a
decision here. This decision is about what is
Mr. Hoyler getting as against the State of
South Carolina. It is not against the upland

1 property owners; they are not parties to this
2 thing and if they feel as if their property
3 lines are being infringed upon, they bring
4 their own action against Mr. Hoyler.

5 COURT: Where does that leave the three
6 dock owners? I can't imagine issuing a ruling
7 that did not specifically exclude them from
8 this case, from any finding in this case. I
9 mean, that's kind of the hard part. I mean,
10 they, of course, would have standing.

11 MR. GRIFFITH: I don't think they have
12 standing in the case against the State of
13 South Carolina. Like Merry Land, we don't
14 think has standing against the case against
15 the State of South Carolina. They have
16 wharfed out -- They have built docks out into
17 Mr. Hoyler's property, one we establish that
18 it is Mr. Hoyler's property, and they are
19 trespassers. But you seek to establish it
20 without them having their say in the case. I
21 mean that's what worries me a little bit.

22 MR. GRIFFITH: But the case is not
23 against them, Your Honor; the case is against
24 the State of South Carolina. They can't --
25

1 If they've gotten permits to build docks,
2 permits don't guarantee that the State of
3 South Carolina has title. They are simply
4 permission from the State of South Carolina to
5 wharf out over property that presumably the
6 State owns. They are not guaranteed that that
7 property belongs to the State of South
8 Carolina and presumably they did their own due
9 diligence. Maybe they missed it as well or
10 maybe they simply didn't care. So, the fact
11 of the matter is, the Hoyler property has been
12 here for the last -- since 1979, he's been
13 paying taxes on it. So, anybody that cared to
14 look carefully would have found that. They
15 pushed those docks out there at their own
16 risk.
17

18 COURT: My comments are to the substance
19 of your case; they are to due process to
20 individuals that maybe aren't a part of this
21 case and would have standing -- I mean,
22 ordinarily when you've got a title clearance
23 action, we have the adjoining property owners
24 named for a variety of reasons. And I am
25 trying to think how this case would be

different than those ordinary cases. In fact,
we have what I have now learned is what would
ordinarily be considered in any other case, an
encroachment by three different property
owners. If this were a piece of upland, and
we were clearing the title to that, I mean, of
course, they would be parties to the case.
So, I don't know. I'd hate to see a case come
this far and then have to be delayed further
to name additional parties, but -- And I am
not ready to make that call right now.
Everyone's here and I am happy to take some
more testimony, but I am concerned about that.
I am concerned that we'll end up with a ruling
that, first of all, even if it's in favor of
your client, it's far too early to tell how
this thing would turn out, but it would be
ineffective against a number of adjoining
property owners because there was no due
process afforded them. But I don't know; it
concerns me. But in the meantime I am going
to think about it, and I'm going to think
about it further during lunch.

1 I am happy to hear any responses to
2 Mr. Griffith's -

3 MR. SMITH: Your Honor, I am not
4 prepared to take a position at this time. I
5 do not know how this would affect permitting
6 by OCRM and OCRM is not a party to this case;
7 that is the Department of Health and
8 Environmental Control, Office of Coastal
9 Research Management. So I can't speak to what
10 effect that would have. Certainly, the ruling
11 in this case may not be binding on other
12 parties, but I am not here as their attorney
13 to represent them or defend their interests.
14 As I said, I am not sure how this would affect
15 permitting issues; ones that have been issued;
16 ones that might be sought in the future.

17
18 MS. SHAHID: If I may address that
19 one point.

20 COURT: Sure.

21
22 MS. SHAHID: OCRM has a regulation
23 specifically for these types of situations.
24 The assumption is that the notification of the
25 adverse claim of ownership of the marsh comes
in during the permit process. The permit

1 application is sent out on public notice and
2 the Agency receives a comment that, you know,
3 I own that marsh. The Regulation provides
4 that the permit application will be stayed
5 thirty days and the objecting party claiming
6 ownership of the marsh has thirty days to file
7 a civil action under 48-39-220 to have their
8 title declared. If they fail to do that
9 within that thirty-day period, OCRM can go
10 ahead and issue that permit, the belief being
11 that marshes presumptively State owned until
12 and unless a declaration is obtained under 48-
13 39-220. So that's how their regulation -
14 that's in R-30-25, I believe is their
15 regulatory process.
16

17 COURT: Maybe I am confusing my self
18 unnecessarily, but I am still concerned as to
19 how any of that helps the guy without a dock.

20 MS. SHAHID: It doesn't. I mean,
21 once that action is brought, that is the final
22 adjudication regarding that marsh. From that
23 point out, if they are provided with a copy of
24 your order, from that point out, it's going to
25

1 be barred from issuing any other permits in
2 that marsh without Mr. Hoyler's permission.

3 COURT: Anyway, I appreciate your
4 comments. I will ponder that for a moment and
5 maybe we can go on --

6 MR. GRIFFITH: Your Honor, do you
7 want to proceed or do you want to ponder that
8 a little bit longer. I hesitate to put on my
9 entire case with Your Honor's concern that we
10 don't have all of the proper parties in it.

11 COURT: Too bad I didn't come up
12 with this thought right when it became
13 lunchtime. Let's go off the record just a
14 second and let me just talk to the lawyers.

15 (A Brief Discussion Ensued Off The
16 Record.)

17 COURT: We're back on the record.
18 We had a brief off the record discussion, but
19 prior to that I had expressed a concern about
20 adjoining property owners and unknowns.
21 Having had our off the record discussion
22 taking a look at the current plat, I note that
23 there are approximately thirty-five
24 individuals and corporations which join the
25

1 property in question. There are thrown on the
2 plat which encroach, if we can use that term,
3 or which go into the property in question here
4 and I have a due process concern about those
5 individuals, not just the dock owners, but the
6 adjoining individuals, but the unknowns. So,
7 what I am going to do is order that those be
8 necessary parties to be added, that the
9 pleadings be amended to reflect such and those
10 individuals be served according to the Rules
11 of Civil Procedure and that what we will do is
12 schedule a trial date in such a manner to at
13 least lock a day in that we can all come back
14 in about seven months.
15

16 Any questions or comments concerning
17 that?

18 That'll be it for today then.

19 (WHEREUPON, THE HEARING
20 WAS CONCLUDED.)
21
22
23
24
25

State of South Carolina) Court of Common Pleas
) 14th Judicial Circuit
 County of Beaufort) No.: 2007-CP-07-3212

H. Marshall Hoyler,

Plaintiff,

vs.

HEARING

The State of South Carolina,
 Merry Land Properties, LLC,
 Sherbert Living Trust, Sherbert
 Living Trust, Sherbert Living
 Trust, Supan Living Trust,
 Elizabeth R. Levin, Edward
 McCray Wise Revoc. Living Trust,
 Carol Ann DeVries Wise Revoc.
 Living Trust, Amelia 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. VonHarten, 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.

COPY

November 19, 2015

000224

Hearing reported by Deborah S. Thomas,
Certified Verbatim Reporter and Notary Public in and
for the State of South Carolina; said hearing held
before the Honorable Marvin H. Dukes, III, Beaufort
County Master in Equity and Special Circuit Court
Judge in accordance with the South Carolina Rules of
Civil Procedure, at the Beaufort County Courthouse,
102 Ribaut Road, Room 212, Beaufort, South Carolina,
on November 19, 2015, at the hour of 9:22 a.m.

THOMAS REPORTING SERVICES
156 Argent Way
Bluffton, South Carolina 29909
(803) 206-7390

000225

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1 party doesn't have standing in a case if it might
2 affect another case.

3 The other case that might be affected here
4 is the ability of Merry Land to put these piers in,
5 to put these docks in. That has no relevance to
6 this case. This -- that is secondary, that is
7 tertiary. It doesn't have anything to do with us.

8 The question before the court is who owns
9 the 95.27 acres claimed by Mr. Hoyler and claimed by
10 the State of South Carolina? We don't think they
11 have any business in the courtroom. And we would
12 ask that Your Honor to the extent that the upland
13 boundary, the high water mark boundary is
14 established, that they not be allowed to participate
15 in this trial.

16 JUDGE DUKES: All right. I'm
17 guessing you have a whole separate on this?

18 MS. SHAHID: Well, my first question
19 is I thought that this was raised and ruled on in
20 January of 2011 by Mr. Griffith, but I'll respond to
21 it again. And, of course, I believe you might have
22 a differing opinion, too, Your Honor, because it was
23 at your direction that we ceased that hearing upon
24 your review of a plat and surrounding properties.
25 And we notified 30, 40, 50 different homeowners that

1 surround the marsh of this action.

2 So Mr. Griffith's arguments at this point
3 are inconsistent with the direction that this case
4 went back when we first started it and you saw the
5 plat and you saw how many properties were affected.
6 But aside from that, I don't believe the statute
7 precludes participation by other parties.

8 The purpose of the statute is to have
9 somebody -- to eliminate the public interest in the
10 marsh. That is the sole purpose of the statute is
11 to have somebody come forward and through an action
12 of this court you eliminate lands below mean high
13 water, the public interest in those lands.

14 And it means that you can fence off this
15 property. It means that you can post no trespassing
16 signs on this property. So members of the public
17 very much have standing to intervene in this lawsuit
18 and object to elimination of their rights.

19 But secondly Merry Land has special
20 status. Merry Land, a developer, acquired multiple
21 parcels, contiguous parcels in Port Royal, South
22 Carolina in 2005 for purposes of a residential
23 development. As an amenity -- and they acquired as
24 part of that four deep water parcels.

25 They then before closing on the property

1 conducted all their due diligence and went through
2 two very public permitting processes; one with the
3 Army Corps of Engineers and one with the Department
4 of Health and Environmental Control, and obtained
5 marina permits from both those agencies to construct
6 a public marina for public use of that tideland area
7 and that waterway.

8 It was after -- and then they closed upon
9 approximately \$5 million worth of property with
10 reliance on those marina permits. And it was after
11 that that Mr. Hoyer's claim was made known.

12 So Merry Land I think does have an injury.
13 And that injury can only be remedied by its
14 successful participation in this lawsuit to enforce
15 the public ownership of this property. The purpose
16 of 48-39-220 is to make clear that until and unless
17 you have this judicial declaration that marsh is
18 still public participate.

19 The mere fact that you are walking around
20 with Governor Tillman's grant and plat, until you
21 get this declaration from this court, that marsh is
22 still public property and subject to public uses.
23 And we very much have a vested interest in being
24 able to use the license that the State and Federal
25 Government gave us to instruct a marina and get

1 water access to what we thought was deep water
2 property and what we paid deep water property prices
3 for.

4 So I think that -- I don't think there is
5 any situation where we shouldn't be allowed to be
6 able to proceed as a party to this action objecting
7 to them eliminating the public trust in that marsh.

8 JUDGE DUKES: Okay. Thanks.
9 Anything from the State on that?

10 MR. SMITH: The State does not object
11 to the participation of Merry Land in this suit.

12 JUDGE DUKES: Okay. All right. Yes,
13 sir?

14 MR. GRIFFITH: Just so that we are
15 clear, Your Honor, I'm looking at the transcript.
16 And it's not a numbered page, but it's just before
17 Georgiana Cooke is called as a witness. And what we
18 had done was we had a pending motion for summary
19 judgment. And I'll read from the record.

20 The standing issue needs to be ruled on
21 immediately if we are going for proceed to trial,
22 but probably I suppose, and let me know if there are
23 any objections, the problem with this is we simply
24 proceed with the testimony and I can hold the
25 various summary judgment motions under advisement

1 pending the conclusion of the testimony.

2 Your Honor never actually ruled on that.
3 So there is no prohibition from arguing this again.
4 And I would -- back to my standing cases, I want to
5 cite the two cases to Your Honor. They are Ex Parte
6 Government Employees Insurance Company 37 S.C. 132,
7 644 S.E. 2d 699. And the Powell case which is
8 Powell ex-relation Kelly versus Bank of America.
9 And that is at 379 S.C. 437, 665, S.E. 2d 237.

10 And quoting from a case that quotes these
11 cases, Your Honor, the Supreme Court and this court,
12 the Court of Appeals, have both recognized that a
13 party does not necessarily have standing in one
14 action merely because that action may affect its
15 interest in another action.

16 Now, Ms. Shahid has made much of the fact
17 that a lot of due diligence was done here, a lot of
18 money was spent, permits were issued, all of that
19 stuff that goes on prior to a big development like
20 Merry Land was proposing. That doesn't change the
21 fact that since the late 19th century to the early
22 21st century that Mr. Hoyler and his predecessors in
23 interest have had a putative claim to this title.

24 And Mr. Hoyler had done everything that he
25 knew to do to put the public on notice. Deeds were

1 on record. He was paying taxes. Now, there is
2 going to be some dispute, but I don't think there is
3 any dispute that in 2005 there was some change over
4 here in Beaufort County in the tax mapping system.
5 They went from written paper documents to GIS
6 system. And there was maybe a gap in there.

7 But anybody that examined the public
8 records in a thorough manner would have found this
9 property and would have been put on notice. And for
10 Ms. Shahid, I think it's a little disingenuous to
11 say, why didn't you put up signs.

12 Well, this property is covered by water
13 twice a day. I don't think that would have worked
14 very good. And I don't know that there would have
15 been anything else. I don't know what else
16 Mr. Hoyler is required to do except follow the
17 race-notice statutes as they exist in this state.
18 He was the first to the courthouse. He had put
19 public notice in the public records of Beaufort
20 County.

21 And the fact that there was an error
22 presumptively within the tax mapping system, that is
23 not a public record that can be relied upon by title
24 examiners or any other individuals looking for
25 title. It's great starting place, but that is not a

1 public record on which you can base a chain of
2 title.

3 The chain of title is in the Clerk of
4 Court's Office or if you have an R.M.C. or an R.O.D.
5 here in Beaufort County, that's where you go to get
6 those records. So I don't -- I think it's a little
7 difficult for Mr. Hoyler to be put in a position
8 where he's got to do more than what any other
9 property owner in this state would be required to do
10 to defend his title against anybody else in the
11 state.

12 And so this -- we spent a bunch of money,
13 we did a lot of work, but the fact of the matter is
14 we missed it, I don't see how that is Mr. Hoyler's
15 problem. And I don't think that that creates --
16 spending money, doing work, creates standing for
17 them in a statutory lawsuit that says a putative
18 property owner and the State of South Carolina.
19 They don't have any standing.

20 JUDGE DUKES: All right. And I
21 appreciate the motion. I understand why you would
22 make such a motion, but I'm going to deny it for a
23 couple of reasons. First, I have to agree with
24 Merry Land's position on 48-39-220.

25 This doesn't appear to be on the exclusion

1 of anybody else. It just tells you who you've got
2 to sue if you are going to pursue this. And so it
3 certainly doesn't exclude the possibility of other
4 defendants.

5 Next, from what I know of this, what is in
6 the briefs and what has been argued and what I've
7 heard before, Merry Land has a substantial interest
8 in this case that would be affected by the outcome.
9 So I thank you for your motion, but it's denied.
10 Thank you, sir.

11 MR. GRIFFITH: All right. Thank you,
12 Your Honor. Call Chet Williams.

13 JUDGE DUKES: All right. Come right
14 around, sir. Do you swear or affirm to tell the
15 truth, the whole truth, and nothing but the truth so
16 help you God?

17 MR. WILLIAMS: I do.

18 JUDGE DUKES: Okay. Come on around
19 here if you would.

20 MR. WILLIAMS: Good morning.

21 JUDGE DUKES: Good morning.

22 WHEREUPON:

23 CHESTER WILLIAMS, being duly sworn
24 and cautioned to speak the truth, the whole truth
25 and nothing but the truth, testifies as follows:

DIRECT EXAMINATION

BY MR. GRIFFITH:

Q. Good morning, Mr. Williams. For the record would you state your full name, please.

A. My name is Chester Campbell Williams.

Q. And, Mr. Williams, where do you reside?

A. Hilton Head Island.

Q. And what is your occupation?

A. I'm an attorney.

Q. What is the focus of your practice?

A. Real estate, zoning, land use. Primarily real estate oriented matters.

Q. And in the course of your practice do you -- do you look at titles? Do you certify titles?

A. I do.

Q. And how does one go about certifying title?

A. The process that I follow, which I think is the generally accepted process, is I retain a title abstracter such as Ms. Coats, her company. They search the public records and produce an abstract -- a title examination abstract for me which I then review and make legal determinations as to the effects of the various documents in the chain

1 of title.

2 COURT REPORTER: Sir, could you move
3 that up closer to your -- there you go. Just so
4 that it carries a little more.

5 BY MR. GRIFFITH:

6 Q. You finished?

7 A. Yes.

8 Q. Are there title insurers in this state --

9 A. There are.

10 Q. -- that write title insurance? What is
11 title insurance?

12 A. I'm sorry. The question is what is title
13 insurance?

14 Q. Yes, sir.

15 A. Title insurance is a contract of indemnity
16 that provides certain protections with respect to
17 title issues to property owners and lenders.

18 Q. Now, do title insurers require attorneys
19 to examine title and certify title to them before
20 they will issue title insurance?

21 A. Title insurance in South Carolina is
22 issued based on certifications of title by attorneys
23 who are approved attorneys for the various title
24 underwriters.

25 Q. And how does one become an approved

1 attorney?

2 A. Application to the underwriters.

3 Q. Okay. And are you an approved attorney?

4 A. I am an approved attorney for a number of
5 different title insurance companies.

6 Q. And have you been so for more than a few
7 years?

8 A. Yes.

9 Q. How many titles have you examined and
10 certified over the course of your career in South
11 Carolina?

12 A. If I had to make a wild guess, hundreds,
13 maybe thousands, a lot.

14 Q. A lot of them?

15 A. Yes.

16 Q. And when you certify title -- do you carry
17 malpractice insurance?

18 A. I do.

19 Q. When you certify title is your malpractice
20 insurance at risk?

21 A. Yes.

22 MR. GRIFFITH: Your Honor, we submit
23 Mr. Williams as an expert on title examination and
24 title to property in South Carolina.

25 JUDGE DUKES: Any questions of

1 Mr. Williams? Any objection.

2 MS. SHAHID: No objection.

3 JUDGE DUKES: All right. I'll find
4 he is an expert in those stated fields.

5 BY MR. GRIFFITH:

6 Q. Mr. Williams, I'm going to show you a
7 couple of exhibits?

8 MR. GRIFFITH: If I may, Your Honor?

9 JUDGE DUKES: Yes, please. Sorry.
10 Go ahead. Oh, I've got the originals, don't I?
11 Okay. One more. Thanks.

12 BY MR. GRIFFITH:

13 Q. I'm going to show you Plaintiff's Exhibit
14 Number 1, if you could tell me what that is, please?

15 A. That is the chain of title for the
16 95.27-acre tract that River Title provided to me.

17 Q. Did you rely on that chain of title in
18 order to examine Mr. Hoyler's title?

19 A. I did.

20 Q. And where does that chain of title start?

21 A. The chain of title starts with a deed that
22 is dated July 7th, 1891, recorded in the Beaufort
23 County Public Records on August 14, 1891, in Deed
24 Book 17 at Page 562. It's a deed from B.R. Tillman
25 Governor and Commander and Chief in and for the

1 State of South Carolina to James M. Crofut.

2 Q. All right. I'm going to hand you what has
3 been marked as Plaintiff's 2. Can you tell me what
4 that is, please?

5 A. Beginning at the bottom of Page 2 is a
6 transcription of the original deed that is referred
7 to in the chain of title, one that is recorded in
8 Deed Book 17 at Page 562.

9 Q. Now, there are how many pages on
10 Exhibit 2?

11 A. There are four pages to the document that
12 you handed me.

13 Q. Is the second page a photocopy?

14 A. The second page appears to be a photocopy
15 of -- appears to be the same as the first page, but
16 it's just not as good of quality.

17 Q. All right. Now, is there something else
18 that is attached to Exhibit 2?

19 A. Yes. Following the deed there is recorded
20 along with the deed a plat showing a 95.27-acre
21 tract. It's designated J.M. Crofut. It's bounded
22 on one side by the Beaufort River. It says plat of
23 95.27 acres of marsh lands and Beaufort River near
24 the Town of Beaufort.

25 I think conveyed to J. M. Crofut by State

1 of South Carolina. It's dated Columbia, South
2 Carolina, July 1891. And then there is a note I
3 think it says originally surveyed in 1882 by, and
4 the name is cut off there.

5 Q. All right. I'm going to hand you
6 Plaintiff's Exhibit 2-A. And if you could tell me
7 what that is, please.

8 A. This is a copy of the same deed, but the
9 one that is recorded in the State Archives. The one
10 that is recorded here in the County records is a
11 transcription of this deed.

12 Q. All right. And is the Exhibit 2-A more
13 legible than Exhibit 2?

14 A. Very much so.

15 Q. Is that because it is a printed copy?

16 A. Well, it's a form deed that is filled in.

17 Q. All right. Now, having identified those
18 documents, did -- were you provided with copies of
19 those documents by Ms. Coats?

20 A. I was provided with a copy of the letter.
21 It's recorded locally by Ms. Coats.

22 Q. And are there other documents in that
23 chain of title?

24 A. Yes.

25 Q. And I'm going to hand you a stack of

1 documents. And I want you to tell me whether or not
2 those documents are referred to in that chain of
3 title.

4 A. You've handed me a copy of the probate
5 file for James Crofut which is designated Probate
6 File C-32 of the Beaufort County Office of the
7 Probate Judge. It's referred to in the chain of
8 title. The next document you've handed me is a copy
9 of the Probate File C-24. It's referred to in the
10 chain of title.

11 The next is a copy of Probate File C-50.
12 It's referred to in the chain of title. The next
13 one is a copy of Probate File W-135. It's referred
14 to in the chain of title. The next one is a copy of
15 Probate File C-174. It's referred to in the chain
16 of title.

17 The next one is a deed that is recorded in
18 Beaufort County records -- Deed Book 289 at
19 Page 1351. It's referred to in the chain of title.
20 The next is a copy of Probate File WC-230 which is
21 referred to in the chain of title. The next one is
22 a copy of Probate File 85-171 which is referred to
23 in the chain of title.

24 Q. And did you have those documents before
25 you when you made your determination whether or not

1 to certify this title or not?

2 A. Yes.

3 Q. And when you reviewed those documents did
4 you come to a conclusion as to who was the current
5 owner of that 95.27 acres?

6 A. Up through the time of the last deed, I've
7 got a spreadsheet and some notes that I've made that
8 are still -- I can tell you who owned it at the time
9 of this last document. I need to refer to those --

10 Q. Who owned it at the time of that last
11 document?

12 A. I need to refer to those notes because
13 it's -- there are some -- there are some percentage
14 interests there that I just don't -- I have not
15 committed to memory. It's -- what Ms. Shahid is
16 holding right now are my notes of the timeline of
17 the chain of title with detailed information as to
18 who held what ownership --

19 Q. Do you need these notes to refresh your
20 memory?

21 A. I do.

22 MR. SMITH: No objection.

23 THE WITNESS: The last document in
24 the stack of documents that you handed to me is the
25 probate file of Rhoda Crofut which is Probate File

1 85-171. And, I'm sorry, I've got a spreadsheet that
2 I've done that I need to take a look at. Those
3 records are in the folder that I have over there.

4 BY MR. GRIFFITH:

5 Q. Go off the record one second.

6 A. No, it's in the Expando file.

7 Q. Could you pull it out of this expandable
8 folder, please?

9 MS. SHAHID: Are you offering it as
10 an exhibit or is he just referring to it?

11 MR. GRIFFITH: He's referring to it.

12 MS. SHAHID: Okay.

13 THE WITNESS: The last document in
14 the chain of title that you handed me is the file
15 for the probate of the Estate of Rhoda Crofut. She
16 passed away on May 30th, 1985. At that time
17 Ms. Crofut did not own any interest in the property
18 because she had conveyed her interest to Marshall
19 Hoyler prior to that in 1979, but the question is in
20 19 -- what day did she die? May 30th, 1985. At
21 that time who owned the property? At that time
22 according to my research Margarett Waterhouse Braz
23 held a 1.3889 percent interest in the property.
24 Mary Elenor Waterhouse Hoyler, who is Mr. Hoyler's
25 mama, had a 1.3889 percent interest in the property.

1 And then depending on how the 1979 deed to
2 Mr. Hoyler is construed, if you construe it in the
3 manner least favorable to him, George Waterhouse,
4 the Fifth, who was also known at various times as
5 George Waterhouse, Junior, held a 4.86111 percent
6 interest in the property. Francis Waterhouse Smythe
7 held a 4.86111 percent interest in the property.

8 Elizabeth Hoyler Jackson held an
9 8.3333 percent interest in the property. And then
10 Mr. Hoyler held a 79.16667 percent interest in the
11 property.

12 MR. GRIFFITH: Just a second, Your
13 Honor.

14 JUDGE DUKES: All right.

15 BY MR. GRIFFITH:

16 Q. I'm going to hand you some additional
17 documents. Go ahead and tell me if you can identify
18 these, please.

19 A. The four documents you've just handed me
20 are documents that I prepared all to Marshall --
21 Hamilton Marshall Hoyler. One from Mary Eleanor
22 Hoyler Gray. One from Elizabeth Hooker Hoyler
23 Jackson. One from Francis Waterhouse Smythe. And
24 one from George Waterhouse, all of which conveyed
25 those grantors' respective interests in two tracts

1 of land here in Beaufort County, one of which is the
2 95.27-acre tract that is the subject of this
3 lawsuit.

4 They are all recorded in the Beaufort
5 Registrar of Deeds' office, three of them on
6 July 23, 2007, and the other one on July 30, 2007.

7 Q. So the chain of title that you have in
8 your hand that Ms. Coats submitted to you, the
9 documents that you have in front of you, were you
10 able to determine ownership interest in this
11 95.27 acres of land that is represented on
12 Exhibits 2 and 2-A?

13 A. Yes. After -- according to these quit
14 claim deeds Marshall Hoyler held a hundred percent
15 interest in the property.

16 Q. In the 97.27 acres?

17 A. Correct.

18 MR. GRIFFITH: Your witness.

19 CROSS EXAMINATION

20 BY MS. SHAHID:

21 Q. Mr. Williams, are you familiar with aerial
22 photography of the property or aerial depiction of
23 the property that Mr. Hoyler owns? Have you looked
24 to see what it looks like?

25 A. I may have looked at the tax maps which

1 have an aerial overlay.

2 Q. Okay. And I'm going to show you what I
3 believe is already in evidence as our Defendant's
4 Exhibit 48 which -- does that appear to you to be
5 the Beaufort County GIS overlays? I'm sorry if you
6 can't read the legend. Does that --

7 A. Yeah, I'm not sure what that -- I mean, it
8 appears to be an aerial picture that shows the
9 95.27-acre tract that we are talking about.

10 Q. Okay. And would you agree with me that
11 there are water features traversing the southern
12 section of Exhibit 48?

13 MS. SHAHID: Your Honor, I'll get you
14 a copy of Exhibit 48. I meant to --

15 JUDGE DUKES: All right. Thank you.
16 And since you have mentioned 48, let me just
17 reiterate for the record and for Deborah, who is
18 trying to keep track of all of this, that as we
19 first started we listed some documents that were in
20 evidence without objection. And of course they
21 don't start in the normal sequential manner. They
22 are, I believe, 40 -- what were the numbers again?

23 COURT REPORTER: Forty-six through 49
24 and 51 through --

25 JUDGE DUKES: Okay. You've got them.

1 Good. I just wanted to make sure. Okay. Good.

2 Thank you. Thank you.

3 BY MS. SHAHID:

4 Q. And I don't know if you answered my
5 question.

6 A. Could you restate it, please?

7 Q. Wouldn't you agree with me that there are
8 multiple water features traversing the southern
9 portion of this tract based on that --

10 A. Understand that I'm not an expert in
11 aerial photography or mapping or water courses, it
12 appears to show certain streams or other water
13 bodies in the southern portion of the tract.

14 Q. Okay. And do you also see a stream or
15 creek that -- in the northern portion of the tract
16 that flows directly to the Beaufort River?

17 A. With the same understanding, it appears to
18 show that, yes.

19 Q. Okay. And isn't it your understanding as
20 an expert in title, that title to navigable streams
21 remains in the public and cannot be conveyed out?

22 A. I mean, that is a matter of law that --
23 I'm not here as an expert on law.

24 Q. Well, you are an expert -- you were
25 qualified as an expert in title?

1 A. Correct. And I can tell you what the
2 deeds say, yes.

3 Q. Okay. Would you certify title to an
4 individual of these creeks, these creek beds? Would
5 you certify that title?

6 A. I would -- I think I would be in a
7 position to certify title with an exception that I'm
8 not certifying anything that is below the mean high
9 watermark.

10 Q. Okay. But you are familiar with the legal
11 principle that streams are navigable highways held
12 open for the public, correct?

13 A. Yes.

14 Q. Okay. Now, did you investigate any
15 records to see if Mr. Hoyler was paying taxes on his
16 property?

17 A. I did.

18 Q. Okay. And I'm going to show you what has
19 not been offered into evidence, and it's the only
20 copy I have. It was an exhibit for Mr. Tetter's
21 deposition. And ask you if this looks like Beaufort
22 County tax records?

23 A. It's cut off. This appears to be a screen
24 shot from the online Beaufort County tax records.
25 It appears to have a date of September 28, 2010, on

1 it.

2 Q. Okay. And does it reflect Hamilton
3 Marshall Hoyler as the tax paying member of the
4 public?

5 A. It reflects Mr. Hoyler as the owner.

6 Q. Okay. And what is your understanding of
7 what factors are considered when property is
8 assessed for taxes?

9 A. My understanding is according to the law
10 that the assessor is required to assess the property
11 in the name of the owner of the property.

12 Q. Okay. What factors does the assessor
13 consider when he is valuing -- providing a valuation
14 of the property?

15 A. That is a question you would have to ask
16 the assessor.

17 Q. Okay. You don't know the answer?

18 A. No.

19 MS. SHAHID: So, Your Honor --

20 THE WITNESS: I'm not the assessor.
21 I don't know all the details that go into that
22 process.

23 BY MS. SHAHID:

24 Q. Do you know any of the details?

25 A. I would assume that they look at recorded

1 deeds.

2 Q. Okay.

3 A. But I also have never thought that tax
4 records are dispositive of ownership of real
5 property.

6 Q. And I'm not speaking to ownership now.
7 I'm speaking to value. What is the --

8 A. That is way outside of my field of
9 expertise.

10 Q. Okay. So you have no understanding of
11 what the tax assessor looks at when he's valuing --

12 A. I can tell you --

13 Q. -- your --

14 A. I can tell you --

15 Q. -- property?

16 A. -- required to assess it at the fair
17 market value.

18 MS. SHAHID: Okay. Now, Your Honor,
19 at this time I would offer what has been marked as
20 Exhibit 56 into evidence.

21 JUDGE DUKES: All right. Fifty-six
22 is one of the ones on the list; is that right?

23 MS. SHAHID: It is not.

24 JUDGE DUKES: It is not? Okay.

25 MS. SHAHID: I'm sorry. It's a new

1 one.

2 MR. GRIFFITH: No objection.

3 JUDGE DUKES: All right. Do we have
4 a copy of that, extra copy. Oh, you've got one?

5 MS. SHAHID: This is 48.

6 JUDGE DUKES: That is 48? Okay.

7 MS. SHAHID: Well, you can keep that
8 one. I've got one of these. Okay. Thank you, Your
9 Honor.

10 JUDGE DUKES: Just trying to keep it
11 all straight.

12 MS. SHAHID: Got ahead of myself. I
13 need to mark that, please.

14 JUDGE DUKES: That is some tiny
15 little print on there. And that is a tax --
16 property tax record there currently? Okay.

17 (MARKED PLAINTIFF'S EXHIBIT NO. 56.)

18 JUDGE DUKES: Let me ask you this
19 while we are waiting on this. There is no highland
20 involved in this case, is there?

21 MR. GRIFFITH: None that we are aware
22 of, Your Honor.

23 JUDGE DUKES: Okay.

24 MR. GRIFFITH: This is all -- the
25 95.27 acres is between the high water mark and the

1 low water mark. And if there are any hummocks or
2 hammocks or any bumps in the marshland, we are
3 unaware of it.

4 JUDGE DUKES: Okay.

5 MR. SMITH: While we are on that
6 point, and can you state at this point whether you
7 are claiming title to anything below mean low water
8 mark stuff as the beds of title streams?

9 MR. GRIFFITH: We are not claiming
10 anything below the low water mark of the Beaufort
11 River nor anything above the high water mark as
12 depicted on this map.

13 MR. SMITH: Okay. If there are any
14 other title creeks in that -- within the property
15 other than the Beaufort River, are you claiming
16 title to anything below mean low water mark as to
17 them stuff as the bed of the stream? I'm not
18 talking about marsh. I'm talking about below mean
19 low water mark.

20 MR. GRIFFITH: I don't know that we
21 are aware of any navigable streams in there, but the
22 deed speaks for itself as to what is within the
23 95.27-acre boundary.

24 MR. SMITH: All right. Thank you.
25 We will deal with that later.

1 JUDGE DUKES: Fifty-six without
2 objection, I understand.

3 BY MS. SHAHID:

4 Q. And my question, Mr. Williams, is how much
5 taxes were paid on this 95.27 acres in 2009?

6 A. According to Exhibit 56 the taxes that
7 year were \$13.29.

8 Q. Okay. And in 2008?

9 A. I assume they were paid.

10 Q. Right.

11 A. This part of the screen shot has part of
12 it cut off on the right side.

13 Q. Okay.

14 A. So I mean what you were looking at on the
15 computer screen with whoever it was that printed
16 this there was additional information there that is
17 not included here on Exhibit Number 56.

18 Q. Okay. And in 2008 how much?

19 A. The document you handed me says \$14.12.

20 Q. In 2007?

21 A. \$13.65.

22 Q. Okay. So from an assessor's point of view
23 the basis at which this was assessed was relatively
24 low, correct?

25 A. Well, relatively low is a relative term.

1 Q. Okay.

2 A. Relative to what?

3 Q. For 95 acres of property, to only pay
4 taxes in the amount of \$13, that is a pretty low tax
5 rate, isn't it?

6 MR. GRIFFITH: Your Honor, we are
7 going to object to relevance. The tax assessor's
8 value -- the fact that taxes were assessed has some
9 relevance in that they show that Mr. Hoyler owned it
10 prior to Merry Land purchasing the upland property.
11 The worth of this property based on what the
12 assessor says has no relevance to who owns this
13 property.

