O/A 1-7-87

IN THE SUPREME COURT OF FLORIDA

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

Appellant,

vs.

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT,

Appellee.

Case No. 68,701

AMICUS CURIAE BRIEF OF THE DEPARTMENT OF ENVIRONMENTAL REGULATION

CAROL A. FORTHMAN
Assistant General Counsel

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400
Telephone: (904) 488-9730

TABLE OF CONTENTS

TABLE OF CITATIONS

Page

LAWS OF FLORIDA

FLORIDA ADMINISTRATIVE CODE

OTHER CITATIONS

PRELIMINARY STATEMENT

This brief is submitted by the State of Florida Department of Environmental Regulation, hereinafter referred to as the Department, in support of the position of Appellee, St. Johns River Water Management District, hereinafter referred to as St. Johns.

The issues in this case revolve around the water management powers given to the Department by the legislature in the 1972 Water Resources Act (Chapter 72-299, Laws of Fla.) and subsequent amendments to that act, and to the delegation of certain of those powers to the water management districts. The issues in this case therefore directly affect the exercise of the Department's water management authority. The Department believes that the decision of the Fifth District Court of Appeal in this case is the only reasonable interpretation of the language and intent of the affected portion of the Water Resources Act and therefore requested and was granted amicus status in support of St. Johns. The Court granted this motion on October 7, 1986 and this brief is submitted pursuant to that Order.

SUMMARY OF THE ARGUMENT

The legislative scheme for water management in Florida consists of a two-tier system with the Department of Environmental Regulation as the top, supervisory tier and the regional water management districts as the second tier. The Department is given authority for the management of all waters of the state with the direction to delegate the authority to the water management districts where the districts are capable of administering the specific programs that are delegated.

One of the functions of the Department that is to be delegated to the districts is consumptive use permitting. The Department has adopted reasonable rules implementing this program, including rules regulating interdistrict transfers of water. The authority to issue consumptive use permits consistent with Department rules has been delegated to all of the water management districts, including St. Johns. The rules governing interdistrict transfers require the approval of each involved district and therefore do not allow for extraterritorial exercise of power by any district.

The legislature has promulgated standards for consumptive use permitting that provide sufficient guidance for all consumptive uses, including interdistrict transfers. The Department has implemented these standards in a reasonable way.

Therefore, the rules adopted by the Department are a reasonable exercise of its statewide water management authority and that authority is properly delegated to the water management districts. The decision of the Fifth District in Osceola County

v. St. Johns River Water Management District, 486 So.2d 616 (Fla. 5th DCA 1986) should be upheld.

ARGUMENT

I. THE DEPARTMENT OF ENVIRONMENTAL REGULATION HAS BEEN GIVEN BROAD REGULATORY POWERS OVER ALL WATERS IN THE STATE WITH THE LEGISLATIVE INTENT THAT IT MANAGE FLORIDA'S WATER RESOURCES ON A STATEWIDE BASIS.

The Water Resources Act of 1972, Chapter 72-299, Laws of Florida, was the state legislature's second major attempt at bringing a statewide management approach to Florida's water resources. The first attempt, the 1957 Water Resources Act, Chapter 57-380, Laws of Florida as amended in Chapter 63-40, Laws of Florida, failed to accomplish all of the legislature's original goals because of the cumbersome nature of the process established under that act. F. Maloney, S. Plager, R. Ausness and B. Canter, Florida Water Law 1980 (Water Resources Research Center, Univ. of Fla. Publication No. 50) 206-207 (1980).

The 1972 act created a two-tier administrative system, originally headed by the Department of Natural Resources and later (1975) transferred to the Department of Environmental Regulation. Chapter 75-22, Laws of Fla. The act was designed to institute a planning and resource based system of water management to replace Florida's common-law "reasonable use" standard. Under the common law standard, rights to the use of water were vested only in riparian owners (surface waters) and owners of overlying land (ground water). The common law placed restrictions on the transport of water away from riparian and overlying lands and also prohibited interbasin transfers of water. R. Hamann, Consumptive Water Use Permitting 10-12, in Florida Environmental and Land Use Law, Vol. 1 (1986).

Because the act has the effect of placing the management of all waters of the state in an administrative agency and replacing previous common law, the intent language and empowering authority of the statute is necessarily comprehensive in scope. In replacing the common law system, the legislature has outlined, in detail, standards for statewide water planning, consumptive uses of water, regulation of wells, and management and storage of surface waters. Chapter 373, Fla. Stat. (1985). The statewide responsibility of the Department is recognized in Section 373.016, Florida Statutes, which states 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 the various water management districts.

