

No.

In The
Supreme Court of the United States

F.E.B. CORP.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Petition For Writ of Certiorari to
the United States Court of Appeals for the
Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Court address Justice Blackmun's criticism of the "broad dictum" of *Anderson v. City of Bessemer City*, N.C., 470 U.S. 564, 581-582 (1985) (J. Blackmun, concurring), which permitted F.R.C.P. 52(a)'s "clearly erroneous" standard of review to be applied in a purely historical document evidence case?
2. Is "plausible" the correct standard of review under Rule 52(a) in an historical document case interpreting and applying the Title 43 U.S.C. §1313(a) language "all lands filled in, built up, or otherwise reclaimed by the United States for its own use?"

**PARTIES TO PROCEEDING AND
CORPORATE DISCLOSURE STATEMENT**

The parties to the proceeding are as follows:

1. F.E.B. Corp.
2. United States of America

Pursuant to Supreme Court Rules 14.1(b)(ii) and 29.6, F.E.B. Corp. is not a publicly held company and there is not a parent company. F.E.B. Corp. does not have a stock ticker symbol.

STATEMENT OF RELATED CASES

- *F.E.B. Corp. v. United States*, No. 12-cv-10072, U.S. District Court for the Southern District of Florida. Order entered March 25, 2015.
- *F.E.B. Corp. v. United States*, No. 15-1171, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered March 28, 2016 (*FEB I*).
- *United States v. F.E.B. Corp.*, No. 18-cv-10203, U.S. District Court for the Southern District of Florida. Order entered July 31, 2020.
- *F.E.B. Corp. v. United States*, No. 20-14047, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered Nov. 1, 2022 (*FEB II*).
- *F.E.B. Corp. v. United States*, No. 24-12383, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered Nov. 5, 2025 (*FEB III*).

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43 U.S.C. § 1311(a)..... 2
43 U.S.C. § 1313(a)..... 2, 8

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Other Authorities

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Insular Affairs, 83rd Cong.* 8

OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is unreported. See *United States v. F.E.B. Corp.*, 2025 WL 3089337 (11th Cir. 2025) (*FEB III*). App. 1a – 21a.

JURISDICTION

This Court has jurisdiction to review the final judgment of the United States Court of Appeals pursuant to 28 U.S.C. § 1254. The Opinion was entered on November 5, 2025. A timely filed Petition for Rehearing was denied on January 30, 2026 (not reported).

STATUTORY PROVISIONS

The statute involved is the Submerged Lands Act:

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources

within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

43 U.S.C. §1311(a).

There is excepted from the operation of section 1311 of this title –

(a) . . . all lands filled in, built up, or otherwise reclaimed by the United States for its own use;

43 U.S.C. §1313(a).

STATEMENT OF THE CASE

The decision below was the third Eleventh Circuit Court of Appeals attempt to resolve the question of ownership of Wisteria Island.

The first decision – *F.E.B. Corp v. United States*, 818 F.3d 681 (11th Cir. 2016) (*FEB I*), held that F.E.B.’s quiet title action was barred by the statute of limitations. However, the Court of Appeals acknowledged that there existed an unanswered question as to the ownership of Wisteria Island: “[W]e affirm the district court’s dismissal of the case for lack of subject matter jurisdiction. In doing so, we note that the dismissal does not quiet title to the property in the United States. The title dispute remains unresolved.” (internal citation omitted). App. 136a.

The government then brought a quiet title action against F.E.B. in 2018. The district court entered summary judgment for the *United States*. *United States v. F.E.B. Corp.*, 477 F.Supp.3d 1277 (S.D. Fla. July 31, 2020). App. 99a.

F.E.B. appealed. The Court of Appeals vacated and remanded for trial because there was “a genuine dispute of fact about whether the United States created Wisteria Island for its own use or whether Wisteria Island’s creation was an accident.” *United States v. F.E.B. Corp.*, 52 F.4th 916, 931 (11th Cir. 2022) (*FEB II*). App. 58a.

The district court, after a bench trial on remand, sought Proposed Findings of Fact from each party. It entered the Proposed Findings submitted

by the government with limited alterations. App. 22a. F.E.B. appealed.

On appeal, F.E.B. contended that the district court's findings lacked support in the record and that Wisteria Island was created without a specific intention to be used "or purpose beyond 'just disposing of dredge spoils.'" *United States of America v. F.E.B. Corp.*, 2024 WL 3089337 *1 (11th Cir. Nov. 5, 2025) (*FEB III*). App. 1a.

The Court of Appeals affirmed: "[B]ecause the district court's factual findings are plausible and supported by the record, we affirm." App. 2a, 15a.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Presents an Important But Unanswered Question of Federal Law

This case presents the important question presented by Justice Blackmun's concurring opinion in *Anderson v. City of Bessemer City*, N.C., 470 U.S. 564, 581-582 (1985) (J. Blackmun, concurring).

Justice Blackmun questioned the wisdom of the Court's "broad dictum" that the Rule 52(a) language: "findings of fact shall not be set aside

unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses” (*id.* at 573) circumscribed Court of Appeals review even where the findings of fact were based purely on documentary evidence. Justice Blackmun wrote:

While the Court may be correct in its dictum today, certainly this case does not require us to decide the question. The record contains far more than documentary evidence, as the Court’s opinion so adequately discloses. In a case that requires resolution of the question, I might eventually be persuaded that the Court’s approach is wise. I prefer, however, to wait for a case where the issue must be resolved and where it has been briefed and argued by the parties, rather than to address the issue by edict without these customary safeguards.

I therefore join the Court only in its judgment and not in its opinion.

Id. at 582.

This is such a case. It is solely a historic document case. All testimony in the case was based solely on the historic documents.

**B. The Court of Appeals Relied on
*Anderson v. City of Bessemer***

The Court of Appeals affirmed the trial court's findings of fact that the 29-acre 1940 Wisteria Island was intentionally filled up for the Navy's "use." It rejected the Petitioner's argument seeking de novo review:

[W]e must review the district court's intent findings deferentially, contrary to F.E.B.'s claim that we should exercise de novo review. Although, as F.E.B. notes, the court relied on "historical documents" that were "undisputed" in reaching its intent findings, clear-error review is not limited to situations where the court's findings rest on credibility determinations. *See Anderson*, 470 U.S. at 574.

App. 14a. (footnote omitted).

The Court of Appeals concluded that the "[h]istorical documents in the record support the view that the United States created the island intentionally for the Navy's use." It found that "the district court's findings are plausible and supported by the record as a whole." App. 15a.

“Plausible” was the touchstone for the Court of Appeals: App. 2a, 13a, 15a, 17a (“plausible to infer”); “reasonable to infer.” App. 17a.

The historical documents were from the “early 1900s” when a 2.9-acre island was formed from dredge spoils, and a Navy commander “suggested reclaiming land in an area off of Key West called Frankford Bank.” App. 15a. But the 29-acre Wisteria Island, formed in the 1940s, is the land in dispute. It is not the same: It did not exist until 1942 and has been owned by F.E.B. pursuant to a quit claim deed issued by the Florida Trustees Internal Improvement Fund since 1952.

To be sure, F.E.B. is correct that Frankford Bank is not coterminous with Wisteria Island, that the primary goal of the dredging operation was to deepen navigation channels, and that records of the dredging itself do not reflect the reasons for where the spoils were placed. But it is plausible to infer that, by placing spoils in an area that the Navy had recommended “should be enlarged by fill and utilized,” the United States intended to use the land it built up or filled in for its own purposes, including as a protective feature and a site for potential development.

App. 17a.

The discussion below was the third time the Court of Appeals grappled with the meaning of, application of, and review of, “built up for its own use” under Title 43 U.S.C. §1313(a). See *F.E.B. Corp., v. United States*, 818 F.3d 681 (11th Cir. 2016) (*FEB I*), suggesting in dicta a view of “for its own use” which the Court subsequently receded from. See also, *United States v. F.E.B. Corp.*, 52 F.4th 916 (11th Cir. 2022) (*FEB II*); *United States v. F.E.B. Corp.*, 2025 WL 3089337 (11th Cir. Nov. 5, 2025) (*FEB III*).

Certiorari should be granted to address Justice Blackmun’s *Anderson v. City of Bessemer* dicta relating to the application of Rule 52(a) to a purely historical document case; a case governed by a firm statutory commitment to states title to submerged lands.

CONCLUSION

Certiorari should be granted to review the decision below. It is an important question. The rights of the States to submerged lands posed a major issue in the 83rd Congress. See *Submerged Lands: Hearings on S.J.Res. 13, S. 294, S. 107, S. 107 Amend. Before the S.Comm. on Interior and Insular Affairs*, 83rd Cong. It’s application should not be determined by mere “plausibility.”

The Rule 52(a) appellate standard of review should be more demanding than accepting as plausible the conclusion of a district court based solely on historical documents. Plausibility beget plausibility. A more critical review should be required under Rule 52(a).

Respectfully submitted,

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT, FILED NOVEMBER 5, 2025**

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-12383

UNITED STATES OF AMERICA,

Plaintiff-Counter Defendant-Appellee,

v.

F.E.B. CORP., A FLORIDA CORPORATION,

Defendant-Counter Claimant-Appellant.

Filed: 11/05/2025

OPINION

Appeal from the United States District Court for the
Southern District of Florida, D.C. Docket No. 4:18-cv-
10203-JEM

Before Rosenbaum, Newsom, and Abudu, Circuit Judges.

PER CURIAM:

This case is about ownership of Wisteria Island, a
small island just off the coast of Key West, Florida, which
was created by dredging operations by the United States

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in the 1920s and 1940s. The United States brought this action to quiet title to Wisteria Island against F.E.B. Corp., which traces its ownership of the island to a quitclaim deed Florida issued in 1952.

In a prior appeal, we held that the question of ownership came down to “whether the United States had an intended use for Wisteria Island when the United States created it.” *United States v. F.E.B. Corp. (“FEB II”)*, 52 F.4th 916, 927 (11th Cir. 2022). And we remanded for trial, because there was a “genuine dispute of fact about whether the United States created Wisteria Island for its own use or whether Wisteria Island’s creation was an accident.” *Id.* at 931. After a bench trial on remand, the district court found that the United States created Wisteria Island for its own uses, including as a natural protective feature, a site for potential improvements, and a place for future dredge-spoil deposits. The court therefore quieted title for the United States.

On appeal, F.E.B. contends that the district court’s “intent” findings lack support in the record, and that Wisteria Island was created without a specific intention or purpose beyond “just disposing of dredge spoils.” But because the district court’s factual findings are plausible and supported by the record, we affirm.

I.

Wisteria Island is located on what used to be shoals—or shallow areas in water that are hazardous to navigation—less than a mile off the coast of Key West. The

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location was at the southern end of shoals known as the Frankford (or Frankfort) Bank, which formed a natural barrier to the west of the harbor.

A. Creation of Wisteria Island

Around the time Florida became a state, the United States reserved the “shoals” of Key West for “military purposes” in connection with the development of a naval depot. Correspondence sent in 1908 by Commandant William H. Beehler, at the naval station in Key West, explains that the Navy regarded Frankford Bank as “a part of the Naval Reservation at Key West” for the naval depot, and that “there is a definite claim by the Navy to Frankford Bank.” Commandant Beehler also wrote that Frankford Bank was important to naval operations since it formed a natural barrier protecting the harbor, and that the Navy “had contemplated erecting a coal shed” there.

In 1916, during World War I, Beehler’s successor at Naval Station Key West, Commandant Warren Terhune, reported to a Navy commission that the advantages of Key West arose from its strategic location at the nation’s southernmost continental limits, as well as the Navy’s “ownership of . . . Frankford Bank, and other partially submerged [keys] and shoals capable of development.” Terhune suggested development possibilities, which included “reclaiming of land by filling, for the purpose of erecting a magazine on Frankford Bank” for “explosive stowage.” In other words, according to Terhune, Frankford Bank, where Wisteria Island now sits, “should be enlarged by fill and utilized.” Terhune also proposed “the erection

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of a breakwater to afford a harbor of refuge at the naval station.” The following year, in 1917, Commandant Terhune signed blueprints for the development of a submarine base at Key West, which included plans for “secure and safe wharfage” at the southern end of Frankford Bank.

In 1917, the Navy commission issued a report which noted that station authorities in Key West “agreed that it will be necessary to fill in over present shoal waters at Frankford Bank or Fleming Key, or both.” Commenting on the plans for development, the report said that certain proposed breakwaters could be rendered unnecessary “by a slight filling in on Frankford Bank.”

In the early 1920s, the United States began a dredging project to deepen the harbor and channels at Key West. The project was undertaken by the Army Corps of Engineers on behalf of the Navy. Dredging refers to excavating sediment from bodies of water. The material removed during this process is referred to as “spoils” or “spoilage.”

In or around 1923, the Army Corps deposited dredged spoils onto the southern part of Frankford Bank, creating a “spoil bank” or island in the rough shape of a kidney bean or crescent. The area of land above sea level was approximately 2.95 acres. According to Professor Charlie Hailey, an expert who literally wrote the book on Wisteria Island¹, the shape of the island reflected that the outer

1. Charlie Hailey, *Spoil Island: Reading the Makeshift Archipelago* (2013). *Spoil Island* is about the construction and use of spoil islands, and it includes a chapter on Wisteria Island.

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edge (fronting the harbor) was created first, and then filled in behind. This process, the professor testified, reflected an intent to create a place for future placement of spoil.

In 1924, after the dredging project was complete, the Florida Trustees of Internal Improvement Fund published a notice that it intended to sell the island. After the Navy objected that the island belonged to the United States, and therefore was not Florida's to sell, the state withdrew the notice and did not move forward with the sale.

In response to Florida's proposed sale, the Navy took steps to protect its interests in Frankford Bank and the spoil island. In a letter dated May 17, 1924, the Navy's Chief of the Bureau of Yards and Docks requested the reservation of the spoil island "for possible Navy use." He explained that, in the Navy commission's development plans for the harbor, "Frankford Bank formed the principal protection from wave action from the westward, and [the plans] contemplated the enlarging of Frankford Bank by depositing the dredged material from the harbor along the edge of the bank." The following week, the Chief of Naval Operations made the same recommendation to the Judge Advocate General, citing the "possible future development of Key West as a naval base of much larger proportions and of the desirability of ownership of Frankford Bank to form a breakwater" for the harbor.

Then, in August 1924, Secretary of the Navy Curtis Wilbur sent a formal request for entry of an executive order reserving the shoals and keys around Key West, including Frankford Bank, for naval purposes. He wrote

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that private development on Frankford Bank might be a source of strain with the Navy, and that “[i]f in the future Key West defenses are to be modernized this area would be of great value in connection with outer defense works.” On August 11, 1924, President Coolidge issued an executive order reserving the shoals and keys in the vicinity of Key West, including Frankford Bank, for naval purposes.

In 1928, the Navy issued a revocable license to a private company to use Frankford Bank and the spoil bank in connection with the shark-fishing industry. The license described Frankford Bank as “[g]overnment property,” under the jurisdiction of the Navy, which was “not in use at the present time.”

After World War II broke out, the United States began massive dredging operations around Key West. The project called for providing adequate seaplane landing and take-off areas, deepening the submarine basin, and deepening the main ship channel and harbor turning basin. *FEB II*, 52 F.4th at 921. The channel-and-turning-basin project was completed in 1943. During this project, the United States dumped dredge spoils in several designated areas, including where it had dumped spoils in the 1920s. *Id.*

By the time the dredging project was finished, the spoil island on Frankford Bank—what we now call Wisteria Island²—had expanded substantially to approximately

2. Wisteria Island takes its name from a quarantine barge named *Wisteria* that ran aground on Frankford Bank in 1919.

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39 acres, with around 25 acres of land above the mean low-water line.³ In 1945, soon after World War II ended, the Navy rebuffed a request to use Wisteria Island in connection with the private shark industry.

B. Origins and Development of the Present Dispute

In 1951, Florida “again noticed its intent to sell Wisteria Island—this time via a quitclaim deed (one with no warranties of title) to a private buyer.” *FEB II*, 52 F.4th at 923. After learning of the proposed sale, local Navy officials sent an internal letter to the Chief of the Bureau of Yards and Docks requesting authority to object. The letter cited the “security risk” posed by private development and “the strategic location of this spoil area,” making “its use for military purposes highly possible,” including as a “fuel storage area,” which was “now under consideration.” Then, in September 1951, the Navy sent a letter to the state objecting to the sale on the grounds that the spoil island belonged to the United States.

In response, Florida’s attorney general acknowledged the United States’s claim but expressed doubt as to its validity. He advised “that the claim is debatable enough and so shrouded in antiquity that I think the best course would be for [Florida] to complete the sale and explain the Navy’s claim to [the buyer] and allow him to accept the . . . deed at his own risk.” Thus, Florida sold Wisteria

3. The record is not entirely consistent about the acreage of land above sea level. Regardless, neither party suggests that the difference between submerged and exposed land, or the specific acreage above sea level, is material to the issue before us on appeal.

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Island to a private buyer in 1952, notwithstanding the Navy's objections.

The following year, in 1953, Congress passed the Submerged Lands Act ("SLA" or the "Act"), 43 U.S.C. §§ 1301–15, *et seq.* The SLA transferred to states the title and ownership of "lands beneath navigable waters" within the boundaries of states and all lands beneath navigable waters within three geographical miles of the state's coast. 43 U.S.C. §§ 1301(a)(1)–(2), 1311. But Congress expressly excepted from this grant "all lands filled in, built up, or otherwise reclaimed by the United States for its own use." *Id.* § 1313(a).

For many years after that, the United States did not reassert its claim to Wisteria Island. In September 1953, the Navy asked the U.S. Department of Interior to investigate and offer advice "on the validity of the Federal Government's claim to ownership of the area," citing its "potential strategic military value." Then, in 1956, the Chief of the Bureau of Yards and Docks advised in a memorandum that title to Wisteria Island depended on whether it "was built up for Federal use," but that, if it was not so built up, "the Navy is left without a strong argument on which to claim the island." In the Chief's view, the Navy "would have a difficult time in proving that this island was built up for Federal use, inasmuch as the records indicate that the only reason for the establishment of the island in 1943 was a site for the deposit of spoil." A 1956 letter from the commanding officer at the naval station in Key West similarly noted that "[t]here is nothing on record locally to indicate whether or not it was the intention of

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the Navy to use the island after it was created,” and that there was “no indication that a specific use of the island was contemplated” before 1952.

Meanwhile, “[t]itle passed from private owner to private owner until F.E.B. acquired the island in 1967.” *F.E.B. Corp. v. United States (“FEB I”)*, 818 F.3d 681, 684 (11th Cir. 2016). And “[t]he federal government appeared to acquiesce to F.E.B.’s ownership, and even entered into licensing agreements with F.E.B. to use the island as a Navy training ground from 2004 to 2006.” *Id.*

But in 2011, the United States again asserted ownership over Wisteria Island. *Id.* In response, F.E.B. filed suit under the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a, to establish that it owned the island. The district court found that the QTA’s statute of limitations had run, so it dismissed the suit for lack of subject-matter jurisdiction. *Id.* We affirmed on appeal in *FEB I*, holding that the 12-year statute of limitations began to run in 1951, nearly 50 years before F.E.B.’s lawsuit.⁴ *Id.* at 687–87. We rejected F.E.B.’s arguments that the United States, through the actions of subordinate employees or the 1953 passage of the SLA, had abandoned its 1951 ownership claim so as to reset the statute of limitations. *Id.* at 690–91, 93. We explained that the Act’s exception for lands “‘built up by the United States for its own use,’ gave rise to an open and obvious question as to whether

4. We note that, in *Wilkins v. United States*, 598 U.S. 152, 158–59, 165 (2023), the Supreme Court held that the Quiet Title Act’s twelve-year statute of limitations is a nonjurisdictional claims-processing rule, abrogating *FEB I* in part.

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the [Act] applied in this case,” and that the title dispute remained unresolved. *Id.* at 693–94.

II.

In 2018, the United States filed suit under the Declaratory Judgment Act to finally resolve the question of title to Wisteria Island. On cross-motions for summary judgment, the district court granted the United States’s motion and denied F.E.B.’s motion. The court reasoned that “the filling in of a spoil area to facilitate Naval dredging operations counts as ‘lands filled in . . . by the United States for its own use’” under the Submerged Lands Act. So the court found that Wisteria Island belonged to the United States.

On appeal, we vacated the grant of summary judgment and remanded for trial, holding that a factfinder “must determine the United States’s intent in creating Wisteria Island.” *FEB II*, 52 F.4th at 927. Interpreting the language of the SLA’s exception for filled-in or built-up lands, we “derive[d] three principles” for its application: (1) “the filling in or building up must have some intentionality to it—it cannot be accidental”; (2) “‘use’ is a broad term—converting to service or employing (again, *for* a purpose)”; and (3) “the Act does not require *actual* use,” meaning that, “[a]s long as the land was created to be used, it doesn’t matter whether the United States actually used the land.” *Id.* at 926–27.

Thus, we reasoned that the question under the SLA was “whether the United States had an intended use for

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Wisteria Island when the United States created it.” *Id.* On that question, the United States argued “that Wisteria Island was created for the ‘use’ of storing dredged soil.” *Id.* at 927. We explained that merely dumping dredged spoil to create an island was not enough. *See id.* at 927–28. That is, “if the United States just dumped the spoils in the area with no intention of ever depositing further dredge spoils (or otherwise using Wisteria Island), then the United States did not create Wisteria Island ‘for its own use.’” *Id.* at 928. But if “the United States intended to use it not just then but also in the future as a designated place to put dredge spoils from the Key West area, then it created Wisteria Island for its own use—namely as a location to store dredging spoils.” *Id.* After all, “[s]torage’ is a use.” *Id.* at 927; *see id.* at 926–27 (“‘Use’ then, can really mean any utility, any way in which the filled in land is ‘convert[ed]’ to the United States’s ‘service.’”).

But on the summary-judgment record, we were unable to tell “what the United States’s intent was at the time it built up what became known as Wisteria Island.” *Id.* at 929–30. We noted that a party’s intent ordinarily is a “question of fact for the factfinder, to be determined after trial,” and that “[b]oth parties ha[d] submitted evidence supporting their positions,” so the evidence did not “necessarily resolve[] the question in one party’s favor.” *Id.* at 927. For that reason, we concluded that there was “a genuine dispute of fact about whether the United States created Wisteria Island for its own use or whether Wisteria Island’s creation was an accident.” *Id.* at 931. We vacated the entry of summary judgment and remanded for trial. *Id.*

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On remand, the district court conducted a two-day bench trial, hearing from various experts, offered by both parties, and receiving voluminous historical records and other documents into evidence. After trial, the parties submitted proposed findings of fact and conclusions of law. The United States maintained that Wisteria Island was intentionally created for several reasons, including as a location to store dredged spoils, as harbor protection from hurricane and tidal forces, and as a potential site for physical improvements. F.E.B. maintained that the evidence showed that “the spoil deposits were placed where they were simply as a byproduct of the purposeful dredging of the shipping channel in the 1920s and 1940s,” meaning Wisteria Island was born of an “accident of proximity” rather than “an intent to create an island for future use of the land.”

The district court entered judgment for the United States. In its order making findings of fact and conclusions of law, the court found that the United States filled in Wisteria Island for its own uses. Those intended uses, according to the court, were as follows: (1) a “location for the recurrent placement of spoil[s]”; (2) a “protective feature” for naval operations from “both natural and manmade incursions”; (3) “non-use (or non-development by private parties)”; and (4) a “site for possible future physical improvements in support of military defenses.”

Thus, in the court’s view, this was not a case “where the United States randomly disposed of spoil,” or “where spoil was intentionally placed in a random area that was otherwise not being used.” “Rather,” the court determined, “this is a case where the United States intentionally placed

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spoil on a location that had strategic value to the Navy and that the United States reserved for the Navy's use." Based on this reasoning, the court held that the United States, not F.E.B., owned Wisteria Island. The court entered judgment quieting title in favor of the United States and against F.E.B. F.E.B. timely appeals.

III.

On appeal from a bench trial, we review the district court's legal conclusions de novo and its factual findings for clear error. *Compulife Software Inc. v. Newman*, 959 F.3d 1288, 1301 (11th Cir. 2020). Clear error is a "highly deferential standard of review." *Morrisette-Brown v. Mobile Infirmary Med. Ctr.*, 506 F.3d 1317, 1319 (11th Cir. 2007) (quotation marks omitted).

