SUPERIOR COURT OF NEW JERSEY

CASE NUMBER A-2066-76

CITY OF NEWARK

PLAINTIFF

VS.

NATURAL RESOURCE COUNCIL- ETC

DEFENDANT

CONTROL DATE	CODE
REMARKS	IMAGES 4

A-3311-72

A-2066-76

CITY OF NEWARK, et al.,)

Appellants,)

vs.) Civil Action

NATURAL RESOURCE COUNCIL IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,)

Respondents.)

Respondent

BRIEF OF APPELLANTS, BOROUGH OF EAST RUTHERFORD, et als

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TABLE OF CONTENTS

TABLE OF CASES

AUTHORITIES CITED

PROCEDURAL HISTORY

This matter involves a consolidated Appeal, one stemming out of a review of administrative action and the others being a series of Quiet Title action. The former, being the case of the City of Newark, et al vs. Natural Resouce Council et al., which was filed on July 19, 1973, under R.2:2-3 (a)(2) from appealing the determination of the Natural Resouce Council in the Department of Environmental Protection taken on June 13, 1973, approving and filing of certain maps prepared for council allegedly indicating "state owned land". This action was then consolidated with numerous Quiet Title Action which involved alleged Tideland Claims from the State of New Jersey in the Boroughs of East Rutherford and Carlstadt.

On August 6, 1973, this Court granted the consolidation and directed the supplementation of the Administrative Record, remanding the same to the Law Division. In that order it was provided that:

> "***The assignment Judge of Bergen County, or such judge as he may designate, is directed to conduct such proceedings and to make appropriate findings of fact and conclusions of law to be submitted to this court for determination of the following issues: (1) whether the maps published by respondent were prepared in accordance with the requirements of NJSA 13:1B-13.1

et Seq. and specifically N.J.S.A. 13:1B-13.3, and were promulgated and adopted in accordance with the provisions of N.J.S.A. 13:1B-13.4" (emphasis added) (Ra5).

Since that time extremely extensive hearings have been held before Honorable Assignment Judge Theodore W. Trautwein respecting both aspects of the consolidated appeal, namely the supplementation of the Administrative Record for purposes of the reviewing of the Administrative Action and secondly the actual hearing of the Quiet Title Action on a specific piece of property. These hearings commence on March 8, 1976. From that time to date the trial Judge has patiently, meticulously and tim e consumingly heard extensive expert testimony and admitted extensive exhibits in both cases pursuant to the direction of the Court. At presently the last and final stage of that record has been completed in the Quiet Title Action captioned New Jersey Sports and Exposition Authority vs. Borough of East Rutherford, Docket No. L-16799-72, which was consolidated in this action by the Law Division.

The specific issues involved in this aspect, of the appeal presently before this Court generate out of extensive pre-trial Motions and Hearings held before the same trial.

Assignment Judge Trautwein. After extensive discovery had been completed, under the direction and guidance of the Trial Court a series of motions were made for partial summary judgment by various consolidated property owners, including but not limited to the following matters of the undersigned. The Borough of East Rutherford in the aforementioned case of New Jersey Sports and Exposition Authority vs. the Borough of East Rutherford; Joseph Jony, et als., in the matter of State Department of Transportation vs. Jony, Docket No. L-13037-74 and Jony vs. State Docket No. L-1926-74TW, and then Daniel Amster et als., in State Department of Transportation vs. Amster, Docket No. L3086A-73. Collaterally, certain of the other consolidated matters were litigated to successful conclusion in Quieting Title in the property owners in question including the premises of Marion Greenberg Parker in the case of New Jersey Sports & Exposition Authority vs. Parker, Docket No. A-264-75 , Peter Logathetis in the case of MBM Trucking in the case of New Jersey Sports and Exposition Authority Vs. Logathetis, Docket No. A-265-75. and MBM Truck Leasing in the case of New Jersey Sports and Exposition Authority vs. MBM Truck Leasing et als. Docket No. 263-75.

The latter three cases decisions were appealed by the State of New Jersey. Briefs filed and Oral Arguments set for February 15, 1977.

Finally after unprecendented numerous extensions and courtesies extended to the State of New Jersey by the Trial Judge and after a historical record of lack of response and complete failure to adequately oppose the motions on March 6, 1975 several orders for Partial Summary Judgment were entered; these orders are the subject matter of the Subject matter presently before this Court.(Ra6). The judgement declared the designation by the State on Tidelands of Federal lands as "hatched" be invalid; the state was ordered to prepare within 120 days a new map designating "hatched" as either State owned or disclaimed, 133 N.J. Super 245 (Law Div. 1974). Notice of Appeal was filed on August 21, 1975 (Ra13) extensive extensions were granted to the State including, but not limited to the extensions of July 2, 1975 to September 24, 1975 (Ra16); October 15, 1975 to October 20, 1975 (Ra23). In the final order of October 28, 1975 the Court declared:

> "In the event of non-compliance with ordering paragraph 'No. 1" above (pro-

mulgation of the grant overlays by October 28, 1975) all prior riparian grants issued by the State shall be deemed valid and sufficient instrument to cut off and extinguish all right, claim, title and interest of the State of New Jersey in and to the lands conveyed thereby." (Ra23).

Applications by the State for stays were made and ultimately additional extensions granted on November 14, 1975 thru November 20, 1975 (Ra25). The state failed again.

On November 20, 1975 the Trial Court declared that the 100% claim of the "hatched areas" bodied in the Natural Resouce Councils Resolution of September 10, 1975 was in fact "arbitrary capricious and unreasonable". See Oral opinion dated December 4, 1975. On December 2, 1975 the Court ordered the State to "demarcate" the boundary line between the sovereign and private claims, are in filled Meadowlands i.e. "the former mean high tide" line.

This Court on heard the State's motion for instructions and application to stay the Trial Court's application Quieting Title by Summary Judgment on February 17, 1976 and on February 23 issued an order permitting Amendment of the State's Notice

of Appeal but denying its application for a stay and instructions. (Ra83)

On February 26 and March 2, 1976 the State brought variou motions to vacate the partial summary judgment's that were granted. (Ra85) The Trial Court has reserved decision on these motions.

STATEMENT OF FACTS

The tortuous history of the unsuccessful attempts to force the reasonable delineation of the State of New Jersey's alleged claims in the Hackensack Meadowland area will not be set forth at this time. However, the extensive Statement of Facts previously set forth by these Appellants and others hereby incorporated herein by reference.

The specific judgments for quieting title were all granted, unoppossed by any affidavit or evidence disputing any material fact. To today, in excess of one year after the summary judgments in question have been entered still no such proof has been provided. Quite to the contrary, in the extensive testimony that has been taken in the case of the New Jersey Sports and Exposition Authority v Borough of East Rutherford, supra. as it relates to said "hatched" areas on the property in question leaves one void of any valid explanation as to any claim in these areas and certainly that the determination was, as the Trial Court found, arbitrary, capricious and unreasonable".

Most specifically, this Appellant does incorporate by reference the "Brief In Opposition to Motion for Instructions Stay, etc." filed on behalf of the Borough of East Rutherford with this Court previously.

ARGUMENT OF LAW

POINT I

THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION HAS BEEN EMPOWERED BY THIS COURT TO ENTER ORDERS AND JUDGMENTS IN THIS MATTER WHICH WILL EXPEDITE AND FURTHER THE ENDS OF JUSTICE.

On August 26, 1973, the Superior Court of New Jersey, Appellate Division, remanded the consolidated City of Newark, et als case to the Law Division, Bergen County. The matter was specifically directed to the Assignment Judge of Bergen County, or such Judge he may designate to conduct such proceedings. In its Order, the Appellate Division remanded the consolidated Actions to the Law Division, for the articulated purpose that the Law Division make "appropriate findings the fact and conclusions of law". (Ra5)

It is crucial to clarify that the consolidated cases primarily are quiet title actions of which the trial court presently has exclusive jurisdiction. The only reason for their consolidation with the collateral Administrative review proceedings was to expedite and farther the ends of justice. In no way was this consolidation intended or stated to be a limitation of the Law Divisions jurisdiction.

Respondents contend in their brief, that the Remand Order was "for the limited purpose of supplementing the

Administrative Record and making recommended findgs of facts and conclusions of law" (RB12:36:40). Respondent's insertion of the word "recommended" serves to greatly confuse the issue. It is clear that the Appellate Division intended that the Law Division of laws be judicial decisions in both the quiet title actions and the Administrative review action. If the Appellate Division desired that the proceedings below be merely an expanded discovery proceeding, the "Remand Order" would have so stated. Rather, the Appellate Division indicated that it wanted the matter tried by the Law Division.

The administrative record in this matter was extremely limited, and trial by a Judge was therefore Ordered by the Appellate Division.

Respondent's Brief continues:

> "The Remand Order does not confer power upon Law Division to enter any judgment affirming or reversing the action of the State Agency. In deed, such power could not be delegated consistant with the rules of the Court." (Ral2:40 to 13:3)

Respondent's contention in this regard, is again erroneous. The Law Division was directed specifically by

the Appellate Division to make Judicial Decisions. Such decisions are precisely what the Law Division has made and what it is in power to make. The jurisdiction of the Superior Court is enunciated in the N.J. Constitution, Art. 6, section 3 par. 2, (1947) wherein it states "the Superior Court shall have original and general Jurisdiction throughout the State in all causes". The jurisdiction vested in the Superior Court is therefore clear and wide-ranging. Those cases decided pursuant to Art. 6, sec. 3, par. 2, uniformly hold such general jurisdiction to be vested in the Superior Courts, "The Superior Court has general jurisdiction in all causes..." Roberts v. Roberts, 106 NJ Super 108, 254 A2d 323 (1969); see also Wojcik v. Pollock, 97 N.J. Super 319, 235, A2d 58 (1967).

In entering Partial Summary Judgments, the trial Court did not exercise ancillary jurisdiction to decide matters over which it lacked jurisdiction. Rather, the trial court was empowered to enter Partial Summary Judgments in appropriate instances independent of the direction of the Appellate Division. Summary judgments are regularly granted in the Superior Court, in appropriate instances, and are considered a desireable means of disposing of appropriate matters:

> "The rule providing for summary judgment is designed to provide a prompt, inexpensive method of dispositions, admissions on file, together with the Affidavidts submitted on the Motion clearly shows not to present any genuine issue of material fact requiring disposition or trial".

Delvin v. Surgent, 18 NJ 148, 113 A2d 9 (1955); New Jersey Highway Authority v. Currie, 35 NJ Super 525, 114 A2d 587 (1955).

The Respondent's contention, that the Assignment Judge of the Law Division be treated as a "special master", rather than a Judge, would merely have served to impart incredible additional delays to the system, due to the fact that the trial court could make no interlocutory rulings on the numerous issues raised before it. It seems clear that the Appellate Division did not intend this result in Remand Order of August 26, 1976. Rather the Law Division was assigned the task of hearing these matters, as a trial court, with the full judicial powers vested in the Law Division of the Superior Court, by the N.J. Constitution, Art. 6, Sec. 3, supra 1. As such, the actions taken by the Court below were wholly proper.

POINT II

THE TRIAL COURT HAD JURISDICTION UNDER ITS ORIGINAL JURISDICTION AND THE REMAND ORDER TO ENTER ORDERS OF JUDGMENT WHEREBY TITLE TO "HATCHED AREAS" COULD BE QUIETED.

The trial Court acted, pursuant to the Appellate Division that the Law Division determined:

(1) "Whether the maps published by respondent were prepared in accordance with the requirements of NJSA 13:1B-13.1 seq., NJSA 13:B-13.3 and

(2) Were a promulgated and adopted in accordance with the Provisions of NJSA 13:B13.4".

The Trial Court found ruling on a motion for Partial Summary Judgment, that there could be no doubt that the "hatched-marked" legend created no genuine factual issue, nor comported with the statute. In so ruling, the Court complied with R.4-46-2, Rules Governing the Courts of the State of New Jersey.

R. 4:46-2, states in pertinant part:

"The Motion for Summary Judgment shall be served with Briefs and with or without supporting Affidavits. The Judgment or Orders sought shall be rendered forthwith if the pleadings, depositions, and Admissions on file, together with the Affidavits, if any, shall palpably that there is no genuine issue after any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

With regard to the Partial Summary Judgment entered by the Trial Court, in the case at bar, it was found that the requirement of the aforesaid rule were met. The Trial Court,

in finding that the State's claim of 100% ownership of the "hatched areas" was arbitrary, capricious, and unreasonable held that these cases could then be the subject of Motions for Partial Summary Judgment. Pursuant to said Rule, the Court was required to grant said motion, and render Judgment in the absence of any genuine factual issue having been raised. Jackson v Diamond T. Trucking Co. 100 NJ Super 186, 241 A2d 471 (1968); Eisen v Kostakos, 116 NJ Super 358, 282 A2d 421 (1971).

Additionally, it must be stated, that the Partial Summary Judgments entered by the Trial Court, were entered in matters which were consolidated with the City of Newark case, matters pending in the Law Division. In said matters, the Law Division had complete jurisdiction to enter such Summary Judgments, just as it would have had jurisdiction to do so had not these cases been consolidated with the City of Newark matter. Said consolidation could not be found to have divested the Law Division of the jurisdiction it would normally have to decide such questions.

Thus, the Law Division clearly had jurisdiction to enter Summary Judgments so as to quiet title in this matter.

