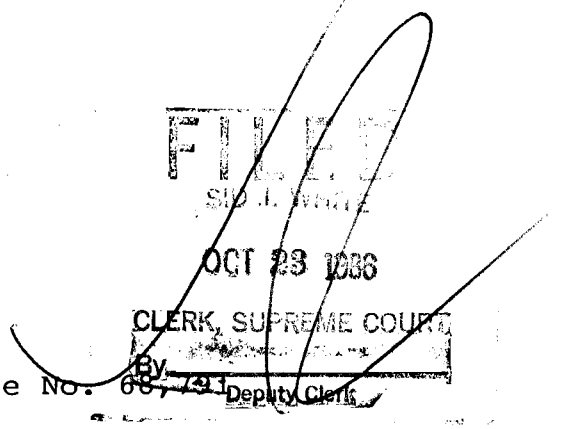
OSCEOLA COUNTY, a political subdivision of the State of Florida,

Petitioner,

vs.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Respondent.



Case No. 68,791

Appeal From The District Court of Appeal, Fifth District

SOUTH BREVARD WATER AUTHORITY AMICUS BRIEF

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PRELIMINARY STATEMENT

The record below is presently not prepared and will not be transmitted until October 20, 1986. Amicus, South Brevard Water Authority, will, therefore, cite to the record as set forth in its Appendix to this Brief. Parties and other governmental entities frequently referred to are as folows:

1. App._____. Citations to the partial record provided in Appendix accompanying this brief.

2. Osceola County. Petitioner herein and the Petitioner in the original prohibition proceedings below.

3. St. Johns. The St. Johns River Water Management District is the Respondent in this Court as it was below.

4. DER. The Florida Department of Environmental Regulation is the agency which was an amicus below.

5. Brevard County. Brevard County was the permit applicant below. A dependent special district of Brevard County, the South Brevard Water Supply Authority, appeared as amicus below.

STATEMENT OF THE CASE

Osceola County seeks discretionary conflict review of the decision by the District Court of Appeal, Fifth District, dissolving an Order to Show Cause and denying a Writ of Prohibition. Osceola County v. St. Johns River Water Management District 486 So.2d 616, (Fla.5th DCA 1986). The issue before the Fifth District was whether the presence of the political boundary of a water management district prohibited an applicant from transferring water across such boundary when the groundwater and surface water in the basin naturally flowed across the boundary in the direction of the applicant?

STATEMENT OF THE FACTS

Brevard County applied for a permit on August 18, 1983, from the South Florida Water Management District to drill a wellfield near Holopaw in Osceola County, Florida. The wellfield is for the purpose of pumping 21.75 million gallons per day of public water to serve a projected population of 185,184 inhabitants located in the cities of Melbourne, Palm Bay, Satellite Beach, Indian Harbour Beach, Indialantic, Melbourne Beach and the unincorporated sections of South Brevard County (Petitioner App.19). Although both the surface water and groundwater in the vicinity of the wellfield flow toward the St. Johns River and the area where the water would be consumed, the wellfield site is located in the South Florida Water Management District.

The water in the groundwater basin in Osceola County flows eastward toward Brevard County and the Atlantic Ocean and serves as an underground source of water for much of southern Brevard County and all of Indian River County. However, the groundwater diminishes in quality and increases in concentration of salts as one moves eastward to the Atlantic Ocean. Affidavit of Douglas A. Munch, Director of the Division of Resource Evaluation, Department of Water Resources, St. Johns River Water Management District. Appendix pages 3,4.

While the wellfield design and pipeline from Osceola County to South Brevard County would require the transport of groundwater across a water management district boundary, there would be no transfer of groundwater across a natural hydro-geologic boundary. The proposed wellfield would intercept the groundwater in its migration in Osceola County before the groundwater deteriorated in its quality in South Brevard County as it approached the ocean.

Chapter 373 Florida Statutes, known as the "Florida Water Resources Act of 1972" sets forth State policy with respect water control and conservation throughout the State of Florida and delegated to the Department of Environment Regulation the responsibility for the administration of Chapter 373 at the State level. Florida Statute 373.026.

Chapter 373 Florida Statutes further created five regional water management districts including the South Florida Water Management District and the St. Johns River Water Management District and delegated specific powers and responsibilities to each such district, including authorization to contract with public agencies, private corporations or other persons, to sue or be sued, to issue orders, to implement or enforce any of the provisions of Chapter 373 or regulations thereunder and to make surveys and investigations of the water supply and resources of the district and cooperate with other

governmental agencies in similar activities.