"A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (quotation marks omitted). So "if the district court's account of the evidence is plausible in light of the record viewed in its entirety," we may not reverse the court's findings even if, had we been sitting as the triers of fact, we "would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573–74 (1985). In other words, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. That's so "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Id.*

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IV.

In the Submerged Lands Act, passed in 1953, Congress largely transferred to states the title and ownership of “lands beneath navigable waters” within the boundaries of states and all lands beneath navigable waters within three geographical miles of the state’s coast. 43 U.S.C. § 1301(a)(1)–(2), 1311. But that grant has several exceptions, including for “all lands filled in, built up, or otherwise reclaimed by the United States for its own use.” *Id.* § 1313(a).

Our decision in *FEB II* interpreted this exception, resolving the legal framework that governs this case and leaving the following question for the district court to answer on remand: “whether the United States had an intended use for Wisteria Island when the United States created it.” *FEB II*, 52 F.4th at 927. That inquiry depends on the United States’s intent “at the time” of the buildup or filling in. *Id.* at 930.

The United States’s intent, in turn, is a question of fact, to be resolved by the factfinder. *Id.* So we must review the district court’s intent findings deferentially, contrary to F.E.B.’s claim that we should exercise de novo review.⁵ Although, as F.E.B. notes, the court relied on

5. Deferential review applies even assuming the United States’s intent is considered a mixed question of law and fact, since the inquiry entailed primarily “case-specific factual issues.” *Bufkin v. Collins*, 604 U.S. 369, 382 (2025) (“When the tribunal below is immersed in facts and compelled to marshal and weigh evidence and make credibility judgments, the appellate court should usually review a decision with deference.”) (cleaned up).

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“historical documents” that were “undisputed” in reaching its intent findings, clear-error review is not limited to situations where the court’s findings rest on credibility determinations. *See Anderson*, 470 U.S. at 574. To the extent that F.E.B. makes legal arguments, though, we review those questions de novo.

The district court found that the United States had several intended uses at the time it built up and created Wisteria Island in the 1920s and the 1940s, including spoils storage, wave protection, and potential development. Because the district court’s findings are plausible and supported by the record as a whole, we affirm.

Historical documents in the record support the view that the United States created the island intentionally for the Navy’s use. Navy documents from the early 1900s, before any buildup occurred, show that Navy officials stationed at Key West viewed Frankford Bank, where Wisteria Island now sits, as under Navy control and important to naval operations there, primarily as a natural barrier protecting the harbor.

More to the point, in 1916, Commandant Terhune advised that Frankford Bank, owing to its strategic location, “should be enlarged by fill and utilized.” Terhune initially suggested reclaiming land “for the purpose of erecting a magazine on Frankford Bank.” The next year, he submitted plans for “secure and safe wharfage” at the southern end of Frankford Bank, in connection with the development of a submarine base. Those plans were reviewed by a Navy commission, which issued a report

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noting that local officials “agreed that it will be necessary to fill in over present shoal waters at Frankford Bank or Fleming Key, or both.” The report also recognized that certain proposed breakwaters could be rendered unnecessary “by a slight filling in on Frankford Bank” to augment the natural protection it provided.

In sum, these records show that, before Wisteria Island was created, the Navy contemplated filling in part of Frankford Bank for (1) protection of naval operations from natural forces and (2) potential physical improvements. So when the United States filled in part of Frankford Bank with dredged spoils several years later, in the early 1920s, it’s reasonable to infer that it did so with those purposes in mind.

Indeed, after Florida attempted to sell the small spoil island in 1924, the Navy quickly sought, and obtained, an executive order reserving the area for the Navy’s use. In seeking that order, Navy officials explained that their development plans for the harbor had “contemplated the enlarging of Frankford Bank”—which “formed the principal protection from wave action” from the west—“by depositing the dredged material from the harbor along the edge of the bank.” And they advised that the “Navy has under consideration the use of this Island,” particularly if Key West developed “as a naval base of much larger proportions.” In a letter to the president, the Secretary of the Navy opined that “[i]f in the future Key West defenses are to be modernized this area would be of great value in connection with outer defense works.”

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To be sure, F.E.B. is correct that Frankford Bank is not coterminous with Wisteria Island, that the primary goal of the dredging operation was to deepen navigation channels, and that records of the dredging itself do not reflect the reasons for where the spoils were placed. But it's plausible to infer that, by placing spoils in an area that the Navy had recommended "should be enlarged by fill and utilized," the United States intended to use the land it built up or filled in for its own purposes, including as a protective feature and a site for potential development.

The record also supports a finding that these same purposes—protective feature and potential development—motivated the second buildup of Wisteria Island in the 1940s. Navy documents from 1924 indicate that officials viewed the spoil island at Frankford Bank as important to the development of Key West "as a naval base of much larger proportions." And that prospect arrived with the outbreak of World War II and massive dredging operations in and around Key West harbor. So again, it's reasonable to infer that, by placing spoils in an area the Navy had previously recognized should be built up and utilized, the United States acted according to that plan and "purposely piled [the spoils] into a particular place," rather than simply dumping them in a convenient location. *FEB II*, 52 F.4th at 929.

Finally, the district court plausibly concluded that Wisteria Island was created with the intent to use the location again to deposit dredged spoils. *FEB II* expressly stated that "if the United States created the island as place for contemporaneous and future dredge-spoil

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deposits, that still would be ‘for its own use.’” 52 F.4th at 931. And we held that there was a “genuine dispute of fact” about that question, *id.* at 931, which means that we viewed the record as sufficient to support a finding in favor of the United States, *see Anderson*, 477 U.S. at 248 (stating that an issue of fact is “genuine” “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”).

At trial on remand, the United States presented the testimony of an expert witness, Professor Hailey, who opined that the United States acted with the “intent that it was creating an island for spoil deposition” in the future.⁶ Hailey testified that it was “standard practice” to reuse locations for depositing spoils, and that the shape of the spoil bank in 1923 reflected an intent to further fill in the area with dredged spoils. Plus, as we noted in the prior appeal, in relation to the 1940s buildup, “[t]he United States intended the maximum fill height—meaning how tall the island would be—to be five feet over the mean high-water line. But if the available material on the island were leveled, Wisteria Island’s flattened elevation would be only three feet over the mean high-water line.” *FEB II*, 52 F.4th at 921. In other words, the spoil island had not reached its intended capacity, suggesting future use as a spoils deposit.

6. F.E.B. suggests that Professor Hailey’s opinions should have been excluded as unreliable. But we do not consider arguments, such as this one, which are raised for the first time in a reply brief. *See Tallahassee Mem’l Reg’l Med. Ctr. v. Bowen*, 815 F.2d 1435, 1446 n.16 (11th Cir. 1987) (“[A] party cannot argue an issue in its reply brief that was not preserved in its initial brief.”).

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F.E.B.'s arguments in response are unconvincing.⁷ F.E.B. relies heavily on the fact that the Navy has never made direct use of Wisteria Island. But “[a]s long as the land was created to be used, it doesn’t matter whether the United States actually used the land.” *FEB II*, 52 F.4th at 927.

In a similar vein, F.E.B. questions why, if Wisteria Island was supposedly valuable to the Navy and created intentionally, the United States failed to take “all necessary steps to secure title and ownership of the Subject Property in the 98 years between 1920 and 2018.” F.E.B. notes that, in the 1940s, the United States obtained title to other spoils deposits around Key West, but not to Wisteria Island.

But the question before us is not whether Wisteria Island was or is important to the United States, or whether the United States should have done more to secure title apart from objecting when Florida proposed to sell the land. The only issue before us is “whether the United States had an intended use for Wisteria Island when the United States created it.” *FEB II*, 52 F.4th at 927. As we have already explained, and as the district court found, contemporaneous records suggest that it did.

7. Nonetheless, we agree with F.E.B. that no record evidence supports the view that Wisteria Island was created for the purpose of “non-use (or non-development by private parties).” Of course, there is evidence the Navy viewed development by private parties as harmful to its interests in Wisteria Island, but that’s different from saying it created the island for that purpose. Even so, though, as we’ve explained, the record sufficiently supports the district court’s factual determination that the United States created Wisteria Island for its own other purposes.

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Moreover, historical documents in the record indicate that the Navy believed it owned Wisteria Island until sometime in the 1950s, when doubt crept in with the sale of Wisteria Island to a private buyer in 1951 and the passage of the SLA in 1953. So the fact that the United States took no action to quiet title in the years after Wisteria Island's creation, or that officials later saw no indication that a specific use was contemplated, "isn't dispositive." *Id.* at 931 ("Because our focus must center on why the land was built, post-creation use (or lack thereof) isn't dispositive."). In applying the SLA's exception, "[w]hat matters is why (at the time of filling in or building up) the land was reclaimed." *Id.*

After a careful review of the entire record, we are not left with a definite and firm conviction that the district court made a mistake. *See Morrisette-Brown*, 506 F.3d at 1319. The record supports the court's findings that the United States, at the time the land was reclaimed in the 1920s and 1940s, intended to use Wisteria Island for its own purposes, including as a protective feature, a site for potential improvements, and a place for future dredge-spoil deposits. All three purposes carried utility for the United States. *See FEB II*, 52 F.4th at 926–27. While F.E.B. points to contrary evidence suggesting that Wisteria Island was created without a specific purpose or intention, that's not enough to show that the district court clearly erred. *See Anderson*, 470 U.S. at 573–74 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

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V.

In sum, and for the foregoing reasons, we affirm the judgment in favor of the United States.

AFFIRMED.

**APPENDIX B — FINDINGS OF FACT AND
CONCLUSIONS OF LAW OF THE UNITED
STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF FLORIDA, ENTERED MAY 30, 2024**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA,
KEY WEST DIVISION

CASE NO. 18-10203-CIV-MARTINEZ

UNITED STATES OF AMERICA,

Plaintiff,

v.

F.E.B. CORP.,

Defendant.

Signed May 29, 2024
Entered May 30, 2024

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jose E. Martinez, United States District Judge

THIS CAUSE came before this Court on the non-jury trial held in this case from January 16, 2024, to January 17, 2024. During and after the bench trial, this Court reviewed the evidence admitted and considered applicable law and arguments presented by counsel. After careful

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consideration of the Parties' submissions, the following findings of fact and conclusions of law are made pursuant to the requirements set forth in Federal Rule of Civil Procedure 52.

I. Introduction

In 2011, Plaintiff, the United States of America ("United States") asserted ownership over the Subject Property, Wisteria Island. In response, Defendant, F.E.B. Corp. ("FEB") sued under the Quiet Title Act, 28 U.S.C. § 2409a, arguing that it owned the island pursuant to the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301–1315. *F.E.B. Corp. v. United States*, Case No. 12-cv-10072-JEM, 2015 WL 3653162 (S.D. Fla. Mar. 25, 2015). The district court held that FEB's action was time-barred and dismissed the case for lack of subject-matter jurisdiction. The district court did not reach the merits of FEB's SLA claim in its quiet title action. On appeal, the 11th Circuit affirmed. *F.E.B. Corp. v. United States*, 818 F.3d 681 (11th Cir. 2016) ("*FEB I*"). The Court abstained from resolving the merits question: whether Wisteria Island was "filled in, built up, or otherwise reclaimed by the United States for its own use." *Id.* at 693. Rather, the Court said, "only that, given the undisputed and well-known facts of Wisteria Island's creation, the plain language of the [Act's] exception for lands 'built up by the United States for its own use,' gave rise to an open and obvious question as to whether the [Act] applied in this case." *Id.* (citation omitted). "The title dispute remains unresolved." *Id.* at 694 (citations omitted).

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Thereafter, the United States brought this instant action on October 11, 2018, seeking a declaratory judgment that the United States, not FEB, held title to the thirty-nine acres—twenty acres above sea level and nineteen below—that made up Wisteria Island. This court entered summary judgment for the United States. (ECF No. 67). The 11th Circuit vacated this Court’s entry of summary judgment and remanded for trial because “there is a genuine dispute of fact about whether the United States created Wisteria Island for its own use or whether Wisteria Island’s creation was an accident.” *United States v. F.E.B. Corp.*, 52 F.4th 916, 931 (11th Cir. 2022) (“*FEB II*”).

II. Findings of Fact**A. History of the Subject Property.**

1. Plaintiff, the United States sued FEB, seeking declaratory judgment to resolve a long-standing title dispute between the two parties over the Subject Property.
2. The “Subject Property” is 39 acres of land off the coast of Key West, Florida and is legally described as:

Commencing at the Northwesterly end of Simonton Street at the intersection of the Southwesterly right-of-way line of Simonton Street and the waters of the Bay of Florida, run North 60° West for a distance of 2150 feet, more or less, to the point of beginning of the property hereafter described. From said pint

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of beginning continue North 60° West for 1000 feet, thence run North 30° East for a distance of 1700 feet, thence run South 60° East for a distance of 1000 feet, thence run South 30° West for a distance of 1700 feet back to the point of beginning.

3. The Subject Property is located at the southern end of Frankford Bank, which is referred to as both “Frankford Bank” and “Frankfort Bank” in historic records.

4. The United States’ claim to the Subject Property dates to the early 1800s when “[t]he United States received the land that became Florida—then known as ‘La Florida’—from Spain in the 1818 Adams-Onís Treaty.” *United States v. F.E.B. Corp.*, 52 F.4th 916, 919 (11th Cir. 2022) (*FEB II*) (citing Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Spain-US., Feb. 22, 1819, 8 Stat. 252).

B. The Navy’s Repeated Reservation and Use of the Subject Property From 1845-1908.

5. The Navy considered the Subject Property to be reserved for naval and military use since as early as 1908.

6. On September 17, 1845, President Polk issued an Executive Order (Executive Order 1845), which set aside and reserved from sale public lands described therein per the request by the War Department.

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7. The Subject Property is included in the area reserved under the Executive Order issued on September 17, 1845.

8. On January 11, 1854, the United States reserved the “shoals” of Key West and Flemings Key for “military purposes.” The Subject Property was a shoal prior to being filled in.

9. By correspondence dated March 9, 1855, the United States notified the State of Florida that “Flem[ing] Key . . . and the shoals of Key West . . . were reserved for military purposes” at the request of the Secretary of War, and that “Flem[ing] Key has been selected by the Secretary of the Navy for a Naval Depot.”

10. On March 26, 1908, Commandant William H. Beehler, on behalf of the Secretary of the Navy, sent a letter explaining that the Navy was “under the impression that the locality of ‘Frankford Bank’ is a part of the Naval Reservation at Key West, being included in the title that reserves Fleming Key, and its adjacent shoals, and Man-of-War Harbor for a Naval Depot,” and that Man-of-War Harbor, and “its adjacent shoals,” belong to the Navy.

11. By correspondence dated April 14, 1908, Commandant Beehler made a formal request to the Secretary of the Navy, Victor H. Metcalf, asking for “cognizance and supervision of the dredging of the material for the Army from ‘Frankford Bank’ for filling at Fort Taylor, Fla., as he understands that ‘Frankford Bank’ is a part of the Naval Reservation.”

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12. In his letter, Commandant Beehler also stated that the Land Office's letter dated March 9, 1855, showed that "the shoals [of Frankford Bank] . . . are reserved for Military and Naval purposes. Fleming Key and its adjacent shoals, and Man-of-War Harbor are reserved for the Naval Depot."

13. As of 1908, the Navy believed it had a "definite claim" to Frankford Bank.

14. Commandant Beehler sought supervisory authority over the Army's Fort Taylor dredge project to protect the Navy's interests in Fleming Key, Frankford Bank, and the adjacent shoals:

Frankford Bank forms the Western edge of Man-of-War Harbor and channel, and its removal by dredgers may deprive that harbor of shelter. Man-of-War-Harbor is also designated as "Hurricane Harbor," because it is a smooth basin that affords perfect shelter during storms.

[] The indiscriminate removal of Frankford Bank by contractors will be likely to seriously impair the value of Man-of-War Harbor and Fleming Key as a torpedo depot.

15. The April 14, 1908 correspondence also establishes that "the Department had contemplated erecting a coal shed on Frankford Bank, for the Navy."

*Appendix B***C. The Navy Expresses its Intent to Fill in and Use the Subject Property.**

16. A letter from Commander Warren Terhune, Beehler's successor at Naval Station Key West, dated October 9, 1916, and included in House Documents, vol. 32, part 4, report no. 6 of Commission on Navy Yards and Naval Stations, Report of Navy Yard Commission (U.S. Naval Station, Key West, Florida, 1918), explains "[t]he advantages of Key West arise from its strategic location at the southern most continental limits to the Nation . . . the ownership by the United States (Navy Department) of an existing plant, with Fleming [Key], Frankford Bank, and other partially submerged [keys] and shoals capable of development; and the existence of fortifications which should be improved."

17. To that end, Commandant Terhune submitted a "[p]lan of station as of July 1, 1916," which included "[b]lue prints [that] show possibilities at Fleming [Key], Frankford Bank, etc."

18. Commandant Terhune added: "The erection of a breakwater to afford a harbor of refuge at the naval station would be justified and would be a wise expenditure in insuring against hurricanes, at the same time affording wharfage for many small vessels."

19. "With regard to the reclaiming of land by filling, for the purpose of erecting a magazine on Frankford Bank" the Commandant added he "is most strongly convinced that these acquisitions, fronting on deep water, will be worth the money".

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20. Finally, Commandant Terhune made clear that “[t]he Navy Department owns Fleming [Key and] Frankford Bank,” and they both “should be enlarged by fill and utilized”.

21. These correspondences establish that the Navy used and intended to use the Subject Property in two ways—as a protective feature and for development for future operations—and, therefore, the Subject Property was filled in for the Navy’s use.

22. A 1917 correspondence from J.M. Helm, Rear Admiral of the United States Navy, establishes the following: “To obtain a station development [in Key West] the station authority are agreed that it will be necessary to fill in over present shoal waters at Frankford Bank or Fleming Key, or both. All are agreed that a plan similar to K-1, Appendix G-2, would afford the best development, the only objection being that it is the most expensive. It is suggested that the breakwaters shown by this plan are unnecessary and that if any protection is required from this direction it can be obtained by a slight filling in on Frankford Bank and the planting of mangroves in the fill to insure permanency.”

23. Rear Admiral Helm’s correspondence establishes that the Navy used Frankford Bank, and more specifically the Subject Property, as a natural breakwater or protective feature.

24. Shortly after authoring the October 9, 1916 letter referenced above, Commander Terhune signed a

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blueprint, titled “Proposed Development for Submarine Base, U.S. Naval Station, Key West” depicting the Subject Property and dated May 11, 1917.

25. The 1917 Blueprint includes the following note: “Development unanimously favored by Naval Station Officers . . . adding thereto Magazine Site on Fleming Key and secure and safe wharfage on Frankford Bank, with ideal aviation site, and unlimited room for a dry-dock and other naval expansion.”

26. Labeled “Enclosure F,” the 1917 Blueprint clearly shows the delineation of this “secure and safe wharfage” on the Subject Property at the southern end of Frankford Bank. Above the delineated wharfage and in the same script as “Enclosure F,” a label denotes “Frankford Bank.”

27. In a February 25, 1918 letter from the House of Representatives Committee on Education to the Secretary of War, the author, W. J. Sears, advocates for the then contemplated Key West Harbor improvement project on behalf of the Navy and states: “From conversations I have had with military naval men, I believe I can safely say without fear of contradiction there is no more important harbor in the United States from a strategic standpoint than Key West.”

28. On March 25, 1918, then U.S. Senator Duncan U. Fletcher, sent a letter to the Army Corps of Engineers, regarding the contemplated improvement of Key West Harbor and arguing that “this improvement ought to be regarded as a war emergency matter” and “this improvement should be made now.”

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29. In an April 12, 1918, letter from the Commandant Naval Station Key West to the Superintendent, U.S. Engineer Office, the Navy made clear that “an increase in the width of [Key West] harbor, particularly in the space immediately abreast the Naval Station, is considered to be a military necessity” and “recommended that the harbor immediately abreast of the Naval Station wharves be dredged to a depth of thirty feet at mean low water.”

D. The United States Fills in the Subject Property for the Navy’s Use During a Project Conducted In Key West Harbor in the Early 1920s.

30. Coast and Geodetic Survey (C&GS) charts of the area (Chart No. 584) from 1919 and 1923 establish that the Subject Property had water depths of 3 to 12 feet at that time.

31. “[D]uring a hurricane in 1919, a 150-foot ship called the Wisteria sank near the shallow ocean floor [or shoal] upon which Wisteria Island was later built. In recognition of that event, the island that the United States created in that area was called Wisteria Island.” *FEB II*, 52 F.4th at 920.

32. The Wisteria ran aground on the Subject Property due to a navigational hazard or shoal.

33. “[I]n the early 1920s, the United States ‘dredged’—or removed soil from the ocean floor—in Key West Harbor, piling the dredged oceanic soil (also called ‘spoils’ or ‘spoilage’) up until it became an island.” *FEB II*, 52 F.4th at 920.

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34. Army Corps of Engineers conducted the dredge and fill project.

35. Before the project began, “[t]he northwest entrance [of Key West Harbor] was obstructed by a sand shoal, over which the controlling depth was 10.5 feet at mean low water.”

36. According to the Army Corps’ Annual Report of the Chief of Engineers, Report Upon the Improvement of Rivers and Harbors in the Jacksonville, Fla., District, the scope of the 1920s dredge and fill project was as follows:

This provides for the removal of coral heads and reefs from the main ship channel and anchorage, so as to give a clear depth of 30 feet at mean low water and a width in the channel of 300 feet; and for a northwest entrance channel with depth of 17 feet at mean low water and of sufficient width for navigation, to be obtained by the construction of a stone jetty on each side of the entrance and by dredging; removing the middle ground to the extent of widening the channel opposite the wharves to a width of 800 feet and a depth of 26 feet at mean low water.

37. The Army Corps’ Reports explicitly found that the improvements “are of great value to the smaller vessels of the United States Navy, enabling them to reach the naval station at Key West without difficulty or danger.”

38. In 1923, during the Key West dredge project, spoil was placed on the Subject Property.

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39. The project was completed by December 15, 1923.

40. Spoil was deliberately placed on the Subject Property, given the utilitarian, protective, and strategic location of the Subject Property on the shoals of Frankford Bank.

41. The Subject Property offered a shallow base for piling up dredged material, and it was close to the dredging operations that maintain the main ship channel, which made the Subject Property (at the southern end of Frankford Bank) a practical location for the deposit of spoil.

42. On April 25, 1924, the Department of Commerce Lighthouse Service sent C&GS a letter notifying C&GS of the appearance of the “spoil bank” on the Subject Property.

43. The letter includes a map with “spoil bank” written in, pointing to the crescent-shaped island on the Subject Property.

44. On the map, another note “southerly crescent 15’ high” appears to the west of the island, and “North end 3 feet high” is written above the island.

45. The intentional placement of spoil on the Subject Property for the Navy’s use in 1923 created the “spoil bank” island, which had over 2 acres of land above the mean low water line.

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E. Florida Attempts to Sell the Island Created for the Navy's Use on the Subject Property; the Navy Objects; and, in response to Florida's Attempted Sale of the Island, the President Executes a New Executive Order Reserving the Subject Property for the Navy's Use.

46. "After the [1920s] dredging was complete, two men applied to buy the island for \$500." *FEB II*, 52 F.4th at 920.

47. "The Florida Trustees of Internal Improvement Fund [(TIIF)] published a notice that it intended to sell the island." *Id.*

48. On or about April 5, 1924, TIIF published the following Notice:

NOTICE is hereby given that the Trustees of the Internal Improvement Fund of the State of Florida, will hold a meeting at 11 o'clock A. M., Tuesday, May 20th, 1924, for the purpose of considering the sale of a submerged tract of land in Monroe County, described as follows, to-wit:

An island in the vicinity of Key West Island, caused by the deposit of excavated material from the Ship Channel.

The deposit lies 1800 feet, more or less, in a Northwesterly direction from the Porter Docks, which are at the end of Fitzpatrick Street,

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City of Key West. It extends 400 feet, more or less, in a Northeasterly direction, 300 feet, more or less, in a Northwesterly direction, and contains approximately 2.8 acres. All in Section 6, Township 68 South, Range 25 East.

Exact description to be furnished with deed.

49. The island TIIF noticed for sale in 1924 is located within the Subject Property.

50. After Notice was published in the Key West Citizen, “the Navy Department objected that the island belonged to the United States and therefore was not Florida’s to sell.” *FEB II*, 52 F.4th at 921.

51. Specifically, by letter dated May 8, 1924, the Judge Advocate General of the Navy sent a letter to TIIF objecting to the sale and asserting title in the United States.

