

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT  
IN AND FOR POLK COUNTY, FLORIDA

CURTIS H. CLARK, ALISON CLARK and  
CLARK CATTLE ENTERPRISES, LLC

Plaintiffs,

vs.

Case No. 2018CA-004321-0000-00

SARAH LEIGH BOUTWELL, SARA LEIGH BOUTWELL REVOCABLE LIVING TRUST,  
SARAH LEIGH BOUTWELL AS TRUSTEE OF SARAH LEIGH BOUTWELL REVOCABLE  
LIVING TRUST, WITHLACOOCHEE WETLAND MITIGATION BANK, LLC, and  
MITIGATION JUNCTION LLC.

Defendants.

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**ORDER GRANTING INJUNCTIVE RELIEF**  
**AND JUDGEMENT FOR DAMAGES**

This matter came on to be heard by the Court by agreement of the parties; the Court after reviewing the allegations of Plaintiff's Second Amended Complaint, the Defendant's Answer and Affirmative Defenses, the Parties' Pre-trial Memorandums, considered testimony of the witness's, reviewed documentary and photographic exhibits filed herein, and being otherwise fully advised enters the following:

**I. ISSUES TO BE DETERMINED**

The issues presented for determination are:

- a) The legal or equitable relationship between adjoining land owners;
- b) Whether or not the Defendants when constructing wetlands on their lands to the west of Plaintiff's lands by changing or altering existing ditches, canals or culverts jointly benefitting both land owners wrongfully altered the flow of surface waters from Plaintiff's lands causing harm;

- c) Whether or not Plaintiffs have and will suffer irreparable harm to their lands and livestock by the continuing saturation of their lands with excessive water which can be remedied by the granting of Injunctive Relief;
- d) Damages to Plaintiff's resulting therefrom by injury to and loss of livestock, and diminution in value of their lands by saturated soils impeding or eliminating agricultural use of the land.

## **II. FACTS**

The following are statements of those facts found by this Court to be true and necessary to this Ruling. To the extent this recitation differs from any party's position, it is a result of determination of credibility, relevance, burden of proof considerations, and the weighing of evidence, both oral, written, documentary and photographic.

The parties have submitted volumes of documentary and photographic exhibits which will be examined first. Plaintiff's will be referred as PE, Defendants as DE, and Joint exhibits JE. The Southwest Florida Water Management District as SWFWMD, the Florida Department of Environmental Protection, FDEP, and Withlacoochee Wetlands Mitigation Bank, WWMB.

1. December 1961, Wall Plastering Company purchased 1270 acres of land in Polk, County Florida. PE 1

2. September 1984 James and Grace Wall were deeded the real property. PE 2

3. JE 36 is designated "Aerial Photo Odom". Exhibit 36 depicts the north half of Wall property in 1980 and the outline later of the mitigation bank. The large ditch running south to north runs through the Clark property. The ditch system carried surface water to the north wherein Wall ditched one canal to the northeast and the other northwest. The system to the northeast which led to a pump was abandoned by him as either too expensive, inefficient or the outfall was illegal. The common drainage system for the property was the outfall to the north located on the north end of the Wall property and the due west ditching which drains the property from east to west along the south end of the large wetland to the west.

4. March 28<sup>th</sup> 1991, at a joint closing the Clark family purchased 536 acres of the Wall property, and Sarah Leigh Boutwell purchased the remainder of 734 acres. PE 3 & 4. The Boutwell

property became jointly owned by Ronald and Sarah Boutwell by deed dated May 18<sup>th</sup> 1992. PE 5.

5. JE 124 dated 1995 when placed next to JE 36, 1980 depicts a large ditch running south to north through Clark property flowing into an agricultural project of Boutwell. The ditch to the south of the large wetland flows east to west into a drainage system moving north. Exhibit 124 insert reflects Mr. Boutwell improvements for the flow of water on north end of his and the Clark's property by installing a large drain culvert.

6. April 30<sup>th</sup> 1996, at a joint closing Ronald Boutwell and Sarah Boutwell in coordination with Curtis and Alison Clark enter into Land Protection Agreements with SWFWMD for the stated purpose of protecting the lands purchased from Wall from development and dedicate its use in perpetuity to agricultural uses. PE 6 & 7.