POINT III

THE DESIGNATION OF CERTAIN AREAS AS "HATCHEC" AND THE ASSERTION OF A 100% STATE OWNERSHIP CLAIM OF ALL SUCH AREAS IS WHOLLY INCONSISTENT WITH THE PROVISIONS OF NJSA13;1B-13-1 ET SEQ.

The "Hatched" areas, the subject of this appeal are areas that the State claimed to have a possible interest in which after extensive study could not be proven to the extent to justify it as being designated as "State-owned lands".

The language of NJSA 13-1B-13.1 et seq. is clear and certain NJSA 13:1B-13.2 states, in pertinent part:

> "The council is hereby directed to undertake title studies and surveys of Meadowlands throughout the State and to determine and certify those lands which it finds are State owned lands."

NJSA 13"1B-13.4 states, in relevant portion:

> "Upon completion of each separate study and survey, the Council shall publish a map portraying the results of its study and clearly indicating those lands designated by the council as State-owned lands." (emphasis supplied)

Pursuant to this legislation, the Natural Resource Council was explicitly directed to determine and certify those lands designated as State-owned. The legislation does

not admit of two interpretations on this point. There is no reference to a category of "possible State-owned lands".

The State has attempted to establish a third classification, absent statutory authority to do so. In doing so, the State has classified property overwhich it asserts an ambiguous, undefined and wholly imprecise interest. Said action, by the State, was counter to the purpose and sense of the legislation in question. Said legislation was designed to provide a method by which the States responsibility in tideland mapping would be accomplished without destroying the rights of either private property owners, or the general citizenry. To that end, the law required that said property be classified in two categories:

(1) Meadowlands to which the State claims ownership

(2) Meadowlands acknowledged by the State to be privately owned.

All designations indicating the status of lands as "hatched" are wholly inconsistent with the Statute, in that no determination and certification of State-owned lands is made. This designation bears no correspondence to the statutory requirement that the Council "determine and certify those lands which it finds are State-owned lands."

Furthermore, in light of the subsequent assertion on September 10, 1975 of 100% State ownership with regard to

such "hatched" areas, this designation does not even serve a notice function to the property owners. The assertion was found and was in fact nothing more than an attempt to salvage the areas previously designated as being without sufficient proof of wonership a year and a half before. No new evidence whatsoever was found. No different or change of circumstances existed other than the Trial Courts insistence that the matter be terminated. On this record, the Trial Court correctly found this assertion clearly arbitrary, capricious, and unreasonable. Further, this assertion provided no meaningful notice to any of the property owners. In order to put property owners on notice of State ownership claims such claims must bear some correspondence with fact. No such correspondance can be found with regard to the designation of lands as "hatched".

The determination of the Law Division, that the utilization of the designation as "hatched" did not comply or womport with NJSA 13:1B-13.1 et seq. was correct. The Court correctly read the Statute as requiring the State to either claim or disclaim the land. Not even the respondent herein contends that they did so in mapping the lands in question.

The extensive transcript of the testimony in the consolidated case of New Jersey Sports and Exposition Authority v the Borough of East Rutherford, as it relates to these

so-called "hatched" areas more than adequately further verifies the initial determination of the trial judge. It would appeal extremely duplicious for this Court at this time to upset the extensive, commendable and burdensome efforts of the trial court in dealing with this highly technical and specialized subject matters.

CONCLUSION

It respectfully submitted that on the basis of above and the extensive efforts of the trial court in this case that it be concluded that a) the Trial Court was empowered by law and also under the order of this Court to enter the orders and judgments in question and further to uphold the Trial Court's determination that the designation of certain areas as "hatched" is invalid and the subsequent assertion of a 100% State ownership claim in the same areas, without further the basis, was "arbitrary, capricious and unreasonable".

Respectfully submitted,

ALFRED A. PORRO, JR.
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A-3311-72

New Jersey Sports & Exposition Authority

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Elizabeth McLaughlin
Clerk

January 31, 1977

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FEB 8 1977
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Elizabeth McLaughlin
Clerk

OPINION FILED
AUG 1977

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Clerk, Appellate Division
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P.O. Box CN00608
Trenton, New Jersey 08625

Re: City of Newark, et al v. Natural Resource Council in the Dept. of Environmental Protection, et al. - Docket A-~~3311-72~~ A-3066-76

Dear Ms. McLaughlin:

The following is a statement in lieu of brief submitted on behalf of the New Jersey Sports and Exposition Authority, pursuant to R. 2:6-4.

The subject case is consolidated with condemnation suits filed by the plaintiff New Jersey Sports and Exposition Authority (hereinafter Sports Authority) in the Spring of 1973. New Jersey Sports and Exposition Authority v. Borough of East Rutherford, Docket No. L-16799-72. The properties condemned are part of the 588 acres acquired in the East Rutherford meadows for the Sports Complex. N.J.S.A. 5:10-6.

The State of New Jersey, Department of Environmental Protection was named a party defendant in every case where there was a possibility of riparian claim under the then existing mapping. N.J.S.A. 13:1B-13.5. O'Neil v. State Hwy. Dept., 50 N.J. 305 (1967). Consistent with the policy of the Assignment Judge in Bergen County, where the State had a riparian claim to a particular property, a trial on title was held before a trial on value. The Sports Authority has filed declarations of taking and deposits in all the cases presently before the court and the money has been withdrawn and put into certificates of deposit in the names of all claimants. The plaintiff, condemnor, is essentially a stakeholder in the litigation on title. The properties have been appraised at their full market value as of the date of commencement of the proceedings N.J.S.A. 20:3-30(a). Deposits were made in all cases in accordance with the Authority's appraisals. If there is a final adjudication delineating all or

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part of the properties in question are owned by the State, the appraisals of the property will be revised according to the separate ownerships. N.J. Turnpike v. O'Neil, 133 N.J. Super 445, 449 (App. Div. 1975). The Sports Authority has a riparian contract with the state which sets forth the manner of payment to the State should the title be ultimately vested in the State. N.J.S.A. 13:1B-13.7. None of the subject cases have been heard before commissioners pending a final resolution of the title question.

Respectfully submitted

William J. Ward

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Respectfully submitted

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A-2066-76

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-~~3311-72~~ A-2066-76

CITY OF NEWARK, et al.,

Appellants-Respondents
and Defendants-Respondents,

vs.

NATURAL RESOURCE COUNCIL IN THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,

Respondents-Appellants

CIVIL *ACTION*
Consolidated Cases
ON APPEAL FROM
Interlocutory Order of March 6, 1975

SAT BELOW
Theodore W. Trautwein, A.J.S.C.

SUPPLEMENTAL BRIEF
~~XXXXXXXXXXXXXXXXXXXX~~
FOR
Defendant-Respondent
BERGEN COUNTY ASSOCIATES

FILED
APPELLATE DIVISION
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TABLE OF CONTENTS

TABLE OF CASES CITED

TABLE OF RULES CITED

TABLE OF STATUTES CITED

TABLE OF OTHER AUTHORITIES CITED

COUNTERSTATEMENT OF PROCEDURAL HISTORY AND FACTS, AND ADOPTION BY REFERENCE OF CITY OF NEWARK BRIEF

The Respondent, Bergen County Associates adopts in full the brief filed on behalf of the City of Newark and others, and submits this brief in supplementation thereof.

These numerous consolidated actions seek to implement the directives laid down by the Supreme Court in *O'Neill v. State Highway Department*, 50 N.J. 307 (1967); and by the legislative response thereto, *N.J.S.A.* 13:1B-13.1 *et seq.*

This aspect of those proceedings relates to summary ajudications of legal title to meadows long since filled, and in which no evidence of alleged former tideflowed status either exists or can be developed.

Indeed, the State admits and has always admitted its inability to delineate areas (rather than percentages of the whole) encompassing its claims in the filled meadows. Its very designation of hatched lands as "questionable" is such an admission of inability to discharge its *O'Neill* burden of challenging the existing upland scene; serves only to becloud and slander otherwise good private titles; continues to impose tax liabilities upon the record title-holders in respect of undefined alleged percentages of State-claimed and therefore (if proved), exempt, lands; and prevents development which would otherwise be ongoing and producing jobs and ratables.

Even more extraordinary than the baneful claims of undefined "percentages" of filled meadows, was the State's response to the ajudication of non-compliance with the statute. After admitting by its claims overlays that the record owner held good title to portions of the "hatched" or "questionable" filled meadows (i.e., that such portions were uplands in their natural state); and after

admitting by testimony that no alleged mean high tide line could be drawn in the filled meadows, the State, by its actions of September 10 and 29, 1975, arbitrarily claimed all of the hatched lands, including the acknowledged uplands! Rarely, if ever, has a sovereign in a constitutional democracy so imposed itself upon its citizens. Rarely, if ever, has a more appropriate case for summary judgment been presented.

What the State sought to do was to shift its *O'Neill* burden of challenging the existing upland scene, to the record titleholders, by asserting the presumption of validity which attends official administrative action, in support of patently and admittedly arbitrary administrative action.

The State's insistence upon ignoring physical facts where it considers them disadvantageous to its erroneously-conceived position, is matched by its insistence upon ignoring and distorting historical facts and riparian law.

Ancient Frankish "ripuarian" law came to England with the Norman Conquest. The king, as chief noble and lord of the realm, held legal title to "waterlands", to the beds, banks, and shores of streams and to the tidelands as regalia, or an incident of his sovereignty. Tidelands were those flowed twice daily by normal tides, or the seas below mean high tide. Lands above mean high tide were known as fastlands. The adjacent upland or "riparian" owner, however, enjoyed certain exclusive rights in the beds, banks and shores of streams and in tidelands notwithstanding legal title thereto was in the crown. Among the exclusive rights held by the upland

owner were those of wharfing-out, fishing, waterfowling and increasing his holdings by accretion. "Accretion" is the addition of soil by gradual deposition through the operation of natural causes so as to form firm ground, or the uncovering of land by gradual subsidence of the water. The materials gradually deposited are known as "alluvion"; the process of gradual subsidence is known as "reliction". To enlarge the landholdings of an upland owner by accretion, the deposition of alluvion or the withdrawal of waters by reliction must be so gradual as to be imperceptible while the process is ongoing. A sudden change in the channel of a stream is known as "avulsion" and, notwithstanding it results from natural causes, has no effect upon legal boundaries or titles. Nor, at the old English common law, could an upland owner enlarge his holdings by artificial means such as filling or diking.

These principles governed titleholdings subject to English sovereignty in the new world.

On March 12, 1663, Charles II of England granted by patent, to his brother, the Duke of York, certain crown lands including the area comprising New Jersey, including lands flowed by the tide. York conveyed to Berkeley and Carteret in payment of a gambling debt on June 24, 1664. Two months later the Dutch surrendered New Jersey to the British governor Nicholls. Following a reconquest by the Dutch in 1672 and a peace treaty between England and Holland in 1674 (by which the Dutch possessions were resurrendered), Charles II thereafter confirmed by deed all prior land grants by Carteret to the Proprietors of East Jersey. This confirmatory deed is the source of all private land titles in this State.

New Jersey declared its independence on July 2, 1776, and, as an incident of its sovereignty took title to tidelands. Its sovereignty, not any grant or deed, is the source of the State's current claims of title to tidelands.

In colonial times there developed in New Jersey a "local common law" which superseded the English common law disability against a riparian owner extending his holdings by artificial diking and filling. The basis for this departure was, probably, the desirability of reclamation. Hence the upland owner could reclaim land under water and thereby acquire good title even against the State so long as his reclamation did not injuriously interfere with navigation. *Gough v. Bell, 22 N.J.L.441 (Sup. Ct. 1850), aff'd Bell v. Gough, 23 N.J.L. 624 (E.&A.1852).* *Bell v. Gough* was important because this "local common law" departure from English common law had not theretofore been judicially acknowledged, the doctrine being (prior thereto) one "not yet settled by the courts of the state." *Stevens v. Paterson & N.R. Co., 20 N.J. Eq.126 (Chan.1869).*

Following judicial recognition and articulation of this reclamation right by the Court of Errors and Appeals in *Bell v. Gough*, the legislature enacted the *Wharf Act (P.L. 1851, p.335)*, which superseded the local common law right of "artificial accretion", and required a license to wharf-out or fill. Such licenses were, however, granted as a matter of course and the Act provided that, when so granted "it shall be lawful for the owner of lands situated along or on tide waters to build docks or wharfs on the shore in front of his lands, and in any other way to improve the same, and when

so built on or improved, to appropriate the same to his own exclusive use." (§1). Section 11 of the Act defined "shore" as the lands between ordinary high and low water.

In 1891 the *Wharf Act of 1851* was repealed by an amendment of the *Riparian Act (P.L. 1891, C.124, p.216)*, which prohibited reclamation of or construction upon tidelands "without grant or permission of said [riparian] commissioners" and expressly stated that the repeal did not revive the pre-Wharf Act local common law of artificial accretion. *In re Camden, 1 N.J. Misc. 623 (Sup. Ct., 1973).*

For a period of some 250 years prior to the 1891 repeal of the *Wharf Act*, the Hackensack Meadows were settled mainly by Dutch farmers. The Dutch had then been and remain to this day, the most industrious of all the world's people in land reclamation. It is therefore likely that as of 1891 and even 1851, substantial areas of the Hackensack Meadows formerly under water had been diked, filled and reclaimed by the adjacent upland owners and title thereto vested in them pursuant to the local common law.

