



United States Department of the Interior
Bureau of Land Management



Eastern States
7450 Boston Boulevard
Springfield, Virginia 22153
<http://www.es.blm.gov>

August 21, 2012

Douglas P. Wheeler, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Re: Title to Wisteria Island

Dear Mr. Wheeler:

Pursuant to your representation of F.E.B. Corp, you asserted in a January 26, 2012, letter and a subsequent meeting with the Director in early March, 2012, that F.E.B. has title to Wisteria Island, a spoil island constructed on a shoal by the U.S. Navy and located in Monroe County, Florida, approximately 645 yards north of Key West. We have carefully reviewed the information you have provided, and continue to conclude that Wisteria Island is in federal ownership. The United States acquired title from Spain to East Florida, including the Keys and offshore marginal seas, by treaty in 1819. Neither the admission nor the readmission of Florida to statehood affected the title, and there has been no conveyance from the United States. A series of reservations, withdrawals, and public land orders shifted responsibilities within the United States government respecting Key West and the surrounding area, including the area of Wisteria Island, from time to time, but none of those altered the original title in the United States.

We understand that it is your position that F.E.B. has title to the island by virtue of a chain of title dating from a 1952 deed from Florida. Our initial response would be that Florida could not convey title because the property was and is owned by the United States. The facts on which our conclusion of government ownership include the following:

A September 17, 1845, Executive Order by President Polk reserved all islands, keys and banks owned by the federal government in the area of the Florida Keys for military use. Correspondence on April 14, 1908, from the Commandant of the Key West Naval Station refers to a letter from the General Land Office dated March 9, 1855, addressed to the United States Surveyor General of Florida, showing that the shoals (of Key West) and Fleming Key are reserved for Military and Naval purposes. A handwritten note on the public land survey plat of Keys Islands in Township 68, Range 25 East states "President's order February 11, 1897,

Exhibit R

reserves all [unsurveyed] land on Key West owned by the Government for Military purposes.” Navy correspondence on April 14, 1908, indicates the Navy objected to the Army’s plans to remove portions of Frankford Bank to add fill to the Fort Taylor site, described plans to erect a coal shed on Frankford Bank and objected to removal of material from Frankford Bank due to its value as a storm barrier saying it forms the Western edge of Man-of-War Harbor and channel, and its removal by dredges may deprive that harbor of shelter during hurricanes. On August 9, 1924, the Secretary of the Navy wrote to President Coolidge with a request to specifically reserve Frankford Bank for naval purposes. He stated that the Navy had held undisputed possession of Fleming Key and the adjacent shoals, including Frankford Bank and Man-of-War Harbor, together with all of the islands and shoals to the westward of Key West for over thirty years. He requested that in view of the strategic location of these areas for naval purposes and in order to avoid confusion in the future, the Navy desired to have them formally reserved for naval purposes. On August 11, 1924, President Coolidge issued Executive Order 4060 reserving for naval purposes “all the islands, keys, harbors, and shoals adjacent to and in the vicinity of the Island of Key West, Florida [contained within described boundaries].” The described area includes Wisteria Island on Frankford Bank. The Navy use of Frankford Bank is demonstrated by, among other things, a January 21, 1927, sketch of a spoil area on Frankford Bank with a 2.95 acre island containing a “shack” and a “timber wharf”. On August 17, 1928, the Navy entered into a lease with Lowe Fish Company for a shark skinning operation on the spoil island on Frankford Bank.

As BLM has discovered no deed of transfer to Florida, attention must turn to another source of authority that could have relinquished or conveyed title from the United States, the Submerged Lands Act of 1953 (“SLA” or “the Act”), 43 U.S.C. § 1301 *et seq.* The Act generally conveyed a three-mile belt of submerged lands to the coastal states but created significant exceptions to conveyance. 43 U.S.C. § 1313. The “made lands” exception for “all lands filled in, built up, or otherwise reclaimed by the United States for its own use,” was interpreted by the Supreme Court, noting that Congress’s purpose in crafting the made lands exception was to “assure each sovereign the continuing benefit of landfill and like work performed by each.” *Cal. ex rel. State Lands Comm’n v. United States*, 457 U.S. 273, 287-288 (1982). Under this exception and the court’s interpretation, the work by the United States in building up and creating Wisteria Island preserved title to the island in the United States.

