IN THE SUPREME COURT OF FLORIDA

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, etc. Petitioners,	:	
vs.	:	CASE NO. 66,565
AGRICO CHEMICAL COMPANY, Respondent.	:	

DISCRETIONARY PROCEEDING TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA, CERTIFYING QUESTIONS OF GREAT PUBLIC IMPORTANCE

PETITIONER COASTAL PETROLEUM COMPANY'S REPLY BRIEF ON THE MERITS

ROBERT J. ANGERER
Post Office Box 10468
Tallahassee, FL 32302
(904) 576-5982

C. DEAN REASONER
Reasoner, Davis & Fox
888 - 17th St. N.W.
Washington, DC 20006

JOSEPH C. JACOBS
Ervin, Varn, Jacobs, Odom
& Kitchen
Post Office Box 1170
Tallahassee, FL 32302
(904) 224-9135

Attorneys for
COASTAL PETROLEUM COMPANY

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SUMMARY OF RESPONSE AND REBUTTAL

Coastal and Agrico appear to agree upon one point, "...that stare decisis applies with particular force and exactitude to judicial decisions which have determined questions regarding real property ...." (BA 42) This is especially true regarding sovereignty lands that are held in a public trust for all the People of Florida.

The point of disagreement comes when deciding the body of law to be applied in this particular case. While the District Court below stated each certified question in terms of the sovereignty lands before it and made a decision regarding sovereignty lands, Agrico tries to state the questions as if they relate to swamp and overflowed lands and not swamp and overflowed lands deeds. (BA 11). The reason Agrico tries to change the issues is that a different body of law relates to sovereignty lands than to swamp and overflowed lands. In fact a whole body of law exists as to the difference between the two lands. State v. Gerbing, 56 Fla. 603, 47 So. 353-357 (1908). If Agrico can just change the issues, then it indeed will be able to argue stare decisis, but on a different body of law. While the ultimate determination of the fact of navigabiltiy and sovereignty land awaits a factual determination, the summary judgment and affirmance were predicated on the assumption of sovereignty lands. Unfortunately for Agrico's argument we are dealing with sovereignty lands as the District Court certified.

The phosphate companies in this and related cases sued Coastal and the Trustees for quiet title to large areas of the phophate district of Florida. In fact only a small portion of these large areas were even claimed by Coastal or the Trustees. By placing large areas of uplands, which neither claimed, the companies sought to bolster their equity position. The

thousands of acres of uplands not involved and never claimed were never an issue. The deeds that these phosphate companies have paraded did and do represent valid title to the uplands, whether as swamp and overflowed deeds, school deeds, federal patents, or otherwise. There has been no repudiation of these deeds by the Trustees. At issue here are the only areas claimed by the Trustees and Coastal, the navigable waters in these areas crossing these areas. Stare decisis does support a claim to these uplands, but not to sovereignty lands.

In its initial brief Coastal challenged Agrico to show the first case which held that a swamp and overflowed deed conveyed sovereignty lands below the ordinary high water marks of a navigable river by virtue of the deed. (BC 11) Agrico failed to meet the challenge. Coastal demonstrated the long precedent answering the first certified question in the negative. State v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); Broward v. Mabry, 58 Fla. 398, 50 So. 826, 831 (1909); Martin v. Busch, 93 Fla. 535, 112 So. 274, 285 (1927); McDowell v. Trustees of Internal Improvement Fund, 90 So.2d 715, 717 (Fla. 1956); and Odom v. Deltona Corp., 341 So.2d 977, 981 (Fla. 1976). Stare decisis dictates reversal of the first certified question.

In it first brief Coastal also challenged Agrico to show a case where estoppel by deed, simply by virtue of that deed, barred assertion of title to navigable rivers. (BC 26) Agrico did not meet this challenge either. Coastal has given the long precedent answering the second certified question in the negative. Shively v. Bowlby, 152 U.S. 1, 10 (1893); Martin v. Busch, 93 Fla. 535, 112 So. 274, 285 (1927); Pierce v. Warren, 47 So.2d 857, 859 (Fla. 1950); and Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976). Stare decisis requires reversal on the second certified question.

