10-18 MA 1-7-87 47

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
SEP 25 1986
CLERK, SUPREME COURT
By
Deputy Clerk

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

PETITIONER'S BRIEF ON THE MERITS

Neal D. Bowen, Esquire
Osceola County Attorney
Co-Counsel for Petitioner
17 South Vernon Avenue
Kissimmee, Florida 32741
(305) 847-1200

William L. Earl, Esquire
PEEPLES, EARL & BLANK, P.A.
Counsel for Petitioner
One Biscayne Tower, Suite 3636
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-3000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

PAGE

STATUTES

SECONDARY AUTHORITIES

PRELIMINARY STATEMENT

The record below is presently not prepared and will not be transmitted until October 20, 1986. Petitioner, Osceola County will, therefore, cite to the record as set forth in its Appendix to this Brief. Parties and other matters frequently referred to are as follows:

1. App. _____. Citations to the partial record provided in Petitioner's 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 the court below found had implied statutory authority to delegate certain powers to St. Johns. DER 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 AND OF THE FACTS

A. The Case

This case is before the Court pursuant to Article V, Section 3(b)(3), Florida Constitution. Osceola County seeks reversal of a decision by the District Court of Appeal, Fifth District,[1] finding implied legislative authority for an administrative agency, the Florida Department of Environmental Regulation, to delegate to yet another agency, the St. Johns River Water Management District, the power to issue permits to withdraw, transport, and use water not located within the limits of St. Johns's statutorily delineated geographic boundaries. The decision below presents first impression questions of statewide importance that will fundamentally affect the future permitting and distribution of Florida's finite water resources.

B. The Facts

This case began in 1984, when Brevard County applied to the South Florida Water Management District ("South Florida"), one of Florida's five regional water management districts, for a consumptive use permit to develop a large well field in the Holopaw area of Osceola County.[2] This permit application was unusual in

---

1/ Osceola County v. St. Johns River Water Management District, 486 So.2d 616 (Fla. 5th DCA 1986).

2/ App. 27, Affidavit of Dr. Gleason, Water Resources Director, South Florida Water Management District.

that Brevard County, where the water was to be consumed, is located entirely within the jurisdictional boundaries of another water management district, the St. Johns River Water Management District ("St. Johns"). Brevard intended to construct a major well field and withdraw and transport large volumes of water from Osceola County in the South Florida Water Management District to the St. Johns River Water Management District to be used in South Brevard County.[3] Because Brevard's application required that the legislatively established geographic, jurisdictional line between these two water management districts be crossed, it is referred to as an interdistrict water permit.[4]

1. **Legislative Framework**

The statute controlling the permitting of water use and transport does not prescribe how to proceed with applications such as that filed by Brevard County.[5] Chapter 373, Florida Statutes, known as the "Florida Water Resources Act of 1972,"[6] replaced several predecessor statutes and a common law system of case-by-case judicial water rights determinations with a comprehensive administrative system of regulation, resource protection,

---

3/ App. 19 (Brevard Permit Application).

4/ The term "interdistrict" and "transdistrict" permit will be used interchangeably herein.

5/ App. 66, St. Johns's Response to Order to Show Cause.

6/ Ch. 72-299, Laws of Fla.

and water use permitting.[7] To implement this system, the legislature, effective July 1, 1973, created six regional water management districts,[8] including the St. Johns River Water Management District and the South Florida Water Management District. The geographic limits of each district's jurisdiction was statutorily set forth by the legislature in detailed metes and bounds legal descriptions.[9]

This overall statutory scheme vests DER with general supervisory powers over water resources and the water management districts, and authorizes DER to exercise any power authorized to be exercised by a water management district.[10] At the same time, the statute requires that "to the greatest extent practicable such power should be delegated to the governing board of a water management district" because "water resource problems of the state vary from region to region."[11]

In dealing specifically with the subject of water use permitting, the legislature provided that either DER or a governing board of a particular water management district could require

---

7/ See Village of Tequesta v. Jupiter Inlet Corporation, 371 So.2d 663, 670 (Fla. 1979).

8/ Ch. 73-190, § 12, Laws of Fla. (in 1977, the districts were reorganized into five districts. Ch. 77-104, § 113, Laws of Fla.).