Through a dual delegation of authority to administrative agencies, the legislature authorized both the Department of Environment Regulation and each Water Management District to adopt regulations and rules to administer the provisions of Chapter 373. Florida Statute Section 373.043, 373.044, 373.113. The district boundaries were set by statute, Florida Statute 373.069, and generally run along watershed or hydrologic lines. Maloney, Plager, Ausness and Canter, Florida Water Law, 210 (1980).

Although statutory boundaries of the various districts generally follow watershed lines, the actual watershed of the area near the proposed wellfield in Osceola County drains to the St. Johns River Water Management District. Affidavit of Dr. Charles Tai, Director of Division of Engineering, Department of Water Resources, St. Johns River Water Management District. Appendix pages 1,2.

The district boundary lines created by statute divide numerous political subdivisions including, for instance, Osceola County, Orange County and the City of Orlando. A portion of the City of Orlando lies in the South Florida Water Management District and the remainder within the St. Johns River Water Management District. A wellfield located in one district serves Orlando water consumers located in the adjoining district.

Orange County has a similar situation. The City of Cocoa, a municipality in Brevard County, is served by a wellfield located in Orange County. Numerous other municipalities and counties depend upon a source of water located outside their political bounds. Affidavit of R. Duke Woodson, Director of Department of Resource Management, St. Johns River Water Management District. Appendix pages 5,6. Numerous privately owned properties upon which residential subdivisions or other developments are constructed, straddle a boundary between water management districts. Id.

The Department of Environmental Regulation adopted Rule 17-40.04 on interdistrict transfers effective May 5, 1981, which required anyone seeking an interdistrict transfer to obtain the consent of both water management districts. The St. Johns River Water Management District enacted Rule 40C-2.312 in January 1983 requiring anyone seeking an interdistrict transfer to obtain a consumptive use permit from the St. Johns River Water Management District if the use lies within the District. While the application was pending before the South Florida Water Management District, Brevard County in conjunction with the South Brevard Water Authority applied to the St. Johns River Water Management District for a consumptive use permit as it was required to obtain the approval of both Districts. The St. Johns staff recommended a denial of the permit and scheduled the

permit for action by its governing board. Prior to a hearing on the merits before the governing board, Osceola County filed this proceeding and obtained a writ of prohibition prohibiting the governing board from hearing this application. The District Court of Appeal discharged the writ and this appeal resulted.

SUMMARY OF ARGUMENT

The St. John's River Water Management District has jurisdiction to consider Brevard County's consumptive use permit application, as the actual consumption and use of the water from the proposed project will be in South Brevard County, which lies within the St. John's District. A well permit must also be obtained from the South Florida Water Management District, in which the proposed well field will be located.

The scope of review is limited to matters appearing on the face of the opinion below. No express and direct conflict exists with Department of Professional Regulations v. Pariser, 483 So 2d 28 (Fla 1st DCA 1985) nor Askew v. Cross Key Waterways 372 So 2d 913 (Fla. 1979). A liberal construction of the provisions of the Florida Water Resources Act of 1972, mandated by the Act itself as well as case law, leads inescapably to the conclusion that transport of water across district boundaries is contemplated and authorized by the Act.

ARGUMENT

POINT I

THE ST. JOHNS RIVER WATER MANAGEMENT DISTRICT HAS JURISDICTION TO CONSIDER BREVARD COUNTY'S CONSUMPTIVE USE PERMIT APPLICATION.

The subject of this litigation is an application by Brevard County for a consumptive use permit. The water source for the consumptive use permit is a proposed wellfield in the Holopaw area of Osceola County lying within the South Florida Water Management District. The water will be piped from the wellfield and consumed in the St. Johns River Water Management District in the cities of Melbourne, Palm Bay, West Melbourne, Satellite Beach, Indian Harbour Beach, Indialantic and Melbourne Beach as well as unincorporated areas of South Brevard County.

Water, as it migrates, does not know political boundaries. Surface water flows into lakes, rivers and streams or percolates into the ground and responds to the subterrain as it moves towards the oceans. At common law, legal restrictions on water use and consumption developed. A person could not withdraw or use groundwater beyond the limits of the ownership of the overlying land where the groundwater was located. Town of Purcellville v Potts, 179 Va. 514, 19 SE. 2d 700, (Va. 1924), Pernell v Henderson, 229 N.C. 79, 16 SE. 2d 449, (N.C. 1941). Surface water could not be consumed outside the watershed or

basin from which it was taken. Maloney, Plager and Baldwin, Water Law and Administration: the Florida Experience, (1968)

Today's technology has produced large pumps and heavy equipment which enable water users to pump,impound and consume Florida's waters at an accelerated rate. Agricultural crop irrigation has been the primary consumer of water in Florida with twice as much water being used for irrigation as for public water supply.[1]

Florida's growing urban population has placed a demand on the development of new sources of water. Dade County uses water from Lake Okeechobee and St. Petersburg and Tampa obtain water from Pasco County.

