

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES A. FRARACCIO, )  
 )  
 Petitioner, )  
 )  
 vs. ) CASE NO. 88-4309  
 )  
 DEPARTMENT OF NATURAL RESOURCES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing officer, Joyous D. Parrish, held a formal hearing in the above-style case on March 28-29, 1989, in Stuart, Florida.

APPEARANCES

For Petitioner: William L. Contole  
McManus, Wiitala & Contole, P.A.  
P.O. Box 14125  
North Palm Beach, Florida 33408

For Respondent: Ross S. Burnaman  
Department of Natural Resources  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUE

The central issue in this case is whether Petitioner violated Chapter 253, Florida Statutes by removing or cutting mangrove trees waterward of the mean high water line of his property.

PRELIMINARY STATEMENT

On June 10, 1988, the Department of Natural Resources (Department) issued a Notice of Violation and Order for Corrective Action which advised Charles A. Fraraccio (Fraraccio) of an alleged violation of Chapter 253, Florida Statutes. This notice claimed Fraraccio had illegally destroyed and removed mangroves on sovereign land within the Jensen Beach to Jupiter Inlet Aquatic Preserve in Martin County, Florida. Thereafter, Fraraccio filed a Petition for Formal Administrative Hearing which sought a review of the disputed issues of fact and the case was forwarded to the Division of Administrative Hearings for formal proceedings on August 10, 1988.

At the hearing, the Department presented the testimony of the following witnesses: Charles A. Fraraccio, owner of the subject property; Rod Maddox, a registered land surveyor employed by the Department's Bureau of Surveying and Mapping; Gregory Fleming, a land surveyor who prepared a survey of the subject

property for the Department; Paul Steven Mikkelsen, a Department employee assigned to the Bureau of Aquatic Preserves; and Kalani Cairns, manager of the Department's Indian River Lagoon Aquatic Preserve program. The Department's exhibits numbered 1, 2, 3, 3B, 4, 5, 6, 8, 11, and 12 were admitted into evidence. Dr. Fraraccio testified in his own behalf and Fraraccio exhibits numbered 1, 2, 3, 4, 5, 9, 10, 11, 13, and 14 were admitted into evidence. Official recognition has been taken of the following provisions: Chapter 18-20, Florida Administrative Code, Rules 18-21.001 through 18-21.005 and 18-21.007, Florida Administrative Code, Chapter 18-14, Florida Administrative Code, and the certificate of action of the Board of Trustees of the Internal Improvement Trust Fund with the accompanying background information and transcript, December 15, 1987.

After the hearing, a transcript of the proceedings was filed with the Division of Administrative Hearings on April 26, 1988. The parties filed proposed recommended orders. Specific rulings on their proposed findings of fact are included in the appendix to this order.

#### FINDINGS OF FACT

1. The Department is the state agency charged with the responsibility of enforcing Chapter 253, Florida Statutes on behalf of the Board of Trustees of the Internal Improvement Trust Fund (Board).

2. The Board holds title to submerged sovereign lands pursuant to Sections 253.03 and 253.12, Florida Statutes, and Article X, Section 11, Florida Constitution.

3. Fraraccio, together with his wife, owns a parcel of real property located in section 13, township 38 south, range 41 east which is commonly known as 26 High Point Road and which is located in Martin County, Florida. The southern boundary of the Fraraccio's property (subject property) borders the St. Lucie and Indian Rivers.

4. In June, 1987, Fraraccio filed an application for permission to alter mangroves which grow along the shoreline of the subject property. It was Fraraccio's intention to cut the tops of the trees in order to promote horizontal growth. This application was filed with and processed by the Department of Environmental Regulation (DER).

5. On September 1, 1987, DER issued a permit for the mangrove alteration. Pertinent to this proceeding is the following specific condition of the Fraraccio permit:

4. "No person shall commence mangrove alteration or other activity involving the use of sovereign or other lands of the state, title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund or the Department of Natural Resources under Chapter 253, until such person has received from the Board of Trustees of the Internal Improvement Trust Fund the required lease, license, easement, or other form of consent authorizing the proposed use. Pursuant to Florida Administrative Code Rule 16Q-14, if such work is done without consent,

or if a person otherwise damages state land or products of state land, the Board of Trustees may levy administrative fines of up to \$10,000 per offense.

