STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID COOK, Petitioner, vs. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, Respondent.	)	Case No. 02-3149

RECOMMENDED ORDER

This cause came on for hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Tallahassee, Florida, on May 19, 2003. The appearances were as follows:

APPEARANCES

For Petitioner: David Cook, pro se
Post Office Box 30
Fernandina Beach, Florida 32035-0030

For Respondent: Suzanne B. Brantley, Esquire
Christine A. Guard, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard
Mail Station 35
Tallahassee, Florida 32399-3000

STATEMENT OF THE ISSUES

The issue to be resolved in this proceeding concerns whether the Board of Trustees should deny David Cook's request

for a Butler Act Disclaimer, in consideration of Section 18-21.019, Florida Administrative Code.

PRELIMINARY STATEMENT

The Petitioner filed a Petition on July 26, 2002, alleging, in essence, that the Board of Trustees of the Internal Improvement Trust Fund (Trustees) erroneously denied his request for a Butler Act Disclaimer pursuant to Section 253.129, Florida Statutes and Rule 18-21.019, Florida Administrative Code. The Petitioner set forth three issues of disputed material facts. The first concerns whether the lands subject to the application for the disclaimer were "permanently improved" by the Petitioner's predecessor in title, so as to convey title to the submerged land beneath those improvements, as described in the case of Anderson Columbia v. Board of Trustees of the Internal Improvement Trust Fund, 748 So. 2d 1061 (Fla. 1st DCA 1999). Secondly, the Petitioner is concerned with whether his survey is an accurate depiction of the boundaries of those improvements, and thirdly, whether the Petitioner has provided the information required by the Rules of the Trustees.

The cause came on for hearing as noticed at which the Petitioner called three witnesses: himself, his son, Daniel A. Cook, and Dr. Joe Knetsch, an employee of the Department of Environmental Protection (Department). The Petitioner also presented 13 composite exhibits. The Petitioner's Exhibits 3,

4, 5, 6, a part of Exhibit 7, (identified in the record,) and 9, 10 and 11 were admitted into evidence. The Respondent called witnesses Terry Wilkinson, Kathy Miklus, Jody Miller and Scott Woolam, all Department employees, as witnesses. The Respondent's Exhibits 1 through 7 were admitted into evidence.

Upon the conclusion of the proceeding the parties elected to order a transcript thereof and to reserve the right to submit Proposed Recommended Orders. Those Proposed Recommended Orders were timely submitted on or before June 27, 2003, and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner, David Cook, is in the commercial fishing business, operating his business in Fernandina Beach on the Amelia River.

2. The Respondent, Trustees, is an agency of the State of Florida which holds title to sovereignty submerged lands on behalf of the people of the state, in accordance with Chapter 253, Florida Statutes. The Trustees is the agency responsible for issuance of disclaimers to formerly sovereignty submerged lands under the Butler Act and other similar riparian acts. The Department serves as staff to the Trustees.

3. In November 1999 the Petitioner submitted an application to the Department for a disclaimer to certain submerged lands pursuant to Section 253.129, Florida Statutes

and Rule 18-21.019, Florida Administrative Code. The application was on DEP Form 63-031(16) ("Form"). The above Rule adopts and incorporates that Form by reference as part of the Rule.

4. The Butler Act transferred title to certain sovereignty submerged lands to the adjacent, upland, riparian owners if and when they filled, bulkheaded, or permanently improved the submerged lands. The Butler Act, enacted in 1921, was retroactive to 1856. It was repealed by implication in most Florida counties on May 29, 1951.

5. A riparian upland owner who has acquired submerged lands under the Butler Act does not have to apply for disclaimer under the Trustees' Rule. The Act conveyed the lands, so the owner is not required to do anything. If an owner needed to prove up his title, he could also file a quiet title action. In order to avoid forcing owners to file such actions, the Trustees provided the Rule as an alternate mechanism to save the applicant time and expense involved in litigation.

6. Kathy Miklus, a Planning Manager in the Title and Land Records Section of the Bureau of Survey and Mapping in the Division of State Lands of the Department, received and began reviewing the Petitioner's application. Upon reviewing the application she determined the application was incomplete. On December 23, 1999, Ms. Miklus wrote a letter to the Petitioner,

advising him that the Trustees had placed a moratorium on applications for disclaimers involving "permanent improvements," but that staff was requesting the Trustees to lift that moratorium since the decision was handed down in the case of City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 746 So. 2d 1085 (Fla. 1999). Ms. Miklus also advised the Petitioner in this letter that he had not submitted a survey or satisfactory evidence of title to the riparian uplands, required by the Rule referenced above. The Petitioner did not respond to the letter.

