

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SOUTH FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Petitioner,)
)
vs.) CASE NO. 86-3691
)
GABLES ENGINEERING, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, James E. Bradwell, held a public hearing in this case on April 8, 1987 in West Palm Beach, Florida. The parties were allowed an opportunity to submit memoranda supportive of their respective positions within thirty (30) days of receipt of the transcript. The parties submitted proposed recommended orders which were considered by me in preparation of this Recommended Order. Proposed findings of fact which are not incorporated herein are the subject of specific rulings in an Appendix to the Recommended Order.

APPEARANCES

For Petitioner: Sarah Nall, Esquire
South Florida Water Management District
3301 Gun Club Road
West Palm Beach, Florida 33402

For Respondent: Robert W. Stewart, Esquire
Corrigan, Zelman & Bander, P.A.
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ISSUE

The issue presented for decision herein is whether or not Respondent, Gables Engineering, is required to obtain a surface water management permit for its property known as the G-Bar-E Ranch in Okeechobee County, Florida.

PRELIMINARY STATEMENT AND BACKGROUND

This action commenced with the filing of an Administrative Complaint and Order by the South Florida Water Management District (District) wherein it sought to require that Gables Engineering Inc. (Gables or Respondent) obtain a surface water management permit for operation and maintenance of a surface water management system on a tract of land owned by Gables, the G-Bar-E Ranch.

At the final hearing, Petitioner called as its witnesses Alvin Castro and Fredrick Davis. Petitioner's Exhibits 1-3 were received into evidence. Respondent called Donald Dillard as a witness. Respondent's Exhibits 1-4 were received into evidence.

FINDINGS OF FACT

Upon consideration of the witnesses and their demeanor while testifying and documentary evidence received, the following relevant facts are found:

1. The South Florida Water Management District (District) is a public corporation of the State of Florida existing by virtue of Chapter 25270, Laws of Florida, 1949, and operating pursuant to Chapter 373, Florida Statutes, and Chapter 40E, Florida Administrative Code as a multipurpose water management district with its principal office in West Palm Beach, Florida.

2. Cables Engineering, Inc., owns property known as the G- Bar-E Ranch which is located in Okeechobee County, Florida. The property is located at the confluence of Otter Creek and Taylor Creek. Otter Creek flows into Taylor Creek which flows offsite into Lake Okeechobee.

3. On August 28, 1986, the District issued an Administrative Complaint and Order which ordered Gables to obtain a surface water management permit pursuant to Chapter 373, Part IV, Florida Statutes for the surface water management system on the G-Bar-E Ranch. Gables refused and requested an administrative hearing on the Complaint and Order.

4. Don Dillard is a Vice President of Gables and has overall responsibility for operating the Ranch. He has been employed by Gables for nine years. Gables has in its employ a ranch manager who remains on site. Until recently, Gables operated the property as a cattle ranch. A portion of its herd was sold to a former ranch manager who also remains on site.

5. Alvin Castro is a civil engineer employed by the District as an area engineer which includes the area of Okeechobee County. Mr. Castro conducted a site inspection on the G-Bar-E Ranch on January 6, 1987.

6. The inspection documented that there are two pond systems on the subject property and eleven hydraulic connections from the subject property to Otter Creek and Taylor Creek.

7. One pond system, identified as pond system No. 2, is located in the mid-western area of the ranch east of Taylor Creek. It consists of three main ponds which are interconnected in a chain with hydraulic control structures and outfall ditches. The ponds were at one time natural ponds but have been deepened and improved to provide a water source for cattle and to store and convey water. A water control structure is located at the western end of each of the three ponds. The structures are aligned and installed to convey water from the upstream ponds to the downstream ponds. The control structures are culvert riser type. A culvert is a man-made conduit that conveys water to a point and allows it to flow. A riser is a half-section of a culvert or pipe welded perpendicular to the outfall culvert. Its main function is to serve as a support structure for weirs or flashboards, which regulate the upstream stages in a ditch. It allows water, as it flows over the spillway or weir, to be collected and directed to the outfall pipe or culvert. Mr. Castro observed water flowing, at the time of inspection, through all three outfall ditches to

the south and westward from the pond system to a hammock area. The ponds have been cleaned of vegetation and the culverts and risers have been maintained by Respondent.