6. In October, 1987, the Department's Bureau of Survey and Mapping was asked to survey the west line of the Jensen Beach to Jupiter Inlet Aquatic Preserve (Preserve) at the confluence of the St. Lucie River. Terry Wilkinson, chief surveyor for the bureau, conducted the field survey on October 14-16, 1987. Mr. Wilkinson placed a metal rebar with a cap designating "D.N.R." at a point on the mean high water (MHW) line at the Fraraccio's property. Mr. Wilkinson also staked three points with lathe markers on a line northerly along the MHW line from the rebar monument. It was Mr. Wilkinson's opinion that the Preserve abutted the Fraraccio property from the point marked by the rebar monument northward along the coast. That portion of the Fraraccio property which was south and west of the rebar did not abut the Preserve.

7. Fraraccio disputed the findings regarding the Preserve boundary reached by Wilkinson and did not concede that his property abuts the Preserve.

8. On December 15, 1987, the issue of the Preserve boundary was taken before the Governor and Cabinet sitting as the Board at the request of the Department, Division of State Lands. Fraraccio was represented before the Board by counsel who argued against the staff recommendation. Mr. Wilkinson's interpretation of the boundary line for the Preserve was approved. That area waterward of the MHW line from the rebar monument northerly along the Fraraccio shoreline was, therefore, deemed to be part of the Preserve and sovereign submerged land.

9. Prior to cutting any mangrove trees, Fraraccio telephoned Casey Fitzgerald, chief of the Department's Bureau of State Lands Management, to inquire as to whether Department permission was required to trim mangroves located above the MHW line. Fitzgerald's letter advised Fraraccio "that trimming mangroves located above the MHW line would not be within the purview of this department." Fitzgerald further recommended that Fraraccio "employ the services of a registered land surveyor to specifically identify the individual trees which are so located."

10. Fraraccio did not obtain an independent survey. Instead, he relied upon the rebar monument and the lathe markers placed by Wilkinson, and contracted to have the mangroves landward of that line trimmed. One of difficulties encountered in determining the location of a mangrove in relation to the MHW line is the fact that one tree may have several trunks and prop roots which emanate from the center of the tree. Consequently, there is some uncertainty regarding how to locate the tree. One method used locates the centermost trunk and considers that point the tree location. Another method calculates the greatest percentage of tree mass and considers that point the center of the tree. This calculated center is then matched against the MHW line. Either method results in a judgment based upon visual inspection. This judgment may differ among reasonable men.

11. In January, 1988, Fraraccio supervised the cutting of mangroves based upon the MHW line as established by the Wilkinson survey. Fraraccio did not intend to cut trees waterward of the MHW line. No trees were cut waterward of the Wilkinson line. A number of trees were trimmed landward of the Wilkinson line.

12. There is no evidence that either the rebar monument or the lathe markers placed by Wilkinson were moved either prior to or after the mangrove alteration.

13. Fraraccio was responsible for the direct supervision of the workmen who completed the mangrove trim. No work was done without Fraraccio's authorization.

14. On March 22, 1988, Kalani Cairns, inspected the Fraraccio property. Cairns took field notes of the inspection. One of comments made at that time was that it was "difficult to determine if MHWL stakes have been moved." Based upon his review of the area, Cairns determined approximately 20 mangrove trees below the MHW line had been topped.

15. Subsequently, the Department issued the Notice of Violation and Order for corrective action. Since Fraraccio did not believe he had cut waterward of the MHW line, no corrective measures were taken. Subsequent to the Notice, additional mangroves were not cut. Fraraccio timely sought review of the notice.

16. In preparation for the formal hearing in this cause, the Department contracted with Greg Fleming to prepare a survey of a portion of the Fraraccio property. The purpose of this second survey was to locate the MHW line along the Fraraccio shoreline and to plot mangrove trees which had been trimmed and which were waterward of the line. Approximately 24 trimmed mangrove trees were located waterward of the MHW line as determined by the Fleming survey.

17. The Fleming survey resulted in a MHW line which was upland of the line established by the Wilkinson survey. The trimmed trees in dispute are located between the two lines, as marked on the ground, by the lathes placed by the two surveyors. Mr. Wilkinson did not testify and no credible explanation was given for why the lines, as marked in the field, differ.