52. In response to the Navy’s objection, TIIF “withdrew the notice and rejected the application.” *FEB II*, 52 F.4th at 201.

53. Thereafter, and in response to Florida’s attempt to sell the island on the Subject Property in 1924, the Navy took immediate action to expressly reserve the Subject Property for naval and military use.

54. By letter dated May 17, 1924, the Chief of the Bureau of Yards and Docks sent a letter to the Chief of

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Naval Operations seeking “Reservation of Keys, Harbor, and Shoals adjacent to and in the vicinity of the Island of Key West, Florida, for Naval and Military purposes.”

55. In the May 17, 1924 letter, the Navy explained that “the island the state of Florida proposes to sell” is part of Frankford Bank; in the Navy’s “development of the harbor, Frankford Bank formed the principal protection from wave action from the westward”; and the Navy, through the Navy Yard Commission, “contemplated the enlarging of Frankford Bank by depositing the dredged material from the harbor along the edge of the bank,” which constitutes the Subject Property.

56. In a letter dated May 24, 1924, from the Chief of Naval Operations to the Judge Advocate General, the Chief of Naval Operations advocates for the express reservation of “Frankford Bank and the artificial island thereon for possible naval use” because Frankford Bank forms a breakwater used by the Navy to protect nearby naval operations and future expansion of those operations.

57. In July of 1924, the Secretary of the Navy, Curtis D. Wilbur, wrote to the Secretary of the Interior regarding “a proposed draft of an executive order reserving for naval purposes certain islands, keys, harbors and shoals adjacent to and in the vicinity of the Island of Key West, Florida.”

58. On August 9, 1924, Secretary Wilbur sent President Calvin Coolidge a formal request for entry of an executive order reserving the Subject Property for Navy use.

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59. In this letter, the Secretary of the Navy expressly stated that “[t]he Navy Department has for over thirty years held undisputed possession of Fleming Key and the adjacent shoals including Frankford Bank . . . together with all of the islands and shoals to the westward of Key West to and including the Marquesas.”

60. The Secretary of the Navy also stressed that these islands and shoals should not be allowed to come under private ownership because of their strategic location: “If privately owned and developed, this location might become a constant expense on account of claims by private parties for damages incidental to gun fire.”

61. The Secretary further explained: “If in the future Key West defenses are to be modernized, these areas would be of great value in connection with outer defense works.”

62. The Secretary expressly requested the reservation of the islands and shoals “in view of their strategic location for naval purposes.”

63. “Indicative of the request’s urgency, two days later on August 11, 1924, President Coolidge issued Executive Order 4060 that reiterated the reservation, for naval purposes, of this area of Key West’s waters that included the spoil island Wisteria.”

64. Executive Order 4060 reserves “all the islands, keys, harbors and shoals adjacent to and in the vicinity of the Island of Key West, Florida” “for use of the Navy Department for naval purposes.”

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65. The Subject Property is included in the geographic area covered by Executive Order 4060: the coverage area extends southward in a peninsula specifically to include the southern end of Frankford Bank where the Subject Property is located.

F. The Navy Used the Subject Property for Repeated Deposits of Spoil and for Additional Purposes.

66. A 1927 blueprint created by the U.S. Naval Station, Key West depicts a kidney shaped island on the Subject Property with an elevated southern crest. A note on the 1927 blueprint identifies that the above sea level land area was almost three acres: “Approx. Acreage of Land above ordinary high tide: 2.95 A.”

67. The 1927 blueprint illustrates that the majority of the land is three feet above mean low water (MLW), with text notes about the formation of the island from dredge spoil material: “Filled by hydraulic dredge, El. Roughly 3’ above MLW.”

68. The shape of the island in the 1927 blueprint establishes that the Navy planned to continue using this island for deposit of spoil and developing it for proposed plans as a building site. Spoil islands are typically built from the outside inward. Initial deposits create an external ring and subsequent spoil deposits are placed in the center.

69. The island depicted on the 1927 blueprint is the same island that the United States filled in for the Navy’s

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use; the Lighthouse Service identified as a “spoil bank” in the April 23, 1924, letter; and TIIF intended to sell in 1924.

70. As an example of the Navy exercising control and ownership over the Subject Property after it was filled in, the United States, by and through the Secretary of the Navy, entered into a Revocable License with Lowe Fish Company on August 17, 1928, for use of the “exposed spoil bank” (i.e., the Subject Property), “for the purpose of carrying on certain processes of preparation of hides in connection with the shark fishing industry.”

G. The United States Fills in and Builds up the Subject Property Again in the 1940s for the Navy’s Use.

71. “[A]fter World War II broke out, the United States began a huge dredging contract to provide adequate seaplane landing and take-off areas, moving some 5.4 million cubic yards of spoils over two years. The project also deepened the submarine basin to twenty-two feet and the main ship channel to thirty feet.” *FEB II*, 52 F.4th at 921 (internal quotations marks omitted).

72. “During that period, the United States again dumped the dredge spoils where it had in the 1920s. As a result, Wisteria Island expanded to its current size, about twenty-one acres above water and eighteen below, for a total of thirty-nine acres.” *Id.* at 921.

73. In October of 1942, the Army Corps of Engineers conducted a pre-dredge survey of the Subject Property for the channel and turn basin project.

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74. By that time, much of the other dredge work (i.e., seaplane landing and take off and submarine basin) was complete and spoil locations already filled in.

75. The 1943 channel and turn basin project had specific areas designated for spoil placement.

76. The Subject Property was specifically designated as, and intentionally used as, “spoil area B” during the 1943 channel and turn basin project.

77. At the commencement of the 1943 channel and turn basin project, spoil area B included the spoil island created during the 1920s Key West Harbor project.

78. During the 1943 channel and turn basin project additional spoil was placed on top of the spoil placed on the Subject Property during the 1920s Key West Harbor project.

79. By June of 1943, at the completion of the 1943 channel and turn basin project, there were almost 25 acres of land above the mean low water line on the Subject Property.

80. The 1943 channel and turn basin project was conducted for the Navy and with Navy funds.

81. In July 1943, after the completion of the 1943 channel and turn basin project, the Army Corps conducted a survey of the Subject Property. The last page of the post-dredge survey clearly shows the increased land mass on the Subject Property.

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82. A comparison of the pre and post dredge surveys establishes that all of the Subject Property had fill placed upon it.

83. For example, the pre-dredge survey shows water depths of 7.3-8 feet on the northwest border, with depths of 7.3 feet at the intersection of the "E 230000" line and "N86000" line, while the post-dredge survey shows depths of 4.1-7.7 feet on the northwest border, with depths of half a foot above water to 6 feet below water at the intersection of the "E 230000" line and "N86000" line.

84. A comparison of the 1941 and 1943 nautical charts clearly shows the expanded land mass on the Subject Property.

85. These charts also depict the Wisteria shipwreck, which provides a stationary point to compare the development of the Subject Property and fill placed across the entirety of the Subject Property.

86. In a letter dated December 7, 1945, the Aide to the Base Command for Naval Station Key West responded to an inquiry by Shark Industries wherein the Navy denied Shark Industries request to use the spoil island and explained the following: "Under Executive Order No. 4060, the Navy has jurisdiction over these spoil areas. The past policy of the Navy in this regard has been for no operations by private enterprise to be set up on these areas, and the Commander of this Base does not want to deviate from precedence so established."

*Appendix B***H. Florida Issues a Quitclaim Deed to the Subject Property Over the Objection of the United States Even Though It Did Not Hold a Colorable Claim to the Subject Property.**

87. “[I]n 1951, Florida again noticed its intent to sell Wisteria Island—this time via a quitclaim deed (one with no warranties of title) to a private buyer.” *FEB II*, 52 F.4th at 923 (citing *F.E.B. Corp. v. United States*, 818 F.3d 681, 684 (11th Cir. 2016) (*FEB I*)).

88. A July 11, 1951 “Plat” shows “proposed bay bottom land and spoil area to be acquired from State I. I. Board by Mr. Paul Sawyer.”

89. Sawyer served as an agent for Bernie Papy in acquiring the Subject Property, and at that time, Papy was serving in the Florida House of Representatives.

90. The Plat depicts the Subject Property as the “proposed area to be acquired,” labels Wisteria Island “Spoil Island,” and clearly delineates that it is encompassed within the boundary of “Frankford Bank.”

91. The southern boundary of Frankford Bank depicted on the Plat matches the boundary of Executive Order 4060.

92. On July 21, 1951, Sawyer sent the Florida Department of Agriculture an “application” for the purchase of the “Spoil Area,” and described the Spoil Area as land that “was dredged up out of the channel by

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the United States Government during World War I and is an island now sitting above sea level.”

93. On August 15, 1951, the Navy sent a “Navy Speed Letter” to the Chief of the Bureau of Yards and Docks seeking authority to object to the TIIF’s intended sale of the Subject Property.

94. The Navy Speed Letter makes clear that the Spoil Area proposed for sale by Florida was a “result of dredging in the main ship channel at Key West, Florida, which was accomplished with the use of Navy funds in 1943”, and was reserved for naval use under Executive Order 4060 when it was filled in.

95. In the Navy Speed Letter, the Commandant of the Sixth Naval District calls attention to the subject property’s immediacy and its strategic value:

Due to the proximity of this spoil area to highly classified Naval activities . . . it is considered a dangerous security risk to allow this property to fall in the hands of private developers . . . the strategic location of this spoil area makes its use for military purposes highly possible, and its use for a fuel storage area is now under consideration.

96. The map attached to the Navy Speed Letter clearly identifies the Subject Property as the “spoil area” in question.

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97. “The United States objected to the sale, claiming that the federal government, not the state of Florida, owned Wisteria Island.” *FEB II*, 52 F.4th at 923 (citing *FEB I*, 818 F.3d at 684).

98. On September 27, 1951, Admiral J. F. Jelley, Chief Bureau of Yards and Docks, Department of Navy, sent a letter to TIIF objecting to the proposed sale of the Subject Property, making clear that the Navy understood that the “spoil area proposed for sale by the State of Florida is located in Frankfort Bank;” that the island was “created by deposits of dredged material from the main ship channel at Key West, Florida and was accomplished by the use of Department of Navy funds;” and that “the Navy considers Frankfort Bank, the shoals adjacent thereto and the spoil area in question as being the property of the United States.”

99. On January 7, 1952, Florida Attorney General Richard W. Ervin sent a letter to the Florida Department of Agriculture in which Ervin stated the following: “I am unable to state definitely whether or not the Navy’s claim is valid. However, I do think that the claim is debatable enough and so shrouded in antiquity that I think the best course would be for the Trustees to complete the sale and explain the Navy’s claim to Mr. Papy and allow him to accept the Trustees’ deed at his own risk.”

100. The January 8, 1952 TIIF meeting minutes establish that TIIF decided to proceed with issuing the quitclaim deed to Sawyer, who was acting “on behalf of Mr. Bernie Papy,” even though the Navy made a “claim

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of ownership”; this is in direct contrast to how TIIF proceeded in 1924 under similar circumstances.

101. On January 9, 1952, TIIF issued a quitclaim deed for the Subject Property to FEB’s predecessor in interest, Sawyer.

102. Florida did not have a colorable claim to the Subject Property on January 9, 1952, when it issued the quitclaim deed.

I. Congress Passes the SLA Only After it Adds the Exception Requested by the Navy to Exclude the Subject Property from Operation of the SLA.

103. In *United States v. California*, 332 U.S. 19 (1947) (*California I*), the Supreme Court ruled that the federal government, not the states, held “paramount rights and power over” the submerged lands within the three-mile belt off the coasts of coastal states; prior to *California I*, there was a dispute between the federal government and the states over who owned these submerged lands.

104. “In response, Congress considered ceding some of the near-offshore undersea floor to the coastal states—the question was how much.” *FEB II*, 52 F.4th at 922 (citing *FEB I*, 818 F.3d at 687).

105. “During the legislative process, Secretary of the Navy Robert Anderson testified before Congress that . . . the military had bases and other improvements on near-offshore islands.” *Id.*

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106. “He expressed concern that ‘in some of the proposed bills[,] title of the United States would be relinquished to all lands beneath navigable waters within State boundaries[,] which is defined to include filled in, made or reclaimed lands.’” *FEB II*, 52 F.4th at 922.

107. And clarified that “Title to this land has never been granted to the United States.”

108. He explained the Navy’s concern over the proposed legislation, and need for amendment of the proposed legislation, which at the time already made an exception for lands to which title had been acquired, as follows:

Practically all of these improvements, as well as the greater portion of other naval waterfront improvement, are constructed on lands which now are or were formerly beneath navigable waters and include filled-in and reclaimed areas. Title to this land has never been granted to the United States. Therefore, it is considered essential that any legislation which would affect lands or installations of the nature described herein should contain appropriate provisions confirming title to and reserving title in the United States to such lands and improvements.

Id.

109. “One Senator asked Secretary Anderson whether he had a list of the places that should be excluded because

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they had such improvements.” *Id.* In response, “Rear Admiral Ira Nunn, the Judge Advocate General of the Navy, submitted a partial list of such places.” *Id.*

110. “Key West (naval station), Fla” was identified as one of the locations where title to land had not been acquired but improvements had been made, and “Fill” was identified as one of the “improvements” at Key West Naval Station where title needed to be reserved.

111. “Attorney General Herbert Brownell, Jr., also testified[, and] [i]n his opening statement, he emphasized that the Department of Justice hoped the eventual law would ‘make certain that all installations . . . on submerged, reclaimed, or filled or other lands’ by ‘the Federal Government’ ‘belong[ed] to [the Federal Government].’” *FEB II*, 52 F.4th at 922-23.

112. Pursuant to Attorney General Brownell’s testimony, the filled in, built up, or otherwise reclaimed land exception was added to the legislation in order to “make certain that all installations by the States on submerged, reclaimed, or filled or other lands inside the line, belong to the States subject to the navigation servitude; also that all installations and acquisitions of the Federal Government within such area belong to it.”

113. Rear Admiral Ira Nunn also appeared before the Senate Committee on behalf of Secretary Anderson. At that time, Admiral Nunn stressed the need to reserve title to lands that the Department of Navy had “improved by the erection of permanent buildings, quay walls, piers,

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and other structures, including filling in, at a cost to the Government of many millions of dollars.”

114. “In 1953, Congress passed the [SLA], 43 U.S.C. §§ 1301–15, *et seq.*, which transferred to states the title and ownership of ‘lands beneath navigable waters’ within the boundaries of states and all lands beneath navigable waters within three geographical miles of the state’s coast.” *FEB II*, 52 F.4th at 923 (quoting 43 U.S.C. §§ 1301(a)(1)-(2), 1311).

115. “But Congress expressly excepted from this grant ‘all lands filled in, built up, or otherwise reclaimed by the United States for its own use.’” *Id.* (quoting 43 U.S.C. § 1313(a)).

116. On May 22, 1953, President Eisenhower signed the SLA into law, with the inclusion of the filled in, built up, or otherwise reclaimed lands exception (i.e., the “use” exception) required by the Navy and added to the legislation shortly before it was passed. 43 U.S.C. §§ 1301–15, *et seq.*

J. The Navy Continues to Assert its Claim of Ownership Over the Subject Property After Passage of the SLA.

117. On September 15, 1953, Admiral Jelley sent a letter to the Bureau of Land Management (BLM) asking BLM to investigate ownership of the Subject Property and advise the Navy “on the validity of the Federal Government’s claim to ownership of the area.”

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118. In the letter, Admiral Jelley explained the following: “Due to the proximity of the spoil area of the bank to highly classified Naval activities at Key West, this Department considers it a security risk to allow the island to fall into the hands of private individuals” and that due to its “strategy military value” the Subject Property “should be reserved to Navy use.”

119. On October 27, 1954, David W. Agnew, by direction of Admiral Jelley, sent BLM another letter addressing the “question . . . raised as to ownership of the . . . island[] . . . embraced within Executive Order 4060 . . . and reserved thereby for use of the Navy.”

120. In the October 27, 1954 letter, the Navy stated the following: “prior to 1953, no action had been taken by the United States to relinquish [] ownership;” “the subject area has been successively reserved for Government purposes since the establishment of the Territory of Florida in 1822;” and that “[i]nasmuch as the area is within the purview of the Submerged Lands Act of 1953, this Department is prepared to show that . . . it is excepted by Section 5 of that Act from any proprietary rights inuring to the State by reason of that Act.”

121. “In 1954, the Navy asked the Bureau of Land Management about its claim to Wisteria Island, explaining that Wisteria Island and the area around Frankfort Bank were of great strategic importance. The Navy asserted that Wisteria Island was close to highly classified Naval activities, and it would be a security risk to allow the island to fall into the hands of private individuals.” *FEB II*, 52 F.4th at 923 (internal quotation marks omitted).

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K. Additional Uses and Plans to Fill the Subject Property After 1960.

122. In 1966, the Army Corps conducted a dredging project at Key West Bight.

123. For the 1966 Key West Bight project, “[m]aterials excavated during construction will be placed on the existing spoil island as show on plate 2. It is proposed to utilize this spoil island both for initial construction and subsequent maintenances.”

124. Plate 2 clearly identifies the southern portion of Wisteria Island as the proposed “spoil area” to be used in 1966 and for subsequent maintenances.

125. The Army Corps has a practice of placing spoil on existing spoil islands and would use those locations repeatedly over long periods of time.

126. The Army Corps currently has a maintenance dredge project for the Key West channel in the planning phase, and the Subject Property is one of several locations being considered for the placement of spoil during that dredge project.

127. The Subject Property provides strategic value and benefit to the Navy currently.

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L. The United States Filled in the Subject Property for its Own Use.

128. Dredge spoil was placed on the Subject Property for utility: the Subject Property is located adjacent to the shipping channel and harbor and constitutes a shoal with shallow waters, making it a useful location for the recurrent placement of spoil.

129. Dredge spoil was placed on the Subject Property to augment the protection the Subject Property provided for navy operations from both natural and manmade incursions.

130. Dredge spoil was placed on the Subject Property given its strategic location, not only in proximity to naval operations, but for future development in furtherance of those operations.

131. The United States placed spoil on the Subject Property with federal use in mind, including non-use as a protective feature.

132. Accordingly, the evidence establishes that when the United States placed spoil on the Subject Property in the 1920s and again in the 1940s, it did so with the intent to use the Subject Property in the following ways: non-use (or non-development by private parties); a protective feature, protecting nearby naval facilities; and as a site for possible future physical improvements in support of military defenses.

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133. The United States filled in the Subject Property for its own use.

III. Conclusions of Law

1. The United States can only dispose of property by an express act of Congress. U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of . . . the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States”). *See also Royal Indem. Co. v. United States*, 313 U.S. 289, 294 (1941); *Int’l Aircraft Recovery LLC v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1258 (11th Cir. 2000).

2. “The Government, which holds its interests [in property] in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property.” *California I*, 332 U.S. at 40.

3. Reservations of land for public use, including military use, are made on public lands (i.e., lands the United States has a claim of ownership over). *See United States v. Midwest Oil Co.*, 236 U.S. 459, 470-71 (1915) (explaining that historically the President has, by executive order, reserve public lands for military and other public uses: “This right of the President to make reser[v]ations-and thus withdraw land from private acquisition-was expressly recognized in *Grisar v. McDowell*, 6 Wall. 364 (9), 381, 18 L. ed. 863, 868, where (1867) it was said that ‘from an

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early period in the history of the government it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States, to be reserved from sale and set apart for public uses.”).

4. Under the SLA, “Congress ceded title to all lands within three miles of the United States’ coast to the states, except for lands that were (1) ‘built up,’ ‘filled in,’ ‘or otherwise reclaimed’ (2) by the United States (3) for the United States’ use.” *FEB II*, 52 F.4th at 919.

5. Accordingly, this case comes down to a question of whether the United States disposed of its interest in the Subject Property by operation of the SLA or whether the Subject Property is excepted from the SLA under the provision of the SLA that excepts “all lands filled in, built up, or otherwise reclaimed by the United States for its own use.” 43 U.S.C. § 1313(a).

6. There is no dispute that the United States filled in the Subject Property when it placed dredge spoils on the subject property in 1923 and again in 1943.

7. Accordingly, the Court must determine if the United did so “for its own use.”

8. “For” as used in the SLA exception requires some intent on the part of the United States in filling in or building up the Subject Property—“in other words not accidentally.” *FEB II*, 52 F.4th at 926.

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9. “Use,” as used in the SLA exception, means “any utility, any way in which the filled in land is converted to the United States’ service.” *Id.* at 926-27 (internal quotation marks omitted and alterations accepted).

10. “Applying those definitions here, we derive three principles. First, because of the presence of the word ‘for,’ the filling in or building up must have some intentionality to it—it cannot be accidental. The United States does not ‘build up’ an island for its own use accidentally. Second, ‘use’ is a broad term—converting to service or employing (again, for a purpose). And third, we note that the Act does not require actual use. That is, the text does not demand that the use be employed. As long as the land was created to be used, it doesn’t matter whether the United States actually used the land.” *Id.* at 927 (internal citations omitted and emphasis added).

11. Accordingly, the question in this case, as framed by the Eleventh Circuit in *FEB II*, is “whether the United States had an intended use for Wisteria Island when the United States created it.” *Id.*

12. “[A] party’s state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be determined after trial.” *Id.* (quoting *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1476 (11th Cir. 1991)).

13. This Court holds that the greater weight of the evidence establishes that the United States filled in the Subject Property for its own use; therefore, the Subject

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Property did not pass from Federal ownership by operation of the SLA.

14. First, the United States repeatedly used the Subject Property in the 1920s and 1940s as a place to store spoil intentionally and deliberately given its utilitarian location: spoil was not merely discarded on the Subject Property.

15. As the Eleventh Circuit recognized in *FEB II*, “[s]torage is a use.” *FEB II*, 52 F.4th at 927 (internal quotation marks omitted).

16. Second, the Subject Property was deliberately filled in to be used as a protective feature protecting naval operations from natural and manmade incursions.

17. The Subject Property was, and remains, valuable to the Navy because of its proximity to naval operations and its usefulness as a barrier against hurricane and tidal threats to the naval operations and against possible private development of the area.

18. Third, not only was the Subject Property used to store spoil repeatedly and as a protective feature, but the Subject Property was also filled in because of its strategic location.

19. This is not a case where the United States randomly disposed of spoil. Nor is it a case where spoil was intentionally placed in a random area that was otherwise not being used. Rather, this is a case where the United

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States intentionally placed spoil on a location that had strategic value to the Navy and that the United States reserved for the Navy's use.

20. Fourth, the Navy had additional plans to develop the Subject Property and place physical structures on the property.

21. When the Subject Property was filled in the 1920s, the Navy had plans to use the Subject Property for wharfage and as a magazine (i.e., a place to store ammunitions).

22. At various time, the Navy also had plans to use the Subject Property as a Navy depot, a coal shed, an aviation site, dry-dock, fuel storage, and other military purposes.

23. Accordingly, the Court resolves the dispute of fact identified in *FEB II*—"whether the United States created Wisteria Island for its own use or whether Wisteria Island's creation was an accident"—*FEB II*, 52 F.4th at 931—in favor of the United States.

24. The United States holds superior title to the Subject Property over FEB.

IV. Conclusion

1. The United States is entitled to judgment in its favor and against FEB as to Count I of the Complaint, (ECF No. 1).

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2. Title is quieted in favor of the United States and against FEB as to the Subject Property.

3. Accordingly, as between the United States and FEB, the United States owns the Subject Property, and FEB holds no ownership interest.

4. Final Judgment shall enter by separate order.

5. The Clerk is **DIRECTED** to **CLOSE** this case and **DENY** all pending motions as **MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 29 day of May 2024.

**APPENDIX C — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT, FILED NOVEMBER 1, 2022**

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT

No. 20-14047

UNITED STATES OF AMERICA,

Plaintiff-Counter Defendant-Appellee,

versus

F.E.B. CORP., A FLORIDA CORPORATION,

Defendant-Counter Claimant-Appellant.

Filed November 1, 2022

Before WILSON and ROSENBAUM, Circuit Judges,
and CONWAY,* District Judge.

OPINION

Rosenbaum, Circuit Judge:

A small island lies just off Key West, Florida. It was not born in the usual way. No volcanic lava plumes rose

* The Honorable Anne C. Conway, United States District Judge for the Middle District of Florida, sitting by designation.