7. December 29<sup>th</sup> 2006, Curtis Clark and family deed all except 60' of their acreage to Clark Cattle Enterprises LLC., subject to the Land Protection Agreement. PE 10

8. On February 28<sup>th</sup> 2008, Sarah Leigh Boutwell enters into a Conservation Easement with FDEP regarding the first mitigation project individually attaching a Specific Purpose Survey at page 7 of PE 11 depicting a ditch running south to north through the Clark property to Boutwell as flowing south to north and an Access Easement Agreement with FDEP April 24 2009, PE13.

9. April 28 2009, Sarah Leigh Boutwell individually transfers the property adjoining Clark to Sarah Leigh Boutwell as Trustee of the Sarah Leigh Boutwell Revocable Living Trust. PE 14

10. November 24 2009, Sarah Leigh Boutwell enters into a Property Services Agreement regarding the first mitigation project with Mitigation Junction LLC operated by Carl Salafrio which is later to amended to substitute Sarah Leigh Boutwell as Trustee. JE 33

11. The first mitigation project is Boutwell individually and Carl Salafrio acting through Mitigation Junction LLC. The Clark ditch affected is the north south ditch depicted in JE 36. PE 20 sets out this project. The third page of the exhibit is a registered land survey describing the Clark water discharge from the large ditch running south to north. The 9<sup>th</sup> page is the same survey showing the direction of flow arrows pointed north detailing two mitigation projects as well as a weir on the north end of the Clark ditch. The flow continues northwest on the Boutwell property.

At page 19 of PE 20 is a picture of the weir and at 21 a staff gauge to measure increase in height of water.

12. October 20 2009, the Department of the Army issues a Public Notice based on information supplied by Carl Salafrio on behalf of WWMB. At page 8 is an aerial photo with WWMB superimposed showing a ditch on the north of WWMB traveling northwest to Dean Still Road. At page 11 EC & D, Salafrio's company, provides a Plan View for public inspection of WWMB activities clearly indicating flow of surface water from east to west then north from Clark property to Boutwell. JE 120

13. PE 22 is the 2017 Withlacoochee Monitoring report prepared by Carl Salafrio, who is EC&D, filed with SWFWMD. That report 9 pages in Bates 285 includes east to west the flow direction information Salafrio provided to the Army Core of Engineers in 2007 upon which a permit was issued in reliance on its accuracy. JE 35 page 21 attaches a copy of the same diagram to the permit.

14. Plaintiff's exhibit 19 is the 2017 Gregg Mine monitoring report involving the first mitigation project by Boutwell and Salafrio filed with FDEP a separate Agency from SWFWMD. Page 5 is a map showing the Gregg mine next to the Clark property, Dean Still Road to the north, a ditch flowing east to west and Intermittent Streams to the northwest from Clark to Boutwell. Nine pages in at Table 3 we find recorded surface water elevation as a result of the weir from 2008 to 2017. The beginning water level elevation January 2008 is 127 feet, identical to the 127-foot testimony by Kevin Albrecht. The elevation at the weir reaches a consistent 128' in October 2014 to 128.5 thereafter.

15. The result on the Clark property can be seen in Exhibit 35 which are the ArGis web map photos beginning in 2002 to 2020. Alison Clark testified water from Boutwells ran west to east and from Clark east to west to the intersection of the ditch and then north as shown on the survey, PE 20. The photos from 2002 to 2020 show after the weir was in place the back flow of water after several years has saturated the Clark property.

16. JE 42 provides four photos showing the flow from the Boutwell northwest outfall flowing northwest under Dean Still Road.

17. JE 5 is a Land Protection Monitoring Report for FDEP dated October 20<sup>th</sup> 2004. Appendix D Photographs contains 10 photos showing significant flooding of Clark lands at that time. Defendants have argued they are representative of pre-mitigation bank conditions. They are not. Between August 13 and the photo date Hurricanes Charlie, Francis and Jeanne poured 16 inches of rain in Polk County, which the Clarks testified ran off in a week through the ditch system.

18. At JE 24 is the WWMD Environmental Resource Permit (ERP) application to SWFWMD filed by (EC&D), a company owned by Carl Salafrio, in December 2012. It lists at page 7 Sarah Leigh Boutwell Revocable Living Trust as Owner, WWMB at prospective Bank owner and Mitigation Junction LLC as Bank Manager.

19. At page 2 JE 24 Topography is stated “the property exhibits a gradual change in elevation of approximately 1 foot typically draining from south to north.”