As the need for public drinking water has increased, there has been a corresponding emphasis on the quality of drinking water available to the public. The legislature in 1977 passed the "Florida Safe Drinking Water Act". Section 403.851 of the Act states as follows:

> It is the policy of the state that the citizens of Florida shall be assured of the availability of safe drinking water. Recognizing that this policy encompasses both environmental and public health aspects, it is the intent of the Legislature to provide a water supply program operated jointly by the Department of Environmental

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1. Irrigation consumed 41.0% of Florida's fresh water withdrawal in 1980, while thermo-electric consumed 25.5%; public supply 18.6% and industrial use was 10.7%. Edward A. Fernald and Donald J. Patton, Water Resources of Florida p.111, 1984.

> Regulation, in a lead-agency role of primary responsibility for the program, and by the Department of Health and Rehabilitative Services and its units, including county health departments, in a supportive role with specific duties and responsibilities of its own. Without any relinquishment of Florida's sovereign powers and responsibilities to provide for the public health, public safety, and public welfare of the people of Florida, the Legislature intends:
>
> (1) To give effect to Pub.L No.93-523 promulgated under the commerce clause of the United States Constitution, to the extent that interstate commerce is directly affected.
>
> (2) To encourage cooperation between federal, state, and local agencies, not only in their enforcement role, but also in their service and assistance roles to city and county elected bodies.
>
> (3) To provide for safe drinking water at all times throughout the state with due regard for economic factors and efficiency in government.
> (emphasis added)

Florida's large agricultural, industrial and municipal consumers may compete for the same water. The judicial system was oriented towards resolving conflicts between competing water users on a case by case basis. The Courts, however, were ill-equipped to deal with such conflicts using common law principles. The Village of Tequesta v Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979).

The purpose of the Florida Water Resources Act is to manage water on a regional basis, instead of allowing property lines, drainage basins or local governments to control the

resource. The Act sought to limit the common law doctrine prohibiting the transport and use of ground or surface water beyond outlying lands, across county boundaries, or outside the watershed or basins and to grant the water management districts the power to approve such uses if consistent with public interest.

The legislature established a new permitting standard in the Act. Consumptive use permits were to be issued for "reasonable beneficial uses". Reasonable beneficial use is defined in Section 373.019 as "the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest". The thrust of the Act is that water allocations should be based on an efficient and reasonable use of the resource. See Neigo, Water Management in South Florida: Setting The Records Straight, The Florida Bar Journal May 1983. The foundation of the Act is to use water resources in the public interest.

Petitioner complains that this is a case of one water management district allocating water resources located in another district. The Petitioner misconceives the nature of the resource. Water is not a resource such as real estate or a mineral which remains at a fixed point. A drop of water is never stationary but moves through a hydrologic cycle from rain

to surface water, percolation to groundwater, evaporation and transpiration or migration to the ocean.

The Florida Water Resources Act, Chapter 373, establishes a regulatory scheme wherein jurisdiction attaches at the point where a person intercepts and uses water in the hydrologic cycle. The Act allows a water management district to require a permit in any one of three instances as follows:

> (1) if a person under Section 373.413 dams, impounds or establishes a reservoir a management and storage of surface water permit must be obtained, or,
> (2) if a person constructs, repairs or modifies a water well under Section 373.342 a well permit must be secured, or,
> (3) a permit must be obtained if there is to be consumptive use of water under Section 373.2119 unless the use is for limited domestic purposes.

The thrust of the Act is that jurisdiction attaches when a person reduces water to possession and use.

The permit which is at issue in this case is a consumptive use permit. Black's Law Dictionary, (5th Ed.), defines consumption as "...the act or process of consuming; ... using of anything ...". This application is for a wellfield located within the South Florida Water Management District, but approval is sought for consumption and public water supply purposes in the St. Johns River Water Management District. The requested permit is not a permit for management and storage of surface waters, or for the drilling or modification of a well, but for the consumption of water. The proper jurisdiction for

this permit clearly is where the water is used or consumed and the proper forum for the issuance of this consumptive use permit is the St. Johns River Water Management District.