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from the sea and created it. Rather, about a hundred years ago, the United States labored to dredge oceanic soil from Key West Harbor, which it piled up on the ocean floor. Later, during World War II, the United States conducted further dredging operations in the area and again dumped the soil it collected in the same area in Key West Harbor. At some point during these operations, Wisteria Island was born.

After Wisteria Island's birth, Congress ceded title to all lands within three miles of the United States's coast to the states, except for lands that were (1) "built up," "filled in," "or otherwise reclaimed" (2) by the United States (3) for the United States's use. We must determine whether Wisteria Island satisfies this exception. Only the third requirement is at issue in this appeal: whether the United States created Wisteria Island for its "use."

Plaintiff-Counterdefendant-Appellee United States says that it created Wisteria Island to store dredged soil. Defendant-Counterclaimant-Appellant F.E.B., which claims to own the island, rejects the United States's assertion that it built Wisteria Island for its "use." According to F.E.B., the island arose simply as a result of the United States's discarding of the soil it dredged from the channel. After all, F.E.B. says, merely dumping soil in a pile isn't *using* it.

We agree with the United States that, if it created Wisteria Island as a place to store dredged soil, then the United States built up or filled in Wisteria Island for the United States's use. But on this record, we find a genuine

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issue of material fact exists as to why the United States created the island. So after a thorough review of the record and with the benefit of oral argument, we affirm in part and vacate in part the district court’s grant of summary judgment to the United States and denial of summary judgment to F.E.B., and we remand this case for a factual determination of why the United States created Wisteria Island.

I. FACTUAL BACKGROUND**A. The Creation of Wisteria Island**

The United States received the land that became Florida—then known as “La Florida”—from Spain in the 1818 Adams-Onís Treaty. *See Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, Spain-U.S.*, Feb. 22, 1819, 8 Stat. 252.

Just over twenty-five years later, in 1845, Florida officially became a state. *An Act for the Admission of the States of Iowa and Florida into the Union*, Pub. L. 28-48, 5 Stat. 742 (Mar. 3, 1845). The Florida Keys, a chain of islands south of mainland Florida, is a part of the state of Florida. Key West lies at the southwest end of the Keys. The same year that Florida became a state, President Polk reserved the “shoals” of Key West for “military purposes.”

Eventually, in the early 1920s, the United States “dredged”—or removed soil from the ocean floor—in Key West Harbor, piling the dredged oceanic soil (also called

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“spoils” or “spoilage”) up until it became an island.¹ Just before that, during a hurricane in 1919, a 150-foot ship called the *Wisteria* sank near the shallow ocean floor upon which Wisteria Island was later built. In recognition of that event, the island that the United States created in that area was called Wisteria Island.

After the dredging was complete, two men applied to buy the island for \$500. The Florida Trustees of Internal Improvement Fund published a notice that it intended to sell the island. But the Navy Department objected that the island belonged to the United States and therefore was not Florida’s to sell. The Trustees withdrew the notice and rejected the application. In the meantime, the Navy Department asked the Secretary of the Interior for an executive order reserving the island for military use because the island was “directly under the guns of Fort Taylor” and, if privately developed, might “become a constant source of expense on account of claims by private parties for damages incidental to gun fire.” In addition, it said, “[i]f in the future Key West defenses are to be modernized, these areas would be of great value in connection with outer defense works In view of their strategic location for naval purposes . . . it is desired to have them formally reserved for naval purposes.” Just a month later, President Coolidge issued an executive order reserving, for naval purposes, this area near Key West, including Wisteria Island.

1. The parties dispute whether the spoils location was above or below the water line, but that distinction is irrelevant for purposes of this appeal.

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This is a map depicting Wisteria Island in relation to Key West. A red arrow points to Wisteria Island.



The record is silent about what happened to Wisteria Island between the 1920s and 1940s. But after World War II broke out, the United States began a “huge dredging contract” to “provide adequate seaplane landing and take-off areas,” moving some 5.4 million cubic yards of spoils over two years. The project also deepened the “submarine basin” to twenty-two feet and “the main ship channel” to thirty feet. During that period, the United States again dumped the dredge spoils where it had in the 1920s. As

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a result, Wisteria Island expanded to its current size,² about twenty-one acres above water and eighteen below, for a total of thirty-nine acres.

The United States intended the maximum fill height—meaning how tall the island would be—to be five feet over the mean high-water line. But if the available material on the island were leveled, Wisteria Island’s flattened elevation would be only three feet over the mean high-water line.

One of F.E.B.’s expert witnesses, geotechnical engineer Mr. Roberto Balbis, submitted a report stating that “[i]t appears that the discharge area was not walled off to help contain the discharge and maximize the amount of fill retained” and that the filling of Wisteria Island was “haphazard.” In his view, “the haphazard manner of filling suggests that Wisteria [Island] was simply a place to discard excess spoil not needed for any purpose.”

B. Legal Developments

Shortly after Wisteria Island reached its current size, oil was discovered in the undersea floor just off the West Coast of the United States. *United States v. California*, 332 U.S. 19, 23, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947) (“*California I*”). Unsurprisingly, both the United States and the coastal states claimed ownership of the oil. *Id.* In

2. It’s possible that the island was originally larger and shrank because of erosion over time. And while that fact may be relevant at trial, the precise details aren’t relevant to this appeal.

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1947, the Supreme Court settled the dispute by holding that the near-offshore undersea floor belonged to the United States. *Id.* at 40. In response, Congress considered ceding some of the near-offshore undersea floor to the coastal states—the question was how much. *See F.E.B. Corp. v. United States*, 818 F.3d 681, 687 (11th Cir. 2016) (“*F.E.B. I*”).

During the legislative process, Secretary of the Navy Robert Anderson testified before Congress that petroleum was crucial to the military and also that the military had bases and other improvements on near-offshore islands. *Submerged Lands: Hearings on S.J. Res. 13, S. 294, S. 107, S. 107 Amendment, and S.J. Res. 18 Before the S. Comm. on Interior & Insular Affs.*, 83rd Cong. 545 (1953) (statement of Robert B. Anderson, Secretary of the Navy). He expressed concern that “in some of the proposed bills[,] title of the United States would be relinquished to all lands beneath navigable waters within State boundaries[,] which is defined to include filled in, made or reclaimed lands.” *Id.* at 546. The problem, Secretary Anderson said, was that a “substantial number of military and naval installations are located on filled in lands and have been improved by the erection of permanent buildings and other structures at a cost to the Government of many millions of dollars.” *Id.* So, he concluded, it was “essential that any legislation that would affect lands or installations of the nature described herein should contain appropriate provisions confirming title to and reserving title in the United States to such lands and improvements. In Secretary Anderson’s view, then, “[t]hese lands with their structures are truly property which has been developed by the Federal

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Government and bear no immediate relation to the matter you now have under consideration.” *Id.*

One Senator asked Secretary Anderson whether he had a list of the places that should be excluded because they had such improvements. *Id.* at 547. Secretary Anderson responded that he would prefer that “the title to military shore installations could be protected by a general provision.” *Id.* But, he said, “[i]f . . . Congress found that it could not properly be so protected, we would be glad to submit such descriptions as you would think appropriate.” *Id.* Rear Admiral Ira Nunn, the Judge Advocate General of the Navy, submitted a partial list of such places. *Id.* at 550; see *Bills to Promote the Exploration, Development, and Conservation of Certain Resources in the Submerged Lands and to Provide for the Use, Control, and Disposition of the Lands and Resources of the Lands Beneath Inland Waters and In the Continental Shelf: Hearings on H.R. 2948 and Similar Bills Before the Subcomm. No. 1 of the H. Comm. on the Judiciary*, 83rd Cong. 201 (1953) (Statement of Ira Nunn, Judge Advocate General of the Navy). Among those listed was Naval Base Key West.

Attorney General Herbert Brownell, Jr., also testified. *Submerged Lands: Hearings on S.J. Res. 13, S. 294, S. 107, S. 107 Amendment, and S.J. Res. 18 Before the S. Comm. on Interior & Insular Affs.*, 83rd Cong. 925 (1953) (Statement of Herbert Brownell, Attorney General). In his opening statement, he emphasized that the Department of Justice hoped the eventual law would “make certain that all installations . . . on submerged, reclaimed, or filled or other lands” by “the Federal Government” “belong[ed] to [the Federal Government].” *Id.* at 926.

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In 1953, Congress passed the Submerged Lands Act (the “Act”), 43 U.S.C. §§ 1301–15, *et seq.*, which transferred to states the title and ownership of “lands beneath navigable waters” within the boundaries of states and all lands beneath navigable waters within three geographical miles of the state’s coast. *Id.* §§ 1301(a)(1)-(2), 1311. But Congress expressly excepted from this grant “all lands filled in, built up, or otherwise reclaimed by the United States for its own use.” *Id.* § 1313(a).

C. Selling Wisteria Island

Meanwhile, two years earlier, in 1951, Florida again noticed its intent to sell Wisteria Island—this time via a quitclaim deed (one with no warranties of title) to a private buyer. *F.E.B. I.*, 818 F.3d at 684. The United States objected to the sale, claiming that the federal government, not the state of Florida, owned Wisteria Island. *Id.* The sale went through, anyway. *Id.*

In 1954, the Navy asked the Bureau of Land Management about its claim to Wisteria Island, explaining that Wisteria Island and the area around Frankfort Bank were of “great strategic importance.” The Navy asserted that Wisteria Island was close to “highly classified Naval activities,” and it would be a “security risk to allow the island to fall into the hands of private individuals.”

Nonetheless, in 1967, F.E.B. acquired the title to Wisteria Island. *Id.* Wisteria Island experienced (legally speaking) a still breeze until 2011. And then the legal clouds began to gather.

*Appendix C***II. PROCEDURAL HISTORY****A. *F.E.B. I***

In 2011, the United States asserted ownership over Wisteria Island. *Id.* In response, F.E.B. sued under the Quiet Title Act, 28 U.S.C. § 2409a, arguing that it owned the island. *Id.* at 684–85. The district court held that F.E.B.’s action was time-barred and dismissed the case for lack of subject-matter jurisdiction. *Id.* at 685.

On appeal, we affirmed. Under the Quiet Title Act, a cause of action accrues when “the plaintiff or his predecessor in interest knew or should have known of the claim of the United States” to the real property. *Id.* (citing 28 U.S.C. § 2409a(g)). Florida—F.E.B.’s predecessor in interest—knew of the United States’s claim in 1951 because the United States had objected to the sale and claimed ownership at that time. *Id.* So, we said, the twelve-year statute of limitations began in 1951 and ran in 1963, nearly fifty years before F.E.B.’s 2011 lawsuit. *Id.*

We rejected F.E.B.’s argument that the United States had acquiesced in F.E.B.’s ownership or, through the 1953 passage of the Act, abandoned the 1951 claim of ownership so as to reset the statute of limitations. *Id.* at 687. We reasoned that the United States couldn’t abandon property without an affirmative congressional act, which needed to be “clear and unequivocal,” and the Act did not rise to that level. *Id.* at 688. This was so, we said, because the Act released only *some* submerged lands and excepted those that were filled in, built up, or otherwise reclaimed

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by the United States for its own use. *Id.* As we explained, the Act wasn't a clear and unequivocal retraction of the United States's claim to Wisteria Island because it wasn't apparent whether Wisteria Island satisfied the filled-in land exception. *Id.*

We abstained from resolving the merits question: whether Wisteria Island *was* "filled in, built up, or otherwise reclaimed by the United States for its own use." *Id.* at 693. Rather, we said "only that, given the undisputed and well-known facts of Wisteria Island's creation, the plain language of the [Act's] exception for lands 'built up by the United States for its own use,' gave rise to an open and obvious question as to whether the [Act] applied in this case." *Id.* (citation omitted). "The title dispute," we concluded, "remains unresolved." *Id.* at 694 (citations omitted).

B. The Proceedings in District Court in this Case

Following F.E.B.'s lawsuit, in 2018, the United States sued F.E.B., seeking a declaratory judgment that the United States, not F.E.B., held title to the thirty-nine acres—twenty acres above sea level and nineteen below—that made up Wisteria Island. In its answer, F.E.B. disputed that the property at issue was thirty-nine acres, arguing that a little over seventeen acres were not subject to the Act's exception.

The parties filed cross motions for summary judgment. For its part, the United States—seeking summary judgment as to all thirty-nine acres—submitted evidence

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that the United States had used Wisteria Island “[a]t various times before 1953 . . . as a protective barrier for naval operations . . . ; as a spoil area; and for operational purposes.” It argued that there was no factual dispute that the island was created by dredging and used as a spoils location. Wisteria Island, the United States said, was built up by the United States for the United States’s use. The United States also said that *F.E.B. I*’s holding—that the United States hadn’t clearly and unequivocally conveyed title to Wisteria Island to Florida—required the court to find for the government. Finally, the United States pointed out that the Navy had explicitly referenced Key West Naval Base as a location it wanted protected in a report to Congress while Congress was writing the Act.

F.E.B. responded that Wisteria Island didn’t fit in the Act’s exception for lands “filled in, built up, or otherwise reclaimed by the United States for its own use” because the Navy had simply discarded the dredged soil there and hadn’t done anything on Wisteria Island—flattened the top, built anything on it, or even protected it from erosion. F.E.B. pointed to a 1956 report from the Commander of the Key West Naval Base explaining that “the deposit of spoil that created Wisteria was ‘incidental to the deepening of the ship channel’ and that ‘there [was] nothing on record locally as to the intention of the Navy to use the Island after it was created.’” It also relied on testimony from Secretary Anderson, Rear Admiral Nunn, and Attorney General Brownell, Jr., to support its claim that Congress never intended to reserve its claim to Wisteria Island because the executive officers were concerned with retaining lands that the United States had improved, and the United States didn’t improve Wisteria Island.

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Second, F.E.B. said our decision in *F.E.B. I* didn't control the outcome because we had explicitly left open whether Wisteria Island fit within the Act's exception. F.E.B. also attached numerous expert reports, including an expert report from grammarian Mr. Bryan Garner, linguist Dr. Barry Schein, and surveyor Mr. Michael Finkbeiner. Mr. Garner's and Dr. Schein's reports—as well as parts of Mr. Finkbeiner's report—concluded that the phrase “for its own use” in the Act must have independent meaning from “built up or filled in” because the language would otherwise be surplusage. F.E.B. didn't argue that summary judgment was improper for all thirty-nine acres because part of Wisteria Island wasn't subject to the Act's exception, as it wasn't made of dredge spoils.

The United States moved to exclude the expert reports as improper expert opinions because they purported to analyze and interpret statutes. Thus, the United States argued, the reports invaded the province of the judge. For its part, F.E.B. asserted that the expert-witness testimony wasn't excludable because it was helpful in analyzing the grammatical structure of the statute, even if it went to the ultimate issue.

The district court entered summary judgment for the United States. It began by defining the question at summary judgment: whether the “incidental but deliberate creation” of Wisteria Island was “for [the United States's] own use.” Next, the district court concluded that *F.E.B. I* was persuasive, but not binding, authority that Wisteria Island was created for a distinct purpose. That Wisteria Island had no future use, the district court reasoned,

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wasn't relevant because the word "future" was not in the statute. The district court declined to rely on the grammarian expert reports because, it said, statutory interpretation is the exclusive province of the court and, if there were any ambiguity, the district court was required here to construe the statute in favor of the United States.

After the district court granted the United States's summary-judgment motion, the United States submitted a proposed judgment decreeing that the United States owned all thirty-nine acres of Wisteria Island. F.E.B. objected. In its view, only the twenty acres above sea level could be characterized as "filled in" under the Act's exception. The district court entered judgment against F.E.B., awarding all thirty-nine acres of Wisteria Island to the United States.

F.E.B. reiterated its argument that some of the land wasn't "filled in" in Rule 59(e), Fed. R. Civ. P., and Rule 60, Fed. R. Civ. P., motions. The district court ordered the parties to address whether F.E.B. abandoned or waived the argument in its Rule 59(e) and Rule 60 motions when it failed to make it in response to the United States's motion for summary judgment.

In response, the United States said that F.E.B. had waived the argument because it had agreed that the "Subject Property" was thirty-nine acres and that the relevant question was whether the Act applied to those thirty-nine acres. F.E.B. took the opposite position. It reasoned that it had preserved its argument through its expert reports showing that not all of the thirty-nine

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acres were made of dredged soil. The district court denied F.E.B.'s Rule 59(e) and Rule 60 motions for three reasons. It concluded that F.E.B. hadn't preserved the argument through references in some expert reports, that F.E.B. had invited the error in framing its summary-judgment briefing, and, that, on the merits, the Act applied to land in question.

F.E.B. now appeals both the entry of summary judgment and the denial of its post-judgment motions.

III. STANDARD OF REVIEW

We review the grant or denial of summary judgment de novo. *B&G Enters., Ltd. v. United States*, 220 F.3d 1318, 1322 (11th Cir. 2000).

As for the district court's decisions about "the admissibility of expert testimony and the reliability of an expert opinion," we review them for abuse of discretion. *United States v. Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc). Under this standard, "we must affirm unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard." *Id.* at 1259.

We likewise review for abuse of discretion the district court's denial of a Rule 60(b) motion for relief from a judgment or order. *Arthur v. Thomas*, 739 F.3d 611, 628 (11th Cir. 2014). The same is true of our review of the district court's denial of a Rule 59(e) motion to alter or amend a judgment. *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998).

*Appendix C***IV. DISCUSSION**

F.E.B. makes three arguments on appeal. First, F.E.B. asserts that the district court erred in entering summary judgment for the United States because Wisteria Island wasn't created for the United States's "own use." Second, F.E.B. claims that the district court erred in disregarding F.E.B.'s expert witnesses' reports on the statutory interpretation of the Act. And third, F.E.B. contends that the district court erred in denying its post-judgment motions to amend or otherwise relieve F.E.B. of the district court's judgment here.

A. Submerged Lands Act

We first must decide whether the Submerged Land Act's exception for land "created for [the United States's] own use" applies to Wisteria Island.

Because this is a case about the meaning of a statute, we begin "with the statutory text, and end[] there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183, 124 S. Ct. 1587, 158 L. Ed. 2d 338 (2004). The Supreme Court has instructed that we should generally construe words "as taking their ordinary meaning at the time Congress enacted the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539, 202 L. Ed. 2d 536 (2019) (alterations adopted and internal citations omitted). Here, Congress passed the Act in 1953, so we consult contemporaneous dictionaries. *Id.*

We begin with the word "for." "For" in this context requires intent. The fourth edition of *Black's Law*

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Dictionary—published in 1951—defined “for” at least in part as “[t]he cause, motive or occasion of an act, state[,] or condition.” *For*, *Black’s Law Dictionary* (4th ed. 1951). And the *New International Dictionary* of the same era described it similarly. *For*, *New International Dictionary* (1952) (“having as goal or object; in order to be, become, or act as”). Cf. *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto. Aerospace & Agric. Implement Workers Loc. 787*, 523 U.S. 653, 656, 118 S. Ct. 1626, 140 L. Ed. 2d 863 (1998) (“It is true enough . . . that one of the numerous definitions of the word ‘for’ is . . . ‘[w]ith the purpose or object of.’”) (citation omitted). The contemporaneous dictionaries then, establish that land is filled in “for” the United States’s use when the land is filled in “with the purpose or object” that the United States will use it—in other words, not accidentally.

The other key word is “use.” “Use,” in the 1950s, had a broad definition. The fourth edition of *Black’s Law Dictionary* defined “use” as “to make use of, to convert to one’s service, to avail one’s self of, to employ” and as the “act of employing everything, or state of being employed, application; employment, as the use of a pen, or his machines are in use. Also the fact of being used or employed habitually[.]” *Use*, *Black’s Law Dictionary* (4th ed. 1951). The 1952 *New International Dictionary* defined “use” as “to convert to one’s service, to avail oneself of”; to “engage in, carry one, indulge in” and “function.” *Use*, *New International Dictionary* (1952). “Use” then, can really mean any utility, any way in which the filled in land is “convert[ed]” to the United States’s “service.”

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Applying those definitions here, we derive three principles. First, because of the presence of the word “for,” the filling in or building up must have some intentionality to it—it cannot be accidental. *Id.* The United States does not “build up” an island *for* its own use accidentally. Second, “use” is a broad term—converting to service or employing (again, *for* a purpose). And third, we note that the Act does not require *actual* use. That is, the text does not demand that the use be employed. As long as the land was created to be used, it doesn’t matter whether the United States actually used the land.

The question, then, is whether the United States had an intended use for Wisteria Island when the United States created it. “As a general rule, a party’s state of mind (such as knowledge or intent) is a question of fact for the factfinder, to be determined after trial.” *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1476 (11th Cir. 1991). Both parties have submitted evidence supporting their positions. On this record, we cannot say that evidence necessarily resolves the question in one party’s favor. So we hold that a factfinder must determine the United States’s intent in creating Wisteria Island.

The United States argues that Wisteria Island was created for the “use” of storing dredged soil. As the United States explains the island’s history, the United States completed a dredging project in the 1920s, dumping spoils in the area that became known as Wisteria Island. But that wasn’t the only time the United States deposited spoils there. Twenty years later, the United States carried out another dredging project and again dumped the spoils in

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the same area—this time on top of the older spoils. The United States suggests that, when Wisteria Island was created, it served as a designated storage site for dredging spoils extracted from the Key West area.

We agree that, if true, this purpose could fit within the Act’s “for its own use” exception. “Storage” is a use. So if that was the United States’s intent in creating Wisteria Island—to establish a storage location for spoils from the Key West area at the time of the original buildup in the 1920s and also beyond—the United States “convert[ed] [the soil] to [its] service.” *Use, New International Dictionary* (1952).

But uncritically accepting the premise that the concept of “storage” fits within “use” would eviscerate the meaning of the latter term. That is, the United States could argue that anytime it put dredge spoils (or even trash) in a spot, and those deposits created land, it was “storing” the spoils or trash there. Under that theory, *all* filled-in or built-up lands would be created for the “use” of storing dredged spoils. The phrase “for its own use” would be surplus-age—a result we strive to avoid. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (“[No words] should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

So how do we draw the line between storage that is “use” and simple dumping? Speaking in normal parlance, when we put soil (or anything else) in a particular place, sometimes we are storing it and other times we are

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disposing of it. The difference between storage and discarding is, in our view, an intent of future use.³ For instance, when we put unwanted trash in the trashcan, we are disposing of it because we don't want it anymore and don't intend to use it; we aren't "storing" it there. On the other hand, when we leave the car in the garage, we are storing it (not disposing of it) because we are going to use it in the future.

Applying that logic here, we consider the United States's intentions when it built up what became known as Wisteria Island. If, at that time, the United States intended to use it not just then but also in the future as a designated place to put dredge spoils from the Key West area, then it created Wisteria Island for its own use—namely as a location to store dredging spoils. But if the United States just dumped the spoils in the area with no intention of ever depositing further dredge spoils (or otherwise using Wisteria Island), then the United States did not create Wisteria Island "for its own use." Rather, it just discarded the spoils in a pile that became known as Wisteria Island. And that does not qualify as "for its own use."

The Supreme Court's decision interpreting the Act, *California ex rel. State Lands Commission v. United States*, 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982) ("*California II*"), reinforces this analysis. In *California II*, the United States had built protective barriers at the

3. Still, as we have noted, there is no requirement that the United States *actually* use the land in the future.

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entrance of Humboldt Bay. Over time, as the bay's tides moved sand, that water movement caused sand to build up around the barriers, creating dry land. *Id.* at 275. The United States and California debated who owned land that had accreted around the jetties.⁴ *Id.* at 276. The Supreme Court resolved the case on choice-of-law and riparian-law grounds. It concluded that, under applicable federal law, accreted lands belonged to the upland owner, the United States. *Id.* at 285–86.

But California also made a second, independent argument. It contended that, even if the accreted land belonged to the United States, the Act constituted an express surrender of the title. *Id.* at 286. The Supreme Court rejected this argument because the Act didn't apply to accreted land. *Id.* at 287 (“We do not read this provision of the Act as applying to the gradual process by which sand accumulated along the shore, although caused by a jetty affecting the action of the sea.”). And even if the Act had applied, the Supreme Court said, the accretions fit the exception for “all lands filled in, built up, or otherwise reclaimed by the United States for its own use.” *Id.* at 287.

4. “Accretion” occurs when water “gradual[ly] and imperceptibl[y]” deposits silt, sand, soil, or sediment on an existing structure “so as to create new dry land in an area that was previously covered by water.” *Proof of Accretion or Avulsion in Title and Boundary Disputes Over Additions to Riparian Land*, 73 *Am. Jur. Proof of Facts* 3d 167 (Sept. 2022 Update), I.B., § 6.

