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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas
Marvin H. Dukes, III, Master-in-Equity

Order, of the S.C. Court of Appeals, filed, August 22, 2019
(Rehearing Denied, October 17, 2019)

H. Marshall Hoyler, ...Petitioner,

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, ...Defendants,

Of which The State of South Carolina and
Merry Land Properties, LLC are the,..... Respondents.

APPENDIX
Volume One

Jefferson D. Griffith, III, S.C. Bar #: 2299,
Richard L. Whitt, S.C. Bar #: 62895
WHITT LAW FIRM, LLC
401 Western Lane, Suite E
Irmo, South Carolina 29063
(803) 995-7719
Attorneys for Petitioner, H. Marshall Hoyler.

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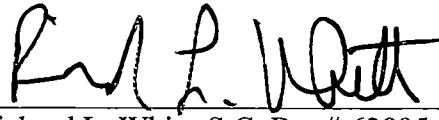
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WHITT LAW FIRM, LLC

By:

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

Richard L. Whitt, S.C. Bar #:62895
Jefferson D. Griffith, III, S.C. Bar #:2299
Whitt Law Firm, LLC
401 Western Lane, Suite E
Irmo, South Carolina 29063
(803) 995-7719

November 14, 2019
Irmo, South Carolina

3

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

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

Richard L. Whitt,
Jefferson D. Griffith,
Austin & Rogers, P.A.,
508 Hampton Street, Suite 300
Columbia, South Carolina 29201
Attorneys for Appellant.

J. Emory Smith, Jr., Esquire,
Robert D. Cook, Esquire,
Alan McCrory Wilson, Esquire,
S.C. Attorney General's Office
1000 Assembly Street
Columbia, South Carolina 29201
(803) 734-3736
Counsel for Respondent, State of S.C.

Stephen Peterson Groves, Sr., Esquire,
Mary D. Shahid, Esquire,
Angelica M. Colwell, Esquire,
Nexsen Pruet
Post Office Box 486
Charleston, South Carolina 29402
(843) 720-1725
**Counsel for Respondent, Merry Land
Properties, LLC.**

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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
Phone: (803) 256-4000
Fax: (803) 252-3679
Attorneys for Appellant.

March 27, 2017
Columbia, 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

CASE NO.: 2007-CP-07-3212

ORDER
GRANTING INTERVENTION BY
MERRY LAND PROPERTIES, LLC

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

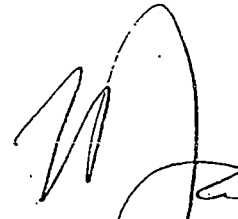
This matter is before me as evidenced by the signatures of counsel below, for entry of an Order Granting Intervention by Merry Land Properties, LLC.

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.

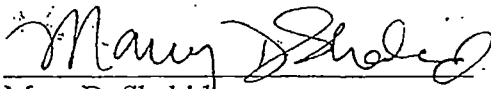
[SIGNATURE PAGE FOLLOWS]



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

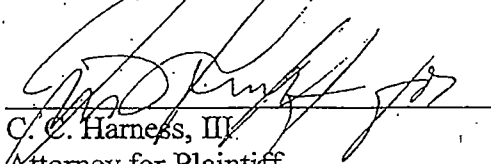
2/22, 2008

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

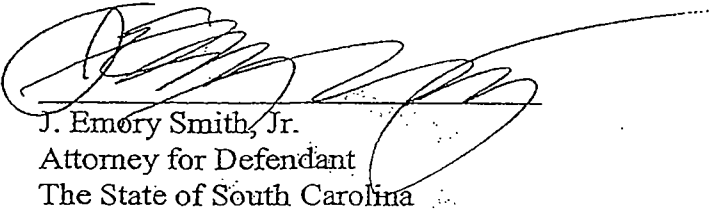
_____, 2008

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. This is a 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 SCRCF 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.

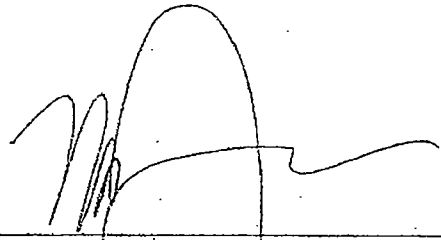
Therefore, this Court finds that all property owners abutting the marsh acreage that is the subject of this action shall be joined as Defendants in this action, and shall be served with copies of the Summons and Complaint in this action. To expedite this, the Court attaches as Exhibit "A" to this Order 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.

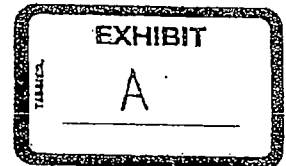
It is further ORDERED that the trial in this civil action shall recommence after all property owners identified in Exhibit A have been served with the pleadings, and have had an opportunity to respond to the pleadings. Provided, however, that hearing in this matter shall not reconvene before August 1,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



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

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 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 2015

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

000011

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

5/19/11

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 Hoyler

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
R110-009-000-017A
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

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

7/27/18
Date

For Clerk of Court Office Use Only

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

Jeff D. Griffith, III

ATTORNEY(S) FOR THE PLAINTIFF(S)

Mary D. Shahid, J. Emory Smith Jr., Steven L. Smith,
Roy W. Boggs, Adam N. Yount, James A. Grimsley III,
W. McElhaney White,

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: N/A

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

H. MARSHALL HOYLER,

Plaintiff,

vs.

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

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STATEMENT OF THE CASE

This action was initiated by the Complaint of Plaintiff, H. Marshall Hoyler, captioned as an "Action to Declare Title to Marshlands," which was filed November 8, 2007. This action arises out of the remedy set forth in S. C. Code Ann. § 48-39-220 which provides that "[a]ny person claiming an interest in tidelands ... may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State." The marshlands at issue, referred to herein as "the disputed marsh," are encompassed in a $\pm$ 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

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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. E. 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

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

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

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

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

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

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

FINDINGS OF FACT

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

General

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

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

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

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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.

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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

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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.

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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 "I.M. Crofut 95 27/100 acres." The 1882 plat does not show any acreage call on the drawing, but refers to "... a tract of marshland containing 114 12/100 acres."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff's Re-Created Plat

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Intervenor's Claims

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

CONCLUSIONS OF LAW

The Court concludes the following as a matter of law:

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

2. In reviewing this matter, the Court serves as the finder of fact. "It is generally recognized that the trier of fact, who has the opportunity to observe the witnesses and listen to their testimony in person, is in the best position to determine issues of witness credibility." Dixon v. Dixon, 336 S.C. 260, 263, 519 S.E.2d 357, 358 (Ct. App. 1999).