7. On April 6, 2000, Ms. Miklus faxed a copy of the December 23, 1999, letter to the Petitioner, with a cover sheet reminding him that his application was still incomplete, and that she still needed the items stated in her letter. The Petitioner called her in July of 2000 about the status of the application. On July 26, 2000, Ms. Miklus called him back and advised him for the third time that he needed to submit the survey and proof of upland ownership required by the Rule. On August 14, 2000, the Petitioner submitted some county tax information. On October 10, 2000, Ms. Miklus asked him again for a survey. On December 4, 2000, the Petitioner called and stated that he had filed a lawsuit a month earlier, and on January 18, 2001, the Petitioner called Ms. Miklus again. Ms. Miklus called him back and left a message to the effect

that she still needed the survey. On January 23, 2001, Ms. Miklus called the Petitioner and told him that she had located his "survey" and a map. Ms. Miklus continued to receive calls from the Petitioner, even after she had turned processing of the case over to Jody Miller for further processing.

8. Mr. Miller is an Engineer II in the Title and Land Records Section of the Bureau of Surveying and Mapping. He prepared drawings and field surveys in the private sector for two years, and subsequently worked for DEP for two years as an Engineering Technician IV and for another two years as an Engineer I. Mr. Miller has two years of study at Tallahassee Community College in civil engineering technology. He has also received additional training in minimum technical standards, surveying law, surveying mathematics, and "AutoCAD." He has reviewed surveys in his present position for 10 years. He was qualified and accepted as an expert in survey review. His area of responsibility is reviewing boundary surveys and mean high water line surveys for the State. Butler Act surveys generally involve both.

9. Mr. Miller continued to try to collect the information required by the Rule from the Petitioner. The Petitioner's application was different and more complex than the normal Butler Act application because it was for a "permanent improvement" that no longer existed, rather than for existing

land fill. This makes the area to be disclaimed more difficult to locate and precisely define as to "footprint" and/or boundaries.

10. Mr. Miller reviewed the document that the Petitioner had submitted in January 2001 and determined that it was not a survey. Rather, it was a "sketch of description." Further, it did not give a legal description of the footprint of the structure that existed prior to May 29, 1951, nor did it show the mean high water line or the location of any structure built before 1951. Mr. Miller testified that there were other problems with the sketch of description as well. The Petitioner, according to the sketch of description, was attempting to claim a large area covering nearly all of the adjacent submerged lands in the marina, except for the submerged lands waterward of the railway. He did not merely limit his claim to the location, size and shape of the permanent improvements built under the Butler Act. Without the correct legal description of the area that was permanently improved under the Butler Act, Mr. Miller was unable to prepare a disclaimer for the Trustees' execution.

11. Subsequently, Mr. Miller worked with the Petitioner, and two of the Petitioner's attorneys, Clinch Kavanaugh and Jeff Brown, and the Petitioner's surveyor, Mike Manzie, in order to help the Petitioner comply with the Rule. Mr. Miller also

visited the site in Fernandina Beach. He conferred with the Petitioner's surveyor Mr. Manzie. Despite all this, the Petitioner never provided all of the items required by the Rule in order to issue a disclaimer.

12. Because the Petitioner never provided the information required by Section 5 of the Form incorporated in the Rule, Mr. Miller recommended denial of the application to his supervisor, Scott Woolam.

13. Mr. Woolam is a Professional Land Surveyor Manager with the Department who supervises the Title and Land Record Section and the Management Survey Section of the Bureau of Survey and Mapping. He holds a bachelor of science degree in land surveying. He has taken additional courses in legal principles, wetlands, and title and has instructed seminars in his field dealing with the statute and rule at issue here, as well as other sovereignty land issues. Mr. Woolam is published in his field. He was qualified and accepted as an expert in surveying and mapping.

14. The Petitioner's application was pending during the Trustees' moratorium on "permanent improvement" disclaimers. However, the moratorium was lifted prior to the time the Petitioner's application was denied. Meanwhile, the Department continued to process the application.

15. The Department's counsel advised Mr. Woolam that the Petitioner had filed lawsuit in the local circuit court during the pendency of his application and Mr. Woolam was told not to communicate directly with the Petitioner without counsel being present. Meetings were held with counsel present to try to resolve the remaining issues.