A jetty is a barrier projecting into the sea or other body of water to protect a harbor. *Webster's Universal College Dictionary* (1st ed. 1997).

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While this final statement is dicta,⁵ it is Supreme Court dicta. So we apply it as much as the text of the statute allows. *See Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006) (“[T]here is dicta and then there is dicta, and then there is Supreme Court dicta.”). Applying those facts here, if the unintentional accretion of land around a jetty that the government built for its own use could qualify for the Act’s “use” exception, then if the United States intended what eventually became Wisteria Island to serve as a location for dredging-spoil deposits, that land purposefully piled into a particular place would also qualify.⁶

5. That statement is dicta for two reasons. First, we so characterized it in our prior appellate decision interpreting this statute. *See F.E.B. I*, 818 F.3d at 689 (“*In California II*, the Supreme Court stated in dicta that the SLA exception for land built up by the United States ‘for its own use’ would apply to coastline that had slowly accreted after the United States constructed jetties nearby[.]”). We are bound by that determination here. *Smith v. GTE Corp.*, 236 F.3d 1292, 1304 (11th Cir. 2001) (explaining that the prior panel precedent rule applies to the earlier case’s “reasoning and result”). Second, because the Supreme Court held that the Act didn’t apply, its statement that an exception to the Act would apply wasn’t necessary to decide the case. *Jordan v. Hamlett*, 312 F.2d 121, 124 (5th Cir. 1963) (“In any event, what was said there in this regard was not necessary to the holding[] and was dictum.”). The Supreme Court’s decision would be unchanged if the sentence about the Act’s exception were eliminated because the Supreme Court held that the Act didn’t apply at all.

6. Some might suggest that *California II* could be read as creating a rule that the Act does not require an intended use for the land at all. After all, the land accreted around the jetties in *California II* inadvertently—the United States did not fill it in for

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F.E.B. rejects this conclusion, relying on an expert witness (Mr. Balbis) who said that “[i]t appears that the discharge area was not walled off to help contain the discharge and maximize the amount of fill retained” and that the filling of Wisteria Island was “haphazard.” Mr. Balbis continued that “the haphazard manner of filling suggests that Wisteria [Island] was simply a place to discard excess spoil not needed for any purpose.” Maybe so. But even if it was, that does not necessarily mean that

its own use (though, of course, the United States did build for its own use the jetties around which the land accreted). But we don’t read *California II* this way because it would cause the language in the Act—“filled in *for* the [United States’s] *use*”—to be surplusage. That is so because, if inadvertently created land were land created “for the United States’s use,” then *all* land would qualify under the exception, and the “for its own use” phrase would be meaningless.

The Supreme Court in *California II* had no occasion to consider whether the Act included a use requirement because it held the Act didn’t apply at all to the land in question and devoted only a paragraph to the topic. *See Schwab*, 451 F.3d at 1325 (following dicta because “[t]his is not subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta. It is well thought out, thoroughly reasoned, and carefully articulated analysis by the Supreme Court describing the scope of one of its own decisions”).

We are duty-bound to follow the Supreme Court’s decisions but we don’t unnecessarily follow dicta to the point at which the result would conflict with the express text of a statute. *See, e.g., Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2498, 213 L. Ed. 2d 847 (2022) (“Dicta that does not analyze the relevant statutory provision cannot be said to have resolved the statute’s meaning. . . . [T]he Court’s dicta, even if repeated, does not constitute precedent and does not alter the plain text of the General Crimes Act[.]”).

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the United States did not create Wisteria Island “for its own use.” As we’ve explained, if the United States created the land with the intent of designating a dredge-spoils dumping ground (or a place to “store” the dredge spoils, as the United States describes it)—not just for the original dredging project in the 1920s but for other dredging projects in Key West Harbor in the future—then it created the island “for its own use.”

On this record, we can’t tell. To be sure, the United States argues that it built Wisteria Island for the purpose of storing dredge spoils. And the United States did, in fact, later use Wisteria Island for the dumping of additional dredge spoils. But as we’ve noted, F.E.B. has also presented evidence from its experts that a factfinder could find supports the notion that the United States had no plan for future use of Wisteria Island when it created the land. So on this record, it’s not clear to us what the United States’s intent was at the time it built up what became known as Wisteria Island. For that reason, a factfinder must determine what the United States’s intent was. *Williams v. Obstfeld*, 314 F.3d 1270, 1277 (11th Cir. 2002) (“[T]he existence of knowledge or intent is a question of fact for the factfinder, to be determined after trial.”).⁷

7. The trial will be a bench trial because neither side demanded a jury trial. *See* Fed. R. Civ. P. 38 (d) (“A party waives a jury trial unless its demand is properly served and filed.”); *cf. United States v. Florida*, 482 F.2d 205, 207 (5th Cir. 1973) (holding non-jury trial where United States filed a declaratory judgment action to quiet title). In addition, F.E.B. was not entitled to a jury trial because it counterclaimed against the United States. *See* 28

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The parties argue instead that each is entitled to full summary judgment. We are not persuaded.

First, we reject the United States’s argument that we are bound by *F.E.B. I*’s statement that “Wisteria Island’s origin is undisputed: It was built up by Navy contractors, who used the land for the government’s purpose and benefit of storing fill accumulated from nearby dredging operations.” *F.E.B. I*, 818 F.3d at 688. To the contrary, *F.E.B. I* explicitly declined to decide whether the Act’s exception applied to Wisteria Island. *Id.* at 693 (holding that the facts of Wisteria Island’s creation “gave rise to an open and obvious question as to whether the [Act] applied” leaving “further explication of these issues to future cases”).

Second, we find unpersuasive the United States’s appeal to the presumption that “grants of federal property are construed strictly in favor of the United States.” *F.E.B. I*, 818 F.3d at 689. The presumption is that “nothing passes except what is conveyed in clear language.” *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S. Ct. 685, 1 L. Ed. 2d 693 (1957). But here, the Act is an explicit textual grant of federal property. The only question is whether Wisteria Island fits within an exception to that clear grant. That answer turns not on the clarity of the textual grant but on the facts about the purpose (or lack thereof) underlying Wisteria Island’s creation.

U.S.C. § 2409a (“A civil action against the United States under this section shall be tried by the court without a jury.”).

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And *third*, the United States points out that, when asked for a list of “filled in” lands, Rear Admiral Nunn submitted a list to Congress that included the naval station at Key West. That fact might well be evidence that the factfinder could consider. But Rear Admiral Nunn’s submission—as a member of the executive branch—is evidence of executive intent, not legislative intent. The United States hasn’t directed us to—nor have we found—a congressional report or committee report that Congress specifically intended to retain title to Wisteria Island—only that the executive branch wanted Congress to do so. *See Demby v. Schweiker*, 671 F.2d 507, 511, 217 U.S. App. D.C. 1 (D.C. Cir. 1981) (rejecting “the contention that the views of an officer of the Executive Branch . . . constitute evidence probative of congressional intent under the circumstances here”).

In short, the United States has submitted only enough evidence that it created Wisteria Island for its own use to get to a trial—not for judgment as a matter of law.

F.E.B.’s arguments fare no better. *First*, F.E.B. contends that “dredging is not a use.” This is so, F.E.B. says, because all dredged lands are filled-in lands. So F.E.B. posits that if dredged lands were “lands filled in, built up, or otherwise reclaimed by the United States *for its own use*,” 43 U.S.C. § 1313(a) (emphasis added), merely because the United States had dredged them, then “for its own use” would be redundant of “lands filled in, built up, or otherwise reclaimed by the United States.” Put simply, F.E.B. reasons, the phrase would lack meaning.

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We agree that, if the United States’s discarding of spoils—never intended for any future purpose—constituted use, then the word “use” would be surplusage. But as we’ve explained, if the United States intended to use what became Wisteria Island as a designated dumping location for future dredge spoils, that’s a “use” in the same way that a garbage dump is a “use” of the land on which it is located.

Second, F.E.B. emphasizes that the United States never used Wisteria Island in a more traditional sense. That is, the military never built a structure on it and the United States never otherwise improved it in any way. But because our focus must center on why the land was built, post-creation use (or lack thereof) isn’t dispositive. What matters is why (at the time of filing in or building up) the land was reclaimed. Was it accidental or was it for a reason? To be sure, that the United States never built an installation on the island may be probative of the fact that the United States didn’t “fill in” Wisteria Island for use as a military base. But it isn’t probative of whether the United States built Wisteria Island *at the time* for a purpose. Besides, the record shows that the United States did deposit additional dredge spoils about twenty years after it originally filled in the area. So again, if the United States created the island as place for contemporaneous and future dredge-spoil deposits, that still would be “for its own use.”

Third, F.E.B. relies on legislative history to show that Congress never intended for the Act to cover Wisteria Island. It cites the testimony of Secretary of the Navy

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Robert Anderson, Rear Admiral Ira Nunn, and Attorney General Herbert Brownell, Jr. But none of the three were members of the legislative branch, so their views can tell us little about what *Congress* intended. *See Demby*, 671 F.2d at 511.

As the District of Columbia Circuit has put it, “[executive officials’] views are binding neither upon Congress nor the courts in determining the meaning of this congressional enactment. They are, in essence, no more than free advice on the subject of how Congress might, if it chose, achieve a particular end.” *Id.* Rather, “Congress’ acceptance or rejection of such counsel suggests little about its true legislative intent. The only value of such comment is as an interpretation by an administrative official.” *Id.* We agree.

On this record, there is a genuine dispute of fact about whether the United States created Wisteria Island for its own use or whether Wisteria Island’s creation was an accident. Given that a genuine dispute of material fact exists, we must vacate the district court’s entry of summary judgment and remand for trial.

B. Expert Witnesses

F.E.B. also raises some arguments about its experts. First, it asserts that the district court abused its discretion in excluding F.E.B.’s expert witnesses’ testimony on the meaning of “for its own use.” And second, F.E.B. contends that the district court abused its discretion when it excluded the report of Mr. Finkbeiner, its expert

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surveyor, because, in F.E.B.'s view, the report would have been helpful. We disagree.

Under Federal Rule of Evidence 702, a witness with particular “knowledge, skill, experience, training, or education” may offer opinion testimony if that witness’s knowledge “will help *the trier of fact* to understand the evidence or to determine a fact in issue[.]” Fed. R. Evid. 702 (emphasis added).

The district court did not abuse its discretion in excluding F.E.B.'s experts because statutory interpretation is a legal question for a judge, not a factual question for the trier of fact. *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1129 (11th Cir. 2018). And at summary judgment, there is no trier of fact. Rather, the district court answers legal questions and determines whether enough evidence allows for a rational trier of fact to find for the non-moving party. See Fed. R. Civ. P. 56; *Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 569 (11th Cir. 1990) (“[T]he district court inappropriately acted as the trier of fact and erred in granting summary judgment to Bankers.”). While expert witnesses may offer opinions on an “ultimate issue” in a case, they may not offer “legal conclusions.” *Commodores*, 879 F.3d at 1128–29. In *Commodores Entertainment Corporation*, for instance, the excluded expert report opined that the “original members ‘owned the underlying marks jointly as tenants in common.’” *Id.* at 1129. We said this legal conclusion was “properly struck.” *Id.*

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Assuming without deciding that legal-conclusion expert reports may be admissible in limited circumstances,⁸ the district court didn't abuse its discretion in excluding the reports here.

Mr. Garner's expert report was explicitly a legal opinion. He acknowledged that, "[a]s a textualist, [he] abstain[ed] from using legislative history." Then he told the district court that he "believe[d]" his opinions "accord[ed] with sound principles of textual interpretation, and in [his] opinion the provision in question is unambiguous." Given that which interpretive sources to use and the ambiguity of a statutory provision are unquestionably matters of statutory interpretation, the district court did not abuse its discretion in excluding the report.

Dr. Schein's report is perhaps a slightly closer call (but not much). Dr. Schein offered background principles of English grammar, explaining how causative verbs function. But Dr. Schein also characterized his retention as an expert as being "to interpret sections of the Submerged Lands Act." As we have discussed, though, statutory interpretation is a matter for a judge. So we cannot say that the district court exceeded the bounds of its discretion in excluding Dr. Schein's report.

8. We can imagine circumstances in which such testimony—say, about foreign law or about the historical underpinnings of a term or phrase—might be helpful. *See, e.g., District of Columbia v. Heller*, 554 U.S. 570, 605, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (analyzing the original public meaning of the Second Amendment).

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Finally, F.E.B. asserts that the district court abused its discretion when it struck parts of the report of F.E.B.'s expert surveyor, Michael Finkbeiner.⁹ We disagree.

The district court did not err in striking the parts of the report that it excluded because Finkbeiner (1) defined legal terms; (2) opined on whether the United States in fact “filled in” the subject property or (3) explained the legal history of Wisteria Island. The district court did not need any assistance in finding or applying legal definitions. *See Commodores*, 879 F.3d at 1128–29. It therefore did not abuse its discretion in excluding parts of the surveyor’s report.

C. Reconsideration

Finally, F.E.B. argues that the district court erred in awarding all thirty-nine acres of Wisteria Island to the United States because the land below the water line is not “filled in” land. It says that the only competent evidence—a surveyor’s report—described the submerged land as “non-filled seabed.” F.E.B. also claims that it preserved the argument when, in its answer to the United States’s complaint, it denied that all thirty-nine acres

9. We aren’t sure whether the district court actually excluded the report. The district court did not reference Finkbeiner’s report. Nor did it describe the surveyor Finkbeiner in the excluding language of its order—referring to only “[l]inguists, legal lexicographers, and grammarians.” But it granted the United States’s motion—which sought to exclude parts of Finkbeiner’s report—in full. So we proceed as if the district court excluded the requested portions of Finkbeiner’s report.

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were subject to the Act. Because submerged land cannot be considered “filled in,” F.E.B. reasons, the district court clearly erred in awarding the United States title to those parts of Wisteria Island. We are not persuaded.

The district court did not abuse its discretion in denying F.E.B.’s motions because F.E.B. failed to preserve the issue. Litigants cannot use a Rule 59(e) motion to “raise argument or present evidence that could have been raised prior to the entry of judgment.” *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005). The same goes for Rule 60(b). *Arthur*, 739 F.3d at 628.

Here, the United States sued for a declaration that it owned *all* thirty-nine acres of Wisteria Island. It also moved for summary judgment as to *all* thirty-nine acres of Wisteria Island. F.E.B. did not respond by arguing that summary judgment as to all thirty-nine acres would be improper; it argued only that Wisteria Island wasn’t “filled in or built up” for the United States’s own use within the meaning of the statute. F.E.B. never asserted that below-sea-level spoils weren’t “built up.” Because F.E.B. didn’t develop this argument before the district court granted summary judgment, the district court didn’t abuse its discretion in denying the motions.

To be sure, F.E.B. mentioned this distinction in three places: (1) in one paragraph of its Answer; (2) in one sentence of its own motion for summary judgment; (3) in one sentence of one expert report. But those three snippets cannot preserve the issue. District courts resolving summary-judgment motions are not on buried-

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treasure hunts. And “[a] passing reference to an issue in a brief is not enough[.]” *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012). When the United States moved for summary judgment as to all thirty-nine acres, F.E.B. had to “plainly and prominently” clarify that it (thought that it) had title to the underwater acres regardless of the status of the above-sea-level land. *United States v. Willis*, 649 F.3d 1248, 1254 (11th Cir. 2011). It did not do so. For that reason, the district court did not abuse its discretion in refusing to consider F.E.B.’s fallback position.

V. CONCLUSION

If Wisteria Island was “filled in” or “built up” *for* the United States’s “use,” then it belongs to the United States. But on this record, we are unsure of the United States’s intent in creating Wisteria Island. The reason the United States created Wisteria Island remains the subject of a genuine question of fact that must be answered by a trier of fact. So we affirm in part and vacate in part, remanding for further proceedings consistent with this opinion.

AFFIRMED IN PART and VACATED AND REMANDED IN PART.

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**APPENDIX D — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF FLORIDA, FILED SEPTEMBER 30, 2020**

UNITED STATES DISTRICT COURT,
S.D. FLORIDA

Case Number: 18-10203-CIV-MARTINEZ

UNITED STATES OF AMERICA,

Plaintiff,

v.

F.E.B., CORP.,

Defendant.

Signed 09/30/2020

ORDER

JOSE E. MARTINEZ, UNITED STATES DISTRICT
JUDGE

THIS CAUSE came before the Court upon F.E.B. Corp.'s Renewed Motion Pursuant to Rule 59(e) to Alter and Amend Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendant's Motion for Summary Judgment and Motion Pursuant to Rule 60 Seeking Relief from the Judgment ("Motion") (DE 77). The Court concludes that the arguments set forth by

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F.E.B. are abandoned and alternatively fail on the merits. Accordingly, the Motion is **DENIED**.

I. Background

After eight years of litigation, including an appeal to the Eleventh Circuit, the parties agreed that the only issue left to be resolved on summary judgment was whether the United States transferred ownership of the Subject Property when it enacted the Submerged Lands Act of 1953 (“SLA”), 43 U.S.C. § 1301 *et seq.*

Following cross-motions by the parties, the Court granted summary judgment to Plaintiff (DE 67). The Court concluded that the Subject Property was excepted by the SLA, reasoning “that the filling in of a spoil area to facilitate Naval dredging operations counts as ‘lands filled in . . . by the United States for its own use.’” (*Id.*: 5). Thereafter, the Court declared: “Wisteria Island belongs to the United States pursuant to the ‘filled in . . . for its own use’ exception of § 1313(a).” (*Id.*: 9). On August 27, 2020, the Court entered final judgment for Plaintiff (DE 76), quieting title to the entire 39-acre Subject Property.

After eight years of litigation, an appeal, and an adverse final judgment on the merits, Defendant now seeks to, in effect, refine and supplement its position on summary judgment by asking the Court to alter or amend the judgment “by making it a partial summary judgment only as to the 20 land acres of the ‘Subject Property’ . . .” (DE 77-1: 3). Defendant claims: “From the beginning of this case it has been clear that the only

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‘filled in’ land was the island created by the dredge spoils.” (*Id.*: 2). On this basis, Defendant seeks consideration of the argument that only these approximately 20 acres of so-called “island land” or “upland”—as distinct from the total 39-acre parcel including “sea bottom”—was “filled in or built up by dredge spoils” of Navy contractors and thus subject to the “filled in . . . for its own use” exception of § 1313(a). (Motion at 2-4).

The Court requested further briefing from the parties based on concerns that this argument was not adequately developed on summary judgment and that F.E.B. expressly invited a ruling on the entirety of the 39-acre Subject Property. This matter is now ripe for consideration.

II. Legal Standards

Rule 59(e) permits a court to alter or amend a judgment. “The only grounds for granting [a Rule 59] motion are newly discovered evidence or manifest errors of law or fact.” *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (alteration in original) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999)). Rule 60(b), in contrast, allows relief to a party from a final judgment due to: (1) mistake, inadvertence, surprise or excusable neglect, (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time, (3) fraud, misrepresentation, or misconduct by an opposing party, (4) the judgment is void, (5) the judgment has been satisfied, released, discharged, reversed or vacated, or (6) any other reason that justifies relief. *See*

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Griffin v. Swim-Tech Corp., 722 F.2d 677, 680 (11th Cir. 1984); Fed. R. Civ. P. 60(b).

Neither Rule 59(e) nor Rule 60(b) permit a movant to raise argument or defenses that could have been raised prior to the entry of judgment. *See, e.g., Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005); *Gonzalez v. Sec’y for Dep’t of Corr.*, 366 F.3d 1253, 1291-92 (11th Cir. 2004).

III. Analysis

Upon review of the record in this case, the Court concludes that the argument asserted by Defendant in the Motion, i.e., that title to Wisteria Island can only be quieted as to approximately 20-acres of “upland” pursuant to the “filled in” exception of the SLA, is abandoned, waived and unpreserved. Put simply, Defendant failed to adequately develop the “upland-only” argument at the summary judgment stage.

To satisfy the Court that it had not abandoned its argument, Defendant refers the Court to its Answer and Affirmative Defenses, in which it denied that all 39 acres were dredge spoils and a similar allegation in a (later withdrawn) Counterclaim. Defendant further points to a bullet-point in its motion for summary judgment (DE 38: 38), and hundreds of pages of expert opinion as support for the notion that it has “preserved a distinction” between Wisteria Island’s upland and sea bottom. (DE 85: 1). However, *arguments* are preserved—not *distinctions*. And a bullet-point is just that—a bullet-point. The Court

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is not required to search through years of litigation and, along the way, germinate seeds of potential arguments for the benefit of the parties. *See Resolution Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) (“There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. Rather, the onus is upon the parties to formulate arguments. . . .” (internal citation omitted)); *Schneider v. Local 103 I.B.E.W. Health Plan*, 442 F.3d 1, 3 (1st Cir. 2006) (“It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel’s work. Judges are not expected to be mindreaders.” (internal quotations marks omitted; alterations accepted)).

More troubling, at the summary judgment stage, Defendant expressly invited the Court to enter judgment on a single issue in this case. In its motion, Defendant stated: “[T]he question now is whether Wisteria was ‘filled in, built up, or otherwise reclaimed for its own use.’ If it was, the United States has title. If it was not, the title is F.E.B.’s.” (DE 38: 20). Then, in response to Plaintiff’s motion, Defendant adopted the following as the dispositive question in this litigation: “Was the Subject Property excepted from the SLA under 1313(a) because it was filled in or built up by the United States for its own use?” again placing the entire 39 acres of the Subject Property at issue, not just 20 acres. (DE 51: 1-2). In response to the dispositive question, Defendant made only one argument: that the answer should be “no” because “a ‘spoil location’ is not ‘lands filled in, built up, or otherwise reclaimed by the United State for its own use.’ “ (*Id.*). Then, in a

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joint motion to stay the proceedings pending resolution of the summary judgment motions, the parties offered the rationale “that this case can be resolved on summary judgment.” (DE 53 ¶5). Defendant did not advise the Court that the cross-motions would leave open issues requiring additional litigation.

The Court’s concern is magnified by the fact that Defendant affirmatively agreed on summary judgment that “Wisteria Island—the subject property—actually was created by the spoil deposited from the 1940s dredging and before that there was no Wisteria Island.” (DE 38: 23). Defendant further stated: “It is undisputed that Wisteria was built up by the depositing of the spoils from the Navy’s dredging project on seabed.” (*Id.*). In Defendant’s Statement of Material Facts, it similarly asserted: “The Subject Property, Wisteria Island, was formed by the depositing of dredge spoil by the Navy in 1942-1943.” (DE 39 ¶1). Later, in response to Plaintiff’s motion for summary judgment, Defendant again conceded that “[t]he Subject Property was a byproduct of the dredging project,” (DE 51: 1 n. 1) and that “that Wisteria Island was built up by the dumping of dredge spoil. . . .” (*Id.*: 4).

As evident from these statements at the summary judgment stage (where issues are narrowed, as distinct from pleading), Defendant has used the term “Subject Property,” “subject property,” “Wisteria,” and “Wisteria Island” interchangeably, and repeatedly admitted that this property was built up or filled in by dredge spoils. Significantly, the term “Subject Property” has been

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defined by both parties as a 39-acre parcel of land. (DE 36 ¶ 2; DE 52 ¶ 2).

A court is under no obligation to reconcile a party's inconsistent statements or untangle its arguments. This dispute has been pending for eight years and the time to develop arguments has passed. Neither Rule 59 nor Rule 60 allow litigants to "keep their powder dry" until an adverse judgment is entered only then to resurrect matters that could have been fully explored earlier. This is not fair to the litigants or the Court. Defendant's failure to assert the "upland-only" argument in more than a perfunctory or skeletal manner on summary judgment constitutes abandonment and is not properly considered at this juncture.

Notwithstanding, the Court alternatively denies the Motion on the merits. As the Government correctly points out, "[t]he question at issue here is how much land was filled in by the United States during the 1940s dredge project, not how much land remained above sea level thereafter." (DE 78:13). Under the SLA "all lands filled in, built up, or otherwise reclaimed by the United States for its own use" are expressly excepted from the operation of that statute. 43 U.S.C. § 1313(a). Straightforwardly, "all lands" includes lands that are not only above sea level, but also lands that are submerged. The statute does not contain the distinction that Defendant presses in the Motion. Accordingly, Defendant's concession that "[t]he Subject Property, Wisteria Island, was formed by the depositing of dredge spoil by the Navy in 1942-1943," (DE 39 ¶1), must be taken at face value and ends this inquiry.