14 JUDGE DUKES: What is the relevance
15 of it?

16 MS. SHAHID: The relevance goes to
17 the strength of his claim, Your Honor. Yes, he's
18 paid taxes, but taxes on a parcel of 95 acres that
19 is valued so low that his tax rate is a mere --
20 averaged \$15 a year. Just goes to the strength of
21 his claim. How much land out there actually does he
22 own? It's traversed with water courses. Some of
23 it -- I mean, we may present evidence, Your Honor,
24 that some of it, the interior property, is below
25 mean low water. We may present evidence, Your

1 Honor, that there is multiple mean low water marks
2 in this parcel which creates some ambiguity and
3 confusion about what he does own. And I believe
4 this particular document supports that whatever he
5 owns, it's not much.

6 MR. GRIFFITH: I find -- Your Honor,
7 just in response to that, I doubt that the assessor
8 has been out there to determine where the low water
9 marks are or where the water courses are. The
10 assessor has made his determination based on the
11 fact that this is marshland. You can't build on it.
12 You can't do anything beyond putting up docks,
13 putting up other non-house, non-permanent structures
14 out there. So I don't know how this is relevant to
15 who owns it and who does not.

16 JUDGE DUKES: Well, let's do this.
17 Rather than get all bogged down in it, I'll allow
18 it. And I'll just try to give it whatever weight is
19 appropriate after hearing the balance of the
20 evidence.

21 MR. GRIFFITH: Thank you.

22 JUDGE DUKES: So thank you.

23 MS. SHAHID: I don't know -- I don't
24 remember what the question was. And I don't know if
25 he responded to it.

1 BY MS. SHAHID:

2 Q. Did you respond?

3 A. I think the last thing was that you were
4 asking me to read off the list of the values.

5 Q. Okay. All right.

6 JUDGE DUKES: Well, I think you
7 actually asked the question was this a low value
8 relative to other 95 acres properties around. I
9 think there was something like that was the last
10 question.

11 THE WITNESS: I would submit that a
12 95-acre tract that was subject to, for example, a
13 conservation easement that severely restricted the
14 development potential of the property might have a
15 similar low value.

16 BY MS. SHAHID:

17 Q. But you would agree with me that is a low
18 value for 95 acres?

19 A. Well, that is -- again, that depends on
20 what you can do with the 95 acres.

21 Q. Okay.

22 A. If you can develop the 95 acres at 16
23 units per acre for residential density, obviously it
24 has a much higher value. If you can't develop it at
25 all or -- you just -- development is severely

1 restricted, then, of course, that reduces the
2 marketable value of the property.

3 Q. I'm going to show you what has been put
4 into evidence as Plaintiff's Exhibit 3. And ask you
5 if you are familiar with that plat as part of the
6 chain of title?

7 A. This plat actually I think came from the
8 State Archives' Office, so it doesn't show up in the
9 records of Beaufort County.

10 Q. So you've never seen those plats?

11 A. Oh, no, I didn't say that.

12 Q. Okay. You have seen those plats?

13 A. I have seen this plat, yes.

14 Q. But they are not part of the chain of
15 title that you researched in the records of Beaufort
16 County?

17 A. The plat that you handed me, Plaintiff's
18 Exhibit 3, is a plat that is recorded in the Office
19 of the Secretary of the State in Book 2 of Public
20 Land Plats Page 16. It's the plat that is referred
21 to in the version of the deed for the State to
22 change in Crofut. That is recorded in the State
23 Archives.

24 The transcribed copy of the deeds that is
25 recorded in the Beaufort County public records

1 contains a plat that is similar to but not the same
2 as this plat. As I mentioned before, the plat that
3 is recorded in the Beaufort County public records
4 refers to the survey in 1882 by, and again the name
5 is cut off. And this is the plat that is dated
6 July 1882 that I think the reference in the recorded
7 plat locally refers to.

8 Q. Okay. And so we are looking at
9 Plaintiff's Exhibit 3-A and then Plaintiff's
10 Exhibit 2, the page numbered 563 to talk about these
11 two separate plats, correct?

12 A. Yes.

13 Q. Okay. And looking at Plaintiff's
14 Exhibit 2 on Page 563, do you see any scale or
15 legend on that plat?

16 A. No.

17 Q. Do you see a north arrow on that plat?

18 A. No.

19 Q. Okay. And can you --

20 A. Nor do I see those on the plat that is
21 recorded in the State Archives.

22 Q. Okay. Now, you provided testimony
23 regarding documents that you found of record in the
24 chain of title for Marshall Hamilton Hoyler?

25 A. Hamilton Marshall Hoyler.

1 Q. I'm sorry. Thank you. Hamilton Marshall
2 Hoyler. Are you aware that Merry Land Properties
3 and the Houston -- and an entity -- the Houston
4 entity, and I can't think of the exact entity now,
5 but it's separate from Merry Land, acquired
6 approximately 18 acres of property waterfront and
7 upland in Port Royal? Have you looked at what they
8 acquired?

9 A. I haven't searched title for that tract,
10 no.

11 Q. Okay. You would not expect to see any of
12 the deeds that you found in the chain of title for
13 the tax map parcel that is Mr. Hoyler's 95-acre
14 marsh parcel, you would not expect to see any of
15 those deeds in the chains of title for the Ribaut
16 Road property and Port Royal property that Merry
17 Land bought, would you?

18 A. I can't answer that without having
19 searched title to the property that Merry Land
20 bought.

21 Q. Well, they are separate parcels, aren't
22 they?

23 A. As far as I know.

24 Q. Okay. So assuming for the sake of
25 argument that they are separate parcels with

1 separate tax map numbers and separate ownership, it
2 would be unlikely to find the same chain of title
3 that you found within the recorded records for the
4 adjoining upland properties?

5 A. Let me see if I can answer your question
6 this way. My recollection of the deeds and the
7 chain of title for the 95.27-acre tract don't refer
8 to any property that is above the mean high water
9 mark.

10 MS. SHAHID: Okay. That is all I've
11 got. Thank you.

12 MR. SMITH: No questions, Your Honor,
13 for the State.

14 JUDGE DUKES: All right. Anything
15 else? Can I look at your plats real quick if there
16 is going to be some more direct?

17 MR. GRIFFITH: That is the State
18 version, I think.

19 JUDGE DUKES: Okay. Thanks.

20 MR. GRIFFITH: There is the bar M.C.

21 JUDGE DUKES: All right. Did you
22 have more questions?

23 MR. GRIFFITH: I do. I thought Your
24 Honor had something.

25 JUDGE DUKES: No. No. I was just

1 going to look at these for a minute. Thank you. Go
2 ahead, please.

3 MR. GRIFFITH: May I approach, Your
4 Honor.

5 JUDGE DUKES: Yes, please.

6 REDIRECT EXAMINATION

7 BY MR. GRIFFITH:

8 Q. Mr. Williams, I'm going to hand you
9 Defendant's Exhibit Number 56.

10 A. Yes, sir.

11 Q. And that is, again, the taxes paid by
12 Mr. Hoyler on the 95.27-acre tract of land; is that
13 correct?

14 A. Yes.

15 Q. Or assessed. I don't know if he paid them
16 or not I think you said.

17 A. Well, that column -- the way this screen
18 works is there is a column for the taxes that are
19 assessed and there is a column for the amount that
20 is paid. And the amount that is paid was cut off.

21 Q. But they've been assessed?

22 A. Yes.

23 Q. Is that a publically available document?

24 A. It's a publically available record.

25 Q. Yeah. And if you had been searching

1 upland property that were adjacent to the marshland
2 would you look at the tax maps that relate to that
3 particular information in order to check the title?

4 A. Typically what is reported to me by my
5 abstracters is information that is germane to the
6 particular parcel that I'm searching. So they give
7 me the tax information on that particular parcel.
8 Unless I specifically request it, typically I don't
9 get tax -- property tax records on surrounding
10 parcels.

11 Q. It's not necessary to pass good title to a
12 parcel of land to know the adjacent property owners,
13 is it?

14 A. Your question again?

15 Q. If you have a parcel of land, and you
16 check the chain of title?

17 A. Uh-huh.

18 Q. Do the individuals or entities who are
19 adjacent to that parcel of land, is it possible for
20 them to change over time?

21 A. Absolutely.

22 Q. Is it important for you as an individual
23 that certifies title to know with specificity who
24 your abutting landowners are?

25 A. No.

1 Q. You would pass title on a property without
2 necessarily knowing who they are, wouldn't you?

3 A. Yes.

4 Q. Now, I think based on some of Ms. Shahid's
5 questions the worth of the property is not
6 necessarily determined by the assessors?

7 A. That is an interesting question. You
8 know, the assessor has some method that they use to
9 determine what they believe the fair market value of
10 a piece of property is. And under State law they
11 are required to reassess everything in the County
12 once every five years.

13 I notice from the record here that from
14 the period of 2005 to 2009 that the value didn't
15 change, but exactly how they go about determining
16 that depends on the use of the property, where its
17 located, a number of different factors.

18 Q. But that's not necessarily determinative
19 of what a willing buyer and a willing seller would
20 pay?

21 A. No.

22 Q. I want you to look at Plaintiff's
23 Exhibit 2-A. And there is some -- it's a printed
24 form, and there is some handwritten information
25 here. And I would like for you to start underneath

1 the handwritten information with the words having
2 such shape, and read to the end of that sentence,
3 please.

4 A. It says, having such shape, form, and
5 marks as are represented by a plat of said land on
6 file in the Office of the Secretary of State in Book
7 2, and 2 is filled -- it's a handwritten notation
8 filled in, of public land plats, Page 16. And,
9 again, 16 is written in in the blank there, together
10 with all woods, trees, water courses, profits,
11 commodities, appurtenances, and hereditaments
12 whatsoever there unto belonging.

13 And then there is a handwritten insertion
14 here, reserving nonetheless to the State of South
15 Carolina all mineral and phosphate rights of said
16 State of South Carolina to the exclusive use,
17 control, and ownership of all mineral and phosphate
18 deposits on the premises hereby granted; to have and
19 to hold the said tract of 95 and 27/100s, and again
20 that is handwritten, of south -- no, that is a
21 continuation. Ninety-five and 27/100s acres of land
22 and all and singular other the premises hereby
23 granted under the said James M. Crofut, his heirs
24 and assigns, forever, and free in common.

25 Q. In looking at this deed, the State

1 conveyed the water courses contained in this 95.27
2 acres; did they not?

3 A. The deed says that it did.

4 Q. What is a water course?

5 A. A water course is a -- where water flows.
6 A natural or artificial stream of water.

7 Q. So water courses within this 95.27 acres
8 were included in that deed?

9 A. The deed says that they are.

10 MR. GRIFFITH: Thank you. No further
11 questions.

12 MR. SMITH: I've got a question, Your
13 Honor.

14 JUDGE DUKES: Yes, sir. Go ahead,
15 please.

16 CROSS EXAMINATION

17 BY MR. SMITH:

18 Q. I'm Emory Smith for the State. I don't
19 have a particular case before me, but are you aware
20 of -- well, let me back up. Can you hand me what
21 you just read?

22 Okay. This language that you read about
23 together with all woods, trees, water courses,
24 profits, commodities, et cetera, et cetera, that is
25 printed on this form; isn't it?

1 A. It is.

2 Q. So it's like a -- would this be then a
3 form document on which they filled in the entries in
4 particular about who got the land and what land they
5 were getting?

6 A. It appears to be so, yes.

7 Q. Okay. Are you aware of case law that says
8 that this language about conveyance of this
9 standard -- this language here about woods, trees,
10 water courses, et cetera, are you aware of a case
11 that says that that is not sufficient to convey land
12 below mean high water?

13 A. I haven't researched that particular
14 point.

15 Q. Okay.

16 COURT REPORTER: I'm sorry. You
17 haven't researched?

18 THE WITNESS: That particular point.

19 BY MR. SMITH:

20 Q. Okay. Have you researched whether a grant
21 of the State, a piece of paper grant, not a statute,
22 can convey land below mean low water mark in the
23 absence of a specific statute conveying that
24 particular land below mean low water?

25 A. I'm not sure that is relevant here because

1 the deed -- the handwritten part of the deed says
2 it's conveying the land that is lying between high
3 and low water marks on river above mentioned.

4 Q. Okay. So --

5 A. So I think the deed by its own terms
6 doesn't convey anything that is below the low water
7 mark.

8 MR. SMITH: Okay. Thank you.

9 JUDGE DUKES: Anything else of this
10 witness?

11 MS. SHAHID: I had one question, Your
12 Honor.

13 JUDGE DUKES: Go ahead, please.

14 RECROSS EXAMINATION

15 BY MS. SHAHID:

16 Q. Do you still have Exhibit 56 in front of
17 you, the printout from the tax assessor? If not, I
18 can hand you a copy.

19 A. I do.

20 Q. If you look at the bottom right-hand
21 corner, do you see a date?

22 A. Yeah, I think I mentioned that before.
23 It's 9/28/2010.

24 MS. SHAHID: 2010. Okay. Thank you.

25 JUDGE DUKES: Anything else?

1 MR. GRIFFITH: No, sir.

2 JUDGE DUKES: Briefly, and maybe this
3 is an issue that the attorneys are aware of and I'm
4 just not since I'm learning this and all of you have
5 learned it for many years. The deed into the
6 current Plaintiff is 95.27 acres; is that correct.

7 THE WITNESS: Yes.

8 JUDGE DUKES: Okay. And that is what
9 we are talking about here today, 95.27 acres?

10 THE WITNESS: Yes.

11 MR. GRIFFITH: Yes, sir.

12 JUDGE DUKES: Okay. And I've been
13 handed a couple of things that seem -- maybe I'm
14 just reading them wrong. I'm going to hand the
15 witness 3. And there is a line there and a whole
16 separate acreage and acreage here. I don't know if
17 you can see that.

18 THE WITNESS: Yes, sir.

19 JUDGE DUKES: And then there is
20 Defendant's 48. And I don't know if that is a line
21 or not. It seems to be about there, but in your
22 opinion is this piece on the right that is labeled
23 1885 part of what you are describing or is it to the
24 left of the line, the 95.27 acres?

25 THE WITNESS: Your Honor, if being

1 look at the plat, the plat itself says -- this is a
2 plat of marshlands containing 114.12 acres.

3 JUDGE DUKES: Uh-huh.

4 THE WITNESS: 95.27, which is the
5 subject of our case, and I think it's 18.85 together
6 equal 114.12.

7 JUDGE DUKES: Right.

8 THE WITNESS: So --

9 JUDGE DUKES: Your testimony is about
10 the 95 acres?

11 THE WITNESS: Correct. The deed --
12 the grant from the State to Mr. Crofut conveys only
13 the 95.27 acre parcel shown on this plat.

14 JUDGE DUKES: Okay. So let me ask
15 you this then. That is kind of what I thought, but
16 when I look at Defendant's Exhibit 48, and we all
17 know about tax maps and how they are drawn and that
18 kind of thing. And I guess this is an aerial tax
19 map from Beaufort County. It seems to show the
20 whole 114 acres to my eye, but maybe it doesn't. I
21 don't know. Maybe there is a line in there. Can
22 you -- do you have an opinion as to that? Can you
23 tell?

24 THE WITNESS: Well, the opinion that
25 I have is that it reinforces my opinion that I don't

1 like to try and rely on tax maps.

2 JUDGE DUKES: I agree with your
3 opinion completely, but anyway, I just don't see a
4 line in there. But my understanding then from your
5 testimony is what we are talking about here today is
6 less than what is depicted in Exhibit 48. Is that
7 an accurate statement?

8 THE WITNESS: This is Exhibit 3?

9 JUDGE DUKES: I know. Exhibit 48 is
10 the tax map. Unless you can find a line in there
11 that I can't.

12 THE WITNESS: It doesn't -- in my
13 experience in looking at these online tax maps the
14 parcel lines are the yellow lines.

15 JUDGE DUKES: Uh-huh.

16 THE WITNESS: And this particular one
17 does not appear to show a parcel line separating
18 what Plaintiff's Number 3, the plat shows the
19 dividing line between the 95.27 acres and the
20 18.85 acres.

21 JUDGE DUKES: Okay. And your
22 testimony here today though is about the 95 acres,
23 not the 18 acres?

24 THE WITNESS: Correct.

25 JUDGE DUKES: Okay. All right. That

1 is all the questions I had. Any questions relative
2 to my questions?

3 MR. GRIFFITH: No, Your Honor.

4 JUDGE DUKES: Okay. All right.

5 Thank you so much.

6 THE WITNESS: Thank you, Your Honor.

7 MR. GRIFFITH: Plaintiff calls Lorick
8 Fanning.

9 JUDGE DUKES: Well, let's take a
10 five-minute break.

11 MR. GRIFFITH: Oh, sorry.

12 JUDGE DUKES: That's all right.

13 (Recess from 10:36 to 10:53.)

14 JUDGE DUKES: All right then. We are
15 back on in 07-CP-07-3212. Call your next witness,
16 sir. And I believe he's here. Can you hold your
17 right hand up for me, please. Do you swear or
18 affirm to tell the truth, the whole truth, and
19 nothing but the truth so help you God?

20 MR. FANNING: I do.

21 JUDGE DUKES: Can you state your
22 whole name for the record, please.

23 MR. FANNING: Lorick Broman Fanning.

24 JUDGE DUKES: All right.

25 WHEREUPON:

1 LORICK FANNING, being duly sworn and
2 cautioned to speak the truth, the whole truth and
3 nothing but the truth, testifies as follows:

4 DIRECT EXAMINATION

5 BY MR. GRIFFITH:

6 Q. Mr. Fanning. Mr. Fanning, could you give
7 us where you live, please.

8 A. I live at 28 Audubon Road, Beaufort, South
9 Carolina.

10 Q. And you are going to have to speak up so
11 the court reporter can take you down.

12 A. Yes, sir.

13 Q. Mr. Fanning, what is your occupation?

14 A. I'm a professional land surveyor in the
15 state of South Carolina and a professional forester
16 in the state of South Carolina and the state of
17 North Carolina.

18 Q. Tell me what a professional land surveyor
19 does.

20 A. We draft and interpret legal descriptions
21 and retrace boundaries. And we lay out improvements
22 on property and prepare surveys of the landscape and
23 make measurements as requested specifically by a
24 contractual agreement from time to time.

25 Q. Does that sort of work require a license?

1 A. Yes, it does.

2 Q. Are you licensed?

3 A. Yes, I am.

4 Q. And what does that license -- does it
5 allow you to supervise other people?

6 A. Yes, it does.

7 Q. And do you supervise other people?

8 A. I do.

9 Q. How long have you been a professional land
10 surveyor?

11 A. About 15 years.

12 Q. All right. And in that 15 years how many
13 plats have you drawn?

14 A. Thousands. Over 5,000, 6,000 plats. I
15 don't have an exact number but it's in the
16 thousands.

17 Q. All right. And those plats are provided
18 to the public?

19 A. Yes, they are. They are recorded in the
20 courthouse and that is when they are made available
21 to the public.

22 MR. GRIFFITH: We would offer
23 Mr. Fanning up as an expert land surveyor.

24 MS. SHAHID: No objection, Your
25 Honor.

1 MR. SMITH: No objection.

2 JUDGE DUKES: All right. Thanks.

3 He's qualified as an expert land surveyor.

4 MR. GRIFFITH: Mr. Fanning -- I'm
5 sorry, Your Honor.

6 JUDGE DUKES: Go ahead.

7 BY MR. GRIFFITH:

8 Q. Mr. Fanning, at my request did you examine
9 a 95.27 acre tract of land belonging to Hamilton
10 Marshall Hoyler?

11 A. Yes, I did.

12 Q. And did you look at the old deeds and
13 plats available in Beaufort County?

14 A. Yes, I did.

15 Q. Were you able to reach a conclusion as to
16 what had been conveyed to Mr. Hoyler pursuant to the
17 plat that was attached to his deed from the State of
18 South Carolina?

19 A. Yes, I was.

20 Q. And what was that conclusion?

21 A. It's represented on a plat that I signed
22 and sealed.

23 Q. All right. And I'm going to hand you
24 the -- I'm going to hand you that plat. And can you
25 identify that, please?

1 A. Yes.

2 Q. What is that?

3 A. This is a plat that was prepared for
4 Marshall Hoyler that represents property he owns,
5 Tax Parcel HAR 1200070000632.

6 Q. And that is the property he was conveyed
7 or his predecessors in interest were conveyed from
8 the State of South Carolina?

9 A. That is what the deed says.

10 MR. GRIFFITH: We move its
11 introduction, Your Honor, as Plaintiff's --

12 COURT REPORTER: Four.

13 MR. GRIFFITH: -- four.

14 JUDGE DUKES: Any objection?

15 MS. SHAHID: Your Honor, I guess my
16 objection is a foundation objection as to how he
17 mapped those boundaries. And I'll tell you what my
18 concern is, Your Honor. He was asked a question
19 about whether he looked at other matters of record.
20 And but then there was no follow-up question as to
21 whether those other matters of record related to the
22 drawing of these boundaries. And my concern is that
23 by not objecting at this juncture I've closed the
24 door on the ability to object to those other matters
25 of record which may be -- may or may not be plats

1 and deeds that are not in Mr. Hoyler's chain of
2 title that are extrinsic to the grant which I think
3 are not admissible. So I guess really I'm asking
4 Mr. Griffith for some foundation.

5 JUDGE DUKES: All right.

6 MR. GRIFFITH: I'm happy to back up
7 and give it another go.

8 MR. SMITH: The State concurs.

9 JUDGE DUKES: Okay. Well, let's see
10 if we can do a little foundation then.

11 BY MR. GRIFFITH:

12 Q. Mr. Fanning, I'm going to hand you
13 Plaintiff's Exhibit Number 3. Can you tell me what
14 that is?

15 A. Yes. It's a written legal description and
16 a plat of a piece of property --

17 Q. All right. Excuse me. Go ahead.

18 A. -- that Mr. Hoyler owns.

19 Q. That Mr. Hoyler owns? What is the date on
20 that plat?

21 A. 1882.

22 Q. And is it --

23 A. April 17th, 1882.

24 Q. All right. And did you use that plat in
25 creating the plat that we referred to earlier that

1 you created?

2 A. Yes, I did.

3 Q. And were you able from that plat to create
4 the plat that you drew?

5 A. Yes.

6 Q. Did you use notes that were
7 contemporaneous notes?

8 A. Yes.

9 Q. Available -- publically available?

10 A. Yes. This was more than adequate to
11 retrace the boundary.

12 Q. All right. And is this a representation
13 of Plaintiff's Exhibit Number 3?

14 A. Yes.

15 Q. In 2010?

16 A. Yes.

17 MR. GRIFFITH: We move its
18 introduction.

19 MS. SHAHID: Your Honor, based on
20 Mr. Fanning's testimony that the plat that he
21 recently had developed, signed, and sealed is based
22 on the plats that were attached to the grant, no
23 objection.

24 JUDGE DUKES: All right.

25 MR. SMITH: Your Honor --

1 JUDGE DUKES: Oh, sorry.

2 MR. SMITH: If I may just ask him a
3 few questions at this point before I determine
4 whether to object. Probably not. But do you have
5 any objection to that?

6 JUDGE DUKES: No, go ahead. You can
7 ask specifically as to the exhibit -- proposed
8 exhibit.

9 BY MR. SMITH:

10 Q. Mr. Fanning, as to this plat that you've
11 drawn, you've testified that you based it upon the
12 1882 plat; is that correct?

13 A. Yes.

14 Q. And did you rely on any other evidence in
15 drawing this plat or was it based solely on the 1882
16 plat?

17 A. I did rely on other evidence.

18 MR. SMITH: Okay. Now, do we want to
19 go into that other evidence now? Otherwise I think
20 I've got to reserve my objection to this plat until
21 we hear about what other evidence he may have relied
22 on. Probably I'm not going to object to it, but I
23 think we need to hear about that first?

24 MS. SHAHID: Based on that response,
25 Your Honor, which was not as clear under examination

1 by his counsel I would also object. And if you
2 recall when I said no objection I made it so long as
3 this was the only thing he relied on being the plat.

4 JUDGE DUKES: Maybe we could just
5 hear about what else he relied on.

6 MR. SMITH: Yeah. Ask him about that
7 and let's go into all of that. And then at that
8 point --

9 REDIRECT EXAMINATION

10 BY MR. GRIFFITH:

11 Q. Well, first of all, before we get into all
12 of that, is the 1882 plat adequate for you to have
13 made this plat.

14 A. Yes.

15 Q. And the property that is shown as the
16 highland property on the 1882 plat, were you able to
17 match it up with property that is extant in 2010?

18 MS. SHAHID: Your Honor, I would
19 object to --

20 MR. GRIFFITH: Boundary markers.

21 MS. SHAHID: I would object.

22 JUDGE DUKES: To the leading or to
23 the -- what is the objection?

24 MS. SHAHID: I believe he's asking
25 the witness to interpret a grant and plat by

1 utilizing extrinsic evidence outside of that grant
2 and plat. And I believe the grant and plat for
3 purposes of conveyance of public tideland have to
4 stand on their own strength.

5 JUDGE DUKES: Okay, but -- well,
6 happy to hear any response.

7 MR. GRIFFITH: Your Honor, we have a
8 plat that is in -- that is contemporaneous with the
9 deed. It conveys marshland between the high water
10 mark and the low water mark. The deed says that.
11 What we've asked Mr. Fanning to do is to go back and
12 see if that plat is reasonably accurate and see if
13 it could be recreated today.

14 And I'm not a hundred percent sure that he
15 has to rely a hundred percent on the 1882 document,
16 but he says that the 1882 document, and presumably
17 there are other documents that have relied on
18 courses and property that was in existence at that
19 time that he's relied on in order to create his
20 plat.

21 MR. SMITH: Your Honor, if maybe I
22 could ask him a few questions at this point we could
23 get through this.

24 JUDGE DUKES: Well, let me ask
25 quickly, is what we are getting bogged down on

1 whether or not he used older adjacent property lines
2 and that sort of thing to try to come up with this
3 plat? I mean, is that what we are getting bogged
4 down on? Maybe I'm missing the point here. I
5 thought it was normal -- well, let me ask this
6 question.

7 In your professional opinion when you are
8 drawing a plat, do you typically rely on adjacent
9 plats or adjacent deeds to draw that plat or not?

10 THE WITNESS: I do.

11 JUDGE DUKES: And did you do so in
12 this case?

13 THE WITNESS: I did review the
14 adjoining landowner plats and what their claims were
15 to land.

16 JUDGE DUKES: What about adjacent
17 deeds?

18 THE WITNESS: I did the same as well.
19 Looked up the deed and the plat. And information to
20 support this boundary.

21 JUDGE DUKES: Okay.

22 THE WITNESS: And to see if there
23 were any encroachments or projections. We are
24 obligated by State law to do that.

25 JUDGE DUKES: All right. Let me see

1 if they have any follow-up questions that might --

2 MS. SHAHID: Well, really just an
3 argument, Your Honor.

4 JUDGE DUKES: Okay.

5 MR. SMITH: I've got a few follow-up
6 questions if I may.

7 MS. SHAHID: Okay. I'll let him go
8 first.

9 JUDGE DUKES: All right.

10 MR. SMITH: What is the Exhibit
11 Number for this plat that --

12 MR. GRIFFITH: It's not been put into
13 evidence yet.

14 JUDGE DUKES: I guess we probably --

15 MR. SMITH: Okay. Do you want to
16 mark it for identification since we are talking
17 about it? Which would this be?

18 JUDGE DUKES: What number, Deborah,
19 do we know?

20 COURT REPORTER: It would be four.

21 JUDGE DUKES: Okay. Plaintiff's 4.

22 (MARKED PLAINTIFF'S EXHIBIT NO. 4.)

23 RECROSS EXAMINATION

24 BY MR. SMITH:

25 Q. How did you use these subsequent drawings

1 in the course of your preparation of Plaintiff's
2 Exhibit 4?

3 A. I used them to support -- evaluated them
4 to see whether they agreed with this plat or not, to
5 support -- further support this plat and to check
6 for encroachments and projections onto this piece of
7 property.

8 Q. Did you find any -- in examining these
9 other subsequent plats, plats subsequent to the 1882
10 plat, did you find any variations in those plats
11 with the 1882 plat?

12 A. Did I find any variations?

13 Q. Did you find any differences in the
14 subsequent plats as compared to the 1882 plat that
15 would affect that boundary?

16 A. No.

17 Q. So did you make any adjustments to the
18 boundary that shows on Plaintiff's Exhibit 4 based
19 upon your examination of subsequent plats?

20 A. Well, you know, evidence that I also used
21 in recreating -- retracing these boundaries in the
22 field was field work. Actually going on site and
23 measuring the actual monuments that are called for
24 on the plat.

25 Q. That are called for on the 1882 plat?

1 A. Yes. Right.

2 Q. I understand that, but did you change
3 these boundaries -- did you make any adjustments to
4 the 1882 boundaries that are shown on this
5 Plaintiff's Exhibit 4 based upon your examination of
6 subsequent plats? Did you see a later drawing that
7 led you to conclude that you needed to adjust the
8 boundary line that you show here on Plaintiff's
9 Exhibit 4?

10 A. I guess I'm a little bit -- I need some
11 clarification by what you mean by adjust. And, you
12 know, have I changed monumentation? No.

13 Q. No. Let me --

14 A. Are the boundaries --

15 Q. Let me back up then. Plaintiff's
16 Exhibit 4, is the boundary line that you have shown
17 on here entirely consistent with where you believe
18 the 1882 plat boundaries would lie?

19 A. Yes, it's consistent.

20 Q. Okay. Did -- when you looked at the 1882
21 plat and then you looked at subsequent plats, did
22 you -- did that change your understanding at all of
23 where you believe the 1882 plat boundary lines would
24 lie?

25 A. The measurement of the mean high water

1 mark in the field to the monument --

2 Q. Yeah.

3 A. -- which is a natural and dynamic
4 monument, that has changed, but the monument itself
5 hasn't. Does that -- does that make -- you
6 understand that?

7 Q. I understand what you are saying.

8 A. Okay.

9 Q. So then let's go to that then. In
10 examining in the field, you did a -- did you do a
11 title survey or how did you use these monuments in
12 the field in drawing this plat?

13 A. Well, the -- I established a mean low
14 water mark and a mean high water mark. And those
15 were the boundaries on the western and eastern side.
16 The mean high water mark on the western side and the
17 mean low water mark on the eastern side. And then
18 the northern and southern boundaries by calls on the
19 plats for acreage and bearings and distances and how
20 the land lot and section that is described on this
21 plat fit into the land lot section network.

22 Q. Did your examination of where -- so you
23 looked at where mean high water mark and mean low
24 water mark are today or at the time you did those
25 measurements?

1 A. That's correct.

2 Q. Okay. Would they be the same as they were
3 back in 1882?

4 A. Most likely not.

5 Q. Okay. So how would that difference affect
6 where these boundary lines would be today?

7 A. Well, they would follow the mean low water
8 mark that is present today. It's a natural
9 monument.

10 Q. Okay. So could where these lines be today
11 be different from where they would have been in
12 1882?

13 A. Sure.

14 Q. Okay. So this --

15 A. But the monument is the same.

16 Q. The monument as in what?

17 A. The mean low water mark and the mean high
18 water mark are natural monuments.

19 Q. Okay. But they are not in the exact same
20 physical locations?

21 A. That's correct.

22 Q. Okay. So this drawing reflects where mean
23 high and mean low water mark are today?

24 A. That's correct.

25 MR. SMITH: Okay. All right. I

1 don't have any other questions. Ms. Shahid, if she
2 has any.

3 MS. SHAHID: I don't have any
4 questions, Your Honor, at this juncture, but I would
5 renew my objection. He testified that he used
6 extrinsic evidence to locate the northern and
7 southern boundaries. He stated that he used the
8 plats, but I believe it was also his testimony that
9 he went outside the plats that are referenced in the
10 grant and utilized other evidence to locate those
11 boundaries.

12 It is our position, and it will be
13 presented to you, that there is some ambiguity as to
14 the northern and southern boundary. And we object
15 to -- let me just say this, Your Honor. I don't
16 object to the exhibit reflecting where mean low and
17 mean high water were at the time that he created the
18 exhibit to recreate the parcel by natural monuments.

19 I would object or reserve my objection
20 that this is an accurate representation of the
21 southern and northern boundary of the plat because
22 he utilized evidence outside the grant and the plat.

23 JUDGE DUKES: Yes, sir, you had a
24 comment?

25 REDIRECT EXAMINATION

1 BY MR. GRIFFITH:

2 Q. You used points that Ms. Shahid has
3 referred to as outside the plat. Are you looking at
4 property that is represented on the 1882 plat for
5 those marks?

6 A. Repeat that question one more time?

7 Q. If you are looking at the 1882 plat, how
8 did you determine, for instance, the six-by-six
9 concrete monument that was found on the Plaintiff's
10 Exhibit 4?

11 A. Well, these -- these are --

12 Q. What are these? What are you referring
13 to?

14 A. Well, the landowner names here.

15 Q. Okay. And that is on the 1882 plat for
16 the record?

17 A. That's correct. They are on there. I
18 looked up their information. And those are land lot
19 and section, 10-acre blocks. And I tied into the
20 land lot and section surveying system for South
21 Carolina. It's one of the oldest in the country.

22 Q. And those -- the information that you tied
23 into would have been in existence at the time of the
24 1882 plat, correct?

25 A. That's correct.

1 Q. And you were able to identify --

2 MS. SHAHID: Object to the leading,
3 Your Honor.

4 JUDGE DUKES: You know what, I think
5 we are probably getting to the point where maybe
6 I'll allow it in for now and we will cover a lot of
7 this in cross examination as to what weight I ought
8 to put on it. I would like to see it real quick
9 though. Deborah, can you hand me the plat? Sorry.
10 Let's look at it. I guess I'm curious. How many
11 acres did this come up with? Is it listed on here
12 somewhere.