20. At page 11 JE 24 Hydrologic Enhancements Salafrio represents the following to SWFWMD: “The hydrologic restoration work plan detailed in Figure 17 and on C-2 and C-3 of Appendix L was developed to ensure that this work will not have adverse effects on hydrologic conditions of adjacent properties. Ditch filling and blocking throughout WWMB is directed at re-isolating and enhancing the hydrologic conditions within wetlands entirely contained within the compensatory mitigation bank. Several of the larger ditches designed to route water northward and offsite will remain open to receiving waters from adjacent properties. Ditch blocks and the filling of ditches will only occur in areas where water is known to flow off WWMB or within ditches that only provide interior drainage.”

21. DE 120 and PE 22 depict flow of waters coming east to west from Clark to Boutwell and are the receiving waters discussed in JE 24.

22. Part of the ERP application JE 24 is a computer model prepared by Mitigation Resources LLC owned by Tom Odom for EC&D owned by Carl Salafrio June 2011. The computer model incorporates assumptions to predict what will take place on the property after the permit is issued and construction begins. The assumptions given to Odom on Boutwell by EC&D were based on a 2008 Lidar topography with a beginning contour level of 128 to 129 feet, JE 45, on site observations, soils data and historic aerials as stated at page 2 of the Odom report. The purpose of improvements was to increase the time water would remain on the property. His model Table A

predicted time of concentration in minutes would be four-fold from existing to propose. Using Lidar his model predicted no adverse effect from a 25-year storm on “tailwater”, which would be the Clark property.

23. Permit from SWFWMD to the Sarah Leigh Boutwell Revocable Living Trust was issued December 20 2012. The Permit JE 16 at pages 3 & 4 finds based on engineering representations of no adverse offsite impacts and materials submitted by Odom and Salafrio that they had reasonable assurance to issue a permit.

24. JE 25 is an Appraisal Report regarding the Clark property September 1995. Photos at pages 9 through 12 of the Appraisal summer August 26 shows that lands of Clark were thriving and free from excessive water. PE 24 are numerous photographs demonstrating significant amounts of water are being retained on the Clerks lands since 2017 to the present from some source that did not exist before with no differing environmental conditions.

25. JE 26 is a letter from WWMB to Clarks counsel denying any culpability for Clarks land water saturation issues, acknowledging they were put on notice March 5 2018, and they would not agree to complete the engineering model themselves to include the Clark property.

26. JE 32 is the same exhibit used to demonstrate the flow of water from east west from Clark to Boutwell.

27. JE 34 is the Amended and Restated Operating Agreement of Mitigation Junction LLC wherein Salafrio and Frasier amend and restate the original agreement between Boutwell and Salafrio to be in full force and effect, except for change in owner ship of the LLC.

28. This Court can find no support by any exhibit, photo or statement made by Defendants when making representations to State and Federal Agencies that waters flow west to east onto the Clark property from Boutwell or that the drainage ditch system created by Wall and adopted by Clark and Boutwell drained other than east to northwest toward the Withlacoochee River Basin.

### **III. TESTIMONY**

29. Curtis Clark is co-owner of the land purchased from Wall with his wife Alison Clark, and Clark Cattle Enterprises LLC. He discussed his long affiliation with ranching and farming in

the Green Swamp area. That in March 1991 he, Alison and the Boutwell family after prior conversation purchased the 1270 acres of ranchland owned by the Wall family since 1961; 536 acres to Clark and 734 acres to Boutwell. The Clark family continued ranching in a cow calf operation raising calves for resale after nurturing them to maturity. Ronnie Boutwell continued ranching and installed a commercial sod operation. Both activities require healthy grass free from disease or fungus to have a successful farming business. Inputs such as fertilizer, pesticides and labor are considerable and affect small profit margins. They both maintained the common drainage system for the two parcels which by gravity directed surface waters to flow from Clark to Boutwell and into the river basin to the northwest. April 30 1996 at a joint closing the Boutwell and Clark family enter into a Land Protection Agreement with SWFWMD to place their lands in perpetuity for agricultural purposes. Clark although aware there was some type of land work next door did not assume anything was taking place that would affect his drainage. By August of 2107 the intrusion of water onto the Cattle Company lands forced him to inquire of his neighbors and SWFWMD if the blocking of the flow of waters through his ditches onto Boutwell and then northwest could be remedied. He received a negative response from both. In 2018 he employed Chastain Skillman Engineering in Lakeland Florida to advise he and Alison of the cause of the saturation of their lands with water and what could be done about it. Since that time his cattle herd has dwindled by half and his and Alison's property has become useless for agriculture which it is restricted too by the Land Protection Agreement with SWFWMD. He requests the Court to enter an Injunction against defendants requiring them to unblock the ditches that previously flowed from the Clark property to Boutwell or reconfigure new ones to facilitate the flow of water between the properties as it had been in the past.

