

Preserving Florida's Public Lands

FISHEATING CREEK, BIRCH STATE PARK AND PALM AVENUE

by JOE KNETSCH

There is no substitute for good, solid research. The following cases prove the value of this proposition. In each one, historical research proved to be an important component of the victory of the public authorities. Performed in conjunction with professional work in hydrology, surveying, and law, historical research has helped to preserve some of the public's most unique and cherished resources. And, taken in the long-run, the monetary savings to the public is, and will be, quite large. The non-monetary savings in the land, its beauty and its bounty, remains untold. The following three south Florida cases — two of them in Broward County — involving the State's Department of Environmental Protection illustrate this point well.

Originally, the staff at the Department of Environmental Protection (DEP) thought that in preserving Fisheating Creek for public ownership, we were keeping a pristine area for future use. This proved not to be the case. The more we researched, the more we found that the landscape had been altered, manipulated and depleted. What stands to-

day is not the same creek seen by the aboriginal settlers, the combatants in the Second and Third Seminole Wars, or the founders of settlements like Palmdale, Tasmania, Venus or Harrisburg. Today's Fisheating Creek is a river with impoundments of large magnitude in its upper reaches, its major tributary so altered as to become nothing more than an occasional wet slough, and a great lake so changed as to have a much lessened impact on the river's mouth area. In short, what exists today in few ways resembles the river as seen at statehood, when the State took

title to the lands below the Ordinary High Water Line (OHWL). Fisheating Creek is like almost every other water body in Florida — changed. To use the word pristine to describe almost any water body in Florida is to render that word meaningless.

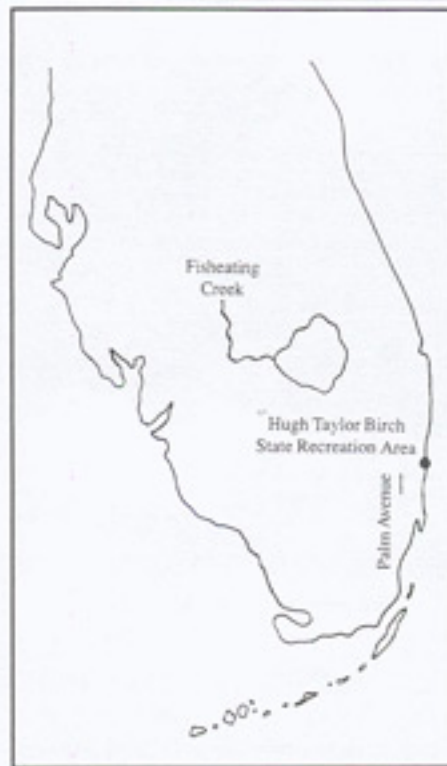
The suit that was filed began in early 1989, when our field investigator discovered certain individuals cutting cypress trees along the creek. Further investigation revealed a man-made fence across the creek a few miles downstream from U. S. 27. With these facts reported, an investigation was begun to determine if the

For anyone who questions whether historical research has a significant practical application, the following article should remove any doubt. Written by Dr. Joe Knetsch, historian with the Florida Department of Environmental Protection and one of the state's foremost practitioners of public and land history, this first-hand view of the value of historical research in preserving three of south Florida's natural treasures was originally delivered as a lecture during Pioneer Days 1997 at the Anne Kolb Nature Center in Hollywood.

In addition to his work for the State, Dr. Knetsch is a former Broward County resident and member of the Broward County Historical Commission. A frequent contributor to Broward Legacy, as well as to historical publications throughout the state, he currently resides in Tallahassee.