Repeal of the *Wharf Act of 1891* by amendment of the *Riparian Act* meant that no riparian owner could thereafter enlarge his holdings by diking and/or filling-in the adjacent areas below high tide. Any upland owner so reclaiming without a grant from the riparian commissioners was declared guilty of purpresture (the enclosure by a private person of public lands).

The Act exempted all reclamations under a *Wharf Act* or other permit or license, previously completed, or commenced prior to July 1, 1891 and completed thereafter but before January 1, 1892. All licenses issued prior to the Act were, by its terms revoked.

The imposition by *O'Neill, supra*, of the burden of proof upon the party challenging the existing scene, established that burden in the State in respect of filled as well as unfilled lands not washed by the mean high tide. The State's burden is to prove not only that the filled meadows were, prior to emplacement of the fill, flowed by the mean high tide, but to prove as well that exclusion of the tide occurred by avulsive, not accretive means and prior to the 1891 *Wharf Act* repeal.

The State cannot discharge that burden and has so admitted by its very designations as well as by sworn testimony. Its "hatching" is both such an admission and a violation of the statutory directive to claim or disclaim. That admission cannot be renounced, and that violation cured by an arbitrary responsive assertion of a claim to everything. Certainly such a bare assertion cannot defeat an otherwise imperatively-impelled summary judgment. *R.4:46-1 et seq; R.4:69-2.* That arbitrarily-asserted claim to everything aggravates rather than cures.

ARGUMENT

POINT I

THE ASSIGNMENT JUDGE OF THE SUPERIOR COURT IS NOT A MERE MASTER OR REFEREE BUT ENJOYS AJUDICATORY AUTHORITY

The State's "jurisdictional" argument is misstated.

There is only one Superior Court, and it is constitutionally vested with general original jurisdiction of all causes throughout the State. *N.J. Const., Art. 6, §3, ¶2 (1947).*

An "appeal" from a final decision of a state administrative agency or officer, as here, is a suit in lieu of the prerogative writ of *certiorari*. It invokes the original jurisdiction of the Superior Court because it is the first occasion wherein the matter in dispute is before a court. *Venue* is laid by *R. 2:2-3(a)* in the Appellate Division rather than (as with prerogative writ challenges to final decisions of local administrative agencies) the Law Division, only because State administrative actions are *normally* based upon an adequate hearing and reviewable record. Thus, and notwithstanding the in-lieu-of-prerogative writ action invokes the *original* jurisdiction of the Superior Court it is commenced and prosecuted *as though it were an appeal from a lower court;* and the constitutionally-insured "review, hearing and relief" (*N.J. Const., Art. 6, §5, ¶4*) takes the *fictional form* of an appeal as a matter of convenient, preferable procedure, *venue* accordingly being appropriately laid by rule in the appellate arm of the Superior Court.

Where, however, as here, there is no record below, the function of the "appeal" fiction disappears and a trial is required as with other actions invoking the original jurisdiction of the Superior Court. Now the appellate arm is singularly *inappropriately* organized for engaging in an extensive fact-finding process. Thus, the "remand" in this case to a trial division.

We stress the word "remand" (expressly and intelligently utilized in the order of August 6, 1973) in contradistinction to the word "refer" or "reference". Traditionally a "remand" returns the matter for certain action to the tribunal of first instance. See *R. 2:9-1(b)*. A "reference" delegates specified functions, usually fact-finding, to a master or referee. Here, however, the "tribunal" of first instance was no tribunal at all, neither the Natural Resource Council nor the Commissioner having exercised quasi-judicial or even rule-making power in taking the challenged actions. The futility of a remand to the Commissioner or the agency was and is apparent. The "remand" order which sent the matter to a trial division of the same court was in practical effect and to good purpose a transfer of venue.

Nomination of an Assignment Judge of the Superior Court (or his judge-designee) to arrange the necessary *plenary* proceedings certainly supports this view of the intent of the "remand" order. It can hardly be said that the Appellate Division thus intended to appoint merely a special master or referee.

The substance of the State's "jurisdiction" position is that the Appellate Division did indeed intend to make of the Assignment Judge of a sister Division, a mere master or referee. There is no power in the Appellate Division to so transform a coequal judicial officer. There is nothing in Article 6 which grants such authority. *R. 2:9-1(b)* does not purport to do so, since this "remand" was not "to the tribunal of first instance" in this case.

Further, this original action in lieu of *certiorari* was *consolidated* (on the State's own motion) with a host of previously-filed condemnation actions then pending in the Law Division (wherein crossclaims to quiet title had been filed). Neither the condemnor nor any of the condemnees in those cases had appealed any final condemnation judgment (there having been none entered). Venue in condemnation actions is laid in the Law Division, *R. 4:73-1*, and that Division is likewise charged with responsibility for directing the order of trials of title disputes and damages. *R. 4:73-2(b)*.

The State, a party to each of these eminent domain proceedings by virtue of its claim of title to all or part of each of the numerous condemned parcels, elected to move to consolidate in order to obviate an otherwise impossible burden of trying the same issues relating to the validity of its claiming procedure, in a great multitude of

separate cases. Upon entry of the Order of Consolidation, the provisions of *R. 4:38-1* governed the consolidated actions. That rule imposes no limitation not otherwise applicable, upon the court in which the consolidated actions are to be tried.

> "Where actions in different *venues* or courts are consolidated, the order of consolidation shall state the venue in which the consolidated action or actions are to be tried....Where consolidation is provided for...all actions shall be consolidated into one action unless the court otherwise orders....[T]*he action first instituted shall...govern the conduct of subsequent proceedings*. Upon consolidation the court may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay."
>
> *R. 4:38-1(e)* (emphasis mine)

To hold, as the State would have this Division hold, that an Assignment Judge of the Superior Court was converted into a mere master or referee in the one case, would so convert him in a great host of other cases consolidated therewith, wherein venue was initially laid in his court, and has never been transferred. The condemnees in those consolidated cases will have been deprived of their rights to have the judicial officer who took the proofs, observed the demeanor of the witnesses, etc., *decide* their respective cases. If this trial judge be denied the power to ajudicate their quiet title crossclaims, their due process rights shall have been seriously compromised.

Assuming, on the other hand, the authority in the trial judge to ajudicate the condemnation quiet-title crossclaims, while denying him

the power to ajudicate the prerogative writ challenge, the result could be two inconsistent decisions in the same consolidated cases. This the orderly administration of civil justice cannot tolerate. It would be no answer to say that the Appellate Division opinion prevails, because no party to any of the consolidated condemnation actions shall yet have appealed, nor could any do so as of right until final judgment (*i.e.*, commissioners' hearings and/or jury trials of valuation), *R.* 2:2-3(nor might any elect to do so.

If the language of the "remand" order of August 6, 1973 suggests an absence of ajudicatory power in the trial court, it should be amended to conform with its purpose and function.

POINT II

THE PUBLIC INTEREST IS SUFFERING ENORMOUS INJURY BY THE STATE'S CONTINUED ARBITRARY INSISTENCE UPON ASSERTING FALSE CLAIMS OF TITLE

The March 6, 1975, Order to which these briefs are addressed; the December 19, 1974, opinion which the Order implemented; and the motions which triggered the opinion and the Order - all were intended to innibit the indefensible wholesale slanders of title and other bad faith acts (including indiscriminate repudiations of the State's own solemn deeds upon which its citizens had long relied in good faith.) That effort has thus far been unsuccessful. The fruits of its frustration are not limited to title holders' private proprietory grievances and personal tragedies, but include as well and more importantly, enormous losses in potential jobs and ratables.

The necessary shelving of substantial construction projects during the interminable delays, and its adverse effect upon recession - recovery in the northeastern part of this State are well-known to this "Natural Resource Council". In attempting to justify their outrageous title-slander its members have habitually wrapped themselves in their "trust fund" flag. Ironically, however, the school children who are the intended beneficiaries of the trust have benefited to an infinitely greater degree from taxes paid by

the private claimants (from time immemorial and presently) on lands claimed by the State (which, if such claims were honored, would be tax-exempt) than they have or will as a result of the Council's arbitrary actions; and those beneficiaries have been and are being irrevocably injured by the continued deprivation of the avails of enormous ratables which, but for capricious positions taken by the tideland agents for their "trustees", would long since have been constructed.

Fundamental public policy as engrossed in the organic law itself, is also being subjected to egregious assault by the State's arbitrary actions. It is not only the New Jersey Sports and Exposition Authority condemnations (i.e., the consolidated actions) which are affected. R. 4:73-2(b) vests discretion in the trial courts to order trials of title or valuation first. Where claimed tidelands are involved the court has uniformly exercised this discretion in favor of title trials first. Those title trials are, in the main, awaiting judicial determination of the propriety of the State's continually - changing claim assertion procedures. Eminent domain proceedings going back nine and ten years are held in a state of limbo, in patent violation of the condemnees' constitutional rights to both just compensation, N.J. Const., Art. I, par. 20 (1947), and due process. Large sums of money deposited in respect of "hatched" lands are frozen in joint deposits.

Taxes are being paid by record title holders on non-income producing vacant lands subject to disputed claims of title by the State or, where the record title holder can no longer afford to pay such taxes, in rem tax foreclosures are threatened. Whatever the validity or invalidity of the State's claiming procedures and methods in respect of unfilled meadows, the continued assertion of arbitrary, non-provable claims to all or undefined portions of filled meadows should not be further tolerated, where such are its effects.

CONCLUSION

For the foregoing reasons the summary adjudications here challenged, should be confirmed by judgment of this Division.

Respectfully submitted,

GLADSTONE HART MANDIS RATHE & SHEDD
A Professional Corporation
Attorneys for Defendant-Respondent

BY: _____
MARVIN H. GLADSTONE

DATED: February 1, 1977.

A-2066-76

THIS MATTER LISTED FOR SUBMIT ON MAR 14 1977

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : BERGEN COUNTY
Docket No. 98-0067
(Appellate Docket No. A-~~3911-72~~ A-2066-76)

CITY OF NEWARK, et al.;
Appellants,
v.
NATURAL RESOURCE COUNCIL in the DEPARTMENT OF ENVIRONMENTAL PROTECTION, et al.,
Respondents.

FILED APPELLATE DIVISION JAN 24 1977

OPINION FILED MAR 29 1977

JOSEPH L. JONY and ALMA JONY, his wife,
Plaintiffs,
v.
STATE OF NEW JERSEY, together with two subdivision, agencies and divisions thereof, the Department of ENVIRONMENTAL PROTECTION,
Defendants.
Docket No. L 1926-74

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. MARTUCK REALTY Docket No. L 25256-72

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. Cariddi, Docket No. L 26776-72

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. BOROUGH OF EAST RUTHERFORD Docket No. L 26801-72

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. LOGOTHETIS Docket No. L 26791-72

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. SYLVESTER, F. Docket No. L 24894-72

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. FISHER Docket No. L 26767-72

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. Marino Docket No. L 19429-72

NEW JERSEY SPORTS & EXPOSITION AUTHORITY v. TOP NOTCH METAL REALTY CO. Docket No. L 30871-73

Courthouse, Hackensack, N.J.
Thursday, October 10, 1974

F-CARTON KOLE, LARNER, JJ

B E F O R E

HONORABLE THEODORE W. TRAUTWEIN, A.J.S.C.

APPEARANCES:

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MARTIN FRIEDMAN, ESQ.,
for Federal Pater

DOMINIC PRESTO, ESQ.,
for Fred Rolter & Frank Burian

JAMES V. ZIMMERMAN, ESQ.,
for Emma and Otto Knissel

ALFRED A. PORRO, JR., ESQ.,
Borough of East Rutherford, et al, and
Joseph L. Jony, et al

MESSRS. VENINO & VENINO
by OTTO VENINO, ESQ.,
for Stanley Atkins

MESSRS. GOLDBERG & CARLIN
by WALTER GOLDBERG, ESQ.,
for Sportland Route 3 Corporation, Charles Eicholz, Aldys Corporation, et al.

Reported by: Edward Salbin
Official Court Reporter

THE COURT: We will call the City of Newark, et al., v. Natural Resource Council, Docket No. Appellate Division A-3311-72.

MR. WEIGEL: Here for the appellant, your Honor.

THE COURT: Now, we also have Jony v. the State of New Jersey, prerogative writ, L-1926-74. Will counsel also come up on that? And then I want to lay a few ground rules and try to explain what I think we are going to do today.

MR. MARTINI: Your Honor, I filed a letter joining in Mr. Weigel's motion, for Mrs. Mazza.

THE COURT: I would like you to give your appearances to the Reporter, please. First your appearance in the City of Newark.

MR. GOLDFEIN: Morton Goldfein, Deputy Attorney General.

MR. WEIGEL: John R. Weigel for the City of Newark, City of Elizabeth, Esther G. Bertoni, et als, and New Jersey Land Title Insurance Association.

MR. MARTINI: Nicholas Martini for Marie Mazza and Dr. Joseph Mazza.

MR. FRIEDMAN: Martin Friedman for Federal Pater Corporation, who is not directly a party to this suit but is a party to the Monster suit and is affected by the matter before the Court.

MR. PRESTO: Dominic Presto for Fred Rolter and Frank Burian.