16. Mr. Woolam conferred with Ms. Miklus and Mr. Miller about the status of the application. They came to a consensus opinion that the Petitioner had not complied with the requirements of Section 5 of the Form and Rule. The sketch of description provided in January 2001 did not identify the mean high water line, did not locate the permanent improvements prior to 1951, and did not explain the methodology used to support the applicant's description of the entire pre-empted area. These items are required by paragraph 5 of the Form. Mr. Woolam discussed the application with Terry Wilkinson, his supervisor, and prepared a letter recommending denial for Mr. Wilkinson's signature.

17. Terry Wilkinson has been with the Department in the Bureau of Surveying and Mapping for 18 years. He spent the last 16 years as Bureau Chief. He is a professional land surveyor and before his employment with the Department worked in the private sector performing coastal surveys, guaging of tides and mean high water line surveys. He also directed field work for

surveys. In his present position, he oversees a bureau that reviews surveys, prepares surveys, administers Chapter 177, Part II, Florida Statutes, which provides that the Department shall approve and assist with all mean high water line surveys, and he determines ordinary high water lines and makes title determinations on behalf of the Trustees. Additionally, he has taught seminars on the foregoing subjects and has received awards in his fields. He was qualified and accepted as an expert in surveying and mapping and in determining title to public lands within the scope of Chapter 253, Florida Statutes.

18. One of Mr. Wilkinson's job duties is to administer the Rule that governs Butler Act disclaimers. Mr. Wilkinson conferred with Mr. Woolam about the proposed denial of the Petitioner's application and agreed that the application did not comply with the Rule because it was incomplete. On July 16, 2002, Mr. Wilkinson issued a letter notifying the Petitioner that his application was denied.

19. The July 16, 2002, denial was based on the fact that the Petitioner's application did not have a legal description of the areas for which the disclaimer was requested, nor a survey showing the pre-1951 improvements and their relations to the current facility. The July 16, 2002, denial letter also indicated that the information lacking from the application had been requested by written communication dated December 23, 1999

and April 6, 2000, and in verbal conversations with the Petitioner and his counsel.

20. In March 2003, after receiving instructions from Mr. Miller, the Petitioner submitted a survey prepared by Mr. Manzie. Although the Manzie survey was offered by the Petitioner at the time of hearing, it was not admitted into evidence. Even had it been admitted into evidence it still did not comply with Section 5, of the Form. Mr. Miller reviewed the March 2003 survey and found a number of technical errors in it. It did not have a true mean high water line, as required by the rule, the disclaimer area was expressed in two legal descriptions instead of one; one of the survey calls was reversed and the areas showed incorrect calculations. The new survey had one substantial error in that it did not show the "footprint" of the improvement that existed prior to May 29, 1951. It was not tied to any type of lots, blocks or streets, and it did not show the saw-tooth docking structure that appears in most of the Petitioner's photographic and other evidence. Therefore, even if it had been admissible, it would still be deemed incomplete under the rule.

21. The Department acknowledges that the Petitioner may own some of the submerged lands pursuant to the Butler Act because permanent improvements existed on them prior to 1951. However, the Petitioner has not provided sufficient proof of

where the permanent improvements lie on the ground in order to issue a disclaimer.

22. The Petitioner states that he owns uplands in Fernandina Beach, Nassau County, on the Amelia River in Section 17, Township 3 North, Range 28 East. He presented numerous deeds which were accepted into evidence. The first deed is a patent from the United States to Florida dated July 9, 1891. Although part of it is illegible it appears to include unsurveyed parts of the land claimed by the Petitioner. The second deed, Trustees Deed No. 14,536, dated December 31, 1891, apparently conveys some of the same unsurveyed lands to Samuel A. Swann. Another Trustees Deed No. 14,537, dated the same day, deeds more lands in Petitioner's area to Samuel Swann, Trustee. Trustees Deeds No. 13,490 and 13,491 dated September 13, 1886, apparently provide railroad right-of-way from Fernandina to Cedar Key to the Florida Railroad Company. The Petitioner also presented four deeds that appear to be from Fernandina Dock and Realty Co., to Nassau Wharf Company, J.H.P. Merrow, and John R. Hardee, respectively. The Petitioner submitted a Trustees Disclaimer No. 23141, dated July 20, 1962, to the City of Fernandina Beach, which states "[t]he disclaimer is needed by the city to clear question of title." Neither the disclaimer nor any of its attachments shows that it was a Butler Act Disclaimer. The Murphy Act Deed from the Trustees, No. 199, to

the Hardee, Trustees appears to be a portion of one of the "water lots" that the Petitioner claims to own. The final deed is from Samuel A. Swann to the Fernandina Dock and Realty Company, recorded January 18, 1902. None of these deeds appears to convey title to the Petitioner nor has he established any chain of title from any of the grantees to himself. In any event, however, this forum may not opine on issues of title to real property which is a matter reserved for the Circuit Courts of Florida.