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IV. Conclusion

For the foregoing reasons, the Motion (DE 77) is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of September, 2020.

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**APPENDIX E — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF FLORIDA, FILED JULY 31, 2020**

UNITED STATES DISTRICT COURT, S.D. FLORIDA,
MIAMI DIVISION.

UNITED STATES OF AMERICA,

Plaintiff,

v.

F.E.B. CORP.,

Defendant.

Case No. 18-10203-CIV-MARTINEZ/OTAZO-REYES

|
Signed July 31, 2020

**ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT AND
DENYING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT**

JOSE E. MARTINEZ, UNITED STATES DISTRICT
JUDGE

THIS CAUSE comes before the Court on cross-motions for summary judgment filed by Plaintiff, United States of America (DE 35) and Defendant, F.E.B. Corp. (DE 38). The Court has carefully reviewed the motions, responses and replies thereto, and is otherwise fully

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advised in the premises. For the reasons set forth below, Plaintiff's motion is **GRANTED** and Defendant's motion is **DENIED**.

I. FACTS

The United States sued F.E.B. Corp. ("F.E.B.") under the Declaratory Judgment Act to resolve a title dispute between the United States and F.E.B. concerning approximately 39 acres of land off the coast of Key West, Florida. That property is presently known as Wisteria Island.

This lawsuit follows the Eleventh Circuit's affirmance of this Court's earlier dismissal of FEB's action to quiet title to the island. *F.E.B. Corp. v. United States*, 818 F.3d 681 (11th Cir. 2016) ("*F.E.B. I*"). There, the appellate court agreed that F.E.B.'s action was barred by the statute of limitations but "note[d] that the dismissal [did] not quiet title to the property in the United States. The title dispute remains unresolved." *Id.* at 693–94 (quotations and citation omitted). The United States filed the present action to settle the title dispute once and for all.

"Both parties maintain, by way of their respective motions, that this case can be resolved on summary judgment" (DE 53: 2) and do not contest the following facts. As set forth previously:

The island in question, known as Wisteria Island (or "the island"), is situated in the Gulf of Mexico, less than a mile off the coast of

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Key West, Florida. It is not a natural island, but rather was formed as a result of dredging operations performed under the auspices of the United States Navy (“Navy”) in nearby Key West Harbor during the first half of the nineteenth century. As Navy contractors deepened the channels in the harbor to improve shipping and aviation access, they deposited the dredged material on a nearby plot of submerged land. The accumulations eventually rose above sea level. A substantial dredging project in 1943 made the thirty-nine-acre (later-named) Wisteria Island what it is today.

In 1951, the state of Florida issued notice of its intention to sell Wisteria Island. The United States objected to the sale of the island on the grounds that the island belonged to the United States. In a letter to the state, the United States traced its ownership of the island and surrounding area to an 1819 treaty with Spain, as confirmed by subsequent 1845 and 1924 Executive Orders. The United States concluded, “In view of the foregoing [Florida is] informed that the Department of the Navy considers . . . the spoil area in question as being the property of the United States. It is, therefore, requested, that no further action be taken . . . to dispose of the spoil area in question by sale or otherwise.”

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In his own letter to the state, Florida's attorney general acknowledged the United States' claim, but expressed doubt as to its validity, opining:

I am unable to state definitively whether or not the Navy's claim is valid. However, I do think that the claim is debatable enough and so shrouded in antiquity that I think the best course would be for [Florida] to complete the sale and explain the Navy's claim to [the buyer] and allow him to accept the . . . deed at his own risk In this manner we can get the question of title settled one way or other in case the Navy decides to litigate with him.

Accordingly, in 1952, Florida sold the island to a private party via a quitclaim deed that contained no warranties of title.

One year later, Congress enacted the Submerged Lands Act ("SLA"), 43 U.S.C. §§ 1301–1315, which, broadly speaking, granted the states ownership of submerged lands within three miles of their coastlines, subject to certain exceptions. In the years that followed, the United States did not reassert its claim to Wisteria Island. Title passed from private owner to private owner until F.E.B. acquired the island in 1967. The federal government

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appeared to acquiesce to F.E.B.'s ownership, and even entered into licensing agreements with F.E.B. to use the island as a Navy training ground from 2004 to 2006.

In 2011, however, the United States once again asserted ownership over Wisteria Island. F.E.B. filed . . . suit under the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a, to establish ownership of the island The district court, however, did not reach the merits of F.E.B.'s SLA claim in this quiet title action.

F.E.B. I, 818 F.3d at 684–85 (footnotes omitted)¹; (*see also* DE 36, United States’ Statement of Material Facts ¶¶ 1-3, 34, 37-42, 52, 54, 68; DE 39, F.E.B.’s Statement of Material Facts ¶ 1). Pending before the Court are cross-motions for summary judgment on the merits of the title dispute. This matter is now ripe for adjudication.

II. LEGAL STANDARD

Summary judgment is appropriate when “there is no genuine dispute as to any material fact and the movant

1. *F.E.B. I* was decided in a summary judgment posture and the parties stipulate that the record in the prior case (No. 12-cv-10072-JEM) is incorporated into this case (DE 28). Although here F.E.B. relies substantially on expert interpretation of historical records to trace the evolution of the property since 1845, (DE 38-12), historical disputes preceding the Navy’s dredging project of 1941-1943 are outside the scope of this Order. Accordingly, the Court recites the undisputed facts as framed by the Eleventh Circuit in *F.E.B. I*.

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is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). At the summary judgment stage, the Court’s function is not to “weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In making this determination, the Court must construe the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party’s favor. *SEC v. Monterosso*, 756 F.3d 1326, 1333 (11th Cir. 2014). “If reasonable minds could differ on the inferences arising from undisputed facts, then a court should deny summary judgment.” *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1317–18 (11th Cir. 2015) (quoting *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir.1997)).

The movant “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). If the moving party bears the burden of proof at trial, the moving party must establish all essential elements of the claim or defense in order to obtain summary judgment. See *United States v. Four Parcels of Real Prop. in Greene and Tuscaloosa Counties*, 941 F. 2d 1428, 1438 (11th Cir. 1991). Once this initial burden is met, “the nonmoving party must offer more than a mere scintilla of evidence for its position; indeed, the nonmoving party must make a showing sufficient to permit the jury to reasonably find

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on its behalf.” *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1050 (11th Cir. 2015). But if the record, taken as a whole, cannot lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial, and summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

III. ANALYSIS

To resolve the ownership dispute over Wisteria Island the Court must consider the applicability the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301–1315. Straightforwardly, the SLA provides that “title to and ownership of the lands beneath navigable waters within the boundaries of the respective States . . . are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States.” *Id.* § 1311(a). Importantly, however:

Excepted from the operation of section 1311 of [the SLA is] (a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise

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than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; **all lands filled in, built up, or otherwise reclaimed by the United States for its own use**; and any rights the United States has in lands presently and actually occupied by the United States under claim of right

Id. § 1313 (emphasis added). Due to factual disputes over the historical origins of Wisteria Island, for summary judgment purposes the parties focus on the “filled in . . . for its own use” exception of § 1313(a). (DE 35: 6 n. 9). In this connection, both sides agree that Wisteria Island was “filled in” as a spoil deposit in conjunction with a dredging project in Key West Harbor from 1941-1943 conducted under the auspices of the Navy.

The only interpretative task for this Court, accordingly, is to determine whether the island’s incidental but deliberate creation was “for its own use.” In considering this question, the Court is guided by the tenet that “Congress used the words of the statute as they are commonly and ordinarily understood and [courts] must construe the statute so each of its provisions is given full effect.” *United States v. McLymont*, 45 F.3d 400, 401 (11th Cir. 1995). “Absent an ambiguity, the statute’s plain meaning prevails.” *Mike Smith Pontiac, GMC, Inc. v. Mercedes-Benz of N. Am., Inc.*, 32 F.3d 528, 531 (11th Cir. 1994). Applying the plain words of the statute,

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as they are commonly and ordinarily understood, Court concludes that the filling in of a spoil area to facilitate Naval dredging operations counts as “lands filled in . . . by the United States for its own use.” *Id.* §1313(a).

This Court’s conclusion is fortified by the Eleventh Circuit’s precedent in *F.E.B. I*. In that case, which is the precursor to this matter, the appellate court addressed whether the “SLA abandoned the federal government’s previously-expressed claim to the (formerly submerged) Wisteria Island, which in turn effectively reset the [Quiet Title Act’s] statute of limitations period for that island.” 818 F.3d at 688. The court determined that it did not, reasoning that “the circumstances of Wisteria Island’s creation hew closely enough to the ‘for its own use’ exception to the SLA to preclude a finding that the SLA clearly and unequivocally abandoned the federal government’s interest in that island.” *Id.* at 689. In reaching its conclusion, the Eleventh Circuit invoked “the Supreme Court’s only treatment of the exception” in *California ex rel. State Lands Comm’n v. United States* (“*California II*”), 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982) and further explained:

In *California II*, the Supreme Court stated in dicta that the SLA exception for land built up by the United States “for its own use” would apply to coastline that had slowly accreted after the United States constructed jetties nearby, even though the accretion was inadvertent, and the resulting coastline had remained barren and unused for the first eighty years of its

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existence. *Id.* at 275–76, 287. That result, the Supreme Court reasoned, “follow[ed] from the congressional object to assure each sovereign the continuing benefit of landfill and like work performed by each.” *Id.* at 287. **Wisteria Island surely was both created and used for a more functional purpose than the inadvertent accretions at issue in California II.**

Id. at 689–690 (footnotes and parallel citations omitted).

The parties quarrel about whether the Eleventh Circuit’s conclusion—that the creation and use of Wisteria Island had a functional purpose squarely within the ambit of the “for its own use” exception of § 1313(a)—is binding precedent or mere dicta. However, this debate is beside the point. The Supreme Court’s dicta in *California II*, and the Eleventh Circuit’s reasoning in *F.E.B. I* are, at minimum, highly persuasive authorities that fit together with a commonsense reading of the statute, and F.E.B. has not provided the Court a sound basis to depart from them.

In this connection, F.E.B. deploys two arguments, which it claims are supported by the SLA’s legislative history. First, F.E.B. distinguishes *California II*, emphasizing that that case “did not involve an ‘offshore spoil deposit,’ it involved only accretions to existing Government lands.” (DE 51: 2). F.E.B. implies that the distinction is legally significant because *California II* was supposedly predicated on legislative commentary that “embraced” the idea that spoil deposits must be adjunct to inland military improvements or installations to fall

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within the “for its own use” exception of §1313(a). (DE 51: 5). F.E.B. next argues that the phrase employed by the Eleventh Circuit in *F.E.B. I* (“Wisteria Island was . . . created and used”) is distinct from the phrase that appears in §1313(a) (“filled in . . . for its own use”), which F.E.B. contends is forward-looking and can only be triggered by a “subsequent use” pursuant to legislative history and rules of statutory construction. (DE 51: 3-4; 38: 24-26).

Initially, it must be pointed out that both arguments are not merely supported by legislative history but entirely dependent upon it. Thus, the principal strength of both arguments is simultaneously their biggest weakness because “[w]here the meaning of a statutory provision is clear, that language is the sole indication of legislative intent.” *Am. Bankers Ins. Co. of Fla. v. United States*, 265 F. Supp. 67, 74 (S.D. Fla. 1967), *aff’d*, 388 F.2d 304 (5th Cir. 1968); *see also Coggin Auto. Corp. v. Comm’r*, 292 F.3d 1326, 1332 (11th Cir. 2002) (“When the terms of a statute are clear, its language is conclusive and courts are not free to replace that clear language with an unenacted legislative intent.”) (alteration omitted).

Put simply, the SLA is clear on its face, and does not include a future-use requirement. And neither the SLA nor the Supreme Court’s dicta in *California II* make reference to a near-shore military improvement or installation requirement. Rather, the Supreme Court merely recognized “the congressional object to assure each sovereign the continuing benefit of landfill and like work performed by each.” *California II*, 457 U.S. at 287. And, as the Eleventh Circuit opined in *F.E.B. I*,

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that reasoning compels the conclusion that the Wisteria Island property was filled in for the use of the United States with even greater force than the unintended accretions in *California II* which remained barren for 80 years. Notably, F.E.B. fails to cite a single case from any jurisdiction, in any context, supporting its interpretation of the language “for its own use.”

Having concluded that the language of §1313(a) is unambiguous, the Court further rejects the “expert testimony” proffered by F.E.B. (DE 38-44, 38-45). Linguists, legal lexicographers, and grammarians are not relevant experts in a property ownership dispute. Statutory interpretation is within the exclusive purview of the Court.² More significantly, if any ambiguity existed in the SLA, the Court would be required to construe the statute “strictly in favor of the United States.” *F.E.B. I*, 818 F.3d at 689; *see also United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S. Ct. 685, 1 L. Ed. 2d 693 (1957) (recognizing the “established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.” (citing *Caldwell v. United States*, 250 U.S. 14, 20–21, 39 S. Ct. 397, 63 L. Ed. 816, 54 Ct. Cl. 197 (1919))).

In any event, the Court notes that the interpretation offered by F.E.B.’s expert that the “filled in” and “use” requirements of §1313(a) are two distinct events such that the Government was required to make further use of the

2. These witnesses are accordingly stricken.

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island beyond filling in, otherwise the phrase “for its own use” would constitute surplusage, is not correct. (DE 38: 25). The first problem for F.E.B. is that there *was* a use beyond filling in: dredging. Secondly, even if there were no other use beyond filling in, F.E.B.’s construction would still not be correct because it overlooks the additional meaning of the phrase “for its own use,” which dictates, very simply, that the filling in must have been for the benefit of the Government (rather than another entity such as the State). If the phrase “for its own use” were eliminated, that meaning would be lost and therefore it cannot be surplusage, as posited by F.E.B.

F.E.B.’s further suggestion that the word “for” within the phrase “filled in . . . for its own use” contemplates use beyond filling in, and that “creation is not use” according to lexical meaning, is similarly unavailing. (*Id.*: 25-26). As previously set forth, the filling in of the spoil deposit in this case was used to advance a dredging project. *See F.E.B. I*, 818 F.3d 688 (“Wisteria Island’s origin is undisputed: It was built up by Navy contractors, who used the land for the government’s purpose and benefit of storing fill accumulated from nearby dredging operations.”). Creation was not the use. Dredging was the use.

For all of these reasons, the Court concludes that Wisteria Island belongs to the United States pursuant to the “filled in . . . for its own use” exception of §1313(a). The Court has considered the remainder of F.E.B.’s arguments and finds them to be without merit.

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IV. CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that Plaintiff's Motion for Summary Judgment (DE 35), is **GRANTED**, and Defendant's Motion for Summary Judgment (DE 38), is **DENIED**. Plaintiff's Motion to Strike (DE 37) is **GRANTED**. The Clerk shall mark this case **CLOSED** and **DENY AS MOOT** any pending motions. The United States is directed to file papers necessary to conclude this action, including a proposed final judgment, no later than **August 10, 2020**.

DONE AND ORDERED in Chambers at Miami, Florida this 31st of July, 2020.

**APPENDIX F — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH
CIRCUIT, DATED MARCH 28, 2016**

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

F.E.B. CORP., A FLORIDA CORPORATION,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

No. 15-11771

|
March 28, 2016.

OPINION

EBEL, Circuit Judge:

Plaintiff-Appellant F.E.B. Corp. (“F.E.B.”) brought this action against Defendant-Appellee United States (“the government”) seeking to quiet title to a spoil island just off Key West, Florida. Because we find that the Quiet Title Act’s statute of limitations has run, *see* 28 U.S.C. § 2409a(g), we AFFIRM the district court’s dismissal of the action for lack of subject matter jurisdiction.

*Appendix F***I. BACKGROUND**

The island in question, known as Wisteria Island (or “the island”), is situated in the Gulf of Mexico, less than a mile off the coast of Key West, Florida. It is not a natural island, but rather was formed as a result of dredging operations performed under the auspices of the United States Navy (“Navy”) in nearby Key West Harbor during the first half of the nineteenth century. As Navy contractors deepened the channels in the harbor to improve shipping and aviation access, they deposited the dredged material on a nearby plot of submerged land. The accumulations eventually rose above sea level. A substantial dredging project in 1943 made the thirty-nine-acre (later-named) Wisteria Island what it is today.¹

In 1951, the state of Florida issued notice of its intention to sell Wisteria Island. The United States objected to the sale of the island on the grounds that the island belonged to the United States. In a letter to the state, the United States traced its ownership of the island and surrounding area to an 1819 treaty with Spain, as confirmed by subsequent 1845 and 1924 Executive Orders. The United States concluded, “In view of the foregoing [Florida is] informed that the Department of the Navy considers . . . the spoil area in question as being the property of the United States. It is, therefore, requested, that no further action be taken . . . to dispose of the spoil area in question by sale or otherwise.” (Doc. 1–32.)

1. Although the parties dispute whether Wisteria Island first came into existence in the 1920s or 1940s, that dispute is immaterial to the statute of limitations question.

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In his own letter to the state, Florida's attorney general acknowledged the United States' claim, but expressed doubt as to its validity, opining:

I am unable to state definitively whether or not the Navy's claim is valid. However, I do think that the claim is debatable enough and so shrouded in antiquity that I think the best course would be for [Florida] to complete the sale and explain the Navy's claim to [the buyer] and allow him to accept the . . . deed at his own risk. . . . In this manner we can get the question of title settled one way or other in case the Navy decides to litigate with him.

(Doc. 1–33.) Accordingly, in 1952, Florida sold the island to a private party via a quitclaim deed that contained no warranties of title.

One year later, Congress enacted the Submerged Lands Act (“SLA”), 43 U.S.C. §§ 1301–1315, which, broadly speaking, granted the states ownership of submerged lands within three miles of their coastlines, subject to certain exceptions. In the years that followed, the United States did not reassert its claim to Wisteria Island. Title passed from private owner to private owner until F.E.B. acquired the island in 1967. The federal government appeared to acquiesce to F.E.B.'s ownership, and even entered into licensing agreements with F.E.B. to use the island as a Navy training ground from 2004 to 2006.

In 2011, however, the United States once again

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asserted ownership over Wisteria Island.² F.E.B. filed this suit under the Quiet Title Act (“QTA”), 28 U.S.C. § 2409a, to establish ownership of the island. F.E.B. argues that it owns the island pursuant to the SLA and Florida law. The district court, however, did not reach the merits of F.E.B.’s SLA claim in this quiet title action. On cross-motions for summary judgment, the district court found that the QTA’s statute of limitations had run, and accordingly dismissed the suit for lack of subject matter jurisdiction. F.E.B. now appeals.

II. DISCUSSION

“We review a district court’s application of a statute of limitations and its grant of summary judgment *de novo*.” *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 750 (11th Cir. 2000). “Summary judgment is appropriate when there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.” *Id.* In this case, the parties agree that there are no material factual issues in dispute and, consequently, that the statute of limitations question may be decided as a matter of law.

A. The QTA

This case is animated by the intersection of two federal statutes: the Quiet Title Act and the Submerged Lands Act. We begin with the QTA.

2. F.E.B. contends the government’s renewed interest in the island was precipitated by the unsanctioned actions of two low-level employees sympathetic to activists opposing development of the island. Be that as it may, it would be immaterial to the statute of limitations question.

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“The QTA . . . waives the United States’[] sovereign immunity and ‘permits plaintiffs to name it as a party defendant in civil actions to adjudicate title disputes involving real property in which the United States claims an interest.’” *McMaster v. United States*, 177 F.3d 936, 939 (11th Cir. 1999) (quoting *Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 276, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983) (internal alteration omitted)); see 28 U.S.C. § 2409a(a) (“The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest. . . .”). As such, it “provide[s] the exclusive means by which adverse claimants [can] challenge the United States’ title to real property.” *Block*, 461 U.S. at 286.

The QTA has a twelve-year statute of limitations, which is triggered when the plaintiff’s QTA action first accrues. See 28 U.S.C. § 2409a(g) (“Any civil action under this section . . . shall be barred unless it is commenced within twelve years of the date upon which it accrued.”). A QTA action accrues when “the plaintiff or his predecessor in interest knew or should have known of the claim of the United States” to the real property at issue. *Id.*

The Supreme Court has twice concluded that, because the statute of limitations circumscribes the scope of the QTA’s waiver of sovereign immunity, compliance with the limitations period is jurisdictional. See *United States v. Mottaz*, 476 U.S. 834, 841, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986) (“When the United States consents to be sued, the terms of its waiver of sovereign immunity define the

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extent of the court’s jurisdiction.”); *Block*, 461 U.S. at 292 (“If North Dakota’s suit is barred by [the QTA statute of limitations], the courts below had no jurisdiction to inquire into the merits.”); see also *Bank One Texas v. United States*, 157 F.3d 397, 403 (5th Cir. 1998).³ For the same reason, the limitations period “must be strictly observed,” and courts “must be careful not to interpret it in a manner that would ‘extend the waiver beyond that which Congress intended.’” *Block*, 461 U.S. at 287 (quoting *United States v. Kubrick*, 444 U.S. 111, 117–18, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979)).

Accordingly, courts have consistently held that the QTA’s statute of limitations standard “does not require the government to provide explicit notice of its claim”

3. Our conclusion is consistent with the Supreme Court’s recent holding in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 191 L. Ed. 2d 533 (2015). In that case, the Supreme Court established a rebuttable presumption that equitable tolling applies to statutes of limitation for suits against the federal government unless (1) Congress has “clearly stated” that a time limit is jurisdictional or (2) stare decisis requires adherence to the Supreme Court’s past determination that a time limit is jurisdictional. See *id.* at 1630–32, 1635–36 (relying on *Irwin v. Dep’t of Veterans Affairs*, 498 U.S. 89, 95–96, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) (establishing the presumption) and *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137–39, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008) (applying stare decisis to decide whether a time limit was jurisdictional)). Pursuant to *Kwai*’s emphasis on stare decisis principles, we adhere to the Supreme Court’s previous treatment of the QTA statute of limitations as jurisdictional. See *Mottaz*, 476 U.S. at 841, 843; *Block*, 461 U.S. at 287–88, 292.

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in order for the statute of limitations to begin running. *Spirit Lake Tribe v. N. Dakota*, 262 F.3d 732, 738 (8th Cir. 2001). “The government’s claim need not be ‘clear and unambiguous,’” and “[k]nowledge of the claim’s full contours is not required.” *Id.* (quoting first *N.D. ex rel. Bd. of Univ. & Sch. Lands v. Block*, 789 F.2d 1308, 1313 (8th Cir. 1986), then *Knapp v. United States*, 636 F.2d 279, 283 (10th Cir. 1980)). Rather, “[a]ll that is necessary is a reasonable awareness that the Government claims some interest adverse to the plaintiff’s.” *Id.* (quoting *Knapp*, 636 F.2d at 283); *see also Kingman Reef Atoll Invs., LLC v. United States*, 541 F.3d 1189, 1198 (9th Cir. 2008) (same); *Cheyenne Arapaho Tribes v. United States*, 558 F.3d 592, 595, 385 U.S. App. D.C. 76 (D.C. Cir. 2009) (same). Moreover, the merits of the government’s claim are irrelevant: “Even invalid government claims trigger the QTA limitations period.” *Spirit Lake*, 262 F.3d at 738; *see also Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 945 F.2d 765, 769 (4th Cir. 1991) (“The crucial issue in the statute of limitations inquiry is whether the plaintiff had notice of the federal claim, not whether the claim itself is valid.”).

In this case, it is undisputed that the state of Florida, F.E.B.’s predecessor in interest, had actual knowledge of the United States’ claim to the island in 1951. The United States’ 1951 letter objecting to Florida’s intention to sell the island plainly set forth the Navy’s claim of ownership over the island: The letter traced the United States’ ownership of the spoil area to an 1819 treaty with Spain, and informed Florida “that the Department of the Navy considers . . . the spoil area in question as being

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the property of the United States.” (Doc. 1–32.) Such an explicit and unambiguous assertion of a property interest more than meets the QTA’s accrual requirements. *See Knapp*, 636 F.2d at 283; *Spirit Lake*, 262 F.3d at 738.