9/ See § 373.069, Fla. Stat. (1985).

10/ § 373.026(7), Fla. Stat. (1985).

11/ § 373.016(3), Fla. Stat. (1985).

permits for consumptive use of water.[12] Subsequently, the legislature mandated that each district, by October 31, 1983, implement consumptive use permitting programs.[13] DER, by administrative rule, has delegated its water use permitting powers to South Florida and St. Johns.[14] The water management districts presently permit all water use but have no independent authority to permit the use of water located outside their own borders.[15] Both South Florida and St. Johns, by rule, have formally implemented the Act's consumptive use permitting powers within their respective districts.[16]

2. Administrative Review and Proposed Action on Brevard's Permit Application

As part of its review of Brevard's permit application, South Florida twice requested additional information from Brevard County concerning the impacts such a large scale withdrawal would have on water resources in the South Florida Water Management District at the site of the proposed well field in Osceola County. Despite these requests, Brevard "failed to provide any

---

12/ § 373.219(1), Fla. Stat. (1985).

13/ See § 373.216, Fla. Stat. (1985).

14/ See Fla. Admin. Code Rule 17-101.040(10)(a)(1),(3).

15/ See Osceola County, 486 So.2d at 619 (no independent statutory authorization).

16/ Fla. Admin. Code Rules 40E-2.031 (South Florida), 40C-2.031 (St. Johns).

information regarding the impact of the proposed withdrawal in Osceola County."[17] Rather than comply with South Florida's request, Brevard instead filed the same incomplete application in its "home district," St. Johns, leaving its application in South Florida pending and incomplete. Both Brevard applications addressed only the "need issues" relating to the demand for the water in St. Johns, and failed to provide any information regarding the reasonableness or impact of this large scale withdrawal on water resources.[18]

Osceola County notified St. Johns of its concerns regarding Brevard's permit.[19] Osceola County was concerned because the legislature has imposed express statutory duties on counties concerning the conservation, planning, and supply of water resources. Local governments are statutorily mandated, among other things, to plan for the most appropriate uses of water, to facilitate the adequate and efficient provision of water, and to conserve, develop, utilize, and protect natural resources including water.[20]

17/ App. 27, Affidavit of Dr. Gleason, Water Resources Director, South Florida Water Management District (emphasis in original).

18/ App. 26, Affidavit of R. Moresi, former Director, Division of Resource Management, St. Johns River Water Management District.

19/ App. 11, see Osceola's Verified Petition for Prohibition.

20/ § 163.3161(3), Fla. Stat. (1985).

Local governments must also adopt comprehensive plans to guide future development and growth.[21] These plans are required to contain a conservation element for the conservation, development, utilization, and protection of natural resources including water.[22] In addition, these mandated local comprehensive plans must contain a potable water element to provide and plan for the future provision of potable water in the county.[23] Local governments are also legislatively mandated to "assess their current, as well as projected, water needs and sources for a ten year period."[24]

Notwithstanding Osceola's objections and the absence of information on the reasonableness of the permit or the impact of interdistrict diversion, St. Johns determined that the application was sufficient and issued a notice of proposed agency action. St. Johns had limited its review only to the need for water in Brevard County and failed "to address the impact of the proposed withdrawal on the water resources in Osceola County or on the water users of Osceola County, as required by the reasonable-beneficial use test for consumptive use permits set forth in Chapter 373, Florida Statutes."[25] Over Osceola County's

---

21/ § 163.3167(1)(b), Fla. Stat. (1985).

22/ § 163.3177(6)(d), Fla. Stat. (1985).

23/ § 163.3177(6)(c), Fla. Stat. (1985).

24/ § 163.3177(6)(d), Fla. Stat. (1985).

25/ App. 26, Affidavit of R. Moresi, former Director, Division of Resource Management, St. Johns River Water Management District.

objections, St. Johns scheduled Brevard County's application to permit the withdrawal of water in the South Florida District for a hearing on May 7, 1985.[26]

Osceola sought a writ of prohibition from the district court, questioning the subject matter jurisdiction of St. Johns to act upon a permit for the withdrawal, use, and transport of water located outside its legislatively defined jurisdictional boundaries.[27] The district court granted an order to show cause prohibiting St. Johns from acting on Brevard's permit pending the district court's decision on the merits.