3. With regard to expert testimony, it is generally recognized that "expert opinion evidence is to be considered or weighed by the triers of the facts like any other testimony or evidence" and that "the triers of the facts cannot, and are not required to, arbitrarily or lightly

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

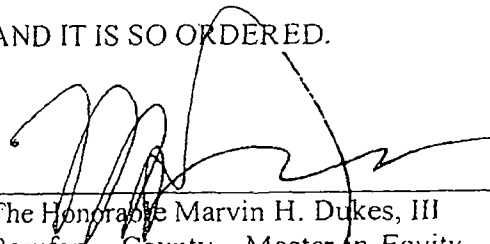
Upon hearing all of the testimony and reviewing the evidence, this Court finds and concludes that:

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

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

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

AND IT IS SO ORDERED.



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

27 day of May, 2016
Beaufort, South Carolina

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.,

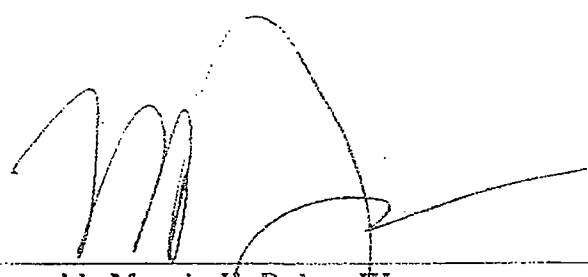
Defendant(s).

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

ORDER

SC Court of Appeals

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

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

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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.

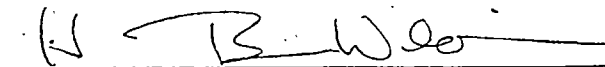
In 2007, Appellant filed an action against the State and sought a declaratory judgment regarding title to marshland. The master issued an order joining thirty-two property owners as defendants in the action because, among other reasons, their property rights would be impacted by the master's decision. 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.

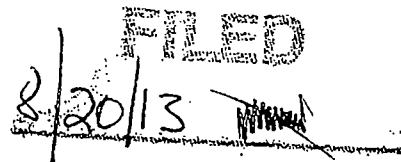
In his return, Appellant seeks to argue for the first time that the master lacked subject matter jurisdiction under section 48-39-220 of the South Carolina Code (2008). Although lack of subject matter jurisdiction may be raised at any time, including on appeal, Appellant's argument does not change the 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



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

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

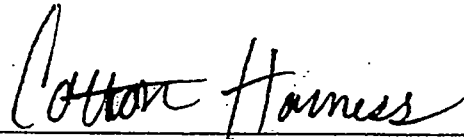
12. Plaintiff can demonstrate alienation of the tidelands included in the subject properties based on the deed from Benjamin R. Tillman, Governor of the State of South Carolina to J. M. Crofut for 95 and 27/100 acres of marsh located on the Beaufort River.

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.



C.C. Harness, III
Law Offices of C. C. Harness, III
505 Belle Hall Drive, Suite 100
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,	)	
	)	
	)	INTERVENOR'S ANSWER AND
v.	)	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. $\pm$ 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.

Mary D. Shahid, S.C. Bar No. 1794
McNair Law Firm, P.A.
Post Office Box 1431
Charleston, South Carolina 29402-1431
mshahid@mcnair.net
(843) 723-7831
Fax: (843) 722-3227

Stephen E. Carter, S.C. Bar No. 12859
McNair Law Firm, P.A.
Post Office Drawer 3
Hilton Head Island, SC 29938
scarter@mcnair.net
(843) 785-2171
Fax: (843) 686-5991

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David E. Hudson
Hull, Towill, Norman, Barrett & Salley
Post Office Box 1564
Augusta, GA 30909
(706) 722-4481
Fax: (706) 849-5119

By: Mary D. 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

EXHIBIT

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.

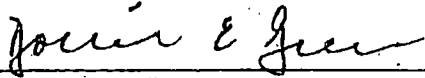
5. No live aboards are allowed at this facility.
6. Anti-fouling paints must not be used below mean high water on any structure such as bulkheads, pilings, docks or dock supports within the confines of the facility.
7. The applicant must implement the spill prevention and clean up plan for this project 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.

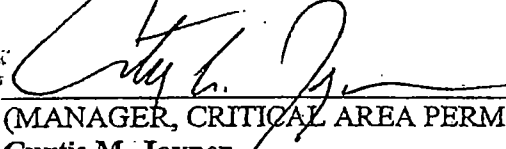
2005-1W-429-P

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


(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.


(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.

Merryland Properties Vicinity Map

SEE SPECIAL
CONDITION(S)

N32°-23'39"E
W80°-40'55"

Merryland Properties

ADJACENT PROPERTY OWNERS:

1. 100112 100112 100112
2. 100112 100112 100112
3. 100112 100112 100112
4. 100112 100112 100112
5. 100112 100112 100112
6. 100112 100112 100112
7. 100112 100112 100112
8. 100112 100112 100112
9. 100112 100112 100112
10. 100112 100112 100112