Beyond that, Florida’s actual knowledge of the federal government’s claim is evidenced by the Florida attorney general’s letter to the state agency attempting to sell the island. The letter acknowledged the Navy’s claim, but nonetheless urged the agency to “complete this sale and explain the Navy’s claim to [the buyer] and allow him to accept the . . . deed at his own risk. . . . In this manner we can get the question of title settled one way or [the] other in case the Navy decides to litigate with him.” (Doc. 1–33.) The fact that Florida duly issued the original private buyer only a quitclaim deed, with no warranties of title, further establishes Florida’s awareness of the federal government’s claimed interest. Because F.E.B.’s predecessor in interest had actual knowledge of the United States’ claim to the real property at issue in 1951, F.E.B.’s QTA claim expired in 1963—well before initiation of this suit.⁴ *See* 28 U.S.C. § 2409a(g). Therefore, the district court was correct to dismiss the case for lack of subject matter jurisdiction.

4. That F.E.B.’s cause of action both arose and expired before the QTA was enacted in 1972 is of no legal moment: “The legislative history is clear that Congress intended to foreclose totally any suit on claims that accrued more than twelve years prior to the effective date of the QTA.” *Block*, 461 U.S. at 286 n. 23, 103 S.Ct. 1811; *see also Knapp*, 636 F.2d at 282 (rejecting “the argument that an action under section 2409a cannot accrue before Congress created the right in 1972 to bring such actions”); *Grosz v. Andrus*, 556 F.2d 972, 975 (9th Cir.1977) (same).

*Appendix F***B. The SLA**

F.E.B. contends that, although the QTA's limitations period may have been triggered in 1951, the period did not expire, because the intervening passage of the SLA countervailed the United States' 1951 assertion of ownership.

Congress enacted the Submerged Lands Act, 43 U.S.C. §§ 1301–1315, in 1953 in reaction to the Supreme Court's ruling in *United States v. California (California I)*, 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1947), which held that the United States—not the states—had “paramount sovereign rights” to submerged lands seaward of the states' coasts. *See United States v. Alaska*, 521 U.S. 1, 5–6, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997). The SLA counteracted that holding, and instead “grant[ed] States submerged lands beneath a 3-mile belt of the territorial sea.” *Id.* at 35; *see* 43 U.S.C. § 1311(a), (b)(1) (“confirm[ing]” and “establish[ing]” states’ “title to and ownership of the lands beneath navigable waters within [their] boundaries” and “releas[ing] and relinquish[ing] . . . all right, title, and interest of the United States . . . in and to all said lands”), § 1312 (defining states’ boundaries as reaching three miles seaward from their coastlines); § 1301(a)(3) (defining “lands beneath navigable waters” to include “all filled in, made, or reclaimed lands which formerly were lands beneath navigable water”).⁵

5. Even though Wisteria Island had been built up above sea level by the time the SLA was enacted, the parties agree that, unless an exception applies, the island falls within the SLA's definition of submerged lands. *See* 43 U.S.C. § 1301(a)(3) (defining

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Not all submerged (or formerly submerged) lands within that boundary, however, fall within the SLA. The SLA contains numerous exceptions, including, for example, lands actually occupied by the United States under claim of right, lands acquired by eminent domain, and, of particular relevance here, “*all lands filled in, built up, or otherwise reclaimed by the United States for its own use.*” 43 U.S.C. § 1313(a) (emphasis added).⁶

submerged lands to include “all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters”).

6. In full, the exceptions include:

(a) [A]ll tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; *all lands filled in, built up, or otherwise reclaimed by the United States for its own use*; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

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F.E.B. argues that the generic language in the SLA abandoned the federal government’s previously-expressed claim to the (formerly submerged) Wisteria Island, which in turn effectively reset the QTA’s statute of limitations period for that island. A few of our sister circuits, in other contexts not involving the SLA, have accepted the possibility that the government’s express abandonment of a claim can prevent a previously-triggered QTA’s limitations period from expiring (although no case that has come to our attention has found that abandonment in fact occurred). *See Spirit Lake Tribe*, 262 F.3d at 739; *Kingman*, 541 F.3d at 1199–1201; *Cheyenne Arapaho*, 558 F.3d at 597; *cf. Rio Grande Silvery Minnow (Hybognathus amarus) v. Bureau of Reclam.*, 599 F.3d 1165, 1186 (10th Cir. 2010) (assuming, “*without* definitively deciding,” that abandonment could reset the limitations period). The bar for showing such abandonment, however, is high.

It is well-established that “the federal government cannot abandon property absent an affirmative act authorized by Congress.” *Int’l Aircraft Recovery, LLC v. Unidentified, Wrecked & Abandoned Aircraft*, 218 F.3d 1255, 1258 (11th Cir. 2000). Moreover, “officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.” *California I*, 332 U.S. at 40. Accordingly, our

(c) all structures and improvements constructed by the United States in the exercise of its navigational servitude.

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sister circuits have consistently held that, for purposes of the QTA statute of limitations, the United States will be deemed to have abandoned a claim of ownership only if (1) “it clearly and unequivocally abandons its interest,” as evidenced by (2) sufficiently formal “documentation from a government official with authority to make such decisions on behalf of the United States.” *Kingman*, 541 F.3d at 1201 (internal quotation marks omitted); *see also Rio Grande*, 599 F.3d at 1186 (same); *Spirit Lake*, 262 F.3d at 739 (same); *Cheyenne Arapaho*, 558 F.3d at 597 (same).

We have no difficulty concluding that the SLA does not rise to the level of the “clear and unequivocal” abandonment of the government’s interest in Wisteria Island necessary to reset the QTA statute of limitations.⁷ The SLA only “release[d] and relinquishe[d]” the United States’ interest in submerged lands “except as otherwise reserved [t]herein.” 43 U.S.C. § 1311(b). One such reservation excepts from the SLA “*all lands filled in, built up, or otherwise reclaimed by the United States for its own use.*” *Id.* § 1313(a) (emphasis added). Wisteria Island’s origin is undisputed: It was built up by Navy contractors, who used the land for the government’s purpose and benefit of storing fill accumulated from nearby dredging operations.⁸ Thus, the plain language of the SLA refutes

7. Of course, because the SLA was passed by Congress, the second prong is met. *See Alabama v. Texas*, 347 U.S. 272, 273, 74 S. Ct. 481, 98 L. Ed. 689 (1954) (per curiam) (holding that the SLA was a constitutional exercise of Congress’s power to dispose of the United States’ property).

8. It is also undisputed that Florida, F.E.B.’s predecessor, had actual knowledge of how the island was created.

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F.E.B.'s argument that the SLA clearly and unequivocally conveyed title in Wisteria Island to the neighboring state of Florida. Consequently, the statute of limitations period to challenge the federal government's ownership of Wisteria Island continued running in the wake of the SLA, and expired long before F.E.B filed this action.

C. F.E.B.'s Arguments

We find F.E.B.'s multifarious arguments to the contrary unpersuasive.

1. For the United States' "own use"

First, F.E.B. argues the exception does not apply because the United States did not build up or fill in the island "for its own use," 43 U.S.C. § 1313(a). Rather, F.E.B. contends, the United States created Wisteria Island incidentally, for the sole purpose of storing the fill that created it, and never used it for anything else. Of course, in ruling on the statute of limitations question, we do not dispositively rule on the merits of F.E.B.'s SLA claim, including as to whether using the island as a place to store fill constitutes "use" under the relevant SLA exception. *See Mottaz*, 476 U.S. at 851 ("The limitations provision of the Quiet Title Act reflects a clear congressional judgment that the national public interest requires barring stale challenges to the United States' claim to real property, whatever the merits of those challenges."). For statute of limitations purposes, the crucial issue is whether the SLA clearly and unequivocally abandoned the United States' interest in the island. It is well-established—and

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was well-established when the SLA was enacted—that grants of federal property are construed strictly in favor of the United States. *See Alaska*, 521 U.S. at 34–35; *United States v. Union Pac. R.R. Co.*, 353 U.S. 112, 116, 77 S. Ct. 685, 1 L. Ed. 2d 693 (1957) (applying “the established rule that land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it.”) (citing *Caldwell v. United States*, 250 U.S. 14, 20, 39 S. Ct. 397, 63 L. Ed. 816, 54 Ct. Cl. 197 (1919)). Given that rule of construction, the circumstances of Wisteria Island’s creation hew closely enough to the “for its own use” exception to the SLA to preclude a finding that the SLA clearly and unequivocally abandoned the federal government’s interest in that island.

That conclusion comports with the Supreme Court’s only treatment of the exception.⁹ *See California ex rel. State Lands Comm’n v. United States (California II)*, 457 U.S. 273, 287, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982). In *California II*, the Supreme Court stated in dicta that

9. In addition, the conclusion is consistent with the SLA’s legislative history, which shows that Congress added the exception in response to the Navy’s concern that the SLA would strip it of submerged lands that it had “improved.” *See Submerged Lands: Hearings on S.J. Res. 13, S. 294, S. 107, S. 107 Amend. Before the S. Comm. on Interior and Insular Affairs*, 83rd Cong. 544–556 (1953) (statement of Robert B. Anderson, Secretary of the Navy). The Navy specifically listed “fill” as one of the “improvements” at Key West Naval Station that it sought to shield from the SLA. *Id.* at 547, 549–50.

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the SLA exception for land built up by the United States “for its own use” would apply to coastline that had slowly accreted after the United States constructed jetties nearby, even though the accretion was inadvertent, and the resulting coastline had remained barren and unused for the first eighty years of its existence. *Id.* at 275–76, 287. That result, the Supreme Court reasoned, “follow[ed] from the congressional object to assure each sovereign the continuing benefit of landfill and like work performed by each.”¹⁰ *Id.* at 287. Wisteria Island surely was both created and used for a more functional purpose than the inadvertent accretions at issue in *California II*.

Although F.E.B.’s predecessors did not have the benefit of *California II*, as discussed above, even the SLA’s plain language put them on notice that the cloud on the island’s title remained unresolved. The SLA did not abandon the United States’ interest in the island for purposes of the QTA statute of limitations.

2. Actions by federal employees

Second, F.E.B. points to subsequent actions by various federal employees appearing to affirm Florida’s ownership of Wisteria Island: For instance, a 1956

10. Although *California II*’s discussion of the exception is dicta, “there is dicta . . . and then there is Supreme Court dicta.” *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006). We have consistently recognized that “dicta from the Supreme Court is not something to be lightly cast aside,” *id.* (quotation marks omitted), but rather is of “considerable persuasive value,” *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998).

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internal memo by the Chief of the Bureau of Yards and Docks to the Chief of Naval Operations opined, “[i]t would appear that . . . the Navy would have a difficult time in proving that this island was built up for Federal use,” and accordingly recommended condemning the island for subsequent federal use (Doc. 67–1); a 1957 letter by the Navy’s District of Public Works Officer requested condemnation appraisals of the island; and 1961 court documents condemning an adjacent island (which may have been created during the same dredging operations that created Wisteria Island) acknowledged that Florida owned and held legal title to the adjacent island prior to the condemnation.

It is, however, well-established that internal agency memos or other informal statements by subordinate government employees are not sufficient evidence of abandonment. *See Rio Grande*, 599 F.3d at 1187 (“[I]ntra-office memoranda, and similar intra-governmental communications do not bind the government, such that they can . . . stop the QTA’s limitations clock.”) (internal quotation marks omitted); *Kingman*, 541 F.3d at 1200–01 (agreeing that documents evincing only “confusion and mistake on the part of some government employees, as to whether the United States ultimately possessed an ownership interest,” did not show abandonment); *Spirit Lake*, 262 F.3d at 740–42, 744 (“[T]he QTA limitations period does not stop when government action simply compounds a pre-existing cloud on title.”); *Cheyenne Arapaho*, 558 F.3d at 598. So, too, here: Nothing in the documents F.E.B. identifies amounts to a “clear and unequivocal” abandonment of the United States’ claim,

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and, even if something did, there is no indication that the authors possessed the authority to dispose of government property. *See California I*, 332 U.S. at 40 (“[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.”). Not only that, but there is no indication that F.E.B.’s predecessors-in-interest were aware of, let alone relied on, the internal government documents identified by F.E.B. *See Rio Grande*, 599 F.3d at 1184–85 (disregarding government statements of which the plaintiffs were not aware because “they certainly could not have led [them] to believe that the United States had abandoned its claim”).

Finally, the remainder of the government actions on which F.E.B. relies—such as the 2004-2006 licensing agreements to use the island for Navy training exercises—were undertaken long after the statute of limitations had run, and are therefore irrelevant. *See id.* at 1185 (finding actions taken after the limitations period to be irrelevant). For all of those reasons, the actions of subordinate federal employees did not abandon the United States’ claim to Wisteria Island.

3. Different government claims

Third, F.E.B. contends the statute of limitations has not run because, in opposing F.E.B.’s SLA claim to the island, the United States now asserts a “different claim” to the island than it asserted in 1951. But the interest in real property that the United States asserted in 1951 is the same interest that it asserts in this suit: ownership

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of Wisteria Island, going back through the entire chain of title to that island. F.E.B.'s predecessors had actual notice of that asserted interest in 1951. It is that interest—not “the subjective intent of the government to enforce [the interest] in the face of changed conditions”—that constitutes the government’s “claim” for purposes of the QTA’s statute of limitations. *Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 449, 451 (10th Cir. 1985). Although the SLA created a new legal claim to the island for F.E.B.’s predecessors, it did not abolish their preexisting notice of the United States’ asserted interest. *See id.* at 451–52 (finding the QTA statute of limitations had run because, although the plaintiffs’ cause of action was newly available due to recently changed conditions, the plaintiffs had actual knowledge of the challenged government interest for many years prior). F.E.B.’s predecessors remained on notice notwithstanding the fact that any government opposition to their newly minted SLA claim could implicate defensive legal arguments different from the affirmative claims raised in the government’s 1951 letter. *See id.* at 452 (“[F]or purposes of determining when ‘the claim’ accrues under § 2409a[(g)], all that is necessary is a reasonable awareness that the government claims some interest adverse to the plaintiffs.”) (internal alteration, quotation marks omitted); *Knapp*, 636 F.2d at 283 (“Knowledge of the claim’s full contours is not required.”).¹¹ The QTA’s statute of limitations accrues

11. *See also Rio Grande*, 599 F.3d at 1176 (“[T]he starting of the limitations clock is not dependent on the plaintiff knowing the precise nature of the property interest upon which the United States predicates its claim of title.”); *Richmond*, 945 F.2d at 770 (“Assuming . . . [the plaintiff] did not know the exact nature

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upon notice of the *United States*' claim—not upon the creation of an adverse claimant's potential cause of action. The United States was not required to reassert its ownership interest after the SLA was enacted in order for the previously triggered limitations period to continue running. *See Richmond*, 945 F.2d at 770 (“To hold that the limitations period did not begin to run until conditions had changed and the government reasserted its claim would be in effect to extend the limitations period indefinitely, in contravention of Congress’s expressed intent.”).

4. No adverse government action

Fourth, F.E.B. contends the statute of limitations has not run because the government did not take action adverse to F.E.B.'s predecessors' interests either before or after the SLA's 1953 enactment. But the plain language of the QTA is clear: The statute of limitations is triggered as soon as a plaintiff acquires actual or constructive notice of the government's claim. *See* 28 U.S.C. § 2409a(g) (“[A QTA] action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.”). Courts have consistently declined to require affirmative adverse government action to initiate the limitations period—let alone to keep an initiated period running. *See Wisconsin Valley Imp. Co. v. United States*, 569 F.3d 331, 335–36 (7th Cir. 2009) (“The Company contends that the clock

of the government's claim in 1938, it still could not escape the limitations bar, for all that is necessary for accrual is a reasonable awareness that the Government claims *some interest* adverse to the plaintiff's.”) (internal quotation marks omitted).

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does not start until the United States uses land in a way incompatible with the private claim. . . . This argument is incompatible with the rule . . . that it is the private party's knowledge (actual or constructive), rather than the United States' bulldozers or other physical activity, that causes a claim to accrue."); *Long v. Bureau of Reclam.*, 236 F.3d 910, 915 (8th Cir. 2001) (holding that a plaintiff's action for an easement accrued in 1949 because, "[w]hile [the plaintiff's] use of [the disputed road] to gain access to his property was not actually denied until 1988, the government's right to deny access was reasonably clear to his predecessor-in-interest in 1949"); *Richmond*, 945 F.2d at 770 (holding that the limitations period started when the plaintiff first learned of the disputed covenant, not when the government later attempted to enforce that covenant for the first time).¹²

F.E.B.'s reliance on *Werner v. United States* to argue otherwise is misplaced. *See* 9 F.3d 1514 (11th Cir. 1993). *Werner* stands for the common sense proposition that the statute of limitations is not triggered by just

12. *See also Rosette Inc. v. United States*, 141 F.3d 1394, 1398 (10th Cir. 1998) ("[The plaintiff] knew of the United States' interest in 1978. . . . The fact that it decided not to contest that interest until a disagreement arose cannot defeat the workings of the statute of limitations."); *Knapp*, 636 F.2d at 283 (finding that the plaintiff's action accrued when it was first aware of the cloud on its title, not when the government later acted on its claim by approving a survey of the disputed land for the first time); *Calif. ex rel. State Land Comm'n v. Yuba Goldfields, Inc.*, 752 F.2d 393, 397 (9th Cir. 1985) ("Neither the language of the statute nor the legislative history of the Act requires a *showing of adversity*." (emphasis added)).

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any government interest in property, but rather only a claimed interest that is inconsistent with—that is, adverse to—the plaintiff’s asserted interest. *See id.* at 1516–17 (finding the plaintiff’s QTA action for an easement across government property accrued not when the plaintiff knew the government owned the property in general, but when the plaintiff realized the government claimed title without an access easement). That proposition is most relevant where a plaintiff asserts a nonpossessory interest, such as an easement; after all, in that context “knowledge of a government claim of ownership may be entirely consistent with a plaintiff’s claim.” *Michel v. United States*, 65 F.3d 130, 131–32 (9th Cir. 1995) (holding that the plaintiffs’ “claim of access to roads and trails across the refuge did not accrue until [they] knew or should have known the government claimed the exclusive right to deny their historic access to the trails and roads across the refuge”) (citing *Werner*, 9 F.3d at 1516). A contrary rule “would lead to premature, and often unnecessary, suits,” as citizens currently enjoying access to government land “would be compelled to sue to protect against the possibility, however remote, that the government might someday restrict [their] access.” *Id.* at 132. Accordingly, courts have widely embraced the proposition that the United States must claim “some interest adverse to the plaintiff’s” before a QTA claim accrues for purposes of the statute of limitations. *See Rio Grande*, 599 F.3d at 1176; *Cheyenne Arapaho*, 558 F.3d at 595; *Wisconsin Valley*, 569 F.3d at 334–35; *Kingman*, 541 F.3d at 1198; *Spirit Lake*, 262 F.3d at 738; *Bank One Texas*, 157 F.3d at 402 n.11; *Richmond*, 945 F.2d at 770.

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F.E.B. conflates the requirement for an adverse government *interest* with a requirement for adverse government *action*. But the two are distinct: Although adverse government action is sufficient to put a plaintiff on notice of a government's claim, it is not necessary. *See Wisconsin Valley*, 569 F.3d at 335–36; *Long*, 236 F.3d at 915; *Rosette*, 141 F.3d at 1398; *Richmond*, 945 F.2d at 770; *Yuba Goldfields*, 752 F.2d at 397; *Knapp*, 636 F.2d at 283. Therefore, given that F.E.B.'s predecessor had actual knowledge of the government's claim to ownership of the island, the fact that the government did not affirmatively obstruct its or its successors' use of the island before or after the SLA's enactment does not forestall application of the statute of limitations.

5. Hypothetical consequences

Finally, at oral argument, F.E.B. asserted for the first time that a finding of no abandonment by the United States in this case would effectively foreclose the availability of QTA claims for all submerged lands nationwide. F.E.B. arrives at that sweeping conclusion by fashioning a new argument for the government (an argument not asserted by the government itself)—namely, that the Supreme Court's 1947 decision granting the United States "paramount" rights in submerged coastal lands, *see California I*, 332 U.S. at 38–39, constituted a "claim" by the United States to all such lands for purposes of the QTA statute of limitations. Starting from that hypothetical premise, F.E.B. contends that, unless the court finds the SLA abandoned all *California I* "claims," the QTA limitations period on all submerged coastal lands expired long ago.

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The problem with F.E.B.’s argument is that it is counterfactual. The government does not argue that *California I* triggered the QTA limitations period for Wisteria Island. Rather, the government asserts that its 1951 letter triggered the limitations period. In that letter, the United States relied not on *California I*, but instead on its 1819 treaty with Spain, and 1845 and 1924 Executive Orders, to assert ownership over the island. As discussed in Section II.A *supra*, that letter’s explicit and unambiguous assertion of a property interest in the island more than meets the QTA’s accrual requirements. We therefore have no reason to consider whether *California I* constituted a “claim” by the United States to Wisteria Island—or submerged lands in general—in order to decide this case. Accordingly, we express no opinion on that issue. Similarly, our holding regarding the SLA’s effect on the QTA statute of limitations is narrowly drawn to the facts of this case. Contrary to F.E.B.’s contention, we need not decide whether the SLA in general abandoned preexisting government claims to submerged lands. Rather, we hold only that, given the undisputed and well-known facts of Wisteria Island’s creation, the plain language of the SLA exception for lands “built up by the United States for its own use,” 43 U.S.C. § 1313(a), gave rise to an open and obvious question as to whether the SLA applied in this case. *See supra* § II.B.

We leave further explication of these issues to future cases.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of the case for lack of subject matter jurisdiction. In doing so, we note that the dismissal "does not quiet title to the property in the United States. The title dispute remains unresolved." *Block*, 461 U.S. at 291.

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**APPENDIX G — ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT
OF FLORIDA, FILED MARCH 25, 2015**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

Case Number: 12-10072-CIV-MARTINEZ-GOODMAN

F.E.B. CORPORATION,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

Signed March 25, 2015

**ORDER GRANTING DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT AND DENYING F.E.B.’S
MOTION FOR SUMMARY JUDGMENT**

Jose E. Martinez, United States District Judge

THIS CAUSE came before the Court upon cross motions for summary judgment. [ECF Nos. 57, 59]. Defendant the United States of America (the “United States” or “Defendant”) moves for summary judgment of Plaintiff F.E.B. Corporation’s (“F.E.B.[’s]” or “Plaintiff[’s]”) Quiet

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Title Claim pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that (1) this court is divested of subject matter jurisdiction under the Quiet Title Act's 12-year statute of limitations; and, to the extent the Court finds it has jurisdiction, (2) the property in question is excepted from the operation of the Submerged Lands Act ("SLA") of 1953, thus maintaining ownership in the United States. F.E.B. filed a response to Defendant's motion [ECF No. 64], and Defendant replied [ECF No. 69]. F.E.B. also moves for summary judgment, on the grounds that there are no material facts in dispute entitling F.E.B. to judgment as a matter of law. Defendant responded [ECF No. 66], and F.E.B. replied [ECF No. 68]. For the reasons set forth herein, the Court grants Defendant's Motion for Summary Judgment and denies F.E.B.'s Motion for Summary Judgment.

I. Background

There is substantial agreement among the parties as to the facts and legal principles material to the adjudication of the merits of this case. Indeed, as Defendant points out, "[b]oth parties in this case agree that there is no genuine issue of material fact remaining in this case which would preclude the entry of summary judgment. Accordingly, the Court is free to decide the remaining questions of law and resolve this case at the summary judgment stage." [ECF No. 69 at 1]. Nevertheless, a review of the factual history giving rise to this dispute is necessary.

This is an action brought against the United States under the Quiet Title Act (the "QTA"), 28 U.S.C. § 2409a,

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seeking to quiet title to a piece of property off the coast of Key West, Florida. *See* [ECF No. 1]. The property in dispute, as alleged by F.E.B. in its Complaint, consists of thirty-nine acres of submerged lands and a spoil area created from those submerged lands known as Wisteria Island or Christmas Island (“Wisteria Island” or the “Subject Property”). In 1819 the United States and Spain entered into the Adams-Onís Treaty which ceded to the United States ownership of the territories known as East and West Florida—property that now consists of the State of Florida. [ECF No. 58 at ¶ 1] (citing ECF No. 1-21). The treaty was ratified by Spain in 1820 and carried into force in the United States in 1821. [ECF No. 1 at ¶ 30]. On March 3, 1845, Florida was admitted into the Union “on equal footing with the original States[,]” becoming the twenty-seventh state of the United States. *Id.* at ¶ 33 (quoting ECF No. 1-4 at 1).