8. One culvert riser structure conveys water from Pond 1 to Pond 2 which consist of a 96-inch riser and a 60-inch culvert, approximately 50 to 60 feet long. At the time of the inspection, water was being discharged through the control structure to an outfall ditch that connects Pond 1 to Pond 2. The outfall ditch is a man-made ditch.

9. A second control structure connects Pond 2 to Pond 3 and interconnecting ditches consisting of a 96-inch ditch riser with a 60-inch culvert in place to hydraulically connect Ponds 2 and 3. The control structure allows water to flow underneath a private road to Pond 3. Mr. Castro observed water flowing from Pond 2 to Pond 3 at the time of his inspection. In the absence of the culvert, the pond system would run together as a large pond. The culverts alter the natural water storage capacity and drainage arrangement on the G-Bar-E Ranch.

10. The third controlled structure is located on the southwest end of Pond 3. It consists of a 96-inch riser on a 60-inch culvert and a sheet pile weir. At the time of his inspection, Castro observed that there was flow of water from the control structure and Pond 3 through the outfall ditch to a hammock wetland area to the southwest. (Petitioner's Exhibit 3, photos 1-6).

11. The other pond systems, identified as pond system 1, is located in the northern portion of the property near the east bank of Taylor Creek. It consists of three main ponds ranging in size of one to five acres. One pond is connected to an outfall ditch to the southwest through a twenty-four inch culvert which runs underneath an existing grass road. At the time of Mr. Castro's inspection, it was conveying water from the pond westward into a vegetated area. The other two ponds are connected to each other via a 12-inch culvert underneath an existing grass road. The ditch is about three to five feet wide. At the time of Mr. Castro's inspection, there was flow of water between the two ponds. The downstream pond has an open connection (no control structure) to a ditch, which ultimately discharges to Taylor Creek. At the time of the inspection, water flow was observed (by Castro) in the ditch and was being discharged from pond 6 to Taylor Creek. (Petitioner's Exhibit 3, photos 11-14) The ditches in the pond system are prismatic; fairly uniform in cross section top width, depth and bottom width, with a straight alignment which indicates that they are man-made. The pond system is well-maintained by Respondent and free of vegetation. (TR, 21).

12. There are four ditch structural connections from the G- Bar-E Ranch to Otter Creek. The easternmost structure consists of a 24-inch riser with a 15-inch culvert. It serves to convey stormwater from an upstream ditch system on the G-Bar-E property to Otter Creek and thereafter, offsite. There was flow to the structure to Otter Creek at the time of Mr. Castro's inspection. (Petitioner's Exhibit 3, photo 7). The second structure is located westward from the first. It consists of a 20-inch riser and a 13-inch culvert. (Petitioner's Exhibit 3, photo 8). The third structure is located westward from the second. It consists of a 32-inch riser and a 16-inch culvert. Discharge of water from the G-Bar-E property to Otter Creek through the third structure was observed by Mr. Castro during his inspection. (Petitioner's Exhibit 3, photo 9). The fourth structure is located westward from the third, consisting of a 36-inch riser and a 24-inch culvert. (Petitioner's Exhibit 3, photo 10).