The third certified question concerning MRTA presents a novel issue because it relates to all sovereignty lands. Stare decisis does not yet play a role in the determination of this certified question.

In addition to trying to change the issues, Agrico tries to hide behind honest landowners. (BA 43) Nothing could be more different than the equities of an honest landowner and of these phosphate companies. These river systems are not a brook or creek, but are the Peace and Alafia River Systems of which these companies had not only record and physical notice, but actual notice of ownership in the State and Coastal. (A 118-126)

The landowners, motel owners and developers referred to by Agrico are in a different position. Each first has the assurance that if near a small stream or river that does not have a history of navigation (A 127-136) then, there is no notice of navigability and no sovereign title. Odom, p. 988 and Martin v. Busch, p. 286. Even if there is a physical notice of sovereign title or history of navigation an honest landowner has the defense of equitable estoppel. State of Florida v. Florida National Properties, Inc., 338 So.2d 13 (Fla. 1976). Furthermore, in most cases such owners border such navigable waterways for the uses and benefits of such waters not to mine and alter them, so the ownership question becomes unimportant to the owners.

The phosphate companies are in a much different equity position. They were spawned in dishonesty in dealing with such lands, as the unrefuted record in these cases shows:

> "In January 1887 a syndicate known as the Peace River Phosphate Company was formed. . ..
> They bought supplies, chartered a boat, and started down Peace River on what they called a hunting trip. Pratt used the seclusion of his tent to make chemical tests of rock taken from the river beds. After phosphate which averaged 61 per cent BPL was found, the men agreed that 'their discovery must be kept a graveyard secret' to

> prevent land costs from skyrocketing. They discussed the matter and devised a scheme by which they could buy all the lands wanted at their own price. The country for miles around was covered with saw palmetto bushes, and the conspirators decided to tell landowners that these palmetto roots were rich in tannic acid. An expose of their plans three years later revealed:
>
> 'It was agreed to announce that they intended starting a plant to extract the tannic acid, provided the property owners would sell them the land cheap enough; that as soon as they had grubbed out all the roots they would have no further use for the lands, and would sell them back to the owners for a mere song. The plan worked beautifully and soon, at very reasonable prices, they had deeds for all the land they desired.'
>
> The company soon secured forty-three miles of the river front, including both banks, making a total distance down the river of twenty-one and one-half miles." (R 1290, Exhibit 29)

Note that no one in 1887 even considered owning the Peace River.

In reviewing the unrefuted facts here one finds the companies knew of Coastal's Lease and the Trustees' ownership, but mined the rivers and deceitfully concealed the conversion. (Letters are in the Appendix, A 118-126). They knew their mesne conveyances eminating from swamp and overflowed lands' deeds and federal patents did not convey river bottoms yet now, hiding behind honest landowners they come forward to assert a claim to the Peace and Alafia Rivers Systems. These companies did not meet the requirements of the law to claim sovereignty lands so they have urged departure from precedent. Agrico cannot hide behind honest landowners who are protected by law now.

The phosphate companies also seek to minimize the impact of their proposed radical change to the property law affecting sovereignty lands by pointing to several lines in the final jundgment they drafted for signature in the trial court. Although the judgment says there is no intention to affect the boating, swimming, fishing and other public uses of the rivers and

streams, the order of the court cannot stop that effect as a necessary implication. By determining the fee ownership the public's rights and uses were determined. Nothing was said in the order of the river and stream lands mined which remain as sand fills, ditches or phosphate slime holding ponds. To suggest that these mined lands are still available for boating, swimming and fishing gives new meaning to the warning signs "at your own risk". The public's interest was tremendously affected as the certification in this case testifies. The people who fish, swim and boat in sovereignty rivers and streams over the state may similiarly be denied access just as they are now to these parts of the rivers and streams that have been mined or will be mined. There is no more assurance contained in the recited paragraph of the trial court's judgment than in its failure to require that mined areas be restored so that such public usage could occur.

The relinquishment of title these companies suggest will place the destiny of Florida's sovereign streams and rivers largely in private hands. It is true that environmental laws apply to public and private lands, but the proof of the extermination possible of these rivers and streams and others has been made by these companies in their treatment of these lands here.