The act followed this policy by bringing <u>all</u> waters of the state under the regulation of this chapter. Section 373.023, Fla. Stat. (1985). Waters of the state are defined in Section 373.019(8), Florida Statutes (1985) as:

> any and all water on or beneath the surface of the ground or in the atmosphere, including natural and artificial watercourses, lakes, ponds, or diffused surface water and water percolating, standing, or flowing beneath the surface of the ground as well as all coastal waters within the jurisdiction of the state.

The Department's jurisdiction is not limited, therefore, by any boundaries of water management districts, but only by the boundaries of the state itself.

In a further grant of authority to the Department, the legislature gave the Department general supervisory authority over the water management districts (the second tier of the two-tier system). In addition, the Department was given authority to exercise any power that may be exercised by a water management district. Section 373.026(7), Fla. Stat. (1985). Section 373.043, Florida Statutes (1985), authorizes the Department to adopt regulations to implement Chapter 373. Nowhere in this broad grant of authority is the Department's power to administer the water resources of the state circumscribed by the boundaries of the water management districts, or any other boundaries.

The permitting power of the various water management districts derives from the delegation of that power to the districts from the Department. Section 373.103, Fla. Stat. (1985). Therefore, the districts have no independently delegated legislative authority to issue the consumptive use permits that are the subject of this action.

Consumptive use permits are covered by Part II of Chapter 373, Florida Statutes. A review of that part again reveals the legislative intent to give broad water management authority to the Department. Section 373.217, Florida Statutes (1985) states:

> (1) It is the intent of the Legislature to provide a means whereby reasonable programs for the issuance of permits authorizing the consumptive use of particular quantities of water may be authorized by the Department of Environmental Regulation, ...
> (2) It is further the intent of the Legislature that Part II of the Florida Water Resources Act of 1972, as amended, ... shall

> provide the exclusive authority for requiring permits for the consumptive use of water and for authorizing transportation thereof pursuant to s. 373.223(2).

Throughout Part II of the act, the Department is specifically mentioned as having authority for consumptive use permitting along with the water management districts. Sections 373.217, 373.219, 373.223, 373.229, 373.233, 373.236, 373.239, 373.243, 373.246 and 373.249, Fla. Stat. (1985). No provision in this part circumscribes the Department's consumptive use permitting authority by limiting it to intra-district transfers.

Where a statute explicitly and repeatedly gives an agency statewide powers and imposes no geographic limits on them within the state, there is to be no reason to imply such limits. The only conclusion that can be drawn from a reasonable reading of Chapter 373, Florida Statutes (1985) as a whole, and Part II in particular, is that statewide management of Florida's water resources is vested in the Department of Environmental Regulation. To imply that the Department's powers are limited by water management district boundaries would thwart the statewide management philosophy which permeates the legislation.

II. THE DEPARTMENT OF ENVIRONMENTAL REGULATION HAS PROPERLY DELEGATED ITS AUTHORITY TO PERMIT INTERDISTRICT TRANSFERS TO THE WATER MANAGEMENT DISTRICTS.

As was discussed above, the Department has statewide authority over consumptive use permitting with no restrictions on the areas in which this authority can be exercised. In addition,

the Department has the authority, and the legislative directive, to delegate such permitting authority to the water management districts. Section 373.016, Fla. Stat. (1985). The Department has delegated consumptive use permitting to the water management districts.

The Department has enacted regulations establishing the basic factors for determining whether a use is a reasonable beneficial use which therefore may be permitted. Fla. Admin. Code Rule 17-40.04. These factors apply to all consumptive use permits issued in the state. In addition, the Department has adopted Florida Administrative Code Rule 17-40.05, which establishes additional criteria for interdistrict transfers of water. This rule requires approval of each affected district before such a transfer can be made.

Under its statewide authority for consumptive use permitting, the Department has delegated to the water management districts its power to authorize interdistrict transfers of water. The Department has delegated that power in a manner that protects the interests of the public as a whole by requiring that the more stringent public interest tests of Florida Administrative Code Rule 17-40.05 be applied. Although these more stringent tests are not required by statute, the Department has adopted the policy of restricting interdistrict transfers to a greater degree than transfers within a water management district. This recognizes the hydrologic integrity of water management districts without restricting the ability to manage water resources on a broader basis where there is a demonstrated need to do so. It also

protects the affected districts by requiring approval of such transfers by all involved districts. Therefore no district can unilaterally affect the resources of another district.