On March 6, 1986, the lower court rendered its decision.[28] After rejecting St. Johns's assertion that Osceola lacked standing,[29] a divided district court construed Chapter 373 to hold that "the legislature has impliedly granted to D.E.R. the authority to allow inter-district diversions of water, and such authority is properly delegated to the water management districts."[30]

26/ App. 13.

27/ App. 11.

28/ App. 1.

29/ In summarily disposing of the standing issue, the court stated "that counties in this state have various statutory duties and responsibilities with respect to planning for water management and conservation, sufficient to give them an interest in any activity of the state or of the agencies of the state as may appear to affect those duties and responsibilities." Osceola County, 486 So.2d at 617.

30/ Osceola County, 486 So.2d at 620.

The district court conceded that water management districts do not have independent authority to allow interdistrict diversions, but predicated its finding of implied authority upon a belief that "[n]othing in the Water Resources Act prohibits D.E.R. from allowing inter-district diversions of water,"[31] that statutory authority was necessarily implied from Section 373.223(2) and from DER's grant of statewide power to regulate the management of water resources. The dissent asserted that the real issue was "whether or not one water management district has jurisdiction to act on a consumptive use permit outside of its statutory boundaries, under the provisions of the Florida Water Resources Act of 1972."[32]

Pursuant to Article V, Section 3(b)(3), Florida Constitution, Osceola County petitioned to invoke this Court's jurisdiction on grounds that the district court's decision directly conflicted with Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978) and Department of Professional Regulation v. Pariser, 483 So.2d 28 (Fla. 1st DCA 1985), and because the decision expressly affects the statutory water planning and provision duties of a class of constitutional officers, county commissioners. On August 29, 1986, this Court ordered the filing of Osceola's brief on the merits.

31/ Osceola County, 486 So.2d at 619.

32/ Osceola County, 486 So.2d at 620 (Sharp, J., dissenting).

SUMMARY OF THE ARGUMENT

There is no express statutory authority for water management districts to issue permits for water beyond their legislatively delineated jurisdictional limits. The language and history of the controlling statutory provision, section 373.223, Florida Statutes, provide no support for the lower court's finding of necessarily implied administrative authority. The lower court's holding is, in fact, contrary to the present scheme of regional water permitting, statutory permitting standards, and specific legislatively delineated water management district boundaries.

The decision below directly conflicts with the holding in Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1979), by finding implied statutory authority to administratively modify water management district boundaries in violation of Florida's nondelegation doctrine, under which an administrative agency may not exercise the legislative function of modifying the geographic boundaries of administrative jurisdiction. Assuming such implied statutory authority could be delegated to an administrative agency, the matter would still be unconstitutional under Article II, Section 3, because there are no legislative standards to guide the permitting of interdistrict diversions of water. Without such legislative standards, neither citizens nor the courts will be able to know how, when, or where such permits are lawful.

ARGUMENT

I.

CHAPTER 373, FLORIDA STATUTES, DOES NOT GRANT IMPLIED STATUTORY AUTHORITY TO ALLOW THE ISSUANCE OF PERMITS FOR DIVERSION OF WATER BEYOND LEGISLATIVELY ESTABLISHED JURISDICTIONAL BOUNDARIES.

The court below was unable to find any express legislative grant authorizing DER to give a water management district the authority to issue permits for withdrawal, use, and transport of water located in another water management district. The district court's finding of implied statutory authority for the permitting of interdistrict diversions was predicated on section 373.223(2), Florida Statutes. Such a finding contravenes the language and legislative history of that section.

A. Section 373.223(2) Provides No Basis for Implied Statutory Authority

The lower court specifically predicated its "necessarily implied" statutory authority for interdistrict permitting by St. Johns on section 373.223(2), Florida Statutes.[33] Section 373.223(2) provides:

> 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

---

33/ Osceola County, 486 So.2d at 619.

> 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.

(emphasis added).