30. Sarah Leigh Boutwell upon being called as a witness was unable to effectively communicate at trial before this Court. Her deposition was tendered by Plaintiff's without objection. At her deposition March 2021 she was able to converse on a variety of subjects. At page 14 she identifies JE 33 as the agreement between her and Mitigation Junction LLC individually which was later amended to her as Trustee of the Sarah Leigh Boutwells Revocable Living Trust and that Carl Salafrio was her initial contact from the beginning of the wetlands project through the present. In that document she appoints Mitigation Junction LLC as an exclusive irrevocable agent for matters dealing with the mitigation banks. At page 18 she verifies she as Trustee is sole owner of the land which adjoins the Clarks and sole holder of the ERP from SWFWMD. At page

22 she testifies the original agreement with Carl Salafrio and her through Mitigation Junction LLC was a 50/50 sharing of profits. Later Donald Fraiser and Dennis Benbow enter the picture. Payments for mitigation credits come to her solely through Mitigation Junction LLC. When asked if the check could be a million dollars she responded “Sometimes”, page 24. At page 30 she understands she is personally responsible under the ERP permit with SWFWMD (JE 16), and she relied upon Carl Salafrio to carry out the permit’s terms. Page 35 she admits authorizing Carl Salafrio’s company EC & D as her actual agent to deal with SWFWMD, and elaborates thereon at page 37. At page 40 she admits receiving the letter from the Clark family dated March 5<sup>th</sup> 2018. That the WWMB has continued selling credits for which she has been paid. That Fraiser nor Benbow came to her to recommend resolving issues with the Clark family right then, page 42; they kept creating more wetlands to market. Page 46 that the Boutwells and Clarks worked together to ensure the drainage worked for the whole property. That the purpose of the conservation easement in 1996 for both families Clark and Boutwell was to run cows. Page 53.

PE 15 is the Conservation and Land Access Easement dated February 25 2014 from Sarah Leigh Boutwell as Trustee of the Sarah Leigh Boutwell Revocable Living Trust to SWFWMD regarding ERP Permit no. 43040545 issued in 2012, JE 16, to the trust. It erroneously lists WWMB as the permit holder, and the entity carrying out the wetland mitigation project when in fact Mitigation Junction LLC is the operator, constructor and maintainer of the all the wetland projects since their inception.

31. Plaintiff’s employed Chastain Skillman environmental engineering group to analyze and advise them regarding the persistent saturation of their soils with water that was impeding the agricultural use of their land. Dr. James Chastain testified his company had spent over 600 hours and charged the Clark family over \$100,000.00 to complete a detailed analysis of their drainage issues with Defendants. Kevin Albrecht of Albrecht Engineering Group a graduate hydrologist supervised the analysis and extensive on-site surveying to reach a scientific opinion supported by detailed observations and decades of experience. Prior to this intensive analysis by the engineers the Clark family spent considerable time and effort with all of the Defendants to reach a solution without litigation. DE 66 is a letter dated March 5<sup>th</sup> from Martin Law Office to Sarah Leigh Boutwell Trustee, Dennis Benbow as Managing Member of WWMB LLC, and SWFWMD setting out the Clarks concerns regarding their lands and cattle and offering the services of Chastain



Skillman engineering to work with their consultants or SWFWMD. By letter dated May 8 2018 JE 26 WWMB rebuffed the Clarks concerns, denied any culpability and refused to extend its engineering efforts to adequately analysis the effect of the construction on the Boutwells property affecting the Clarks drainage. Representatives of Chastain Skillman, the Clarks and their Counsel met with SWFWMD to encourage their participation to relieve the burden on the Clark family for prospective engineering costs, by letter dated September 4<sup>th</sup> 2018, JE 17, the Clarks enumerated six areas of concern set out on the attached diagram to Michelle Hopkins of SWFWMD that conveyances of water from Clark to Boutwell had been altered by WWMB to Clarks detriment. Hearing no response Chastain Skillman conducted an analysis of the WWMB model, their survey crews under Albrecht's supervision measured elevations at important drainage junctions with Boutwell. They found actions by WWMB carried out by Mitigation Junction LLC did not protect Clarks from increased surface water levels that previously drained through ditches and canals set up between the land owners to the river basin. By letter from James Chastain to SWFWMD, DE 68, these concerns were expressed, along with statement that Chastain had not completed an extensive onsite model on the Clark property and asked for the water districts help with this prospective expensive undertaking.