Under the statutory requirements, Brevard County must obtain a well permit from the South Florida Water Management District where the proposed wells would be located. Both water managements under the statutes will have an opportunity to act on the proposed project.

This case, in essence, represents the efforts of one local government to prevent another local government from withdrawing water from beyond its boundaries. Neither Osceola County nor any of its citizens have ownership rights in the groundwater as it migrates beneath Osceola County and moves toward Brevard and Indian River Counties on the east coast. Osceola County and its citizens merely have the right to make a reasonable use of the water in the Floridan Aquifer as it passes beneath their lands. Village of Tequesta v Jupiter Inlet Corp. 371 So.2d 663 (Fla. 1979).

An earlier attempt by a local government to govern the water resources of Florida was proscribed by the Second District Court of Appeal in Pinellas County v Lake Padgett Pines 333 So.2d 472 (Fla.2d DCA 1976). The Court in that case stated such water management "determinations should be made on a regional rather than a county or municipal level". The issue

before the court in Pinellas County was whether a permit for development of a public water supply wellfield should be decided initially by a local government under Chapter 380, Florida Statutes, or by a water management district pursuant to the Florida Water Resources Act. The Court held that the water management district was the proper entity to issue permits because the home county would be reluctant to issue the required approval under Chapter 380. The Court reaffirmed the basic proposition of the Florida Resources Act that water is to be managed on a regional rather than a local basis. Further, the legislature has clearly expressed its intent that local governments shall not adopt or enforce any law, ordinance, rule or regulation contrary to the provisions of the Water Resources Act. Florida Statute 373.223(2) preempts water management regulation from local government to the Water Management District.

In its brief, Petitioner claims that Florida Statutes 373.223(2) does not authorize the transport of water across district lines and should be strictly construed as in derogation of the common law. However, there was no common law right proscribing the transport of water across district boundaries as no district boundaries existed under the common law.

Rather, as stated by the Court in Pinellas County v Lake Padgett Pines, 333 So.2d 472 (Fla 2d DCA 1976), the Water

Resources Act should be liberally construed for effectuating the purposes described in the Act. There the Second District examined in detail the legislative history of the Act, and held that the legislative intent was that water resources in the State of Florida be developed pursuant to the dictates of Chapter 373, and that regional water management districts were granted the overriding responsibility for water supply determinations. In the Act, the legislature clearly expressed its intention that water management districts have the authority to provide for transport of water beyond overlying land, across county boundaries and outside the watershed from which it is taken. Since the district lines were intended to roughly approximate watershed lines, it is clear that the legislative intent was in fact to authorize transport of water across district boundaries. A liberal construction of the Act can only reach this conclusion.

The Act itself mandates a liberal construction of its provisions in order to effectively carry out its purposes. Florida Statutes 373.616; 373.6161. Further, reinforcement of this mandate is found in the fact that Florida Statutes 373.6161 was enacted in 1973, a year after the Florida Water Resources Act became law. The last expression of the legislative will prevail where any doubt exists. Askew v Schuster, 331 So.2d 297 (Fla 1976).

The maxima of statutory construction "ut res magis valeat quam pereat" requires not merely that the statute should be given effect as a whole, but that effect should be given to each of its provisions. Forehand v Bd of Public Instruction, 166 So.2d 668 (Fla 1st DCA 1964). If, as Petitioner claims, Chapter 373 does not authorize transfers of water across district lines, how could effect be given to Florida Statutes 373.223(2) which authorizes transfers across watershed lines? Since district boundaries were drawn generally along hydrologic or watershed lines, transport across watershed lines would normally also involve crossing district boundaries.

Chapter 373 is clearly designed to benefit the public welfare. Statutes effecting the public policy of the state and advancing the general welfare should receive a liberal construction so that their beneficial results may be felt to the fullest extent compatible with their terms. Miami Beach v Berns, 245 So.2d 38 (Fla 1971); Vocelle v Knight Bros. Paper Co., 118 So.2d 664 (Fla 1st DCA 1960).

In its brief Petitioner claims that the legislature "painstakingly delineated in metes and bounds the precise geographic boundaries of each of the five water management districts". An examination of Florida Statute 373.069 reveals that district lines run along section lines, along highways and along county boundaries. There are no metes and bounds

descriptions in the common real estate description sense of calling out angles and distances. It is clear that the district boundaries, while presumably attempting to approximate watershed boundaries, were drawn as a matter of administrative convenience and can in no way be construed as precise legal descriptions of watershed boundaries. In fact, in the instant factual situation, the watershed from the proposed wellfield flows to the St. Johns River, and the groundwater in the Floridan Aquifer from which the wells would draw flows eastward to Brevard and Indian River Counties. These artificial boundaries should not control the planning for the most efficient utilization of Florida's water resources.