Therefore, it is the opinion of BLM that Florida had no title to Wisteria Island whatsoever at the time of its purported conveyance to Paul Sawyer acting as agent for Bernard Papy in 1952 or at any other time. Neither the statehood grants to the State of Florida nor the SLA conveyed this property to the State. The grantee and his principal were clearly on notice as to the claim of ownership by the United States. When Florida was contemplating a sale of the spoil island in 1951, the Navy notified Florida that the spoil island was property of the United States. The Navy Bureau of Yards and Docks, an agency of the United States (predecessor agency to the current Naval Facilities Engineering Command) wrote to the State of Florida, Trustees of the Internal Improvement Fund, on September 27, 1951. The letter notes that the “land which is proposed for sale [identified as the spoil island on Frankford Bank] was created by deposits of dredged material from the main ship channel at Key West, Florida and was accomplished by the use of Department of the Navy funds in the year 1943.” A copy of the letter is attached as

Exhibit A. This statement clearly and unequivocally evidences the elements required by the SLA exception for "all lands filled in, built up, or otherwise reclaimed" by the United States for its own use. Although other substantial naval claims to and use of Frankfort Bank existed prior to World War II, the work by the Navy during those years with funds of the United States leaves no doubt that the spoil island is within the made lands exception in the SLA. The letter concludes by unequivocally notifying Florida that the spoil island is property of the United States using this language:

[T]he Trustees Internal Improvement Fund are informed that the Department of the Navy considers Frankfort Bank, the shoals adjacent thereto and the spoil area in question as being the property of the United States.

Exhibit A, page 3. After receiving this notice of the United States' ownership of the spoil island, Florida referred the title issue to its Attorney General, Richard Ervin, who responded in a letter dated January 7, 1952. In brief, Florida's chief legal officer found that he was unable to determine whether Florida had title to the spoil island, stating that "I am unable to state definitely whether or not the Navy's claim is valid." A copy of the letter is attached hereto as Exhibit B. In the absence of any finding that Florida had a claim of title to the spoil island, General Ervin nevertheless recommended a course of action to "explain the Navy's claim to Mr. Papy and allow him to accept the Trustees' deed **at his own risk.**" [Exhibit B, emphasis added.] Moreover, the Board's minutes state that these issues were discussed with Mr. Papy, and he confirmed that he was "willing to take the risk..." Minutes of the Board of Trustees of the Internal Improvement Fund of Florida, Volume 28, page 627 (Exhibit C).

You have noted that Public Land Order No. 6214 changed the purpose for which the lands were reserved in 1982. By its express terms, this Public Land Order made no change in the ownership of any properties of the United States.

We appreciate the opportunity to review this question anew and delineate the rights and claims attaching to Wisteria Island. If you have any further questions regarding the matter, please do not hesitate to contact me at (703) 440-1600.

Sincerely,



Dr. John Lyon
State Director
Eastern States, BLM



DEPARTMENT OF THE NAVY
BUREAU OF YARDS AND DOCKS
WASHINGTON 25, D. C.

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IN REPLY REFER TO

EA-12.1E/rh
NEC/NI-1
EIO-2-KW
EIO-28-KW-3

* Trustees Internal Improvement Fund
State of Florida
Tallahassee, Florida

27 SEP 1951

Sirs:

This Bureau has been informed of the proposed sale by the State of Florida of spoil area containing approximately 39 acres located in Frankfort Bank, Key West, Monroe County, Florida.

The land which is proposed for sale was created by deposits of dredged material from the main ship channel at Key West, Florida and was accomplished by the use of Department of the Navy funds in the year 1943.

This proposed action by the State of Florida raises the question as to whether title to the land in question is vested in the state or in the United States.