13. There are several manmade hydraulic connections to Taylor Creek on the G-Bar-E Ranch. On the eastbank of the Creek, the northernmost, identified as Ditch A, is a straight channel. At the time of Mr. Castro's inspection, it was discharging water from the G-Bar-E property to Taylor Creek by means of a 36-inch riser and a 30-inch culvert. The discharge served to drain the G-Bar-E property. (Petitioner's Exhibit 3, photos 15-16). The next ditch south is a prismatic channel with a straight alignment and uniform cross section, connected to Taylor Creek by a 46-inch riser and a 36-inch culvert. At the time of Mr. Castro's inspection, it was discharging water from the G-Bar E property to Taylor Creek. (Petitioner's Exhibit 3, photos 19-22). The headwaters of the ditch is a hammock wetland area at its upstream reach. (Petitioner's Exhibit 3, photos 19-22). The next ditch south is connected to Taylor Creek via a hydraulic control structure consisting of a 42-inch riser and a 30-inch culvert. The structure has at least one flashboard, which is a temporary barrier affixed to the slots on the riser and used to hold and regulate upstream water levels and to increase or decrease the storage capacity. (Petitioner's Exhibit 3, photos 24-25) The ditch drains a hammock area in the interior of the G-Bar-E property which lies to the northeast. It controls water from the upper end of the G-Bar-E property.

14. On the westbank of Taylor Creek, the northernmost connection is an open connection to Taylor Creek. (Petitioner's Exhibit 2, sheet 1; Petitioner's Exhibit 2, photo 17). South of that connection is another ditch with an open connection to Taylor Creek. To the South is another open channel connection to Taylor Creek which has a non-functional control structure at the downstream end. (Petitioner's Exhibit 3, photo 23).

15. The existing system of ponds and ditches on the G-Bar-E Ranch will collect, convey and can regulate upstream storage and flow rates to Taylor Creek and Otter Creek.

16. In 1963 Gables conveyed to Okeechobee County a permanent easement along Taylor Creek. The Taylor Creek easement runs through the G-Bar-E property, roughly from the northeast corner to the southeasternmost corner. The easement to Okeechobee County covers about 150 feet on each side of Taylor Creek through the property. The purpose of the easement, as stated on the face of the document, is for the construction necessary to improve the Taylor Creek channel including widening, deepening, straightening, spoil placement and spoil disposition, installation of drip and pipe drop spillways; for operation and maintenance of the channel; and for the flowage of water through the channel, spillways, and pipe drop spillways. The grantor (Gables) reserved the right to use the easement land at any time, in any manner and for any purpose not inconsistent with the full use and enjoyment thereof by Okeechobee County.

17. A small portion of the ditches on the G-Bar-E Ranch which connect to Taylor Creek and the control structures in those ditches lie within the area covered by the easement granted to Okeechobee County (approximately 150 feet). However, the major portion of the ditches all lie outside the easement granted to Okeechobee County. (TR 63-64; Respondent's Exhibit 4). The ditches serve to drain the G-Bar-E property into Taylor Creek and benefit the G-Bar-E Ranch property. This use is consistent with and permitted by the county's easement. The ditches and structures serve the purpose of draining the property and facilitating the flow of water to Taylor Creek. Mr. Dillard testified that Gables Engineering has not constructed, repaired or maintained any of the ditches during his nine year tenure with the company. (TR 67). However, no

evidence was presented to indicate that the ditches or structures were constructed by Okeechobee County pursuant to the easement or that they benefit Okeechobee County rather than Respondent.

18. In 1966 and 1967, Respondent granted to Okeechobee County a permanent easement along Otter Creek and Biminy canal, which run roughly from east to west near the northern boundary of the property. The easement is for construction necessary to improve Otter and Biminy Creek including widening, deepening, straightening, spoil placement and disposition, installation of drop and pipe drop spillways; for operation and maintenance of the channel and the flow of water to the channel, spillways and pipe drop spillways. Gables Engineering, Inc. reserved the right to install pipe drop inlets, retain, impound and regulate the flow of water into Otter Creek and Biminy Canal lying within the Grantor's land, provided they are installed in conformance with sound engineering practice. Respondent reserved the right to use the easement property at any time and for any purpose not inconsistent with its use by Okeechobee County. (Respondent's Exhibit 2). Four control structures lie within the easement area along Otter Creek and Biminy Canal. A small portion of the ditches from the G-Bar-E Ranch property leading to the control structure lie within the easement area. There is no record evidence to establish that the control structure, which facilitates the flow of water to Otter Creek and Biminy Canal, is maintained by Okeechobee County or in any way serve the purposes of the easement to Okeechobee County. It is unclear who actually constructed the structures. The structures serve to convey water from the G-Bar-E property to Otter Creek. (Petitioner's Exhibit 3, photos 7 and 9). This appears consistent with and expressly permitted by the easement granted to Okeechobee County.