Stare decisis should be applied as agreed. Swamp and overflowed lands deeds and federal patents convey uplands, which is most of the land named by Agrico and which is uncontested by Coastal or the Trustees. Sovereignty lands, however, are not conveyed. Odom, Martin v. Busch and Shively. The certified questions should be answered in the negative, the lower court's decision reversed, and the case remanded with directions to enter consent judgment on the uncontested uplands and not the sovereignty lands.

ARGUMENT

POINT I

THE 1883 SWAMP AND OVERFLOWED LANDS DEEDS ISSUED BY THE TRUSTEES DO NOT INCLUDE SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS.

POINT II

THE DOCTRINE OF LEGAL ESTOPPEL OR ESTOPPEL BY DEED DOES NOT APPLY TO 1883 SWAMP AND OVERFLOWED LANDS' DEEDS BARRING THE TRUSTEES' ASSERTION OF TITLE TO SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS.

Are sovereignty lands involved here? Yes, there are sovereignty lands involved here and not 4 to 5 miles away.1 Although the Respondent argues here that no sovereignty lands are involved, Respondent alternatively argued below and the trial court had to presume navigability for purposes of the disputed issue. More important, the undisputed evidence demonstrated the presence of sovereignty lands (A 127-136). The only evidence on navigability presented by Agrico was the township plats.

Not only has the Peace River System been held to be within Coastal's sovereignty lands Lease 224B,2 but the evidence here shows a navigable river. (A 127-136) As just seen, the discovery of river pebble phosphate was by boat (R 1290, Exhibit 29)! The production of river pebble phosphate continued by dredge without permission for a short period. The phosphate companies' own use of the Peace River belies any claim of non-navigability.

Are Agrico's deeds and patents void? No. These deeds and patents convey that which they may legally convey, that is, most of the lands named in the

1. Agrico undercuts the very decision it must sustain by challenging these certified questions. The phrasing of the certified questions itself shows the presence of sovereignty lands!

2. Burns v. Coastal Petroleum Company, 194 So.2d 71, 76 (Fla. 1st DCA 1966), cert.denied, 201 So.2d 549 (Fla. 1967), cert.denied sub nom Coastal Petroleum Company v. Kirk, 389 U.S. 913 (1967).

suit by Agrico which are uplands, but they do not convey sovereignty lands. Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927) and Shively v. Bowlby, 152 U.S. 1 (1893). Neither Coastal nor the Trustees have repudiated or claimed the deeds or patents are void. None of these deeds expressly cover the Peace or Alafia Rivers Systems, but are simply large block descriptions through which the rivers pass. Coastal's Lease 224B expressly covers these navigable rivers (A 163). The phosphate companies did not even believe that they owned the rivers (A 118-126). No one claims the deeds are void.

Does the "contemporaneous finding" argument preclude assertion of sovereignty title? No. This is Agrico's attempt to change the issues. The clear law of Florida is as this Court later held:

> "If the Trustees of the Internal Improvement Fund actually conveyed 'sovereignty lands,' believing them to be 'swamp and overflowed lands,' their mistake, however innocent, would not supply the power they lacked. Assuming that the Secretary of the Interior purposely included the land in his patent, we cannot see how the state would have got any more by the process if the land was actually a part of the 'sovereignty lands,' for it already possessed these. So we attach small importance to these two acts, which amounted to little more than gestures if, in truth, the physical characteristics of the land itself placed it in the classification of 'sovereignty lands.'" Pierce v. Warren, 47 So.2d 857, 859 (Fla. 1950).

Here where the companies knew and believed they did not own the rivers, the result should be clear, and the decision below reversed.

Are the Peace and Alafia Rivers meandered here? No. But as this Court held in Odom v. Deltona Corp., 341 So.2d 977, 989 (Fla. 1977), nonmeandering may create only a rebuttable presumption, not a conclusive one. The evidence of navigation here more than rebuts any presumption, especially on summary judgment. Florida's rivers were largely nonmeandered except for their mouths. Although most Florida rivers were meandered only near their mouths,

these rivers were important means of navigation in Florida.3 Despite nonmeandering, Florida's rivers were navigated and navigable.