Under the provisions of paragraph 2 of the treaty concluded February 22, 1819 between the United States and Spain and proclaimed February 22, 1821, there was ceded to the United States in full power and sovereignty all the territories situated to the eastward of the Mississippi known by the name of East and West Florida, including all adjacent islands dependant on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which were not private property.

By the Act of March 30, 1822 the Congress (3 Stat. 654) in establishing the territorial government of Florida, by a provision in Section 5 thereof declared that "The Governor and Legislative Council shall have no power over the primary disposal of the soil nor to tax the lands of the United States nor to interfere with the claims to lands within the said territory". By Section 9 of this Act certain public laws of the United States were extended to and given full force and effect in the territory, among these laws was "An Act to prevent settlements being made on lands ceded to the United States until authorized by law, approved March 3, 1807."

Exhibit A

2412.1B/rh 16
ND6/NI-1
T10-2-KW
T10-23-KW-3

The Act of March 3, 1845 (5 Stat. 742) for the admission of Florida into the Union as a state, provides in Section 5 that the State of Florida shall embrace the territories of East and West Florida which by the treaty of amity, settlement and limits between the United States and Spain on the 22nd day of February 1819 was ceded to the United States, and in Section 7 it is provided that the State of Florida be admitted into the Union upon the express condition that it shall never interfere with the primary disposal of public lands lying within it nor levy any taxes on the same whilst remaining the property of the United States.

By the Act of March 3, 1845 (5 Stat. 769) entitled "An Act supplemental to the Act for the admission of Florida into the Union" it is provided in Section 5 thereof that certain propositions therein offered were on condition that the legislature of the State by virtue of the powers conferred upon it by the convention which framed the constitution of the State, should provide, by an ordinance, irrevocable without the consent of the United States, that the State should never interfere with the primary disposal of the soil within the same by the United States nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers thereof and that no tax shall be imposed on lands the property of the United States.

The spoil area proposed for sale by the State of Florida is located in Frankfort Bank and is included in the area which by Executive Order, dated September 17, 1845 was reserved from sale or entry of any kind with a view of determining its military relations and properties. The area covered by this Executive Order was embraced approximately within Lat. 24° 15' north and Lat. 24° 58' 5" north, Long. 80° 58' 5" west and Long. 83° 29' west. While this area was originally placed under the jurisdiction of the War Department control thereof was relinquished by that Department on April 24, 1878 at which time the area involved reverted to the Department of the Interior as a part of the public domain of the United States.

According to the records of this Bureau the Department of the Navy exercised jurisdiction over an area of which Frankfort Bank is a part for more than 30 years prior to the promulgation of Executive Order 4060, dated August 11, 1924.

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In view of the foregoing the Trustees Internal Improvement Fund are informed that the Department of the Navy considers Frankfort Bank, the shoals adjacent thereto and the spoil area in question as being the property of the United States.

It is, therefore, requested that no further action be taken by the Trustees, Internal Improvement Fund, to dispose of the spoil area in question by sale or otherwise.

Sincerely yours,



J. F. Jelley
Chief of Bureau

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RICHARD W. ERVIN
ATTORNEY GENERAL

STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

January 7, 1952

Mr. Sinclair Wells
Land Agent
Department of Agriculture
C A P I T O L

Dear Mr. Wells:

I am returning your file with reference to the recent sale by competitive bids for certain spoil bank to Honorable Bernie Papy by the Trustees of the I. I. Fund.

I am unable to state definitely whether or not the Navy's claim is valid. However, I do think that the claim is debatable enough and so shrouded in antiquity that I think the best course would be for the Trustees to complete the sale and explain the Navy's claim to Mr. Papy and allow him to accept the Trustees' deed at his own risk. Then if litigation ensues, he will be in position to defend the title. In this manner we can get the question of title settled one way or other in case the Navy decides to litigate with him.

Sincerely,

Richard W. Ervin
Richard W. Ervin
Attorney General

RWE/lr

Enclosures

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Exhibit B

(4)

plosphate, minerals and metals and 50% of the petroleum thereon or thereunder.