Further, in the State Comprehensive Plan, Section 2(8)(b)3, Chapter 85-57 Laws of Florida, the legislature in 1985 adopted as a policy the encouragement of the development of local and regional water supplies within water management districts "instead of transporting surface water across district boundaries". This policy statement, although addressing surface water on which district boundaries were drawn, implicitly recognizes the propriety of interdistrict diversions of water and attempts to discourage, where possible, the transportation of surface water across district boundaries. Obviously had the transport of water across district boundaries not been previously authorized and intended by the legislature, this 1985

policy statement would have been unnecessary. The primary focus of the issues before this Court is whether the St. Johns River Water Management District is vested with permitting authority to control the consumptive use of water entering its district as set forth above. The statute addresses three separate permitting modes: One, management and storage of surface waters; two, regulation and permitting of wells; and, three, permitting of consumptive uses of water. St. Johns clearly has an interest in controlling the quality of water entering the district as well as the manner and means by which this water would be made available to the public for consumptive use. Likewise, the South Florida district would be primarily concerned with the design and construction of the proposed wellfield. Both districts must necessarily involved in the process and they are. At the same time neither district is permitting matters beyond district boundaries. Each is simply addressing the impact of the proposed project upon the water resources within its district.

POINT II

THE OSCEOLA COUNTY DECISION IS IN HARMONY WITH DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL

In its brief, Petitioner, Osceola County, asserts that the decision below conflicts with decisions of this Court and other District Courts of Appeal. However, Petitioner improperly argues factual matters not contained on the face of the decision of the District Court and attempts to raise issues not addressed by the District Court. As stated by this Court in Kincaid v World Insurance Company 157 So.2d 517 (Fla. 1963):

> The measure of our appellate jurisdiction on the so called "conflict theory" is not whether we would necessarily have arrived at a conclusion differing from that reached by the District Court. The constitutional standard is whether the decision of the District Court on its face collides with the prior decision of this Court or another district court on the same point of law so as to create an inconsistency or conflict among the precedents. (Id at 518) (emphasis added)

The proper scope of review in the instant proceeding is for this Court to examine the face of the opinion issued by the District Court below, and detemine whether express and direct conflict with decisions of this Court or another District Court appears thereon. In Kincaid, this Court specifically held that it is not at liberty, in making the jurisdictional determination, to explore the factual situation beyond that narrated in the opinion of the District Court. Id. at 518. This settled rule of law has more recently been reaffirmed in

Mancini v State, 312 So.2d 732 (Fla 1975).

Addressing the issues considered by the District Court and the factual matters apparent from the face of that decision it is clear that no conflict exists.

Chapter 373, Florida Statutes provides the authority for the Department of Environmental Regulation and the various water management districts to preserve, protect and efficiently use the waters in the State of Florida. A review of this statute clearly reveals the legislative intent that the waters of Florida be managed and conserved on a state wide basis. The basic policy statement is contained in Florida Statute 373.016, Declaration of Policy. Subsection 1 provides:

> "The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled so as to realize their full beneficial use."

Subsection 3 of Florida Statute 373.016 provides:

> "The legislature recognizes that the water resources problems of the state vary from region to region both in magnitude and complexity. It is, therefore, the intent of the legislature to vest in the Department of Environmental Regulation or its successor agency the power and responsibility to accomplish the conservation, protection, management and control of the waters of the state and with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to various water management districts. The Department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent practicable such power should be delegated to the governing board of the water management district."

Florida Statute 373.023 (1) provides:

> "All waters in the State are subject to regulation under

the provisions of this chapter unless specifically exempted by general or special law."

Florida Statute 373.026 provides:

"The Department of Environmental Regulation or its successor agency shall be responsible for the administration of this chapter at the state level. However, it is the policy of the State that to the greatest extent possible the Department may enter into inter-agency or interlocal agreement with any other state agency, any water management district or any local government conducting programs materially affecting the water resources of the State."

Florida Statute 373.036 requires the establishment of a state water use plan. Subsection 2 of that statute states that the Department of Environmental Regulation, in formulating a state water use plan, shall give due consideration to:

(A) The attainment of maximum reasonable - beneficial use of water for such purposes as those referred to in subsection 1:

(B) The maximum economic development of the water resources consistent with other uses;

(C) The control of such waters for such purposes as environmental protection, drainage, flood control and water storage:

(D) The quantity of water available for application to a reasonable beneficial use;

(E) The prevention of wasteful, uneconomical, impractical or unreasonable uses of water resources;

(F) Presently exercised domestic use and permit rights;

(G) The preservation and enhancement of the water quality of the state and the provisions of the state water quality plan;

(H) The state water resources policy as expressed by this chapter.

