



FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
COMMISSIONER ADAM H. PUTNAM

December 22, 2010

Mr. Mark Luchte
Southwest Florida Water Management District
6750 Fruitville Road
Sarasota, Florida 34221

SUBJECT: 373.406(2) Binding Determination – Robert Colvin

Dear Mr. Luchte:

Per your request, enclosed please find our written report on the subject referral. In short, it is the Department's opinion that the operation in question is engaged in production agriculture and that the wetland impacts in the North Area are exempt; however, the wetland impacts in the South Area are not exempt under subsection 373.406(2), Florida Statutes.

If you or your staff have any questions as you review the document, please feel free to contact me or Bill Bartnick at 850-617-1700.

Sincerely,

Adam H. Putnam
Commissioner of Agriculture

A handwritten signature in black ink, appearing to read "Richard J. Budell".

Richard J. Budell, Director
Office of Agricultural Water Policy

Enclosure

cc: Robert Colvin
13711 Bay Lake Road
Groveland, FL 34736

Carol Forthman

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES
Office of Agricultural Water Policy
1203 Governors Square Blvd., Suite 200
Tallahassee, Florida 32301

Binding Recommendation and Opinion
Florida Statute 373.406(2) Exemption Claim
Robert J. Colvin, Lake County

FDACS Clerk No. A76343

Pursuant to the existing *Memorandum of Agreement Regarding Binding Determinations of Exemptions Under Subsection 373.406(2), Florida Statutes*, between the Southwest Florida Water Management District (District) and the Florida Department of Agriculture and Consumer Services Office of Agricultural Water Policy (OAWP), the District requested that OAWP evaluate agricultural activities located on property owned by Robert J. Colvin (Colvin) to determine whether these activities qualify for the statutory exemption. Per this request, staff has performed a site inspection, evaluated District and owner-provided documentation, researched available historical data, and has rendered a conclusion based on the following information.

Background:

The site is a single, contiguous 50-acre parcel, located within Section 17, Township 23 South, Range 24 East, in Lake County, southwest of the intersection of State Road 50 and County Highway 585. The land is classified as agriculture pursuant to 2011 Lake County Property Appraiser information. Robert J. Colvin holds title to the property, and acquired the parcel by warranty deed on January 1, 1974.

On December 12, 2008, District staff met with Mr. Colvin to assess the extent of alleged wetland impacts. In February 2009, the District's Environmental Manager met onsite with the owners and indicated that the District did not believe the alleged impacts qualified for an agricultural exemption. On February 4, 2010, the District sent a Notice of Violation/Proposed Consent Order to the Colvins, proposing a \$222,431.00 fine to resolve the alleged impacts. On August 26, 2010, the District's Regional Agricultural Team met with Mr. Colvin onsite to evaluate the property for an agricultural exemption. On September 30, 2010, the District sent the Colvins an additional letter stating that the alleged impacts did not qualify for an exemption. The Colvins responded to the District in an undated letter, around August 2010. On October 21, 2011, the District sent OAWP a letter requested a binding determination.

Site Inspection Findings:

On October 27, 2011, a site inspection was performed by Noel Marton with the OAWP, accompanied by Mr. and Mrs. Robert and Mary Colvin. During the site visit, two areas of filled wetlands were inspected. One of these filled areas is located at the north end of the property and the other in the southern end. Further, production area fields were also inspected and digital photographs were taken.

At the time of the site inspection, the operation consisted of improved pasture and pastured cattle. No irrigation system was in place, but two (2) non-functioning surface water/irrigation pumps were observed. Mr. Colvin indicated that he hoped to lease the property to a watermelon farmer in the coming year. Mr. and Mrs. Colvin also produced photographs depicting row crop operations with above ground, portable irrigation systems, dated from the 1970's and 1980's.

OAWP will address its findings using the information provided within the District's October 21, 2011 Request for Binding Determination letter, including, but not limited to, aerial map figures titled "Colvin Property – Map of Impacted Areas" (Figure 1), "Colvin Property – Impacts to Historic Dredged Areas not Being Pursued" (Figure 2), a 1984 color infrared aerial photographic map (Figure 3).