23. The Petitioner also presented seven color photographs, referred to at hearing as the "modern" photographs which were admitted into evidence. Certain other historic black and white photographs that were offered by the Petitioner were not admitted into evidence. The modern photographs all show various structures and/or pilings located on the submerged lands adjacent to the uplands the Petitioner states that he owns. The photographs are not to scale, and none of them were taken directly overhead, so measurements cannot ascertain the size of any structure that was there. Additionally, they had no verified dates, and the Petitioner admits that none of them were taken prior to May 29, 1951. The Petitioner identifies a number of remnants which may have been pilings. They are of unknown origin and age and their significance was not shown. Further, there was no showing that conditions in the photographs also

prevailed 52 years ago. The Petitioner is not a surveyor and chose not to have his surveyor testify. There is no testimony about the size of the structure. The Petitioner's Exhibit 8, Sanborn maps, was not admitted into evidence.

24. Two aerial photographs, taken by the Florida Department of Transportation, dated 1943 and 1953, were admitted into evidence. The 1953 aerial photograph is not relevant because it was taken after the Butler Act was repealed. The 1943 photographs reveal that there was a long, narrow structure, perhaps a walkway, extending to a small terminal platform that bears no resemblance to the "Area for Disclaimer" identified in the Petition. The photograph merely shows that some structure was present in 1943.

25. The Petitioner's United States Army, Corps of Engineers maps show a "Nassau Wharf Co." structure, that he apparently claims, which is a saw-toothed docking structure that is not clearly located in relation to the Petitioner's modern-day facility. The saw-toothed docking structure was an antiquated dock design to allow for the efficient mooring of sailing ships with lengthy bow sprits which would jut over the wharf area. Depths shown on the maps are not helpful in locating the pre- 1951 structure. A Petitioner witness, Mr. Knetsch, testified that the primary purpose of the Army Corps maps was navigation, not locating structures. The saw-tooth

wharf configuration is not substantiated by the 1943 photograph which shows a narrow structure with a small terminus, or the 1933 Coast and Geodetic Survey, which shows a structure similar to the 1943 structure. The saw-toothed dock was evidently removed before that time.

26. None of the evidence admitted shows that the Petitioner conformed to the requirements of the Form in Section 5 of the Rule. Section 5.A.(1) requires a "[p]resent mean high water line surveyed and approved in accordance with Chapter 177, Part II, Florida Statutes. . ." The Sketch of Description provided in January 2001 is not a mean high water line survey and shows no approval by the Department. It shows "approximate mean high water line." Section 5.A.(3) requires "[t]raverse of fill [permanent improvement] showing location of the former mean high water line, with a land tie to an established accessible section, other U.S. Government Land Office Survey Corner, or other controlling corner[s]." The permanent improvement is not located, and no tie to any of the requisite corners is shown on the sketch of description. Section 5.A.(4) requires a "[s]tatement of methodology used to re-establish the pre-fill mean high water line (photo interpretation, historic surveys prepared prior to fill, etc.)." In relation to permanent improvements, this is interpreted to mean the methodology used to re-establish the footprint of the permanent improvement. No

statement of methodology appears on the Sketch of Description. Section 5.C. requires a legal description of the filled [improved] parcel. The legal description in the Sketch of Description shows a large area of submerged lands, with no relation to the permanent improvement, which is unsupported by the evidence. Finally, Section 5.E. requires satisfactory evidence of title in the applicant to the riparian uplands to the mean high water line. The Petitioner did not submit any deed to the riparian uplands that would establish his ownership. The Department staff testified that the deed they reviewed showed that the conveyance of the uplands to the Petitioner from his father reserved a life estate in the father. While the Petitioner testified that his father had died in 1999, the rights of his mother to any remainder in the life estate were not established. Thus, the Petitioner failed to show that his application complied with the Rule.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties hereto. Sections 120.569 and 120.57, Florida Statutes.

28. The Trustees hold title to and manage state-owned lands, including all sovereignty submerged lands under Chapter 253, Florida Statutes. See Sections 253.001 and 253.03, Florida Statutes (2002).