18. At the time of the cutting, however Fraraccio believed the Wilkinson lathes marked the MHW line. This belief was based upon the representations that the Department had made regarding the rebar monument marked "D.N.R." and the fact that the placement of the lathe stakes had coincided with placement of the rebar.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of these proceedings.

20. Rule 18-14.003, Florida Administrative Code, provides in pertinent part:

It shall be a violation of this rule for any person or the agent of any person to knowingly refuse to comply with any provision of Chapter 253, F.S., willfully violate any provision of Chapter 253, F.S., or to willfully damage state land (the ownership or boundaries of which have been established by the state) or products thereof, by doing any of the following:

\* \* \*

(2) Remove, in violation of state or federal law, any product from state land without written approval or specific exemption from the board or department.

\* \* \*

(6) Any other willful act that causes damage to state land, or products thereof, when such activity occurs without the required approval by the board or department.

21. Rule 18-14.001, Florida Administrative Code, provides in pertinent part:

As used in this rule chapter:

(1) "Board" means the Governor and Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund.

(2) "Department" means the Department of Natural Resources.

\* \* \*

(5) "Person" means individuals, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations; and a political subdivision of the state.

(6) "Products" means without limitation, indigenous, planted or exotic trees and other vegetation, or portions thereof; peat; solid minerals, phosphate, or limestone; oil or gas; metals; or other inorganic material, such as sand or gravel. For purposes of this rule, animal wildlife within the jurisdiction of the Florida Game and Fresh Water Fish Commission and seashells shall not be considered products of state lands.

(7) "State land" means that land, title to which is vested in the board pursuant to Section 253.03, F.S.

22. In this case, the Department has failed to establish that Fraraccio knowingly refused to comply with any provision of Chapter 253, Florida Statutes, that he willfully violated any provision of that chapter, or that he willfully removed or cut the mangroves waterward of the MHW line. The facts of this case demonstrate that Fraraccio relied on the initial survey performed by Wilkinson and did not cut trees waterward of the Wilkinson MHW line. That such reliance may have been in error, based upon the subsequent survey performed by Fleming, does not establish Fraraccio sought to intentionally ignore Chapter 253 or the rules promulgated thereunder. It was reasonable for Fraraccio to rely on the rebar monument and the lathes placed by Wilkinson since that line was represented by' the Department to be the MHW line. There was no evidence that the lathes had been moved either before or after the time Fraraccio had had the trees topped. Further, only mangrove trees landward of the lathe markers were cut.

23. In this instance, the rule prohibiting removal of any product from state land is couched in language of "knowing" and "willful" action. From the

facts of this case, it is clear Fraraccio believed he was cutting trees upland of the MHW line. Consequently, he did not knowingly or willfully remove any product of the state.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of Trustees of the Internal Improvement Trust Fund enter a final order dismissing the Notice of Violation against Charles A. Fraraccio.

DONE and ENTERED this 23rd day of June, 1989, in Tallahassee, Florida.

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JOYOUS D. PARRISH  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, FL 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 23rd day of June, 1989.

#### APPENDIX TO RECOMMENDED ORDER IN CASE NO. 88-4309

Rulings on the proposed findings of fact submitted by Petitioner:

1. Paragraphs 1 through 5 are accepted.
2. With regard to paragraph 6, it is accepted Wilkinson put down three lathes and that there is no evidence that those lathes were moved. Otherwise, the paragraph is rejected. Mr. Wilkinson did not testify and, therefore, no evidence was presented on the issue of the lathes. It is clear Fraraccio believed the lathes to be the MHW line.
3. Paragraph 7 is accepted.
4. Paragraph 8 is rejected as contrary to the weight of the evidence. The MHW line was correctly depicted on the ground and on paper by the Fleming survey which was done after-the-fact. Pertinent to this case is the fact that Fraraccio and DNR treated the Wilkinson survey on the ground (as shown by-the rebar and the three lathes) as the MHW line prior to the cutting.
5. Paragraph 9 is accepted.
6. With regard to paragraph 10, the record shows Fleming was contacted to perform the second survey in December, 1988, and that it was dated February, 1989. With that modification and clarification, paragraph 10, in substance, is accepted.
7. Paragraph 11 is accepted to the extent that the two surveys differed on the ground (as opposed to on paper).
8. Paragraphs 12, 13, and 14 accepted but are irrelevant.
9. With regard to paragraph 15, it is accepted that the workmen were instructed not to cut waterward of the MHW line. The remainder is irrelevant to this proceeding.