creek was navigable in 1845, when the state took title to lands below navigable waters, thus giving the State a claim of ownership. I authored the first three reports on the creek's condition as of 1845 and sent the last one to the Attorney General's representative, David Guest, in March of that year. What we had found, after a brief historical investigation lasting less than two months and based mostly on sources the Department already had in house, was that the creek was used by the original inhabitants of the area, probably Caloosa or a related pre-Caloosa group whose great ceremonial mound at Fort Center was excavated and reported on by the late Dr. William Sears and others. Also found were reports from John T. Sprague's classic account of the Second Seminole War and an especially important report by George Preble, printed in *Tequesta* magazine in the early 1940s. This latter account was to be one of the most important and controversial in the entire litigation. What it proved was that, in 1842, "Past-Midshipman" Preble and his colleagues used thirty-foot long, four-foot wide Indian dug-out canoes to go upstream from Fort Center to the area near the Old Venus Mound, approximately fifty river miles. A few other accounts were found for the Third Seminole War, but none so significant as that of Preble. Not much subsequent information was found on the area, which is still relatively sparsely settled, until an Army Corps of Engineers report for 1915, showing the creek not to be navigable much beyond old Fort Center. The initial evidence also revealed a hearing from 1947, during which an attorney for our opponent, Lykes Brothers Inc., noted that beyond a few rowboats for fishing, the creek was not in use. Based upon Preble, Sears' work, and some of the evidence from the Third Seminole War reports, it was concluded in 1989 that the creek was navigable in 1845 and probably susceptible to use even later.

Even though the Executive Director of the old Department of Natural Resources, predecessor to DEP, did not think the creek navigable, his trip to the area, at Lykes Brothers'



behest, made his conclusions suspect to the press and it was reported so in many newspapers around the state. The Department of Natural Resources refused to take the case any further under direct orders of the Director. However, given the public nature of the outcry and the evidence in the report, Attorney General Bob Butterworth took it upon himself, as the State's top legal officer, to accept the case and assigned David Guest to the job. Guest's experience with an earlier suit involving the Peace River made him the ideal attorney to handle this litigation. His staff, which included Monica Reimer and Karen McMillan, two exceptionally talented people who remained in touch with the case throughout the entire time it took to come to trial, was already in place and geared toward this type of litigation. (Ms. Reimer became one of the three attorneys to try the case on behalf of the Attorney General's Office, having gone to law school and begun practicing in Tallahassee in the meantime.) The notoriety of the case also attracted the attention of the Army Corps of Engineers, who soon began a federal suit on behalf of the creek. Thus, although the Department of Natural Resources initially refused to

be a part of any litigation, the efforts of the Attorney General and the Army Corps began the long, complicated process.

For clarification, it must be understood that the Corps' case depended upon the creek's use for commerce in conjunction with interstate or international trade. The State's case did not depend upon this exacting criteria, but upon the creek's use, or susceptibility for use, for what are termed "useful public purposes." Whatever commerce was carried on upon the creek, in the State's case, did not have to rely on interstate or international trade, but could be strictly local in nature.

Without going into too great detail, the Corps' case was a difficult one from the outset and, in my view, questionably managed by the attorneys assigned to the case. We have always found it ironic that, being the author of the first reports and continually researching this case in the meantime, we were never questioned, deposed or consulted by the Corps' legal representatives. From an even broader perspective, they did not use the expertise of Mr. Guest or other members of his staff effectively and failed to challenge in court many allegations of the opposition which were of a very questionable nature. As a result, the Corps lost its case. Furthermore, the initial failure of the challenges and evidence offered by the Corps placed their own appeals attorney at a distinct disadvantage. In the end of this phase of litigation, the appeal of the case, although very creditably managed, was doomed to failure.

A serious refocusing of the case by Mr. Guest and his staff, and those of us in the Bureau of Survey and Mapping who were asked to assist, now took place. It was obvious that much more research would have to be done if the State's case was to succeed where the Corps' had failed. As a result, we hired researchers who examined records in Kansas City, Missouri; Detroit, Michigan and Brunswick, Maine. Local holdings in Sebring (DeVane Papers), LaBelle (local files and newspapers), Arcadia (Howard Melton's holdings of old DeSoto County newspapers and the

DeSoto County Clerk of the Court records), Belle Glade (Lawrence Will Papers and old holdings of the *Glades Democrat*), Miami (Museum of South Florida History and the Richter Library Special Collections at the University of Miami), Bradenton (Manatee County Library's Eaton Room of Florida History and the Clerk of the Court's old records section), Tampa (University of South Florida Library, Special Collections), Gainesville (P. K. Yonge Library of Florida History) and, most importantly, Fort Lauderdale (Broward County Historical Commission) were visited. We also made a trip to the National Archives in Washington and a two day visit to its Southeastern Regional Library at East Point, Georgia. Finally, at the suggestion of Mr. Guest, Dr. Louis DeVorse, of the University of Georgia, was consulted and additional research conducted in Maine and Massachusetts. Dr. DeVorse's expertise in historical cartography was to introduce all of us to an almost new understanding and appreciation of maps and how they were made.