13 THE WITNESS: It is. It's right
14 here.

15 JUDGE DUKES: Oh, of course. Right
16 where it ought to be. So this one is 89. All
17 right. Let's do that. I'm going to -- again, the
18 beauty of non-jury, allow it in and put whatever
19 weight is required. Thank you.

20 BY MR. GRIFFITH:

21 Q. Mr. Fanning, did you also take a copy of
22 the 1882 plat, plot the 95.27 acre tract on it and
23 then impose your 2010 drawings on that?

24 A. I did.

25 Q. Is this a representation of that effort?

1 A. Yes, it is.

2 JUDGE DUKES: All right. Without
3 objection.

4 COURT REPORTER: That will make this
5 6. No, 5.

6 (MARKED PLAINTIFF'S EXHIBIT NO. 5.)

7 COURT REPORTER: Do you want the
8 judge to have it?

9 MR. GRIFFITH: I want him to testify
10 first.

11 JUDGE DUKES: All right. There you
12 go.

13 BY MR. GRIFFITH:

14 Q. Mr. Fanning, can you describe what you
15 have there?

16 A. It's an overlay of Exhibit 3 which is the
17 April 17th, 1882, plat with the boundary survey that
18 I prepared retracing that very same plat.

19 Q. Is the 1882 boundary survey on there as
20 well?

21 A. Yes.

22 Q. Can you tell me how you represented the
23 1882 boundary survey?

24 A. It has bearings and distances on it. And
25 I drew those into the Auto CAD.

1 Q. All right.

2 A. And over-layed --

3 Q. How do you distinguish between the 2010
4 and the 1882 drawing?

5 A. Oh, this -- the 1882 plat is in purple and
6 the work that I did is in red.

7 Q. All right. How does the 1882 plat and the
8 2010 plat fit together on that drawing on what is
9 now Plaintiff's five?

10 A. They geometrically have the same shape --
11 similar shape. They fit well. And as one would
12 expect with a natural monument a hundred years
13 later, it meanders back and forth.

14 Q. The plat that you drew and the plat in
15 1882, are they representative of property that falls
16 where on there? What is the eastern boundary of
17 both of these parcels?

18 A. The eastern boundary would be the mean low
19 water mark of the Beaufort River.

20 Q. What about the western boundary?

21 A. It would be the mean high water mark of
22 the Beaufort River.

23 Q. And in between those is marshland?

24 A. That's correct.

25 Q. And is that representative of the

1 description in the deed from the Governor of South
2 Carolina to Mr. Crofut as shown on Plaintiff's 2-A?

3 A. Yes, it is.

4 Q. Mr. Crofut, who was Mr. Hoyler's
5 predecessor in title, was conveyed marshland from
6 the State of South Carolina; is that correct?

7 A. That is what it says in the deed.

8 MR. GRIFFITH: That is all.

9 JUDGE DUKES: Okay. Can I borrow the
10 deed real quick?

11 THE WITNESS: Yes, sir.

12 CROSS EXAMINATION

13 BY MS. SHAHID:

14 Q. Good afternoon, Mr. Fanning. I'm going to
15 show you -- and I'm going to go grab my reading
16 glasses, but I'm going to show you what is in
17 evidence as Merry Land's Exhibit 48. And ask you if
18 that is the area in question, the marsh parcel that
19 you surveyed and the surrounding area?

20 A. And what is representing what I surveyed
21 on here?

22 Q. Well, is that the marsh parcel.

23 A. No, show me where I surveyed.

24 Q. Is that the marsh parcel?

25 A. I can't say that because, I mean, I don't

1 know what this line means.

2 Q. Okay.

3 A. I don't know who prepared it or --

4 Q. Is that the marsh? This is a Beaufort
5 County GIS reflection.

6 A. That is a -- it appears to be an image of
7 the marsh.

8 Q. Mr. Hoyler's marsh?

9 A. That's right. But as far as this
10 representing a boundary of that --

11 Q. I'm not asking you that.

12 A. Okay.

13 Q. Just want to know if that is the marsh.
14 And that is the surrounding area, right, the upland?

15 A. As a tax map would depict it.

16 Q. Okay. And --

17 A. With all of those -- reserving all of the
18 meta data that applies to tax maps.

19 Q. Okay. And how long have you been a
20 surveyor in Beaufort County?

21 A. It's been about 15 years.

22 Q. Okay. So you are familiar with the
23 Spanish Point Development?

24 A. I am.

25 Q. And that Spanish Point Development has

1 properties that abut the Hoyler marsh, correct?

2 A. It does.

3 Q. Okay. And I'm going to show you what I've
4 marked as Exhibit 1, Merry Land Exhibit 1. It's a
5 plat of the Spanish Point subdivision. Have you
6 ever seen that plat before?

7 A. Yes.

8 MS. SHAHID: Okay. Your Honor, at
9 this time I would offer Merry Land Exhibit 1 into
10 evidence.

11 JUDGE DUKES: All right.

12 MR. GRIFFITH: Your Honor, the
13 relevance of property above Mr. Hoyler's property or
14 that abuts Mr. Hoyler's property is -- I don't see
15 it. I don't see the relevance of introducing this
16 document.

17 JUDGE DUKES: Well --

18 MR. GRIFFITH: It's not where they
19 are. It's north of them.

20 JUDGE DUKES: I understand. I'm
21 going to allow it though. I want to get the whole
22 picture, so thank you.

23 BY MS. SHAHID:

24 Q. And, Mr. Fanning, would you agree with me
25 that there is an indication along the Spanish Point

1 subdivision of the Beaufort River? And I guess I'm
2 looking at --

3 A. An indication?

4 Q. The Beaufort River is labeled?

5 A. Right here?

6 Q. Yes.

7 A. It says Beaufort River, yes.

8 Q. Okay. And down here do you see a symbol
9 that is typically used for marsh?

10 A. I do.

11 Q. Okay. And this symbol that is typically
12 used for marsh, is that based on your understanding
13 of the area and the location of the Hoyler parcel,
14 is that reflective of Mr. Hoyler's claimed marsh?

15 A. Well, this isn't a survey of Mr. Hoyler's
16 marsh.

17 Q. I understand.

18 A. So to that end, no, it's not
19 representative.

20 Q. All right. Are you aware that
21 Mr. Hoyler's claimed marsh abuts Spanish Point
22 properties in this location? And the location that
23 I'm pointing at is the -- if north is up, a
24 southeasterly location.

25 A. This area, right here, a Mr. Willard.

1 Q. Right.

2 A. Yeah.

3 Q. Okay.

4 A. Generally.

5 Q. Generally speaking that is his marsh? All
6 right. And in that area etched in as marsh, do you
7 see any indication that that is listed out or called
8 out on that subdivision plat as a separate parcel?

9 A. I don't see an indication -- what I see is
10 an indication of where the Spanish Point subdivision
11 stops.

12 Q. Okay.

13 A. You know, I don't see an indication nor do
14 I know that they've made an effort to investigate
15 the ownership --

16 Q. Okay.

17 A. -- or do a title search on the ownership
18 or done any research on --

19 Q. But you would agree with me that these
20 particular parcels, and I'm pointing at lots within
21 Spanish Point --

22 A. That are not on the water.

23 Q. -- that are not on the water and those
24 along the water are clearly defined with boundary
25 lines and with an I.D. number on Exhibit 1, correct?

1 A. They do have boundary lines.

2 Q. All right. And we don't see -- even
3 though we are only looking at a small piece of that
4 marsh, but we don't see any indication on that plat
5 that that marsh has a boundary line and a tax
6 number, do we?

7 A. We don't see that that boundary line that
8 a tax number?

9 Q. That that marsh has a boundary line or a
10 tax number. That it's being treated as a piece of
11 private property in the same manner that the upland
12 lots are?

13 A. But this is not a survey --

14 Q. Okay.

15 A. -- of anything other than Spanish Point.

16 Q. Okay. It's a recorded plat?

17 A. It's not a survey of the adjoining
18 properties.

19 Q. Oh, okay. All right. Thank you.

20 A. That I can see.

21 Q. All right. Well, then let me show you
22 something else. I'm going to show you Defendant's
23 Exhibit 2 which is a plat prepared by -- for
24 Beaufort River Development by David Yeoman and ask
25 you to look at that plat?

1 MR. GRIFFITH: Same objection, Your
2 Honor.

3 JUDGE DUKES: All right. And what is
4 this one? Let me look at it real quick.

5 MS. SHAHID: And, Your Honor, I also
6 have the GIS printout to help -- to go with the
7 exhibit to help locate the parcel.

8 JUDGE DUKES: Okay. Let me give you
9 that one back. And that one is exhibit what, I'm
10 sorry?

11 MS. SHAHID: Three. I'm sorry. Two
12 is what you handed Mr. Fanning.

13 JUDGE DUKES: Right.

14 MS. SHAHID: And 3 is the photograph
15 that helps locate the property.

16 JUDGE DUKES: Deborah is going to
17 hand me the whole stack to make it easier. So 2 and
18 3 are more or less together?

19 MS. SHAHID: Yes, sir.

20 JUDGE DUKES: And same objection; is
21 that right, with regard to both 2 and 3 --

22 MR. GRIFFITH: Yes, sir --

23 JUDGE DUKES: -- from the Plaintiff?
24 And I'm going to allow them and again try to figure
25 this out.

1 MS. SHAHID: Okay.

2 JUDGE DUKES: So thank you.

3 BY MS. SHAHID:

4 Q. Okay. And I'll ask you, Mr. Fanning, if
5 you can read at the bottom of Exhibit 2 what that
6 says?

7 A. What it says is marshes at Beaufort River.

8 Q. Okay. And if I -- if you assume that I
9 have properly oriented you as to the location of
10 these properties that were platted for Beaufort
11 River -- is it Beaufort River Development?

12 A. That's correct. LLC.

13 Q. Okay.

14 A. It has the LLC on it.

15 Q. Okay. And it abuts sort of the southern
16 portion of the marsh owned by Mr. Hoyler?

17 A. Yes.

18 Q. Okay. Claimed to be owned? All right.
19 I'm also going to now show you Exhibit 4. And
20 Exhibit 4 is a plat prepared by Mr. Trogdon for a
21 piece of property on Spanish Point Drive. And for
22 orientation purposes I'm going to give you Exhibit 5
23 which is intended to show you the location of that
24 plat.

25 MS. SHAHID: And I would offer 4 and

1 5 into evidence.

2 JUDGE DUKES: All right. You've seen
3 4 and 5.

4 THE WITNESS: Do you need to look at
5 them?

6 JUDGE DUKES: You know what, I have
7 them. I've got copies. So --

8 MR. GRIFFITH: Just a question, Your
9 Honor. I didn't hear 3 on there.

10 MS. SHAHID: I'm sorry.

11 JUDGE DUKES: I'm sorry. I thought I
12 did that together.

13 MR. GRIFFITH: I'm sorry. I thought
14 you did 1 and 2.

15 JUDGE DUKES: Yeah. And no --

16 MR. GRIFFITH: And 3, there is a
17 further objection. It's apparently a screen draft
18 off of the GIS mapping site.

19 JUDGE DUKES: Right.

20 MR. GRIFFITH: And I don't -- first
21 of all, I'm not a hundred percent sure what its
22 purpose is, but it doesn't show a complete screen
23 shot, if I am oriented correctly, to know whether or
24 not on that particular day on that particular screen
25 shot Mr. Hoyler's property is identified with a tax

1 map number. This thing says it's dated 2015, I
2 think. 2015 aerial in the top left corner. And so
3 I don't know whether this thing is zeroed insofar
4 that there is not a tax map number on there. And if
5 you pan back out whether you would see a tax map
6 number. So I would object from that standpoint.

7 JUDGE DUKES: Let me see if I can get
8 you all to stipulate to that because I see the
9 yellow line on the right side. So I'm assuming that
10 it has that number and --

11 MS. SHAHID: It does.

12 JUDGE DUKES: -- we just can't see
13 it.

14 MR. GRIFFITH: Okay. If we'll --

15 MS. SHAHID: It does. I'm sorry.

16 MR. GRIFFITH: -- stipulate to that
17 that is fine.

18 JUDGE DUKES: Okay. All right.

19 MS. SHAHID: Now I've offered you
20 Exhibits 4 and 5.

21 BY MS. SHAHID:

22 Q. And if I could hold 4 for just a second.

23 A. Sure.

24 Q. This is Exhibit 4. And I've told you that
25 this is a survey prepared by Mr. Trogon for Lot 8,

1 Block C, Spanish Point subdivision. You've already
2 identified Spanish Point as having some lots that
3 about Mr. Hoyler's marsh. And if you could, what is
4 the description on this plat up in the top plat?

5 A. What is the description or what is --

6 Q. Yes. What are these -- what does this
7 say?

8 A. I mean, that description is in my opinion
9 not ownership, but what it's bound by --

10 Q. Okay. And what does it say?

11 A. -- in a metes and bounds description.

12 Q. I'm sorry. What are these words -- say?

13 A. It would say marshes of the Beaufort
14 River.

15 Q. Okay.

16 A. Which would be the monument.

17 Q. And I'm going to show you Exhibit 6 and 7,
18 Exhibit 6 being a David Yeoman survey for a piece of
19 property owned by Westergaard and Spanish Point
20 Drive. Seven being our effort using the tax map to
21 show it in relationship to the marsh claimed to be
22 owned by Mr. Hoyler.

23 MR. GRIFFITH: May we have the same
24 stipulation?

25 MS. SHAHID: Yes. Yes.

1 JUDGE DUKES: Okay. All right.

2 MR. GRIFFITH: With regard to the tax
3 map.

4 MS. SHAHID: The tax map is not being
5 offered for the purposes to dispute that it's a
6 parcel with a number on it. It's just being there
7 to show that we are looking at plats of property
8 that about Mr. Hoyler's marsh.

9 JUDGE DUKES: Got it. And were this
10 screen to be backed out, somewhere in the claimed
11 property would be a number?

12 MS. SHAHID: Yes.

13 JUDGE DUKES: All right. Okay.

14 MS. SHAHID: Yes.

15 BY MS. SHAHID:

16 Q. And, again, the area to the water side of
17 the Westergaard property is described as marsh.

18 A. It says marsh.

19 Q. Labeled marsh? Okay. And I'm going to
20 show you a plat that you prepared, an as-built
21 survey. I'm offering it as Exhibit 8. And, in
22 addition, I'm offering the GIS photo to refresh your
23 memory. Are you familiar with this plat?

24 MS. SHAHID: Oh, Your Honor, I'm
25 sorry. Did I offer 5 and 6 into evidence? If I

1 did --

2 JUDGE DUKES: I think so. Yeah.
3 Five and 6, and we will allow those again with the
4 stipulation on the yellow line. And then we talked
5 about 6 and 7. I guess I have a question on 6 and
6 7. The northern-most line -- does not the
7 northern-most line eliminate these from what's
8 claimed?

9 MS. SHAHID: Your Honor, these
10 aren't -- yes.

11 JUDGE DUKES: These aren't adjacent
12 to what is claimed, are they?

13 MS. SHAHID: They are.

14 JUDGE DUKES: They are? Okay.

15 MS. SHAHID: They are, but we are not
16 asserting that we have a property -- that there has
17 been a property given or taken. These are offered
18 only for the purposes of showing how surveyors have
19 described that marsh in plats of record.

20 JUDGE DUKES: Okay. I'm just
21 thinking the marsh that is referred to in 6 and 7 is
22 not -- again, I'm no surveyor, but --

23 MS. SHAHID: Oh, might be outside the
24 bounds --

25 JUDGE DUKES: Yes.

1 MS. SHAHID: -- of the grant?

2 JUDGE DUKES: Is that true or not? I
3 don't know. It's pretty close.

4 MS. SHAHID: Not as far as GIS
5 reflects the parcel.

6 JUDGE DUKES: It's not? Okay.

7 MR. GRIFFITH: No, sir. Just --

8 JUDGE DUKES: All right. Well, keep
9 on talking about it.

10 MR. GRIFFITH: -- 7 on the water side
11 you can still see the boundary mark to Mr. Hoyler's
12 property.

13 JUDGE DUKES: No. No. I see that,
14 but the testimony earlier is there is a line that
15 runs east and west. I'm sorry. The northern
16 boundary --

17 MR. GRIFFITH: I don't think we've
18 gotten there yet.

19 JUDGE DUKES: Okay. All right. Go
20 ahead then, please.

21 BY MS. SHAHID:

22 Q. And I've showed you 8 and 9 and ask you if
23 you are familiar with that as-built survey that you
24 did?

25 A. I am.

1 MS. SHAHID: All right. And Your
2 Honor, at this time I would offer 8 and 9 into
3 evidence.

4 JUDGE DUKES: Same objection. Same
5 stipulation, am I right?

6 MR. GRIFFITH: Yes, sir.

7 JUDGE DUKES: Okay. All right. I'll
8 allow them.

9 BY MS. SHAHID:

10 Q. And that as-built survey that you
11 prepared, that shows a dock, doesn't it?

12 A. Yes.

13 Q. Okay. And that dock also is reflected in
14 this aerial photo, correct, shown in Exhibit 9?

15 A. That's correct.

16 Q. Okay. And there is no indication on your
17 survey that you prepared that that dock may be
18 located in property claimed by Mr. Hoyler, correct?

19 A. There is no indication on this plat.

20 Q. Correct. Do you recall the purpose that
21 you prepared that plat?

22 A. It was for Sharpco East, LLC.

23 Q. Do you recall --

24 COURT REPORTER: I'm sorry. It was
25 for? I didn't hear you.

1 THE WITNESS: Sharpco East, LLC.

2 BY MS. SHAHID:

3 Q. Do you recall why you prepared that plat?

4 A. To reflect their boundary.

5 Q. Okay. Were they selling their property?

6 A. I'm not sure. You would have to -- I'm
7 not sure if they were buying it or selling it. I
8 don't remember.

9 Q. Was that plat recorded?

10 A. It does have a recording on it, yeah.

11 Q. You think it was done for purposes of some
12 transaction; buying or selling?

13 A. It could be used for that, a recorded
14 plat.

15 Q. You don't know? You don't know?

16 A. What it was -- I mean, I would have to go
17 back and look in my file. I'm assuming that they
18 were using it to describe their property. Whether
19 it was for buying it, selling it, or building a new
20 house or making improvements to their property, you
21 know, I can't recall exactly what I prepared it for
22 them for.

23 Q. That dock is an appurtenance to their
24 property?

25 A. Yes. It's a --

1 Q. And you have no indication on that plat
2 that that dock might be traversing marsh where there
3 is a claim of ownership to it?

4 A. I wasn't surveying the marsh.

5 Q. Okay.

6 A. I was only surveying the Sherperts' lots.

7 Q. You were surveying the dock?

8 A. And the dock is shown on here --

9 Q. Right.

10 A. -- accurately.

11 Q. Okay.

12 A. But I'm not certifying to any kind of -- I
13 mean, I don't certify to title.

14 Q. Okay. All right. Now I'm going to show
15 you -- thank you. I'm going to show you Exhibits 10
16 and 11. Exhibit 10 is a plat prepared by
17 Mr. Trogon for the Wises' property on Spanish Point
18 Drive. And Exhibit 11 is our photographic image
19 identifying that property. And I'll ask you the
20 same question. When you get to the water's edge
21 portion of the lot it is described as marshes of the
22 Beaufort River on that plat, the plat --

23 A. Are you testifying or --

24 Q. I'm asking you --

25 A. -- am I?

1 Q. -- a leading question.

2 A. What am I doing?

3 Q. Yes or no. I'm trying to speed things up.
4 Is it described as marshes of the Beaufort River on
5 Defendant's Exhibit 10?

6 A. It says marshes of the Beaufort River.

7 MS. SHAHID: Okay. Your Honor, I
8 would offer 9 and 10 into evidence if I haven't
9 already.

10 JUDGE DUKES: All right.

11 MR. GRIFFITH: Same objection, Your
12 Honor.

13 JUDGE DUKES: Same? Okay. I'll
14 allow it. Thanks.

15 MS. SHAHID: I'm sorry, Your Honor.
16 I might have the numbers wrong. 10 and 11. 10 and
17 11.

18 JUDGE DUKES: Okay.

19 BY MS. SHAHID:

20 Q. All right. Now I'm going to show you what
21 has been marked as Exhibit 12. It's also a piece of
22 property on Spanish Point drive. And it was
23 surveyed by David Gasque. And it's accompanied by
24 Exhibit 13 which is an attempt to reflect the
25 property. Okay. And what is shown as the

1 boundary -- what is identified at the seaward, for
2 lack of a better word, boundary of this particular
3 property shown on Exhibit 12?

4 A. A line that runs north 29 degrees, 50
5 minutes, 8 seconds east from a one-half inch rebar
6 that he set to another one-half inch rebar that he
7 set. And being 120.40 feet. That is the boundary
8 that he calls for in that.

9 Q. Okay. And the area to the east of that is
10 labeled the Beaufort River?

11 A. It is labeled the Beaufort River.

12 Q. Okay. There is no --

13 A. It's southeast.

14 Q. There is no indication that there is a
15 parcel with its own boundaries to the east of that
16 particular --

17 A. Again, this is not a survey of anything
18 but Lot 11. That's not a survey of the adjoining
19 land. It says being Lot 11, Block C, Spanish Point.

20 Q. Okay.

21 A. It doesn't say it's anything else.

22 MS. SHAHID: All right. Your Honor,
23 I would move those into evidence being Exhibits 12
24 and 13.

25 JUDGE DUKES: Same?

1 MR. GRIFFITH: Yes, sir.

2 JUDGE DUKES: Okay. I'll allow them.

3 BY MS. SHAHID:

4 Q. I'm now going to -- I'm skipping because I
5 had some -- I'm skipping to now Exhibits 16 and 17.
6 16 being a lot on Spanish Point Drive surveyed by
7 Mr. Gasque and 17 being a depiction of that lot.
8 And I'll ask you the same question. What is shown
9 at the seaward boundary? Is there any indication of
10 anything other than marsh at that seaward boundary?

11 A. Well, there is a line. There is an iron
12 old (sic), and there is a line south 74 degrees, 12
13 minutes, 25 seconds west, 141.39 feet to another
14 iron old (sic). That is the boundary that this plat
15 calls for. Whether that's --

16 Q. For lot 14?

17 A. -- correct or not, I wouldn't know without
18 doing a survey of it.

19 Q. And then on the other side of that
20 boundary is the word marsh?

21 A. That's right.

22 Q. Okay. And yet on either side of the lot
23 there is an identification that Lot B exists and
24 Lot --

25 A. I don't see a Lot B.

1 Q. I'm sorry. Lot 13 and Lot 15, correct?

2 A. Okay. That's correct.

3 Q. All right. But no indication that --

4 A. It's -- I mean, you -- repeat that. I
5 want to -- that question. You kind of stated
6 something there and --

7 Q. All right. Well, would you agree with me
8 that on either side of Lot 14 is a depiction that
9 there is a Lot 13 and a Lot 15?

10 A. That is what this appears to represent.

11 Q. Okay. And no indication on the -- and I'm
12 going to keep calling it seaward side or Beaufort
13 River side that there is a Hoyler lot?

14 A. Well, I think that maybe we should -- I
15 think that what this is showing and what these plats
16 are showing is metes and bounds description. Not
17 ownership or specific things like that. The marsh,
18 the Beaufort River, those are natural monuments.

19 Q. Okay.

20 A. That describe the mean high water mark.
21 And he's being bound by Lot 13, bound by Lot 15.

22 Q. And --

23 A. He's not saying -- I mean, you know,
24 Spanish Point Drive, he's bound by the 75-foot
25 right-of-way.

1 Q. You would agree with me that being told on
2 a plat that you are bound by the marshes of the
3 Beaufort River is different from being told on a
4 plat that you are bound by parcel owned by Hamilton
5 Marshall Hoyler?

6 A. Repeat that question, please?

7 Q. You would agree with me there is a
8 difference between a plat showing you or bound by
9 the marshes of the Beaufort River versus a plat that
10 shows you are bound by a marsh parcel subject to
11 private ownership?

12 A. Well, somebody can own the marsh just like
13 somebody can own Lot 13 or Lot 14 or Lot 15. So you
14 can own the marsh. The marsh is the monument.

15 Q. Okay.

16 A. Just like this plat calls for an iron old
17 (sic). That is a monument. Half-inch rebar. That
18 is the monument. The mean high water mark is a
19 monument. The marshes are a -- you know, if you are
20 bound by the marsh, you are bound by the mean high
21 water mark on the marsh.

22 MS. SHAHID: If I haven't already,
23 Your Honor, I offer 16 and 17 into evidence.

24 MR. GRIFFITH: Same objection.

25 JUDGE DUKES: All right. Thank you.

1 I'll allow them.

2 BY MS. SHAHID:

3 Q. And I'm also going to show you 18 and 19.
4 Eighteen being a plat prepared for David and Rita
5 Brown and 19 being an effort to locate that plat in
6 relationship to the marshes of the Beaufort River --
7 I mean to the marsh parcel that is shown on Beaufort
8 County GIS as Mr. Hoyler's marsh parcel.

9 And, again, if you look at that plat, does
10 it label or call out the marsh as marshes of the
11 Beaufort River? And that plat being Exhibit 18.

12 A. It says marshes of the Beaufort River.

13 Q. All right. And that plat was prepared by
14 whom?

15 A. And it has a -- it has a boundary line
16 that they put in there, too.

17 Q. Right. A boundary line for the lot that
18 has been surveyed?

19 A. Uh-huh.

20 JUDGE DUKES: Nineteen doesn't show
21 the yellow line on the right, but we will just
22 acknowledge that it would be there.

23 MS. SHAHID: Okay.

24 JUDGE DUKES: It's out there
25 somewhere.

1 MS. SHAHID: Okay. And I would move
2 19 and 20 into evidence -- 18 and 19 into evidence.

3 JUDGE DUKES: All right.

4 MR. GRIFFITH: Same objection.

5 JUDGE DUKES: All right. And I don't
6 know if you heard that, 19 doesn't show the yellow
7 line, but I think it's acknowledged by all that the
8 yellow line is off this map and the property to the
9 right is the disputed tax map parcel. Is that
10 accurate in 19? So I'll allow them with that
11 agreement stipulation.

12 BY MS. SHAHID:

13 Q. And I'm not sure I got an answer, but
14 19 -- 18 was prepared by whom, what surveyor?

15 A. David Gasque.

16 Q. All right. I'm going to --

17 COURT REPORTER: I got David. I
18 didn't hear the last word.

19 THE WITNESS: Gasque. I'm sorry.

20 BY MS. SHAHID:

21 Q. I'm going to show you what I've marked as
22 Defendant's Exhibits 20 and 21. Exhibit 20 being a
23 plat for William Keyserling. Exhibit 21 being the
24 GIS printout. And if I could hold this for just a
25 minute? I'll give it right back to you. For this

1 property. Are you familiar with Oyster Cove Road?

2 A. I am.

3 Q. Okay. All right. And this is a parcel
4 that abuts the parcel of property claimed by
5 Mr. Hoyler?

6 A. Yep.

7 Q. And Mr. Gasque, how did he identify what
8 is a parcel of property claimed by Mr. Hoyler?

9 A. Marshes at Beaufort.

10 Q. Okay.

11 A. And he -- wait a second now. You are
12 saying how he described the boundary?

13 Q. No. No.

14 A. Or --

15 Q. I'm just asking you to read what he puts
16 there.

17 A. Oh, what he writes?

18 Q. Yes.

19 A. And I'm pointing to an area off of the
20 property that says marshes of Beaufort.

21 Q. But you would agree with me when he
22 identifies this lot, this lot being the one shown on
23 Exhibit 20 as R120-007-0102, Lot 7, he provides an
24 identification for that parcel?

25 A. He also describes it as Lot 6.

1 Q. Okay. And down here Lot 8, correct?

2 A. And Lot 7 there.

3 MS. SHAHID: All right. And, Your
4 Honor, I would offer 19 -- 20 and 21 into evidence.

5 JUDGE DUKES: All right. Same
6 objection?

7 MR. GRIFFITH: Yes, sir.

8 JUDGE DUKES: Okay. I'll allow it.

9 BY MS. SHAHID:

10 Q. Now I'm going to show you Exhibit 22 which
11 is which is a David Yeoman survey, a closing plat
12 prepared for Beaufort Investments, LLC, for some
13 property off of Murrell Circle. Are you familiar
14 with Murrell Circle in relation to the parcel of
15 marsh claimed by Mr. Hoyler?

16 A. I am.

17 Q. Okay. If you could, tell me what is
18 written at the top right-hand corner of that plat?

19 A. Marshes at Beaufort River.

20 MS. SHAHID: Okay. And, Your Honor,
21 at this time I would offer 22 and 23 into evidence.

22 JUDGE DUKES: Same?

23 MR. GRIFFITH: Yes, sir.

24 JUDGE DUKES: Okay. I'll allow them.

25 MR. GRIFFITH: Thank you.

1 BY MS. SHAHID:

2 Q. Your Honor -- I mean Mr. Fanning, I'm
3 going to show you Exhibit 24 which is a plat from
4 Todd Drive. And it is a plat prepared for the
5 Lubyas by Mr. Trogon. I'm going to ask you if you
6 are familiar with Todd Drive?

7 A. Let me see what you've got there.

8 Q. Exhibit 24.

9 A. I'm not particularly familiar with Todd
10 Drive, but --

11 Q. And I'm going to show you Exhibit 25.

12 A. Let me see -- where is that, in Spanish
13 Point?

14 Q. Yes.

15 A. Okay. Yeah. That goes into Bayview. I
16 know the area. I didn't know it was Todd Drive
17 without looking at a map.

18 Q. And you would agree with me at their
19 boundary on the Beaufort River the indication
20 provided is Beaufort River at the top of the plat?

21 A. I mean, he's got a boundary again that he
22 -- it's bound by the Beaufort River.

23 Q. Okay.

24 A. Which would be the mean high water mark.

25 MS. SHAHID: And I'm going to

1 offer -- I'm sorry. I'm having a terrible time
2 seeing. Twenty-four and 25 into evidence.

3 MR. GRIFFITH: Same objection.

4 JUDGE DUKES: All right. Let me see.
5 Is that the lines on them? Twenty-five is missing
6 the line on the right, but again we will
7 acknowledge -- I'll allow it, but I think everyone
8 acknowledges that the marshy area shown on 25, if it
9 were to have the tax map number, would be that
10 number referenced and that goes back to --

11 THE WITNESS: This one here has a
12 mean high water mark on it there.

13 BY MS. SHAHID:

14 Q. Okay. And see whether that mean high
15 water mark would be property claimed to be owned by
16 Mr. Hoyler, correct?

17 A. That's correct.

18 Q. Okay. Now I'm going to show you what has
19 been marked as Defendant's Exhibits 26 and 27, 26
20 being a land title survey prepared for Capstone
21 Realty Advisors and HUD. Twenty-seven being an
22 aerial that reflects the buildings that are shown on
23 that off the survey. Are you familiar with that?

24 A. I mean, in what way are you asking am I
25 familiar with it?

1 Q. Well, are you aware that this facility
2 exists in this vicinity as reflected on Exhibit 27?

3 A. Yes. Yes, I am aware of that.

4 Q. And it abuts the marsh claimed by
5 Mr. Hoyler. And that this is a plat, Exhibit 26,
6 that --

7 A. Okay. I was -- I thought you were
8 pointing to that.

9 Q. That reflects this exhibit?

10 A. Okay.

11 Q. Okay? Exhibit 27. All right. And on the
12 water side of this plat, how is that identified in
13 the plat?

14 A. Well, again, he's got a boundary line that
15 I can't read the bearing and distance of. And then
16 it appears that there is a gap between that and then
17 the critical line. And then seaward of the critical
18 line it appears to say marshes of the Beaufort
19 River.

20 Q. Okay. I'm going to show you 28 and 29, 28
21 being a plat in Spanish Point prepared by David
22 Gasque.

23 MR. GRIFFITH: Your Honor, just for
24 the record we object to 26 and 27 as well, the same
25 objection.

1 JUDGE DUKES: Okay.

2 MS. SHAHID: Which I didn't offer. I
3 haven't offered 26 and 27. I didn't offer them.

4 JUDGE DUKES: You didn't offer 26 and
5 27?

6 MS. SHAHID: I need to. And I would
7 offer 26 and 27 into evidence.

8 JUDGE DUKES: All right.

9 MR. GRIFFITH: We will object.

10 JUDGE DUKES: That's all right. And
11 I'll allow them over the objection and note again
12 that the yellow line would be here and show what
13 we've discussed. That is going to be the same on
14 29, by the way, no yellow line.

15 BY MS. SHAHID:

16 Q. Okay. And now I'm going to show you lot
17 17, Todd Drive, Spanish Point subdivision,
18 Exhibit 28. It's a plat prepared by David Gasque
19 for the Devaults. And I'm also going to show you
20 the GIS printout marked as 29. Do you recognize
21 that as a parcel of private property that abuts the
22 marsh claimed to be owned by Mr. Hoyler?

23 A. Yes.

24 Q. And what is that marsh -- what is that
25 depiction? How do they -- what is written there

1 where it says marsh? Marshes of the Beaufort River?

2 A. It shows an approximate location of the
3 mean high water mark. And then it shows the marshes
4 of the Beaufort River and on the seaward side
5 of that, mean high water mark.

6 Q. Okay. And, Mr. Fanning, that may be all
7 of those. I just need to run through the stack real
8 quick to make sure.

9 A. I don't know how well organized they are
10 in here. You've got to flip back and forth.

11 MS. SHAHID: And I need to offer
12 those into evidence, too.

13 MR. GRIFFITH: Same objection. I
14 thought I heard her say she offered it into
15 evidence.

16 JUDGE DUKES: Which numbers? The
17 last two?

18 MR. GRIFFITH: Yes, sir.

19 JUDGE DUKES: Okay. All right. I'll
20 allow them. The same stipulation as to the missing
21 yellow line.

22 MS. SHAHID: And, Your Honor, I have
23 another exhibit I want to talk to him about, but I
24 need to find the larger copies, if I could just take
25 a quick break. I'm not going to be able to read --

1 JUDGE DUKES: Do we just need a break
2 in general or do you just need one minute?

3 MS. SHAHID: I just need to talk to
4 my paralegal about it, but hopefully it wouldn't
5 take any time.

6 JUDGE DUKES: Okay. Let's just be
7 off the record for a second.

8 (Discussion off the record.)