Where did Odom apply its holdings to rivers? Nowhere. This Court in Odom was not dealing with rivers, but with small nonmeandered lakes and ponds wholly within the perimeter of conveyances. Deltona's Brief in Odom argued:

> "This case does not involve the navigability of tidal areas, coastal regions, rivers, or large freshwater lakes where there is 'notice' of potential navigability.(pg. 6)
> . . . . . .
>
> Florida's present test of navigability poses no problems in regulating areas where waters are, in fact, navigable and the test will have practical application--i.e., coastal areas, rivers, and relatively large lakes where landowners are 'on notice,' either through the physical size of the water body or its meandering, that the body may be navigable and thereby subject to state ownership and jurisdiction." (pg. 35)(Emphasis added.)

Thus, small nonmeandered lakes and ponds within the perimeters of conveyances were the subject and issue in Odom, not long rivers of Florida. Odom's holding has not applied by this Court to Florida's streams or rivers.

Where in Odom did this Court overrule the long line of cases that hold that swamp and overflowed lands deeds do not convey sovereignty lands?4 Nowhere. As a matter of fact, both the trial court judgment quoted in Odom (at p. 980, 981) and this Court's own opinion (at p. 988) upholds the settled law of Florida:

> "Appellants also argue for the application of the 'notice of navigability' concept, i.e., that the grantee of swamp and overflowed lands under a Trustee deed takes with 'notice' that the conveyance does not include sovereignty land, In the case of a large lake, such as Lake Okeechobee, a 500,000 acre lake, we agree;9 however, it

3.See Exhibit at Florida State Museum in the basement of the R.A. Gray Building: "Waterways: The History of Water Transportation in Florida."
4.Agrico conceeded that the federal patents these lands cannot provide a basis for affirmance under certified question 2.(BA 31)

> seems absurd to apply this test to small, non-meandered lakes and ponds of less than 140 acres and, in many cases, less than 50 acres in surface.
> 9. Martin v. Busch, 93 Fla. 535, 112 So. 274, 286 (Fla. 1927)."

These river systems are almost 100 miles in length. This is not a case of first impression on this issue, however, since the Court has expressly and consistently held to the contrary, that such deeds do not convey sovereignty lands.5

Where in Odom did this Court overrule the long line of cases that hold that both authority and intention must exist to apply collateral estoppel? Nowhere. Legal estoppel has been applied, but the theory of legal estoppel or estoppel by deed has never been held to bar Florida's assertion of title to navigable river sovereignty lands. No Florida case has ever allowed a person to defend his claim to parts of long rivers using the doctrine of legal estoppel where authority and intention to convey such sovereignty lands were not present. Agrico did not cite a single such case!6

5.State v. Gerbing, 56 Fla. 603, 47 So. 353, 357 (1908); Broward v. Mabry, 58 Fla. 398, 50 So. 826, 831 (1909); Martin v. Busch, 93 Fla. 535, 112 So. 274, 285 (1927); McDowell v. Trustees of Internal Improvement Fund, 90 So.2d 715, 717 (Fla. 1956). Odom quoted most of these cases.

6.Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961), was a case where the Trustees had authority to convey the lands. This Court's own opinion states the Trustees had authority to convey the lands. Supra at 103.

POINT III

IN THIS CASE, THE MARKETABLE RECORD TITLE ACT, CHAPTER 712, FLORIDA STATUTES, DOES NOT OPERATE TO DIVEST THE TRUSTEES OR COASTAL OF TITLE TO SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS.

Is Agrico's response to the simple chronology valid? No. MRTA could not vest title between 1963-1978 to the sovereignty lands here because three different MRTA exceptions precluded such vesting, even if MRTA applied to these lands. Respondent ignored the chronology and attempted to draw attention away from the simple facts demonstrating its failure to qualify for protection under MRTA even if MRTA applied to sovereignty lands generally.