LOCATION: PORT ROYAL
JOHNNY MOLEHILL CIRCLE

SCALE: NO SCALE

COUNTY: BEAUFORT

APPLICANT: MERRYLAND PROPERTIES

ACTIVITY: PRIVATE MARINA

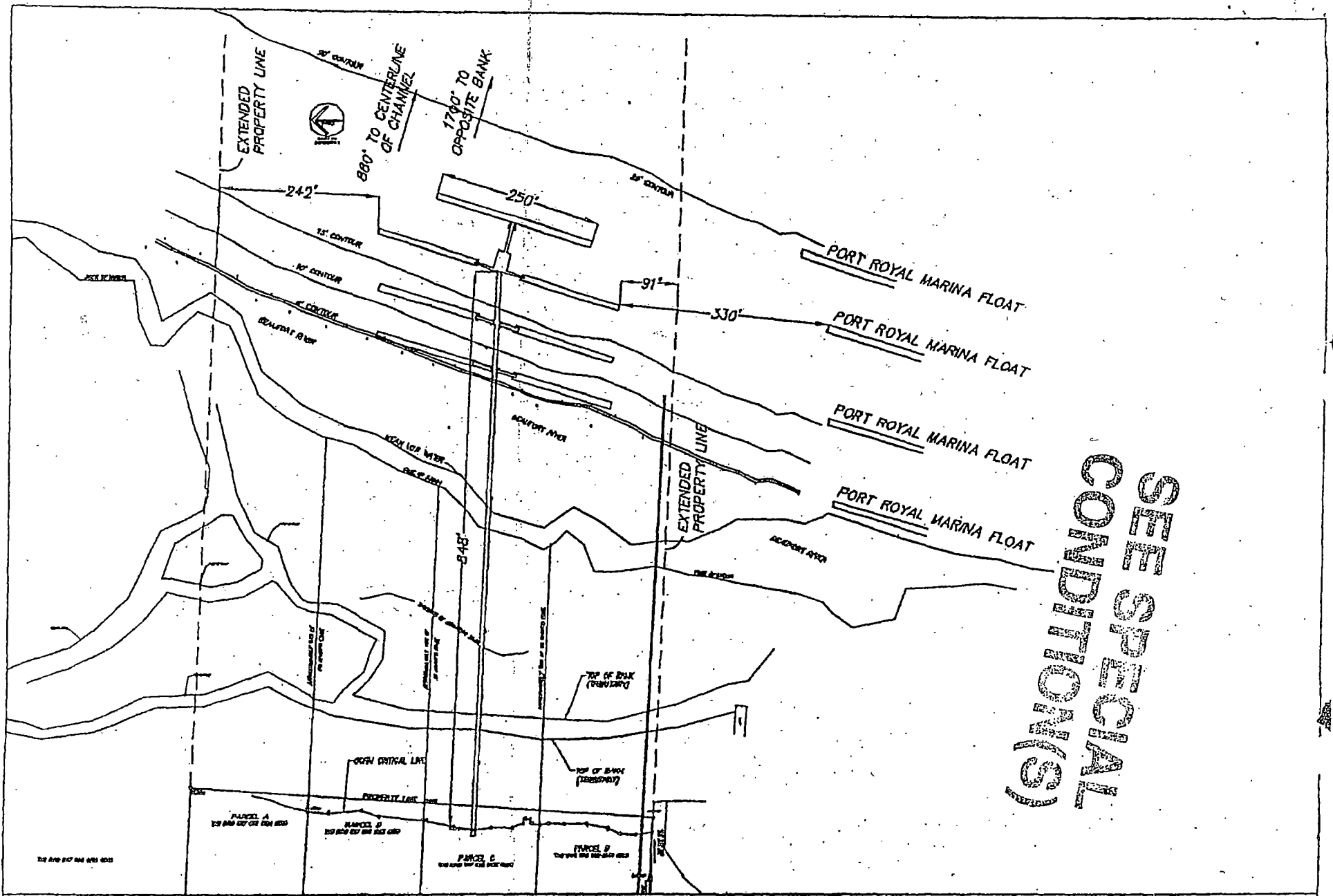
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9 of 11

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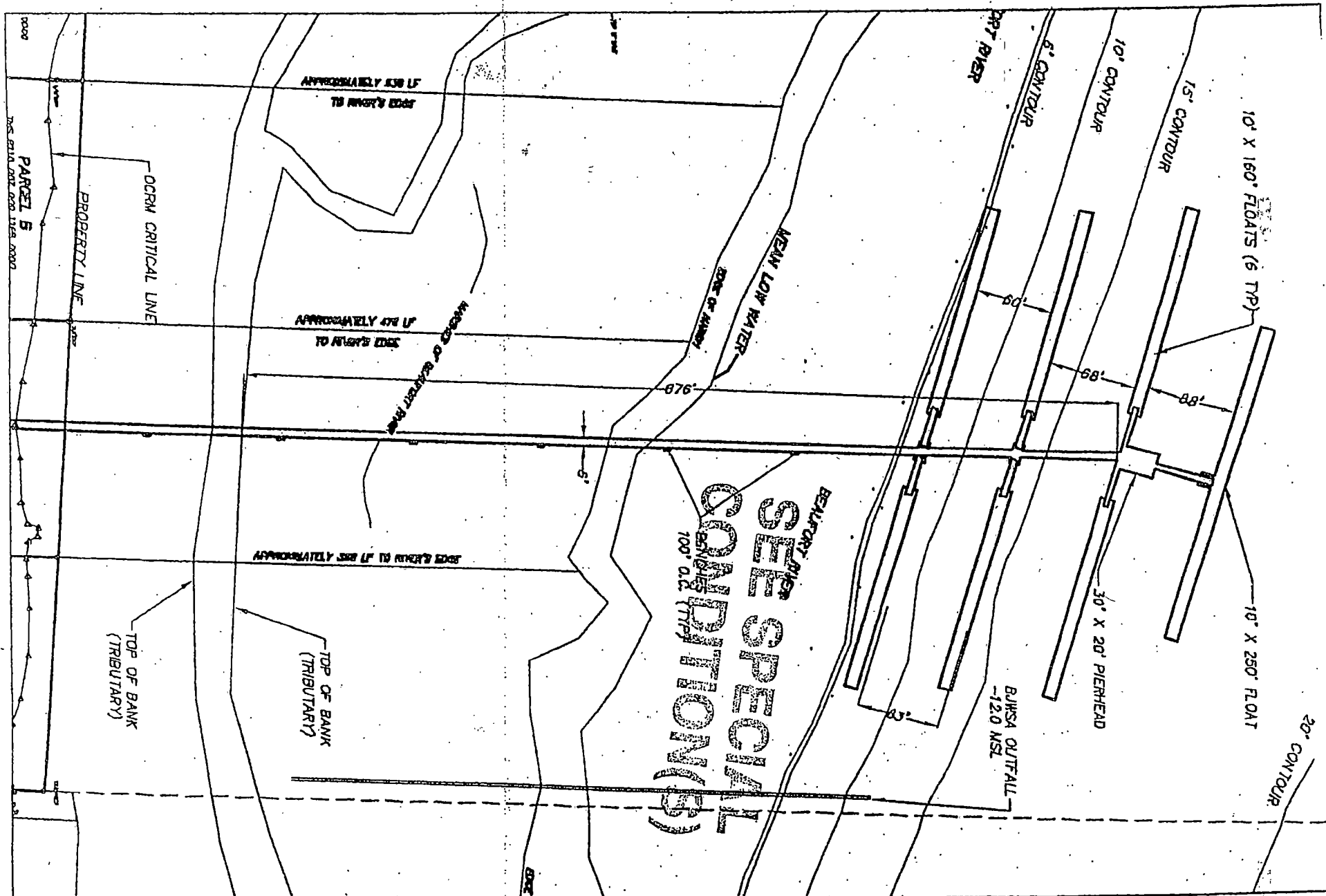
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SPECIAL CONDITIONS