9 JUDGE DUKES: All right. We just
10 took a quick break. And during that time we
11 recognized that it's just a couple of minutes until
12 noon. That the cross is going to take a good bit
13 longer of Mr. Fanning so we might as well just eat
14 lunch now. Why don't we try to be back by about
15 1:15. Is that do-able? And, Mr. Fanning, don't
16 discuss your testimony with anyone during the break.
17 Okay

18 MR. SMITH: Your Honor, if I may, I'm
19 hopeful we can finish up today. Do you think still
20 we can, Mary and Jeff? Because if not, I would
21 certainly appreciate a shorter lunch so we could get
22 through this.

23 JUDGE DUKES: Well, we could try
24 1:00. It's real hard to get out of here, find food,
25 and make it back, but sure. If you all think you

1 can do 1:00 o'clock, go fast.

2 MR. SMITH: Could we go a little
3 later if we need to like 5:30 or so to finish up?

4 JUDGE DUKES: I've got to check with
5 the security people and everybody else, but we can
6 certainly try because we have tomorrow booked, too.

7 MR. SMITH: We do. It's just -- I've
8 got some things in Columbia I would like to be able
9 to get to.

10 JUDGE DUKES: Okay. All right.

11 MR. SMITH: But certainly this case
12 is what is scheduled, I will do what is needed.

13 JUDGE DUKES: All right. Well, let's
14 do this. Let's try to be back by 1:00. We will do
15 our best and do that. And, again, you understand
16 the rules?

17 THE WITNESS: I understand.

18 JUDGE DUKES: All right. We will be
19 out until 1:00 then.

20 (Lunch recess 11:55-12:58.)

21 JUDGE DUKES: Back on the record in
22 07-CP-07-3212. Mr. Fanning, you are still under
23 oath. Go ahead, please.

24 BY MS. SHAHID:

25 Q. Mr. Fanning, I have a few more plats I

1 would like to show you. Here we go. I'm going to
2 show you a larger copy of what we've marked as
3 Exhibit 38 only because I'm having a little bit of
4 trouble reading the detail on the larger copy.

5 But this is the Ward Edwards plat that was
6 created for Merry Land of its waterfront parcels
7 that it acquired. This is the larger copy. And
8 here it is the plat.

9 And the reason I'm handing you that is to
10 ask you -- let me ask you this first.

11 MS. SHAHID: I would move to admit
12 Exhibit 40. I'm sorry. Defendant's 38. Exhibit 38
13 into evidence.

14 MR. GRIFFITH: Well, we will continue
15 to have the objection if the purpose is to show the
16 Beaufort River butts up against it.

17 MS. SHAHID: I'm sorry. It's 39.
18 Your Honor, I'm sorry. I should have had the Lasix
19 surgery.

20 JUDGE DUKES: That's all right.

21 MS. SHAHID: I just cannot read these
22 little numbers.

23 JUDGE DUKES: So it's 39?

24 MS. SHAHID: Thirty-nine.

25 JUDGE DUKES: This plat?

1 MS. SHAHID: Yes.

2 JUDGE DUKES: Okay. And this is a
3 plat showing -- thanks. Showing -- at least it
4 would purport to show the common boundary between
5 the Claimant's property and the Defendant's
6 property. Is that --

7 MS. SHAHID: Well, this plat was
8 developed for purposes of platting the 18.43 acres
9 on Ribaut Road, Sutcliffe Road, and Johnny Murrell
10 Circle for Merry Land Properties.

11 JUDGE DUKES: Okay.

12 MS. SHAHID: This is a plat of all of
13 the property that they acquired. And it includes
14 these upland -- these parcels that abut the claimed
15 marsh.

16 JUDGE DUKES: Okay. And that was my
17 question, it does abut the claimed marsh. So I'll
18 allow it. Thank you.

19 MS. SHAHID: Okay. And, Madam Court
20 Reporter, it is Exhibit 39. And I would move it
21 into evidence.

22 BY MS. SHAHID:

23 Q. So, Mr. Fanning, do you see some plat
24 references on there?

25 A. Yes.

1 Q. Okay. And the purpose of plat references
2 is that information that a surveyor obtains about
3 the surrounding area? Is that why you list it as a
4 plat reference? Or not you, but is that why it
5 would be listed as a plat reference?

6 A. It would be, you know, supporting
7 information.

8 Q. Okay. All right. And is one of those
9 plat references a plat called property of John E.
10 Murrell prepared by Christianson?

11 A. Yes.

12 Q. Okay. And I've got a plat of John E.
13 Murrell prepared by Christianson marked as
14 Exhibit 41. Does that appear to be the same plat as
15 referenced?

16 A. Yes.

17 MS. SHAHID: Okay. Your Honor, at
18 this time I would move 41 into evidence.

19 MR. GRIFFITH: Same objection, Your
20 Honor.

21 JUDGE DUKES: Forty-one again is --
22 let me see 41. Okay. So 41 is referenced in 39.
23 And it also purports to show the common boundary,
24 whatever that might be. So I'll allow that.

25 MS. SHAHID: Right.

1 MR. GRIFFITH: Well -- okay.

2 BY MS. SHAHID:

3 Q. And this exhibit which purports -- was a
4 referenced exhibit by our surveyor also shows
5 marshes of the Beaufort River, correct? Or uses the
6 phrase marshes of the Beaufort River?

7 A. It says marshes of the Beaufort River.

8 Q. Okay. And let me find you one more plat.
9 Is there a plat of utility line easement across
10 property of Jeffrey J. Hubble also used as a plat
11 reference?

12 A. A plat of utility line easement across
13 property of Jeffrey J. Hubble is a reference on
14 the -- what is it, exhibit?

15 Q. That is Exhibit 39.

16 A. Thirty-nine.

17 Q. I'm going to show you what has been marked
18 as Defendant's Exhibit 38 and ask you if that
19 appears to be the same plat that is referenced on
20 our plat that our surveyor prepared?

21 A. This is a -- this is a -- repeat your
22 question again.

23 Q. Does that appear to be a plat of utility
24 line easement prepared by Christianson -- I'm sorry.
25 I'm trying to read --

1 A. By Robert Venerson.

2 Q. By Venerson that is referenced on our
3 plat?

4 A. It's a plat of an easement, that's
5 correct.

6 Q. Okay.

7 A. Not a -- not a --

8 Q. Utility line easement?

9 A. Right.

10 Q. Okay. Let me make sure I'm handing you
11 the right plat then. And I believe I am. Well --

12 MS. SHAHID: And, Your Honor, at this
13 time I would move Exhibit 38 into evidence.

14 JUDGE DUKES: Tell me what 38 does
15 again because I -- the other ones I think had the
16 alleged common boundary.

17 MS. SHAHID: This one does, too.

18 JUDGE DUKES: Oh, it does? Okay. I
19 just can't see it there. Let me let the Plaintiff
20 examine it and see.

21 MR. GRIFFITH: I can't see it either.

22 JUDGE DUKES: Come take a look and
23 see what you think. Where is north on that one? Is
24 north up?

25 MS. SHAHID: North is down.

1 MR. GRIFFITH: North is down so --

2 JUDGE DUKES: Why does anybody do
3 that? North should always be up. Okay. Well, if
4 north is --

5 MR. GRIFFITH: I don't see any
6 definition, bearing, or distance on any of the
7 boundary lines, so --

8 COURT REPORTER: I'm sorry. You are
9 going to have to speak up.

10 JUDGE DUKES: Yeah. You moved his
11 microphone --

12 MR. GRIFFITH: I don't see any
13 bearings or distances on this piece of property to
14 define it. I don't see any monumentation described
15 down here. It's showing an easement.

16 MS. SHAHID: All right.

17 MR. GRIFFITH: In fact, where does
18 it --

19 JUDGE DUKES: Let's do this. I don't
20 know if the Plaintiff objects, but that one I can't
21 quite figure out. I don't know if that helps us
22 towards a boundary or the ownership question unless
23 you can --

24 MS. SHAHID: And really neither, Your
25 Honor. It goes to -- it really goes to the fact

1 that it is shown as a plat of record on our plat.
2 It's work our surveyor did. And it's just offered
3 really to show the extent to which we went to
4 discover certain things.

5 JUDGE DUKES: Okay.

6 MS. SHAHID: And it says Beaufort
7 River on it.

8 JUDGE DUKES: But, I mean, the fact
9 that it's referenced on the plat 39 or whatever it
10 is kind of shows that. I don't know if you actually
11 need to put the plat in. I was thinking you were
12 doing that to show something about the alleged
13 common boundary, but -- so why don't we -- we've
14 talked about it so much now it almost doesn't
15 matter, but why don't we leave that one out.

16 MS. SHAHID: Okay.

17 JUDGE DUKES: And that one is 38. So
18 38 will not be in, Deborah.

19 MS. SHAHID: Did I offer 41? Okay.
20 And it was admitted?

21 JUDGE DUKES: Forty-one, yes, I
22 think. Forty-one was one of the ones that showed --
23 yeah.

24 MS. SHAHID: Johnny Murrell Circle,
25 right.

1 BY MS. SHAHID:

2 Q. All right. I'm going to show you what has
3 been marked Exhibit 42 by Merry Land. And this is
4 the -- and we can move that out of your way. This
5 is the recorded subdivision plat for Oyster Cove.
6 Do you recall that Oyster Cove is an area in the
7 vicinity of the Hoyler marsh?

8 A. Uh-huh.

9 Q. Okay. And do you see on the Oyster Cove
10 recorded subdivision plat the reference to marshes
11 of the Beaufort River?

12 A. It's mighty difficult to read, but I
13 believe that is what it says.

14 MS. SHAHID: Okay. And I would offer
15 Exhibit 42 into evidence, Your Honor.

16 JUDGE DUKES: Same objection?

17 MR. GRIFFITH: Same objection.

18 JUDGE DUKES: Okay. I'll allow it.

19 MR. GRIFFITH: And just for the
20 record I'm going to throw in an objection that this
21 is beginning to be a little cumulative.

22 JUDGE DUKES: I'm guessing at some
23 point we are going to run out of adjacent
24 properties. We've got to be getting close. So are
25 we working our way north? Is that what --

1 MS. SHAHID: I think we are done.

2 JUDGE DUKES: Okay.

3 MS. SHAHID: No. No.

4 JUDGE DUKES: No? How many more do
5 we have?

6 MS. SHAHID: Hold on. Done.

7 JUDGE DUKES: I sort of get the
8 picture.

9 MS. SHAHID: Done.

10 JUDGE DUKES: Okay. All right.

11 MS. SHAHID: Finished.

12 JUDGE DUKES: All right.

13 MS. SHAHID: Okay.

14 BY MS. SHAHID:

15 Q. Mr. Hoyler -- Mr. Fanning. I'm so sorry.
16 Mr. Fanning --

17 MS. SHAHID: There is one more, Your
18 Honor. One more.

19 JUDGE DUKES: Sure. Go ahead.

20 MS. SHAHID: I'm so sorry.

21 BY MS. SHAHID:

22 Q. I'm going to show you what has been marked
23 as Defendant's Exhibit 43 which is another plat
24 reflecting Oyster Cove subdivision. Would you agree
25 that that is in the area, the vicinity of

1 Mr. Hoyler's claimed marsh?

2 A. It is not in what he claims.

3 Q. Right. But in the vicinity?

4 A. In the vicinity.

5 Q. And has properties that border that marsh?

6 A. Yes.

7 Q. Okay. And that marsh is shown on Exhibit
8 43 as salt marshes of the Beaufort River, correct?

9 A. It says salt marshes of the Beaufort River
10 on the plat. I'm not -- you are making that
11 interpretation.

12 Q. I'm just saying what it says on the plat?

13 A. It says that on the --

14 Q. Yeah. No interpretation. Just want you
15 to confirm that those words are on the plat. Okay.

16 MS. SHAHID: And I would offer 43
17 into evidence.

18 JUDGE DUKES: Same objection?

19 MR. GRIFFITH: Yes, sir.

20 JUDGE DUKES: And I'll allow it.

21 Thanks. And that is the last one, right?

22 MS. SHAHID: That is. And I'm so
23 sorry --

24 JUDGE DUKES: No, that's all right.

25 MS. SHAHID: -- I misrepresented

1 that, Your Honor.

2 JUDGE DUKES: No problem.

3 MS. SHAHID: Okay.

4 BY MS. SHAHID:

5 Q. And I think for purposes of some of the
6 next questions I might be more comfortable back
7 here. So I'm going to get out of your space for a
8 few minutes. So, Mr. Fanning, do you have in front
9 of you the original plat?

10 A. I do not.

11 Q. The original plats from the -- attached to
12 the original grant? Do you have copies of those?

13 JUDGE DUKES: If you could help him
14 with that --

15 THE WITNESS: These could be copies,
16 but I wouldn't -- I wouldn't call what you gave me
17 original.

18 BY MS. SHAHID:

19 Q. No. No. No. I'm sorry. The original
20 ancient -- I'm going to call them the ancient plats,
21 the plats that were attached to the old grant, do
22 you have copies of those in front of you? Here, I'm
23 going to hand you --

24 A. Show me specifically. Is this the one you
25 are specifically talking about?

1 Q. Well, I want to know which ones -- which
2 one you used and relied on.

3 JUDGE DUKES: Why don't we try just
4 for the record, we will try to refer to the exhibit
5 numbers.

6 BY MS. SHAHID:

7 Q. Right. These are Exhibit 3 which is
8 dated -- can you read that date? 1882?

9 A. 1882.

10 Q. And then appended to a page in plaintiff's
11 Exhibit 2 is a plat I believe dated '92. Am I
12 wrong? Or '91? '91?

13 A. I've seen both of them.

14 Q. And did you utilize both of them when you
15 were trying to prepare your plat?

16 A. I did. I utilized them.

17 Q. All right. And what aspects of it did you
18 utilize?

19 A. Well, the bearings and the distances, the
20 land lot and section reference to adjacent
21 ownerships.

22 Q. Okay.

23 A. And the written description of the
24 property, the acreages.

25 Q. Okay. Aren't there differences between

1 the two plats?

2 A. There are some differences.

3 Q. Bearings and distances differences?

4 A. These aren't the original copies so I
5 can't -- I mean --

6 Q. You don't know?

7 A. You know, I know there is -- this one has
8 E.A. Crofut in one of the adjacent parcels where
9 this one doesn't.

10 Q. All right. And you were able to decipher
11 and read all of those bearings and distances the way
12 they are shown on those exhibits?

13 A. I was. I was able to zoom in on them and
14 convert them from chains to feet and put in the
15 bearings.

16 Q. Okay.

17 A. (Inaudible).

18 Q. I'm sorry. Finish your answer.

19 A. No, go ahead.

20 Q. And do you recall which one in particular
21 you were looking at or was it both?

22 A. You know remembering back -- how long has
23 it been? Seven years? Five years? I can't
24 remember specifically a detail like this. I believe
25 I typed them both in and they represented the same

1 piece of property.

2 Q. Okay. And a plat is defined as a finite
3 piece of parcel -- piece of property; is that
4 correct?

5 A. Not necessarily.

6 Q. Okay. Are you familiar with the
7 definitions in the LLR regulations related to plats
8 and surveys?

9 MR. GRIFFITH: Objection, Your Honor.

10 JUDGE DUKES: What is the objection?

11 MR. GRIFFITH: The objection is
12 unless she can show that the LLR definitions existed
13 in 1882 and 1891 they have no bearing on those
14 plats.

15 JUDGE DUKES: Are you asking him
16 about these plats or currently what the definition
17 is?

18 MS. SHAHID: I'm asking him about the
19 ability to close boundaries based on those bearings
20 and distances with those plats, to re-create the
21 plat that he created.

22 JUDGE DUKES: All right. So -- I
23 guess certainly he's been qualified as an expert.
24 He can answer currently what the definition -- if he
25 knows, what the definition of plat is. So if you

1 know. Was that the first question? Do you know
2 what the definition of plat is? First of all, do
3 you know.

4 THE WITNESS: Yes, I do.

5 JUDGE DUKES: Okay. And what is a
6 plat?

7 THE WITNESS: A plat is a metes and
8 bounds description of a piece of property.

9 JUDGE DUKES: Okay.

10 MS. SHAHID: Okay.

11 BY MS. SHAHID:

12 Q. Now, does that have to be a finite piece
13 of property or can it be open-ended out in the air
14 or in space somewhere?

15 A. It needs to be defined on all sides.

16 Q. All right. And isn't it true that using
17 the courses and bearings in those older grants that
18 accompanied -- older plats that accompanied the
19 grant, it is difficult to close the plat at its
20 northern end?

21 A. On this piece?

22 Q. Yes.

23 A. I didn't have a lot of difficulty reaching
24 an acceptable level of closure with --

25 Q. There is no bearing on this line, correct?

1 A. That's correct.

2 Q. Okay. There is no bearing on that line?

3 A. But there is a way to determine the
4 bearing.

5 Q. Well, but there is no bearing shown on
6 that line, correct?

7 A. Well, it shows a starting point here and
8 it gives an acreage call in which that line can be
9 reestablished.

10 Q. All right. And there is no bearing shown
11 on this line. And I'm pointing --

12 A. And again there is a starting point for
13 this line that is established by bearings and
14 distances. There is a specific acreage call. And
15 that line can be reestablished.

16 Q. Okay.

17 JUDGE DUKES: Let me make sure just
18 for the record. You were first referring to
19 exhibit -- I don't know what that one is.

20 THE WITNESS: Me neither.

21 MS. SHAHID: Two. Plaintiff's 2.

22 JUDGE DUKES: Two? Okay.

23 THE WITNESS: Exhibit 2.

24 JUDGE DUKES: And then the most
25 recent comments had to do with 3 and you are

1 referring to the northern boundary?

2 THE WITNESS: Yes. And the comments
3 are the same. They apply to both drawings.

4 JUDGE DUKES: All right.

5 THE WITNESS: Or both plats that
6 there is a bearing and a distance that defines a
7 starting point of this line right here. And then
8 there is a specific acreage call that can be
9 determined mathematically from this point where this
10 line is going to fall and connect to the mean high
11 water mark on the side.

12 BY MS. SHAHID:

13 Q. So essentially you located that line by
14 measuring acreage above and below that line?

15 A. That's correct.

16 Q. So you could --

17 A. By taking what had been conveyed. It's a
18 parent parcel. Okay? And this northern portion
19 could have been conveyed out. And it's been my
20 experience as a surveyor that if a parent parcel
21 conveys out a specific amount of acreage, and that
22 portion -- that conveyance, any shortages of it come
23 out of the parent parcel.

24 Q. Okay. And do you remember when we took
25 your deposition you talked about a sliding bearing?

1 A. That's right. That is exactly what I'm
2 talking about.

3 Q. And so the sliding bearing is the line --
4 and let me refer to your plat because -- and your
5 plat is Plaintiff's Exhibit 4. This line is a
6 sliding bearing, correct?

7 A. That's correct.

8 Q. Meaning you could move it up or move it
9 down, but you located it based on an acreage
10 assumption?

11 A. There is only one possible outcome --

12 Q. Okay.

13 A. -- to create that specific acreage and the
14 northern portion if you will. There is only one
15 possible outcome from this specific point right here
16 where that line comes from. There is only one
17 possible outcome for where that line can end up on
18 the other side with this specific acreage call.

19 Q. Okay.

20 JUDGE DUKES: Did you have an --

21 MR. GRIFFITH: No objection, Your
22 Honor, but listening to that, he's saying this point
23 here and this point there. And this is a -- if he
24 could just call it out. Is it the northern
25 boundary?

1 JUDGE DUKES: Yeah. I'm sorry.

2 Yeah, the northern boundary.

3 THE WITNESS: That's correct. It
4 would be the northern boundary.

5 JUDGE DUKES: I should have said
6 that. I saw that is what you all were working with..

7 BY MS. SHAHID:

8 Q. Okay. You don't have an acreage
9 measurement up here on your plat to show --

10 A. I wasn't asked to survey that.

11 Q. Okay. And your acreage down here is about
12 five acres? How short is it? Three acres?

13 A. I don't have a specific amount. It would
14 be 89.06 minus 95 and 27/100.

15 Q. All right. So about six acres short?

16 A. Roughly, yeah.

17 Q. Okay. Now, how about the southern
18 boundary?

19 A. How about it?

20 Q. Is that a sliding bearing? Can it be
21 moved up and down?

22 A. No. It has a specific bearing. It has a
23 specific bearing from a point here -- out here. And
24 it has a specific bearing and distance down here.

25 JUDGE DUKES: Okay. And show --

1 THE WITNESS: It has a specific
2 bearing and distance here coming down this way and
3 it has a specific bearing and distance coming out
4 this way.

5 BY MS. SHAHID:

6 Q. Okay.

7 A. That is a turned angle and extended to the
8 mean high water monument.

9 Q. Have you looked at a depiction of this
10 parcel using the Beaufort County GIS? We've looked
11 at several, but have you ever studied one using the
12 Beaufort County GIS picture?

13 A. Yes.

14 Q. Okay. You agree with me that Beaufort
15 County terminates the southern boundary before you
16 terminate the southern boundary?

17 A. Beaufort County did not do a boundary
18 survey.

19 Q. That is not my question.

20 A. Okay.

21 Q. You would agree with me that on that GIS
22 representation the southern boundary does not
23 include this dock here at the end, right?

24 A. I don't know about the dock. I would to
25 look specifically at it, but --

1 Q. I've got the picture.

2 A. -- I do not -- the GIS system has a
3 disclaimer that comes along with it.

4 Q. I understand that.

5 A. Okay. So you can't rely on that to
6 establish -- is that what you are looking for?

7 Q. Yes.

8 JUDGE DUKES: All right. Can you all
9 tell us what exhibit you are looking at?

10 MS. SHAHID: We are looking at
11 exhibit --

12 THE WITNESS: Forty-eight.

13 MS. SHAHID: -- 48 which is the GIS?

14 JUDGE DUKES: Okay.

15 BY MS. SHAHID:

16 Q. And it appears in 48 --

17 A. Yeah.

18 Q. -- that the boundary of the parcel ends
19 before the survey -- ends before the dock, the
20 southern boundary of the parcel as depicted on this.

21 A. I struggle with making an interpretation
22 of your question using the word boundary on a tax
23 map.

24 Q. Okay. The yellow line -- the
25 southern-most yellow line depicting Hoyler's claimed

1 marsh terminates and does not encompass the dock?

2 A. The yellow line does not include the dock.

3 Q. Okay. Now, your parcel -- your survey --
4 are you going to record this by the way? Hasn't it
5 already been recorded? You don't know? I'm asking
6 you.

7 A. I don't know.

8 Q. Okay.

9 A. I personally have not taken it and
10 recorded it.

11 Q. Okay. Are you aware that it's been
12 attached to certain documents of record executed by
13 Mr. Hoyler and recorded?

14 A. I'm aware that he's -- he's paid for me to
15 prepare one for him. He can use it as he pleases.

16 Q. Okay. Now, can you pull this exhibit up
17 again? Is it 40?

18 MR. GRIFFITH: Your Honor, may I
19 approach?

20 JUDGE DUKES: Yeah, please. Probably
21 want to see what is going on.

22 MR. GRIFFITH: Yes, sir.

23 JUDGE DUKES: I don't blame you.

24 BY MS. SHAHID:

25 Q. What else do you capture as reflected on

1 Exhibit 40 that isn't shown in the GIS depiction of
2 2015?

3 A. What is Exhibit 40?

4 Q. I'm sorry. Exhibit --

5 A. Forty-eight?

6 Q. -- 48. Thank you.

7 A. What do I what?

8 Q. What else do you capture? In terms of
9 your extension of that southern boundary, what else
10 do you capture? You've picked up the dock that
11 before now we didn't know was part of the parcel.
12 What else have you captured? How far does that
13 extension go? Can you tell me?

14 MR. GRIFFITH: Object to the
15 characterization of what we knew and what we didn't
16 know.

17 JUDGE DUKES: Yeah, I'll -- anyway.

18 THE WITNESS: So rephrase that
19 question?

20 BY MS. SHAHID:

21 Q. How far on that picture is this line, this
22 point?

23 A. How far on that picture?

24 MR. GRIFFITH: Can we find out
25 which -- can you identify the line for the record?

1 MS. SHAHID: L-78 on Plaintiff's 4.

2 THE WITNESS: I want to qualify that
3 you are asking me to testify to the accuracy of a
4 tax map when I show you where this line is on here.

5 BY MS. SHAHID:

6 Q. No. I'm just asking you to tell me what
7 properties other than --

8 A. It would approximately be depicted down in
9 here.

10 Q. Okay. Down toward the marina?

11 A. Yeah. I mean, there is Lot 36 --

12 Q. Okay.

13 A. And I don't see a Lot 36 on here, but, you
14 know, I believe it to be down in here somewhere.

15 Q. Okay. Down in this open water area?

16 A. I wouldn't call that open water area.

17 Q. Okay. I mean am I --

18 A. I mean, what -- I guess --

19 Q. I'm pointing right above the walkway for
20 the marina. Are you talking about this area?

21 A. That is a mud flat in there.

22 Q. Okay.

23 A. This picture depicts it when the tide is
24 up.

25 Q. Okay. All right. Now let's look again at

1 your plat. You don't call out any water courses or
2 tributaries on the plat that you prepared, correct?

3 A. Let me see it.

4 Q. And water courses or tributaries other
5 than the Beaufort River on the plat that you
6 prepared?

7 A. That's correct.

8 Q. Okay. And you didn't do that because you
9 were locating natural monuments being mean low at
10 the Beaufort River and mean high at the upland?

11 A. That's correct.

12 Q. Okay. And how many elevations -- those
13 weren't -- were those elevations that you shot
14 around the perimeter of this parcel as shown on
15 Exhibit 4? Did you shoot those elevations?

16 A. I did.

17 Q. Okay. And is this reflective of all the
18 elevations that you shot while you were out there?

19 A. On the mean high water mark and the mean
20 low water mark, yes.

21 Q. Okay. And did you investigate the
22 interior of the parcel to see if there is any other
23 intervening mean low water areas?

24 A. The boundary was from the Beaufort
25 River --

1 Q. Okay.

2 A. -- not the confluence or tributaries. And
3 so I retraced --

4 Q. The boundary?

5 A. -- the boundary, what was described in the
6 original plat.

7 Q. All right. So you did not --

8 A. The original plat showed tributaries and
9 included them in there.

10 Q. Okay. You did not shoot any elevations in
11 any of the creeks in order to determine if there is
12 another mean low water?

13 A. I did shoot the elevation across the front
14 of the creeks.

15 Q. Correct. Well, across the front of the
16 creek. Are you pointing to this line?

17 A. Well, where the --

18 Q. That is -- on Exhibit 48, that is --

19 A. Yeah. These dry up at low water at the --
20 at the -- if you had an accurate aerial photograph
21 that represented mean low water mark, you would see
22 that these creeks are shut off.

23 Q. Okay. So you shot elevations at the edge,
24 but not in the interior?

25 A. That's correct.

1 Q. Okay. And by -- in the interior in
2 particular, I'm looking at the area that abuts the
3 Merry Land property which is the southern extension
4 on Exhibit 48?

5 A. That's correct.

6 Q. You did not shoot any elevations in those
7 creeks? Are you -- is it your opinion as a surveyor
8 that your client Mr. Hoyler owns the multiple water
9 courses and tributaries that traverse this parcel
10 based on this aerial photograph, Exhibit 48?

11 A. As a surveyor, I've retraced the original
12 plat.

13 Q. Okay.

14 A. It is not vested in the licensing
15 jurisdiction of a surveyor to certify to title.
16 However, we do look at it and we can have opinions
17 about it.

18 Q. Okay.

19 A. I believe Mr. Hoyler owns this piece --

20 Q. Okay.

21 A. -- that I have surveyed.

22 Q. And you are aware that these creeks are
23 used for public recreation?

24 A. I mean --

25 Q. You see docks?

1 A. -- I haven't gone out there. I do see a
2 dock there.

3 Q. There is a dock up here? There is now a
4 dock down here that has been captured?

5 A. Uh-huh.

6 Q. That would indicate to you, wouldn't it,
7 that people boat and utilize these tributaries for
8 public recreation?

9 A. That would indicate, but I have not been
10 asked to go out there and make observations.

11 Q. Okay. And these tributaries, and by these
12 tributaries I'm referencing two major -- well, I say
13 major. Strike that. Two water features up in the
14 north and a series of smaller tributaries in the
15 south. And these tributaries provide access to the
16 Beaufort River, right?

17 A. Sure.

18 Q. You haven't boated -- have you boated in
19 this area?

20 A. Sure.

21 Q. They do provide access to the Beaufort
22 River?

23 A. Yeah.

24 Q. Okay.

25 A. But let me -- let me ask you a question

1 about your question. When you say they provide
2 access to the Beaufort River, from where?

3 Q. Okay. These tributaries can be navigated
4 from the Beaufort -- into and out of the Beaufort
5 River?

6 A. From the Beaufort River side? Not all the
7 time.

8 Q. Okay. But can they be navigated --

9 A. And it depends on the nature of the
10 vessel. I mean, you can't take a big sport fishing
11 boat up in there.

12 Q. Well, no. But they can be used for
13 recreational navigation?

14 A. When the tide is up.

15 Q. Okay. Certainly you would agree with me
16 that these are -- these are featured differently than
17 the surrounding marsh? I mean, these tributaries,
18 again I'm pointing to the north and then to the
19 south, they don't look the same as the surrounding
20 marsh. I mean, you are not claiming that they are
21 the same as the surrounding marsh?

22 A. I'm claiming that they are above the mean
23 low water mark on the Beaufort River side.

24 Q. But not -- you don't know on the interior
25 because you haven't done that investigation?

1 A. That's correct.

2 Q. And you would agree with me that those
3 older plats the accompanied grant included a
4 reflection of tributaries on them?

5 A. That's correct.

6 Q. But you didn't show any tributaries on
7 your plat?

8 A. That's correct.

9 Q. And if you were to look at those older
10 plats, and I just refer to them in the plural
11 because you used both of them, the ones that
12 accompany the grant, those plats, they don't have a
13 legend, do they?

14 A. Not specifically a legend.

15 Q. There is no scale, is there?

16 A. They can be scaled.

17 Q. Okay. But there is no scale shown on the
18 face of the plat?

19 A. I don't see one, however they can be
20 scaled.

21 Q. Okay. Is there a directional arrow
22 anywhere?

23 A. Sure. The bearings on the lines can
24 orient it.

25 Q. Okay.

1 A. To north.

2 Q. All right.

3 A. But there is not specifically a north
4 arrow on this plat, but the land lot and sections
5 are north, south, east, west. And there are
6 bearings on the lines.

7 Q. Okay. Is there any tie in or tie down
8 area noted on those older plats other than natural
9 linings?

10 A. Well, it shows the -- where it -- it shows
11 where it ties into the land lot and section of
12 adjacent parcels here.

13 Q. All right. You are talking about --

14 A. These are 10-acre blocks of land.

15 Q. Okay.

16 A. So land lot and section.

17 Q. When I asked you tie in, I noticed on your
18 plat that you have a specific tie in. You anchor or
19 tie down the parcel?

20 A. That's correct.

21 Q. Okay. And you do that anchoring or tieing
22 down, which I think might be your beginning point;
23 is that correct?

24 A. Let me see what you are -- point to it.
25 That is a tie, yeah. See, these land lot and

1 sections in Beaufort are very similar to the State
2 plane coordinate system. It's a large network that
3 can be retraced from multiple monuments. You could
4 retrace this property from monuments you find on St.
5 Helena, from monuments you find in Sheldon. It's a
6 major network across Beaufort.

7 Beaufort is the only county in South
8 Carolina I know of where they did the land lot and
9 section system. And you can find those monuments.
10 The State plane coordinate system, the modernization
11 of that, not of the South Carolina land lot and
12 section, but an example of it is the State plane
13 grid system.

14 If everything in South Carolina -- in
15 Beaufort, South Carolina, was obliterated -- it's
16 just a larger network. I could come off with a VRS
17 network from continuously operating reference
18 stations around the state and I could reestablish a
19 point in Beaufort with GPS to a great degree of
20 certainty to relocate that piece of property and the
21 boundary of it.

22 That is why they are so available and why
23 they are in place. And this was in place uniquely
24 and to the benefit of the land owners and surveyors
25 in Beaufort. This has been in place in Beaufort for

1 a long, long time.

2 Q. I guess my point is what makes a property
3 a finite piece of property is to be able to locate
4 it on the ground and you must have a beginning point
5 and an end point, right?

6 A. Right. A beginning point where the
7 property begins and where it ends.

8 Q. And you --

9 A. What it is bound by --

10 Q. Right.

11 A. -- as well as bearings and distances. And
12 cumulatively those point to the boundary of the
13 property.

14 Q. And I'm not a surveyor, and you know that.
15 But I always thought that the tie in point was the
16 beginning point of the parcel?

17 A. You can tie it off site monuments and
18 reference networks and --

19 Q. All right. My question is I don't see a
20 tie in point here. And yet you have selected a tie
21 in point, right?

22 A. I mean, these points here are going to tie
23 in to the land lot and section. Down around here --

24 Q. But you call out --

25 A. See over here?

1 Q. I'm sorry. You call out this as a tie in?

2 A. See that one right there?

3 Q. Barely.

4 THE WITNESS: I'm pointing to this
5 right here, Marvin, maybe you can see it. These are
6 10-acre blocks. And there is a point where it ties
7 in right there.

8 JUDGE DUKES: All right. Well, why
9 don't --

10 MR. GRIFFITH: What exhibit, please?

11 JUDGE DUKES: Yeah. This is
12 Exhibit --

13 MR. GRIFFITH: What is it for the
14 record?

15 THE WITNESS: This is Exhibit 3.

16 JUDGE DUKES: I don't know if that
17 answered your question.

18 BY MS. SHAHID:

19 Q. You called out a specific point as a tie.
20 That specific point as a tie is not the beginning or
21 ending point for this -- these older plats?

22 A. That's right. This is actually part of
23 the parent parcel, not the portion that Mr. Hoyler
24 owns, but it's nonetheless the same parent parcel.