Careful analysis of this section and its history is crucial to any finding or "necessarily implied" statutory authority to allow interdistrict diversions. In addition to the lower court's reliance, St. Johns has identified this provision as the sole authority for its rule purporting to authorize it to permit water use and transport beyond its district boundaries.[34] DER has also asserted that section 373.223 "plainly authorizes" DER to allow water resources to be transferred from one district to another.[35]

This statute, on its face, makes no reference to the transportation of water across legislatively established district boundaries. The statute enumerates three types of water transport that may occur within a water management district: transport of ground water beyond the land lying above it, known as "overlying land"; transport of water across county boundaries; and transport of water beyond a watershed. § 373.223(2), Fla. Stat. (1985). To understand the meaning of these provisions one

---

34/ See Fla. Admin. Code Rule 40C-2.312. Section 120.54(7), Florida Statutes, requires that each agency's rules identify the specific section or subsection of Florida Statutes being implemented. St. Johns has named Section 373.223 as the statute being implemented in its interdistrict diversion.

35/ See App. 79, DER's Response to Order to Show Cause.

must first understand the common law rule which the current statute supplanted. See generally Village of Tequesta v. Jupiter Inlet Corporation, 371 So.2d 663 (Fla. 1979).

The common law generally prohibited the transport and use of water beyond riparian land when dealing with surface waters, or overlying lands when groundwater was being removed. See Hamann, "Consumptive Water Use Permitting," I Florida Environmental and Land Use Law 10-12 (Environmental and Land Use Law Section, The Florida Bar, 1986); Maloney, "Florida Water Law," Legal and Administrative Systems for Water Allocation and Management, 35-36 (Cox ed. 1978).

A limited statutory exception to this common law rule was passed in 1957. See Ch. 57-380, § 8, Laws of Fla. This enactment, originally codified as section 373.141(1), Florida Statutes, abrogated the common law prohibition and authorized the diversion of excess waters "beyond riparian or overlying land." See Maloney, "Florida's New Water Resources Law," 10 U. Fla. L. Rev. 119, 132 (1957). The drafters of the Model Water Code, the basis of the subsequent 1972 Florida Water Resources Act, expanded the language of the 1957 exception and included it in the proposed Model Water Code. See Maloney, Ausness, and Morris, A Model Water Code § 2.02(2) (1972)(commentary). When the legislature enacted the Florida Water Resources Act of 1972, it incorporated this proposal and amended the 1957 wording to eliminate the excess water requirement and to include transport out-

side the watershed from which the water was taken. See Ch. 72-299, Part II, § 3, Laws of Fla.

The enactment of the 1972 Water Resources Act, however, provided no authority for transporting water across county boundaries or across the statutory boundaries of the water management districts established by the legislature in the very same Act. Id. These omissions are critical since these specific enactments are in derogation of the common law and must be strictly construed. E.g., Carlile v. Game & Fresh Water Fish Commission, 354 So.2d 362, 364 (Fla. 1977).

Subsequent legislative amendments went even further to foreclose a broad construction of these legislative grants. In 1976, subsequent to the establishment of the water management districts and with full cognizance of their role and regulatory function, the legislature added an additional authorization to allow the transport of water "across county boundaries." Ch. 76-243, § 10, Laws of Fla. This legislation resolved any doubts as to the right to permit the use and transport of water across boundaries within a water management district, but included no language extending permitting authority across legislatively defined water management district boundaries.

In section 373.069(1), Florida Statutes, the legislature has painstakingly delineated, in metes and bounds, the precise geographic boundaries of each of the five water management districts. § 373.069(1)(a)-(e), Fla. Stat. (1985). If the

legislature desires that these boundaries be expanded, it need only add to the exceptions enumerated in section 373.223(2). It has not done so. The history and language of section 373.223 provide no authority for the lower court's finding of implied authority to modify the legislatively established geographic jurisdictional limits of such districts. The court's finding of an implied exception should be reversed.

B. Rulemaking Authority Should Not Be Implied Where the Legislature Has Expressly Spoken.

Despite the absence of express statutory authority or any authority reasonably implied from section 373.223, the district court nonetheless found implied authority for St. Johns to permit the withdrawal and transport of water located beyond its legislatively delineated boundaries. Both DER and St. Johns have adopted rules seeking to administratively implement or to provide standards for interdistrict diversions of water. St. Johns's rule cites only section 373.223 as a basis for its implementing statutory authority and provides no criteria or standards. See Fla. Admin. Code Rule 40C-2.312. DER's rule purports to establish administrative standards for the permitting of interdistrict transfers of water despite the absence of express authority or any legislative standards. See Fla. Admin. Code Rule 17-40.05.