The Trustees of Internal Improvement Fund reserve the right to reject the sale.

By order of the Trustees of the Internal Improvement Fund of the State of Florida,

FULLER WARREN, Governor
Trustees I. I. Fund

The land was taken out and no objections were filed to the sale. Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees confirm sale in favor of Mrs. Pogelshen at a price of \$500.00 an acre.

Application was presented from George S. Brockway, on behalf of Avonlea Crescent, with offer of \$500.00 an acre for 0.28 acres of sovereignty land adjacent to his upland property in Lot 3, Section 16, Township 47 South, Range 43 East, Palm Beach County.

Motion was made by Mr. Ervin, seconded by Mr. Mayo and adopted, that the Trustees agree to advertise the land for objections only, based on offer from Mr. Cecorelli.

Offer of ten cents (10¢) per cubic yard was submitted from Palmsbury Dredging Company of Palmetto, Florida, for permission to dredge shell from Sarasota Bay. Mr. Wells reported that the applicant has the approval of the County Commissioners of Sarasota County for removing shell from the area requested.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees accept the offer and authorize issuance of three-year shell lease in favor of Palmsbury Dredging Company for removing dead oyster shell from Sarasota Bay.

Offer of \$200.00 an acre was presented from Carter B. Cooke for purchase of the island known as Molasses Keys in Sections 21 and 22, Township 66 South, Range 31 East, containing 3 acres, more or less, in Monroe County.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees agree to advertise the island for objections only based on offer of \$200.00 an acre from Mr. Cooke.

Application was presented from Fritz Stern to purchase 11.5 acres of land on Rabbit Island in Sections 26 and 27, Township 43 South, Range 36 East, Palm Beach County, for which he offers \$88.00 an acre.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees agree to advertise the land for objections only, based on offer from Mr. Stern who owns the adjoining land.

Application was presented from P. L. Colarom with offer of \$10.00 an acre for the NE 1/4 of SE 1/4 of Section 9, Township 1 South, Range 15 West, containing 40 acres in Bay County.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees agree to advertise the land for sale subject to competitive bids, based on offer from Mr. Colarom.

Mr. Wells reported that various objections were filed to sale of certain parcels of land in Monroe County, advertised to be sold September 4, 1951. Based on said objections, the Trustees declined to sell the land in excess of Paul Sawyer, who made the applications and bid \$200.00 an acre on date of sale. Since that date the objections have been withdrawn and applicants request confirmation of sale of two parcels in question, one being 15.59 acres and the other 8.75. Mr. Wells recommends that the sale be now made to Mr. Sawyer a cash.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees accept sale of the two parcels in favor of Mr. Sawyer a cash. A H. McDonald, at the price offered—\$200.00 an acre, was the highest bidder. The last objection in the first Monroe County advertisement received in minutes of the Trustees September 9, 1951, 3.75 acres, and the other bids need to be bid separately in the third Monroe County advertisement of the same date, 15.29 acres.

Mr. Wells reported that on September 4, 1951, the Trustees considered an offer of \$100.00 per acre for 33 acres—applied for by Paul Sawyer on behalf of Mr. Paul Sawyer and confirmed sale in his favor at a price of \$75.00 an acre. Subsequent to the sale, September 27, 1951, but before the offer was issued, objections were filed by the U. S. Navy Department, against date of ownership. Delivery of the deed was held up pending disposition of the protest. Mr. Wells now recommends that the Trustees confirm sale in favor of Mr. Sawyer at the price of \$75.00 an acre. In the event the title to the land is determined by the Navy Department, the Trustees will be required to refund purchase price of the land.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees confirm sale of the land returned to at the price offered, according to recommendations from Mr. Wells.

Offer of \$100.00 an acre was received from Claude Gendello of Key West, Florida, for purchase of 2.82 acres of Bay Bottom land on Long Key, opposite his property in Township 64 South, Range 25 East, Monroe County.

Handwritten notes and stamps at the top of the page, including a date stamp "September 28 1951" and a signature.