10. Paragraphs 16 through 18 are accepted.
11. With regard to paragraph 10, it is accepted Fraraccio cut or trimmed the trees based upon the Wilkinson survey as depicted by the rebar and 3 lathe markers. Otherwise, paragraph 19, is rejected as irrelevant.
12. Paragraph 20 is accepted.
13. Paragraph 21 is rejected as irrelevant to this proceeding.

Rulings on the proposed findings of fact submitted by the Department.

1. Paragraphs 1 through 16 are accepted.
2. The first sentence of paragraph 17 is accepted since both surveys coincided at the point of the rebar marked "D.N.R.;" otherwise, the paragraph is rejected as contrary to the weight of evidence since the surveys differed as plotted on the ground.
3. Paragraphs 18 and 19 are accepted.
4. Paragraph 20 is rejected as irrelevant.
5. Paragraph 21 is accepted.
6. Paragraph 22 is rejected as contrary to the weight of the credible evidence.
7. Paragraph 23 is rejected as irrelevant. The number of trees cut waterward of the MHW line as established by the Fleming survey was approximately 24. The size of the trees is irrelevant.
8. Paragraph 24 is rejected as irrelevant.
9. Paragraphs 25 and 26 are accepted.
10. Paragraph 27 is rejected as irrelevant to this proceeding.

COPIES FURNISHED:

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Tallahassee, FL 32399-3000

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES A. FRARACCIO, )  
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 vs. ) CASE NO. 88-4309  
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 DEPARTMENT OF NATURAL RESOURCES, )  
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CORRECTED RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Joyous D. Parrish, held a formal hearing in the above-style case on March 28-29, 1989, in Stuart, Florida.

APPEARANCES

For Petitioner: William L. Contole  
McManus, Wiital & Contole, P.A.  
P. O. Box 14125  
North Palm Beach, Florida 33408

For Respondent: Ross S. Burnaman  
Department of Natural Resources  
3900 Commonwealth Boulevard  
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

The central issue in this case is whether Petitioner violated Chapter 253, Florida Statutes by removing or cutting mangrove trees waterward of the mean high water line of his property.

PRELIMINARY STATEMENT

On June 10, 1988, the Department of Natural Resources (Department) issued a Notice of Violation and Order for Corrective Action which advised Charles A. Fraraccio (Fraraccio) of an alleged violation of Chapter 253, Florida Statutes. This notice claimed Fraraccio had illegally destroyed and removed mangroves on sovereign land within the Jensen Beach to Jupiter Inlet Aquatic Preserve in Martin County, Florida. Thereafter, Fraraccio filed a Petition for Formal Administrative Hearing which sought a review of the disputed issues of fact and the case was forwarded to the Division of Administrative Hearings for formal proceedings on August 10, 1988.

At the hearing, the Department presented the testimony of the following witnesses: Charles A. Fraraccio, owner of the subject property; Rod Maddox, a registered land surveyor employed by the Department's Bureau of Surveying and Mapping; Gregory Fleming, a land surveyor who prepared a survey of the subject property for the Department; Paul Steven Mikkelsen, a Department employee



assigned to the Bureau of Aquatic Preserves; and Kalani Cairns, manager of the Department's Indian River Lagoon Aquatic Preserve program. The Department's exhibits numbered 1, 2, 3, 3B, 4, 5, 6, 8, 11, and 12 were admitted into evidence. Dr. Fraraccio testified in his own behalf and Fraraccio exhibits numbered 1, 2, 3, 4, 5, 9, 10, 11, 13, and 14 were admitted into evidence. Official recognition has been taken of the following provisions: Chapter 18-20, Florida Administrative Code, Rules 18-21.001 through 18-21.005 and 18-21.007, Florida Administrative Code, Chapter 18-14, Florida Administrative Code, and the certificate of action of the Board of Trustees of the Internal Improvement Trust Fund with the accompanying background information and transcript, December 15, 1987.

After the hearing, a transcript of the proceedings was filed with the Division of Administrative Hearings on April 26, 1988. The parties filed proposed recommended orders. Specific rulings on their proposed findings of fact are included in the appendix to this order.

#### FINDINGS OF FACT

1. The Department is the state agency charged with the responsibility of enforcing Chapter 253, Florida Statutes on behalf of the Board of Trustees of the Internal Improvement Trust Fund (Board).