Appellant has stated that allowing interdistrict transfers somehow gives a water management district "extraterritorial powers." (Brief of Appellant, p. 18, et seq.) This analysis overlooks two crucial facts in the permitting scheme under Florida Administrative Code Rule 17-40.05. The first is that the transfers are a delegation of the Department's statewide power. The second, and perhaps most important in determining the reasonableness of the delegation of the Department's power, is the fact that any transfer must be approved by all affected districts. This gives any district a veto power over either withdrawal of water from, transfer of water across, or use of water in its district. No district can unilaterally affect the resources of another district. Only where both districts agree to the manner of withdrawal, transport and use can the transfer take place. In addition, each district must consider all of the criteria in Florida Administrative Code Rule 17-40.05 without regard to whether it is the supplying district or the using district. Therefore any claim that the rule gives a district "extraterritorial" powers is incorrect and misleading. No extraterritorial powers are given because no water management district can be forced by another to supply it with water or to accept a use of water from another district. Each district has control over what affects the resource within its boundaries. Under the statute, the Department has the power to permit such

transfers but has chosen to limit the execise by delegating a "double" permitting procedure to the districts.

In a somewhat contradictory argument to the "extra-territoriality" argument, Appellant asserts (Brief of Appellant, p. 22) that the process for interdistrict transfers improperly bifurcates the reasonable beneficial use permitting test. This is clearly not true. Each affected district must approve the transfer and grant a permit in that district. Each permit must meet the requirements of Florida Administrative Code Rule 17-40.04 for reasonable-beneficial water use as well as the requirements of Florida Adminitrative Code Rule 17-40.05 on water transport. Therefore, rather than bifurcating the reasonable-beneficial use test, the rules require a double review for interdistrict transfers.

Appellant cites what it characterizes as St. Johns River Water Management District's intent to consider the application before it without the proper information required by the rule (Brief of Appellant, pp. 22-23) as a basis for claiming a bifurcation of the reasonable-beneficial use standard. This argument totally ignores the posture in which Appellant first brought this action. This action was brought as an original petition in the Fifth District Court of Appeal for a writ of prohibition. The petition was based on Appellant's contention that St. Johns lacked the authority to consider <u>any</u> permit application of this nature. St. Johns has never had an opportunity to rule on whether the application provided sufficient information or on whether it would approve the application even if

complete. If St. Johns were to act in a manner contrary to the governing statutes or rules, that decision could be appealed. Sections 120.68 and 373.114, Florida Statutes (1985) both provide independent avenues of appeal for water management district actions. The adequacy or inadequacy of information provided in any permitting proceeding is irrelevant to the question of whether that proceeding is authorized by statute. Furthermore, there is no basis in the record for Appellant's assertions. The court below made no findings with regard to the underlying adequacy of the application as that issue was never presented to it. It is therefore improper to attempt to assert and argue these allegations in this action.

III. INTERDISTRICT TRANSFERS OF WATER DO NOT CONFLICT WITH THE STANDARDS IN ASKEW V. CROSS KEYS WATERWAYS.

Appellant asserts that the decision below conflicts with Askew v. Cross Keys Waterways, 372 So.2d 913 (Fla. 1979) in two ways; first, that it in some way modifies the boundaries of the water management districts and second, that the legislation is invalid for lack of legislatively defined standards to guide in the promulgation of rule.

A. Interdistrict Transfers of Water do not Constitute a Modification of Water Management District Boundaries.

As to the first argument, the Department has never asserted that it has the authority to modify the water management district boundaries. The setting of the boundaries is clearly a

legislative function. The Department, however, disputes the contention that the interdistrict transfer provisions of Florida Administrative Code Chapter 17-40 in any way modify the boundaries of the districts. In fact, it is difficult to see how they could be interpreted as doing so. The only possible reasonable construction of Appellant's argument would be that by allowing interdistrict transfers of water, the rule somehow abolishes the district boundaries. This clearly does not occur. As pointed out above, the rule specifically recognizes the individual districts by allowing for a veto power by either involved district.

Appellant's argument presupposes a legislative intent that the district boundaries are some "invisible wall" for water that can never, under any circumstances, be crossed. This intent is not expressed anywhere in the statute and is in fact contradicted by the express intent to provide for statewide management of the resource.

In drawing up the water management district boundaries the legislature gave only the direction that there be five districts and that the boundaries "are intended to follow as nearly as practicable the natural river basin boundaries of the state." Chapter 72-299, Section 12, Laws of Fla. This division, based on surface hydrologic boundaries (river basins), does not follow ground water aquifer boundaries and generally includes several river basins within each district. Furthermore, the boundaries generally fall along section lines that approximate the river basin boundaries but are not exact metes and bounds determinations

of the hydrologic boundaries of the river systems. Section 373.069, Fla. Stat. (1985).