MR. ZIMMERMAN: James V. Zimmerman, attorney for Emma and Otto Knissel.

MR. PORRO: Alfred A. Porro, attorney for the Borough of East Rutherford and various individual property owners, approximately 12 to 15 and Joseph L. Jony.

MR. VENINO: Otto Venino, Jr., attorney for Stanley Atkins, of Venino and Venino.

MR. GOLDBERG: Walter Goldberg of Goldberg and Carlin appearing for Sportland Route 3 Corporation, Charles Eicholz, Aldys Corporation, et al.

THE COURT: In the City of Newark case Mr. Weigel has initiated this proceeding

with a motion for partial summary judgment. That seeks this Court's declaration that the State has not complied with the directions of the Legislature in the appropriate statute.

Now Mr. Porro has filed a motion in Jony and what I propose to do is treat that portion of his motion which seeks the same relief as Mr. Weigel, as being temporarily consolidated with the City of Newark. The rest I am going to just hold. You go into areas that I don't want to touch upon today.

MR. PORRO: Agreed.

THE COURT: We are going to confine ourselves solely to the alleged impropriety of the Hatch-marked areas.

MR. PORRO: I should inform the Court, your Honor, that there has been some procedural question raised here by Mr. Rindone. I don't know if he wants to press it today.

THE COURT: I see he is standing.

MR. PORRO: But if that is the case our brief is also to apply in the City

of Newark case. I should tell you also the representative of the Department of Transportation I spoke with yesterday as a result of discussions with the Court's clerk and they are not here solely because of the anticipation of what you were going to do.

THE COURT: For that purpose it is not necessary to have the condemnors here. They are perfectly welcome. I see Mr. Litwin is here. Now Mr. Rindone?

MR. RINDONE: Your Honor, it was not my intention to intrude on these proceedings. However, service was attempted in the Jony matter upon me and I must advise the Court that I am not assigned to accept initial process and complaints in the Attorney General's office. I appropriately advised Mr. Porro of that fact, immediately upon service, by return mail. I don't know anything about the Jony case, either the facts or the issues. I briefly scanned the complaint when I came in this afternoon to the courtroom. I don't know what effect the consolidation would have

upon my client, the Division of Marine Services in the Department of Environmental Protection, and I would leave it to the Court's discretion as to whether that matter should be held in abeyance pending an appropriate review, well, proper service, number one, and an appropriate review of that file and answering affidavits, the filing of an answer, or whatever the State would feel is appropriate under the circumstances.

MR. PORRO: Your Honor, I have got no real serious objection in terms of any postponement of the Jony matter because, as I said, our brief that was filed there is to be adopted in the City of Newark case anyway, so legally I will be presenting the same argument, whatever the Court wants to do.

THE COURT: All right, we will just carry the Jony case without date.

MR. LITWIN: (For the Sports Authority) If I may be heard shortly, Mr. Porro has filed several motions in the Sports & Exposition cases, condemnation

cases. That deals with the same issue before the Court in your case. I advised the Court by letter the 8th of October that I had no objection to the Court hearing this matter on short notice. That was provided, to the Sports & Exposition Authority, assuming that the only issue that was to determine was, was this appropriate in the context of the City of Newark case.

THE COURT: Fine. Now, on the City of Newark case I am certainly going to hear from Mr. Weigel and from Mr. Goldfein and Mr. Porro. It is now almost two o'clock. I don't want to hear a lot of repetitious arguments. Mr. Friedman, are you going to want to wait and see what is said and supplement?

MR. FRIEDMAN: Yes, sir.

THE COURT: I know I can trust you on that.

Mr. Martini?

MR. MARTINI: Mine would be essentially in support of Mr. Weigel and I have two photocopies of the maps here which

I would like to show your Honor. I think these are the maps the State is relying upon insofar as my client is concerned and I would like to register my observations that these two maps are invalid under the statute and they are not the basis of a legal claim by the State of New Jersey as far as my client's property is concerned.

THE COURT: Have you read Mr. Weigel's brief?

MR. MARTINI: Yes, I have.

THE COURT: Is your argument any different than his?

MR. MARTINI: My argument is only I want to show the maps, that's all. I join in what he says in his brief.

THE COURT: Have you shown the maps to anybody else?

MR. MARTINI: No, I have not, I just got these, by the way, yesterday.

THE COURT: All right, just hold that for a while.

Mr. Weigel, how long do you think you will be?

MR. WEIGEL: Oh, possibly ten or

fifteen minutes, your Honor.

THE COURT: Mr. Goldfein?

MR. GOLDFEIN: Certainly less than that I hope.

THE COURT: Mr. Porro?

MR. PORRO: I intend to rely primarily on the brief, your Honor.

THE COURT: Very good, then I will hear you, Mr. Weigel.

MR. WEIGEL: Your Honor, certainly if there is any point that you would like to have me explain, or expound on a little bit further during the course of the matter, or if it is convenient for the Court to have any of the counsel here do likewise, I certainly have no objection and would not I don't think unduly be disturbed in the presentation I hope to make by the effort to try to explain matters as we are going through.

With the exception of Mr. Porro, I don't believe there is anybody in the room who attended any substantial number of the depositions that have been taken in the City of Newark case and I appreciate

from the affidavit of Mr. Goldfein, since he is relatively new to his present assignment, that because of the length of this discovery proceeding, which is now in 19 volumes with something just under 2800 pages of testimony, that he has not yet been able himself, personally, to get through the entire transcript. But there were essentially, your Honor, two matters that my motion for partial judgment was directed to, the hatch-mark area being one of them and the second matter involving the question of reflection on the so-called base photo maps and claims overlays of the conveyances that the State of New Jersey through its tideland agent has made in the past.

THE COURT: Yes.

MR. WEIGEL: I don't want to repeat what is in the brief and I don't want to go into any great length or recitation of the history of this matter. The Court knows very well from briefs that I have prepared and filed with the Court and the Federal Pater case and in the

Monster case, I know the Court is very familiar with the history of the State's assertion of its ownership claims. The contention that I have made throughout the various appearances that I have had and in the briefs that I filed with the Court is that historically the State asserted a claim of sovereign ownership based on the dual test of navigability and tidal ebb and flow and that test essentially through judicial decision has been written out of the law and that the present assertion of the State's claim is based upon a tideland test, in other words, whether or not particular properties flowed naturally by the mean high tide and is also below the elevation of the mean high tide, of course, being a certain part of it. I accept completely, your Honor, the fact that we are talking here about a claim made by the State of New Jersey as opposed to an adjudication of the validity of that claim on any specific parcel of land.

I tried very diligently and with

the cooperation of the Attorney General's office, particularly then Assistant Attorney General Morton I. Greenberg, to clarify last summer this matter so that it is clear to me that the issues that are involved in the City of Newark matter and consolidated cases with it in terms of the so-called appeal are matters that relate to the tideland mapping techniques that are employed in the compliance by the State with the statute, N.J.S.A. 13:1B-13.1 and following and we are not here to discuss the validity of the specific ownership claims on specific parcels of land, but I have to add to that that with the history that we have in this matter, which the Court knows from the order that was entered on September 8, 1971, in which the then grey and white map, as it was called, was for purposes of proof of the State's ownership claims suppressed by this Court and I think the basic reason why that map was suppressed was because the Court was satisfied that the State had not done a minimal amount to comply with the requirements

of the statute in asserting its claim. Again I am trying to draw what I see in my own mind is a very clear distinction between the assertion by the State of its claim of ownership and the adjudication if you will of that claim on specific parcels of land.

I think the framework that we have to operate in is that the State is duty-bound in the assertion of that claim under the statute to do it in a reasonable manner and in a manner which satisfies the requirements of the Legislature when it enacted that law. We are not talking here about the State asserting any claim that it wants to assert for any reason. I have tried to reiterate time and time again that the sovereign has an obligation to its citizens. It is not a stranger, it is not out there dealing with the parties in the sense that traditional private litigants might face one another, but rather the State is duty-bound to its citizens to act benevolently, to look out for their interest, to protect the weak,

to protect the uninformed, to protect the litigant who cannot afford the best counsel, to protect the litigant who has to come in and appear pro se, and if the State does not do that and if it is not the judgment of this Court that the State has that as an affirmative obligation then I don't know where we are ever going to go with these matters. And I think that framework becomes the framework in which we have to step ahead with the matters that are brought forth in these two items, that are brought forth in my notice of motion.

So I do not accept and I ask the Court not to accept that the only test here is whether or not the State makes a claim. I think we have to decide whether or not that claim is reasonably made, if it is made consistent with the requirements of the law.

Now, what is the framework of the law in which we are dealing? I think we all have to understand that Chapter 404 of the Public Laws of 1968 was enacted in

response to a problem. The New Jersey Supreme Court when it decided the O'Neill case in 1967 in effect invited the State to finally and at long last catalogue its far-flung holdings. In response to that suggestion from the Supreme Court this particular statute was enacted. Now, that statute imposed certain obligations on certain people and certain departments and entities within the state government and I think the essential issues here are what were those obligations in terms of their basic expression and what was the basic opinion that the Legislature was giving to be effective, to follow, and in light of the problem, in light of the O'Neill holding, which very importantly, on the argument that I have, concerned itself with the practical world. I think we have to talk about the practical world.

The court saw that in areas where lands have been filled in so that it was not possible at the present time to look on those lands and consider that those lands were in their natural condition, that

the Court very clearly imposed a burden. The burden cuts both ways. It cuts against the State, it cuts against private claimants. The cut is based upon what the present condition of the land is. If the land is presently tidally flowed and there is a private claimant who is coming forth and asserting a claim to it then that private claimant has the burden as against the sovereign to show by evidence that is convincing to the Court that the private ownership claim should be maintained in the face of the burden that is placed upon that private party. And the other side of the cutting edge is that the State, where it asserts that it owns it, owns under the concept of tidelands doctrine, that it owns the land in face of presently filled land, land that is above the reach or above the elevation of the mean high tide, The State has that burden and that is a very, very important concept and I have in the back of my mind the view that the people down in Trenton, and I want to indicate clearly to the Court that I don't

say anybody here has been acting out of any sinister motive at all because I have tried to place myself in the position of a person in a department, a person who did have responsibility for asserting these claims, and I think the obligation that the person in the executive department probably feels is this. They feel that they have to assert as broad a claim as they conceivably can for fear that there would be any kind of implied criticism that they had been unfaithful to their own duties and obligations. I accept that. I think that the claims that have been asserted here have been asserted on that basis and I don't suggest at all, I didn't intend to imply in anything I filed here or any other matter, that anyone in the administration of these matters in Trenton is acting out of a sinister motive, but I think the obligation is clearly that of the Court, because if the Court does not tell the executive what the law is and how that law is to be applied in the practical world in terms of

resolution of this problem -- frankly, your Honor, I don't think you or I would live to see the day when these matters are finally resolved because this problem already has exhausted the lives of many people. People are dying, people with knowledge of the conditions that have relevant information are expiring on us and I hope that the basic approach of the State and the basic approach of this Court is this, that given that problem, given the Legislature's insight as to how that problem should be solved, some hard decisions have to be made.

Admittedly, not everybody is going to be happy with those decisions, but I think, as Chief Justice Weintraub said to then Assistant Attorney General Greenberg, "Well, you can't do certain things. You are going to have to pick up your tent and go home." And why should this really bother the Court or why should this really bother the State in this sense? As the court pointed out in O'Neill, people acted with respect to these properties

at a time when the State's understanding of its own claims and the people's understanding of what the State was claiming is entirely different from what that understanding is today in 1974. I am satisfied from the depositions that I have taken and depositions that I have pointed out to the Court, that the administration of the riparian policy of this State from the year 1890 until at least 1965 was that claims were not on a regular consistent basis made over interior meadowlands. What does that mean? That means that private parties were acting as well as the State with respect to the policies and the positions as the State would express them.

Now, it seems to me a matter of absolutely basic fairness that as between the State and the private owner, who is in a better position to know what the State's true ownership interests are? I think that question clearly has to be answered but the State has to know and where the State by its actions and its

conduct and its activities over a period of decades lulls people into the belief that these lands are the subject of private ownership people act with respect to them as privately owned lands and then that the State in about the mid-1960s rather consistently, although prior to that there are some erratic instances which can be pointed to, but up until the middle '60s the policy I think was clear and after the mid-60s I think the policy consistently became something else.

Now, in the framework of that matter as I have tried to express it, you have the O'Neill decision coming down, the O'Neill decision trying to take an effect and put a practical handle on this matter, the practical handle being largely in that burden of persuasion and those of us who have been working in these matters over the years know the great difficulty in carrying that burden forward. On the hatch-marked areas, specifically the problem as I see it is this, that the statute I believe clearly was intended

to resolve the cloud which existed at the time of enactment of Chapter 404 Laws of 1968 over meadowland titles throughout New Jersey. People simply didn't know because the sovereign did not express its claims, inventoried its claims, in terms of a tideland doctrine. The Legislature wanted in effect to put the State in a position with respect to its citizens of finally telling the people what the State claimed to own, and the other side of it what then in effect the State was willing to acknowledge was privately owned.

I see the intention of Chapter 404 of the Laws of 1968 as an effort to establish two classifications of property and two classifications only. The claims that the State can reasonably assert to lands that it owns in fee simple, not some vague, undefined interest, but in fee simple, and the lands that the State is willing to acknowledge are privately owned in fee simple.