29. The Trustees adopted Section 18-21.019, Florida Administrative Code, to implement Section 253.129, Florida Statutes. Section 253.129 provides that the Trustee shall issue disclaimers upon request to qualified riparian owners under the Butler Act. The Butler Act, a 1921 clarification of the 1856 Riparian Act, provides that if an upland riparian owner on certain navigable water bodies, including rivers, bulkheaded, filled, or permanently improved the contiguous submerged lands, that owner would receive title to those submerged lands upon such improvement. See Chapter 8537, Laws of Florida (1921). The Butler Act was implicitly repealed by the legislature's conveyance of tidal sovereignty submerged lands (in counties other than Dade and Broward) to the Trustees in 1951; it was explicitly repealed by the Bulkhead Act in 1957. See Board of Trustees of the Int. Imp. Trust Fund v. Key West Conch Harbor, Inc., 683 So. 2d 144, fn.3 (Fla. 3d DCA 1996). The applicant's property abuts tidal lands in Nassau County; therefore, the May 29, 1951, deadline applies.

30. Rule 18-21.019, Florida Administrative Code, adopts and incorporates the form for applications for disclaimers under the Rule, DEP Form No. 63-031(16). The Form requires, among other things, in paragraph 5.A.(1), "[t]hree prints of a survey prepared, signed and sealed. . . clearly showing: [p]resent mean high water line surveyed and approved in accordance with Chapter

177, Part II, Florida Statutes;." The Petitioner failed to supply a mean high water line survey approved by the Department under Chapter 177, Florida Statutes, and therefore failed to comply with the Rule.

31. The Form also requires in paragraph 5.A.(3): "[the] traverse of the fill [improvement], showing location of the former mean high water line with a land tie to an established accessible section corner, other U.S. Government Land Office Survey Corner, or other controlling corner(s)." The Petitioner's Sketch of Description did not supply this information and it therefore failed to comply with the Rule.

32. The Form further requires in paragraph 5.A.(4): a "[s]tatement of methodology used to re-establish the pre-fill mean high water line. . . ." The methodology was not supplied by the Petitioner, who did not comply with this section of the Rule.

33. The Form requires in paragraph 5.C. a "[l]egal description of the filled [improved] parcel." The Petitioner did not provide a legal description of the improved parcel and therefore failed to comply with this section of the Rule.

34. The Form additionally requires in paragraph 5.E. "[s]atisfactory evidence of title in the applicant to the riparian uplands to the mean high water line." The Petitioner apparently presented a deed to the Department (although he did

not present it at hearing) that showed his father had some interests in the uplands. Although the Petitioner testified that his father was dead, he did not state whether his mother had an interest in the uplands. The Trustees cannot issue a disclaimer unless they know to whom it should be issued.

35. The Petitioner raised two other issues, in addition to his compliance with the Rule. First, "[w]hether the lands subject to the application to disclaimer were 'permanently improved' by the Petitioner's predecessor in title so as to convey title to the submerged lands beneath these improvement . . . ." The Respondent does not question whether some of the lands adjacent to the Petitioner's uplands may have been permanently improved. The Petitioner has simply failed to prove which lands those were, sufficiently defined for the Trustees to issue a disclaimer.

36. The Petitioner's second issue is "[w]hether Petitioner's survey is an accurate depiction of the boundaries of those improvements." The Department has shown that the 2001 Sketch of Description provided by the Petitioner did not accurately depict the boundaries of the improvements, as discussed above. The survey done in March 2003 was not admissible as evidence. Even if it had been admissible or had corroborated some other testimony or evidence, the Department has shown that the 2003 survey also lacked information required

by the Rule. Therefore, no depiction of boundaries has been made, and the accuracy of them is not at issue.

37. The Petitioner attempted to raise certain issues related to title by the presentation of numerous deeds, specified above. Exclusive, original jurisdiction to determine title to real property resides in the circuit court in the county in which the land lies. See Section 26.012(2)(g), Florida Statutes (2002). The deeds and other documents in evidence are of little or no assistance in determining, as must be done here, where the permanent improvements were located on May 29, 1951, or whether the Petitioner has submitted all of the documents required by the Rule.

38. In summary, the Department's proposed action to deny the application is in accordance with Rule 18-21.019(1), Florida Administrative Code, and the Petitioner has failed to present preponderant evidence to establish that the Petitioner has complied with the terms and provisions of that Rule. Consequently, his Petition must fail.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that the Board of Trustees of the Internal Improvement Trust Fund, of the State of Florida issue a Final Order dismissing the Petition of David Cook dated July 26, 2002.

DONE AND ENTERED this 1st day of August, 2003, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
Division of Administrative Hearings
this 1st day of August, 2003.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.