These districts were designed to provide a regional approach to water management but there is no indication that they were intended to create water regions that can never be crossed. Such an interpretation ignores the importance of ground water regions which do not always conform to surface water boundaries. Dean Frank E. Maloney, the chief author of the Model Water Code that was largely codified as Chapter 72-299, Laws of Florida, proposed in 1968 that the planning and management of water under new laws could act as a mechanism for possible long-distance transport of water from northern Florida to South Florida. F. Maloney, S. Plager & F. Baldwin, Water Law and Administration, The Florida Experience 418 (1968). Although such transfers are not likely to be proposed now, it is obvious that the person who devised and promoted the concept of water management districts in Florida, did not intend them to be as restrictive as Appellant proposes. Appellant's argument presupposes that the legislature contemplated that it was acceptable to transfer water 200 miles between the St. Marks River basin in Wakulla County and the Escambia River basin between Santa Rosa and Escambia Counties, but entirely prohibited to transfer water 20 miles between the St. Marks River Basin and the Wacissa River Basin in adjacent Jefferson County. A more reasonable interpretation is that the water management districts were established to provide a mechanism for regionally based water regulation, but that the legislature never intended them to be isolated water kingdoms with no regard for statewide concerns.

The reasonable-beneficial use standard, as implemented by the department and the districts, provides a resource-based analysis that recognizes the regions without ignoring the larger management needs of the state. Therefore, transferring water between districts does not modify their boundaries, but simply recognizes this larger purpose.

B. Interdistrict transfers of water do not lack sufficient legislative guidance as to applicable standards.

Appellant also argues (Brief of Appellant, pp. 29-33) that even assuming the constitutionality of the legislative delegation to the Department and the subsequent delegation to water management districts, Chapter 373, Florida Statutes provides no meaningful legislative standards for interdistrict transfers of water under its consumptive use permitting provisions. Therefore, Appellant contends, the rules violate the requirements outlined in Cross Keys for legislative standards to guide administrative rulemaking.

The legislature has provided explicit standards for consumptive use permitting generally in Section 373.223, Florida Statutes (1985) as follows:

> 373.223 Conditions for a permit.
>
> (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.
>
> (3) The governing board or the department, by regulation, may reserve from use by permit applicants, water in such locations and quantities, and for such seasons of the year, as in its judgment may be required for the protection of fish and wildlife, or the public health and safety. Such reservations shall be subject to periodic review and revision in the light of changed conditions. However, all presently existing legal uses of water shall be protected so long as such use is not contrary to the public interest.

Reasonable-beneficial use is defined in section 373.019(4), Florida Statutes 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."

These standards have been incorporated into and elaborated upon in Florida Administrative Code Rule 17-40.04. The Department has also adopted Florida Administrative Code Rule 17-40.05 governing interdistrict transfers specifically. Under Cross Keys and subsequent cases, the legislative standards in Chapter 373 are clearly sufficient guidance for the rules governing consumptive use permitting.

The law that was struck down in the Cross Keys decision, Section 380.51(1), Florida Statutes (1975), involved the delegation of broad powers to the Administration Commission to

designate certain areas of the state as Areas of Critical State Concern. The effect of the designation was to give the Division of State Planning authority over local land development regulations, thereby superseding what had traditionally been a local government function. The designation was to be based on several factors, but no relative weight was given to any factor.

The Court in Cross Keys held that the designation of these areas by the Administration Commission was invalid because of the "absence of legislative delineation of priorities among competing areas and resources which require protection in the State interest." 372 So.2d at 919. The Court there distinguished between permissible "fleshing out" of legislative policy and the exercise of "primary and independent discretion" Id. at 920. The Court held that certain policy level decisions are reserved to the legislature and may not be delegated.

In reviewing, in this case, the standards for consumptive use of water, it is clear that Section 373.223, Florida Statutes sets forth adequate standards to allow for consumptive use permitting, and that Florida Administrative Code Rules 17-40.04 and 17-40.05 are permissible exercises of the rulemaking authority of the department. Such rules merely carry out legislative policy, as set forth in Chapter 373, Florida Statutes, and do not in themselves attempt to usurp the legislative prerogative. These rules are similar to those upheld in Brewster Phosphates v. State, Department of Environmental Regulation, 444 So.2d 483 (Fla. 1st DCA 1984), pet. for rev. den., 450 So.2d 485 (Fla. 1984). There, the court upheld the Department's establishment of a certain area

as an Outstanding Florida Water over objections that such designation was an unconsitutional delegation of legislative authority. Quoting Cross Keys, the Court related the needed guidance to "the subject matter dealt with and the degree of difficulty involved in articulating finite standards." Id. at 485. The court in that case looked to the type of function being delegated and the entire legislative scheme on which it was based. This case presents a similar situation.