Being rebuffed by SWFWMD and Boutwell the Clarks authorized Chastain Skillman to accomplish a detailed analysis of their lands. Chastain's findings are set out in a review dated June 2020, JE 27. After two extensive onsite surveys of numerous data points, Kevin Albrecht found that a land elevation of 127 feet above sea level was an appropriate measuring stick to analyze water levels. By coincidence his 127-foot beginning point is identical to Carl Salafrio's January 2008 beginning water level of 127 feet in PE 19 discussed in paragraph 14 of this ruling and the WWMB piezometer levels pre-mitigation April 2011 to August 2011 page 17 of the report. Both Chastain and Albrecht testified the result of construction on the Boutwell property has raised water levels on it one to two feet which is shared with the Clark property; the filling of ditches and removal of culverts on Boutwell's lands that previously drained water from the Clark property increased the saturation of the Clarks lands on a continuing basis. There finding in part were:

- a. Diminished ability of Clark property to drain storm volume,
- b. Longer drainage residence time on Clark property,
- c. Cumulative impacts don't allow time for saturated land to recover.

- d. Routine small storms have greatest impacts,
- e. Flat land coupled with WWMB drainage blocks creates marsh like conditions.

James Chastain testified their analysis completes the original WWMD analysis to examine in detail the effects of the Boutwell wetlands projects and construction. That the Clark property without drainage is impeded from carrying out any agricultural pursuits. The difference in the Chastain analysis is that while considering contour of the land it's the depth and contouring of the ditches by Wall, then Clark and Boutwell to drain the land by gravity flow from east to northwest across the property that governs the relationship of the parties. He and Kevin Albrecht testified their opinions were to a reasonable scientific certainty the actions by the Defendants were the cause of the saturated soils of Clark.

32. Alison Clark's testimony reflects daily onsite attention to the Clark Cattle lands and livestock for 41 years. The survey described in PE 19; paragraph 11 of this ruling describes a ditch draining south to north from Clark to Boutwell. Ms. Clark explained water from a ditch going east to west flowed west to the beginning of the north south ditch and on Boutwell west to east to the same point. Water from both ditches then flow north as depicted on the survey. Exhibit 35 the Argis Web map photos from 2002 to 2020 shows meeting of both waters converging at the south end. Through time after the weir was placed on the north end by Mitigation Junction which impeded flow raising the water level form 127 feet to 128.5 over several years caused flooding and wetlands being created on the Clark property. Through the google overheads and the Polk County aerial maps Ms. Clark demonstrated the gradual dramatic change of the Clark property uplands being lowlands after construction of the wetlands by Boutwell blocking the flow of water from Clark to Boutwell through the ditch system. Exhibit 34, contains numerous photos depicting the history and evolution of the effects of saturated soils on the Clark property, the demise of livestock, pastureland rendered impassable and useless a once profitable farm life in ruin.

33. Dr. Robert Gukich, a large animal veterinarian from Lake Wales examined the health of the Clark's cows. He graduated from Auburn school of Veterinary medicine and returned to his home town. He has provided services to thousands of mama cows. In 2018 when the Clarks cattle herd was dwindling, weights were down and calves, bulls and brood cow were sickly, they called Dr, Gukich. Brood cows not cared for will not reproduce. They need space and clean water. He along with the Clarks drove over the entire ranch. He observed wet soils and sickly cows. He took

samples from several cows and had them tested for “flukes” although he knew from observation what was harming the herd. He testified that cows can’t survive in wet soils that parasites such as flukes thrive in it and are ingested by the cows. There is no cure for flukes. While the adults might be killed the eggs inside the cow are unaffected. He testified the cause is saturated soils creating a breeding ground for pests and disease. That water drains nutrients from the grass and affects cattle health. That wet lands at Clark ranch had reduced the available pastureland to raise a herd, and as long as the land was wet ranching would be affected. He explained by autopsy photos how flukes invade the liver of a cow and cause a slow death from malnutrition. He offered an opinion to reasonable medical certainty that the saturated soils at Clark’s ranch were the cause of the flukes and lack of nutrition in the grass was affecting their cows.