We were fortunate in also having on board a lady of remarkable ability and tenacity in Sara Warner, who undertook to follow-up many of the leads that some of the documents showed us. In one case, we found the existence of a "Small Watershed Act District" in the upper reaches of Fish-eating Creek which had impounded over 8,000 acres of water during the dry seasons. This District, which has done exactly what it set out to do under the law, has been very effectively altering the source of the stream from its initial work in the late 1950s until this present time. Ms. Warner's follow-up research exposed these facts and also found that few records of its existence can be found anywhere other than that District's own holdings, even though it reports to other governmental entities. She also followed leads concerning the condition of Rainey Slough, which was originally the main tributary to Fish-eating Creek and whose own sources were in Tippen Bay and the Long Island Marsh areas of eastern DeSoto County. This drainage was greatly altered in the late 1950s by the dig-



Fisheating Creek, c. 1960.

ging of the Montgomery Canal, which diverted most of the water from the Tippen Bay and Long Island Marsh areas from its original flow into Fish-eating Creek westward into the Peace River. Just how effective was this change? In the preservation deposition of pioneer resident Frank Jones, he remembered that his uncle used to bring his boat up to the old ferry landing over the slough and visit his relatives from time to time during his hunting and fishing expeditions. Today, except in most extreme conditions, would you need a ferry to cross this slough or even be able to bring a skiff up to this location? No! Thus, Ms. Warner's in-depth research proved that the creek's sources had been altered in a most significant manner.

Unfortunately, most of this research could not be used effectively in court because key pieces of the data, such as discharge and construction details, were missing from the files. Without that data, our hydrologist could not testify to the exact impact of these changes, even with aerial photography clearly showing the changes.

The preservation deposition of the late Frank Jones, a former Glades County Sheriff's deputy, was one of the crucial documents in the trial. One of our major tasks was to verify the central facts of this document. Research into census data and postal records proved to be very important

here and did verify nearly every important point Mr. Jones had made. He recalled the stores in Palmdale and Venus which had traded with the local Indians in the 1920s and '30s, the owners of these establishments, the families who lived along the creek, and the methods by which these settlers lived. Crucially, he remembered clearly that this local trade was frequently carried on by small boats and Indian dug-out canoes, and recalled almost the exact location of the Palmdale store of one "Pug" Delaney who traded in hides and furs. Evidence found in the *Fort Lauderdale Daily News*, at the Broward County Historical Commission offices, verified that Delaney was a frequent visitor to Lakeport and Fort Lauderdale, where he traded for supplies. Information found in LaBelle, at the Heritage Museum, gave even more details of this fascinating man's life, including his former residence in Palmdale, where his wife was the postmistress. Verifying the evidence offered by Mr. Jones' deposition was crucial in proving that the creek was used for local commerce even into the 1930s.

But this still was not enough to give lasting proof of travel on the creek at the time of statehood or before. Numerous visits to the Broward County Historical Commission, however, soon solved this dilemma. In the holdings of the Historical Commission are a large number of reels of the correspondence of the Adjutant General of the United States Army. This military correspondence, acquired for the Commission by the late County Historian, Dr. Cooper Kirk, showed the type of vessels ordered by the U. S. Army for conducting its war against the Seminoles and Miccosukees. The correspondence included the original letters of General Persifer Smith, who founded Fort Center on Fish-eating Creek in early 1838. The boats ordered by General Thomas Jesup, who commanded the campaign in 1837-38, showed clearly that the craft were specifically designed for Florida's shallow rivers, streams and lakes. Additionally, the letters of the Naval and Marine commanders, also available at the Historical Commission, provided the fi-

nal link in this chain of investigation — the orders to Preble's commanding officer, Captain John Rodgers, to undertake the trip up Fisheating Creek.