A review of the historic photographs demonstrates that the North Area was filled prior to 1984 when the District's wetland jurisdiction was expanded by the Henderson Wetlands Protection Act. Activities prior to the Act were legally conducted and not subject to permitting. There were also areas that had been dredged that the District was not pursuing as outlined in Figure 2.

Figure 1 identifies two (2) specific areas of wetland impacts, the North Area (3.2 acres) and the South Area (4.8 acres).

Figure 2 identifies the same two areas, North and South, and delineates areas not being pursued by the District with these two (2) areas.

Figure 3 depicts the property condition in 1984.

Statutory Analysis:

(a) *"Is the person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture on lands classified as agricultural pursuant to s. 193.461, F.S.?"*

YES. The OAWP finds that Colvin is engaged in the practice of agriculture on the 50 acres of agricultural land in Lake County, as evidenced by their current agricultural land use classification and the ongoing agricultural production activities.

(b) *"Has the individual altered the topography of the tract of land for purposes consistent with the normal and customary practice of such occupation in the area?"*

Not Applicable. With regard to the North Area, by comparing current site conditions and recent aerial photographic maps to Figure 3, the preponderance of impacts occurred during or prior to 1984, thus excluding them from District jurisdiction. Therefore, no determination is being made for this area.

NO. With regard to the South Area, OAWP finds that these activities are not a normal and customary practice for the area because:

1. The size of the wetland impact area (4.5 acres) associated with the South Area exceeds what OAWP considers to be normal and customary for cow/calf or row crop/vegetable production; and
 2. These impacts occurred after 1984.
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(c) *"Are the alteration(s) for the sole or predominant purpose of impeding or diverting surface waters or adversely impacting wetlands?"*

This analysis applies only to the South Area.

NO. (As to impeding or diverting surface waters.) OAWP finds that the agricultural activities on the whole were not for the sole or predominant purpose of impeding or diverting surface waters. During the October 27, 2011 site visit, the owner, as well as OAWP staff verified that the post-development drainage patterns are consistent with the pre-development drainage patterns. Secondly, the onsite ditch system is not connected to offsite drainage systems. Lastly, the entire farm's drainage system is gravity driven, and is devoid of discharge pumps.

YES. (As to adversely impacting wetlands.) The documents from the South Area show a 4.8 acre area of filled wetlands. This fill was for the purpose of converting wetlands to cultivated area. Therefore, the fill was for the predominant purpose of adversely impacting wetlands.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, OAWP has determined that the North Area was altered prior to 1984, during the time when the District did not have statutory authority to regulate these wetlands. However, the South Area would not qualify for an exemption under subsection 373.406(2), F.S.

Nothing herein relieves the landowner from applying for and obtaining any applicable federal, state, or local authorization.

A determination by the Department that an activity is not exempt from permitting does not preclude the landowner and the water management district from agreeing to modifications to the activity that would render it exempt.

Right to Administrative Hearing:

If you wish to contest OAWP's action, you have the right to request an administrative hearing to be conducted in accordance with Sections 120.569 and 120.57, Florida Statutes, and to be represented by counsel or other qualified representative. Mediation is not available. Your request for hearing must contain:

1. Your name, address, and telephone number, and facsimile number (if any).
2. The name, address, telephone number, and facsimile number of your

attorney or qualified representative (if any) upon whom service of pleadings and other papers shall be made.

3. A statement that you are requesting an administrative hearing and dispute the material facts alleged by OAWP, in which case you must identify the material facts that are in dispute (formal hearing), or that you request an administrative hearing and that you do not dispute the facts alleged by the OAWP (informal hearing).
4. A statement of when (date) you received this Notice and the file number of this Notice.

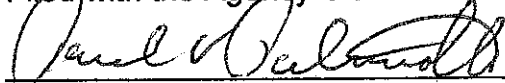
Your request for a hearing must be received at the address shown on this Notice within twenty-one (21) days of receipt of this Notice. If you fail to obtain a Release from this Notice or fail to request an administrative hearing within the twenty-one (21) day deadline you waive your right to a hearing and the binding determination will become final agency action upon filing with the agency clerk.

You may appeal the final agency action by filing: (1) a Notice of Appeal with the OAWP at the address shown in this Notice, and (2) a copy of the Notice of Appeal with the applicable district court along with the filing fee within 30 days of the action becoming final.