25 THE WITNESS: You want to see --

1 MR. SMITH: Excuse me. I just wanted
2 to see the tie in point to which you were pointing.

3 THE WITNESS: Right here.

4 MR. SMITH: Okay. And by "here" it
5 is on Exhibit 3 at which point? Just read it out so
6 we will know if we have to review the record later.

7 THE WITNESS: I believe it says
8 Politzer. W. Politzer.

9 MR. SMITH: Okay. Thank you.

10 BY MS. SHAHID:

11 Q. And you are aware that Beaufort County's
12 GIS records do not show the 12-acre northern portion
13 as a separate parcel?

14 A. I am aware of that. And I believe they
15 are in error.

16 Q. Okay.

17 JUDGE DUKES: Can I hold 3, please.
18 The plat, right there.

19 THE WITNESS: This one right here?

20 JUDGE DUKES: Yeah. Thank you.

21 MS. SHAHID: Your Honor, if I could
22 have a minute just to talk to my surveyor and
23 engineer?

24 JUDGE DUKES: Sure.

25 MS. SHAHID: I'm about to wrap it up.

1 I'll just step outside for a minute if that's okay?

2 JUDGE DUKES: All right. We will be
3 at ease for a couple of minutes.

4 MR. GRIFFITH: Your Honor, I need to
5 step outside, too.

6 JUDGE DUKES: Sure. Let's all wander
7 around for about five minutes. So you are still
8 under oath. Don't talk to anybody. Feel free for
9 wander about.

10 (Recess 1:35 to 1:44)

11 JUDGE DUKES: All right. Back on the
12 record then. You are still under oath, Mr. Fanning.
13 BY MS. SHAHID:

14 Q. Mr. Fanning, have you placed any pins or
15 markers in the marsh to reflect the boundary that is
16 shown on Plaintiff's Exhibit 4?

17 A. No, I have not. The monuments are the
18 mean high water mark and the mean low water mark.
19 And --

20 Q. Is it your intention to place any pins or
21 markers in that boundary?

22 A. Well, an iron pin isn't going to hold up
23 in the salt water.

24 Q. So is that the reason you didn't do it?

25 A. So I have not set any pins.

1 Q. Is that the reason you didn't set any pins
2 or marks or any indication of boundary line?

3 A. I have tied it to monumentation on the
4 upland so that it can be retraced from
5 monumentation.

6 Q. And let's talk a little bit more about
7 these older plats that you've looked at. I guess
8 they've been --

9 COURT REPORTER: They are in order.

10 MS. SHAHID: I'll find them. Yeah.

11 JUDGE DUKES: Here they are.

12 MS. SHAHID: Okay.

13 BY MS. SHAHID:

14 Q. Now, there is no indication on those plats
15 that they are in chains or feet, is there? You
16 assumed chains and converted to feet?

17 A. I want to say that there was something
18 that specifically indicated it was in chains and
19 that -- whether that was actually a determination
20 that came from you, they are in chains because the
21 Land Lot Section 660-by-660 for a 10-acre block.
22 And those measurements work out exactly to chains.
23 And chains is a unit of measurement that was
24 commonly used at this time.

25 Q. So you assumed they were in chains based

1 on --

2 A. I didn't just assume it.

3 Q. Okay.

4 A. There is a lot of supporting information.

5 MS. SHAHID: Okay. Your Honor, that
6 is all I've got for Mr. Fanning.

7 MR. SMITH: I've got just a few
8 questions.

9 JUDGE DUKES: All right. Go ahead,
10 sir.

11 MR. SMITH: I apologize if any of
12 those are ones that have already been covered, but
13 let's see. Have you -- this is 4. Where is 3? Is
14 that --

15 JUDGE DUKES: Three should be there.

16 MR. SMITH: Two, I guess is -- what I
17 want is the plat.

18 JUDGE DUKES: I've got 2-A which is
19 the deed.

20 MR. SMITH: I would like 2-A if I
21 may.

22 JUDGE DUKES: Yeah. There is 2-A
23 which is the deed. Everything else should now be
24 down there.

25 MR. SMITH: Okay. And these are the

1 plats, the 1881 plats? This is 1882.

2 THE WITNESS: '82, yeah.

3 MR. SMITH: Okay.

4 CROSS EXAMINATION

5 BY MR. SMITH:

6 Q. Now, when you drew Plaintiff's 4, when I
7 was talking to you earlier you said that you had
8 used as monuments where mean high water and mean low
9 water are; is that correct?

10 A. They are considered natural monuments.

11 Q. Okay. Now, to what extent did you use
12 coordinates that are shown on three, Exhibit 3?

13 A. Coordinates as in a --

14 Q. Where it shows coordinates on here,
15 doesn't it, along this line here?

16 A. Those aren't coordinates. Those would be
17 bearings and distances.

18 Q. Bearings. Well, bearings and distances,
19 to what extent did you use those --

20 A. To what extent?

21 Q. -- in drawing Plaintiff's 4?

22 A. I used them to establish the northern and
23 the southern boundary lines as described in my
24 testimony before.

25 Q. Okay. But it also shows bearings along

1 the Beaufort River, doesn't it?

2 A. That's correct.

3 Q. Okay. Did you use those in drawing the
4 boundary on Exhibit 4 along the Beaufort River?

5 A. I mean, it -- I went out and I measured
6 the mean low water mark for -- at the time I was out
7 there off of a tidal benchmark.

8 Q. I understand that, but --

9 A. And established that monument. And I did
10 type that plat in and see how it -- how it matched,
11 how it -- you know, if they agreed with each other.

12 Q. Well, to what extent did they agree with
13 each other?

14 A. Well, there is an overlay that represents
15 that. And in my opinion in over a hundred years --

16 Q. That is this one right here?

17 A. That's correct.

18 Q. Okay. Now, which line on --

19 JUDGE DUKES: Now, you all try to do
20 it one at a time for Deborah.

21 MR. SMITH: I'm sorry.

22 THE WITNESS: Okay.

23 BY MR. SMITH:

24 Q. Which line on here on five shows the mean
25 high water mark line and which shows the --

1 A. I need to step away for a second so
2 everybody can see what I'm talking about, but this
3 red line right here --

4 Q. You are talking about on the top of the --

5 A. On the top of the drawing on the -- north
6 would be this direction.

7 Q. Yeah.

8 A. So this would be the western boundary.

9 Q. Yeah.

10 A. The red line would be the mean high water
11 mark.

12 Q. Okay.

13 A. And the purple line here would be the
14 reference plat.

15 Q. Going by the coordinates in Exhibit 3?

16 A. That's correct.

17 Q. Okay.

18 A. And then on the eastern boundary the mean
19 low water mark as measured in the field would be the
20 red line right here.

21 Q. Okay.

22 A. And the mean low water mark or the
23 boundary of the property would be -- as per the
24 reference plat would be this purple line.

25 Q. Okay. But the boundary on Exhibit 4 is

1 based upon the mean high and mean low water mark?

2 A. At the date of that survey.

3 Q. Yeah. Okay. Now, what is the -- there is
4 a variation on Exhibit 5 between the bearing line
5 and the mean high and mean low water mark line and
6 along the upland properties. What is the amount of
7 the variation there in feet, approximately?

8 A. I couldn't recall from memory exactly what
9 it is.

10 Q. You can't tell by looking at it because it
11 shows points where the lines do not coincide?

12 A. Right. It meanders back and forth. I
13 would be guessing at it if I didn't measure it in
14 AutoCAD and specifically label the drawing.

15 Q. Okay. And did you do any kind of an
16 acreage analysis to determine whether the -- to what
17 extent your drawing of the property matched up with
18 the acreage conveyed in the plat?

19 A. I mean, I did look at it.

20 Q. Did you do -- did out an acreage
21 calculation using some type of a program?

22 A. I did.

23 Q. Okay. And did it -- was it consistent?

24 A. There was, what, about a five-acre
25 discrepancy. I mean, it's listed on that plat the

1 acreage that I determined. And then he has an
2 acreage call here, 95.27. And I have a specific
3 acreage labeled on that plat. If you remove that
4 exhibit, slide it down. 89.06.

5 Q. On Exhibit 4?

6 A. That's correct. On Exhibit 4 it says
7 89.06 which is, you know, roughly -- roughly
8 five acres.

9 Q. And you may have mentioned it earlier but
10 tell me again, please, how you determined mean high
11 water and mean low water.

12 A. Mean high water and mean low water are
13 determined by taking the closest tidal station.

14 Q. Uh-huh.

15 A. And if it's in very close proximity --
16 this one I believe I used a Kemper Azimuth mark in
17 the nearby tidal station to pull my elevations off
18 of. And those tidal stations, NOAA, publishes a
19 19-year tidal ap with the mean high water mark and
20 mean low water mark.

21 And those elevations I correlated to the
22 1998 vertical datum. And I established the contour
23 of the mean low water mark on the Beaufort River
24 side and the mean high water mark on the -- what
25 would be the western side.

1 And then as an additional and valid way of
2 establishing it I looked at a tidal prediction chart
3 for that area, interpolated it between two tidal
4 stations for this specific area, and determined the
5 time from those tidal graphs and charts of when mean
6 low water would be, made sure that the weather
7 conditions were not going to be something that
8 impacted the tide, like a prevailing wind that would
9 make it higher than normal or lower than normal.

10 And I went out in the field and pin
11 flagged it where the water actually was at the time
12 those tidal predictions said it would be at the mean
13 high water mark and said it would be at the mean low
14 water mark. And those two measurements agreed.

15 Q. How far away were these tidal stations
16 that you used, the NOAA stations that you used as
17 references?

18 A. Oh, probably less than a mile.

19 Q. Okay.

20 A. One of them is right at the foot of the
21 bridge downtown. And I'd have to look at my notes
22 for the other one -- where the other one was, but --

23 Q. Did you determine whether there were any
24 differences between where you were measuring and
25 where those stations were measuring that would

1 require that you adjust your data, your calculations
2 any?

3 A. I don't believe there was an adjustment
4 over a couple hundredths of a foot.

5 Q. Okay. Let me just look here. I think I'm
6 done?

7 A. The major -- the more -- the more impacted
8 adjustment is the time in which the tide is going to
9 be at mean low water or mean high water mark at that
10 specific location between the stations.

11 Q. And did you make that adjustment?

12 A. I did.

13 Q. And when was it that you did the mean high
14 water and mean low water calculation?

15 A. I can't remember the specific date of that
16 field work.

17 Q. Well, I mean was it recent or was it back
18 when we took your deposition?

19 A. It was at the time -- it was at the time
20 of that survey, within --

21 Q. This is when? I can't read the data on
22 it.

23 A. What is the -- there is a date range on
24 that plat. I can't read it from here. 2008 to 2010
25 but the field work for the mean high water mark and

1 the mean low water mark were done -- I don't have
2 the specific date in that range.

3 Q. Have you done any work on this property
4 since you drew these -- Exhibit 5 and Exhibit 4 that
5 would change your conclusions at all?

6 A. I haven't done any work on it.

7 MR. SMITH: Okay. Thank you. That
8 is all that I had.

9 JUDGE DUKES: Anything else?

10 MR. GRIFFITH: I have some, Your
11 Honor. Do you have any?

12 JUDGE DUKES: Just briefly. There is
13 a shell rake to the east side of all of that that is
14 not submerged at, I think, even the highest tides.
15 I can't tell from exhibit -- which is your plat?
16 Exhibit Number 4?

17 THE WITNESS: Four.

18 JUDGE DUKES: Is that shell rake
19 included in your plat or not?

20 THE WITNESS: This shell rake is
21 included in the plat. I believe it's where somebody
22 dumps. So it's old shells. It's not an active live
23 shell area, but a white shell if you will that has
24 been piled up by a barge.

25 JUDGE DUKES: Right. I mean, you can

1 actually see it in the aerial. It's pretty large,
2 but that area is never submerged I don't think. Is
3 that your understanding as well?

4 THE WITNESS: No. There is a small
5 area above the mean high water mark in there?

6 JUDGE DUKES: But is that area
7 within --

8 THE WITNESS: It is within the
9 boundary.

10 JUDGE DUKES: In the part that is not
11 submerged?

12 THE WITNESS: That's correct.

13 JUDGE DUKES: Okay. You don't have
14 any idea of the acreage of the part that is not
15 submerged do you? Maybe you do. I don't know.

16 THE WITNESS: I don't. I can go out
17 there and determine it.

18 JUDGE DUKES: Okay. All right. I
19 don't have any other questions.

20 CROSS EXAMINATION

21 BY MR. GRIFFITH:

22 Q. Mr. Fanning, we had a long conversation
23 between you and Ms. Shahid about boundaries. And
24 specifically a number of plats which showed one of
25 their boundaries as being marshes of the Beaufort

1 River or the Beaufort River, correct?

2 A. That's correct.

3 Q. Is that an inappropriate way to call that
4 boundary?

5 A. No.

6 Q. Even if Mr. Hoyler owns the property, is
7 it an incorrect way to call the boundary?

8 A. That's correct. Just as if you were to
9 say it's bound by Lot 17. Lot 17 could be owned by
10 somebody. A road right-of-way can be owned by the
11 government or a railroad right-of-way can be owned
12 by a railroad company. And you may simply put, you
13 know, 75-foot right-of-way, railroad right-of-way.
14 Well, it could be owned by anybody. Marsh land
15 could be owned by people as well.

16 Q. So on alerting anybody that is checking
17 that title as to ownership, does that assist in any
18 way?

19 A. In certifying to ownership? Verifying --

20 Q. Well, in determining if anybody owns it
21 other than the State?

22 A. It represents a natural boundary.

23 Q. Okay. And there was a question about
24 tributaries within -- on these plats, the older
25 plats, which are on Exhibit Plaintiff's 3 --

1 THE WITNESS: I don't have any
2 originals.

3 MR. GRIFFITH: Just a minute here.

4 COURT REPORTER: That is 2 and 1 and
5 4 and 5.

6 MR. GRIFFITH: I think 2 is the one.

7 BY MR. GRIFFITH:

8 Q. On Plaintiff's 2 and 3. And you answered
9 that there were some tributaries shown on those
10 plats?

11 A. That's correct.

12 Q. Are those tributaries near the southern
13 end of the plat?

14 A. No.

15 Q. In response to some questions you had
16 reference to a grid system?

17 A. That's correct.

18 Q. Tell me again what the grid system is.

19 A. It's a Beaufort land lot and section
20 system. Township and range.

21 Q. Would that system have been in place when
22 these plats were drawn?

23 A. It was. Those are 10-acre blocks.

24 Q. When you are saying those are 10-acre
25 blocks --

1 A. Referring to --

2 Q. Referring to Exhibit 3, tell me where the
3 10-acre blocks are.

4 A. They are these blocks up here.

5 Q. On the landward side?

6 A. On the west side.

7 Q. Okay. And are those graphically
8 represented on Plaintiff's 5?

9 A. Yes, they are.

10 Q. And, again, those were in existence during
11 the time when those plats on Exhibits 2 and 3 were
12 drawn?

13 A. That's correct.

14 Q. So it would be fair to say -- well, let me
15 ask it this way. Did you use those old grid lines
16 to establish the southern boundary?

17 A. I established the southern boundary with
18 the specific bearing and distance calls off of the
19 plat here.

20 Q. Okay. And that is on Plaintiff's 3?

21 A. That's right. The land lot and sections
22 help with creating a network to tie into for
23 retracement.

24 MR. GRIFFITH: I don't have anything
25 further.

1 MS. SHAHID: Just a couple questions.

2 REDIRECT EXAMINATION

3 BY MS. SHAHID:

4 Q. Mr. Fanning, are you aware that the plats
5 and surveys that you create as a surveyor are
6 utilized to create legal property descriptions?

7 A. Yes.

8 Q. All right. And you are aware that when
9 using those plats and surveys and describing the
10 piece of property we could -- we as lawyers would
11 describe it as bounded to the west by property of
12 Joe Smith, bounded to the east by property of Sam
13 Smith, that that is how we describe property in
14 legal property descriptions?

15 A. I would disagree.

16 Q. Well, you don't agree that that is how we
17 use your plats and surveys to describe --

18 A. Well, not to the extent that you have to
19 define who owns that property.

20 Q. You would agree with me that a statement
21 bounded to the east by marshes of the Beaufort River
22 is a different statement than bounded to the east by
23 lands owned by Mr. Hoyler?

24 A. They are worded differently, but they can
25 be the exact same thing.

1 Q. All right. But a property description
2 based on any -- those multiples of plats that I
3 provided to you is going to say bounded to the east
4 by marshes of the Beaufort River. It's not going to
5 say bounded to the east by lands of Marshall Hoyler?

6 A. It could very well say that. To be very
7 clear about it, a plat would be correct if it used
8 either description.

9 Q. Okay. And the 10-acre parcels that you
10 describe as being on the plat, there is nothing on
11 those historic plats that accompanied the grant, no
12 scale, no acreage measurement by which you conclude
13 those are 10-acre parcels, correct?

14 A. Repeat that question?

15 Q. The 10-acre parcels that Mr. Griffith
16 asked you about and are reflected on your plats,
17 your re-creation, there is nothing in the original
18 plat that says 10 acres or provides you the
19 measurement of those parcels. You have assumed that
20 from other information outside those plats?

21 A. I haven't made an assumption.

22 Q. Well, you have --

23 A. And it's --

24 Q. Let me -- you have reviewed information
25 outside those plats to come to that conclusion?

1 A. Township and range, land lot and section,
2 State plane coordinates are established grid
3 systems. Okay? They are things you refer to. And
4 there are networks that have been put together to
5 simply this kind of thing. And Beaufort County has
6 one. And there are records in the courthouse that
7 establish the township and ranges. And they have
8 ownership records in there as well.

9 And when a surveyor in Beaufort County
10 looks at a plat and it shows -- you know, this has
11 bearings on it. It can be oriented to north. It
12 has distances on it. It can be scaled with those.
13 And you noticed that these are 660-by-660 which can
14 be determined raw from this. Okay?

15 You know they are 10-acre blocks.
16 660-by-660 is 10 acres. And from that, and knowing
17 that the bearings on the lines are east and west
18 which is what all the grid systems are based off of,
19 cardinal directions. And the fundamental knowledge
20 of land surveying in Beaufort County and other
21 areas, you know, you are on a land lot and section
22 system. These are 10-acre blocks. It's fundamental
23 knowledge that every surveyor should have.

24 Q. My question --

25 A. And that is what -- this plat was drawn

1 with the expectations that everybody can draw these
2 conclusions together.

3 Q. My question, Mr. Fanning, was there is
4 nothing expressly stated on that plat that says
5 10 acres about anything. It's not explicitly --

6 A. I disagree because it can be determined
7 from the information on it.

8 Q. Being able to determine it is different
9 from an expressed measurement or statement of
10 10 acres. I understand that you have determined it,
11 but there is nothing on there to tell you that,
12 correct? Nothing on there that expressly states
13 this is 10 acres. There is no scale? There is no
14 acreage measurement?

15 A. To me it's like a reflex as a surveyor.

16 Q. Okay.

17 A. You look at this. You know it.

18 MS. SHAHID: Okay. All right. That
19 is all I have.

20 MR. SMITH: I've got one question if
21 I may.

22 RECROSS EXAMINATION

23 BY MR. SMITH:

24 Q. You've drawn on Exhibit 5 a line based
25 upon bearings and a line based upon your conclusion

1 of where mean high water and mean low water lines
2 are. Which -- is there a reason why -- and assuming
3 without deciding that, you've accurately done your
4 work, and I mean you no disrespect. I know you are
5 an experienced surveyor, but is there -- which
6 boundary line should be used? Shouldn't the
7 boundary line based upon the bearings be used
8 because that was what was in the original grant and
9 plat rather than the current mean high water, mean
10 low water line?

11 A. Well, the mean high water mark and the
12 mean low water mark are monuments. And the bearings
13 and the distances represent where they were in the
14 1800s and mine represent where they are today. You
15 own to the monument. And ownership is to the
16 monument. You are bound -- you know, if that was
17 the case then there -- you know, those monuments are
18 natural monuments. They erode. They accrete.
19 Storms affect them. People -- you know, but --

20 Q. But they also move. And --

21 A. Well, that is what accreting and eroding
22 is.

23 Q. And in convening this property they didn't
24 say you get the mean high water, mean low water,
25 wherever it may be a hundred years from now or 200

1 years from now. It says you get in property that is
2 currently within mean high, mean low based upon
3 these bearings. They didn't make it a flexible
4 conveyance, did they, that would move around
5 depending upon --

6 A. That is my understanding of it as it --
7 that has been my understanding in my career as a
8 land surveyor is if you own to a mean high water --
9 if you own to a natural monument. And that natural
10 monument moves, so does your boundary line.

11 Q. Well, let me ask you this. Is there any
12 reason why you believe your calculation of the line
13 based upon the bearings is inaccurate?

14 A. Why I believe my conclusion is inaccurate.

15 Q. Is -- are you of the opinion that the line
16 that you have drawn based upon bearings is correct?

17 A. On my drawing?

18 Q. On your drawing Exhibit 5?

19 A. I believe it accurately represents the
20 mean high water mark and the mean low water mark and
21 the northern and southern boundaries for that tract.

22 Q. Well, you show a variation on Exhibit 5
23 between -- some point between the bearing line and
24 the mean high water mark line don't you? We talked
25 about that earlier.

1 A. On these two?

2 Q. Yes.

3 A. Yes.

4 Q. So you've got a variation there?

5 A. That's correct.

6 Q. Is there -- is your calculation of the
7 bearing line in your opinion accurate?

8 A. Which one?

9 Q. The bearing line.

10 A. Based off of this?

11 Q. Again, my understanding is that you drew a
12 bearing line here based upon the original
13 conveyance?

14 A. That's correct.

15 Q. And that you did a mean high, mean low
16 water line based upon your current measurements. My
17 question for you is the bearing line, is that
18 accurate based upon the conveyance in your opinion?

19 A. I believe it is, yes.

20 Q. Okay.

21 A. At the time that it was prepared.

22 Q. Okay.

23 A. A hundred years ago.

24 Q. Okay. But your opinion is that we should
25 instead go by wherever the current mean high water

1 and mean low water mark line is?

2 A. That's correct, because it's a natural
3 monument that can erode, accrete, hurricanes affect
4 it, people dump shells.

5 MR. SMITH: Okay. All right. Thank
6 you.

7 JUDGE DUKES: Anything else of this
8 witness?

9 MR. GRIFFITH: I don't know if we
10 ever permanently got his plat in. And I move that
11 it go in -- that it be made an exhibit.

12 JUDGE DUKES: What number was it?

13 COURT REPORTER: Four.

14 JUDGE DUKES: Is it in, Deborah?

15 COURT REPORTER: I have it in.

16 JUDGE DUKES: Okay.

17 MR. GRIFFITH: Okay.

18 MR. SMITH: Five is in?

19 JUDGE DUKES: The official list says
20 it's in so we are all good. All right. Thank you
21 so much, sir. Do we want to excuse Mr. Fanning? Is
22 he going to be recalled? Do we have any idea?
23 Recalled?

24 MR. GRIFFITH: Yes, sir.

25 JUDGE DUKES: Okay. Well, sorry.

1 Don't go far.

2 THE WITNESS: That's all right.

3 JUDGE DUKES: I'm not sure if we are
4 going to finish this one today. How many witnesses
5 do we have left.

6 MS. SHAHID: Three or four.

7 JUDGE DUKES: Okay.

8 MS. SHAHID: I've got a quick one I'm
9 going to put up if --

10 JUDGE DUKES: Well, I want to get
11 everything on. I just don't want anybody to think
12 we are going to roll out of here at 5:00. I don't
13 think that is going to happen at this point.

14 MR. GRIFFITH: Just for the record,
15 Your Honor, we copied the deeds and wills that were
16 a part of --

17 JUDGE DUKES: Oh, good.

18 MR. GRIFFITH: -- the testimony
19 earlier. And we would move those into evidence.

20 JUDGE DUKES: Those were
21 Mr. Williams' backup; is that correct?

22 MR. GRIFFITH: That's correct, sir.

23 JUDGE DUKES: And we talked about
24 that before. Why don't we clamp those and make
25 those -- what was Mr. Williams' -- what number were

1 we on when he was testifying? We will claim those
2 and put an A next to them or something. Deborah, do
3 you remember? He was our first witness. I mean, we
4 had the deeds --

5 MR. GRIFFITH: I'm thinking 3-A.

6 JUDGE DUKES: 3-A?

7 MR. GRIFFITH: Yes, sir.

8 COURT REPORTER: 3-A of the
9 Defendant's.

10 MR. GRIFFITH: Yes.

11 JUDGE DUKES: All right. Is that
12 good with everyone? 3-A without objection is going
13 to be the collection of the deeds and things that
14 Mr. Williams relied on in his testimony earlier.
15 All right.

16 COURT REPORTER: You said
17 Plaintiff's?

18 JUDGE DUKES: Plaintiff's, yeah. All
19 right.

20 (MARKED PLAINTIFF'S EXHIBIT NO. 3-A.)

21 MR. GRIFFITH: Your Honor, we would
22 like the court to take judicial notice of the South
23 Carolina Civil Statutes approved by the General
24 Assembly in 1893, a portion of them, which
25 specifically refer to the ability of the

1 legislature, ability of the Governor to issue deeds
2 on behalf of the State of South Carolina.

3 JUDGE DUKES: All right. And
4 everyone has seen that I assume?

5 MR. GRIFFITH: That's correct.

6 MS. SHAHID: Yes.

7 JUDGE DUKES: You are all good with
8 it?

9 MS. SHAHID: No objection.

10 JUDGE DUKES: Okay.

11 MR. GRIFFITH: There is another --

12 JUDGE DUKES: We are going to make
13 that one Plaintiff's --

14 COURT REPORTER: The next one for
15 Plaintiff's would be 57 unless you are going to
16 attach it to one of the previous ones again.

17 JUDGE DUKES: Just to confuse you?
18 No. Why don't we go with 57 then.

19 COURT REPORTER: Fifty-seven.

20 (MARKED PLAINTIFF'S EXHIBIT NO. 57.)

21 JUDGE DUKES: And I have a feeling
22 whatever is there is going to be 58. What is the
23 next thing?

24 MS. SHAHID: Your Honor, that number
25 is the Defendant's number.

1 JUDGE DUKES: Oh, wait. These are
2 Plaintiff's exhibits, Deborah.

3 COURT REPORTER: I've got these as
4 Plaintiff's right now.

5 JUDGE DUKES: Okay.

6 COURT REPORTER: But I do have five
7 Defendant's numbers from -- what do you mean --

8 JUDGE DUKES: Did we mix them up?

9 MR. GRIFFITH: Yes.

10 JUDGE DUKES: Yeah.

11 MS. SHAHID: We can fix it.

12 MR. GRIFFITH: We can fix it.

13 JUDGE DUKES: Yeah, we can fix it.

14 MR. GRIFFITH: It's not a problem.

15 JUDGE DUKES: Does anybody really
16 care who the Plaintiff or the Defendant is?

17 MR. GRIFFITH: Not really. Just as
18 long as they are in evidence.

19 JUDGE DUKES: Okay.

20 COURT REPORTER: All right. So I
21 have this one is 57.

22 JUDGE DUKES: 57, yeah.

23 COURT REPORTER: Okay. And it's a
24 Plaintiff, right?

25 JUDGE DUKES: It is Plaintiff.

1 COURT REPORTER: Okay. You want a
2 Plaintiff on it?

3 JUDGE DUKES: Okay. Yeah, let's go
4 with whatever the sticker is. Plaintiff's 57. We
5 will sort it all out. So --

6 COURT REPORTER: Okay. So you've got
7 another one?

8 MR. GRIFFITH: Yes, ma'am. One more.

9 JUDGE DUKES: There is one more.

10 COURT REPORTER: So what do you want
11 on that one?

12 MR. GRIFFITH: We will keep them
13 consistent.

14 JUDGE DUKES: Fifty-eight.
15 Fifty-eight.

16 (MARKED PLAINTIFF'S EXHIBIT NO. 58.)

17 MS. SHAHID: Are you --

18 MR. GRIFFITH: I'm almost ready.
19 These are the antecedent statutes that we talked
20 about. Plaintiff's 58 is the antecedents because
21 there was some question about the timing of these
22 statutes and the timing of the deed. These tie in
23 to show it.

24 JUDGE DUKES: All right. Can I look
25 at those, Deborah, when you've got them all

1 finished.

2 COURT REPORTER: I don't have a clip
3 for that.

4 JUDGE DUKES: All right. All right.
5 I'm going to put those there for a minute. Thank
6 you so much. Is there a particular part of 57 or is
7 it sort of the whole thing is there?

8 MR. GRIFFITH: There is a specific
9 section, Your Honor.

10 JUDGE DUKES: I was just going to put
11 a paperclip next to the --

12 MR. GRIFFITH: Yes, sir. Actually
13 the preface makes 58 unnecessary, but out of an
14 abundance of caution we would put that in.

15 JUDGE DUKES: All right.

16 MR. GRIFFITH: Look at Section 85, I
17 believe, Your Honor.

18 JUDGE DUKES: All right. I'm going
19 to put a paperclip next to 85. Okay.

20 MR. GRIFFITH: Yes. That's it.

21 JUDGE DUKES: Just that? All right.

22 MR. GRIFFITH: Maybe we ought to deal
23 with the State's specific reservation of the
24 phosphate lands.

25 JUDGE DUKES: All right. Now, the

1 deed had something about that in it, right? Didn't
2 the deed reserve --

3 MR. GRIFFITH: Yes, sir. And that is
4 why.

5 JUDGE DUKES: All right. All right.
6 Thank you.

7 MR. GRIFFITH: That is the
8 Plaintiff's case, Your Honor.

9 JUDGE DUKES: That is the Plaintiff's
10 case. Any motions before we hear from the
11 Defendant?

12 MS. SHAHID: We are all consulting
13 for just a minute.

14 JUDGE DUKES: All right. Take your
15 time. We are good.

16 MR. SMITH: Your Honor, for the
17 record, the State moves for a directed verdict. The
18 burden of proof is on the Plaintiff to overcome the
19 State's presumption of ownership. And for the
20 record I would like to make that motion.

21 And a particular part of it I would like
22 to note that under the case law they cannot -- and
23 this was in the e-mail that I sent to Your Honor and
24 counsel yesterday. They cannot claim ownership to
25 land below the mean low water such as the bottoms of

1 streambeds absent a specific statute from the
2 general assembly.

3 And as their witness Mr. Williams
4 testified, they are not claiming below mean low
5 water. So that may be a moot issue. I would also
6 note that the grant itself refers -- has that
7 boilerplate printed language in it about woods,
8 trees, water courses, et cetera.

9 And under State versus Fain, that language
10 cannot in and of itself convey any land below mean
11 high water. And I'll give you that citation. It is
12 259 Southeast 2d 606. And that is Footnote 1. And
13 it referred to the same kind of boilerplate language
14 of water courses, timber woods, et cetera. That
15 cannot in and of itself convey land below mean high
16 water.

17 And so that -- those are the grounds for
18 our motion. And we ask that Your Honor carefully --
19 I know Your Honor will carefully consider the
20 evidence in ruling on this case.

21 MS. SHAHID: And, Your Honor, Merry
22 Land would join that motion and share in the concern
23 that the plat prepared by Plaintiff's surveyor seeks
24 to privatize what are clearly public waterways
25 located both in the southern and northern section of

1 the marsh parcel.

2 And there was no effort made to carve
3 those out, in addition to all of the concerns noted
4 by the Attorney General's Office.

5 MR. SMITH: And I would also add,
6 too, Your Honor -- I want to give this a little bit
7 of thought between now and the end of the trial, but
8 I don't believe that the grant can convey a moving
9 target of land that moves with wherever mean high
10 water or mean low water mark is at a particular
11 time.

12 For example, the law in this state is that
13 natural accretions of land belong to the upland
14 owner where as erosions of upland naturally
15 occurring belong to the State. So I think we would
16 have to go -- and to the extent that Your Honor
17 determines this grant is valid and applicable in
18 this area, we would have to go by the lines based
19 upon the bearings rather than wherever the mean high
20 water or mean low water mark happens to be today or
21 next year or five years ago.

22 JUDGE DUKES: Okay. Thank you.
23 Happy to hear from you, sir.

24 MR. GRIFFITH: Your Honor,
25 specifically, of course, all of the inferences

1 should be drawn in favor of the Plaintiff. I would
2 cite Your Honor to the Low Country Open Land Trust
3 case. And it's at 552 Southeast 2d 778.

4 And in it the court established, to
5 establish fee simple ownership of the marshland
6 tract, the plaintiff must show, Number 1, its
7 predecessors in title possessed a valid grant, which
8 we have shown by the deeds that there is a valid
9 grant of ownership. And the grant's language was
10 sufficient to convey the land below the high water
11 mark to the plaintiff.

12 It goes on to say, and there is a great
13 deal of discussion about attacking a plat. And
14 primarily what the plat and the language in the deed
15 are for are to show the intent of the State because
16 the State does come in cloaked with presumption of
17 ownership.

18 And so the cases where title has passed
19 into private ownership, there are -- there is a
20 great deal of emphasis placed on having words to the
21 effect below the high tide mark, below -- or
22 marshland or something that indicates that the State
23 intended to divest itself of that property.

24 We think clearly the deed contains that
25 language. The attached plat, which became a part of

1 the deed, clearly indicates that the State intended
2 to divest itself of the marshland. At the time the
3 grant was made it was 95.27 acres.

4 The argument about tidal channels,
5 waterways that are navigable, those are not shown on
6 that plat. And much to Mr. Smith's argument, I
7 don't know what has changed since 1882. I don't
8 know whether these channels have advanced or filled
9 in.

10 The question before the court is ownership
11 of this property. And to the extent that there are
12 river bottoms in there, I'm not sure that our client
13 can claim those, but we certainly claim the 95.27
14 acres that was originally granted to him.

15 And again, if we follow Mr. Smith's
16 theory, that the uplands and the lowlands never
17 change. And that there is no dynamic function in
18 the marshland, then the 1882 plat shows two
19 waterways in that plat. And so we would suggest
20 that if Mr. Smith is correct and it's not a dynamic
21 water, then there is nothing that matters whatever
22 is down there at the southern end of this property.