2. The Board holds title to submerged sovereign lands pursuant to Sections 253.03 and 253.12, Florida Statutes, and Article X, Section 11, Florida Constitution.

3. Fraraccio, together with his wife, owns a parcel of real property located in section 13, township 38 south, range 41 east which is commonly known as 26 High Point Road and which is located in Martin County, Florida. The southern boundary of the Fraraccio's property (subject property) borders the St. Lucie and Indian Rivers.

4. In June, 1987, Fraraccio filed an application for permission to alter mangroves which grow along the shoreline of the subject property. It was Fraraccio's intention to cut the tops of the trees in order to promote horizontal growth. This application was filed with and processed by the Department of Environmental Regulation (DER).

5. On September 1, 1987, DER issued a permit for the mangrove alteration. Pertinent to this proceeding is the following specific condition of the Fraraccio permit:

4. "No person shall commence mangrove alteration or other activity involving the use of sovereign or other lands of the state, title to which is vested in the Board of Trustees of the Internal Improvement Trust Fund or the Department of Natural Resources under Chapter 253, until such person has received from the Board of Trustees of the Internal Improvement Trust Fund the required lease, license, easement, or other form of consent authorizing the proposed use." Pursuant to Florida Administrative Code Rule 16Q-14, if such work is done without consent, or if a person otherwise damages state land

or products of state land, the Board of Trustees may levy administrative fines of up to \$10,000 per offense.

6. In October, 1987, the Department's Bureau of Survey and Mapping was asked to survey the west line of the Jensen Beach to Jupiter Inlet Aquatic Preserve (Preserve) at the confluence of the St. Lucie River. Terry Wilkinson, chief surveyor for the bureau, conducted the field survey on October 14-16, 1987. Mr. Wilkinson placed a metal rebar with a cap designating "D.N.R." at a point on the mean high water (MHW) line at the Fraraccio's property. Mr. Wilkinson also staked three points with lathe markers on a line northerly along the MHW line from the rebar monument. It was Mr. Wilkinson's opinion that the Preserve abutted the Fraraccio property from the point marked by the rebar monument northward along the coast. That portion of the Fraraccio property which was south and west of the rebar did not abut the Preserve.

7. Fraraccio disputed the findings regarding the Preserve boundary reached by Wilkinson and did not concede that his property abuts the Preserve.

8. On December 15, 1987, the issue of the Preserve boundary was taken before the Governor and Cabinet sitting as the Board at the request of the Department, Division of State Lands. Fraraccio was represented before the Board by counsel who argued against the staff recommendation. Mr. Wilkinson's interpretation of the boundary line for the Preserve was approved. That area waterward of the MHW line from the rebar monument northerly along the Fraraccio shoreline was, therefore, deemed to be part of the Preserve and sovereign submerged land.

9. Prior to cutting any mangrove trees, Fraraccio telephoned Casey Fitzgerald, chief of the Department's Bureau of State Lands Management, to inquire as to whether Department permission was required to trim mangroves located above the MHW line. Fitzgerald's letter advised Fraraccio "that trimming mangroves located above the MHW line would not be within the purview of this department." Fitzgerald further recommended that Fraraccio "employ the services of a registered land surveyor to specifically identify the individual trees which are so located."

10. Fraraccio did not obtain an independent survey. Instead, he relied upon the rebar monument and the lathe markers placed by Wilkinson, and contracted to have the mangroves landward of that line trimmed. One of difficulties encountered in determining the location of a mangrove in relation to the MHW line is the fact that one tree may have several trunks and prop roots which emanate from the center of the tree. Consequently, there is some uncertainty regarding how to locate the tree. One method used locates the centermost trunk and considers that point the tree location. Another method calculates the greatest percentage of tree mass and considers that point the center of the tree. This calculated center is then matched against the MHW line. Either method results in a judgment based upon visual inspection. This judgment may differ among reasonable men.

11. In January, 1988, Fraraccio supervised the cutting of mangroves based upon the MHW line as established by the Wilkinson survey. Fraraccio did not intend to cut trees waterward of the MHW line. No trees were cut waterward of the Wilkinson line. A number of trees were trimmed landward of the Wilkinson line.

12. There is no evidence that either the rebar monument or the lathe markers placed by Wilkinson were moved either prior to or after the mangrove alteration.