APPLICANT: MERRY LAND PROPERTIES ACTIVITY: PRIVATE MARINA P/N:	LOCATION: PORT ROYAL SCALE: 1" = 200' <i>Johnny Moreall Circle</i> COUNTY: BEAUFORT DATE: SEPTEMBER 12, 2005 <i>Sh. 2 of 4</i>	ADJACENT PROPERTY OWNERS: NORTH OF SITE 1. R110 007 000 0108 0000 2. R110 007 000 0114 0000 SOUTH OF SITE 1. R110 000 00A 0078 0000 2. R110 000 00A 0077 0000 3. R110 000 00A 0076 0000 4. R110 000 00A 0075 0000 5. R110 000 00A 0074 0000 6. R110 000 00A 0073 0000 7. R110 000 00A 0072 0000
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APPLICANT: MERRY LAND PROPERTIES

ACTIVITY: PRIVATE MARINA

P/N:

LOCATION: PORT ROYAL

SCALE: 1" = 100'

COUNTY: BEAUFORT

DATE: SEPTEMBER 12, 2005

Johnny Morrall circle

Sh. 3 of 4

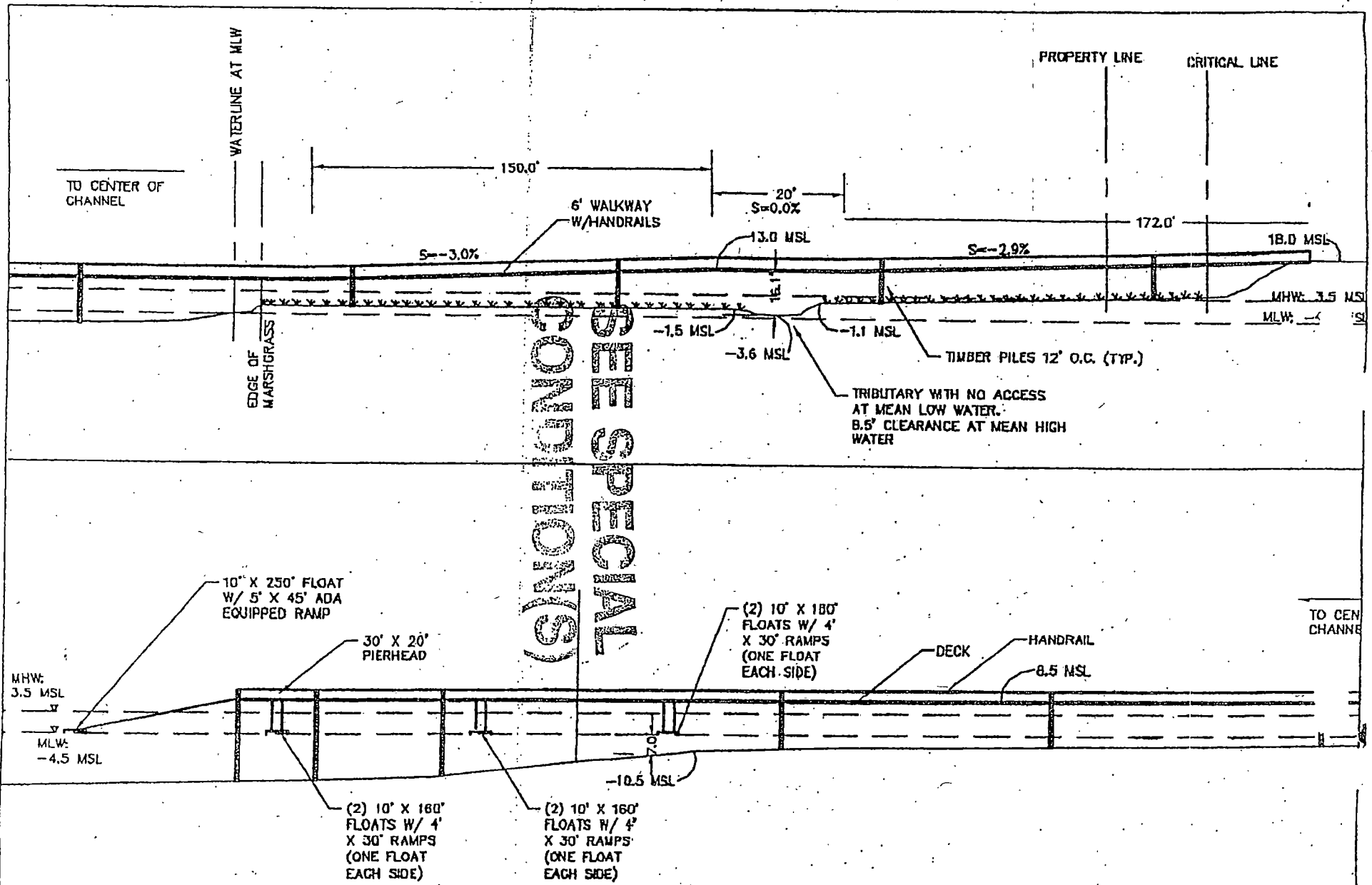
ADJACENT PROPERTY OWNERS:

- NORTH OF SITE
 1. R110 007 000 0101 0000
 2. R110 007 000 0114 0000
 SOUTH OF SITE
 1. R110 000 000 0000 0000
 2. R110 000 000 0027 0000
 3. R110 000 000 0028 0000
 4. R110 000 000 0029 0000
 5. R110 000 000 0030 0000
 6. R110 000 000 0031 0000
 7. R110 000 000 0032 0000

10 of 11

000077

5



APPLICANT: MERRY LAND PROPERTIES
 ACTIVITY: PRIVATE MARINA

LOCATION: PORT ROYAL
 SCALE: 1" = 50'
 COUNTY: BEAUFORT

ADJACENT PROPERTY OWNERS:

NORTH OF SITE:

1. R110 007 000 D109 0000
2. R110 007 000 R114 0000

SOUTH OF SITE:

1. R110 008 000 0026 0000
2. R110 008 000 0027 0000
3. R110 008 000 0028 0000
4. R110 008 000 0029 0000
5. R110 008 000 0030 0000

DAT:

DATE: FEBRUARY 10, 2000

CH 16 200

11 of 11

0000078
 082



REPLY TO
ATTENTION OF

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

Signos Boly

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





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

REPLY TO
ATTENTION OF

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).

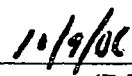
c. Significant new information surfaces which this office did not consider in reaching the original public interest decision.

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.