Now, what the State is trying to do with the hatch-marked areas is both ingenious

and in many, many ways I think has some basis if you accept the proposition that I accept that these people were trying to assert, as best they could see it, the most extensive claim that they could support with any kind of basis. What they did in the hatch-marked areas and I think this emerges clearly from the transcript -- it is unfortunate that Mr. Goldfein, who is the principal attorney for the State, has not had the benefit of going through the entire record up to this point -- but I have directed his attention to specific pages of the transcript in the hope that there is enough information there to enable him to glean from those pages what happened here. But let me try to express to the Court what comes out of this transcript as I see it and what the State did and why it did it.

In the hatch-marked areas we are talking today from the State's own testimony of areas that are presently filled in, in other words, the tide

insofar as that tide would determine a claim or non-claim of State-ownership cannot be located today across the property simply because it is filled in. The State in effect did not have the benefit of the 1972 infra-red photography over this specific property, that infra-red photography being significant because it provided what the State's contractors, principals, the Earth Satellite Corporation in Washington, D. C., and its consultants and its employees have designated a botanical indicator. So that given the 1972 photography, given the botanical indicator that the State believes it has through that photography, the State does feel that it is in a position with respect to that property to define an ownership claim, in other words, a broad line, where they have the filled-in area they hatch it in. In those instances where there is an adjoining area of meadowland which is today unfilled, in other words, it is what they call a virgin meadowland area and that adjoining virgin meadowland area showed up

in the 1972 infra-red photography with the botanical indicators the State does feel that they are in a position to draw a line on that virgin area. The State also feels that they are in a position with respect to the filled-in areas to go back to earlier source data and what the State clearly did and I don't fault them at all for this thinking, is that the State went back to the earliest source data that pre-dated the filling of the particular area. In the hatch-marked areas they generally had available to them photography, which you have seen some places in the record referred to as 1930 photography and in many places as 1932 photography. It is the same photography. It is actually photography that the State could not identify as to the specific date on which it was taken, but which was taken at some point in time between 1930 and 1932 and also in 1940 photography.

What the State is saying is this, that on the basis of that 1930, 1932 photography, or the 1940 photography, in

those limited instances where that is applicable, the area that is presently filled in and the area that is today virgin meadows look similar, look similar.

Well, what does similar mean? Does it mean that the botanical indicator which enables the State to go in and draw the line, draw the boundary on the property that is presently virgin meadowland exists? The answer is no. Does the State even have the ability on the basis of that photography and the "look similar" to go in and to identify particular species of grass? The answer is no. So that what the State has done, again I say it is an ingenious effort to try to maximize the claim, is the State has gone in and they have analyzed the adjoining meadowland area on the basis of the botanical indicators on the 1972 photography, come up with a percentage. They are able to define specific claims remember on the 1972 photography in the virgin meadowland area. They come up with the percentage over a meadow area, maybe 25 percent. So

what do they do? They go then back over to the filled-in area, an area where they have no botanical signature, where they have no 1972 infra-red photography and they don't have it simply because the area was filled in at that time, they go back to the earliest photography that they have prior to the filling and then they come up and they say that it looks similar. They can, and I pointed this out in my answering affidavit, the State clearly can in the hatch-marked areas go in and on the basis of the 1940 photography, on the basis of the 1930 or 1932 photography, or the 1890 Vermeule Map, the State can clearly draw the beds of certain tidal creeks and streams. So the State has clearly told us in these depositions that it has the ability to draw a claim in hatch-marked areas. The reason that the areas are hatched in is solely because the State feels that it should be entitled to something greater than the beds of those tidal flowed creeks and streams which it can actually draw on the basis of a source

document. And the reason that it asserts it has that greater claim is based upon the "look similar" on the early photography and the 1972 infra-red photography and botanical signature that comes out of it. Even if the Court were to accept that as logical, where it falls down is right here, your Honor. The critical question is not what that adjoining meadowland looked like in 1972, the critical question is what did that adjoining meadowland look like immediately prior to the time the adjoining meadowland was filled in, because if that adjoining meadowland was filled in and elevated well above the mean high tide at the time when the tide did not reach as far as it does today on the adjoining meadowlands, then the State's position, even following its own theory through, just collapses at that point.

I am persuaded that as a matter of basic fairness to its citizens it is not asking too much to ask the State to draw a line where it is asserting a claim and to support the line as drawn and I

think it reaches into the Federal Constitution and the State Constitution and reaches the whole concept of fair process to tell me that I am going to lose my title where my State can't come in and over my property can't draw a line and say "That was tidally-flowed and this was not tidally-flowed," but in effect my whole property is somehow bothered and concerned by so-called interest expressed not in terms of what the tidal condition was on my land at any former time, but what the tidal condition was on my neighbor's lands in 1972. Why 1972? I see absolutely nothing at all, your Honor, that should bother the State and I think all it requires is a direction from this Court that the time has finally come after fourteen years of this nonsense to take and to define these claims in terms of the law and if those claims by their definition in terms of the law and expression of a tidal boundary requires that the State doesn't get as much as the State would like to have, then I say exactly what Chief Justice

Weintraub said, "Pick up your tent, boys, go home; good effort, good try, but pick up your tent and go home," and in effect confirm the private ownership claims.

THE COURT: Mr. Weigel, do you have any idea, just a rough idea of how many acres of meadowland are hatch-marked? Anybody made an estimate?

MR. WEIGEL: I asked Mr. Younguns, your Honor, through his counsel to make that information available to me. As the Court may know, unfortunately Mr. Younguns was in a very serious automobile accident recently. I think he is physically unable to do it.

MR. GOLDFEIN: I think I can answer that. Our information is 589.227 acres of the 34,604 acres of the Hackensack Maps are hatched and of those 223.12 acres are the subject of private grants. According to the information I have there are some 360-odd acres involved.

MR. WEIGEL: Your Honor, I know I am running over the time I indicated, I would also like to express in the record

my position with respect to the other problem, the problem of the State incorporating upon these photo maps and claims overlays conveyances that the State has previously made and here I think it is a matter again of basic fairness. What did the law contemplate? The law clearly talks in terms of determining and certifying State-owned lands. I think everybody in that Legislature and I know when I first read the statute I just assumed what they were going to do would be to come out and assert what their ownership claims were as of a particular date when they were asserting the claim, the date being a date subsequent to the enactment of the statute and their performance of all of the tidal studies and surveys in accordance with the statute which was required. But what have we gotten? These maps are worse than the Grey and White Map because at least in the Grey and White Map they tried to do it. In the Grey and White Map the State did make an effort to try to show what areas

were covered by its prior conveyances and it is true they did miss something, but at least they did a good general effort to try to identify those parcels of land which they acknowledge there was a conveyance from the State through its tideland agent to some private owner. And the thing that bothers me and the reason I am particularly concerned about this is because of two matters which I raised in my brief.

Number one, the State has in effect asked this Court to impose a constructive trust for the benefit of the State over funds on deposit in a Sports Authority condemnation case to the extent that those funds exceed the $1,000 per acre that was paid and I believe it was 1968 by Smila-Rutherford for a quit-claim deed as it was called, quit-claim deeds being distinguished from riparian grants, quit-claim deed being a sweep grant over the owners' property given at that time and as it had been previously during the 1960s at a thousand dollars an acre, without

the slightest allegation that this applicant for that quitclaim grant deceived the State, perpetrated any fraud on the State, or anything of that kind. What happened between the time the State filed its request, its application to impose the trust and the date of the conveyance back in 1968 was simply that the mapping had taken place and lo and behold here the State comes up with a much more substantial claim that I guess it knew it had in 1968 and in effect it wants to take and go back behind its own instrument.

You can't walk away from this problem by saying we are talking about funds in court because absent the condemnation the State could just as well come in here and say in effect that that quitclaim deed back in 1968 was ineffective to convey title, or it was ineffective to convey title at least to the extent that inadequate consideration was received for it.

The other problem that bothers me, your Honor, is the problem that is

presented by the State clearly asserting fee simple claims interior of the line of mean high water, which the State of New Jersey itself has accepted and made the basis for its own riparian grants. Example, there is an entire group of riparian grants along Newark Bay reaching up into the Passaic River, the two riparian grants, your Honor, as opposed to the quitclaim. The riparian grant historically in the record was handled in this way. The applicant submitted to his State an application and with that application went the applicant's survey. The State got the application, got the survey, and then as a matter of administrative routine within the administration of the office -- it used to be called the Navigation Bureau -- they would go and they would look at the last sheets that the State maintained, the State kept these as the basic documents upon which it would check lines of mean high water before it would make its own conveyances, and where the State thought that the engineer of the applicant had not

properly located that line of mean high water, of course, the State would not issue its grant, it sent the application back and said that the surveyor should go and establish as of the time the present line of mean high water and never once did the State of New Jersey ever issue a riparian grant without in effect approving and accepting, and I suggest clearly incorporating that finally accepted line of mean high water and it based its conveyance on it.

As the Court I am sure well knows, no riparian grant instrument is given except in reference to that line of mean high water which the State itself has used and incorporated in its own conveyances.

So I think the problem is not a theoretical problem, your Honor, I think it is a real problem, it is a practical problem and I think all I am asking this Court to do is in effect say to the State "Map your claims as the law says they should be mapped, map them as of today, not as of how those claims would be absent the

conveyances of the State," and if the State is required to do that then the State has the clear obligation now to let the people know which of its conveyances it is going to attack and which of its conveyances it is willing to accept and it serves the public and it serves the Court and I would hope that the State would see that it serves the State in this regard.

As I said, people's lives were being exhausted on this. People with knowledge are dying. Documents are being lost and when better than today to have that issue, if the State is claiming the invalidity of any document which appears to convey its title to these lands, what better than to have that issue today when memories are better than they will be ten or fifteen years from now and documents are more readily available now than they will ever be in the future.

THE COURT: Thank you, Mr. Weigel. I think I would like to hear from you, Mr. Goldfein.

MR. GOLDFEIN: Thank you, your

Honor. If the Court please, certainly the Court is aware that the appellants have no monopoly on the gravity of the situation. The State through the Natural Resource Council in the Department of Environmental Protection are very well aware of the gravity. The State through the Legislature has allocated a great amount of resources in dealing with these problems. The ultimate purpose in dollars that might be extracted from this acreage for the School Fund is a number one issue before the people of New Jersey today. There is no monopoly on the gravity of the situation. As to my recent involvement in the case perhaps, your Honor, for purposes of this motion that particularly is an advantage because as one who has not lived with these problems for fourteen years and as one who confronts a motion for summary judgment I have the opportunity to evaluate it on the merits of the motion. I can look, as I hope the Court would look, and see what has been offered in support of the motion, until one o'clock yesterday

I might add, with the exception of the advice that ten pages of a very late volume of the 2800 pages of depositions had been offered to the Court and which the State had no knowledge of having been offered in that nothing to that effect was set forth in the moving papers, there was as we approached the motion before the Court a brief and argument as to how Mr. Weigel on behalf of the appellant had become convinced that at this point in the case there was no question whatsoever before the Court. I need not cite cases I recited in my brief which deal with motions for summary judgment. However, I would ask the Court to consider its function in this matter. The docket number indicates this is an Appellate Division case. Mr. Weigel has brought his case as required by the rules of court before the Appellate Division. The Appellate Division has sent it here for very broad purposes, that being to supplement and create a record upon which the Appellate Division can decide the case.

THE COURT: Something more than that in the remand, wasn't there? They directed me to make findings of fact and conclusions of law.

MR. GOLDFEIN: I think, your Honor, that the Court -- I would certainly concur -- that the Court was directed to make recommended findings of fact, recommended findings of law.

THE COURT: Now I think the language is important. This consolidated appeal is remanded to the Law Division for purpose of supplementing the administrative record for Appellate review. The Assignment Judge of Bergen County or such judge as he may designate is directed to conduct such proceedings and to make appropriate findings of fact and conclusions of law "to be submitted to this court for determination of the following issues."

I don't think it says recommended findings of fact and conclusions of law. I make them, as I read it, and the procedure is very appropriate. The Appellate Division doesn't have the facilities -- they certainly

can exercise original jurisdiction in many matters -- but they don't have the facilities to take testimony, nor do the rules permit such a thing. So I guess where we are at is this. Mr. Weigel and the rest of the people joining with him say, "Judge, here are some uncontradicted facts. Nobody can dispute them. There is no material fact issue within the framework of your motion as I understand it, Mr. Weigel, and I move as a matter of law to have this Court grant my motion that the State has not followed the mandate of the Legislature in the act here involved."

So you are not arguing that there are material fact issues, are you?

MR. GOLDFEIN: Your Honor, as I stated in my brief, as I now have been given facts in the context of the summary judgment motion I reserve the opportunity to offer affidavits, as required by the summary judgment rule, to controvert the conclusions arrived at by Mr. Weigel's brief.

THE COURT: Let's see if we can just understand ourselves, I'm sorry I am

interrupting you. Where is the sheet where Mr. Weigel sets forth certain uncontradicted facts, or is it in his affidavit? Mr. Weigel's affidavit Paragraph 4, "The following facts are undisputed in this record and form the basis for the relief requested." No. 4. I assume you have reviewed that?

MR. GOLDFEIN: Yes, your Honor, I received that affidavit yesterday.

THE COURT: Are they undisputed facts?