Was Coastal's Lease recorded properly? Yes. Agrico argues Lease 224B was not recorded properly as found below. As one Court has already reasoned regarding the Polk County recording of Coastal's Lease 224B in 1954:

> "Coastal contends that its and the Trustees' rights are preserved from extinction under the MRTA by virtue of section 712.03(4) of Florida Statutes which provides an exception for '[e] states, interests, claims or charges arising out of a title transaction which has been recorded subsequent to the effective date of the root of title.' The Trustees vigorously argue that sovereignty lands are immune from operation of the MRTA. Both the Trustees and Coastal maintain that the MRTA does not apply to them because such application would violate the Florida and United States Constitutions.
>
> This court is of the view that it does not have to reach the questions whether the MRTA affects sovereignty lands nor if the Act is unconstitutional. Assuming arguendo that the MRTA applies to sovereignty lands, this court finds that the exception set forth in section 712.03(4) of Florida Statutes precludes the extinguishment of Coastal's and the Trustees' rights.
>
> The facts regarding the history of recordation of Coastal's lease interests in Polk County, Florida are uncontroverted, and those facts as set forth in Document 509, Part II, pp. 4-7 are incorporated by reference into this memorandum opinion. The parties, however, disagree on the effectiveness of such recording.
>
> Coastal's lease was properly recorded in Polk County on April 9, 1954. Although an unsigned printed copy of the lease was filed at that time, in 1949 a properly executed

> original had been recorded in Charlotte County. According to the customary practice in the pre-Xerox era, a non-original was inserted as the record entry supported by the verification of the Clerk that the original was lawfully entitled to be recorded. See Fla.Stat.§695.19 (1979). Thus, Mobil's marketable record title does not affect or extinguish Coastal's and the Trustees' rights because the 1954 Polk County filing of the royalty deeds with leases attached is an effective title transaction recorded subsequent to the date of Mobil's root of title." (Emphasis added.) Mobil Oil Corporation v. Coastal Petroleum Company, et al., Case No. 79-1082, United States District Court, Northern District of Florida, Memorandum Opinion and Order, pgs. 1-3 (1981).

See a copy of the recorded lease including the verification in the appendix hereto (A 180).

Furthermore, the assertion that Lease 224B was merely a part of another document is answered by the Clerk of Court's seperate transaction number and fee notation on the face of the recorded Lease and the absence of any Exhibit Number. See the front page of Lease 224B at A 160. The recording of Lease 224B was entirely proper. (Also see A 104-108).7

Is Coastal's Lease description sufficient? Yes.8 The description given is as it constitutionally must be. "An inflexible meander demarcation line would not comply with the spirit or letter of our Florida or United States Constitutions nor meet present requirements of society." State of Florida v. Florida National Properties, Inc., 338 So.2d 13, 19 (Fla. 1976). Although

7.There was no question about the proper recording of a judgment affecting the Lease. Although Agrico argues that this point was not preserved, Coastal raised the point below (A 103). The recorded judgment is a decisive exception alone for reversal. Section 712.03(4), Florida Statutes.

8. Coastal's Lease has been upheld by this and other courts. Watson v. Holland, 155 Fla. 342, 20 So.2d 732 (1953), Burns v. Coastal Petroleum Company, supra, and Collins v. Coastal Petroleum Company, 118 So.2d 796 (Fla. 1st DCA 1960), cert.discharged, 125 So.2d 300 (Fla. 1960). No court has said the description is vague or void. In Burns the description was confirmed to the Peace River contrary to the argument of Agrico. The First District Court of Appeal (not the Second) held "We conclude Drilling Block 7 has within its eastern boundary Peace River from its mouth to Township 29/30." This was on rehearing in the case and not the original opinion quoted by Agrico.(BA 4)

Coastal cited these authorities in its Brief, Agrico did not respond. Rather, it cited Deering v. Martin, 95 Fla. 224, 116 So. 54 (1928), which is totally inapplicable. In that case only some vague or uncertain part of sovereignty lands were conveyed. Here the Peace River to Township 29/30 is specifically conveyed:

> "Also the bottoms of and water bottoms adjacent to the rivers hereinafter named which flow through natural channels in the Gulf of Mexico, to wit: Myakka, Manatee, Little Manatee, Alafia, Caloosahatchee (from its mouth to LaBelle Bridge), Peace River to Township 29/30, included within said Drilling Blocks 5, 6, 7 and 8 as shown on said map." (A 15)

To specify the description further would run afoul of State of Florida v. Florida National Properties, Inc., supra.9

Does Coastal's Interest Arise Out of the Lease? Yes. Agrico has argued that since the Trustees' interest does not arise out of the recorded Lease and since Coastal's interest is derivative of the Trustees' interest that Coastal's interest does not arise out of the Lease!? (BA 38) Coastal's interest arises from the recorded Lease 224B. In it the Trustees leased the Peace River to Township 29/30 South and the Alafia River, consistent with an earlier Exploration Agreement. The recorded Judgment also raised this interest. It taxes credibility to suggest as Agrico does that Coastal's interest does not arise from Lease 224B.