A review of these provisions leads to the inescapable conclusion that the legislature intended for the waters of the State of Florida to be managed with statewide perspective and not handled in a parochial, possessive manner.

Part II of Chapter 373 deals with the permitting of consumptive uses of water and provides the legislative authorization for the permit sought by Brevard County. Florida Statutes 373.223 sets forth the conditions for a permit to be issued either by the governing board of the water management district or the Department of Environmental Regulation. Section 1 and 2 of the statute are as follows:

> (1) To obtain a permit pursuant to the provisions of this chapter the applicant must establish that the proposed use of water:
>
> (A) is a reasonable-beneficial use as defined in S.373.019(4);
>
> (B) will not interfere with any presently existing legal use of water; and
>
> (C) is consistent with the public interest.
>
> (2) The governing board or the Department may authorize the holder of a use permit to transport and use ground or surface water beyond overlying land, across county boundaries or outside the watershed from which it is taken if the governing board or Department determines that such transport and use is consistent with the public interest and no local government shall adopt or enforce any law, ordinance, rule, regulation or order to the contrary.

At common law, the transport of water beyond overlying land and outside the watershed from which it is taken was

proscribed. Town of Purcellville v Potts, 179 Va. 514, 19 SE.2d 700 (Va.1924), Pernell v Henderson, 220 N.C. 79, 165 E. 2d 449 (N.C. 1941). However, the Florida legislature clearly recognized that these common law constraints were not in the best interest of the orderly growth and development of the State of Florida and authorized such transfers.

The five Water Management Districts have adopted administrative rules providing the requirements for consumptive use permits: Rule 40C-2, Florida Administrative Code; Rule 40E-2, Florida Administrative Code. Appendix pages 7 through 15.

Further, Rule 40C-2.312 promulgated by the St. Johns River Water Management District requires that the transport of water across district boundaries shall require the approval of each affected district and that each district may make approval of its consumptive use permit contingent upon approval of the related permit in the adjoining district.

Reduced to its essence, Petitioner urges in Point I of its brief that Florida Statute 373.223(2) does not authorize inter-district transfers of water and thus conflicts with Department of Professional Regulation v Pariser, 483 So.2d 28 (Fla. 1st DCA, 1985).

Petitioner claims that since the legislature, in providing for movement of water across county lines, beyond overlying lands, and outside of the watershed from which it is

taken, was silent as to inter-district transport, the legislature must have intended that each district would be limited to managing the water resources within its own boundaries and that water could not be moved from one district to another under any circumstances. The premise was rejected by the Fifth District Court of Appeal.

In Pariser, an Administrative Hearing Officer held invalid a rule implemented by the Department of Professional Regulation establishing that failure to pay an administrative penalty constituted grounds for additional disciplinary action a licensee. The First District Court of Appeal affirmed on the basis that there existed no implied authority for this rule since the legislature had provided a specific method of collection of fines in Florida Statute 455.227, which authorized the Department of Legal Affairs, upon request by the Department of Professional Regulation, to bring a civil action to recover the fine. Further, Florida Statute 120.69 provides a means for enforcement of agency action including contempt of court proceedings.

While no administrative agency in Florida has inherent rulemaking authority, the law is clear in Florida that agencies may have rulemaking authority fairly implied from the statutory provisions governing them. Department of Professional Regulation, Board of Professional Engineers v Florida Society of

Professional Land Surveyors 475 So.2d 939 (Fla. 1st, DCA 1985); State Board of Education v Nelson 372 So.2d 114 (Fla. 1st, DCA 1979). This is especially so where the authorizing statute contains provisions expressly authorizing the agency to adopt rules. In the instant cause, Florida Statutes 373.043, 373.044 and 373.113 all specifically direct and authorize the Department of Environmental Regulation and the various water management districts to adopt, promulgate and enforce such regulations and review procedures as may be necessary or convenient to administer the provisions of Chapter 373. From the declaration of policy contained in Florida Statute 373.016 it is clear that the Florida Water Resources Act contemplated statewide conservation and control of Florida waters and it may be fairly implied that the Department of Environmental Regulation was authorized to promulgate such rules as may be necessary for the transfer of waters within the State of Florida without regard to artificially drawn district boundaries, some of which actually divide counties. Osceola County v St. Johns River Water Management District 486 So. 2d 616 (Fla 5th DCA 1986). Petitioner's assertion that inter-district transfers are not authorized by Chapter 373 leads to the illogical, even ludicrous, conclusion that in those counties divided by district lines, water for one portion of the county must be provided solely from the district in which that segment of the county

lies and water for the other portion of the county must be solely provided from its district. Since the establishment of the district lines was made by statute, Florida Statute 373.069, this act of the legislature must be considered with other statutory provisions in determining whether the Department of Environmental Regulation may fairly be implied to have authority to implement rules for inter-district transfers.