Still, with more than four years of research, the outcome of the case remained in doubt. The last piece, however, fell into place during the trial. We had argued, two years before the trial, that there was additional archaeological evidence that would aid our case. However, Mr. Guest was not enthusiastic about this as it concerned a period too long before statehood and we could not relate it to current or past navigability. This changed when I had the opportunity to show the information to Jeff Mahl of the Attorney General's Broward Office. Mr. Mahl, who had handled Dr. DeVorse's four days of testimony, was excited about the evidence, especially that of the mound pattern of settlement along the river. Piecing together evidence from the Florida Master Site File, Sears's works, and other archaeological accounts of the Caloosa culture, we soon put the material on a map developed by Jeffrey Cooner, a consulting Public Land Surveyor from Fort Myers. The result was highly significant. It clearly showed that the "residential mounds," to use archaeologist Robert Carr's term, thirteen of which were west of U. S. 27, were all on the edge of the creek, built from fifty to seventy-five centimeters above the highwater marks. Most were contemporary with the Fort Center ceremonial complex. Thus there could be no doubt that the creek was central to this culture's existence and that they probably took their dead for ceremonial burial, via the creek, to Fort Center. This proved the statement made in the initial report that this creek had one of the longest known use patterns of any river or stream in the State of Florida, dating back to about 500 B.C.

The final nail in the coffin, so to speak, came with the testimonies of Dr. DeVorse and Mr. Terry Wilkinson, the State's chief cadastral surveyor, who both noted that the latitude of Mr. Preble's observations taken at the Old Venus Mound and that of U. S. Deputy Surveyor J. S.

Stearns, were exactly the same in showing the end of the useful channel of Fisheating Creek. At 27° 05' North, the creek disappears into a swamp with no clear channel beyond that point. That Preble in 1842 would note this, and that Stearns, during the course of his public lands survey of 1871 would cite the exact same latitude was not coincidental. This had to be where the creek actually ended. The map work of both men, as retraced by surveyor Rod Maddox, plus their notes, showed this to be the case. That Preble and his expedition reached this point in Indian dug-out canoes of thirty feet length and four foot width obviously made the creek appear navigable to any objective jurist because this was accomplished in 1842, just three years prior to statehood.

Greatly shortened and condensed, this was the State's winning case. The incredible teamwork of all involved was something to behold. It involved constant work from nearly 7:30 each morning until 11:30 each night (or later). The intellectual stimulation was intense and exciting. The legal work of David Guest and his staff and Monica Reimer and Jeff Mahl of the Attorney General's Office was of the highest order. But, most importantly, it was the cooperation of researchers, librarians, archivists, local historical societies and commissions as well as national sources of information that made the case winnable. Without this network of un-named players, Fisheating Creek may have been lost and its natural beauty, even in its altered form, destroyed by later developments.

HUGH TAYLOR BIRCH STATE RECREATION AREA

Hugh Taylor Birch donated his Fort Lauderdale beachfront lands for a state park shortly before his death in 1943. His wish was to keep the land from development, in the normal sense of that word, and leave something to the area he so deeply loved. As a shrewd, knowledgeable lawyer who handled some of the largest clients in Chicago, he also was cautious with his own lands. Realiz-

ing that the State of Florida had not always kept lands donated to it for park purposes (e.g. Royal Palm Hammock Park and Turtle Mound), he placed a reverter clause in the bequest stating that the donation must be used for park purposes only, or else it would pass to his heirs and assigns, Antioch College, in Antioch, Ohio, Birch's alma mater. Throughout the years after Mr. Birch's passing, there have been several attempts by his heirs and assigns to rest the park from State ownership.

During the course of threatened litigation, the question of what constituted "park purposes" was constantly raised. The answer to this question would hinge upon, in essence, what Mr. Birch intended to do with his property during his lifetime. It was in regard to this intent that the Department of Environmental Protection was asked to become involved in investigating the life and times of Hugh Taylor Birch. But where to begin? There is no large single holding of Birch papers, and, because he was based in Chicago, what did remain might be difficult to obtain. Luckily, Pamela Euston, then with the Fort Lauderdale Historical Society, had written a paper for Dr. Paul George's class in Florida history at Florida Atlantic University. Her paper, "Big Boss: The Life and Times of Hugh Taylor Birch," was the beginning point of our research. Although centered on his life and accomplishments, Ms. Euston's paper contained numerous citations to sources and named many of Mr. Birch's associates in Fort Lauderdale, including Commodore A. H. Brook and J. B. Fraser. Mr. Fraser, a longtime engineer and property owner in Fort Lauderdale, had given a deposition during the course of earlier litigation that proved to be one of the most important documents for our research.