The permitting of consumptive uses of water is a much narrower function than the broad regulatory scheme of Areas of Critical State Concern. Such permitting turns largely on a technical analysis of water resources that are the function of the agencies involved. The interdistrict transfer of water involves a similar analysis, differing only in that two districts are involved, both of which must review all aspects of the proposed water use. Conducting these analyses is precisely the type of function for which administrative agencies are created. The larger policy issues are resolved by the legislature, and the agency is guided by these policies in its rules and their application to specific cases.

Although Section 373.223, Florida Statutes does not explicitly give specific authority for interdistrict transfers of water, the interpretation by the agency that such transfers are permissible, and its adoption of rules to carry out this interpretation, should be given deference and upheld absent a finding that they are arbitrary and capricious. General Telephone Company of Fla. v. Fla. Public Service Commission, 446 So.2d 1063

(Fla. 1984). In making a determination of the reasonableness of this interpretation, the rules must be read in pari materia with the overall intent of the legislation. Brewster Phosphates, 444 So.2d at 485. As reviewed above, the overall scheme of Chapter 373, Florida Statutes, including Part II, is to provide for statewide management of water resources by the Department with that management generally being implemented by the water management districts to allow for regional variations where appropriate. There would be no need for statewide oversight by the Department if the water management districts were intended to be totally autonomous and independent with regard to water management.

Therefore, because the rules are clearly based on both the explicit legislative directive in Section 373.223, Florida Statutes and because they carry out the overall legislative scheme of statewide management delegated on a regional basis, the rules are well within the range of valid standards and guidance that were outlined in Cross Keys and Brewster Phosphates.

CONCLUSION

The Department of Environmental Regulation has statewide authority, pursuant to Chapter 373, Florida Statutes to manage all of the waters of the State of Florida. The Department could exercise that authority by permitting transfers of water across water management district boundaries. The Department has delegated its authority to the water management districts, with

the limitation that each involved district approve the transfer before it can occur.

The Department has based its rules for such transfers on the standards for consumptive use permitting in Chapter 373, Part II, Florida Statutes. These standards are sufficient guidance for the promulgation of rules governing the decisions involved in approval of consumptive use permits. The type of decision involved in such permitting is of the type generally delegated to agencies and the delegation does not usurp legislative powers.

Based on the foregoing argument, the denial of the Writ of Prohibition should be affirmed and the two involved water management districts should be permitted to proceed with consideration of the applications before them.

Respectfully submitted,

CAROL A. FORTHMAN
Assistant General Counsel

CERTIFICATION OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to the following counsel of record on this 24th day of October, 1986:

William L. Earl, Esquire
One Biscayne Tower, Suite 3636
Two Biscayne Boulevard
Miami, Florida 33031

Neal Bowen, Esquire
17 South Vernon Avenue
Kissimmee, Florida 32741

Clifton A. McClelland, Jr., Esq.
1380 Sarno Road
Post Office Box 977-Eg
Melbourne, Florida 32935

Robert Bruce Snow, Esquire
Post Office Box 2060
Brooksville, Florida 33612

Stephen P. Lee, Esquire
111 S.E. 25th Avenue
Ocala, Florida 32671

Edward de la Parte, Jr., Esquire
West Coast Regional Water
Supply Authority
705 East Kennedy Boulevard
Tampa, Florida 33602

Mary E. Harlan, Esquire
Post Office Box 60
Bartow, Florida 33830

Andrew A. Graham, Esquire
Marjorie E. Smith, Esquire
Reinman, Harrell, Silberhorn,
Moule & Graham, P.A.
1825 South Riverview Drive
Melbourne, Florida 32901

William E. Curphey, Esquire
1515 Sarno Road
Melbourne, Florida 32935

Edward B. Helvenston, Esquire
Pasco County Government Center
7530 Little Road
New Port Richey, Florida 33553

Vance W. Kidder, Esquire
St. Johns River Water
Management District
Post Office Box 1429
Palatka, Florida 32078-1429

Carol A. Forthman

CAROL A. FORTHMAN
Assistant General Counsel

STATE OF FLORIDA DEPARTMENT
OF ENVIRONMENTAL REGULATION
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400
Telephone: (904) 488-9730