MR. GOLDFEIN: Your Honor, I haven't had the opportunity to review it with the people who might know the answers to that question. As I understand the rules of practice and I understand everything is being treated liberally in this matter, twenty-four hours is hardly an opportunity to respond.

THE COURT: Let's take one very simple undisputed fact then. You concede that the maps that have been published in part have areas that are hatch-marked?

MR. GOLDFEIN: Yes, sir.

THE COURT: And the hatch-marking means that the claim is a questionable claim. Is that correct?

MR. GOLDFEIN: Yes, sir.

THE COURT: Let's take that one simple fact alone. Mr. Weigel says both O'Neill and the statute directed the State to determine and certify those lands which it finds are State-owned lands.

Now, has it done that with respect to these some 589 acres? That is a motion that is ripe for determination through the summary judgment rule, isn't it? Isn't that facts?

MR. GOLDFEIN: Your Honor, at Page 47 of your opinion in Federal Pater I have written down a quote where you said the Legislature has recognized the disputed nature of the claims of this kind. The State joins in that characterization. The State alleges its claim in the so-called hatched areas.

THE COURT: Page 47?

MR. GOLDFEIN: I believe so.

THE COURT: I can't find it. Would

you read it again to me?

MR. GOLDFEIN: The Legislature has recognized the disputed nature of the claims of this kind.

THE COURT: I must have a different pagination than you.

MR. GOLDFEIN: Your Honor, I have my copy of it available.

THE COURT: Is that at the bottom? That the Legislature has recognized the disputed nature of the claims of this kind? I don't know. Go ahead.

MR. GOLDFEIN: I had it written down as being at Page 47.

THE COURT: All right. Wasn't the thrust of the opinion in O'Neill and the object of the Legislature to say "Look, we want you to tell the world what lands you, the State of New Jersey, are claiming, so that people will know where they are at". Now you have done that to a great extent and thousands of acres you have been able to determine and certify to be State-owned lands. But you have also designated some as questionable and

a lot of those lands are not accurately in any type of litigation at this time.

It is true I have dealt from time to time with lands that are the subject matter of condemnation proceedings on behalf of the Sports Complex or indeed the Department of Transportation, or the New Jersey Turnpike Authority and I only partially solved the problem within the framework of a withdrawal of a deposit situation. We get to an area where A owns blank acres and sure enough the State says some of it is tide-flowed, and we even work it out in percentages through the good offices of Mr. Scapatullo who says 75 percent is tide-flowed, 25 percent is upland. So we give the applicant, who is seeking withdrawal of the money that has been paid into court under a declaration of taking, we let him take 25 percent of the deposit and we have even gone this far, in some instances he will say 50 percent is tide-flowed, 25 percent is upland and 25 percent is questionable and we say, "Mr. Rindone, I order you to

designate," and we get an answer from him in terms of percentages. That is fine for purposes of withdrawal. We still have to have that title suit tried some day and hopefully that property owner will get a decision, but what about the people whose lands are not involved in any condemnation proceedings? The State hasn't indicated what it is going to do with these questionable designated areas. Do you know what they are going to do, Mr. Goldfein, or is it going to go on indefinitely?

MR. GOLDFEIN: Your Honor, I don't pretend with the limited experience I have had in this matter and related matters to be able to answer these kinds of questions. If the Court is going to entertain this motion I ask for the opportunity to consult with my clients to evaluate the facts specified in Mr. Weigel's affidavit yesterday and to inform the Court of our response.

THE COURT: I don't even know whether I need those facts that were giv to you and to myself yesterday. I will

satisfied if you confine your argument to the framework of fact that I have given you, that the State in response to the statutory direction has published a map with hatched areas on it that says, "This is questionable." They don't say that it is clearly State-owned land and they don't say it is clearly private property owned land. And I simply ask you to read the statute and tell me as a matter of law whether or not the State has complied with the directions of the Legislature.

Mr. Rindone, did you want to say something?

MR. RINDONE: Yes, if I may be heard, your Honor, in this particular context. I think if the State has been guilty of any shortcoming in connection with these hatched areas what it has been guilty of is being too forthright in disclosing its analytical processes in connection with these maps. Your Honor, you cannot take the mapping project and consider it without the flow of contemporary events. The Sports Authority project

exerted some pressure upon the completion of these maps and the production of them in satisfaction of the statutory mandate and the adoption by the Council. The staff of the Division of Marine Services in attempting to analyze the maps, particularly the ones which involve the Sports Authority Complex, came upon areas not readily definable and rather than stop there and at that moment refine that problem they went around it, so that the overall picture might achieve context and texture, so that the major objectives of the statute could be satisfied.

Now, we have been going back in those hatched areas and we have been defining them in accordance with what we hope is a satisfactory scientific process. The Court will determine this in due course. We have been doing it on the basis of request, not for any ceremonies, but so that there might not be any accusations or claim of partiality. Anyone who has inquired of my office how do we get this matter resolved have been very readily

informed, "Make a motion to have the State designate," and in this fashion the State has responded promptly and fully and I am sure, your Honor will recall that in no case where the Court has asked the State to designate, in no case has the State failed to do that.

THE COURT: But that is not the problem though. What about the guy sitting there owning his land, nobody has condemned it, he wants in effect to do something with it and in effect his title is slandered by this condemnation?

MR. RINDONE: But in fact we cannot accomplish everything at once unfortunately. There are human limitations of the manpower, budget limitations of expertise available.

THE COURT: From what I understand you are not going to know anymore than you do today.

MR. RINDONE: That may very well be, your Honor, but it is only last August that all of the existing panels were finally approved by the Natural Resource

Council and we are now addressing ourselves to the matters of the hatched areas as they come up. Now, once these requests have exhausted themselves certainly we would address ourselves on our own motion as it were to those areas which are still hatched, concerning which no one has raised the question.

THE COURT: But what good is it going to do to say, "Okay, Mr. Jones, your acre of land we have said twenty-five percent of it is questionable, we are willing to split the difference with you now and say 12-1/2 percent is tide-flowed?

MR. RINDONE: That is not the process.

THE COURT: Wait a minute, how are you going to do it?

MR. RINDONE: How have we been doing it in the past? The method which Mr. Weigel has suggested to the Court is essentially the same. I can't make exact scientific representations to the Court because I don't have the background.

THE COURT: Where are you going

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THE COURT: Where are you going

to draw the line? It is now easy to say for purposes of withdrawal of a deposit, "Keep 75 and get 25." But how do you draw the line the way you are doing it now?

MR. RINDONE: I get the impression, your Honor, that somewhere lurking here is the concept that there is a table backed up to the wall with a green felt top on it and somebody is rolling dice and coming up with a figure, but that is not it at all.

THE COURT: You want me to answer that question?

MR. RINDONE: If you care to, certainly.

THE COURT: I have that idea.

MR. RINDONE: That perhaps there is the need for affidavits that Mr. Goldfein is talking about.

THE COURT: Sometimes I have that idea. I have that idea. Well now, where do I get the idea that in questionable areas when you are pinned to the wall you take a position 75 percent is tide flowed

and 25 is upland? Where do I get that idea from?

MR. RINDONE: There may be a pattern that emerges from the figures, I don't know, I have never juxtaposed them to determine that, but I can tell your Honor that those determinations are not made by the same people that make the other determinations.

THE COURT: Okay. Now, look, I think you people have done a tremendous job.

MR. RINDONE: That is not at issue here, your Honor.

THE COURT: Let me praise you a little bit if you don't mind, and Mr. Weigel has said you have done a good job and a lot of the other people, Mr. Porro and Mr. Friedman, they have been involved in this for years and they are the elder statesmen of this riparian game we play and I can appreciate the difficulties involved and as Mr. Weigel said that hatched area, whoever built that theory up was really a smart cookie, I mean it is

a pretty good thing, but he has asked me pointblank to determine whether or not you have determined and certified those lands that are State-owned and I defy you to demonstrate to me how you have certified State-owned lands when you put that hatching legend on that map.

MR. RINDONE: As I indicated to the Court it would have been a lot easier for the State to say, "This is ours." We wouldn't be here today, but we were more forthright than that, we said, "We are not sure, we will come back to it."

THE COURT: You were forthright about it. Now I have got to answer the question they have asked me.

MR. RINDONE: But there is an issue of material fact.

THE COURT: Where is there an issue of material fact, you tell me, because I can't grant the motion then.

MR. RINDONE: There is an issue of material fact, your Honor, because the statute does not say that contemporaneously and at the same time all points in the

surveyed areas must be absolutely and finally declared as being either the riparian lands of the State or the uplands of the private owners.

THE COURT: In fairness to these gentlemen you are on your feet and you are arguing and they haven't had the benefit of any notice of this argument before and you very conveniently took the position that, "I was not the deputy authorized to accept service of certain papers."

MR. RINDONE: I am not arguing that case.

THE COURT: I don't know why you should continue to argue today.

MR. RINDONE: I don't want to take advantage of anyone, but Mr. Goldfein is here, he has been in this matter in a theoretical way for only a few months. I have sat in this courtroom for almost two years working on a day-to-day basis with these hatched areas and I thought for me to sit still here and let the matter be decided without raising my voice would not

be in fairness to my client.

THE COURT: I'm sure you can be very helpful to me. I want to be fair to these gentlemen. Do you have any objection to Mr. Rindone continuing this argument?

MR. WEIGEL: No, sir.

MR. PORRO: I am in accord, your Honor, he is saying some very interesting things.

THE COURT: This is no reflection on you, Mr. Goldfein, I want to hear you in detail too.

MR. GOLDFEIN: Your Honor, I have relied a great deal on Mr. Rindone in the educational process involved.

THE COURT: Can I just hear him for a minute then?

MR. GOLDFEIN: Your Honor, I don't mean to cut him off and I am certainly pleased to discuss it with him as much as the Court pleases and counsel, but you suggest that you are hearing from him something for the first time?

THE COURT: Oh, no. I meant that he did not submit a brief.

MR. GOLDFEIN: And we submit that until yesterday in spite of the rules of court we didn't know what the specific facts were that were being relied on. Those things kind of balance one another off I suppose in the Court's mind. Given the gravity of the cause, your Honor, and the incompletion of assembling a record and I hope we can do that as quickly as possible, have this matter decided in fairness to everyone, I don't think, strenuously don't think this Court should be granting partial judgments in any of these areas. It seems that Mr. Weigel sets it out in his affidavit. As far as he says I would like to quote it, Paragraph 5, "None of the discovery which remains to be conducted has any bearing whatsoever on the two matters on the motion for partial summary judgment."

As I understand it, the discovery that is left to be done is mine. I certainly have not authorized Mr. Weigel to make that statement and I would hope that the Court would afford us the opportunity to complete

discovery in the case, to participate in the Court's preparation of findings of fact and conclusions of law for submission to the Appellate Division and let the case proceed.

THE COURT: Mr. Goldfein, I will tell you why I welcomed -- I will be candid -- I welcomed this motion because if they are right we ought to know that as soon as possible. Isn't that so?

MR. WEIGEL: My answer to Mr. Goldfein, your Honor, is maybe my mind is simpler than everybody else, but it just seems to me this law is so patently clear. What I am asking for is in the law. There is nothing that any record, any questions that Mr. Goldfein could ever think to ask of my experts that is going to change it in one single shade.

THE COURT: I might as well tell you what I intend to do when I decide this motion, whether I grant it or deny it, I will put it in form that it is final enough to go right back up to the Appellate Division right now and not later at the end

of the case, because if you are right then somebody has to start moving on this question and not wait until the Appellate Division hears the whole matter after I make my complete findings of fact and conclusions of law. I think it is imperative and if I am wrong we ought to know that too.

Mr. Goldfein, do you have anything further you want to state? Are you asking me to put off my decision so that you can file a supplemental brief? Is that it?

MR. GOLDFEIN: I would like the opportunity to file an answering affidavit.

THE COURT: I will give you that opportunity.

MR. GOLDFEIN: And I don't think a supplemental brief is necessary.

THE COURT: I think I have to, Mr. Weigel, in fairness to the State.

MR. GOLDFEIN: I would like the opportunity to file a supplemental brief as well, your Honor, and if I might I will at that time suggest several other interpretations of the statute.

THE COURT: Mr. Porro?

MR. PORRO: I will try to be brief. I would like to incorporate, which I have informed the State by separate letter, the Jony brief and the Jony affidavit, because in the first four points in the affidavit they are applicable in this case. I would like to incorporate Mr. Weigel's argument so that we don't have to be repetitious insofar as the statutory construction. I think the statute is clear. We have set forth citations of statutory construction in the brief.

THE COURT: They were very helpful.

MR. PORRO: And I have also picked up on the question of the interpretation of the word map. I don't think anything has to be said here in that regard. I would like to clarify at one point though so that my position is clear, I am representing individual property owners. Quite frankly I am in the overall challenge just to protect our interest. However, I am going to and I have made motions

separately for one reason. I don't read anywhere in the statute my property owners have been foreclosed of a right to quiet title and I am asking on that theory -- this map that we are talking about, regardless of what the determination is, is only a picture of an assertion. I come forward now with a motion for summary judgment in the quiet title action and this will be my argument in Jony and it is in the present twelve cases we have filed, East Rutherford, Sylvester and what have you.