Fraser's deposition and letters document precisely what Mr. Birch did with his property. It had been an original contention by Antioch College that the land at Mr. Birch's estate was "pristine," natural Florida flora and fauna. This was true only for the first few years of his ownership. Very early on, Birch had begun



Hugh Taylor Birch stands amidst some of the beautiful trees, both native and exotic, on his Fort Lauderdale property (courtesy of the Fort Lauderdale Historical Society).

dredging and had even purchased a dredge from "Cappy" West to work on the property. As the years went by, he began drastically altering the landscape to fit his ideal of the perfect tropical property. As Ms. Euston showed quite conclusively in her biographical sketch, Mr. Birch and his daughter Helen travelled widely and almost always brought back tropical plants with which to experiment at his Fort Lauderdale estate. To get land upon which to plant these exotic species, Mr. Birch resorted to clearing, ditching, draining and filling his land. Mr. Fraser's letters and deposition document and detail these operations.

Aerial photographs from the Broward County Historical Commission and Dillon Aerial Photography clearly demonstrated the vast number of changes to the Birch property over the years. The most important changes to the landscape included the bulkheading and filling of a large portion of the park's area from materials taken out of the Intracoastal Waterway. Here, Birch, Brook and Fraser worked out the details of the right-of-way, dredging and spoil deposit sites, which benefited Birch's property. Every change in the Intracoastal near Birch's holdings added spoil material for filling in the native mangrove and buttonwood originally found on the property. After reviewing the documents, photographs and

property descriptions, it was easy to conclude that approximately two-thirds of the original land which now constitutes Hugh Taylor Birch State Recreation Area has been altered beyond recognition and is basically built upon fill material from the Intracoastal Waterway.

Again, as in the Fisheating Creek litigation, the Attorney General's Office picked up the case and assigned Myron "Mike" Burnstein, of its Hollywood office, to the case. In my opinion, a better choice could not have been made. The Attorney General's staff in Broward did a very professional job of making earlier depositions available to the researchers and obtaining local materials from sources in South Florida. Once more, we made many trips to Fort Lauderdale to visit the records of the Broward County Historical Commission, the Fort Lauderdale Historical Society and, finally, the Model Land Company records recently opened at the University of Miami's Richter Library. With the assistance of Dr. William Brown, Jr., Karen Hudson and Esperanza deVarona of the Richter Library Special Collections staff, we were able to locate a large number of additional documents which demonstrated the purchase of the property and some of its early changes. Together with letters found in the David Fairchild Tropical Gardens Collections, we soon had an excellent idea

as to the actual intent Mr. Birch had for his property. Mr. Burnstein used this to great advantage in preparing his effective arguments.

Birch and Fairchild developed a close friendship over the years and often shared discoveries about the exotic plants they were both experimenting with on their Florida properties. Both were desirous of creating their own versions of Eden in south Florida. Birch's constantly-altered plans for his property in Fort Lauderdale show how, as various new plants were desired, acquired and experimented with, his concept of the final product changed. At the time of his death, a final plan really had never been developed, even though it had been discussed among Birch and his associates. The results were a concept of landscape different from, but similar in approach to, that developed earlier by his friend David Fairchild.

In relating all of this research and discovery to the concept of "park purposes," it can be clearly shown that Mr. Birch's ideas themselves were constantly evolving. Therefore, if Birch was unsettled on a private plan for the property, what could the State do to develop its concept for the park? The question as to Birch's actual intent was fairly open, and Mr. Burnstein's arguments on this point were very effective in showing the jury the vagueness of the phrase in the context of Mr. Birch's expressed wishes. Although there were other questions raised by the Antioch attorneys and we were not privy to all of the answers given in court, it is obvious that Mr. Burnstein's points carried the day. Were it not for the numerous changes to the property by Mr. Birch himself and the unsettled nature of his final plans, those arguments and points would have been much less effective in persuading a jury.