On September 17, 1845, President James Polk issued an Executive Order in which he reserved from sale “all Islands, Keys, and Banks, comprising the group called the Dry Tortugas, with all other Islands or Keys on the Florida coast[,]” maintaining it as the property of the United States. [ECF No. 58 at ¶ 2; ECF No. 1 at ¶¶ 37-39]. The Dry Tortugas are located approximately seventy miles from Key West and Wisteria Island. [ECF No. 1 at n.5]. After the Civil War, Florida was readmitted to the Union on June 25, 1868. *Id.* at ¶ 40. Florida’s 1868 Constitution “established Florida’s boundaries to include submerged lands beneath navigable waters extending as far south and west as the Dry Tortugas, including the Florida Reefs, and all submerged lands extending

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from the Florida coastline for three marine leagues—approximately 10 and one-half land miles—into the Gulf of Mexico.” *Id.* The Submerged Lands and Wisteria Island are within Florida’s 1868 boundaries. *Id.* In 1878, however, the Secretary of the War Department relinquished the public lands initially reserved from sale by President Polk in 1845, “except the land reserved on the Island of Key West, and the islands, keys, and banks encompassed by the Dry Tortugas.” *Id.* at ¶ 41.

By correspondence dated April 14, 1908, the Commandant’s Office for the U.S. Naval Station, Key West established that the Army was in the process of, or was about to begin, a dredge project in Key West Harbor. [ECF No. 58 at ¶¶ 6-7]. From 1919 through 1923, the United States conducted a dredging project (the “1920s Dredge Project”) in Key West Harbor. *Id.* at ¶ 14. “Reports indicate that the improvements were done for the benefit and use of the Navy.” *Id.* at ¶ 15-16. The 1920s Dredge Project was effectively completed on December 15, 1923. *Id.* Thereafter, “a small ‘spoil’ island appeared where Wisteria Island would develop.” *Id.* at ¶ 21. On February 26, 1924, shortly after the project was completed, “an application was made to the Florida Trustees of the Internal Improvement Fund (TIIF) ‘to purchase a shallow bank or island in the tidal waters of Monroe County.’” *Id.* at ¶ 23 (quoting ECF No. 58-11 at 2). In response, on or about April 5, 1924, the Trustees published notice in a local newspaper announcing a May 20, 1924 meeting being held for the purpose of considering the sale of “[a]n island in the vicinity of Key West Island, caused by the deposit of excavated material from the Ship

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Channel.” *Id.* at ¶ 24 (quoting Minutes of the Trustees Internal Improvement Fund, Volume 15, p.191-92 (1923-24)). The Navy Department duly objected to the sale. *Id.* at ¶ 25. Specifically, on May 5, 1924, the Judge Advocate General of the Navy notified TIIF ““that the island was part of Frankford Bank and could not be considered as tidal lands of the State and, therefore, there was no authority in the State for the sale.”” *Id.* at ¶ 26 (quoting September 15, 1953 Letter from Admiral J.F. Jelley, ECF No. 58-13). After the Navy’s objection, on June 11, 1924, TIIF withdrew the island from sale and rejected all bids. *Id.* at ¶ 27.

On August 9, 1924, the Secretary of the Navy sent President Calvin Coolidge a formal request for an executive order to “reserve ‘all the islands, keys, harbors and shoals adjacent to and in the vicinity of Key West, Florida . . . together with certain other lands known as Frankford Bank’ for naval purposes.” *Id.* at ¶ 32 (quoting August 9, 1924 Letter from the Secretary of the Navy, ECF No. 58-16). Two days later, on August 11, 1924, the President issued Executive Order 4060, which reiterated the reservation, for naval purposes, of ““all the islands, keys, harbors, and shoals adjacent to and in the vicinity of the Island of Key West, Florida.”” *Id.* at ¶¶ 33, 35 (quoting ECF No. 1-30). Although the coverage area established by the Executive Order included the spoil island Wisteria, thus capturing the Subject Property, F.E.B. contends that President Coolidge was without authority to reserve any of Florida’s submerged lands beneath navigable waters without agreement and/or the remittance of compensation to Florida, which never occurred. [ECF No. 1 at ¶ 44].

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As a result, F.E.B. further alleges that the Order “only reserved *public lands* within the geographical area encompassed by the Order, and not those lands ‘subject to vested rights,’ including Florida’s submerged lands.” *Id.*

Subsequently, in the early 1940s, “the Navy entered into a ‘huge dredging contract’ to dredge the Key West Harbor channel and turning basin.” *Id.* at ¶ 38. This project (the “1940s Dredge Project”) “was conducted by and for the Navy and with Navy funds in order to ‘provide adequate seaplane landing and take-off areas’ for the Navy.” *Id.* at ¶ 39 (quoting ECF No. 58-19 at 2). From 1941 to 1946, the United States dredged the Key West Channel and deposited previously submerged lands onto five separate spoil areas including Wisteria Island. [ECF No. 1 at ¶ 6]. The 1940s Dredge Project had specific areas designated for spoil fill; this included the Subject Property, created during the 1920s Dredge Project, which was designated as “spoil area B[.]” [ECF No. 58 ¶ 41].

In 1951, the Florida Department of Agriculture received an application for the purchase of the spoil area from Paul Sawyer who served as an agent for Bernie Papy in securing the deed for the Subject Property from Florida. [ECF No. 58 at ¶¶ 48, 55]. The request described the spoil area as land that “was dredged up out of the channel by the United States Government during World War I and is an island now sitting above sea level.” *Id.* at ¶ 48 (internal quotations omitted). In response, on July 30, 1951, TIIF issued its notice of intention to sell the 39-acre spoil area. *Id.* at ¶ 49. The Navy promptly responded in a letter dated August 15, 1951 (the “Navy Speed Letter”)

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addressed to the Chief of the Bureau of Yards and Docks, “seeking authority to object to the TIIF’s intended sale of the Spoil Area.” *Id.* at ¶ 50 (citing August 15, 1951 Navy Speed Letter, ECF No. 58-28). The Navy Speed Letter submitted as follows:

The land included in this proposed sale is a fill which was deposited as a result of dredging in the main ship channel at Key West, Florida, which was accomplished with the use of Navy funds in 1943. This land also falls within the limits of an area which was reserved for use of the Navy for Naval purposes by Executive Order No. 4060 dated 11 August 1924.

Due to the proximity of this spoil area to highly classified Naval activities . . . it is considered a dangerous security risk to allow this property to fall in the hands of private developers. Further, due to expansion of Naval facilities and activities in the Key West area, the strategic location of this spoil area makes its use for military purposes highly possible, and its use for a fuel storage area is now under consideration.

In view of the foregoing, authority is requested for this Headquarters to request the Trustees of the Internal Improvement Fund to withhold the sale of this property pending Navy Department’s requirements.

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[ECF No. 58-28]. Additionally, on September 27, 1951, the Navy sent TIIF a letter formally objecting to the proposed sale of the Subject Property and claiming an adverse interest to Florida's ownership of the property. [ECF No. 1-32]. Therein,

the Navy made clear that it understood that the "spoil area proposed for sale by the State of Florida is located in Frankfort Bank;" that the island was "created by deposits of dredged material from the main ship channel at Key West, Florida and was accomplished by the use of Department of Navy funds;" and that "the Navy considers Frankfort Bank, the shoals adjacent thereto and the spoil area in question as being the property of the United States."

[ECF No. 58 at ¶ 53] (quoting ECF No. 1-32). In response to the Navy's letter, then Florida Attorney General Richard W. Ervin sent a communication to the Florida Department of Agriculture in which he stated the following: "I am unable to state definitely whether or not the Navy's claim is valid. However, I do think that the claim is debatable enough and so shrouded in antiquity that I think the best course would be for the Trustees to complete the sale. . . ." [ECF No. 1-33]. Ervin also suggested that TIIF explain the Navy's claim to the purchaser, Papy, "and allow him to accept the Trustees' deed at his own risk." *Id.* "On January 9, 1952, TIIF issued a deed to Sawyer for '[a] parcel of Bay Bottom Land and Spoil Area' 'containing 39 acres, more or less.'" [ECF No. 58 at ¶ 56] (quoting ECF No. 1-9). In turn, Sawyer issued a deed to Papy dated

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January 28, 1952, for the Subject Property. *Id.* at ¶ 59 (citing ECF No. 1-11).

F.E.B. claims that in 1953 “the State’s right, title and interest to and in submerged lands within its boundaries, as articulated in Florida’s 1868 Constitution, were recognized, confirmed, and established by the United States Congress and President Eisenhower through the enactment [of] the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.*” [ECF No. 1 at ¶ 15]. The Submerged Lands Act (the “SLA”) provides in pertinent part as follows:

It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States [are] *recognized, confirmed, established, and vested in and assigned to the respective States . . . and [their] respective grantees, lessees, or successors in interest.*

The United States *releases and relinquishes* unto said States [and their respective grantees, lessees, or successors in interest] . . . *all right, title and interest* of the United States . . . to all said title, improvements, and natural resources.

Id. at ¶ 50 (quoting 43 U.S.C. § 1311(a) and (b)). The SLA further defined all lands beneath navigable waters as “all filled in, made, or reclaimed lands.” *Id.* at ¶ 51 (citing 43 U.S.C. § 1301(a)(3)).

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F.E.B. alleges that it acquired record title to the Subject Property in 1967, “succeeding a line of record title owners beginning with Paul E. Sawyer.” [ECF No. 60 at ¶ 3]. For over 60 years thereafter, F.E.B. claims that it has been assessed, and has paid, Monroe County ad valorem taxes as owners of Wisteria Island. *Id.* at ¶ 4. Also, F.E.B. maintains that for over 47 years it has “paid all property taxes on Wisteria Island, identified its ownership of Wisteria Island on federal and state tax returns, maintained the island, and pursued development with Monroe County.” *Id.* at ¶ 5. Defendant argues, however, that “whether Plaintiff paid ad valorem taxes to Monroe County is not material to a determination of whether the United States holds superior title to the Subject Property.” [ECF No. 67 at ¶ 4]. In 2004, 2005 and 2006, the Navy entered into licensing agreements with F.E.B. whereby, at the Navy’s request, F.E.B. authorized the Navy to conduct SEAL Team exercises on Wisteria Island. [ECF No. 60 at ¶ 11]. While the United States does not dispute the authenticity or existence of the licensing agreement, it does submit that “[t]here is no evidence that a formal inquiry was undertaken prior to execution of the license agreements to determine whether Plaintiff, in fact, held title to the Subject Property.” [ECF No. 67 at ¶ 11]. Further, the United States again points out that this fact is not material to a determination of superior title to the Subject Property. *Id.*

As alleged in the Complaint, on August 3, 2011, the United States’ Naval Air Station Key West, Public Affairs Office, issued a News Release which concluded that the Navy did not have a claim to the Submerged Lands, and

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asserted that any claim the United States may have once had to the Submerged Lands would have “reverted back to the [United States’ Bureau of Land Management (the “BLM”)]’ when the United States revoked Executive Order No. 4060.” [ECF No. 1 at ¶ 22]. Then, on August 24, 2011, a public affairs officer for the BLM sent an email to the *Key West Citizen* stating as follows:

Because the creation of Wisteria Island was not a natural occurrence, the island was never considered to be a part of the public domain of the United States. . . . The State of Florida claimed sovereign rights to Wisteria Island under the authority of the Submerged Land Act of May 23, 1953”

[ECF No. 1-16 at 2]. In August 2011, a Key West citizen, Naja Girard, contacted both the BLM and the U.S. Fish and Wildlife Service regarding the ownership of the Subject Property. [ECF No. 60 at 13]. The United States’ Fish and Wildlife Service confirmed the BLM’s denial of any interest in the Submerged Lands on August 26, 2011, through an email stating:

[T]he BLM . . . [has] made a final determination that because the creation of Wisteria Island was not a natural occurrence (created by dredged material), the island was never considered to be part of the public domain of the United States. . . . Wisteria Island is outside of our refuge boundaries and falls under the jurisdiction of the State of Florida.”

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[ECF No. 1-17]. Then, on November 7, 2011, BLM sent a letter to Ms. Girard in which it stated that, after further review of the records, a Federal Interest Determination conducted by the Chief of the Branch of Cadastral Survey revealed that legal title to Wisteria Island “would appear to be still vested in the United States.” [ECF No. 60 at ¶ 16; ECF No. 1-18]. On November 18, 2011, the BLM issued a news release in which it declared that it owns Wisteria Island. [ECF No. 60 at ¶ 23; ECF No. 1-19]. Therein, BLM admitted that this claim “is a reversal of the [BLM’s] Aug. 24 stance.” [ECF No. 1-19 at 1]. Finally, on August 21, 2012, the BLM issued a communication to F.E.B.’s legal counsel regarding the BLM’s interest in Wisteria Island. [ECF No. 1-20].

Ultimately, F.E.B. filed the present claim asserting that

[t]he United States has improperly asserted an adverse claim of interest in the Submerged Lands as against the interest of FEB. The claim of ownership by the United States lacks substance, has clouded FEB’s title, and created a case and controversy regarding FEB’s ownership, use, maintenance and development of the Submerged Lands and Wisteria Island.

[ECF No. 1 at ¶ 69]. As a result, F.E.B. seeks an order quieting title to F.E.B. in the Submerged Lands which are the subject of this litigation as well as an order confirming the validity of its ownership of the Submerged Lands, including Wisteria Island.

*Appendix G***II. Legal Standard**

A motion for summary judgment should be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). By its very terms, this standard provides that “the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there will be no *genuine issue of material fact*.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). An issue of fact is “genuine” if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Anderson*, 477 U.S. at 248; *Matsushita Electric Indus. Co.*, 475 U.S. at 586. It is “material” if it might affect the outcome of the case under the governing law. *Anderson*, 477 U.S. at 248. In addition, in considering a motion for summary judgment, the Court is required to view the evidence in the light most favorable to the non-moving party. *Id.* at 255.

If the moving party bears the burden of proof at trial, the moving party must establish all essential elements of the claim or defense in order to obtain summary judgment. *See United States v. Four Parcels of Real Prop, in Greene and Tuscaloosa Counties*, 941 F.2d 1428, 1438 (11th Cir. 1991). The moving party “must support its motion with credible evidence . . . that would entitle it to a directed verdict if not controverted at trial.” *Id.* (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan,

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J., dissenting)). “If the moving party makes such an affirmative showing, it is entitled to summary judgment unless the nonmoving party, in response, ‘come[s] forward with significant, probative evidence demonstrating the existence of a triable issue of fact.’” *Four Parcels of Real Prop, in Greene and Tuscaloosa Counties*, 941 F.3d at 1438 (quoting *Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.3d 1472, 1477 (11th Cir. 1991)).

In contrast, if the non-moving party bears the burden of proof at trial, the moving party may obtain summary judgment simply by establishing the nonexistence of a genuine issue of material fact as to any essential element of a non-moving party’s claim or affirmative defense. *Celotex*, 477 U.S. at 324. When the non-moving party bears the burden of proof, the moving party does not have to “support its motion with affidavits or other similar material *negating* the opponent’s claim.” *Id.* at 323 (emphasis in original). The moving party may discharge its burden in this situation by showing the Court that “there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 324. Once the moving party discharges its initial burden, a nonmoving party who bears the burden of proof must cite “to particular parts of materials in the record” or show “that the materials cited do not establish the absence or presence of a genuine dispute. . . .” Fed. R. Civ. P. 56(c)(1).

III. Analysis

At the crux of both Plaintiff and Defendant’s motions for summary judgment is the issue of the Quiet Title Act’s

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12-year statute of limitation and whether the Court lacks subject matter jurisdiction over this action. The Court previously denied Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction [ECF No. 20], finding dismissal inappropriate *at that time*. [ECF No. 38 at 8]. Although the Court considered it "clear that the United States claimed an interest in Wisteria Island in 1951 per the Navy's letter[,] it nevertheless found an issue as to whether a dispute to the title of the Subject Property actually existed in 1951 and whether, therefore, the statute of limitations began to run in 1951. *Id.* Subsequently, the parties filed their cross motions for summary judgment upon which the Court held a hearing in order to delve deeper into the statute of limitations argument asserted by the United States. [ECF No. 75].

The United States argues that this action is barred by the 12-year statute of limitations set forth in the QTA, depriving the Court of subject matter jurisdiction, and rendering dismissal appropriate. [ECF No. 59 at 4]. In response, F.E.B. submits that the Court should hold that the statute of limitations does not bar this action because it did not begin to run prior to the enactment of the SLA given that the government asserted no claim to Wisteria Island adverse to the interests of F.E.B. or its predecessors. [ECF No. 57 at 18]. Specifically, F.E.B. argues, "that the limitations provision of the QTA does not begin to run when a party has notice of the United States' claim of ownership of property in the absence of a claim or act by the United States that is *adverse* to the party's asserted interest." *Id.* at 20 (citing *Werner v. U.S.*, 9 F.3d 1514 (11th Cir. 1993)).

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As sovereign, the United States is generally immune from suit, “save as it consents to be sued, and the terms of its consent to be sued in any court define that court’s jurisdiction to entertain the suit.” *McMaster v. U.S.*, 177 F.3d 936, 939 (11th Cir. 1999) (quoting *U.S. v. Sherwood*, 312 U.S. 584, 586 (1941)). Under the QTA, “[t]he United States may be named as a party defendant in a civil action . . . to adjudicate a disputed title to real property in which the United States claims an interest. . . .” 28 U.S.C. § 2409a(a). Notwithstanding, the QTA bars a civil action that is not “commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” 28 U.S.C. § 2409a(g). “Because the QTA waives the government’s sovereign immunity from suit, . . . a plaintiff must comply with the limitations period to effectuate that waiver. Hence the QTA statute of limitations acts as a jurisdictional bar unlike most statutes of limitations, which are affirmative defenses.” *Spirit Lake Tribe v. N.D.*, 262 F.3d 732, 737-38 (8th Cir. 2001) (citing *State of N.D. ex rel. Bd. of Univ. & Sch. Lands v. Block*, 789 F.2d 1308, 1310 (8th Cir. 1986)).

Defendant argues that the QTA’s 12-year statute of limitations accrued on or about September 27, 1951, when Florida (Plaintiff’s predecessor in interest) received actual notice of the claim by the United States via a letter sent from the Chief of the Navy’s Yards and Docks Bureau. [ECF No. 59 at 6; ECF No. 1-32]. In its Order Denying Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction, the Court previously determined,

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“[i]t is clear that the United States claimed an interest in Wisteria Island in 1951 per the Navy’s letter.” [ECF No. 38 at 8]. Plaintiff, however, submits that the QTA gives a federal court jurisdiction only “to adjudicate *a disputed title* to real property in which the United States claims an interest.” [ECF No. 57 at 18] (citing 28 U.S.C. § 2409a; *Lesnoi, Inc. v. U.S.*, 170 F.3d 1188 (9th Cir. 1999)). More specifically, although the Navy may have asserted ownership in 1951, Plaintiff argues that “the essential element of adversity was missing.” *Id.* at 21.

As Defendant points out, and the Court agrees based on consideration of argument presented during the hearing on the parties’ cross motions for summary judgment, Plaintiff appears to be conflating two distinct statutory subject matter jurisdictional requirements: “(1) when the Court has the jurisdiction to haul the United States into court as a defendant under the QTA; and (2) when the statute of limitations for a cause of action brought under the QTA accrues.” [ECF No. 66 at 3]. In fact, these requirements are separate and distinct. For the Court to exercise subject matter jurisdiction over the United States, the QTA requires that there be a “disputed title.” 28 U.S.C. § 2409a(a). “The requirement of a ‘disputed title’ is not related to (and is not repeated) in the statute of limitations for the QTA.” [ECF No. 66 at 4]. Rather, the QTA separately bars any civil action “unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” 28 U.S.C. § 2409a(g). Based on the express language

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of the statute and its plain meaning, the Court cannot extrapolate a requirement for a *dispute to title* prior to the accrual of the statute of limitations.

That being said, the Court agrees with Defendant's position that "even if the Court were to require a disputed title in order for the QTA statute of limitations to accrue, the undisputed evidence in this case establishes that a dispute to title existed in 1951 when the claim of the United States was known to Plaintiff's predecessor in interest, Florida. . . ." [E C F No. 66 at 4]. A review of the record evidence submitted in support of the parties' cross motions for summary judgment confirms that there was, indeed, a factual dispute to title of the Subject Property in 1951. In response to the July 21, 1951 application for purchase received from Paul Sawyer on behalf of Bernie Papy, on July 30, 1951 TIIF issued its notice of intention to sell the 39-acre spoil area which included the Subject Property. [ECF No. 58 at ¶¶ 48-49]. The Navy promptly responded on August 15, 1951 "seeking authority to object to the TIIF's intended sale of the Spoil Area." *Id.* at ¶ 50 (citing August 15, 1951 Navy Speed Letter, ECF No. 58-28). Additionally, on September 27, 1951, the Navy sent TIIF a letter formally objecting to the proposed sale of the Subject Property and claiming an adverse interest to Florida's purported ownership of the property. [ECF No. 1-32]. Therein,

the Navy made clear that it understood that the "spoil area proposed for sale by the State of Florida is located in Frankfort Bank;" that the island was "created by deposits of dredged material from the main ship channel at Key

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West, Florida and was accomplished by the use of Department of Navy funds;” and that “the Navy considers Frankfort Bank, the shoals adjacent thereto and the spoil area in question as being the property of the United States.”

[ECF No. 58 at ¶ 53] (quoting ECF No. 1-32). In response to the Navy’s letter, Florida’s then Attorney General communicated his ambivalence regarding the Navy’s claim and stated, “I am unable to state definitely whether or not the Navy’s claim is valid. However, I do think *that the claim is debatable enough* and so shrouded in antiquity that I think the best course would be for the Trustees to complete the sale. . . .” [ECF No. 1-33] (emphasis added). He also suggested that TIIF explain the Navy’s claim to the purchaser, Papy, “and allow him to accept the Trustees’ deed at his own risk.” *Id.* Further, the Attorney General opined that the deed would place Papy “in position to de-fend [sic] the title. . . . get[ting] the question of title settled one way or other in case the Navy decide[d] to litigate with him.” *Id.* By the Attorney General’s own words, therefore, in 1951 there was a “question of title” regarding the Subject Property which needed to get “settled.” Accordingly, the State of Florida, F.E.B.’s predecessor in interest, had actual notice of the claim of the United States to the Subject Property in 1951. As a result, the 12-year statute of limitations began to accrue in 1951 divesting this court of subject matter jurisdiction over the present action. 28 U.S.C. § 2409a(g).

Plaintiff cites to *Werner* and the several cases cited therein to support the argument that the statute of

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limitations did not begin to run until the government actually interfered with F.E.B.'s use of the property. [ECF No. 64 at 11]. Conceding that Defendant claimed ownership of Wisteria Island in 1951, Defendant argues that the statute of limitations did not start to run until 2011 because, until then, Plaintiff never made any proactive effort to stop F.E.B. and its predecessors from using the island. *Id.* However, as the Court suggested at the hearing, and as Defendant rightly argues, *Werner* is not controlling because it addresses easement rights, not fee simple ownership.

Ultimately, when legislation provides a waiver of the sovereign immunity of the United States, the statute of limitations provision constitutes a condition of that waiver. *See Block v. N.D. ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983). “Accordingly, although we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would ‘extend the waiver beyond that which Congress intended.’” *Id.* (quoting *U.S. v. Kubrick*, 444 U.S. 111, 117-18 (1979)). Because Plaintiff filed its suit more than twelve years after 1951 – the date its predecessor in interest, the State of Florida, received actual notice of the claim of the United States—the suit is barred by 28 U.S.C. § 2409a(g), and this Court has no jurisdiction to inquire into the merits.

IV. Conclusion

After careful consideration, and for the reasons set forth herein, it is hereby

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ORDERED AND ADJUDGED that:

1. Defendant's Motion for Summary Judgment [ECF No. 59] is **GRANTED** as set forth herein.
2. This case is **DISMISSED with prejudice** for lack of subject matter jurisdiction.
3. F.E.B's Motion for Summary Judgment [ECF No. 57] is **DENIED**.
4. This case is **CLOSED**, and all pending motions are **DENIED AS MOOT**.

DONE AND ORDERED in Chambers at Miami, Florida, this 25th day of March, 2015.

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**APPENDIX H — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT,
FILED JANUARY 30, 2026**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 24-12383

UNITED STATES OF AMERICA,

Plaintiff-Counter Defendant-Appellee,

versus

F.E.B. CORP., A FLORIDA CORPORATION,

Defendant-Counter Claimant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 4:18-cv-10203-JEM

Before ROSENBAUM, NEWSOM, and ABUDU, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Appellant
F.E.B. Corp. is DENIED.