9.Section 712.01(3), Florida Statutes (1981), comes after any asserted vesting period of 1963-1978. In 1978 sovereignty lands were protected and no longer could any vested interest vest. Askew v. Sonson, 409 So.2d 7, 9 (Fla. 1981). There was no specificity requirement before 1981. See Kittrell v. Clark, 363 So.2d 373 (Fla. 1st DCA 1978), cert.denied, 383 So.2d 909 (Fla. 1980). Here the description is as it constitutionally must be, and as specific as can be. The later statute can have no effect upon sovereignty lands after the 1978 exception in Section 712.03(7), Florida Statutes. Agrico's argument that the 1981 amendment can be applied after the exception in 1978 of sovereignty lands from MRTA is erroneous. Furthermore, as argued, the description was as complete as could constitutionally be given.

Can Respondent take advantage of MRTA? No. It cannot because of the exceptions created by the recorded Lease and Judgment, Section 712.03(4), and its actual knowledge. Without MRTA, its claim to these navigable rivers and streams fails upon the settled law of Florida which protects such sovereignty lands and avoids any legal estoppel, unless the claimant can show equitable estoppel. Here Agrico cannot show equitable estoppel so it has urged these changes in the property law of Florida concerning sovereignty lands. The certified question should be answered in the negative, the decision should be reversed, and the case remanded to the lower court to enter consent judgment on the uplands only, without costs.

CONCLUSION

Affirmance here would mean this Court would be overruling over 100 years of property law precedent rooted in law, reason and public policy. Swamp and overflowed lands' deeds have never, of themselves, conveyed sovereignty bottoms of navigable rivers. Legal estoppel has never barred a sovereignty claim to river bottoms, without a grant based upon specific intention and specific authority. Federal patents do not convey sovereignty lands nor can they be the basis of a legal estoppel against the Trustees or Coastal. The application of stare decisis requires reversal.

Even if MRTA were applied to sovereignty lands between 1963 and 1978 to create the claimed vested rights, two seperate recorded title transactions are exceptions under MRTA here, as is the actual notice of Agrico since at least 1961. To affirm will mean whole navigable river systems, much of the wetlands of Florida, will cease to exist as sovereign waters held by the People of Florida. Finally to consider the facts and equities herein, a trial, not summary judgment, was appropriate.

Coastal urges the Court to consider the destiny of Florida's sovereignty lands as this may be its only opportunity under constitutional jurisdiction to continue to protect any sovereignty lands. Coastal Petroleum Company urges the Court to reverse the lower court.

ROBERT J. ANGERER
Post Office Box 10468
Tallahassee, FL 32302
(904) 576-5982

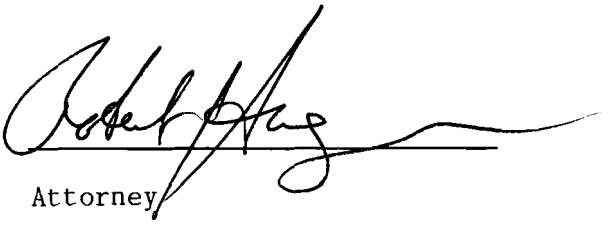
C. DEAN REASONER
Reasoner, Davis & Fox
888 - 17th St. N.W.
Washington, DC 20006

JOSEPH C. JACOBS
Ervin, Varn, Jacobs, Odom
& Kitchen
Post Office Box 1170
Tallahassee, FL 32302
(904) 224-9135

Attorneys for
COASTAL PETROLEUM COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by U.S. Mail to David G. Hanlon, Esquire, Post Office Box 3324, Tampa, FL 33601, and Louis Hubener, Esquire, Attorney General's Office, Suite 1501, The Capitol, Tallahassee, FL 32301, this 15th day of April, 1985.



Attorney