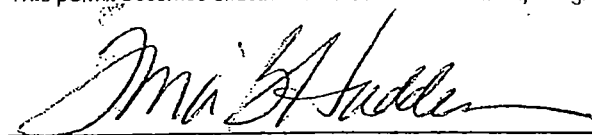
6. Extensions. General condition 1 establishes a time limit for the completion of the activity authorized by this permit. Unless there are circumstances requiring either a prompt completion of the authorized activity or a reevaluation of the public interest decision, the Corps will normally give favorable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


Tennant Houston
(PERMITTEE)
MERRY LAND PROPERTIES, LLC


10/9/06
(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

OCT 17 2006
(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).

SHIRAZ

ADJACENT PROPERTY OWNERS

2005-W-429-P

RECOGNITION FOR ROYAL

SCALE: NO SCALE

CONTRACT BAPT

RELIC AND DIVERS AND PROPERTIES

ACTIVITY: PRIVATE MARINA

84/11/18

Street Atlas USA® 2004

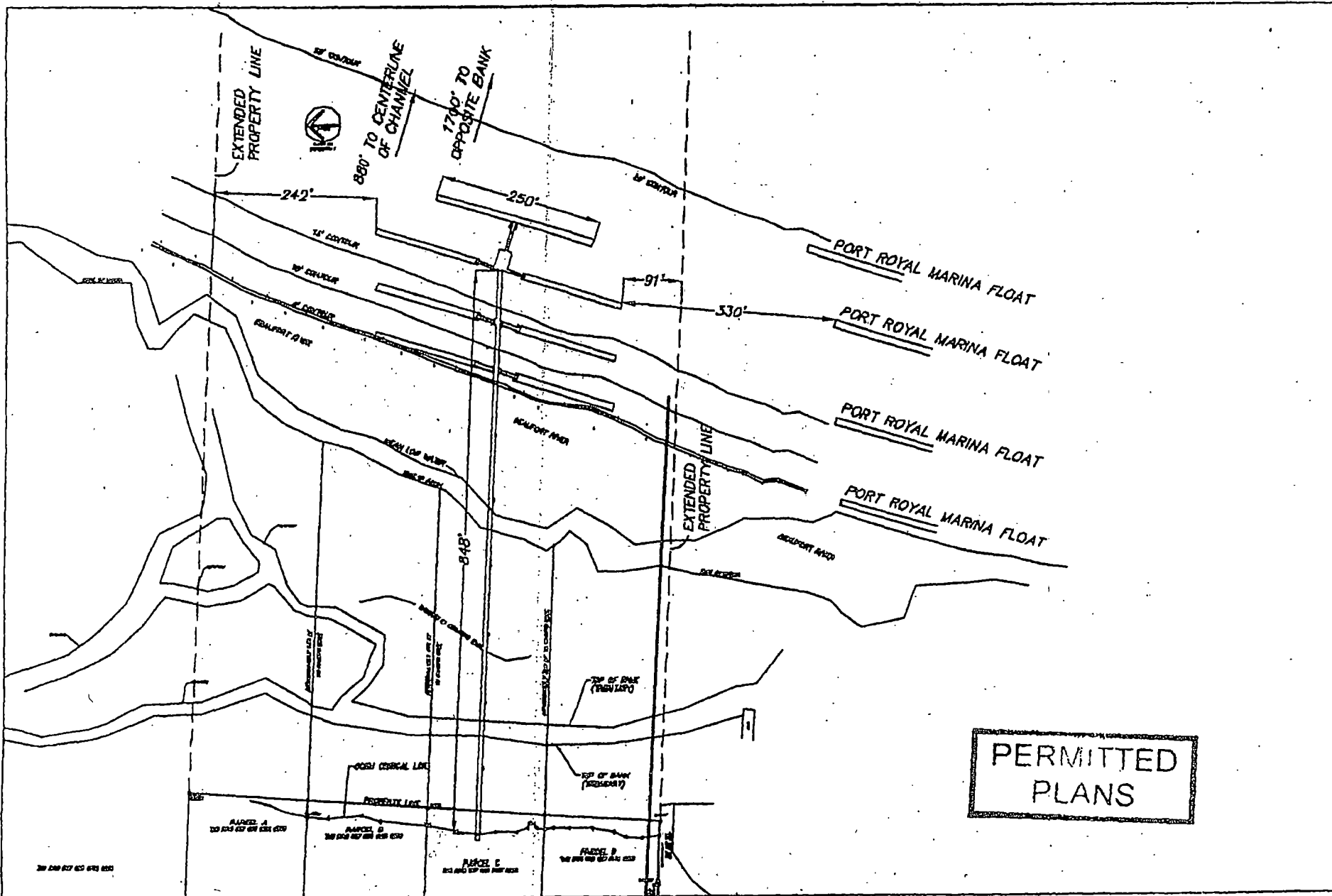
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000087

Scale 1: 12,800

 $1'' = 1.0887 \text{ ft}$

Data Zoom: 40



PERMITTED
PLANS

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 0100 8000
2. R110 007 000 0114 8000
EAST OF SITE
1. R110 008 00A 0028 0000
2. R110 008 00A 0037 0000
3. R110 008 00A 0040 0000
4. R110 008 00A 0045 0000
5. R110 008 00A 0054 0000
6. R110 008 00A 0063 0000
7. R110 008 00A 0072 0000