23 Now, if there are waterways down there,
24 that doesn't affect the grant. The question is if
25 they naturally occurred since the grant, then the

1 State, as he says, as property accretes or as
2 property erodes it benefits the highland owner as it
3 accretes. It benefits the lowland owner as it
4 erodes.

5 I'm confident Mr. Hoyler would rather have
6 95.27 acres rather than the 89 acres that
7 Mr. Fanning found that he had, but I disagree with
8 the Attorney General, respectfully. Those are
9 dynamic factors. They are going to change. And
10 that is why you showed them as highlands -- I'm
11 sorry. High water mark and low water mark so that
12 when they change the respective area within those
13 two boundaries changes with them. Thank you.

14 JUDGE DUKES: And I guess I'm trying
15 to put my finger, at this point, on what it is the
16 Plaintiff claims. So the Plaintiff claims between
17 the low water mark and the high water mark. So an
18 area of roughly six feet of shoreline, depending, in
19 that bounded area.

20 And I think I understood the testimony to
21 be it included that fairly significant shell rake.
22 The shell rake is in the photograph that was
23 described, and I think probably accurately, is at
24 high tide is a good bid exposed at high tide. So
25 you are not claiming that I assume?

1 MR. GRIFFITH: Your Honor, at the
2 time the grant was made -- at the time the grant was
3 made it was 95.27 acres. And there is no indication
4 on that plat of a shell bed. And so we don't know
5 what existed at that time. And those are -- this is
6 not shells where there are living oysters.

7 This is a place where it's clear that
8 people have come and dumped oyster shells into the
9 water. Now, what effect the building up based on
10 human activity has on our grant, I don't know the
11 answer to that. And I would be happy to brief it
12 for you, but there is no indication that there was a
13 shell rake there when the original grant was made.

14 JUDGE DUKES: I guess I'm just
15 curious whether or not the purported ownership
16 includes the shell rake area or not.

17 MR. GRIFFITH: Well, it would
18 certainly include that portion of it that is covered
19 at high tide.

20 JUDGE DUKES: But not the part that
21 is dry above high tide.

22 MR. GRIFFITH: I don't want to
23 concede that, Your Honor, because if a man-made
24 area --

25 JUDGE DUKES: You are assuming it's

1 man-made.

2 MR. GRIFFITH: I am. Well, based on
3 his testimony that it was not a living rake. That
4 it was dumped shells.

5 JUDGE DUKES: Anyway --

6 MR. GRIFFITH: If something has
7 developed over time, then again we are in a living
8 area of land. And if something has built up over
9 time then presumably that is not part of his
10 property. Anything below the low water mark --
11 excuse me. Above the low water mark and below the
12 high water mark we are claiming.

13 If at high water some of those shells are
14 exposed, then I don't know that we can claim them,
15 but I don't want to concede that.

16 JUDGE DUKES: Now the other thing I
17 guess that was mentioned earlier, we've got an
18 aerial photo from the County for tax map purposes
19 probably at high tide kind of from the looks of it
20 but it's hard to tell. We don't have one at low
21 tide. So I don't -- maybe there is going to be
22 testimony at some point about what the interior of
23 this looks like at low tide.

24 But let's assume for the moment that it's
25 all threaded with water courses and water and all of

1 that. Is the Plaintiff claiming those water
2 courses?

3 MR. GRIFFITH: Your Honor, at the
4 time that the deed was made to the Plaintiff in
5 1882, there were no water courses shown in that
6 area, but we are in a dynamic area. And to the
7 extent that at the low water mark if these streams
8 are navigable according to law in South Carolina, I
9 don't know what developing those navigable streams
10 over the course of time bodes for the Plaintiff, but
11 I do know this. That on the plat -- on the
12 contemporaneous plat those water courses are not
13 shown.

14 JUDGE DUKES: But as you pointed out
15 a minute ago, the accretion and the -- I mean --

16 MR. GRIFFITH: If it changes and if,
17 in fact, they are navigable streams then I think
18 that that is a discussion that we need to have with
19 the State, but anything within that 95.27 original
20 grant that is above the high water -- below the high
21 water mark and above the mean low water mark we are
22 a claiming.

23 JUDGE DUKES: All right. So just
24 to -- I'm just trying to get a handle on exactly
25 what you are claiming. So it's everything below the

1 low water mark, the high water mark --

2 MR. GRIFFITH: No. Everything above
3 the low water mark --

4 JUDGE DUKES: I should have said
5 between. I'm sorry.

6 MR. GRIFFITH: Yes, sir.

7 JUDGE DUKES: Yeah. Below the mean
8 high water mark, above the mean low water mark.

9 MR. GRIFFITH: Correct.

10 JUDGE DUKES: Within those
11 boundaries, maybe or maybe not including the shell
12 rake, and on that plat. All right. Well, let's do
13 this. The motion was for a directed verdict, which
14 of course is a very difficult verdict -- a very
15 difficult motion at this point in the proceedings.
16 And so I'm going to deny it. And we can proceed.
17 So I am happy to hear from your first witness.

18 MS. SHAHID: Okay. My first witness
19 is Tennent Houston.

20 JUDGE DUKES: How are you. Come on
21 around. Hold up your right hand. Do you swear or
22 affirm to tell the truth, the whole truth, and
23 nothing but the truth so help you God?

24 MR. HOUSTON: I do.

25 JUDGE DUKES: All right. Have a seat

1 if you would. And state your whole name for the
2 record.

3 MR. HOUSTON: My name is William
4 Tennent, T-e-n-n-e-n-t, Houston, H-o-u-s-t-o-n.

5 WHEREUPON:

6 TENNENT HOUSTON, being duly sworn and
7 cautioned to speak the truth, the whole truth and
8 nothing but the truth, testifies as follows:

9 DIRECT EXAMINATION

10 BY MS. SHAHID:

11 Q. Mr. Houston, where are you from

12 A. I'm from Augusta, Georgia.

13 Q. Okay. And if you could, explain to the
14 court your relationship to Merry Land Properties,
15 LLC.

16 A. I am one of three managing partners of
17 Merry Land Properties, LLC.

18 Q. Okay. And what is Merry Land Properties,
19 LLC?

20 A. It is a limited partnership that is
21 involved in the investment and development of real
22 estate.

23 Q. Okay. And how long has that entity been
24 in existence?

25 A. That entity, 10 years. And predecessor

1 organizations go back about 30 years.

2 Q. All right. So how long have you been
3 involved in the business of land development?

4 A. Over 30 years.

5 Q. What is your educational background?

6 A. I have a Bachelors Degree in History from
7 Washington and Lee University, a Masters in Business
8 Administration, and I'm a C.P.A.

9 Q. Okay. And what are -- or what is your
10 role or what types of duties do you perform as part
11 of the managing partner of Merry Land Properties?

12 A. Look for opportunities in real estate both
13 to acquire, dispose of properties. We also are in
14 the wetland and stream mitigation business and other
15 ancillary areas.

16 Q. Is there any particular type of
17 development that Merry Land is known for or do you
18 do everything?

19 A. We do a variety of things, but
20 predominantly we've been involved in the
21 multi-family apartment business.

22 Q. Okay. And what -- what led you to
23 consider the acquisition of property in Port Royal,
24 South Carolina?

25 A. We were looking for an apartment site.

1 And did not find one that we thought was suitable
2 for apartments, but in the process came across a
3 site that we thought was a rare opportunity to build
4 a significant mixed use type development, property
5 including condominiums, perhaps apartments, on the
6 Beaufort River with deep water access.

7 Q. Okay. And how did you learn of the site
8 located in Port Royal?

9 A. We were looking with a local real estate
10 agent named Bill Anderson who had been helping us
11 try to find apartment sites. And he was aware or at
12 sometime later became aware of this opportunity and
13 presented it to us.

14 Q. Okay. And we've got some plats in
15 evidence. And one of them is a plat that Ward
16 Edwards showed -- prepared. And it showed
17 18.43 acres. Is 18.43 the acreage of your
18 acquisition in the Port Royal area?

19 A. The total acreage is 18 acres. It
20 consists of two tracts, primarily; an eight-acre
21 tract that fronts on the Beaufort River and also
22 Johnny Murrell circle. And then across Johnny
23 Murrell Circle another tract that fronts on that
24 road and Ribaut Road.

25 Q. Okay. And how many acres is that tract?

1 A. Ten acres.

2 Q. All right. And what was the intended use
3 of the parcel across the road?

4 A. Well, the original hope was that we could
5 develop one project and could either perhaps
6 persuade the Department of Transportation to reroute
7 Johnny Murrell or else to incorporate it into the
8 development.

9 Q. Okay. Where are you now in your
10 development implementation of the Port Royal
11 project?

12 A. We are here in court.

13 Q. Okay. What -- did you actually have some
14 entitlements? Did you get a --

15 A. Oh, yes.

16 Q. -- development approved?

17 A. Yes. Before we closed the purchase, we
18 did quite a bit of work both to determine the
19 feasibility of a project and also the ability to
20 actually construct such a project. You want --

21 Q. Yes. I would like the details of all of
22 that.

23 A. -- the detail on that? Okay. Well, again
24 the idea was to build a mixed use development. And
25 it looked like a rare opportunity because of that

1 deep water access. And we suspected or we thought
2 after talking to various folks in the area that
3 there was a pretty good likelihood that we could get
4 a permit although the prevailing wisdom at that time
5 was that it would be very difficult.

6 Q. And what kind of permit are you talking
7 about?

8 A. I'm talking about a permit from D.H.E.C.
9 to build a marina.

10 Q. Okay. And when you say prevailing wisdom
11 was difficult, what is it that you understood to be
12 difficult?

13 A. At the time there was -- there remains a
14 creek within that property that the O.C.R.M. and I
15 guess Corps consider to be navigable. And so as
16 part of this long process of buying this property we
17 had many, many discussions with the Corps and
18 engineers and whatnot, and were never able to get
19 permission to cross that creek, but during the
20 permitting process the rules were changed to allow a
21 permit seeker to cross a small body of water to get
22 to a larger body of water; in this case the Beaufort
23 River.

24 Q. Okay.

25 A. Now, we did a lot, a tremendous amount of

1 due diligence on this property. My partners and I
2 have probably have bought, sold, developed over
3 dozens, perhaps a hundred different properties in a
4 number of different states. And we have developed a
5 pretty thorough process of what is called due
6 diligence in the industry; that is, inspections.

7 And so with respect to this property, one
8 of the first things we did was we engaged a local
9 engineer, Ward Edwards, and a local attorney, David
10 Tetters, to make sure that what we were looking at
11 what was we thought it was.

12 We talked to local real estate brokers and
13 dealers in the business, including Low Country
14 Realty. Talked to Mr. Billy Keyserling who has a
15 commercial real estate brokerage. Walked the
16 property with him all in an attempt to determine
17 what would be marketable and what sort of prices we
18 could get for it and so forth.

19 Then the engineers did boundary surveys.
20 We eventually did geotechnical surveys to make sure
21 that we could -- the compaction was suitable. We
22 did tree surveys to make sure there were no
23 landmark-type trees that would impede development.

24 We did a Phase 1 environmental study. We
25 had a land planner lay out several different

1 possible developments, but most importantly we spent
2 a tremendous amount of time trying to get that
3 permit to deep water and retained you at that time
4 to help us in that effort.

5 We worked with Marine -- O'Quinn Marine
6 Contractors also to produce that application and had
7 many meetings with O.C.R.M. and the Corps of
8 Engineers before we finally got it approved.

9 After they okayed it, it was submitted for
10 public comment. I think we had one person comment
11 on it. They objected to the fact that it might
12 obscure their view of the river, but that was not --
13 apparently did not stop the process.

14 And during that time a front page article
15 appeared on our permit with a diagram of the
16 proposed marina which would be a 40-slip marina
17 which was approved and a banner headline. So there
18 was quite a bit of activity involving this, much of
19 it was known to the public.

20 And only after we had all of these things
21 buttoned up to include the permit or assurance of
22 the permit, it actually wasn't -- the letter wasn't
23 received until some time later, did we close the
24 purchase of the properties. In fact, we extended
25 the contracts several times because of -- without

1 access to deep water the development and the prices
2 we were contracted to pay didn't make sense. So
3 when it was all said and done, we closed on the
4 property.

5 Q. All right. And what was the purchase
6 price?

7 A. The total price of all the properties was
8 \$6 million.

9 Q. Okay. And was the property that is off of
10 Johnny Murrell that fronts the Beaufort River, was
11 that property -- did you pay waterfront prices for
12 that property?

13 A. We did indeed. We paid \$4.5 million for
14 that acreage versus \$1.5 million for 10 acres.

15 Q. Okay. And this due diligence and
16 investigation period that you described, over what
17 period of time did that take?

18 A. I think we began looking at the property
19 and talking to the brokers and owners of the
20 property in 2004. And I don't believe we closed the
21 purchase until January of '06, I believe.

22 Q. Okay. And just to get a finger count of
23 the number of professionals you engaged, you had a
24 real estate lawyer?

25 A. Real estate lawyer. You want me to --

1 Q. Go ahead.

2 A. We had a real estate lawyer, a marine
3 whatever, law firm.

4 Q. Contractor?

5 A. Well, marine contractor. A permitting
6 lawyer, that would be you.

7 Q. Okay.

8 A. Geotechnical engineers, civil engineers
9 that were engaged by Ward Edwards. We talked again
10 to the O.C.R.M. and to the Corps. We talked to the
11 City of Port Royal, both administrator and the
12 planning and zoning director to be sure that we had
13 the -- that we could build what we wanted and that
14 they were in favor of the project. They did submit
15 a letter as part of our application endorsing the
16 project.

17 Environmental consultants. And those are
18 the ones I can think of off the top of my head.

19 Q. Okay. And over what period of time did
20 this investigation go, from when to when?

21 A. From -- from probably the middle of 2004
22 until we closed the property which I believe was in
23 December of '06.

24 Q. Okay. And how important was deep water
25 access to your project?

1 A. It was critical. We would not have bought
2 that property or spent -- we would not have bought
3 that property if there had been any question as to
4 whether we had deep water access.

5 MS. SHAHID: Did you want --

6 MR. GRIFFITH: I'm getting there. Go
7 ahead. I'm winding up.

8 MS. SHAHID: Okay. All right.

9 BY MS. SHAHID:

10 Q. And I'm sorry. I've lost my train of
11 thought?

12 MR. GRIFFITH: Well, I'll object now.
13 I don't understand the relevance of this, Your
14 Honor. There has been no claim by Mr. Hoyler that
15 he has any claim to the 95.27 acres of land that is
16 in question here. If this is going toward their
17 equitable defenses, we have an objection
18 specifically based on that. And that is that the
19 defenses of laches and I forget what the other
20 one -- estoppel, they may not be used as
21 offensive -- have any offensive use. They are
22 strictly to be used on -- in response to a complaint
23 against that entity. We certainly have not
24 complained against Merry Land Properties.

25 And if this is going towards those

1 defenses that are set forth in their counterclaim,
2 we would strenuously object to that.

3 JUDGE DUKES: All right. Well, I
4 think we're just trying to make a nice full record
5 here. So I'll allow him to go on, but thank you.
6 BY MS. SHAHID:

7 Q. In the course of consulting with the
8 multiple professionals that you identified, and the
9 Town of Port Royal and other local Beaufort -- some
10 of whom were local Beaufort professionals, did you
11 receive any information to indicate that the marsh
12 might have a claim of ownership?

13 A. None whatever. No one that we discussed
14 with ever indicated anything like that.

15 Q. Okay. And the consultants or other Town
16 officials, et cetera, that you were speaking with,
17 were they aware -- had you made it known that you
18 wanted to construct a marina?

19 A. Yes.

20 Q. And what was your intent for use of that
21 marina?

22 A. The marina would be available to the
23 public, but we figured that the buyers or residents
24 of whatever we might develop as members of the
25 public would have an opportunity to get access to

1 those slips. And that that would add significant
2 value to the development at least on the waterfront
3 tract.

4 Q. Okay. I'm going to show you some
5 documents relating to the permit that was issued
6 that are already in evidence. It's going to take me
7 a couple minutes just to sift through and not take
8 them too far out of order. Okay. I'm going to show
9 you what is in evidence as Defendant's Exhibit 53
10 which was not objected to and ask you if that is the
11 permit that you received from the Department of
12 Health and Environmental Control?

13 A. Yes, it is.

14 Q. Okay. All right. And I'm going to show
15 you Defendant's Exhibit 54 which has not been
16 objected to and ask you if you could identify the
17 first page of Exhibit 54?

18 A. The first page is an affidavit of
19 publication by the Post and Courier -- Charleston
20 Post and Courier.

21 Q. And if you could look at the affidavit --
22 if you could look at what is being published, what
23 does that relate to?

24 A. A public notice. Merry Land Properties
25 has applied to the Army Corps of Engineers and the

1 South Carolina Department of Health and
2 Environmental Control, Office of Ocean and Coastal
3 Resource Management for a permit to construct
4 community marina. Do you want me to keep reading?

5 Q. No. That is good. All right. And the
6 second page of that exhibit?

7 A. That is an affidavit filed in the County
8 of Beaufort and State of South Carolina again
9 showing that public notice.

10 Q. Okay. And the third page of the exhibit?

11 A. The public notice itself. The following
12 is provided for further description of the proposed
13 project and follows a description of the marina.

14 Q. Okay. And then the fourth page of --
15 remind me of the exhibit number if you don't mind?

16 A. Fifty-four.

17 Q. Exhibit 54.

18 A. And then a public notice clarification --

19 Q. Published by D.H.E.C.?

20 A. Published by D.H.E.C.

21 Q. I'm sorry. Does it have a different date
22 from --

23 A. August 29, '06.

24 Q. And what is the date of the first
25 publication?

1 A. January 21, '06.

2 Q. Okay. And if you can turn the page after
3 that, what is that? I better be more specific
4 instead of saying what is that. 1, 2, 3, 4 pages
5 into Exhibit 54.

6 A. Public notice, Charleston District, Corps
7 of Engineers. This is the Corps public notice.

8 Q. And what is it dated?

9 A. Dated December 23rd of '05.

10 Q. Okay. In that package, Exhibit 54, how
11 many public notices are contained in that package?

12 A. Four, five.

13 Q. Okay. Well, there are two newspaper
14 notices.

15 A. Okay.

16 Q. And then how many --

17 A. Public notices? I've got 1, 2, 3.

18 Q. Okay. All right. And I'm going to show
19 you what has been admitted in evidence as
20 Exhibit 52. And I haven't handed it to you yet, but
21 if you look on 1, 2, 3, 4, 5, the 6th page of
22 Exhibit 52, what have you got?

23 A. A certificate of mailing.

24 Q. Is it of your permit application?

25 A. Of Merry Land Properties as permittee.

1 Q. Okay.

2 A. And D.H.E.C., O.C.R.M. certifies that they
3 have mailed the following issuing memo affixed
4 hereto to the following.

5 Q. Okay.

6 A. And a number of different -- let's see. 1,
7 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 individuals.

8 Q. Okay. Turn the page again. Another
9 certificate of mailing?

10 A. Another certificate of mailing, another
11 one.

12 Q. And another one in the back?

13 A. Another one in the back.

14 Q. Okay. Did you as developer instruct those
15 professionals working for you to provide all
16 necessary information to public agencies that they
17 requested?

18 A. We did.

19 Q. Did you as developer do anything to hide
20 your activity or not involve the affected public in
21 your activity?

22 A. No.

23 Q. Your intended activity? I'm going to ask
24 you to look at something else. This is also part of
25 Exhibit 52 which is in evidence. It's 1, 2, 3, 4, 5

1 pages in. And it's a memorandum to file from Bill
2 Eiser. Do you remember who Bill Eiser is?

3 A. No. Apparently he's at O.C.R.M.

4 Q. Uh-huh. And so you stated --

5 A. I see. All right.

6 Q. You stated in your earlier testimony that
7 the regulation had changed. I thought just for
8 further edification could you read the first couple
9 of sentences of Mr. Eiser's memo?

10 A. Okay. Dated May 16th, '06. Regarding the
11 issue of jumping a navigable creek, based on my site
12 visit of 2/21/06, I have concluded that the smaller
13 creek this dock walkway will cross over is, in fact,
14 navigable. However, I think it is appropriate to a
15 apply regulation 30-12(A) (1) (n) which states rare
16 geographic circumstances such as very close
17 proximity of a significantly larger creek within the
18 extension of property lines may warrant dock
19 extension to a creek other than the first navigable
20 creek.

21 Q. Okay.

22 A. Et cetera.

23 Q. And if I showed you the aerial on
24 Exhibit 48 of your property, would you be able to
25 indicate to the Judge which creek Mr. Eiser is

1 commenting on? It's the creek that your marina
2 crosses.

3 A. Yes, I would. It's this creek through --

4 Q. And you know what, maybe if you had a
5 black pen or something that could also circle it on
6 the exhibit. See if yours doesn't work. Okay.
7 You've outlined in black a water -- just that water
8 feature?

9 A. It might have -- actually it might have
10 gone a little further, but let's see.

11 Q. All right. If you want to show that --

12 MR. GRIFFITH: Where is this?

13 THE WITNESS: This is this little
14 black --

15 MR. GRIFFITH: All right.

16 THE WITNESS: It probably went up to
17 here actually.

18 MR. GRIFFITH: Okay.

19 MS. SHAHID: Okay.

20 THE WITNESS: Down there toward the
21 bottom.

22 JUDGE DUKES: Yeah, I see it. I see
23 where you marked it. Thank you.

24 BY MS. SHAHID:

25 Q. And have I provided you any information

1 about the current validity of your permit?

2 A. I understand they are still in effect.

3 Q. Okay. And just to refresh your memory
4 about the information that I've provided, did I talk
5 to you about a joint resolution in 2010 and 2013
6 that extended development approvals?

7 A. You did.

8 Q. Okay. And do you see those in front of
9 you?

10 A. I do.

11 Q. Okay. And I'll look just a minute. And
12 do you see that O.C.R.M. permits are shown on the
13 table attached as those affected by the joint
14 resolution affecting development approvals?

15 A. Yes.

16 Q. Okay. And what again are the years of
17 these joint resolutions?

18 A. Well, July 26, '13. The earlier one was
19 November 26 of '10.

20 Q. Okay. Did you see in your inspection of
21 the property that you were purchasing, did you
22 observe whether other individuals abutting the marsh
23 claimed by Mr. Hoyler had constructed docks over the
24 property?

25 A. I did.

1 Q. How many docks did you observe?

2 A. I think there were three.

3 Q. Okay. And what, if anything, did that
4 lead you to conclude regarding your ability to use
5 the -- traverse over the marsh property?

6 A. Well, it indicated that what I think
7 everyone assumed was that was State -- marshland
8 that belonged to the State. And that a waterfront
9 property owner could get a permit to build a dock.
10 There was also a sewer effluent pipe that ran
11 through that property. In front of part of our
12 property there is a small man-made earthen jetty.
13 There was quite a bit of evidence of (inaudible)
14 into that property by other parties.

15 Q. Okay. And was there any physical
16 indicater on the property or on the -- did you
17 inspect your shoreline --

18 A. Yes, ma'am.

19 Q. -- vis-a-vis the parcel of marsh?

20 A. We did.

21 Q. Was there any physical indication to you
22 that the area seaward of mean high water abutting
23 the property -- your four marsh parcels, Beaufort
24 River parcels, was being used privately?

25 A. No.

1 Q. Were there any signs?

2 A. No.

3 Q. Any fences?

4 A. No.

5 Q. Any structures at all?

6 A. No.

7 Q. Okay. And how has the inability to move
8 forward and utilize these permits -- has it harmed
9 Merry Land Properties?

10 A. Oh, absolutely. We've been pretty much
11 stymied because we bought it for one purpose. And
12 until this matter is resolved we cannot use it for
13 that purpose. And to dispose of it without
14 exercising that right would be at a disastrous loss.
15 And in the meantime as this thing has dragged on we
16 are paying interest. We've probably paid a million
17 dollars interest on these properties as these
18 proceedings have continued.

19 MS. SHAHID: Okay. Your Honor, I
20 don't have anything else for Mr. Houston.

21 JUDGE DUKES: All right. Thank you.
22 Any questions?

23 CROSS EXAMINATION

24 BY MR. GRIFFITH:

25 Q. Mr. Houston, good afternoon.

1 A. Good afternoon.

2 Q. I'm Jeff Griffith. I think you and I have
3 met before.

4 A. We have.

5 Q. Mr. Houston, it is clear from your
6 testimony that Merry Land Properties did a
7 spectacular amount of due diligence before it bought
8 this property.

9 A. We did.

10 Q. Did your title examination turn up any
11 evidence of Mr. Hoyler's property?

12 A. No.

13 Q. Did anyone search the tax records in
14 Beaufort County?

15 A. Of?

16 Q. To determine whether or not there was
17 anybody paying taxes on this piece of property owned
18 by Mr. Hoyler?

19 A. I don't believe any records were searched
20 other than those of the property we acquired.

21 Q. So it wasn't important to you to know
22 whether or not there might be a claim by some
23 individual seaward of your property?

24 A. All indications we had was that there was
25 no such person.

1 Q. But in all of that due diligence you
2 didn't ask anybody to check on that?

3 A. Well, we had surveys prepared that showed
4 it belonged to the State. That was what we relied
5 on.

6 Q. Okay. But a survey is not a title
7 examination, is it?

8 A. No.

9 Q. And so a title examination may have showed
10 or would have showed that there were taxes being
11 paid on that property?

12 A. Yes.

13 Q. And there was a tax parcel number assigned
14 to it?

15 A. If -- had that been done it apparently
16 would have, yes.

17 Q. Okay. Now, you don't think that
18 Mr. Hoyler has done anything wrong, do you?

19 A. Well, obviously we have now suffered quite
20 a bit of damage by the inability to use our
21 property. Whether that has occurred by his
22 negligence or desire to extract money from us, I
23 don't know.

24 Q. You don't think there is anything wrong
25 with somebody paying taxes on property that they

1 own, that they have a chain of title to and they
2 have title in their name?

3 A. No.

4 Q. You wouldn't expect them to do anything
5 else, would you?

6 A. I might expect them to do else, but I
7 don't see anything wrong with doing that.

8 Q. Now, you and I had a deposition in which
9 you testified under oath in September of 2010. And
10 I'm going to give you that testimony now. If you
11 will unseal that. We can do it together.

12 JUDGE DUKES: Wow. That one is like
13 shrink wrapped?

14 MR. GRIFFITH: It is shrink wrapped.
15 And, of course, I haven't tried to open it.

16 THE WITNESS: They wouldn't let me
17 bring a knife in.

18 MR. GRIFFITH: Maybe we need a pair
19 of scissors.

20 JUDGE DUKES: Deborah, have you got
21 such a thing?

22 MS. SHAHID: I don't have a probably
23 with him not using the sealed one if you just want
24 to show him he's misstated something.

25 MR. GRIFFITH: That's right. That's

1 all.

2 JUDGE DUKES: I've got a key. Here,
3 hand it over. I think I can get it open. You got
4 it?

5 MR. GRIFFITH: I got it.

6 BY MR. GRIFFITH:

7 Q. I'll ask you to turn to Page 18. Actually
8 the question starts on Page 17 on Line 25. I'm
9 going to read the question. And I would like for
10 you to read your answer.

11 So based on what you learned from your
12 professionals subsequent to the discovery of
13 Mr. Hoyler's claims to the marsh, is it your
14 assertion that Mr. Hoyler did anything wrong? And
15 what is your answer?

16 A. Read the answer? I have not asserted
17 that.

18 Q. All right. So at that time you didn't
19 think Mr. Hoyler had done anything wrong. Is there
20 anything wrong with maintaining a piece of property
21 that you own?

22 A. I'm not sure that property was ever
23 maintained other than just owned.

24 Q. Is there anything wrong with paying taxes
25 on property?

1 A. No.

2 Q. Is there any obligation that Mr. Hoyler
3 has to notify anybody other than by the public
4 records of this State of his ownership interest in
5 that property?

6 A. Certainly there is no requirement to do
7 so. It is customarily done.

8 Q. And by what method?

9 A. Well, you know, property -- undeveloped
10 property that we own we generally maintain it, if it
11 needs maintaining. If we think people might
12 incur -- my intrude on the property or dump or
13 whatever we post the property.

14 Q. Don't you think it would be a little
15 impractical to post a piece of property that is
16 inundated by the tides twice a day?

17 A. No. You know, in my -- boating in this
18 area I see markers of all sorts in marsh areas. For
19 example, you know, oyster harvesting areas.

20 Q. Ms. Shahid showed you a number of
21 documents related to your dock permit?

22 A. Yes.

23 Q. And in that dock permit you said that
24 there was a substantial amount of public notice?

25 A. Correct.

1 Q. And where was that public notice provided?

2 A. Post and Courier, I believe the Beaufort
3 Gazette. I don't know what other, you know, online
4 or other methods they used to disseminate that.

5 Q. It would not have been published in Rhode
6 Island?

7 A. No.

8 Q. As a part of that permitting process you
9 were required to mail out notices?

10 A. We were.

11 Q. And in mailing out those notices you mail
12 out notices to individuals, do you not?

13 A. To all adjacent landowners.

14 Q. Okay. And the purpose of that is to
15 notify those individuals or entities that might miss
16 the public notice; is it not?

17 A. I think it's to give special notice to
18 those people who are most likely to have -- to be
19 affected by the permit.

20 Q. Right. So it's kind of a belts and
21 suspenders approach --

22 A. A what?

23 Q. Belt and suspenders approach to give
24 notice to those people who have adjacent property?

25 A. A belt and suspenders?

1 Q. Yes. Holding -- doubly protecting?

2 A. Yes, sir.

3 Q. All right. And is Mr. Hoyler listed on
4 any of those individual notices?

5 A. No. No, he's not. He was not -- as far
6 as anyone knew he was not an owner of the property.

7 Q. So he would not have been given an
8 individual opportunity to notify you early on of his
9 interest?

10 A. Not in this process, no.

11 Q. And Merry Land doesn't claim any interest
12 in any property below the high water mark in
13 Beaufort County?

14 A. No.

15 Q. So you don't claim any portion of the
16 property that Mr. Hoyler owns?

17 A. No. The State owns it.

18 MR. GRIFFITH: Mr. Hoyler owns --
19 that is all.

20 MS. SHAHID: I do have some
21 follow-up.

22 JUDGE DUKES: Yes. Go ahead, please.

23 REDIRECT EXAMINATION

24 BY MS. SHAHID:

25 Q. Mr. Griffith asked you about what has

1 Mr. Hoyler done to harm you. And I would like to
2 ask you about maybe what he hasn't done. And I have
3 talked to you -- I'm using a manual that was
4 provided to me by Mr. Griffith. And it includes
5 Statute 48-39-220.

6 And are you familiar with that statute,
7 the statute that gives rise to this civil suit?

8 A. No, not really.

9 Q. Okay. All right. Assume for me, because
10 it's true, but assume for the sake of argument that
11 Chapter 39 relates to the Department of Health and
12 Environmental Control. If you -- if you could, read
13 Section (A) for me.

14 Any person claiming an interest in
15 tidelands which for the purpose of this section
16 means all lands except beaches in the coastal zone
17 between the mean high water mark and the mean low
18 water mark of navigable waters without regard to the
19 degree of salinity of such waters may institute an
20 action against the State of South Carolina for the
21 purpose of determining the existence of any right,
22 title, or interest of such person in and to such
23 tidelands as against the State. Service of process
24 shall be made upon the Secretary of State, Budget
25 and Control Board.

1 Q. And if you could read the last paragraph,
2 Paragraph (D)?

3 A. The Attorney General shall immediately
4 notify the Department upon receipt of any private
5 suit made under this section, his response to that
6 suit, and the final disposition of the suit. The
7 Department will publish all such notifications in
8 the State Registrar.

9 Q. Okay. And the Department being D.H.E.C.
10 What was the regulatory entity that was reviewing
11 your marina permit?

12 A. O.C.R.M. which is a component of D.H.E.C.

13 Q. And this civil action that we are involved
14 in today, it was filed after the permit was issued?

15 A. The civil --

16 Q. This lawsuit.

17 A. Yes. Yes. Yes.

18 Q. Okay.

19 A. Yes.

20 Q. And it was filed or how did Mr. Hoyler
21 come to learn about the permit?

22 A. After we closed the purchase and the
23 permit was issued, we contacted our bank to
24 refinance the loan. And they had an appraiser who
25 in his analysis noticed on the local Beaufort County

1 GIS system, the computers, that there seemed to be a
2 tax parcel there.

3 And at that time we sent a letter -- an
4 offer to purchase the marshland or his purported
5 interest in it from Mr. Hoyler.

6 Q. Is it your understanding that Mr. Hoyler
7 learned about the permit and your interest in the
8 marsh from you before he learned about it from
9 anybody else?

10 A. I don't -- I would assume so, but I don't
11 know what he knew before.

12 Q. Okay. And is it -- is it correct that as
13 soon as you learned of his identity you reached out
14 to him?

15 A. Correct. I guess I had -- also had that
16 notice that we described in there been filed, then
17 we would have known. In other words, had he started
18 this action and that notice was made -- public
19 notice was made, then we would have been made aware
20 of his purported interest in that property from the
21 outset before we got so deeply into this.

22 Q. Well, looking again at Section (D) of
23 48-39-220, and I assume for the sake of argument
24 that the Department means D.H.E.C., who else would
25 have known?

1 A. The attorney general shall immediately
2 notify the Department, meaning D.H.E.C.

3 Q. Okay.

4 A. So D.H.E.C. was the only -- we applied for
5 the permit.

6 MS. SHAHID: Okay. That is all I've
7 got, Your Honor.

8 JUDGE DUKES: Anything of this
9 witness?

10 MR. SMITH: No questions, Your Honor.

11 JUDGE DUKES: Okay. Anything else?

12 RE CROSS EXAMINATION

13 BY MR. GRIFFITH:

14 Q. So the time sequence of this is you buy
15 the property and you are going to refinance the
16 property. And when you refinance the property --
17 when you were in the process of refinancing the
18 property lo and behold somebody finds a GIS tax
19 number. And that tax number belongs to Mr. Hoyler?