34. Dr. Thomas Spreen was called as an agricultural economist by Plaintiffs. He graduated from Purdue with a BA, Masters and Ph.D. in math and Ag Economics. He sought employment at the University of Florida Ag department Institute for Food and Agricultural Sciences (IFAS). He became chairman of the department of Ag economics, and is now Professor Emeritus. His report is PE 26. His method for establishing loss to the Clarks cattle as a result of saturated soils went unchallenged. He found the number of brood cows declined from 190 in 2016 to 87 in 2022. Calves sold from 145 to 46. That while prices for calves increased the weight of Clarks calves dropped dramatically due to flukes and malnutrition and the percent of calves produced in relationship to number of brood cows dropped by 1/3. He offered three damage scenarios based upon reasonable economic certainty. The first 2016 to date of trial; the second 5 years assuming Clarks lands could be rehabilitated by regaining drainage and third a 10-year analysis assuming Boutwells lands could not be restructured. They are as follows:

A. 2018 to 2022 \$283,707.00

B. 2022 to 2027 \$294,627.00

C. 2022 to 2032 \$578,334.00

35. Kyle A. Catlett MAI of Trigg, Catlett & Associates testified regarding the diminution of the value of the lands of Clark Cattle Enterprises as a result of the saturation of its soils caused by inability of its drainage ditches to drain as they had in the past prior to the construction of wetlands on the Boutwells property. He has an extensive background on the appraisal of

agricultural lands and cattle ranches. He points out the poignancy of the Clarks dilemma in that the property is in the Green Swamp subject to housing restrictions. Further the Clarks and Boutwells entered into Land Conservation agreements with SWFWMD to only use their lands for agricultural purposes. The legislature created an exception to Ag use allowing mitigation banks to replace agricultural uses for the benefit of developers facing a wetlands issue being able to destroy the wetland impeding development and remake it with an artificial one in another place. The Clarks wish to retain the land for cattle which is rendered useless by the wet ground. The Appraisal Report is PE 24. It uses the market value approach which is what a buyer not under duress will pay for a property based on its appeal to him or her. He evaluated the Clark land under the assumption It “had been materially and adversely impacted by the Withlacoochee Wetland Mitigation Bank on the adjacent Boutwell property.” PE 24 page 4. He reviewed four lands encumbered by Conservation Easements, but not subject to continued wet soils. He then sought to find lands affected by hydrological issues. He found seven properties affected and compared their marketability to lands unaffected. The result was as follows:

- A. The unaffected market value of the Clark property \$ 2,103,000.00.
- B. Affected market value considering adverse hydrological effects \$725,000.
- C Diminution in value of Clark lands \$ 1,378.000.00

His opinion was to a reasonable appraisal certainty, and went unchallenged.

36. Donald Fraiser a long-term resident and 1/6 owner of Mitigation Junction LLC was called by the Defendants. He had previously observed the Wall property and stated it had a drainage system that drains north to the Withlacoochee river five miles to the northwest. That water from the Wall property flows south to north which is downstream. He states water flows from Boutwell to Clark. He refers to a USGS topographic site location map, DE 123, to support his theory that water flows northeast across Boutwell and Clark to an outfall at the northern end of Clarks property at the site of the pump abandoned by Wall. Other than a contour map and anecdotal history he offers no other relevant information. He states the going rate per credit to a prospective developer to be able to destroy one wetland by creating another is \$175,000.00 a credit for a total value of \$17,000,000.00 based on 123 credits available on the Boutwell property.

37. David Kramer was called by the defense as a SWFWMD representative. He stated the Boutwell permit was issued by Michelle Hopkins December 20 2012, JE 16, based on the ERP application, JE 24, indicating no adverse off-site effects. That it gave reasonable assurances to them that the project would have no adverse off-site impacts on adjoining property. The engineer of record will use all available data. SWFWMD did no independent modeling. That they were told in the ERP application storm events would not exacerbate water issues on adjacent property. He believes there was “ground truth” survey data in addition to Lidar used on both properties. He has not reviewed Chastain “ground truth” survey data, and SWFWMD is a neutral party in this matter. He seems unaware the only ground truth survey data from Defendants is PE 20, a 9/10/07 survey demonstrating the south to northwest flow of water and DE 122 which is the first extensive ground truth surveys conducted by Chastain Skillman.