What I am saying to the Court is I filed an affidavit. This affidavit shows that our property is upland. This affidavit shows also, and I was happy to hear Mr. Rindone say this, that our property because we are within the Sports Complex area has been treated completely different than any other place in the Hackensack Meadowland and in that there is a violation of equal protection. My affidavit is undisputed. It is not undisputed, it is verified today by Mr.

Rindone because he says to the Court on the record today we treated those properties differently. Our affidavit sets forth all quadrangles in which the hatched areas were used and when the truth comes out, your Honor, and if they are going to file an affidavit they are going to tell you they abandoned the hatched areas, they were abandoned, and if you look at the quadrangle we pointed to in our affidavit you will see they were the first ones that came out under the pressure as Mr. Rindone says of the Sports Authority. Our affidavit goes further and takes their base material that they used on properties to justify hatching and then we go outside the Sports area and we show you on the same exact base material they deemed the other properties free and clear. That is a violation of equal protection if I have ever seen one. I don't ask the Court to invalidate that map. I say I want our titles quieted unless they come forward with something and as of today in my twelve separate motions they have not

come forward with a thing. I say in all due deference and have to agree with the Court and with Mr. Goldfein that they should be given that opportunity, but I ask the Court to please make that expeditious.

Lastly, your Honor, we have raised in our brief the question of the procedural and substantive due process. There is very little question in my mind that when this whole question came about initially there was some discussion of a third area, a questionable area, and it was determined at that time that you could not put a question mark on a piece of property and satisfy due process either procedurally, or substantively, unless you went further and set forth certain procedural aspects to provide either for the clearance of the title or a determination and I point in that direction, your Honor, again on our specific pieces of property.

I think we have said all that has to be said in terms of authority in the brief, your Honor, but I do think that much more important than all of the legal

citations is some of the facts that we have disclosed to this Court by going to the source materials that are set forth in our affidavit.

THE COURT: That was very interesting. I had never known that at one time they contemplated three hatched areas but apparently the Legislature abandoned that idea.

MR. PORRO: Why they abandoned the idea is very simple, because they couldn't leave a piece of property in hatched area unless they said if you are in that hatched area you follow step one, two and three and your property is cleared by a formula. If you will take notice the statute has no formula, it deals with a question where the property owner can protest. Quite frankly I think as the Legislature abandoned that so do we abandon it, your Honor. I think the only remedy for the property owner to get justice in these cases is to bring the actions to quiet title and that fact of abandonment and you will see also abandonment

of the hatched areas after you leave the Sports Complex quadrangles, that probably was because of the pressure, as Mr. Rindone said.

THE COURT: Thank you, Mr. Porro.

Mr. Friedman, do you have anything you want to add?

MR. FRIEDMAN: I adopt the arguments made by both Mr. Weigel and Mr. Porro.

Mr. Rindone referred to the flow of contemporary events. This case, this motion, has to be seen in a context and he is correct, but I don't think he points to the right one. These maps are done pursuant to a statute adopted in January of 1969 and by their terms required the completion of the map in the Hackensack Meadowlands within six months, to wit, July 13, 1969. Needless to say it is now the fall of 1974 and those maps were finally approved about two months ago, long after the Legislature ever contemplated their being done. I am somewhat shocked to find out that this mapping develops an urgency to satisfy the needs of the State's

prodigal son.

THE COURT: Let's put the blame where it belongs. Number one, you know and I know that the Legislature said to somebody, "Do this," and never gave them enough money to begin to do it.

MR. FRIEDMAN: That's correct.

THE COURT: I think the people sitting here ought to know that there are many fine people in Trenton who could do this job if they had the proper amount of money and I think you ought to say that.

MR. FRIEDMAN: That's correct, but, Judge, I think this is a litany you have heard too often from me, but I think it is important in each one of these cases to give a history of the tideland question, being at least a capsule form, be it part of the record, so that should this or any other particular case go forward to our Appellate court we don't have isolated out the history of this and if you will bear with me for a few moments I wish to state it.

In 1961 there is an unreported

decision, Sisselman v. the State of New Jersey, which gave rise to the claims of the State. This was followed by a group of prerogative actions dating from 1963, '64 and I guess into '65 involving areas where the State Highway Department had come upon the land and taken the land. The litigants in those cases of prerogative writ actions sought hearings, sought trials and they were met by opposition by the courts -- I'm sorry, by the State, to which the courts acquiesced, saying, "Wait for O'Neill." The first of those cases was State v. O'Neill and when O'Neill is decided the Supreme Court will lay out the law and we will know where we are going. 1967 came. O'Neill was decided and O'Neill said in part and as was recited here today that the burden of proof where lands are now above mean high tide, where a party is asserting something in the present status quo, the burden of proof is on the side against the status quo. The cross-hatched areas of land are obviously at this moment above mean high tide, obviously,

therefore the burden of proof is on the State.

After 1967 in the prerogative writ actions and many eminent domain proceedings that had then come into existence, motions were made by various and sundry counsel of varying types, seeking the same thing, to get these matters on the trial calendar, to get trials, to get these cases heard. They were met by in the parlance of our day a stone wall by the State of New Jersey. We couldn't get a hearing. Then we were told there is legislation pending down in Trenton that is going to solve all the problems, so don't rush, we will put off any adjudications until that legislation is adopted. And in January of 1969 the legislation was adopted and called for mapping in six months of the particular area here involved. The courts then at the request of the State again avoided any adjudications of title, telling us we have to wait for the maps. Those maps didn't take six months, they took two years and when those maps came

forward they were rather summarily thrown out by the courts and at that point there were again attempts to get adjudications. There were attempts to work out a viable settlement procedure, all of which have come to naught and we were then told wait again, there is new maps coming out and now the new maps are out and the State still says to us we are not prepared, if I understand counsel for the State's position, we are not prepared in either of these to say whether we claim it or don't claim it, or the nature of our claim, or the particular area we claim, and what they say on their maps, I am quoting from the legend at the bottom of the maps, "Cross-hatched areas. Portions of these areas were formerly below mean high water."

I remember when I was a kid I was always fascinated by signs such as "bridge may be slippery when wet." That is true, any bridge may be slippery when wet and any land may be claimed by the State, but what the individual property owners are entitled to, what due process

calls for, and what the statute calls for is an explicit statement by the State, "We claim block, acre," or, "we don't claim it," and what we end up with 13 or 14 years into this process, five years after the statutory admonition to map the property, two mapping jobs later, is being told, "Well, we didn't have time to complete it the way we would like it." I go back again to Chief Justice Weintraub's remarks to Mr. Greenberg, now Judge Greenberg, which are quoted in Mr. Weigel's brief, "If you haven't got it fold your tent and go home." On the cross-hatched areas they haven't got it. After fourteen years our clients are entitled to the use of their property. They pay taxes on it. They must pay the taxes or they are forfeited to the municipalities. They can't rent it, they can't mortgage it, they can't develop it, they can't sell it. Mr. Rindone tells us if I would go to him and ask him for a specification of their interest he will give it to me. He didn't put in the qualification, "If it is in litigation."

If it is not in litigation I don't get it, and if I am not in litigation there is no procedure blessed by any court of this State that lets my client act with his property with the freedom that any owner of property is entitled to have.

Judge, the hardship that has been imposed upon people is unbelievable. I don't think that in any individual case, you know, with the owners of this property they should compete as in Queen for a Day to show the great hardship, but the reality is this is not an abstract question. These are people who have been trampled. Just things that come to your mind. I have a client that has a life estate and has sat with a life estate since 1961 and she is now sixty years of age or something like that. What is this Court and what is the State doing for that woman? They had to tell her, yes, when you're dead, when your life estate is over, fine, the remainder men with whom she is in conflict will have a good title. That is life. But of course the remainder men keep

telling her you got to pay the taxes.

Judge, simple justice requires that after all these years, after all these opportunities, if the State cannot with any definition state a claim upon a particular piece of property, fold your tents and go home.

THE COURT: Thank you, Mr. Friedman. We will take a short recess.

Mr. Weigel, Mr. Porro, Mr. Friedman and Mr. Martini, I want you to think about something while we recess and that is assume I grant the motion what do you want me to do affirmatively?

[Recess.]

THE COURT: Mr. Martini, we are not going to have time for you to demonstrate to me the State's claim is specious by introducing maps because is any of your client's property within an area that is hatched?

MR. MARTINI: Yes, sir.

THE COURT: Can't you ride on their argument then?

MR. MARTINI: Yes. I would like

to point out I represent a widow who has been really hanging on the ropes for fourteen years. She suffered great hardship. There is no legal, valid, or constitutional basis for this hatched area on this map and I think we are entitled as a matter of law to an order by your Honor eliminating the hatched areas on the map.

THE COURT: Well, isn't that motion before me?

MR. MARTINI: It is included in the motion. I am attacking now on a more limited basis as far as my clients. I join in his motion all the way through.

THE COURT: You are making a suggestion if I grant the motion that I go one step further and order all hatched areas deleted from the map. Is that what you are suggesting?

MR. MARTINI: Right.

THE COURT: Do you have any suggestions just assuming for the sake of argument that I grant your motion, Mr. Weigel?

MR. WEIGEL: Yes, your Honor. It seems to me that it is clear to me and I am sure from just those few pages I have referred the Court to out of the transcript of the depositions that the State can assert certain ownership claims within the hatch-marked areas, those claims essentially being to the beds of certain tidal creeks and streams and based upon source matter which has sufficient legality to constitute the basis for a claim, the 1890 Vermeule Map being one source, the 1930-1932 photography being another, the 1940 photography being yet a third; in those instances where the land was not filled in by that time.

I think the practical thing to do in light of what you are asking is the least in terms of imposition on the State.

Now, we all know that the State has accepted these 36 maps in the Hackensack area. Those maps are in the form of what I call photographs, really they are aerial photographs and certainly there is no basis for disturbing the aerial photograph

because it forms the basis upon which these claims overlays are laid on it. It is really the claims overlay itself that we are concerned with because it is only on that document that the hatch-marked areas appear, and since the maps have been accepted, they have been approved, I assume they have been filed according to the statute and we are talking about on the maps that have been accepted of an area of only 589 acres I believe it was, so I think that the thing that would be persuasive to me would be just within those limited areas to require the State to supplement, not to take new entire overlays over again and to take only in those areas where there is a hatched area and within that area to delineate a specific claim. And I can tell the Court and the Court may itself remember from the trip we had together out to the Market Hurd Company in Minneapolis in the process that they showed us in the trip we had through the plant where they were showing us how the photographs were in effect reduced and

used and how the overlays were prepared. They did have a series of intermediate overlays. Some of those areas covered by those intermediate overlays were rather small in size and I think it would certainly be appropriate, instead of asking the State to do over an entire overlay, to ask them to supplement within those hatched areas by small additional overlays the claims that will be asserted and in terms of the other problem that I have tried to portray.

THE COURT: Excuse me, the maps that are filed are not a bunch of overlays, are they, the actual map that is filed?

MR. WEIGEL: Oh, yes.

MR. PORRO: Oh, yes.

THE COURT: I haven't looked at that map.

MR. WEIGEL: What the documents are -- I should have brought them up -- your Honor, it is very good, we have no problem with the resolution of the area photographed. It is an aerial photograph which is one document. On top of that you lay a clear plastic made with a stable

base material and on which lines appear. There are tic marks that enable you to place the overlay in a proper position over the base photograph and then you are able to actually see individual lines over property as it appeared in 1972 where the State is asserting a claim, but we are talking about two separate documents.

THE COURT: Because I have had a map in here from time to time, the Waldon Swamp area for example was just one map, and hatchmarks on it.

MR. PORRO: That was prepared specially for that action, your Honor.

THE COURT: I was always under the impression --

MR. FRIEDMAN: Judge, these are paper rather than clear base overlays, but the first document is the aerial photograph itself. The second document is a clear base overlay that shows, that you lay on top. This one is printed on paper. The official one is a clear base material so you can overlay this on the aerial photograph and see the areas that

fall into various designations.

MR. WEIGEL: So what I am suggesting to the Court --

THE COURT: My budget didn't even permit me to buy those maps.

MR. PORRO: You will see them.

MR. MARTINI: I bought this one.

THE COURT: Can you lend it to me?

MR. MARTINI: Yes, I will.

MR. WEIGEL: Your Honor, if it would help I would strongly urge that the Court take the quality product that they have, the stable based photograph with the clear stable base overlay and I will provide the Court with the Walden Swamp base photograph and overlay if there is no objection. I would be glad to have it delivered to the Court.

THE COURT: I didn't want to look at the proceeding really until there was a trial.

MR. WEIGEL: I will show it to the Court just to satisfy the questions I guess you would ask. In effect what I am saying, your Honor, it is clear that there

is just not just one map, one item.

THE COURT: I knew the process you were describing but I was under a different impression as to what was going to be filed with the County Clerk.

MR. WEIGEL: That is what is filed, there is no question about that at all. I'm sure the State will admit that, a stable base photograph which represents an aerial depiction of the property as of 1972 and on top of that a separate document, a clear overlay on stable based material to reduce the possibility of shrinkage and distortion there with certain lines on it and there is on each of the overlays a little legend which describes what the different areas are. There is a ticking system, in other words, with a line and a short line moving away from it to indicate which side of a particular line the State asserts is upland and which side is within the State's claim.

THE COURT: Your suggestion, if you do prevail, is they make another overlay that shows the beds of original

streams or creeks or what have you?