20 A. Correct.

21 Q. And that tax number would have been
22 available to anyone prior to your purchase of this
23 property?

24 A. Had somebody -- obviously not on GIS, but
25 apparently those records did exist at the County.

1 Q. Okay. So had anybody made the effort to
2 look, they would have found that prior to your
3 buying this property in the tax records?

4 A. That is true. That is not, of course,
5 customary or normal in professional practice.

6 Q. Well, the question is would we have found
7 it or not?

8 A. Yes.

9 Q. Now, I've got a blown up version of our
10 statute. So I'm going to stand back here.
11 Everybody can read it. In Part (A) I want you to
12 tell me what obligation there is on the part of the
13 purported landowner to bring this suit.

14 A. Anyone who claims an interest in order to
15 perfect that interest must institute an action
16 against the State of South Carolina.

17 Q. Now, it doesn't say must, does it?

18 A. May. Okay.

19 Q. May?

20 A. May.

21 Q. So they are not obligated to ever bring
22 this lawsuit, are they?

23 A. No, not if they -- no.

24 Q. So Mr. Hoyler, if he had sat there for the
25 next hundred years under that statute there is no

1 obligation whatsoever for him to bring this lawsuit.
2 And he, in fact, brought this lawsuit after he was
3 informed that there was a proceeding and the permit
4 was about to be issued?

5 A. I don't know what the limitations are on
6 that statute.

7 Q. Well, you see it?

8 A. Well, I don't --

9 Q. You can read plain English. There is no
10 obligation there, is there?

11 A. In that paragraph I don't see an
12 obligation.

13 Q. All right. Would you like to see the
14 whole statute?

15 A. No. I was -- you said forever. I'm not
16 so sure -- but at any rate, I think what that says
17 is that in order for him to own the property he has
18 to file the action.

19 Q. He doesn't have to do anything, does he?
20 May?

21 A. In order to own it he would have to do it,
22 right?

23 Q. Not necessarily. He's got a deed to it.
24 I think my -- we can flit around here on what the
25 meaning of the statute is, but the clear implication

1 of what you testified to earlier about your bank
2 finding the GIS tax map reference which indicated
3 that Mr. Hoyler had that property and had done what
4 he was obligated to do by the State of South
5 Carolina for public notice, that anyone doing your
6 due diligence looked in the tax records of Beaufort
7 County they would have found that, wouldn't they,
8 prior to your purchase?

9 A. If anyone had looked at that specific
10 parcel which was normally shown in every other
11 publication as property of the State of South
12 Carolina, if anyone had done a title search of that
13 particular piece of property they would have found
14 another owner.

15 Q. Let me ask you this way. You are not
16 saying that the bank was doing a title examination
17 on Mr. Hoyler's property. They were doing a title
18 examination on your property, weren't they?

19 A. Yes.

20 Q. So they found it?

21 A. Well, what I'm saying is the fact is that
22 that parcel did not show on the County GIS system at
23 the time we bought the property and did the due
24 diligence. It appeared sometime later for some
25 reason.

1 Q. So you are blaming Mr. Hoyler for an error
2 on the part of the Beaufort County GIS system?

3 A. No.

4 Q. So if the GIS system was inoperable or had
5 a problem, that is not Mr. Hoyler's fault, is it?

6 A. No.

7 Q. And so if they had been doing due
8 diligence, if they knew that at that time the GIS
9 system was being swapped out, was being switched
10 over, and that there might be a problem they could
11 have gone to the paper records and found it?

12 A. They could have gone to the paper records
13 and found it.

14 MR. GRIFFITH: Nothing further.

15 JUDGE DUKES: Anything else of this
16 witness?

17 MS. SHAHID: No, sir.

18 JUDGE DUKES: Okay. Thank you so
19 much, sir.

20 THE WITNESS: Thank you.

21 JUDGE DUKES: All right. Call your
22 next witness.

23 MS. SHAHID: David Tetter.

24 MR. SMITH: Your Honor, if I may, I'm
25 just going to slip across the hall real quick, but

1 you can go ahead. I don't need a break.

2 JUDGE DUKES: You know what, why
3 don't we just take a five-minute break. I think
4 Deborah needs one, too.

5 MR. GRIFFITH: That is an awesome
6 idea.

7 JUDGE DUKES: Let's take a
8 five-minute break.

9 (Recess 3:15 to 3:22.)

10 JUDGE DUKES: Back on the record in
11 07-CP-07-3212. Mr. Tetter, can you hold your right
12 hand up for me, please. Other right hand. Swear or
13 affirm to tell the truth, the whole truth, and
14 nothing but the truth so help you God?

15 MR. TETTER: I do.

16 JUDGE DUKES: Okay.

17 WHEREUPON:

18 DAVID TETTER, being duly sworn and
19 cautioned to speak the truth, the whole truth and
20 nothing but the truth, testifies as follows:

21 DIRECT EXAMINATION

22 BY MS. SHAHID:

23 Q. Please state your full name for the
24 record.

25 A. David Lee Tetter.

1 Q. And where do you live, Mr. Tetter?

2 A. I live on Lady's Island in Beaufort
3 County.

4 Q. All right. And, Mr. Tetter, what do you
5 do for a living?

6 A. I'm an attorney.

7 Q. How long have you been an attorney?

8 A. Since 1980.

9 Q. Okay. And do you have any specialty in
10 your practice?

11 A. Not necessarily. I can't say a specialty
12 under the rules, but my focus is on land use, real
13 estate closing, governmental law.

14 Q. All right. And for how many years have
15 you been practicing real estate law?

16 A. My first closing I recall was in 1982.

17 Q. Okay. And what percentage of your
18 practice relates to real estate?

19 A. At the time I did this transaction that is
20 at issue here it was probably about 60 to
21 65 percent. Recently I took a job as a governmental
22 attorney, as a County attorney, so it's probably a
23 reverse now, about 35 percent at this point.

24 Q. Okay. And tell me what you were hired or
25 retained to do by Merry Land Properties?

1 A. To handle the assimilation of properties,
2 the closing and obtaining by fee simple several
3 properties in the Port Royal area for a development
4 that they were contemplating.

5 Q. Okay. And you had to leave to go to a
6 meeting and probably were not here when Mr. Houston
7 testified, but he described a 10-acre parcel on one
8 side of the road and then 18 acres on the other side
9 including, I think, eight acres of waterfront
10 property?

11 A. That was correct. I don't remember the
12 exact anywhere, but there was a large parcel we used
13 to call the Sutcliffe Trailer Park. And then they
14 had all the parcels that were along the edge of the
15 Beaufort River and the marshes in that area that
16 were across Johnny Murrell Circle.

17 Q. All right. And so what were you tasked
18 with doing?

19 A. Initially tasked to go out and research
20 the titles on this, coordinate between the various
21 professionals that would be involved in a closing
22 with the surveyors, the title abstracters, those
23 things to get the data together to be able to say we
24 could -- we had the right people selling to us. We
25 knew what liens and other things affected the

1 properties we had to take care of. And to be able
2 to issue ultimately a title insurance policy as part
3 of the closing when we obtained the deed from the
4 various sellers.

5 Q. Okay. And as somebody with a big real
6 estate practice over the years, are you familiar
7 with the Beaufort County GIS system?

8 A. I have watched it develop over the
9 decades, yes.

10 Q. And have there been any changes or
11 modifications to that system? And, if so, when and
12 what were they?

13 A. As we transitioned from paper records that
14 were prevalent up until probably the early 2000s,
15 the County purchased software systems in order to be
16 able to assimilate all of the paper documents into a
17 more searchable type process and coordinate
18 against -- amongst the various organizations; the
19 assessor, the auditor, et cetera.

20 So sometime I believe it was in the late
21 '90s we started using a Smith data system. Then it
22 was transferred over to something else, migration of
23 data. Ultimately we went to a Manitron System I
24 think at the time we did this transaction. So there
25 were multiple platforms of software that were tried

1 out and used as -- you know, all governments
2 basically grew into a digitized system at that time.

3 Q. Okay. Now, was there a particular change
4 that affected this transaction? Do you remember
5 when you closed this transaction?

6 A. I think what you are getting at is at the
7 time we closed this we were trying -- there had been
8 a migration of data from one program to another.
9 And it is my recollection that as with any software,
10 when we change it over we find errors. We report
11 errors. There are programming glitches, those types
12 of things that are worked through.

13 And then every time it was transferred
14 over from the paper to the first, to the second, to
15 the third there were improvements along the way
16 trying to get it so that when you input data, you
17 would get it. I recall, and particularly in this
18 case if you will, that when we abstract -- and
19 I'm -- just like Mr. Williams testified earlier, I
20 hire an abstractor to look at it, bring me the
21 record at least 60 years old. We look at it. We do
22 those types of things.

23 And in looking at the surveys, we look to
24 see what we can see. We don't rely on the tax
25 records, but we look at it to give us good sign

1 posts and areas to where to start looking at things
2 as we are looking at the property that we are
3 actually abstracting.

4 In this particular case it's my
5 recollection that when we went to each of the --
6 let's focus on the waterfront properties. Each of
7 the different owners there, and looked at the tax
8 records and the tax maps to see where we were, we
9 could see what they were against, compare the
10 abutters.

11 And in this case when we looked we didn't
12 see any indication on the river side that there was
13 a tax parcel out there. When you look at this way
14 that the GIS maps print out, depending on the layers
15 that you have, you see the street address, you see
16 the tax parcel number, all of those things there.

17 And in this case we didn't see anything,
18 so we didn't go digging to try and find something
19 because in all the deeds that we did on the eight,
20 pretty much they all had the same description on
21 that eastern side.

22 Q. Okay. And what description are you
23 referring to?

24 A. Bounded on the east by the marshes of
25 Beaufort River or Beaufort River.

1 Q. And what conclusion do you as a real
2 estate attorney reach when you see multiple plats
3 and deeds that say bounded on the east by the
4 marshes of the Beaufort River?

5 A. Well, that the boundary is the Beaufort
6 River or the marsh.

7 Q. Okay. Do you -- do you -- is there any
8 indication that the boundary is a private parcel of
9 property when described as such?

10 A. We did not see that when we looked at the
11 tax records which was our first line of what do you
12 see out there when you are looking at it. We did
13 not see anything at that time. And when we got into
14 each of the individual title searches on each of
15 those eight parcels, did not see any indication.

16 Back in the old days they used to bound it
17 on the north by lands of Jones, bounded on the west
18 by lands of Smith, bounded on the, you know, south
19 by lands of whatever, and then on the Beaufort
20 River. So you are given an indication that
21 everybody that is familiar with that property, and
22 the surveyors have done their own due diligence on
23 it, too, haven't seen anything out there that
24 indicated it's owned by anyone else.

25 Q. Do you work with a lot of surveyors?

1 A. I think I've worked with almost every
2 surveyor in Beaufort County and Jasper County.

3 Q. Okay. In the course of Mr. Fanning's
4 cross examination, I introduced multiple surveys
5 into the record. Were you present for that cross
6 examination?

7 A. I was.

8 Q. Are you familiar with David Gasque?

9 A. I am.

10 Q. Okay. Is David Gasque an experienced
11 surveyor in your experience as a real estate lawyer?

12 A. Yes. Been working with him for decades.

13 Q. Are you familiar with Trogdon?

14 MR. GRIFFITH: Your Honor, I don't
15 think he can be used to bolster the reputation of
16 these surveyors.

17 JUDGE DUKES: I'll allow him to
18 answer whether he's heard of them or not. I mean,
19 that is --

20 THE WITNESS: Let me put it this way.
21 There are two Trogdons, the father and the son. I
22 used to live next door to the father when I was
23 young. I knew his work. Young Doug Trogdon who
24 worked for the County at a time, I'm familiar with
25 his work.

1 BY MS. SHAHID:

2 Q. Okay. As a surveyor?

3 A. As a surveyor.

4 Q. How about Yeoman? David Yeoman?

5 A. I've known David Yeoman and worked with
6 him for decades, also.

7 Q. Okay. How about Christianson?

8 A. The old Mr. Christianson, A.O.

9 Christianson has passed some time ago, but I'm very
10 familiar with his work. A lot of it is the basis of
11 reference for surveyors and abstracters in our
12 County records over here. Neils Christianson, also
13 knew him.

14 Q. Okay. Now, I am going to show you
15 something that I have not yet marked as an exhibit
16 for purposes of this proceeding, but was your
17 deposition exhibit. Can you identify this document?

18 A. Yes. I recall this document.

19 MS. SHAHID: Okay. Let me go ahead
20 and get the court reporter to mark it.

21 (Discussion off the record.)

22 (MARKED DEFENDANT'S EXHIBIT NO. 57.)

23 MS. SHAHID: Mr. Griffith, this was
24 Exhibit 1 from Mr. Tetter's deposition.

25 MR. GRIFFITH: Thank you, ma'am.

1 MS. SHAHID: Now marked as
2 Exhibit 57. Defendant's Exhibit 57.

3 BY MS. SHAHID:

4 Q. All right, Mr. Tetter, can you explain
5 what Exhibit 57 is?

6 A. This is -- excuse me. This is a screen
7 shot from the County GIS records that either I or my
8 staff had printed out at the time we were
9 researching these properties for these closings.

10 MS. SHAHID: All right. Your Honor,
11 at this time I would offer 57 into evidence.

12 JUDGE DUKES: All right.

13 MR. GRIFFITH: Okay.

14 JUDGE DUKES: No objection?

15 MR. GRIFFITH: No objection.

16 JUDGE DUKES: Okay. Fifty-seven.

17 BY MS. SHAHID:

18 Q. Okay. And you've spoken a lot about we.
19 Who all would be doing this work with you or at your
20 supervision?

21 A. In my office at that time besides myself I
22 had a paralegal, Marlene Smith, who has been doing
23 closings longer than I have. And although she is
24 not a licensed professional, she's probably taught
25 half the lawyers in Beaufort how to do closings.

1 So she would be working with me to gather
2 together the file and keeping it together so we can
3 get to the closing at that time. I had I think two
4 or three other assistants who would help gather the
5 file together and, of course, keep it organized so
6 we would know what was going on.

7 So they would -- this particular exhibit,
8 as I recall, was part of a series of printouts that
9 we sent to -- I don't want to get the name wrong.
10 The Hall law firm that was assisting Merry Land out
11 of Augusta with the closing from that side of the
12 river. And we were sharing data at that time or
13 forwarding them data. So I think this was part of
14 something that we put together so we were trying to
15 coordinate because we had multiple assimilated
16 properties that we -- properties we were
17 assimilating to make sure we had everything that we
18 were looking at accounted for.

19 Q. Okay. I'm going to show you what's
20 already in evidence as Exhibit 56. And represent to
21 you that I didn't realize how small it printed. And
22 that I can show you a larger version of it if you
23 need to look at a larger version of 56.

24 A. Okay.

25 MS. SHAHID: And, Madam Court

1 Reporter, I think I need to mark this larger version
2 of 56, too. My 56 when we printed it, printed real
3 small.

4 JUDGE DUKES: Got it.

5 COURT REPORTER: This would be 58.

6 (MARKED DEFENDANT'S EXHIBIT NO. 58.)

7 BY MS. SHAHID:

8 Q. Do you -- well, let me hand it to you.
9 I'm now handing you 58 which I'm offering into
10 evidence to replace 56 since 56 is difficult to
11 read. Is that your handwriting?

12 A. Actually I don't believe it is my
13 handwriting.

14 Q. Not your handwriting?

15 A. I believe this was -- I'm referring back
16 to the assistants that helped me keep this together.
17 I actually believe this is the handwriting of
18 Allison Kline who was working in my office at that
19 time.

20 Q. Okay. Is that screen shot reflected in 56
21 the same data base that is it -- I'm sorry.
22 Fifty-eight and 56 the same data base screen shot
23 that is shown in 57?

24 A. I believe it is.

25 Q. Okay. And did you make a conclusion when

1 you reviewed that screen shot as to whether a parcel
2 on the -- marsh parcel was called out or identified?

3 A. In looking at this, I did not see anything
4 to indicate there was another parcel to the east
5 toward the river.

6 Q. Okay. Did the GIS upgrade or change
7 programs to something different from what you are
8 looking at?

9 A. They did.

10 Q. And how soon in time after this
11 transaction closed?

12 A. I believe it was within the year.

13 Q. Okay. All right. Did you do -- is
14 adjoiners or adjoining boundaries something that you
15 look at in the course of the work you do?

16 A. It is. When I'm looking at the parcel of
17 land to certify title on it I, of course, look at
18 the deeds. I look at the plats referenced in the
19 deeds. And often times I look at the adjoining
20 property and look at the last deed that is
21 referenced of that property so I can see what plat
22 is over there because sometimes you will see a
23 notation on some of these, boundary line according
24 to deed book whatever, whatever, indicating that
25 there is a break between the two. That is something

1 that I would want to clear up before I move forward.

2 Q. Okay.

3 A. So in this case what we were doing was
4 looking at, you know, with a strip of properties not
5 so much concerned about the boundaries in between
6 the ones that we were acquiring, but those on the
7 end and on the interior so that we could match those
8 boundaries.

9 Q. Okay. Did you use any -- did you review
10 any other resources other than computer GIS in
11 looking at adjoiners?

12 A. I did.

13 Q. What other resource?

14 A. I finally recall the name of the map books
15 that we kept around at that time. The Magellan
16 maps.

17 Q. Okay. What are the Magellan maps?

18 A. They are commercially available reprints
19 of the large tax maps the County keeps in its
20 assessor's office. Again, they are the paper
21 records out there. Magellan company would put those
22 together, sell them. Surveyors often had them.
23 Realtors would purchase them from time to time.

24 I didn't purchase one. I would go to my
25 surveyors and look at theirs if there was an issue

1 or have them send me a page. In this particular
2 instance as we were looking at the various drafts of
3 the surveys, because it wasn't just magically all
4 right at this first time. We had to go and look
5 through some stuff.

6 I visited a different surveyor than the
7 surveyor doing this because the survey that Ward
8 Edwards put together, their office wasn't readily
9 close to me. And I could just drive across the
10 bridge to Mr. David Gasque's office.

11 And I went over there and I looked at his
12 Magellan maps as I was trying to clarify some of the
13 various parcels involved.

14 Q. Do you have any recollection of his
15 Magellan maps as they relate to the marsh parcel in
16 question?

17 A. It is my recollection that they were
18 consistent with what I had in the GIS. I did not
19 see a parcel in his maps identified as being by the
20 river.

21 Q. Gasque's Magellan?

22 A. The maps that he had in his possession,
23 yes.

24 MS. SHAHID: All right. That is all
25 I've got for Mr. Tetter.

1 JUDGE DUKES: Thank you.

2 MR. GRIFFITH: May it please the
3 court, Your Honor.

4 CROSS EXAMINATION

5 BY MR. GRIFFITH:

6 Q. Mr. Tetter, I'm Jeff Griffith. I believe
7 you and I have met before?

8 A. That's correct.

9 Q. Mr. Tetter, once a deed is recorded in
10 Beaufort County, how does it get on a tax map?

11 A. It is my understanding that it goes
12 through a process that the various groups of
13 departments in our government, the auditor and the
14 assessor, the planning department, they all
15 coordinate together to make certain that the data
16 that is necessary to create the tax map is
17 available.

18 In general, if you are asking about how do
19 they -- how does a plat of record attach to a deed,
20 get in the tax maps, it's the assessor creates that
21 document upon their review.

22 Q. So it's not the granter or the grantee
23 that do that work. That is the County officials?

24 A. That is the County official.

25 Q. Right. And so any errors in the placing

1 parcels on the tax maps is a County error, not the
2 individual property owner error?

3 A. That's correct, with the exception that if
4 the property owner submits an incorrect plat it can
5 create a boundary line on the tax maps that is
6 incorrect.

7 Q. Okay. And you've checked the tax maps
8 since all of this came to the fore?

9 A. I personally haven't checked them. I
10 believe I may have been shown a map at my
11 deposition.

12 Q. All right. Now, I'm going to show you
13 Defendant's 26, and ask you if you can tell me that
14 that is, please?

15 A. This is a screen shot, if you will, of one
16 of the screens that you can get through the Beaufort
17 County assessor's office.

18 Q. All right. And whose name appears on
19 that?

20 A. This one shows Marshall -- Hamilton
21 Marshall Hoyler, Junior, I think is the -- get it in
22 the right correction.

23 Q. All right, sir. Does it tell you how long
24 taxes had been being assessed against Mr. Hoyler?

25 A. It appears from looking at this that --

1 this only goes back to 2000.

2 Q. Okay.

3 A. It goes back from 2000. It shows that
4 there were taxes paid. The valuation only was
5 forward from 2005.

6 Q. Okay. But from the year 2000 Mr. Hoyler
7 was being taxed?

8 A. It appears, yes.

9 Q. And assuming that there is no error in any
10 plats submitted by any of the property owners, then
11 the error is with the people who put the tax map
12 together, correct? It's not with the property
13 owner?

14 A. The tax assessor's maps are often in error
15 as we go through them. That is why we don't rely on
16 them to issue title insurance or a title opinion,
17 but they are supposedly recording what is submitted
18 to them.

19 Q. Are you an individual who is authorized to
20 issue title insurance?

21 A. I'm an agent for two companies.

22 Q. All right. Were you an agent at the time
23 this property closed?

24 A. I was.

25 Q. Did you -- did you issue a title policy or

1 did you certify to the title insurance company that
2 they could issue a policy?

3 A. Close. As an agent I'm not required to
4 fill out the certification form. I issue my opinion
5 as part of the title commitment and policy.

6 Q. Okay. And the policy issued -- was issued
7 for this particular piece of property?

8 A. Several policies were issued on different
9 parcels, yes.

10 Q. Well, the parcels that about Mr. Hoyler's
11 property?

12 A. They were. They were subject of title
13 insurance.

14 Q. All right. And there are exceptions to
15 title policies, are there not?

16 A. That's correct.

17 Q. And you only certify to a certain area, do
18 you not?

19 A. That's correct.

20 Q. And you did not certify anything below the
21 mean high water mark to Merry Land Properties, did
22 you?

23 A. That's correct.

24 Q. Okay. The title policy doesn't cover
25 anything below the mean high water?

1 A. In this particular case, no.

2 Q. All right. So for issuing title insurance
3 and certifying title to these particular parcels
4 that abut Mr. Hoyler's property, it wasn't
5 necessarily important to know who abutted them. You
6 were certifying the title that was being described
7 on your title insurance policy, were you not?

8 A. That's correct.

9 MR. GRIFFITH: One second.

10 THE WITNESS: I would like to clarify
11 that. Because we did not see another tax parcel
12 adjacent to it in our due diligence, we didn't go
13 out to see if there was an abutter that had a
14 different platted boundary line other than what we
15 had found on our title searches in the abstracts.

16 BY MR. GRIFFITH:

17 Q. But, again, that omission there was an
18 error on the part of the County, not on the part of
19 Mr. Hoyler?

20 A. I believe that's correct, yes.

21 MR. GRIFFITH: Nothing further.

22 JUDGE DUKES: Anything else of this
23 witness?

24 MR. SMITH: Nothing, Your Honor.

25 JUDGE DUKES: Okay. All right.

1 Thank you so much.

2 MS. SHAHID: May he be excused?

3 THE WITNESS: May I be excused.

4 JUDGE DUKES: If there is no
5 objection, yes. It sounds like there is none. So
6 call your next witness, please.

7 MS. SHAHID: Call Ray Cook.

8 JUDGE DUKES: All right. Come on
9 around, please. Do you swear or affirm to tell the
10 truth, the whole truth, and nothing but the truth so
11 help you God?

12 MR. COOK: Yes, sir

13 JUDGE DUKES: All right. Have a
14 seat, please. State your whole name for the record.

15 MR. COOK: Donald R. Cook, Junior.

16 (Discussion off the record.)

17 WHEREUPON:

18 DONALD COOK, JR., being duly sworn
19 and cautioned to speak the truth, the whole truth
20 and nothing but the truth, testifies as follows:

21 DIRECT EXAMINATION

22 BY MS. SHAHID:

23 Q. Could you state your full name, please,
24 Donald.

25 A. Donald R. Cook, Junior.

1 Q. And where do you live?

2 A. In Bluffton, South Carolina.

3 Q. Okay. And, Mr. Cook, what is your
4 profession?

5 A. South Carolina professional surveyor.

6 Q. And how long have you been a professional
7 surveyor?

8 A. Since 1998.

9 Q. Okay. Do you hold an active license?

10 A. Yes, ma'am.

11 Q. And are you currently employed during
12 surveying?

13 A. Yes, ma'am.

14 Q. And has that been the case since 1998?

15 A. No, ma'am. There was a break.

16 Q. Okay. How long of a break?

17 A. I think three years.

18 Q. Okay. And where are you employed now?

19 A. I'm employed for myself; Cook Land
20 Surveying.

21 Q. And how long have you been self-employed?

22 A. Since 2006.

23 Q. Is there a geographic territory that you
24 are -- you do most of your work in?

25 A. Most of the work is done in the Beaufort,

1 Jasper, Colleton, Hampton Counties.

2 Q. Okay. And do you do residential --
3 surveying for residential development?

4 A. Yes, ma'am.

5 Q. Do you do surveying for individual
6 homeowners?

7 A. Yes, ma'am.

8 Q. Do you do anything for commercial?

9 A. Yes, ma'am.

10 Q. And, Mr. Cook, were you the surveyor of
11 record for Merry Land Properties?

12 A. As I recall, yes, ma'am.

13 Q. All right. And did you prepare the
14 plat -- I have the larger copy here and a smaller
15 copy to tell you what the exhibit number is.

16 MS. SHAHID: Let me go get my exhibit
17 list.

18 BY MS. SHAHID:

19 Q. And I'm sorry for the delay, Mr. Cook.
20 I've made your plat an exhibit, but it's a smaller
21 exhibit. And I just want to make sure that I'm
22 referring to it correctly in your examination. And
23 I'm giving you the larger copy because it's easier
24 to read. Hold on. I'll get my exhibit list. I
25 believe it's Exhibit 33, plat entitled Alta ACSM

1 Land Title Survey of 18.43 acres, Ribaut Road and
2 Johnny Murrell Circle. Is that the title of that
3 plat?

4 A. No, ma'am. This is a boundary survey.

5 Q. Boundary survey? Okay. Exhibit 39. Plat
6 entitled Boundary Survey of 18.43 Acres, Ribaut
7 Road, Sutcliffe Road, and Johnny Murrell Circle?

8 A. Yes, ma'am.

9 Q. Okay. And I do have a smaller copy of
10 Exhibit 39, but I'm going to ask you to refer to the
11 larger copy. Did you -- in the course of this
12 survey, did you look for other plats of record?

13 A. Yes, ma'am. I reviewed the title package
14 that I was given.

15 Q. Okay. And you have a section in this
16 survey called references. Are those other plats of
17 record?

18 A. Yes, ma'am.

19 Q. And were they utilized to help you do this
20 boundary survey?

21 A. Yes, ma'am.

22 Q. Okay. And we -- I introduced those plats
23 through the testimony of the other surveyor,
24 Mr. Fanning, but what I want to ask you is there
25 were two plats on that list that we introduced into

1 evidence which related to the property on Johnny
2 Murrell. Did you rely on the representation of --
3 in those plats for the annotation on Exhibit 39 that
4 indicates that Merry Land's property is the marshes
5 of the Beaufort River?

6 A. Yes, ma'am.

7 Q. Okay. And how do you typically utilize
8 plats in the area in terms of establishing
9 boundaries?

10 A. You review the boundaries, the bearings,
11 distances, the calls. And look at the surrounding
12 information; roads, rights of way, those kind of
13 things.

14 Q. Okay. And was there anything in the plats
15 that you reviewed that would have indicated that
16 this marshes of the Beaufort River is actually
17 claimed as private property?

18 A. No, ma'am.

19 Q. And have you been provided copies of older
20 plats that accompanied a grant from the State of
21 this marsh parcel -- disputed marsh parcel?

22 A. Could I see it?

23 Q. Yes. The first one I'm going to show you
24 is the back page of Plaintiff's Exhibit 2. And it's
25 from 1891. And the second one that I'm going to

1 show you is Plaintiff's Exhibit Number 3. And it's
2 1881, I believe.

3 A. Yes, ma'am.

4 Q. Okay. And would you be able with the
5 information on those plats, those two plats that
6 accompanied the grant, to re-create a plat?

7 MR. GRIFFITH: Objection.

8 JUDGE DUKES: What's the objection?

9 MR. GRIFFITH: The objection, Your
10 Honor, is that unless Merry Land is claiming some
11 interest in this property, that to ask this
12 gentleman to try to re-create Mr. Hoyler's property
13 is irrelevant and immaterial.

14 MS. SHAHID: That is actually not
15 what I'm asking.

16 JUDGE DUKES: What are you asking?

17 MS. SHAHID: I'm asking him if there
18 is enough information on there for him to do it, not
19 if he would do it.

20 MR. GRIFFITH: The same objection.

21 It's immaterial to whether or not Mr. Hoyler -- if
22 the State of South Carolina wanted make this -- ask
23 those questions, fine. Mr. Hoyler owns this piece
24 of property. And whether or not Merry Land's
25 surveyor could re-create it or not is immaterial to

1 them. And it is immaterial to who owns this
2 property.

3 JUDGE DUKES: Is this witness being
4 called -- I guess we haven't qualified him as an
5 expert.

6 MS. SHAHID: No.

7 JUDGE DUKES: Just as a --

8 MS. SHAHID: Surveyor.

9 JUDGE DUKES: Just as a surveyor.
10 And so therefore just a fact witness as to what he's
11 got in front of him. So we are not asking him if in
12 his expert opinion given a series of points can you
13 close it. So that is not really the question. So I
14 think I'll sustain the objection there.

15 MR. GRIFFITH: Thank you, Your Honor.

16 JUDGE DUKES: Thanks.

17 MS. SHAHID: Well, Your Honor, given
18 that ruling, I will try to qualify the witness as an
19 expert. I had not provided -- I don't know that
20 I've provided notice to anybody that he's an expert,
21 but he's a registered land surveyor. So I don't
22 know --

23 JUDGE DUKES: Well, ask him some
24 questions and we will see.

25 MS. SHAHID: I will. Okay. I was

1 just anticipating the lack of notice issue.

2 JUDGE DUKES: Okay.

3 BY MS. SHAHID:

4 Q. So, Mr. Cook, how long have you been a
5 registered land surveyor?

6 A. Since 1998.

7 Q. All right. And so with a little gap in
8 time, approximately how many years have you worked
9 in land surveying?

10 A. Fifteen to 20.

11 Q. Okay. And in what geographic area of the
12 state?

13 A. Beaufort, Jasper, Hampton, Colleton, Low
14 Country of South Carolina.

15 Q. All right. And as a registered land
16 surveyor, who have you worked for over the years? I
17 know right now you have your own business; Cook Land
18 Surveying. Prior to that you worked for other
19 companies?

20 A. Yes, ma'am.

21 Q. All right. What other companies have you
22 worked for?

23 A. Surveying Consultants; Ward Edwards,
24 Incorporated.

25 Q. Okay. Two other companies?

1 A. Yes, ma'am.

2 Q. All right. And can you give me a number
3 of approximately how many plats and surveys you've
4 created as a licensed surveyor?

5 A. It would be over a thousand I would guess.

6 Q. Over a thousand over the past 15 years?

7 A. Yes, ma'am.

8 Q. And any of those plats become plats of
9 record and get recorded?

10 A. Yes, ma'am.

11 Q. All right. And in your work as a surveyor
12 preparing plats do you ascertain boundaries of
13 particular parcels?

14 A. Yes, ma'am.

15 Q. Okay. Is there certain resources that you
16 utilize to ascertain boundaries of particular
17 parcels?

18 A. Yes, ma'am.

19 Q. Okay. What would those resources be?

20 A. Plats, deeds, easement documents.

21 Q. Okay. What about instrumentation? Do you
22 use instrumentation for any purpose?

23 A. What kind of instrumentation.

24 Q. Field? Field work?

25 A. Yes, ma'am. We use typical surveying

1 field equipment.

2 Q. And that is for what purpose?

3 A. To accurately measure property boundaries.

4 Q. Okay. And have you had occasion in your
5 surveying work to review older other plats, other
6 surveyor's work, and then determine if you could
7 relocate that parcel on the ground?

8 A. Yes, ma'am.

9 Q. Is that something that you've done
10 regularly as a surveyor?

11 A. Yes, ma'am.

12 MS. SHAHID: Okay. So, Your Honor,
13 at this time, I would offer Mr. Cook as an expert
14 witness in land surveying.

15 JUDGE DUKES: Any questions of Mr.
16 Cook?

17 CROSS EXAMINATION

18 BY MR. GRIFFITH:

19 Q. In re-creating old surveys, what
20 information do you normally gather?

21 A. Define "old."

22 Q. Survey of the approximate age of this
23 survey, 1882?

24 A. You would look at records of the County.
25 You would look at plats and records that you were

1 given by attorneys.

2 Q. Would you look at the grid system that is
3 in Beaufort County?

4 A. May or may not.

5 Q. Okay. Have you had an occasion to
6 relocate this particular plat, the 1882 there shown
7 on Exhibit 3 -- 2 and 3, I believe? That's right.
8 2 and 3.

9 A. Can you ask the question again? I'm
10 sorry.

11 Q. Yes, sir. Have you had occasion to go and
12 do any work with regard to those specific plats?

13 A. No, sir.

14 MR. GRIFFITH: We object, Your Honor.

15 JUDGE DUKES: I'm sorry?

16 MR. GRIFFITH: We object to -- we
17 don't object to him being an expert witness. We do
18 object to his having any opinion on any effort to
19 re-create these plats since he's never had the
20 opportunity or never been asked to do so. And I
21 don't know that he would be competent to offer an
22 opinion on what it involves or whether or not it
23 could even be done.