38. Carl Salafrio hydrologist and Tom Odom engineer occupy positions similar to Chastain and Albrecht. Carl Salafrio as owner of Mitigation Junction LLC has participated in all mitigation activities on the Boutwell property. JE 24 is the ERP application he filed on December 2012 with SWFWMD. It contains extensive information about the proposed construction of WWMB and its effects on the land. A page 2 Salafrio states through EC& D, his company, under Topography WWMD and surrounding properties are relatively flat. That there is a gradual change in elevation of 1 foot draining south to north. He cites to a Water Flow and Discharge Lidar Topography aerial, Figure 9. This exhibit describes flow of water south to north exactly as described by the Clarks. It shows the east to west and west to east meeting of ditches then flowing north from Clark to Boutwell. It shows water circling from Boutwell to Clark then turning northwest to an identified discharge point at the north end of the Boutwell property and onto the river basin. This may be why at page 11 7,5 Hydrologic Enhancement he cites Figure 17 to state his work will not affect receiving waters from other properties. Figure 17 and other identical maps show water coming east to west from Clark to Boutwell and then north. This is the document he testified was changed, which in fact was not.

The Hydrologic Computer Model for the ERP was prepared by Tom Odom June 2011 for EC & D to use in support of the Boutwell permit application. In appendix D he discusses being able to quadruple the water retention time on the Boutwell. property. His input data consisted of JE 45 a Lidar map reflecting elevations he used for the Clark property as well as Boutwell. He

considered ecological data from elevation of Lichens on trees to help establish high water marks. His model reflected a 25-year storm event would have no effect on the Clark property because the Clark elevation was high enough to withstand intrusion of water from Boutwell. His participation with the project was limited to the ERP application which SWFWMD accepted along with the representation by EC & D that gave them reasonable assurances the project was a represented.

39. Mark Ellard PE a hydrologist was hired by Defendants in July 2022 to critique the work of the other experts. He stated the ERP application and model gave reasonable assurance to SWFWMD that a permit should be entered and that a Lidar picture taken in 2008 was adequate to establish the Clark elevations. That the use of ecological data from trees was valid even though he did nothing to verify it. His testimony regarding reasonable assurance for issuance of a permit is directed to SWFWMD and has no relevance to this matter. He attacks Kevin Albrecht's use of piezometer data a page 20 of JE 27 the Chastain report not realizing it was data from Carl Salafrio's historical water level records for the Boutwell property. In the parlance of this litigation his testimony appears to be a last-ditch effort by Defendants to shore up untenable positions.

#### **IV. LAW OF THE CASE**

The ERP permit application states as follows:

##### 4.1 General.

- a. Will not cause adverse water quantity impacts to receiving waters or adjacent lands.
- b. Will not cause adverse flooding to onsite or offsite property.

The legal issue is not whether or not the Clark land elevation by the Boutwell engineer is correct, or whether the permit was validly granted. The issue is whether or not the methods and manner of change to the terrain of her land by Boutwell has caused harm to the Clarks property. Further, whether or not Boutwell complied with or violated her permit conditions is between she and SWFWMD. Violation or compliance with permit conditions while evidentiary between she and the Clarks is not determinative. Clark cannot enforce the permit. SWFWMD issued the permit based on Boutwell representing to it the adjacent properties would not be harmed.

The landmark decision in Florida is *Westland Skating Center, Inc v. Gus Machado Buick, Inc.* 542 So2d 959 (Fla.1989). Justice Steve Grimes discussed competing theories of liability for alteration of surface waters by a land owner. If the claim is based upon the intentional act of an adjoining landowner the law of Nuisance applies and the conduct of the offending party is measured in terms of reasonableness, bracket (1) page 961. The general rule is that the lower land owner must accept water from the higher, and may not make improvement that injure the upper owner. The converse is true the upper owner cannot use its property to the detriment of the lower. The basic issue is that the person responsible for altering surface water flow should be responsible. At page 962 the Court points out the person erecting barriers should provide adequate drainage to protect the adjacent owner. Lastly at (5) the Court states compliance with a code or statute while evidence of reasonableness does not justify interference with another's property rights.

*Heritage 5, LLC v. Estrada*, 64 So. 3d 1292 (Fla. 4<sup>th</sup> DCA 2011), involved a situation similar to ours. The adjoining neighbor to Heritage altered his abutting property by filling in an east west ditch causing surface waters to back up onto Heritage's nursery causing harm to land and crops. Heritage as Clark claimed damage to property, diminution in value of land and sought injunctive relief. The Court found the transition from wetland to agricultural use by creating ditches and canals by the adjoining land owners facilitated the natural flow of water as part of a drainage scheme. The lower Court was directed to determine damages and the terms of a permanent injunction.