MR. WEIGEL: No. My suggestion is a little more limited. I am suggesting nothing be done with the stable base photograph because the claim is not depicted on the photograph. It is only on the stable based overlay that I am suggesting that anything be done and I am not suggesting that that stable base overlay be expunged or anything of that kind, but that if the Court does grant the motion that in effect the State as a minimum item supplement the stable base overlay in those areas that are hatched by providing a smaller but of course to scale and resolved to get the kind of accuracy that they have achieved on their stable base overlay, the claims within the hatched areas.

So that in effect you could take and lay yet a third working base photo map, original claims overlay with a supplemental claims overlay in the hatched area. In certain maps like Walden Swamp map as a matter of actual procedure I would almost think because of the extensive

hatched areas it might be simpler for the State and its contractor to put out a new overlay, but I think it is only in that one area that would cause any problem.

In terms of the State's conveyances and the State acknowledging those conveyances I believe that could be done in any number of ways. It is my understanding from the depositions that were taken of Mr. Johnson, who I believe now heads the group down there and bears the title of Supervisor of Grants and Leases, that he has in house but not available to the public as yet and in some stage of production, I don't know if it reached final stage -- an overlay which can be laid on the base photo map and I believe that overlay does show the prior conveyances made by the State of New Jersey.

What I think we are asking for on the second aspect of the motion is for Mr. Johnson's effort to be continued and that the State as it publishes its maps and claims overlays that it reflect on those overlays that have not yet come out,

the conveyances which it acknowledges transferred the title from the State to the grantees in those areas that are already mapped; that it supplement the present claims overlay with the overlay that Mr. Johnson is preparing and then in some official way through the Council, filed according to the statute, acknowledge that those areas depicted were in effect validly conveyed by the quitclaim deeds or the riparian grants that were given. And I am contemplating that the State, if that is the order of the Court, the State may now want to take the position that certain of its conveyances were not effective to convey the title and in those instances I am certainly not asking the Court to make any direction on the State to reflect something that it doesn't want.

THE COURT: I don't think you are in a posture of summary judgment on some of this stuff involving grants. We may have some trouble here on that one.

MR. WEIGEL: No, on the grants maybe I am not making clear what I'm asking

for. In effect I'm asking the State to reflect at the time it accepts and authorizes to be filed base photo maps and claims overlays, as complying with the statute, that it incorporate within those claims and reflect the private ownership that it acknowledges was derived through a conveyance from the state itself by its tideland agent. That is all I'm asking for and that clearly gives the State the option of saying that a particular instrument is valid or invalid. If the State acknowledges it is valid it can incorporate the instrument on its overlay. If the State takes the position that it is invalid as an instrument of title it will not incorporate it and then it would bring into court, I assume, the issue of whether or not the State's position with respect to the invalidity of that instrument was a correct position, which would be a separate position and clearly not here.

THE COURT: In other words, you are saying, "Let's know now, State, if you

are going to claim that a certain grant is invalid we want to know it now."

MR. WEIGEL: And nothing more.

THE COURT: And they would indicate that by not showing it.

MR. WEIGEL: If they have any question about the instrument they simply wouldn't show it and that would bring the issue up and it would come into a court, this one or some other court, in a completely separate matter. There is nothing here I am suggesting to you to resolve that is a problem because I don't see that as an issue. The only issue I see to that is in effect a direction to the State to reflect claims as of the date they are asserted and to incorporate on those claims by acknowledging all the conveyances that have been previously made that the State admits were effective conveyances transferring title from the State to the grantee within the instrument.

If the State wants to take the position that any instrument or any group of instruments were not effective as title

instruments the State would simply then not incorporate the lands that were covered by those instruments within the acknowledged uplands.

THE COURT: What do you rely on in the statute that says you are entitled to have that kind of work product?

MR. WEIGEL: I rely on the basic statute itself, your Honor, which says to me in effect a direction to the State to do its mapping in such a fashion as to determine and certify State lands. If the State has conveyed its interest to the grantee and the maps don't reflect it, then the State clearly does not comply with the statute. It is a very basic and simple argument.

THE COURT: I read the statute at one time as saying "State, show what lands you claim and those lands that you don't claim then whoever has the deed into those lands owns the lands."

You want them to go one step further and say, "State, insofar as those lands are concerned that you do not claim

we want you to put something on there that says we recognize that the grant that gave you title to these lands from the State is a valid one." Is that what you want them to do?

MR. WEIGEL: Your Honor, what I am saying is very basic, very simple, and it is this. If the State accepts and certifies as of August 1974 that it owns a specific amount of property that it depicts on a base photo map and claim overlay, that that should be the truth of the claim as of the date of its acceptance and as of the date which it authorizes it to be filed. In other words, that it should represent that truth in all instances except in the instance where there is a State quitclaim or riparian claim incident. In those instances you are left in the same kind of doubt as you are in the hatch-marked areas, who is going to know on the basis of the action of the State coming in and asserting a constructive trust of funds in court or challenging its own conveyances

down in Newark, where it is not accepting the mean high water --

THE COURT: I know what you are trying to do.

MR. WEIGEL: I am saying nothing more, your Honor, than that these claims should represent State ownership as of the date that that ownership is asserted in terms of its acceptance by the Council and their authorization that it is valid.

THE COURT: Let's assume I agree with you. Do you want something depicted on these maps that shows that what would ordinarily be a claim by the State to lands because they were submerged by mean high tide at one time or still are, but are not now claimed by the State, you want them to say because there is a grant --

MR. WEIGEL: Your Honor, they could do what they did in the Grey and White Maps. I'm sure if you remember those maps there were big patches of grey where the State was claiming an ownership right in the middle of it and there would be a patch of white blocked off with property

lines and so forth and what that represented because of its depiction in white as opposed to the grey the State was acknowledging that that was in effect a piece of land that although it probably would be asserting a grey claim or an ownership claim over it, in the absence of that grant it was acknowledging that grant was valid and conveyed title. That is all we are asking, very simply, depict in some fashion, whatever fashion satisfies the requirement of the statute, which is in terms of a clear depiction, I don't care how it is done on the map as long as we the public can know what conveyances the State has made. The State is willing in 1974 or on whatever date the Natural Resource Council accepts that as a determination and certification of State owned land that the State owns it.

THE COURT: Using the Grey and White analogy are you saying if they adopted that here, are you saying the man who owns black acre and knows he has a grant he doesn't see that block there, he

knows the State is not recognizing his grant. Is that what you want?

MR. WEIGEL: Yes. What that will do, I submit to the Court, it is in the public interest, it will pose that party with the fact that the State of New Jersey is saying with respect to his conveyance that that was a defective instrument to convey title. That will enable that issue to be promptly brought to the Court and resolved rather than letting this thing run for years and years while lives are being expended. It is in the public and the Court's interest, certainly in the private claims interest and I hope it would be in the mind of the sovereign that looks out for people, understanding the benefit of that kind of ruling.

MR. FRIEDMAN: Judge, I agree with Mr. Weigel. I would like to make two comments. One, I think should the Court grant both prayers of relief, that they be separated out, in other words, not have one project dependent in time on the

other. In other words, let it be on two separate overlays. The sandwich can get infinitely thick it doesn't make too much difference. So when one is available and published one problem is resolved. When the other is available it is resolved and similar to that job I think realizing all of the problems of enforcement that some time strictures be put upon this work. From past experience the State, for whatever reason, has just not met, not done things within any reasonable expectation of time within which they should be done and I think whether it be administrative divisions of the State, the Legislature, or whatever, that they should be aware of the fact the Court expects this to be done within some reasonable time.

THE COURT: Mr. Goldfein, I am giving you to the 24th to file answering affidavits and supplemental briefs. Proponents of the motion, you will have a week thereafter to respond, which will be by October 31st.

MR. GOLDFEIN: Thank you, your

Honor.

MR. WEIGEL: Your Honor, we have a couple other matters if we could that are germane to the general problem. Although not bearing on this we would like to take it up with the Court. It will only take a moment.

THE COURT: I have a meeting at four o'clock I have to attend.

MR. WEIGEL: I'm sure we can get it done.

Your Honor, I did send out to approximately 180 parties involved in these matters the notice with respect to Mr. Kraft, the elderly gentleman, who is not physically able to come to court and I would like to have a chance now with Mr. Goldfein and the other gentleman from the State present to have a date set in which we could go down and see Mr. Kraft and conduct the examination.

MR. GOLDFEIN: Your Honor, on this matter, this is the first that we have discussed it before the Court. I presume that in consenting to visit with

Mr. Kraft with the Court and I hope with a stenographer present, that the State would in no way be consenting to waiving Mr. Kraft's appearance. If the purpose is to go down and make an examination of whether Mr. Kraft is going to be available for trial I would like Mr. Weigel to state on the record specifically what his purpose is in our visiting Manahawkin and Mr. Kraft. Apparently as I understand it there is testimony by Mr. Kraft in prior proceedings which Mr. Weigel would like to preserve for purposes of this matter and he would like the Court to talk to Mr. Kraft in order to evaluate that.

THE COURT: I would like to state why I think I am going down there. I understand that this man's testimony may be of some importance in our pending suit that challenges the validity of these maps. He is elderly, his health is not good. If I have to decide this case on the basis of his prior testimony and answers to questions in depositions I think it is always helpful. You don't see the man here,

you just read the written word. I would like to be able to see him and to judge for my own sake the extent of his credibility. It would be helpful to me just to see what kind of a man he is vis-a-vis accuracy, is he a rambling idiot or does he have some of his faculties still about him. That is the only reason.

MR. GOLDFEIN: Your Honor, with that understanding and with our reservation too of the right to object to any of his testimony in the future, we are certainly willing to go to Ocean County.

THE COURT: I will reserve all rights you want on that score. Is there an objection to my seeing him?

MR. GOLDFEIN: Not by the State.

THE COURT: Do you want to add anything, Mr. Weigel?

MR. WEIGEL: No, that is certainly my understanding of what the purpose of the trip was. Very frankly, your Honor, knowing the gentleman's physical condition I assume his health is not going to improve

between now and the time the Court is going to have a plenary hearing on this matter. I certainly respect the fact that assuming he doesn't improve and he is physically able to come here he will be expected to come.

MR. PORRO: By way of clarification on the Jony matter can I ask the Court to revise the return date of that order to show cause previously signed, to October 31st with the understanding that the State will also file its documents relating to that matter by October 24th?

THE COURT: Yes, just consider it continued to that date.

MR. FRIEDMAN: Judge, may I just point out to the Court that the pretrial in Newark is set down for October 30th. My suggestion to the Court is we move back the day for filing one day to the 30th rather than the 31st just so whatever we are going to have available will be available by the day of pretrial.

MR. PORRO: Yes, that is a good point.

THE COURT: If I have to wait until the 30th for these documents do you mean I am going to give a decision on the 30th? I won't be able to read them.

MR. FRIEDMAN: We might end up with a situation one day at pretrial certain documentation is available to us and the following day new affidavits, new sketches, I don't know what, may be forthcoming. I am not looking to the Court for a decision on the 30th, all I am saying whatever is going to be filed for this motion should be available to counsel for the date of the pretrial.

THE COURT: And that is the 30th. Okay, change it to the 30th.

MR. WEIGEL: One other matter I had, your Honor. I received a letter from Mr. Goldfein, a copy of which went to the Court, which in the absence of a response from me by today's date sought to preclude me from furnishing the names of witnesses to be deposed. It is clear, I think I have indicated that to the Court, that there is no possibility for the complete

record of depositions to be completed in this matter by the 30th of October. There are many other counsel involved. I have recently been retained in a couple of other matters myself and in reviewing the files I see very extensive detailed work done by experts that I was not aware of and Mr. Porro has a very extensive file and I would ask the indulgence of Mr. Goldfein and the State and the Court by permitting us the freedom to extend his deadline date of today until the pretrial date of the 30th and in advance of that I would make the representation to the Court that I will consult with Mr. Porro and anyone else in the court who wishes to try to compile a complete list so that Mr. Goldfein can then get about taking whatever depositions he wants.

MR. GOLDFEIN: Your Honor, so long as we are afforded sufficient time, after we have been furnished with a list, to conduct those depositions, I have no problem with receiving it at any time.

THE COURT: I can't foresee any

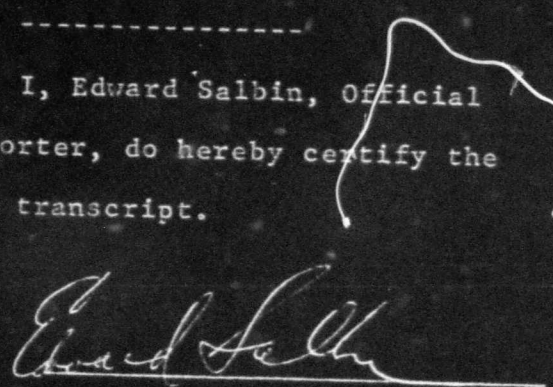
problems there. Don't foreget, gentlemen, the 23rd is the deadline for your memos to me. I do not want to go in cold on that conference.

MR. WEIGEL: Do you have a date that you can suggest that is free on your calendar?

THE COURT: I will have to see you inside. Thank you, gentlemen.

MR. WEIGEL: Thank you, sir.

I, Edward Salbin, Official Court Reporter, do hereby certify the foregoing transcript.



October 13, 1974