19. In 1964 Gables Engineering granted Okeechobee County a bridge and access road easement which consists of an existing graded road forty feet in width running from State Road 15 to the west boundary of Taylor Creek. The easement is for purposes in conjunction with the construction, maintenance and operation of an access road and bridge across Taylor Creek. The access road and bridge across Taylor Creek do not presently exist. The road easement crosses over a culvert between two of the ponds in pond system 2. However the pond system itself, including the outfall structure and ditch at the western end of the system, lie outside the easement. The easement also crosses a culvert in pond system 1, but the remainder of the pond system lie outside the easement. (TR 63-64).

20. The ponds, control structures and ditches on the G-Bar- E Ranch serve to drain the property internally and to Otter Creek and Taylor Creek. One pond system drains water into a hammock area to the southwest. This system consist of three ponds with control structures between each pond and an outfall ditch at the southwestern end of the system. The other pond system drains water to wetland areas and to Taylor Creek. It consists of three ponds, control structures and outfall ditches to a wetland area and to a ditch leading to Taylor Creek. While Respondent maintains that the culverts were installed for the purpose of allowing vehicular access between the southern and northern areas of the Ranch, the credible evidence reveals that the control structures primary purpose is to drain the property and control the flow of water throughout the system.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action. Section 120.57(1), Florida Statutes.

22. The parties were duly noticed pursuant to the notice provisions of Chapter 120, Florida Statutes.

23. The authority of the Petitioner is derived from Chapter 373, Florida Statutes; Rule Chapter 40E-1, Part VI, Florida Administrative Code and Rule Chapter 40E-4 Florida Administrative Code.

24. Section 373.416, Florida Statutes, authorizes the district to require permits and impose such reasonable conditions, except for exemptions set forth in Section 373.406, Florida Statutes, as are necessary to assure that the operation or maintenance of a dam, impoundment, reservoir, appurtenant work, or works will not be inconsistent with the overall objectives of the District and will not be harmful to the water resources of the district.

25. Rule 40E-4.041, Florida Administrative Code, provides in pertinent part as follows:

(1) Unless expressly exempt by law or District rule a surface water management permit must be obtained from the District prior to the construction, alteration, operation, or abandonment of any dam, impoundment, reservoir, appurtenant work or works.

26. Section 373.403, Florida Statutes, provide the following pertinent definitions:

(1) "Dam" means any artificial or natural barrier, with appurtenant works, raised to obstruct or impound, or which does obstruct or impound, any of the surface waters of the state.

(2) "Appurtenant works" means any artificial improvements to a dam which might affect the safety of such dam or, when employed, might affect the holding capacity of such dam or of the reservoir or impoundment created by such dam.

(3) "Impoundment" means any lake, reservoir, pond or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline.

(4) "Reservoir" means any artificial or natural holding area which contains or will contain the water impounded by a dam.

(5) "Works" means any artificial structures, including, but not limited to, ditches, canals, conduits, channels, culverts, pipes, and other construction that connects to, draws water from, drains water into, or is placed in or across the waters in the state.

(6) "Closed System" means any reservoir or works located entirely within agricultural lands owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof.

(8) "Maintenance" or "repairs" means remedial work of a nature as may affect the safety of any dam, impoundment, reservoir, or appurtenant work or works, but excludes routine custodial maintenance.

27. Rule 40E-4.021, Florida Administrative Code, provide the following pertinent definitions:

(1) "Surface water management permit" means a letter of conceptual approval, construction permit or operation permit.

(4) "Operation permit" means a surface water management permit issued by the District authorizing the operation and maintenance of a surface water management system in accordance with the terms and conditions of the permit.

