

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

Binding Determination
Florida Statutes 373.406(2); 373.407
Roberson Ranch, Osceola County, Florida

FDACS Clerk No. A79111

Introduction:

Pursuant to Section 373.407, F.S., a water management district or landowner may request that the Florida Department of Agriculture and Consumer Services (FDACS) make a binding determination as to whether an existing or proposed agricultural activity qualifies for a permitting exemption under Section 373.406(2), F.S. However, in order for FDACS to conduct a binding determination, all of the following conditions must exist:

- a. There must be a dispute between the landowner and the water management district as to the applicability of the exemption.
- b. The activities in question must be on lands classified as agricultural by the county property appraiser pursuant to Section 193.461, F.S.
- c. The activities in question have not been previously authorized by an environmental resource permit (ERP) or a management and storage of surface water (MSSW) permit issued pursuant to Part IV, Chapter 373, F.S., or by a dredge and fill permit issued pursuant to Chapter 403, F.S.

The St. Johns River Water Management District (District) and the landowner have requested that FDACS conduct a binding determination on Roberson Ranch, and the conditions described above are in place.

Background:

John and Kathy Roberson own approximately 1,461 acres of property located in Sections 3, 4, 5, and 6, Township 28, Range 33; and Section 1, Township 28, Range 32 in Osceola County, Florida known as the Roberson Ranch. Beginning in the 1990's the Roberson's began constructing access roads to service their silviculture and cow calf operations.

In June 2009, District land management staff was notified that a fill road had been constructed in a forested wetland within the Roberson property adjacent to public lands known as Triple N Ranch. Triple N Ranch is located south of Roberson Ranch. In July 2009, the District conducted a preliminary aerial inspection of the Roberson Ranch and sent a letter to the Roberson's requesting a site visit. In September 2009, District staff met with the Robersons on site to review the subject area adjacent to Triple N Ranch. District staff advised the Robersons that the construction of the road would have likely required an ERP permit. In June 2010, District staff conducted a more comprehensive aerial review of the Roberson Ranch and identified other areas of

alleged violation associated with road construction activities. Based on aerial interpretation, the District identified approximately 10.74 acres of road-related wetland impacts, which according to the District would have required an ERP permit.

On February 7, 2012, FDACS received a request for a binding determination from M.J. Nichols and Associates, the environmental consultant representing the Robersons. On February 9, 2012, FDACS received another request for a binding determination from the District. On February 24, 2012, FDACS requested clarification from Mike Nichols and the District on the areas that needed to be reviewed in conjunction with the binding determination request. On March 9, 2012, a conference call was held that included FDACS staff, District staff and representatives of the Robersons to try and resolve inconsistencies found in the two requests for binding determinations. On March 12, 2012, FDACS requested additional information from the District. On March 13, 2012, FDACS received a series of historic aerials from the District. On May 3, 2012, FDACS received confirmation of the sites to be inspected from the District and M.J. Nichols and Associates. Ten (10) road sites were identified by the District.

Site Inspection Findings:

On May 8, 2012, a site inspection was performed by Vanessa Bessey with the FDACS, accompanied by Mike Nichols, C.E.P., with M.J. Nichols and Associates, and Dave Morin, both representing Roberson Ranch. During the field visit, the ten (10) sites identified and agreed upon by the District and the Roberson's were investigated and digital photographs were taken at various locations. The sites will be discussed below using the same identifications utilized in the requests for binding determinations received from the District and Roberson Ranch. The sites are depicted in **Exhibit 1**.

Areas 1 and 2

Areas 1 and 2 involve alleged dredging and filling in a cypress swamp wetland. The areas are located in the western portion of the property and to the east of the residence. These areas involve the alleged dredging of approximately 0.213 acres (Area 2) and subsequent placement of the fill material in approximately 0.327 acres (Area 1) of wetland to construct a road (estimated to be at-grade) in or around 2001. An alternate roadway was noted immediately adjacent to Areas 1 and 2 and appears to be sited within uplands. Mr. Morin indicated that the new road was built to include the oak trees in an expanded deer pen area.

Area 27

Area 27 involves approximately 1.261 acres of alleged fill impact to a wet prairie system in or around 1990. On the day of the inspection, it was noted that the area was dominated by bahiagrass with a light scattering of wetland plant species. According to Mr. Morin, the area was dominated by palmetto and was cleared and planted in improved grass to support the cow calf operation on the ranch. The road way is slightly elevated and appears to be built in uplands based on the conditions observed during

the field visit. Moreover, a review of the U.S. Fish and Wildlife Service National Wetland Inventory (NWI) map did not list this area as a wetland.

Areas 30 and 31

Areas 30 and 31 involve the alleged dredging of approximately 0.164 acres (Area 30) and filling of approximately 0.342 acres (Area 31) of cypress/bay swamp. Based on review of historic aerials, the roadway appears to be present as early as 1990. These areas are located in the south central portion of the property and are adjacent to the southern property line. The road is well vegetated and is slightly above grade and is necessary to traverse the southern property line in this area.