PALM AVENUE RIGHT-OF-WAY

The third and final case of a public land nature involved the dispute created by the widening of Palm Avenue in western Broward County. The setting for this case is the early twentieth century, prior to the cre-

ation of Broward County in 1915. As most everyone now knows, Broward was almost totally covered with water during certain times of the year. The thin strip of habitable land lay on the edge of the Everglades which encompassed most of the present county. Early developers of Broward County had to drain the land by means of canals before it could be made usable and cultivable. The preferred method was to dredge canals and connect them to the State's Everglades Drainage Project main canals, such as the North and South New River Canals or the Hillsboro Canal. The spoil from these canals was then spread evenly and leveled by rollers to construct roadways running within the old right-of-way of the canal itself. This was the common practice. However, about five years ago, this right-of-way was successfully challenged in a local court. The County lost its contention and paid a substantial sum to the landowner in question. When the same attorney brought forth more contestants along the right-of-way for the expansion of Palm Avenue, the County turned to Stephen Lipton to litigate the problem.

A former partner of Lipton, now in his own practice, Patrick Scott is a skillful historical researcher and writer. During the course of researching his first article in the *Broward Legacy*, Mr. Scott had contacted us for information regarding Spanish Land Grants. Knowing our interest in land history, he contacted the office in Tallahassee and asked for any documents which would show the original intent of the Trustees of the Internal Improvement Fund in making right-of-way grants. He also discussed some of our findings with Mr. Lipton and his assistants. At the time, we came to the offices of the Broward County Historical Commission to research Fisheating Creek and encountered one of Mr. Lipton's associates, who immediately arranged for a meeting. In the course of our five and a half hour conference, we were able to establish an understanding of the case and identify the research needs that would answer some crucial questions. Mr. Scott, who had originally brought us into

the case as an outside source, meanwhile, was conducting important historical research on his own.

Having served on the Historical Commission and researched in its holdings many times over the years, I was fairly familiar with the Commission's map collections. During our meeting, Mr. Lipton, his staff and I were able to find many key maps that assisted in the litigation. Also, the Commission's archives proved to be valuable in having information pertaining to the development of roads in the early years and public dedications of rights-of-way to the County. Finally, and most importantly, the Commission also has an important collection of early Broward newspapers which discussed the development of the area in their weekly reportings. By borrowing some of these rolls of microfilm from the Commission, we were able to assist Mr. Lipton in finding contemporary reports of road construction activity.

Through solid research into the newspaper accounts, the Trustees correspondence and Minutes and early road legislation, we were able to show just how and when this infrastructure was developed and the rights of the public to these same roads. At the same time, Patrick Scott was extensively combing the records of other newspapers in the holdings of the Palm Beach Historical Society and in Miami. His discoveries, paralleling ours, showed conclusively that the rights-of-ways for the canals covered the same lands as the roads and that one was not done without the other. Indeed, one developer of the lands in question stated in 1913 that the spoil was being used for "turnpikes" for public travel to and from his improvements. When the legislature passed an act in 1926 giving all roads then in existence or platted to Broward County as public highways, much of the case Mr. Lipton had to argue was made.

Mr. Lipton and his staff soon put the research provided by Mr. Scott and me to good use. In a hearing before an officer of the Court, he was able to argue effectively that the earlier decision was incorrect and that the alleged land owners were not entitled to the \$4,500,000 they were

seeking. After hearing arguments from both sides, the hearing officer simply asked Mr. Lipton's opposing counsel, "Are you sure you want to take this to court?" Within a very short time, whatever rights that the claimants may have been entitled to, if any, were settled for approximately \$70,000. Once again, good, solid research in the historical records had proven crucial to the public's interest in its own lands.

In summary, what can we conclude? First and foremost, historical research is not an esoteric, entertainment only field. It has important and cost-effective uses which cannot now be denied. Second, the public's land must be preserved, even if by costly litigation, because we do not know the price we may have to pay in the future. Current price cost-benefit analysis does not apply very well to natural resources, like public lands, nor does it predict future values which may not be known in the present. Third, historical and legal research are cooperative efforts. No one researcher can stand alone and do the job without the assistance of many others — like librarians, archivists, legal staffs, local historical societies or commissions and other historical researchers. Finally, the public itself must take initiatives to preserve its past records and present resources. Destruction of public records and lands continues unabated throughout the state and nation. Without these records, many other resources, like public lands, are endangered. In a state which undervalues its historical record, such as Florida, we cannot allow any further diminution of our recorded past. It has never been truer than today that the future depends upon the past and, if we do not preserve our recorded heritage, there may be no future.