The Defendants make much of having a SWFWMD permit to alter ditches and canals as somehow justifying blocking the flow of Clarks waters through canal and ditches as they had for decades. The issues Clark seeks to litigate have never been the subject of a contested matter or litigation. A decision by Justice Quince while sitting on the Second District Court of Appeal disposes of this issue. *Porter v. Saddlebrook Resorts Inc.* 679 So.2d 1212, (Fla. 2<sup>nd</sup> DCA 1996) denied a collateral estoppel defense of a prior Administrative Hearing because issues relating to

nuisance were not litigated. A predecessor opinion states the same that compliance with ordinances or rules is only evidence of reasonableness and not determinative of whether or not one land owner harmed another, and that the injured landowner may recover crop loss damages and diminution in value of land during pendency of nuisance. *Porter v. Saddlebrook Resorts* 596 So. 2d 472 (Fla.2<sup>nd</sup> DCA 1992).

Clarks have made claim for Negligence, Nuisance, Trespass and Injunctive Relief. The acts by Boutwell are intentional and continuing. Nuisance applies. Trespass is an add on assuming Boutwells waters are backing up onto Clark's properties as well as Clarks waters being impeded or blocked. Claim for permanent Injunction is Clark's primary remedy.

*Weekley v. Pace assembly Ministries Inc.* 761 So. 2d 220 (Fla. 1st DCA 1996) citing Westland, supra, founds allegations of flooding by one land owner against another were sufficient to support a claim for Injunctive Relief. Clarks when filing suit in 2018 made no claim for Temporary Injunction because Boutwell denied she was impeding Clark's waters, had a valid SWFWMD permit and a Bond would be exorbitant. Defendant Boutwell continued to develop her land to Clark's detriment even when put on notice 4 years ago.

This Court has broad discretion when framing an Order Granting Injunctive Relief. *Channel Components Inc v. America H Electronics Inc.* 915 So2d 1278 (Fla. 2<sup>nd</sup> DCA 2005). Boutwell by forging ahead with constructing wetlands to sell for credits of \$175,000 a piece may have made remediation of her lands impossible to rectify Clark's saturation of its lands.

As discussed in the analysis by the Court of exhibits and testimony there is substantial evidence that the defendants altered the flow of surface water drainage from what was previously engineered on the property by prior owners and prior use by the parties. There can be no reasonable dispute that the Defendants uses of the Boutwell lands has caused injury to the Clark's lands and livestock.

The evidence establishes that Sarah Leigh Boutwells Individually and as Trustee owed a legal duty to Alison and Curtis Clark and Clark Cattle Enterprises to not interfere with the



drainage of their lands as previously created between them. Clark's lands and livestock have suffered irreparable harm as a result of the continued saturation of the Clark property by the use of Boutwells and her associates when creating wetlands for profit.

**IT IS ORDERED AND DECREED** that:

1. Plaintiff's request for Injunctive Relief is GRANTED.
2. Defendants Sarah Leigh Boutwell Individually and as Trustee of the Sarah Leigh Boutwell Revocable Living Trust, the Sarah Leigh Boutwell Revocable Living Trust, and Mitigation Junction LLC, their officers, agents, employees, and all persons acting through or for them shall be immediately and permanently enjoined from:
  - a. Engaging in any further acts or conduct that restricts the flow of water from the Clark property through Boutwell;
  - b. Present to the Court within 30 days a detailed plan for facilitating the flow of water from Clark to Boutwell; at that time the Court will determine if a fine will be assessed.
3. Defendants shall preserve all records of sale of credits,
4. Defendants shall make no disposition of assets to avoid this Decree,
5. A hearing will be held to determine the injury to and loss of livestock caused by Defendants actions from 2018 to 2022.
6. Defendants be required to pay Plaintiff's reasonable attorney's fees, costs and interest upon motion being made by Plaintiff's,

**IT IS FURTHER ORDERED** that:

7. This Court reserves jurisdiction of this cause to enter additional damages as presented in the record and stated in this Order depending on compliance by Defendants with the Injunction.
8. Implement and increase or decrease the daily fine based on the actions of the Defendants,

9. That execution exist forthwith for execution of this Order and Decree,

**DONE AND ORDERED** at Bartow, Polk County, Florida, this 31<sup>st</sup> day of March, 2023.

A handwritten signature in black ink, appearing to read 'D. Moore', written over a horizontal line.

Dana Y. Moore, Circuit Court Judge

COPIES FURNISHED TO

Counsel of record  
Rory Ryan Esquire  
Michael Martin Esquire