(5) "Surface water management system" means the collection of devices, improvements, or natural systems whereby surface waters are controlled, impounded, or obstructed. The term includes dams, impoundments, reservoirs, appurtenant works and works as defined in subsections 373.403(1)-(5), Florida Statutes.

28. Competent and substantial evidence was offered herein to establish that G-Bar-E Ranch contains "impoundments" in the form of ponds which contain surface waters and have a discernible shoreline within the purview of Section 373.416(3), Florida Statutes. The evidence also reveals that the G-Bar-E Ranch

contains "Works" in the form of ditches, conduits, culverts, and pipes that connect to and drain water into the waters in this state within the purview of Sections 373.416(5) and 373.019(8), Florida Statutes. The impoundments, ditches and control structures function as a surface water management system and serve to drain the property internally and to Otter Creek and Taylor Creek. As such, it is concluded that Gables Engineering is required to obtain a permit to operate and maintain the system as required by Section 373.416, Florida Statutes and Rule 40E- 4.041, Florida Administrative Code.

29. The easements conveyed by Gables Engineering to Okeechobee County neither on their face nor as applied, exempt Gables Engineering from the requirement to obtain a permit from the impoundment and works on the G-Bar-E Ranch. None of the impoundments and only a small segment of the works are actually located within the easements. Additionally, neither Section 373.406, Florida Statutes nor Rule 40E-4.053, Florida Administrative Code exempt the portion of impoundments and works which lie within the drainage easements from the requirement to obtain a permit to operate. The impoundments, ditches, and control structures on the G-Bar-E Ranch control water on the property and drain water from the Ranch property to Taylor Creek, Otter Creek and Biminy Canal. On their face, the easements permit Gables Engineering to install and operate surface water impoundments and works on the Ranch property. Therefore, Gables Engineering is subject to the permitting requirements of Chapter 373, Part IV, Florida Statutes.

30. Gables Engineering is not exempt from obtaining a permit to operate as an "agricultural closed system" pursuant to Section 373.406, Florida Statutes. This is so since a "closed system" is defined by Section 373.403(8), Florida Statutes, as any reservoir or works located entirely within agricultural lands owned or controlled by the user and which requires water only for the filling, replenishing, and maintaining the water level thereof."

31. The courts have construed the closed system exemption narrowly indicating the requirements that such a system must be located entirely within the lands of the user and cannot exist where there is discharge into waters of the state. See, *Corporation of the President of the Church of Latter-Day Saints v. St. Johns Water Management District*, 489 So.2d 59 (Fla. 5th DCA 1986).

32. The surface water management system on the G-Bar-E Ranch discharges into Otter Creek and Taylor Creek, both waters of the state as defined by Section 403.031(12), Florida Statutes, and ultimately flow into Lake Okeechobee. In addition, several of the systems' ditches cross easements which belong to Okeechobee County.

33. The District interprets an agricultural closed system to be those systems which do not discharge offsite. An agency's interpretation of a statute it is charged with administering is entitled to great weight. *Department of Environmental Regulation v. Goldring*, 477 So.2d 532 at 534 (Fla. 1985).

34. Finally, the provisions of the Florida Water Resources Act are to be liberally construed to effectuate their purpose. Section 373.616 and 373.6161, Florida Statutes (1985). In so doing, persons claiming exemption under the water resources Act must demonstrate fully, their entitlement thereto. For these reasons, the Respondent, Gables Engineering, Inc., is not exempt from the permitting requirements of Chapter 373, Part IV, Florida Statutes, as a closed agriculture system.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Petitioner, South Florida Water Management District enter a Final Order requiring Respondent, Gables Engineering, to file an application to obtain a surface water management permit to operate works on the G Bar-E Ranch pursuant to Chapter 373, Part IV, Florida Statutes and that an initial application be submitted to obtain a surface water management permit within 30 days of the entry of the Final Order in this case.

RECOMMENDED this 18th day of September, 1987, in Tallahassee, Florida.

JAMES E. BRADWELL
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of September, 1987.

COPIES FURNISHED:

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