13. Fraraccio was responsible for the direct supervision of the workmen who completed the mangrove trim. No work was done without Fraraccio's authorization.

14. On March 22, 1988, Kalani Cairns, inspected the Fraraccio property. Cairns took field notes of the inspection. One of comments made at that time was that it was "difficult to determine if MHWL stakes have been moved." Based upon his review of the area, Cairns determined approximately 20 mangrove trees below the MHW line had been topped.

15. Subsequently, the Department issued the Notice of Violation and Order for corrective action. Since Fraraccio did not believe he had cut waterward of the MHW line, no corrective measures were taken. Subsequent to the Notice, additional mangroves were not cut. Fraraccio timely sought review of the notice.

16. In preparation for the formal hearing in this cause, the Department contracted with Greg Fleming to prepare a survey of a portion of the Fraraccio property. The purpose of this second survey was to locate the MHW line along the Fraraccio shoreline and to plot mangrove trees which had been trimmed and which were waterward of the line. Approximately 24 trimmed mangrove trees were located waterward of the MHW line as determined by the Fleming survey.

17. The Fleming survey resulted in a MHW line which was upland of the line established by the Wilkinson survey. The trimmed trees in dispute are located between the two lines, as marked on the ground, by the lathes placed by the two surveyors. Mr. Wilkinson did not testify and no credible explanation was given for why the lines, as marked in the field, differ.

18. At the time of the cutting, however, Fraraccio believed the Wilkinson lathes marked the MHW line. This belief was based upon the representations that the Department had made regarding the rebar monument marked "D.N.R." and the fact that the placement of the lathe stakes had coincided with placement of the rebar.

#### CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of these proceedings.

20. Rule 18-14.003, Florida Administrative Code, provides in pertinent part:

It shall be a violation of this rule for any person or the agent of any person to knowingly refuse to comply with any provision of Chapter 253, F.S., willfully violate any provision of Chapter 253, F.S., or to willfully damage state land (the ownership or boundaries of which have been established by the state) or products thereof, by doing any of the following:

\* \* \*

(2) Remove, in violation of state or federal law, any product from state land without written approval or specific exemption from the board or department.

\* \* \*

(6) Any other willful act that causes damage to state land, or products thereof, when such activity occurs without the required approval by the board or department.

21. Rule 18-14.001, Florida Administrative Code, provides in pertinent part:

As used In this rule chapter:

(1) "Board" means the Governor and Cabinet sitting as the Board of Trustees of the Internal Improvement Trust Fund.

(2) "Department" means the Department of Natural Resources.

\* \* \*

(5) "Person" means individuals, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations; and a political subdivision of the state.

(6) "Products" means without limitation, indigenous, planted or exotic trees and other vegetation, or portions thereof; peat; solid minerals, phosphate, or limestone; oil or gas; metals; or other inorganic material, such as sand or gravel. For purposes of this rule, animal wildlife within the jurisdiction of the Florida Game and Fresh Water Fish Commission and seashells shall not be considered products of state lands.

(7) "State land" means that land, title to which is vested in the board pursuant to Section 253.03, F.S.

22. In this case, the Department has failed to establish that Fraraccio knowingly refused to comply with any provision of Chapter 253, Florida Statutes, that he willfully violated any provision of that chapter, or that he willfully removed or cut the mangroves waterward of the MHW line. The facts of this case demonstrate that Fraraccio relied on the initial survey performed by Wilkinson and did not cut trees waterward of the Wilkinson MHW line. That such reliance may have been in error, based upon the subsequent survey performed by Fleming, does not establish Fraraccio sought to intentionally ignore Chapter 253 or the rules promulgated thereunder. It was reasonable for Fraraccio to rely on the rebar monument and the lathes placed by Wilkinson since that line was represented by the Department to be the MHW line. There was no evidence that the lathes had been moved either before or after the time Fraraccio had had the trees topped. Further, only mangrove trees landward of the lathe markers were cut.

23. In this instance, the rule prohibiting removal of any product from state land is couched in language of "knowing" and "willful" action. From the

facts of this case, it is clear Fraraccio believed he was cutting trees upland of the MHW line. Consequently, he did not knowingly or willfully remove any product of the state.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of Trustees of the Internal Improvement Trust Fund enter a final order dismissing the Notice of Violation against Charles A. Fraraccio.