24 JUDGE DUKES: All right.

25 MR. SMITH: May I ask one question?

1 JUDGE DUKES: Yeah. Go ahead,
2 please.

3 CROSS EXAMINATION

4 BY MR. SMITH:

5 Q. Just Ms. Shahid referenced a small gap.
6 How long a gap did you have in your surveying
7 practice?

8 A. It was about three years.

9 Q. What were you doing during that time?

10 A. I was helping my parents build houses.

11 Q. Okay. So you -- did you maintain your
12 license during that period?

13 A. Yes, sir.

14 MR. SMITH: Okay. That is all that I
15 have.

16 JUDGE DUKES: I mean, that period of
17 time, a thousand plats, I mean, I'm going to qualify
18 him as an expert land surveying. Now, certainly you
19 can --

20 MR. GRIFFITH: No, sir. I don't
21 object to him being an expert.

22 JUDGE DUKES: Yeah.

23 MS. SHAHID: I haven't asked the
24 question, yet.

25 JUDGE DUKES: But anyway, so --

1 MR. GRIFFITH: Well, ask him then and
2 I'll object.

3 JUDGE DUKES: Now we will get into
4 the question I suppose, whatever it might be.

5 REDIRECT EXAMINATION

6 BY MS. SHAHID:

7 Q. And you've been retained by Merry Land to
8 assist with these court proceedings, correct?

9 A. Yes, ma'am.

10 Q. All right. And you've reviewed the plats
11 that accompanied the grant?

12 A. Yes, ma'am.

13 Q. All right. And did you note any
14 deficiencies in those plats?

15 A. Yes, ma'am.

16 Q. All right. Can you explain to the judge
17 what are the deficiencies in those plats that you
18 noted upon your review?

19 A. Missing --

20 MR. GRIFFITH: Excuse me, Your Honor.
21 Just -- again, just because he's an expert, I don't
22 know that that makes it any more material his
23 opinion on Mr. Hoyler's property. The question is
24 as between Merry Land and Mr. Hoyler is where is the
25 high water mark.

1 JUDGE DUKES: All right. But, I
2 mean --

3 MR. GRIFFITH: That is a natural
4 monument that is established by the forces of
5 nature.

6 JUDGE DUKES: I understand, but the
7 plats are part and parcel of all of this. So I
8 understand your objection, but I'm going to let him
9 go ahead with it.

10 MR. GRIFFITH: Thank you.

11 BY MS. SHAHID:

12 Q. Can you explain to the court what
13 deficiencies you have noted in those plats?

14 A. Lack of a graphic scale or a scale. Lack
15 of a point of beginning or point of commencement to
16 locate the property. Those are the two main
17 deficiencies that I see.

18 Q. Okay. And in your opinion do those
19 deficiencies affect your ability to replicate
20 those -- that into a survey?

21 A. Yes, ma'am.

22 Q. Okay. Does it materially affect your
23 ability?

24 A. Yes, ma'am.

25 Q. All right. And how does it affect your

1 ability to replicate that and create a new survey?

2 A. Well, without a point of beginning you
3 have no part -- no point to start to locate the
4 parcel on the ground. Without a scale you can't,
5 you know, tell if they were -- what measurement of
6 units they were using. So, therefore, scaling it,
7 you don't know really how big the parcel is or
8 potentially how big it is.

9 Q. What does it mean for a parcel to close?

10 A. It means that when starting at point of
11 beginning and following a metes and bounds around
12 that parcel the last point will come back to the
13 first point at some area.

14 Q. So what does it mean when a parcel doesn't
15 close?

16 A. It means that the points are just kind of
17 hanging out there in space.

18 Q. Okay. If you will hold on just a minute,
19 I've got --

20 MS. SHAHID: That is all I've got for
21 this witness.

22 JUDGE DUKES: All right. Sure. Go
23 ahead.

24 MR. SMITH: I'm not sure what the
25 order should be.

1 JUDGE DUKES: Oh, we are just kind of
2 doing this.

3 RECROSS EXAMINATION

4 BY MR. SMITH:

5 Q. Now, why would the bearings not be
6 sufficient for purposes of locating this property?

7 A. If the bearings aren't to a certain
8 degree, in other words, to a certain accuracy, the
9 property may not close. In other words, if you are
10 going around the parcel and the bearings are
11 deficient you would not be able to close the parcel.

12 Q. Well, can you determine by looking at it
13 whether the bearings are deficient?

14 A. By just looking at it? No, sir.

15 Q. Okay. So if -- assuming that the bearings
16 were correctly stated, would you be able to locate
17 the parcel?

18 A. To locate the parcel?

19 Q. Yes.

20 A. No, sir. No, sir.

21 Q. Why is that?

22 A. For the lack of point of beginning.

23 Q. But you can't look at -- the bearing
24 itself won't tell you where it is?

25 A. No, sir.

1 Q. What does the bearing tell you?

2 A. It tells you direction.

3 Q. Okay. Let me just see the -- which -- you
4 were using this 1882 plat. But are there other
5 surface features here or landmarks that would allow
6 you to determine the general location and then use
7 the bearing as a reference to determine location
8 from there?

9 A. Possible general location, yes, sir.

10 MR. SMITH: Okay. No further
11 questions.

12 CROSS EXAMINATION

13 BY MR. GRIFFITH:

14 Q. Mr. Cook, I'm Jeff Griffith. How are you
15 this afternoon?

16 A. I'm good. How are you?

17 Q. I'm well. Thank you. Mr. Cook, are you
18 familiar with the township and range system in
19 Beaufort County?

20 A. Yes, sir.

21 Q. And the township and range system is a
22 grid system that is set off in 10-acre squares; is
23 it not?

24 A. In the dealings I've had with it, yes,
25 sir.

1 Q. All right. And so is this particular
2 piece of land covered by that grid system?

3 A. Which piece, sir?

4 Q. The 95.27-acre tract.

5 A. It doesn't look to be covered by it.

6 Q. All right. Is the upland property covered
7 by it?

8 A. Possibly.

9 Q. All right. Why do you say possibly? Why
10 can you not definitely determine that from looking
11 at those plats?

12 A. There is no reference to that system.

13 Q. Okay. The system itself is made up of
14 books and indices, is it not, so that you can go to
15 a particular grid mark and determine what is within
16 that grid range, correct?

17 A. That is my understanding.

18 Q. All right. So if you had the book
19 reference and the indices you could locate this
20 upland parcel for sure on that grid system; could
21 you not?

22 A. Possibly.

23 Q. Okay. But you haven't been asked to do
24 that, have you?

25 A. No, sir.

1 Q. And you haven't been asked to re-create
2 the 95.27-acre tract of land, have you?

3 A. No, sir.

4 Q. So what you are just essentially telling
5 us is that a quick glance at these plats, you come
6 up with these two potential problems, but you
7 haven't tried to work those potential problems out,
8 have you?

9 A. Not a quick glance, sir.

10 Q. Well, have you tried to work out the
11 problems that you perceive?

12 A. I've reviewed it.

13 Q. Have you worked them out to determine
14 whether or not you can re-create the area on the
15 upland side of the 95.27 acres?

16 A. No, sir.

17 Q. So what your testimony is is that this is
18 what upon a review of plats that are over a hundred
19 years old, this is what I think?

20 A. It's my opinion, sir.

21 Q. All right. Now, much has been made about
22 the terminology used to identify the marsh property
23 where Mr. Hoyler is making his claim. Have you been
24 in the courtroom and heard Ms. Shahid refer to all
25 of those plats and that the eastern boundary of

1 those plats is either the Beaufort River or the
2 marshes of the Beaufort River?

3 A. Yes, sir.

4 Q. Okay. Now, you know that Mr. Hoyler is
5 making a claim for 95.27 acres lying within the
6 marshes of the Beaufort River; do you not?

7 A. That is my understanding.

8 Q. All right. And given what you know about
9 Mr. Hoyler's claim, it would not be incorrect today
10 to call that the marshes of the Beaufort River,
11 would it not?

12 A. That's correct.

13 Q. So to call it the marshes of the Beaufort
14 River really doesn't matter. It's who actually owns
15 it, correct?

16 A. Potentially.

17 Q. Well, it's yes or no. What makes it
18 potentially?

19 A. Somebody is making a claim to it.

20 Q. Well, somebody -- assume for a minute that
21 somebody owns that property. It wouldn't be
22 incorrect to call it the marshes of the Beaufort
23 River, would it?

24 A. No, sir.

25 MR. GRIFFITH: Okay. Nothing

1 further.

2 JUDGE DUKES: Anything else.

3 MS. SHAHID: No, sir.

4 JUDGE DUKES: Thank you so much, sir.

5 MS. SHAHID: Can Mr. Cook be excused?

6 JUDGE DUKES: Yes, unless there is
7 some objection?

8 MR. GRIFFITH: None from the
9 Plaintiff.

10 JUDGE DUKES: Call your next witness.

11 MS. SHAHID: Yes. Our next witness,
12 probably our final witness, is Greg Baisch.

13 JUDGE DUKES: Good afternoon.

14 MR. BAISCH: Good afternoon, sir.

15 JUDGE DUKES: Do you swear or affirm
16 to tell the truth, the whole truth, and nothing but
17 the truth so help you God?

18 MR. BAISCH: Yes, sir.

19 JUDGE DUKES: Have a seat and state
20 your whole name and spell your last name for
21 Deborah, please.

22 MR. BAISCH: You know I don't have an
23 easy last name, huh? Gregory Adam Baisch. And my
24 last name is spelled B, as in boy, a-i-s-c, as in
25 cat, h.

1 JUDGE DUKES: Thank you. Go ahead,
2 please.

3 WHEREUPON:

4 GREGORY BAISCH, being duly sworn and
5 cautioned to speak the truth, the whole truth and
6 nothing but the truth, testifies as follows:

7 DIRECT EXAMINATION

8 BY MS. SHAHID:

9 Q. Mr. Baisch, where do you reside?

10 A. I reside in the town of Port Royal.

11 Q. Okay. And are you a licensed
12 professional?

13 A. Yes, ma'am.

14 Q. What do you hold your license in?

15 A. In the State of South Carolina.

16 Q. For what?

17 A. Professional engineering.

18 Q. Okay. And how long have you -- tell me
19 about your educational background.

20 A. I went to Clemson University, graduated in
21 1998. Passed the Fundamentals of Engineering test
22 at that time which allowed me to practice under a
23 professional engineer as an engineer in training for
24 four years until I had the experience to sit and --
25 petition the State to sit for a professional license

1 to become licensed and take a test.

2 Q. Okay. And so how long have you had your
3 license?

4 A. Since 2003. Four years after becoming --

5 Q. So you've been a licensed professional
6 engineer for approximately 12 years?

7 A. Yes, ma'am.

8 Q. And tell me about your work history?

9 A. I worked at Ward Edwards Engineering since
10 graduating college.

11 Q. Okay.

12 A. So in January 18th, 1999, I started.

13 Q. And what type of work do you do with Ward
14 Edwards?

15 A. Civil engineering, site development,
16 consulting.

17 Q. All right. Were you the engineer of
18 record for the Merry Land development?

19 A. I was the project manager sort of speak,
20 but we never certified anything in an engineering
21 aspect. It never got to that point of land
22 development.

23 Q. Okay. So in your role as a professional
24 engineer you are responsible for all design related
25 to residential development?

1 A. Residential, commercial. Civil
2 engineering is the practice -- the engineering
3 discipline practice of dealing with design
4 construction, and maintenance of our physical and
5 natural environment, yes, ma'am.

6 Q. And as a civil engineer are you charged
7 with knowledge of the regulations of regulatory
8 agencies like D.H.E.C., for example?

9 A. Yes, ma'am. We routinely work with
10 D.H.E.C. on permitting and designing projects to
11 their regulations.

12 Q. Do you do storm water permitting through
13 D.H.E.C.?

14 A. Yes, ma'am.

15 Q. Do you do other types of permitting such
16 as docks or marina permitting?

17 A. Yes, ma'am. We support those, you know,
18 portions of those applications.

19 Q. Okay. And in the course of your career as
20 an engineer approximately how many residential or
21 commercial development projects have you been
22 involved in as an engineer?

23 A. Hundreds.

24 Q. And how about projects that you are the
25 lead engineer on?

1 A. Similarly. I mean, a lot.

2 Q. Okay. Are you a person with seniority at
3 Ward Edwards currently in the Bluffton office?

4 A. Yes, ma'am. I'm a vice president of Ward
5 Edwards Engineering.

6 Q. And do you supervise any folks at Ward
7 Edwards?

8 A. Yes, ma'am.

9 Q. Do you supervise other engineers?

10 A. Yes, ma'am. Engineers in training as well
11 as professional engineers.

12 Q. Okay. And do you have general knowledge
13 of surveying?

14 A. Yes, ma'am.

15 Q. Is surveying something that engineers
16 study?

17 A. It's part of our course work. I'm not
18 personally licensed as a professional surveyor, but
19 routinely work with surveyors and work with surveys
20 in doing what we do.

21 Q. Okay. As an engineer can you speak to
22 boundary?

23 A. Yes, ma'am. I can interpret the boundary
24 provided by a surveyor.

25 MS. SHAHID: All right. And, Your

1 Honor, at this point I would offer Mr. Baisch as an
2 expert witness in civil engineering.

3 JUDGE DUKES: Any questions of Mr.
4 Baisch? Any objections.

5 MR. SMITH: No objection.

6 JUDGE DUKES: Okay. Mr. Griffith?

7 MR. GRIFFITH: No objection.

8 JUDGE DUKES: All right. So
9 certified.

10 BY MS. SHAHID:

11 Q. And, Mr. Baisch, if you could, tell me
12 your involvement with Merry Land Properties and the
13 project.

14 A. Yes, ma'am. I can't remember dates or
15 anything, but Tennent Houston contacted our office
16 that he had this property under contract and asked
17 us to support different aspects of his due diligence
18 in the purchase.

19 Q. Okay. And what aspects of that did you
20 support?

21 A. We supported some surveying, you know,
22 general local Town of Port Royal ordinance reviews,
23 that type of nature. Permit application, you know,
24 general information, local knowledge, et cetera.

25 Q. All right. Did you do any investigation

1 for Mr. Houston or for Merry Land Properties?

2 A. I would say yes, but I mean -- yes, short
3 answer.

4 Q. Did employees under your supervision
5 conduct any investigation for Merry Land Properties?

6 A. Yes, ma'am.

7 Q. Okay. Was that investigation related to
8 the marina permit?

9 A. Yes, ma'am.

10 Q. What type of investigation did you pursue
11 related to the marina permit?

12 A. I believe from what I recall O'Quinn and
13 Tennent were pursuing a marina permit. And we
14 provided some drawing support and, you know, just
15 general information as they would ask as they would
16 proceed with answering questions from O.C.R.M. of
17 that nature.

18 Q. Did you --

19 A. But we reviewed the available information,
20 you know, tax maps, and LIDAR data, and everything
21 that was available to us, quad maps, et cetera.

22 Q. Did you do some analysis of the small
23 creek that intervenes before you get to the Beaufort
24 River in front of Merry Land Properties?

25 A. If I recall properly, one of the

1 questions -- that creek was in question as I think
2 Tennent also testified to that the regulations had
3 changed, but there were some questions as to where
4 maybe some live oyster rakes were within the creek
5 and the nature of that creek being navigable. And
6 so we had -- I believe we had conducted some further
7 soundings in that area and field investigation.

8 Q. Okay.

9 A. And to present that information in Exhibit
10 form to O.C.R.M. to support that application.

11 Q. Okay. You mentioned something about LIDAR
12 data. Tell me what LIDAR data is.

13 A. LIDAR data is information that is light
14 detection and ranging, but it's an airplane aerial
15 laser light deflection that measures distance. And
16 they can extrapolate elevation data over a broad
17 area.

18 Q. Okay. And how do you as a civil engineer
19 utilize LIDAR data?

20 A. It's a planning tool similar to -- you
21 know, prior to LIDAR data, you know, U.S.G.S. had
22 quad maps which were, you know, just general
23 representations of the topography of an area.

24 Q. Okay. Now, there is a couple -- about
25 three exhibits that are in evidence that you

1 prepared for me; Exhibit 47, which is a LIDAR map;
2 Exhibit 48, which is an aerial map that we've had
3 testimony to; and Exhibit 49 which is a quad map.
4 And I took the liberty of going behind me and
5 providing you what I think are the bigger copies of
6 those exhibits?

7 A. Yes, ma'am.

8 Q. For you to refer to, but so that I don't
9 get confused I'm going to write exhibit numbers on
10 them at the top. Aerial 48. Okay. I see two of
11 yours are not any bigger than mine, but we will go
12 ahead and -- the LIDAR is 47 and the quad is 49.
13 Okay. And I'll hand these up to you for your
14 reference. Thank you.

15 Okay. And the first one I would like you
16 to look at is the quad sheet for -- which is
17 Defendant's Exhibit 49. Do you have that in front
18 of you?

19 A. Yes, ma'am.

20 Q. What do you as a civil engineer rely on
21 the quad sheet for?

22 A. Quad sheets were put out by U.S.G.S. to
23 show -- they are a planning tool. So they show
24 general topography of an area, known structures,
25 waterways, water courses. It may even show

1 utilities in some instances and roadways.

2 Q. Okay. Now I would like you to take the
3 quad sheet and pull out your exhibit -- your large
4 Exhibit 48 which is the -- which is the larger copy?

5 A. Of the aerial photograph?

6 Q. Yeah.

7 MS. SHAHID: And, Madam Court
8 Reporter, I think this larger copy is so much better
9 than the smaller one that I would like to mark it.

10 JUDGE DUKES: Make it 48-A or
11 something? Forty-eight-A?

12 COURT REPORTER: Forty-eight-A.
13 Defendant's 48-A, right.

14 JUDGE DUKES: Defendant's 48-A.
15 Exactly. Because that is the same as 48, right?
16 Just bigger? Okay.

17 MS. SHAHID: Yes, sir.

18 JUDGE DUKES: Excellent. Thanks.

19 (MARKED DEFENDANT'S EXHIBIT NO.
20 48-A.)

21 MS. SHAHID: I tried to streamline
22 and have small things, and it's not working.

23 JUDGE DUKES: No. It's easier to
24 look at the big ones.

25 MS. SHAHID: I want to go back to

1 Exhibit boards. All right.

2 BY MS. SHAHID:

3 Q. Showing you Exhibit 48. And comparing it
4 to the quad sheet on Exhibit 49, can you indicate to
5 the court where this feature, this yellow defined
6 parcel that extends all the way up to here, is
7 reflected on this quad sheet?

8 A. Yes, ma'am. If you look on the quad
9 sheet, the current Beaufort County GIS system, you
10 can actually pull that up as a background image with
11 the tax map. So the -- in black on the quad sheet
12 actually shows the tax map similar to what is yellow
13 on Exhibit 48.

14 Q. Okay.

15 A. So Exhibit 49 shows the GIS depiction of
16 that tax parcel and so does 48.

17 Q. All right. And can you put an X generally
18 in the area where the Merry Land four waterfront
19 parcels are on that quad sheet?

20 A. Yes, ma'am. They are shown 1, 2, 3, 4.

21 Q. Okay. And you've done that on Exhibit 49.
22 And does it appear on this quad sheet that there is
23 separation between the upper part of the marsh and
24 the lower part on the quad sheet?

25 A. Yes, ma'am.

1 Q. And what is separating those two parcels
2 of marsh?

3 A. It appears to be a water course of some
4 nature, extension of the Beaufort River.

5 Q. Can you find that same water course by
6 looking at the aerial photograph provided by
7 Beaufort County?

8 A. It would appear to align with the lighter
9 green areas surrounding the brown areas in front of
10 those four parcels.

11 Q. Okay. And so what areas -- can you circle
12 the areas on Exhibit 48-A that are consistent with
13 49 and appear separate from this larger marsh
14 parcel?

15 A. It would be -- it would be that area is
16 similar to the features appearing on the quad sheet.

17 Q. Okay.

18 A. Exhibit 49.

19 Q. All right. And are you familiar with this
20 creek?

21 A. Yes, ma'am.

22 Q. Okay. Is this the -- was this creek the
23 subject of the permit application?

24 A. Yes, ma'am.

25 Q. All right. And I've actually got some

1 permit drawings that may help illustrate this. Oh,
2 I've got the permit in evidence. Here you go. So
3 these permit drawings, and maybe I'm looking at --
4 hopefully I'm looking at the right one. Which this
5 is Page 10 of 11 of Exhibit 53 shows the
6 construction of what?

7 A. Let me look at this for a second. This
8 would show the construction of the dock extending
9 from or the application for construction of a dock
10 extending from one of the Merry Land parcels -- one
11 of the four Merry Land parcels to the Beaufort River
12 deeper water.

13 Q. Okay. Can you draw a line on Exhibit 48
14 that depicts where that dock was planned to cross?

15 A. So it would be the second parcel in -- up
16 here somewhere. It would appear somewhere in here.

17 Q. Okay. All right.

18 A. It would be representative of that, that
19 line.

20 Q. Okay. All right. Now I want to give you
21 Exhibit 47. And maybe you better explain -- well,
22 you've got a better copy here.

23 A. You already handed me the larger copy of
24 labeled 47.

25 Q. Yeah. All right. Explain to me how that

1 data is collected and what it is intended to show,
2 the LIDAR data?

3 A. The LIDAR data is collected by airplanes
4 with -- I guess they set up a known elevations on
5 the ground, detect light and the ranging, and they
6 can pick out that elevation. And they traverse an
7 area and provide the topography of that area. They
8 spit out a cloud of data. And they will eliminate
9 the anomalies because obviously in wooded areas you
10 will have trees that those lights would hit that
11 would throw that data off. So -- but it is --
12 similar to the quad map, it is an accurate planning
13 tool for reviewing elevations, general topography of
14 a parcel.

15 Q. Okay. And do you see some elevations in
16 the water features that abut Merry Land's property?

17 A. Yes, ma'am. There is -- you know, if you
18 review -- if you are looking at the elevations that
19 they shot through that, you know, there are some --
20 if I can read them, there is negative two, negative
21 four, negative one, zero, one, twos, zeros. It
22 appears to range from a negative four maybe to a
23 positive two throughout that area in front of --

24 Q. And are you looking only at the water
25 feature or are you looking at the marsh, too?

1 A. I was looking at the water in the marsh,
2 the area between, you know, where the LIDAR data
3 stops. The LIDAR data stops at the -- doesn't show
4 the -- once it hit a consistent elevation, I guess,
5 of the Beaufort River.

6 Q. Can you interpret from at that data
7 something relative to mean low water?

8 A. I mean, no. You can make some
9 generalizations that there is some elevations -- I
10 believe this is on '88 datum, but I think you could
11 make some -- it's a planning tool. So it shows you
12 that there are some elevations there that have
13 potential to be below mean low.

14 Q. Okay. And what has been your experience
15 in the creek?

16 A. Our family had kept a boat at the adjacent
17 marina for years. And, you know, I've been through
18 that creek getting bait and been fishing up through
19 this whole area. So, I mean -- and then work with
20 this property, I've been in and around it.

21 Q. Okay. So you are familiar with this
22 creek?

23 A. Yes, ma'am.

24 Q. All right. And when I say this creek, I'm
25 pointing to the water feature that you've drawn the

1 blue line through on Exhibit 48-A.

2 So what has been your experience
3 navigating in that creek?

4 A. I mean, that it's an accessible water to
5 enjoy as part of the Beaufort River.

6 Q. Okay. You've navigated in that creek?

7 A. Yes, ma'am.

8 Q. All right. And did you send your staff
9 out there to locate the oyster beds?

10 A. Yes, ma'am. As part of one of the
11 comments received I think during the permitting
12 effort with O.C.R.M., our staff had gone out through
13 that area to locate some oyster beds.

14 Q. Okay. And did they go out in a boat?

15 A. Yes, ma'am.

16 Q. And did they go out at low tide?

17 A. Yes, ma'am. They went out at a lower
18 tide. I don't know whether that was exact mean low
19 or what, but it was a lower tide to be able to get
20 the extent of the oysters that would be exposed.

21 Q. Okay. And were photographs taken of the
22 creek during their visit?

23 A. During their visit and then subsequent
24 visits in nature. We had taken photographs of that
25 area, yes, ma'am.

1 Q. Okay. I'm going to show you what has been
2 marked as Defendant's Exhibit 50. And I'm going to
3 ask you to confirm whether these are photographs
4 that were done as part of Ward Edwards'
5 investigation and confirm the location of these
6 photographs, that they are the area that we've been
7 talking about. Can you --

8 MR. GRIFFITH: Did he take them?

9 MS. SHAHID: I'm sorry?

10 MR. GRIFFITH: Did he take them?

11 BY MS. SHAHID:

12 Q. Did you take the photograph?

13 A. Personally, I can't recall.

14 MR. GRIFFITH: Then I object.

15 MS. SHAHID: Okay.

16 BY MS. SHAHID:

17 Q. Are you familiar with the area?

18 A. Yes, ma'am.

19 Q. Can you identify --

20 MS. SHAHID: Well, I'm sorry. I
21 guess I better let you do -- tell me what to do.

22 JUDGE DUKES: Well, go ahead. I
23 would be interested to know the answer before I
24 rule, but --

25 MS. SHAHID: I'm just going to take

1 over.

2 THE WITNESS: I have taken
3 photographs out there.

4 MS. SHAHID: I'll rule on it.

5 JUDGE DUKES: But go ahead. So you
6 have -- he's got some familiarity with the creek.
7 Can I look at them a second? What are they exactly?

8 THE WITNESS: Yes, sir.

9 MS. SHAHID: Oh, and I need to get
10 the Judge a copy. They are still up there.

11 JUDGE DUKES: These are 50 we are
12 talking about --

13 MS. SHAHID: Yes, sir.

14 JUDGE DUKES: -- is that correct?
15 Based on his familiarity both as an engineer and
16 personally using it I'll allow them. So, thanks.

17 MS. SHAHID: Okay.

18 BY MS. SHAHID:

19 Q. All right. So tell me what the first page
20 of Page 50 shows.

21 A. You are looking at probably in the water
22 near the vicinity of -- between this jut out and the
23 blue line --

24 Q. Okay.

25 A. -- looking back towards Port Royal Landing

1 Marina and the bridge to Lady's Island.

2 Q. Okay. And this is a creek area that
3 you've been through in a boat?

4 A. Yes, ma'am.

5 Q. Okay. And what does the second page of
6 Exhibit 50 show?

7 A. It's a similar orientation, just closer
8 towards Port Royal Marina. You can see the dock --
9 the small dock projecting from the property owner in
10 Port Royal Marina that has a dock -- or Port Royal
11 Landing that has a dock.

12 Q. Okay.

13 A. In the foreground and Port Royal Landing
14 Marina proper in the background.

15 Q. And what does the third page of Exhibit 50
16 show?

17 A. The opposite direction, kind of near the
18 mouth of that creek looking back at the dock along
19 Port Royal Landing. And to the right of that would
20 be Merry Land's property.

21 Q. And the fourth photograph?

22 A. It would have been an exhibit -- that
23 would have been a photo taken probably between the
24 Port Royal Landing dock and Port Royal Landing
25 looking again back at an angle towards that dock and

1 in the background would have been Merry Land.

2 Q. Can you tell which tidal stage that is?

3 A. It appears to be a rather low tide.

4 Q. Okay. And do you observe water in the
5 channel?

6 A. Yes, ma'am.

7 Q. Okay. And the next page?

8 A. The next page is fairly similar to one of
9 the previous pages we looked at.

10 Q. Okay. All right.

11 A. As a matter of fact, it may be the exact
12 same picture.

13 Q. Okay.

14 A. It is.

15 Q. All right. And then the next page? Is
16 this another --

17 A. Same thing. I think that is a --

18 Q. That is the shot that has the oyster beds?

19 A. Yeah. That is a very similar photo if not
20 the same as the one we looked at.

21 Q. Okay. Well, you only sent me 68, so --
22 all right. So turn back to that page.

23 A. Yes, ma'am.

24 Q. And let's -- let's see. Let me be able to
25 identify that better. That is -- Exhibit 50. And

1 it's actually the second page perhaps is the one
2 that you thought it was of Exhibit 50?

3 A. Yeah, very similar.

4 Q. Okay. Is that one of the shots taken by
5 the folks that you were supervising in doing the
6 creek survey for O.C.R.M. where they were looking
7 for the oyster beds?

8 A. Yes, ma'am. We have this file in our
9 archives as -- as being taken as part of our efforts
10 to support this project..

11 Q. And, again, that was at low tide that they
12 were out there?

13 A. This appears to either be a rising or
14 falling time. Maybe not extreme -- not quite low
15 because one of the photos we looked at is even a
16 little bit lower than this photo.

17 Q. Yeah. Okay. All right. And, again,
18 going back to your general observations of the LIDAR
19 data.

20 A. Yes, ma'am. Got that in front of me.
21 Exhibit 47.

22 Q. Okay. Can you point to the area where you
23 see data with the potential to demonstrate mean low
24 water?

25 A. As a planning --

1 Q. I'm sorry. A mean low water measurement,
2 yes.

3 A. This -- if I was asking a surveyor or
4 looking at a document like this that had these
5 elevations with a minus four showing up, I would ask
6 for -- I would tend to think that that minus four
7 contour may have some water in it that may be under
8 mean low and should be further investigated, yes,
9 ma'am.

10 Q. Okay. And is that consistent with your
11 experience and knowledge of the creek?

12 A. Yes, ma'am. And the -- you know, the
13 other exhibits. You know, we would have -- we can
14 compare to the mean and the quad map which similarly
15 shows that, the LIDAR data, and the photographs and
16 the aerial image.

17 Q. Okay. And what is your understanding of
18 closing a survey?

19 MR. GRIFFITH: Objection.

20 JUDGE DUKES: What -- I think --
21 yeah, you are not a surveyor, are you? I think you
22 said you worked with surveyors; is that correct?

23 THE WITNESS: Yes, sir. We rely on
24 surveying data to perform our engineering on
25 property.

1 JUDGE DUKES: Okay. Sustained.

2 BY MS. SHAHID:

3 Q. Did you ask your staff to attempt to close
4 the boundaries of the plats of record from 1882 and
5 1891 that accompanied the deed?

6 A. Yes, ma'am.

7 MR. GRIFFITH: Object to the
8 question.

9 THE WITNESS: When we were notified
10 by Mr. --

11 JUDGE DUKES: Well, hold on one
12 second. I don't mind him answering what he
13 requested. The follow-up question is going to be
14 what did they say which --

15 MR. GRIFFITH: And I'm going to
16 object to that, Your Honor.

17 JUDGE DUKES: Yeah. So I'm good with
18 the yes, but I don't know what the -- stop right
19 there and wait for the next question.

20 BY MS. SHAHID:

21 Q. Were you involved in that process? Do you
22 have firsthand knowledge of their efforts to attempt
23 to close? Were you involved in the process?

24 A. Yes, ma'am. We --

25 Q. Were you working with them on that?

1 A. Working with them, directed them to
2 verify -- requested our surveying staff to try to
3 re-create that plat and close it.

4 MR. GRIFFITH: I'll have to object,
5 Your Honor, to anything that they told him.
6 Anything they told --

7 JUDGE DUKES: Well, he hasn't gotten
8 there, yet.

9 MR. GRIFFITH: Okay.

10 JUDGE DUKES: But, you know --

11 MR. GRIFFITH: I thought he said the
12 survey established.

13 JUDGE DUKES: Well, I think -- I
14 can't remember if he said what the result was. I
15 don't know if he said that, but anyway stay away
16 from the result as far as questions.

17 BY MS. SHAHID:

18 Q. How is that done?

19 A. In this case or really in any case if you
20 would take the plat that is available, and you can
21 read the data on it, and start inputting the, find
22 the starting point or pick a starting point if you
23 can't find a starting point. You can do it from
24 multiple. And take those bearings and distances and
25 work your way around the property to try to get it

1 to close.

2 Q. Okay. And why would it be necessary to
3 close it from an engineering perspective?

4 A. Well, from an engineering perspective so
5 you have an identified piece of property that you
6 are working on.

7 Q. Okay. And were you working with the
8 surveyors or the other professionals in an attempt
9 to close these boundaries?

10 A. Under my direction, yes, ma'am.

11 Q. Under your direction? All right. And did
12 the boundaries close?

13 MR. GRIFFITH: Objection.

14 JUDGE DUKES: Yeah. I think we've
15 had your surveyor. I think he's testified he's not
16 a surveyor, so sustained.

17 BY MS. SHAHID:

18 Q. From an engineering perspective do you
19 consider boundaries and the legitimacy of
20 boundaries?

21 A. Yes, ma'am.

22 Q. From an engineering perspective do you
23 ever re-create boundaries?

24 A. No. I mean, we would direct a surveyor,
25 but we would consider if a surveyor tells us if it

1 is a valid boundary to be working on that we have a
2 known piece of property.

3 Q. Do you remember the name of the surveyor
4 that assisted you with this project?

5 A. There would have been a number of staff.
6 I'm not -- specifically recall.

7 Q. Okay. Has there been a turnover of your
8 staff since that work was done?

9 A. Yes, ma'am.

10 Q. Was your office closed after that work was
11 done or shortly after that work was done?

12 A. No. What we had -- shortly after when the
13 economy did what it did and we were -- we started
14 diversifying and getting back to the core of our
15 business which was engineering.

16 And at the time this was done we had -- we
17 had a lot more disciplines under our roof. We had
18 surveying in-house. We had natural resource,
19 environmental consultants, structural engineers,
20 waste water engineers. And at that time, we got
21 back down to the core of what we did which was land
22 development consulting and civil engineering.

23 Q. Okay. The individuals working for you at
24 that time that closed the boundary, are they even
25 employed by Ward Edwards?

1 A. No, ma'am.

2 Q. Okay. And how many years have they not
3 been employed by Ward Edwards?

4 A. I imagine it's varying degrees. We didn't
5 just have a lay off at one date, but somewhere
6 probably between 2007 and 2009, somewhere in that
7 range is when.

8 Q. Okay. So does that -- do you even know
9 where those individuals are located at this point in
10 time?

11 A. Some I do.

12 Q. Okay. Are they local or are they --

13 MR. GRIFFITH: Your Honor --

14 JUDGE DUKES: I'm not sure where
15 she's going yet, but -- go ahead. Carry on.

16 THE WITNESS: Yes, ma'am. Some are
17 local.

18 BY MS. SHAHID:

19 Q. Okay.

20 A. Similar to Ray Cook starting his own firm.
21 There are a couple other surveyors we had that had
22 their own firm or working in the coastal area.

23 Q. Can you identify the exact individual who
24 has firsthand knowledge about the closure of these
25 boundaries other than you?