Supporting Documents:

- (1) NRCS Field Office Technical Guide, Section IV
- (2) FDACS 2008 Florida Cow/Calf Operations Best Management Practices
- (3) FDACS 2005 Florida Vegetable and Agronomic Crops Best Management Practices Manual
- (4) Aerial Photography, Dated 1970 to 2010
- (5) USDA Soil Survey, Lake County, Florida
- (6) Site Visit Digital Photographs
- (7) 2011 Lake County Property Appraiser Information Card
- (8) E-mail Correspondence from SWFWMD Staff
- (9) Written Correspondence from Colvin

Filed with the Agency Clerk and rendered this 21st day of December, 2011.



Paul Palmiotto, Agency Clerk

Figure 1

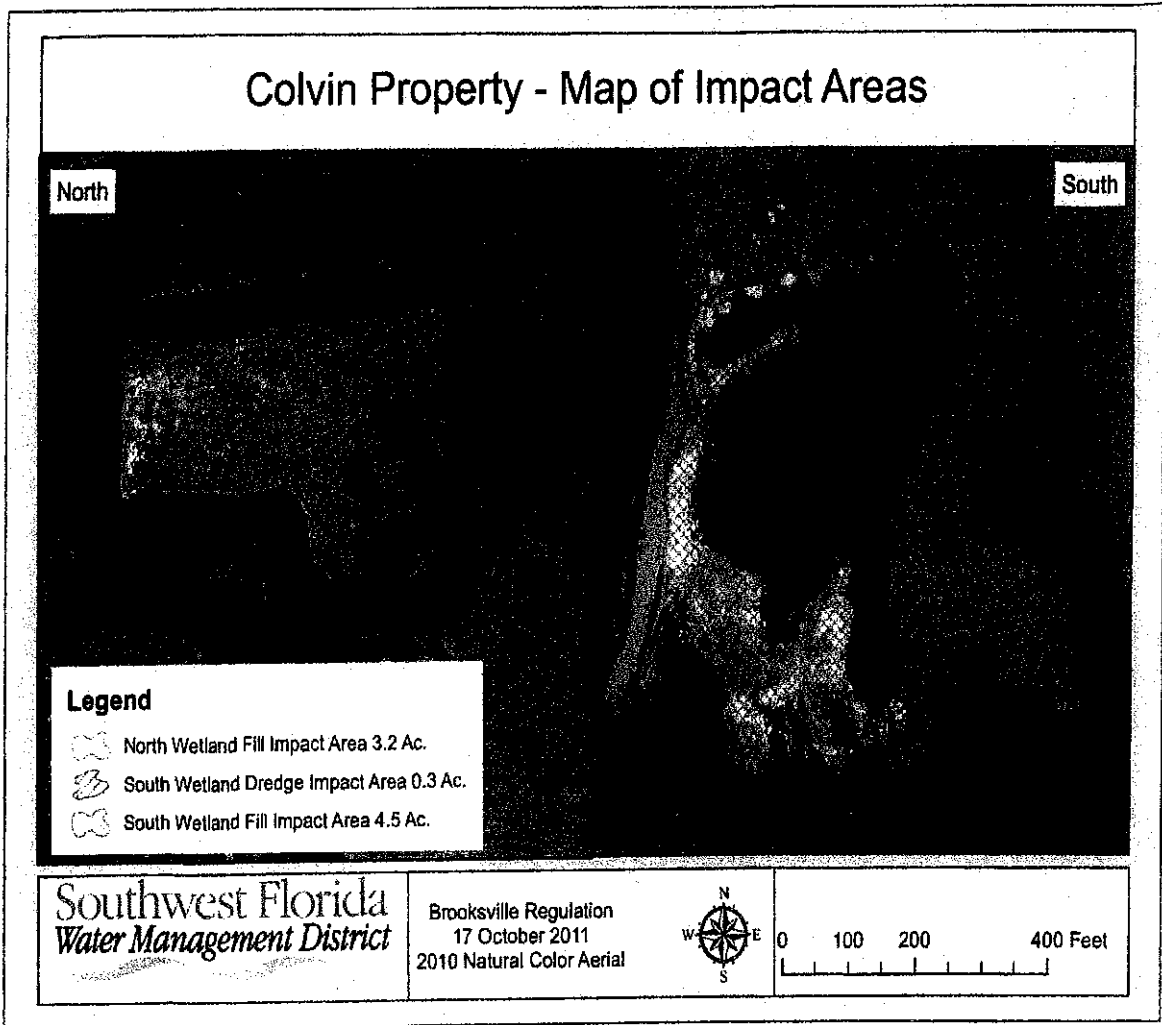


Figure 2

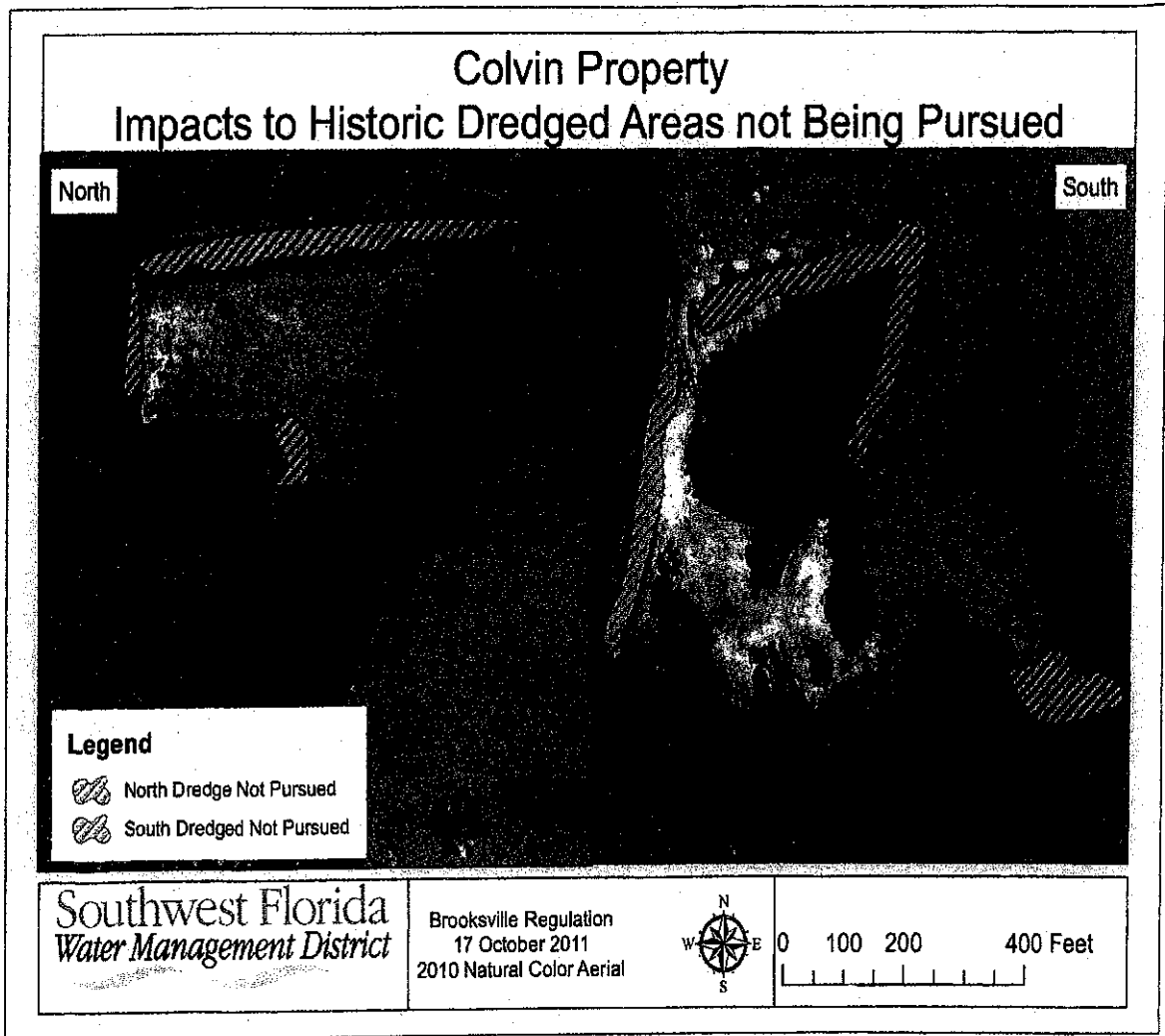


Figure 3