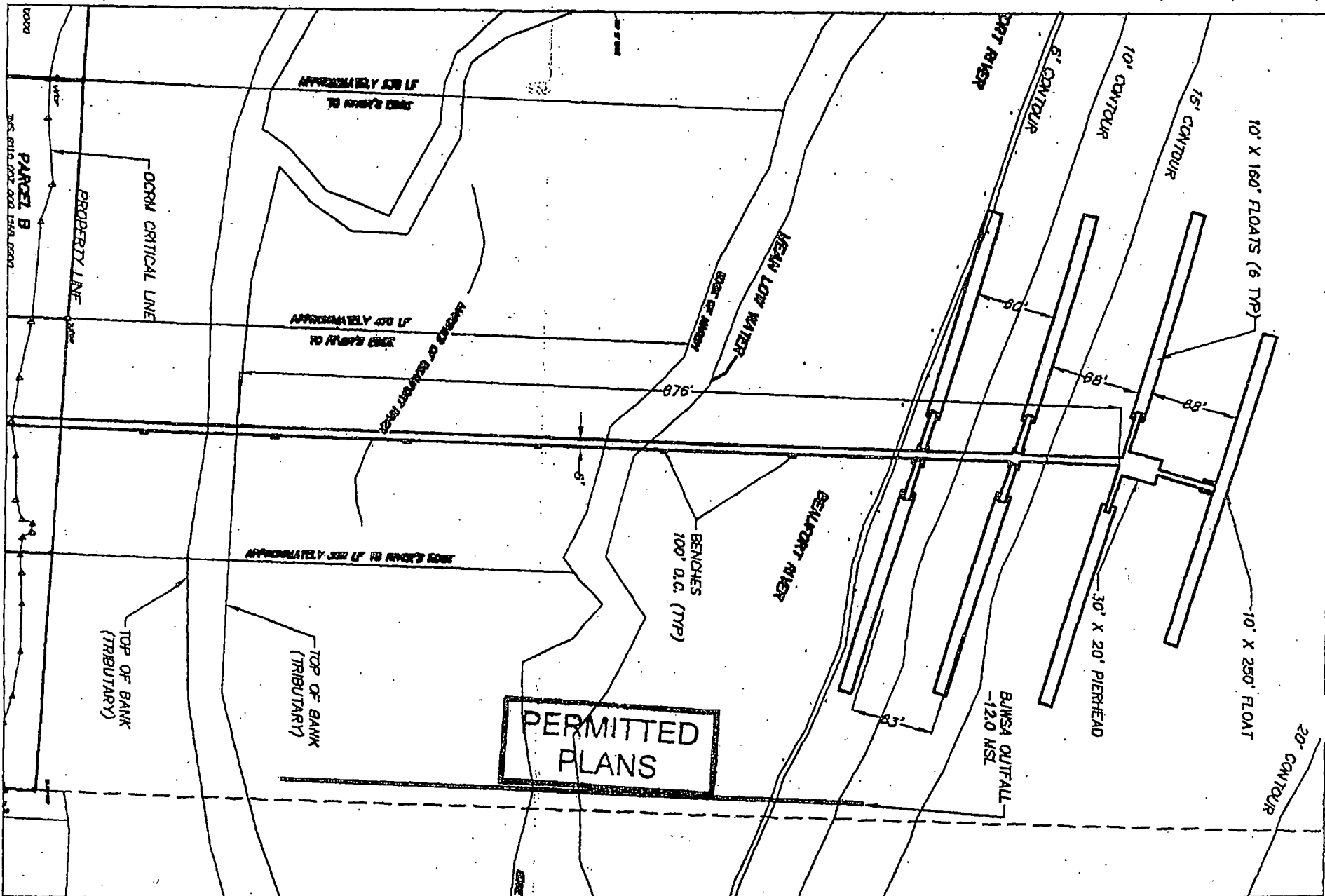
2005-1W-429-P

Sh. 2 of 4

000088

4

092



APPLICANT: MERRY LAND PROPERTIES

ACTIVITY: PRIVATE MARINA

P/N:

LOCATION: PORT ROYAL

SCALE: 1" = 100'

COUNTY: BEAUFORT

DATE: SEPTEMBER 12, 2005

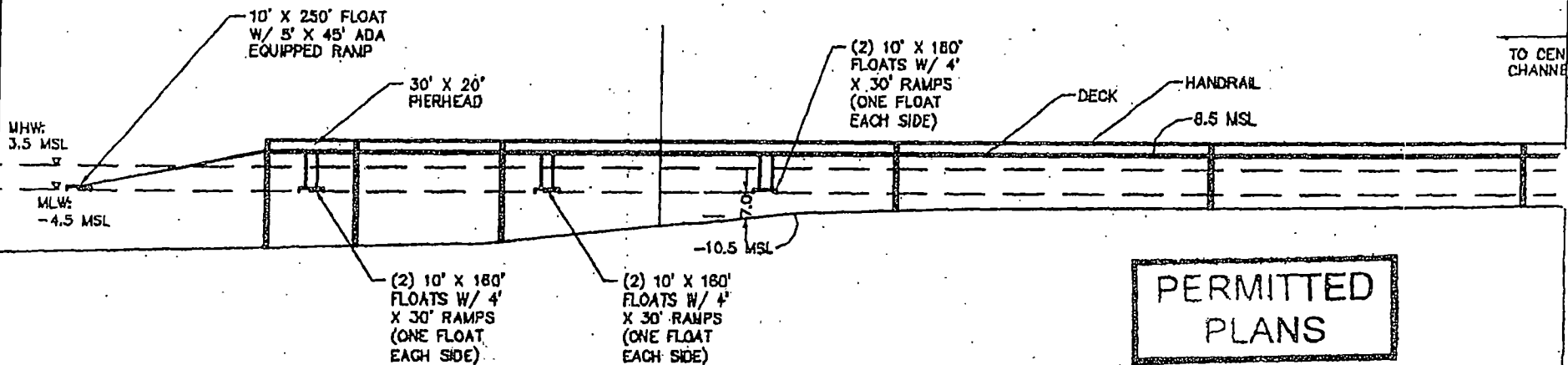
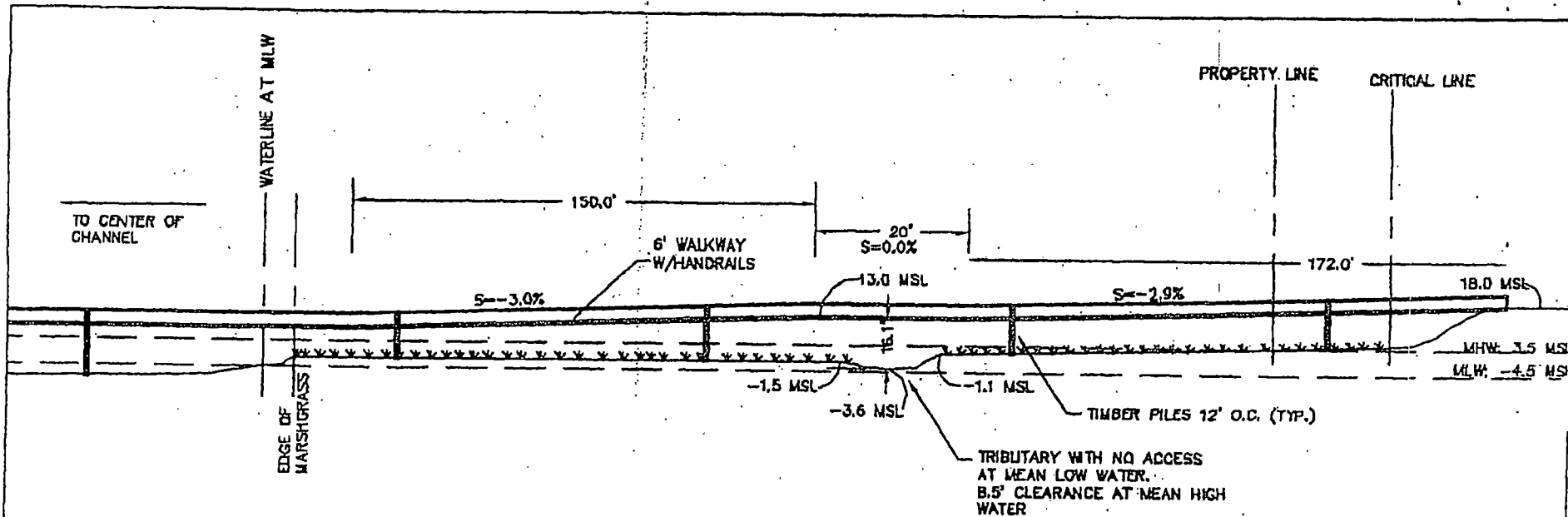
ADJACENT PROPERTY OWNERS:

NORTH OF SITE:
1. R110 007 000 0109 0328
2. R110 007 000 0114 0328
SOUTH OF SITE:
1. R110 008 000 0107 0328
2. R110 008 000 0107 0328
3. R110 008 000 0107 0328
4. R110 008 000 0107 0328
5. R110 008 000 0107 0328
6. R110 008 000 0107 0328
7. R110 008 000 0107 0328

2005-1W-429-P

Sh. 3 of 4

0000895



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 SITE
1. R110 007 000 0109 0000
2.0 R110 007 000 0114 0000
SOUTH OF SITE
1. R110 000 000 0000 0000
2. R110 000 000 0000 0000
3. R110 000 000 0000 0000
4. R110 000 000 0000 0000
5. R110 000 000 0000 0000
6. R110 000 000 0000 0000
7. R110 000 000 0000 0000

2005-1W-429-P

Sh. 4 of 4

00000000

094

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2007-CP-07-3212

H. MARSHALL HOYLER,)
Plaintiff,)

CERTIFICATE OF SERVICE

v.)

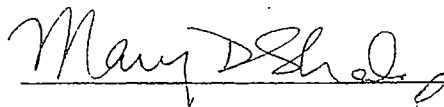
THE STATE OF SOUTH CAROLINA,)
Defendant.)

2007 NOV 26 PM 2:39
CLERK OF COURT
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 3:15
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.

000092

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.

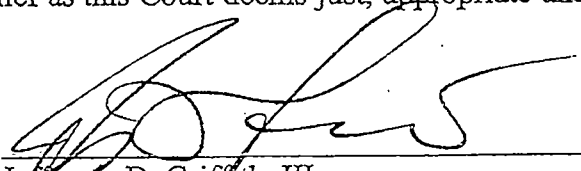
6. Plaintiff denies the allegations of Paragraph 20.
7. Plaintiff denies the allegations of Paragraph 21.
8. Plaintiff denies the allegations of Paragraph 22.
9. Plaintiff admits such allegations of Paragraph 23 as are direct quotations from the deed but craves reference to the deed for the specific 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	)	
COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS
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

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Email: esmith@scag.gov

By: 

March 25, 2016

ATTORNEYS FOR THE STATE

IN THE COURT OF COMMON PLEAS
FOURTEENTH CIRCUIT

CASE NO.: 2007-CP-07-3212

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 Hoyer's Post-Trial Brief follows.

2016-12-7 PM 11:13
STANLEY S. ADAMS, Esq.
CLEVELAND, OHIO

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. Mozingo, 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.

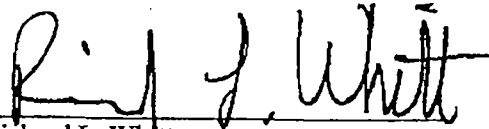
The Intervenor should not be allowed to assert the defenses of laches or equitable estoppel because they cannot be used in an offensive capacity as the Intervenor attempts to do here. Even assuming that they should be allowed, the Intervenor failed to prove them by a preponderance of the evidence.

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.

Richard L. Whitt
Jefferson D. Griffith, III
508 Hampton Street, Suite 300
P.O. Box 15907
Columbia, South Carolina 29211
Phone: (803) 256-4000
Fax: (803) 252-3679
Attorneys for Plaintiff

000119

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

herein, the only evidence of the character and ownership of the marshes resulting from a title search of the parcels abutting the marsh were indications on multiple plats that the marsh was part of the "marshes of the Beaufort River." Plaintiff's failure to take any action to make his claim of title known to abutting owners resulted in costing Intervenor \$6,000,000.00 in investment that wouldn't have been made if Intervenor had known that it wouldn't have water access on the Beaufort River.

Tennent Houston, one of Intervenor's three managing partners, testified at the hearing. He and his partners conducted a due diligence inquiry related to the property for two years before closing on the property. He described the property as 18.43 acres. "It consists of two tracts; primarily; an eight-acre tract that fronts on the Beaufort River and also Johnny Morrall Circle. And then across Johnny Morrall Circle another tract that fronts on that road and Ribaut Road." (Tr. P. 197.) Intervenor paid \$4,500,000.00 for the 8 acres adjacent to the Beaufort River and only \$1,500,000.00 for the remaining 10 acres, indicating that the acreage adjacent to the Beaufort River was considered to be water-front.

Mr. Houston described the significant due diligence undertaken prior to closing to ensure that the Port Royal property could support the mixed-use development including a deep water access marina. There were discussions with many professionals regarding the ability to build a marina, focusing on the presence of an intervening creek which would have to be crossed in order for access to be located on the Beaufort River. According to Mr. Houston, he and his partners have purchased, developed and sold over a hundred different properties in different States, and have a rigorous due diligence protocol. Intervenor engaged a local engineering firm, Ward Edwards and a local real estate attorney, David Tedder, to assist them in assessing the potential of the property. Ward Edwards provided both civil engineering services and

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 indiscernible. 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 determining 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 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 WJ, 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

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 Merry Land's permit applications (206:14-208:23 and Ex. 54). In addition, the Beaufort Gazette also ran a front-page article with a diagram of the proposed 40-slip marina under a banner headline in December, 2005, before Intervenor closed on the property (201:14-19).

9. The permits ultimately issued because neither permitting process with two separate regulatory agencies revealed any possibility that the disputed marsh, over which a walkway would be constructed for access to the marina, was subject to a private claim of ownership.

10. Intervenor's real estate attorney, David Tedder, examined the titles for the parcels comprising the Port Royal Property. Mr. Tedder examined multiple documents to see where the parcels abutted the disputed marsh parcel, including tax records, maps, and deeds (235:4-15). Mr. Tedder did not see indication of any tax parcel on of the documents examined. All the documents described the eastern bordering property as a marsh parcel.