Petitioner contends Pariser provides direct and express conflict with the instant cause. In Pariser the legislature provided specific methods for enforcement of administrative fines; however, the Department of Professional Regulation implemented a rule providing an additional method of enforcement. For the instant cause to be factually on all fours with Pariser, we would need a situation in which the legislature had provided a specific method for inter-district transfers of water, which method would be in conflict with the rule challenged in this cause. Since that is obviously not the case, there is no direct and express conflict with Pariser.

Petitioner points to language contained in Florida Statute 373.223(2) which states that:

> "The governing board or the department may authorize the holder of a use permit to transport and use ground or surface water beyond overlying land, across county boundaries or outside the watershed from which it is taken if the governing board or department determines that such transport and use is consistent with the public interest."

Had the legislature meant to restrict transfers within district boundaries it could easily have said so by including such restrictive language in the statute. For instance, the phrase "outside the watershed" could have been stated as "outside the watershed within district boundaries". This was clearly not the legislative intent considering the broad statewide concerns for the control and conservation of water set forth by the legislature in its declaration of policy contained in Florida Statute 373.016. Further, district lines were drawn generally along surface water hydrologic or watershed lines. Maloney, Plager, Ausness and Canter, Florida Water Law, 210 (1980). In essence then, legislative authorization to transfer water across watershed lines is authorization to cross district lines.

No direct and express conflict with Pariser exists.

POINT III

JURISDICTION WAS IMPROVIDENTLY GRANTED AS THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ASKEW V. CROSS KEY WATERWAYS.

In Point II of its brief, Petitioner relies largely upon the holding of Askew v. Cross key Waterways 372 So. 2d 913 (Fla. 1970) in its attempt to demonstrate express and direct conflict with the decision of the Fifth District Court of Appeal.

Askew dealt with the constitutionality of the provisions of Section 380.05(1), Florida Statutes, 1975, which provided for designations by the Division of State Planning and Administrative Commission of areas of critical state concern through criteria stated in Section 380.05(2)(a) & (b), Florida Statutes, 1975. This court held the criteria for designation of areas of critical state concern set forth in those sections to be constitutionally defective because they reposit in an Administrative Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection. The legislative deficiency involved was the absence of legislative delineation of priorities among competing areas and resources which required protection in the state interest. Id. at 919.

This Court reiterated that the doctrine of separation of powers proscribes the exercise of primary and independent

discretion by an administrative agency (Id. at 920), but went on to point out that where the legislature makes the fundamental policy decision and delegates implementation under adequate safeguards, there is no violation of the doctrine of separation of powers. Id. at 921.

In the instant cause it is apparent that Chapter 373, Florida Statutes, sets forth specific priorities in Florida Statute 373.016(1) & (2) and further clearly indicates that water resources must be managed on a statewide basis.

Florida Statute 373.016(2) provides that it is further declared to be the policy of the legislature:

(A) To provide for the management of water and related land resources;

(B) To promote the conservation, development and proper utilization of surface and groundwater;

(C) To develop and regulate dams, impoundments, reservoirs and other works and to provide water storage for beneficial purposes;

(D) To prevent damage from floods, soil erosion and excessive drainage;

(E) to preserve natural resources, fish and wildlife;

(F) To promote the public policy set forth in S.403.021;

(G) To promote recreational development, protect public lands and assist in maintaining the navigability of rivers and harbors; and

(H) Otherwise to promote the health, safety and general welfare of the people of this state.

Further, Florida Statute 373.223 sets forth conditions

required for the issuance of a consumptive use permit as follows:

> Florida Statute 373.223(1). To obtain a permit pursuant to the provisions of this Chapter the applicant must establish that the proposed use of water:
>
> (A) Is a reasonable - beneficial use as defined in Section 373.019(4);
>
> (B) Will not interfere with any presently existing legal use of water; and
>
> (C) Is consistent with the public interest.