DONE and ENTERED this 18th day of July, 1989, in Tallahassee, Florida.

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JOYOUS D. PARRISH  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of July, 1989.

#### APPENDIX TO THE RECOMMENDED ORDER IN CASE NO. 88-4309

Rulings on the proposed findings of fact submitted by Petitioner:

1. Paragraphs 1 through 5 are accepted.
2. With regard to paragraph 6, it is accepted Wilkinson put down three lathes and that there is no evidence that those lathes were moved. Otherwise, the paragraph is rejected. Mr. Wilkinson did not testify and, therefore, no evidence was presented on the issue of the lathes. It is clear Fraraccio believed the lathes to be the MHW line.
3. Paragraph 7 is accepted.
4. Paragraph 8 is rejected as contrary to the weight of the evidence. The MHW line was correctly depicted on the ground and on paper by the Fleming survey which was done after-the-fact. Pertinent to this case is the fact that Fraraccio and DNR treated the Wilkinson survey on the ground (as shown by the rebar and the three lathes) as the MHW line prior to the cutting.
5. Paragraph 9 is accepted.
6. With regard to paragraph 10, the record shows Fleming was contacted to perform the second survey in December, 1988, and that it was dated February, 1989. With that modification and clarification, paragraph 10, in substance, is accepted.
7. Paragraph 11 is accepted to the extent that the two surveys differed on the ground (as opposed to on paper).
8. Paragraphs 12, 13, and 14 accepted but are irrelevant.
9. With regard to paragraph 15, it is accepted that the workmen were instructed not to cut waterward of the MHW line. The remainder is irrelevant to this proceeding.

10. Paragraphs 16 through 18 are accepted.
11. With regard to paragraph 19, it is accepted Fraraccio cut or trimmed the trees based upon the Wilkinson survey as depicted by the rebar and 3 lathe markers. Otherwise, paragraph 19, is rejected as irrelevant.
12. Paragraph 20 is accepted.
13. Paragraph 21 is rejected as irrelevant to this proceeding.

Rulings on the proposed findings of fact submitted by the Department.

1. Paragraphs 1 through 16 are accepted.
2. The first sentence of paragraph 17 is accepted since both surveys coincided at the point of the rebar marked "D.N.R.;" otherwise, the paragraph is rejected as contrary to the weight of evidence since the surveys differed as plotted on the ground.
3. Paragraphs 18 and 19 are accepted.
4. Paragraph 20 is rejected as irrelevant.
5. Paragraph 21 is accepted.
6. Paragraph 22 is rejected as contrary to the weight of the credible evidence.
7. Paragraph 23 is rejected as irrelevant. The number of trees cut waterward of the MHW line as established by the Fleming survey was approximately 24. The size of the trees is irrelevant.
8. Paragraph 24 is rejected as irrelevant.
9. Paragraphs 25 and 26 are accepted.
10. Paragraph 27 is rejected as irrelevant to this proceeding.
11. With regard to paragraph 28, it is accepted that the trimmed mangroves were, in part, red mangroves. The exact number is unknown.
12. Paragraph 29 is accepted, but is unnecessary.
13. Paragraph 30 is rejected as unnecessary, irrelevant, or immaterial.
14. Paragraph 31 is rejected as unnecessary, irrelevant, or immaterial.
15. Paragraph 32 is accepted.
16. Paragraph 33 is rejected as contrary to the weight of the credible evidence.
17. Paragraph 34 is accepted.
18. Paragraph 35 is accepted to the extent that Fraraccio was advised that a survey locating the trees to be cut in relation to the line would be beneficial.
19. Paragraph 36 is accepted as an accurate statement of how one might visually determine MHW line; however, it is not the only method, and it was not unreasonable to rely on lathes placed by a competent surveyor.
20. Paragraph 37 is rejected as irrelevant, immaterial, or contrary to law.
21. Paragraph 38 is rejected as contrary to the weight of the evidence.
22. Paragraph 39 is accepted.
23. Paragraph 40 is rejected as contrary to the weight of the evidence.
24. Paragraph 41 is accepted.
25. Paragraph 42 is rejected as contrary to the weight of the evidence.
26. Paragraph 43 is rejected as contrary to the weight of the evidence.
27. Paragraph 44 is accepted but is irrelevant, immaterial and unnecessary.

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