11. 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 contained a symbol for marsh (90-130 and Def. Exs. 1, 2, 4, 6, 8, 10, 12, 16, 18, 20, 22, 24, 26, 28, 39, 41, 42, and 43⁸): None of these plats of record contained any indication that the disputed marsh might be privately owned.

12. Mr. Tedder searched the tax records and tax maps of the waterfront properties but saw no indication of a tax parcel on the eastern side of the Port Royal property (235:4-21). All

⁸ These 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).

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-hundreths 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.

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

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.

17. 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).

18. Intervenor hired ^{multiple} a multitude of professionals who conducted extensive due diligence on the Port Royal property before purchase. Yet, Plaintiff's ownership claim went undiscovered because the only document available to provide any indication of Plaintiff's claim was outside of the chain of title of the properties of interest to Intervenor. Intervenor established 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. Plaintiff failed to produce any plat or other document that might have been in the chains of title of Intervenor's properties containing any indication of private ownership of the marsh parcel that Intervenor could have known about prior to the purchase.

Plaintiff is Estopped From Asserting an Ownership Claim Based on his Failure to Take Any Affirmative Actions to Disclose his Alleged Ownership

19. "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 part 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).

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.

Mary Shalid

Mary D. Shalid, Esquire
Angelica M. Colwell, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
P.O. Box 486
Charleston, South Carolina 29401
Telephone: (843) 577-9440

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*

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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]

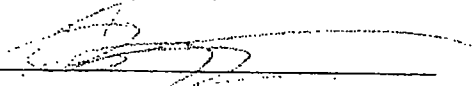
² "There seems to be no doubt, however, that the state as such trustee has the power to dispose of these beds as she may think best for her citizens; but not being, as it seems to us, subject to grant in the usual form under the provisions of the statute regulating vacant lands, it would seem to follow 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]

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

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3680
Email: esmith@scag.gov

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.)

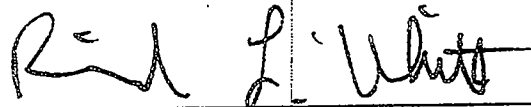
Factually, Plaintiff's counsel specifically asked the Court to allow Post Trial Motions, by electronic mail to the Court, dated **March 1, 2016** at 1:57 p.m., and **March 28, 2016**, at 3:35 p.m., both of which are incorporated herein, by reference.

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.

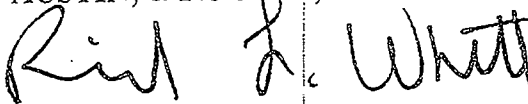
RULE 11(a) SCRPC CERTIFICATION

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.



Richard L. Whitt
Jefferson D. Griffith, III
508 Hampton Street, Suite 300
Post Office Box 11716
Columbia, SC 29211
(803) 251-7442 (phone)
(803) 252-3679 (fax)
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, SCRCF 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.

 **COPY**
000173

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

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, SCRCP 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.)

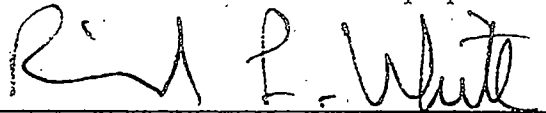
Factually, Plaintiff's counsel specifically asked the Court to allow Post Trial Motions, by electronic mail to the Court, dated **March 1, 2016** at 1:57 p.m., and **March 28, 2016**, at 3:35 p.m., both of which are incorporated herein, by reference.

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.

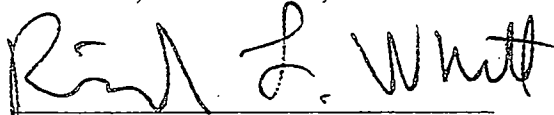
RULE 11(a) SCRPC CERTIFICATION

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.



Richard L. Whitt
Jefferson D. Griffith, III
508 Hampton Street, Suite 300
Post Office Box 11716
Columbia, SC 29211
(803) 251-7442 (phone)
(803) 252-3679 (fax)
Attorneys for Plaintiff

June 6, 2016
Columbia, South Carolina

000176

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

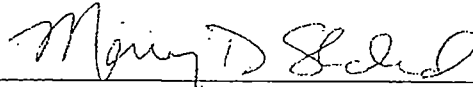
regarding the testimony he had given earlier regarding his ability to close the survey, and then considered again Plaintiff's objection to Defendant's request. (Tr. p. 306-308). The testimony was not cumulative. Defendant's witness, Mr. Gardner, was the surveyor who had originally examined the plats 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).



Mary D. Shahid, Esquire
Angelica M. Colwell, Esquire
NEXSEN PRUET, LLC
205 King Street, Suite 400
P.O. Box 486
Charleston, South Carolina 29401
Telephone: (843) 577-9440

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

Jefferson D. Griffith, III,
Richard L. Whitt,
Austin & Rogers, P.A.
508 Hampton Street, Suite 300
Columbia, South Carolina 29201
(803) 251-7442
Attorneys for Appellant.

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Other Counsel of Record:

J. Emory Smith, Jr., Esquire
S.C. Attorney General's Office
1000 Assembly Street
Columbia, South Carolina 29201

Mary D. Shahid, Esquire
Nexsen Pruet
P.O. Box 486
Charleston, South Carolina 29402

000188

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.

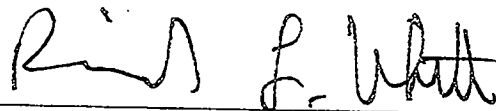
This filing is made *nunc pro tunc* and it relates back to Appellant's Notice of Appeal as filed on June 16, 2016.

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:



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
Phone: (803) 256-4000
Fax: (803) 252-3679
Attorneys for Appellant.

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

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OCT 26 2016

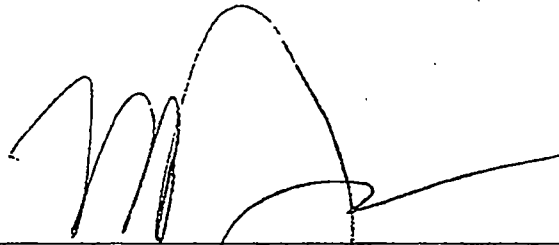
SC Court of Appeals

JERRI ALIA ROSENE
CLERK OF COURT
2016 OCT 26 AM 11:11
BEAUFORT COUNTY, SC

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.

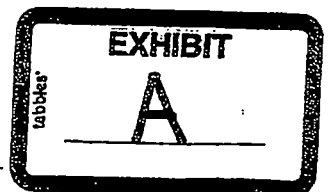
After review of Plaintiff's motion, and Defendants' Memo in opposition, I hereby deny the Rule 52(b) and 59(e) motions.

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



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