Florida Statute 373.019(4) defines reasonable beneficial use to mean the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest.

The above referenced statutes clearly provide sufficient guidelines to the Department of Environmental Regulation and to the various water management districts to implement reasonable rules regarding the permitting of consumptive uses of water in the State of Florida. In Cross Key, the Court's concern was that the primary policy decisions regarding the designation of areas of critical state concern were not made by the legislature but were left to the Governor and cabinet acting as the Administrative Commission. The court

focused on the failure of the legislature to accomplish the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection. Id. at 919. In the instant cause, geographic areas to be administered by the various water management districts are specifically set forth by statute and the resource to be protected is without argument the quality and quantity of water in the State of Florida. Further, the legislature specifically recognized that in order to accomplish the conservation, protection, management and control of the waters of the state a certain amount of flexibility must be delegated to the appropriate water management districts. Florida Statute 373.016(3). Petitioner attempts to assert that the legislature was required to set forth some different set of guidelines for inter-district permitting of consumptive uses of water. No rational basis exists for this conclusion. Since an applicant for an inter-district transfer of water must meet all permit criteria from both districts, complete protection and control exists to protect the quality of water introduced into the district wherein the water is consumed as well as the impact upon the water needs of the district from which the water is drawn.

Petitioner further argues that Rule 17-40.05 authorizes a water management district to permit matters involving water resources lying outside of the geographic

limitations of the district. There is nothing in the record which would support this contention. On the contrary, the St. Johns River Water Management District has an interest in, and is charged with the responsibility of controlling the quantity and quality of waters received from another district. Neither permitting process need exceed the geographic boundaries of the respective district, and permits for both districts must be obtained before the transfer of water could occur. Thus, the rule sought to be invalidated by Petitioner does not allow an administrative expansion of any legislatively delineated geographic jurisdiction of water management districts.

CONCLUSION

The St. Johns River Water Management District has clearly been granted statutory authority to consider and issue consumptive use permits for the use of water within its jurisdictional boundaries. Since the Florida Water Resources Act, as well as case law, mandates liberal construction of Chapter 373 to effectuate a statewide water policy, it is clear that the legislature intended for each district to have authority to issue consumptive use permits for water to be consumed within its district.

No express and direct conflict exists on the face of the decision below with any decision of this Court or any other district court of appeal.

WHEREFORE, South Brevard respectfully requests this Court determine that its Order granting jurisdiction was improvidently entered and affirm the decision of the Fifth District Court of Appeal below.

Respectfully submitted,
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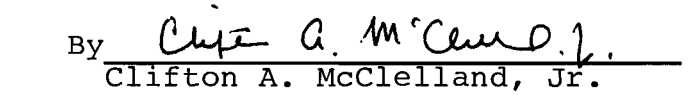
WATER AUTHORITY

By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Brief and Appendix have been furnished by U. S. Mail to SID J. WHITE, CLERK OF THE SUPREME COURT OF FLORIDA, Supreme Court Building, Tallahassee, Florida, 32302, and a copy to: WILLIAM L. EARL, Peeples, Earl & Blank, P.A., One Biscayne Tower, Suite 3636., Two S. Biscayne Boulevard, Miami, Florida, 33131; NEAL D. BOWEN,17 S. Vernon Avenue, Kissamee, Florida, 32741; VANCE W. KIDDER, St. Johns River Water Management District, P. O. Box 1429, Palatka, Florida, 32078-1429; ROBERT BRUCE SNOW, County Attorney, Hernando County, 112 N. Orange Avenue, P. O. Box 2060, Brooksville, Florida, 33512; EDWARD M. CHEW, ESQ., 705 E. Kennedy Boulevard, Tampa, Florida, 33602; MARY E. HARLAN, P.O. Box 60, Bartow, Florida, 33830, for Polk County; EDWARD B. HELVENSTON, Assistant County Attorney, Psco County Government Center, 7530 Little Road, New Port Richey, Florida, 33553; CAROL A. FORTHMAN, Department of Environmental Regulation, 2600 Blair Stone Road, Tallahassee, Florida, 32301; VALERIE A. ROBERTS, 322 E. Pine Street, Orlando, Florida, 32801; STEPHEN P. LEE, County Attorney, Marion County, 111 S. E. 25th Avenue, Ocala, Florida, 32671; WILLIAM CURPHEY, ESQ., County Attorney, Brevard County, 1515 Sarno Road, Melbourne, Florida, 32935, on this 20th day of October, 1986.

Clifton A. McClelland, Jr., Esq.