Area 39

Area 39 involves the alleged filling of approximately 0.707 acres of wet prairie/cypress swamp wetland. The area is located along the southern property line adjacent to the Triple N Ranch. The road is built at or slightly above grade and an equalizer culvert is present. Mr. Morin indicated that in a ten-inch rain event, no water passes over the road and that the equalizer culvert functions properly. There was no evidence of scour or erosion in the area and the roadway was well vegetated. The road is necessary to traverse the southern property line in this area.

Areas 50 and 51

Areas 50 and 51 are located in the south central portion of the property and involve the alleged dredging of approximately 0.449 acres of dredge (Area 51) and 0.342 acres of alleged filling (Area 50) in a freshwater marsh/cypress wetland to construct a roadway to traverse the property. Based on review of historic aerials, the roadway appears to have been constructed as early as 1990. The roadway was constructed at or slightly above grade and based on conditions observed in the field and review of the NWI map, it appears to have been constructed in uplands. However, it appears that the alleged dredging activities did occur within the wetland.

Areas 44 and 45

Areas 44 and 45 involve the alleged dredging of approximately 0.212 acres (Area 45) and alleged filling of approximately 0.360 acres (Area 44) of cypress swamp/wet prairie wetlands. The roadway is located on the eastern property line and based on review of historic aerials appears to have been constructed as early as 1995. The roadway is slightly above grade and is necessary to traverse the eastern property line in this area.

Application of Statutory Criteria:

Pursuant to Section 373.406(2), F.S., all of the following criteria must be met in order for the permitting exemption to apply.

- (a) *"Is the landowner engaged in the occupation of agriculture, silviculture, floriculture, or horticulture?"*

YES. The FDACS finds that Roberson Ranch is engaged in the occupation of agriculture.

(b) *“Are the alterations (or proposed alterations) to the topography of the land for purposes consistent with the normal and customary practice of such occupation in the area?”*

YES. For Areas 27, 30, 31, 39, 44, 45, and 50. FDACS finds that the activities in these areas are normal and customary for the types of agriculture being conducted in the area.

NO. For Areas 1, 2, and 51. For Areas 1 and 2, the roadway was built immediately adjacent to an existing roadway and is not associated with a property line. Given current access afforded by the existing roadway, FDACS finds that the wetland impacts could have been avoided in this area. The activities are therefore not normal and customary.

For Area 51, the amount of wetland impact is excessive and exceeds what FDACS finds to be normal and customary.

(c) *“Are the alterations (or proposed alterations) for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands?”*

NO. For the areas identified above for which activities were found to be normal and customary, the FDACS finds that the alterations were not conducted for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands.

YES. For the areas identified above for which activities were found not to be normal and customary, the FDACS finds that the alterations were conducted for the sole or predominant purpose of adversely impacting wetlands.

Conclusion:

Based upon the aforementioned facts, site-specific characteristics, historical land use, and documented industry practices, the FDACS has determined that the activities that are normal and customary based on the criteria identified in item (b) above qualify for an exemption under Section 373.406(2), F.S.; all other wetland related impacts do not meet the exemption.

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.

Notice of Rights:

If you wish to contest the Department'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, and 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 Department (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 Office of Agricultural Water Policy, 1203 Governors Square Blvd. Suite 200, Tallahassee, Florida 32301, within twenty-one (21) days of receipt of this Notice. If you 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.

Any party to these proceedings adversely affected by this Final Order is entitled to seek judicial review of this Final Order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedures. Judicial review proceedings must be instituted by filing a Notice of Appeal with the Department's Agency Clerk, 407 South Calhoun Street, Suite 509, Tallahassee, Florida, 32399-0800, within thirty (30) days of rendition of this order. A copy of the Notice of Appeal must be filed with the Clerk of the appropriate District Court of Appeal accompanied by any filing fees prescribed by law.

Supporting Documents:

- (1) District request for exemption determination dated February 9, 2012
- (2) Site Visit Digital Photographs
- (3) M.J. Nichols request for exemption determination dated February 7, 2012
- (4) Water Quality Best Management Practices for Florida Cow/Calf Operations Manual, 2008 Edition
- (5) Natural Resources Conservation Service Conservation Practice Standard Code 560 (Access Roads)

- (6) Silviculture Best Management Practices Manual, Florida Forest Service, Revised 2011
- (7) Additional information received from the District (historic aerial maps) on March 12, 2012
- (8) Florida Forest Service letter dated March 15, 2012 with site management plan for silviculture

Filed with the Agency Clerk and rendered this ____ day of _____, 2012.

Paul Palmiotto, Agency Clerk

Exhibit 1