The lower court's affirmation of such rules, on the basis of implied statutory authority, directly conflicts with a recent

decision of the District Court of Appeal, First District. Department of Professional Regulation v. Pariser, 483 So.2d 28 (Fla. 1st DCA 1985), announced an express and logical limitation on the doctrine of implied delegation, directly conflicting with the holding below. Pariser holds that the rule of expressio unius est exclusio alterius limits the agency authority which may be implied from a statute in the face of express legislative enumeration of agency powers. Id. at 29.[36]

The lower court's findings are contrary to Pariser because in section 373.223(2), and in the boundary definitions of section 373.069, the legislature expressly enumerates those circumstances and locations where water may be transported. Those provisions, however, provide no rulemaking authority to permit interdistrict diversions across district boundaries established in section 373.069 by the legislature.

Thus, the legislature has chosen not to include water management district boundaries among the specific statutorily enumerated boundaries across which water management districts may permit the transport of water. See § 373.223(2), Fla. Stat. (1985). In construing a statute, courts should be extremely cautious in adding to words enacted by the legislature. Armstrong v. City of Edgewater, 157 So.2d 422, 425 (Fla. 1963);

36/ The rule of expressio unius est exclusio alterius provides that where a statute enumerates things upon which it operates, it excludes those things not expressly mentioned. E.g., Thayer v. State, 335 So.2d 815, 817 (Fla. 1976).

Rebich v. Burdine's and Liberty Mutual Insurance Co., 417 So.2d 284, 285 (Fla. 1st DCA 1982).

In the instant case, there is no indication whatsoever that the legislature intended an implied authority allowing a water management district to issue permits for water located beyond the geographical limits the legislature has so carefully delineated. When there is doubt as to legislative intent or where speculation is necessary, such doubts should be resolved against the power of courts to supply missing words in the statute. Armstrong, 157 So.2d at 425.

As it applies to the instant case, the court in Pariser noted:

> We recognize 'that rulemaking authority may be implied to the extent necessary to properly implement a statute governing the agency's statutory duties and responsibilities,' [citation omitted] however, when the legislature expressly has provided a method for implementation . . . we think it would be erroneous to additionally imply such authority . . . .

Pariser, 483 So.2d at 29.

This language is applicable to the case at bar. Nothing in Chapter 373 can be found to sustain a purported implied authority to adopt administrative rules when the legislature has expressly provided three instances when transport is authorized and when it has expressly delineated districts within which permits are to issue.[37] The decision below should be reversed.

---

[37]/ None of the water management districts other than St. Johns have adopted rules purporting to give them authority to implement or permit interdistrict diversions.

C. A Statewide Water Resources Program Does Not Imply Statutory Authority for Extra-Territorial Permitting.

Another predicate to the lower court's finding of implied statutory authority was its belief that "[t]he statutory authority to allow inter-district diversions of water is necessarily implied in the grant to D.E.R. of statewide power to regulate the management of water resources. . . ." Osceola County, 486 So.2d at 619. Such a conclusion misreads the basic structure of Florida's presently implemented program for permitting water use and transport in Florida.

Florida's unique system of water management, although comprehensive and statewide in scope, was designed to be flexible and responsive to local needs, but regionally based and controlled. The legislature, in enacting Chapter 373, provided a "comprehensive statewide plan" for the protection and management of state waters. Osceola County, 486 So.2d at 619. This same plan, however, "divided" the state into five water management districts with provision for both general supervision by DER and assurance that regional and basin concerns would be addressed. See St. Johns River Water Management District v. Deseret Ranches of Florida, Inc., 421 So.2d 1067, 1068, 1070-71 (Fla. 1982).[38]

38/ The legislature has further declared that "future growth and development planning reflect the limitations of the available groundwater or other available water supplies." § 373.0395, Fla. Stat. (1985).

The views of the Act's principal architect, the late Dean Frank Maloney, provide insight into the uniqueness of Florida's system and the importance of regional administration as the cornerstone of regulation and management of a comprehensive state water resources program:

> The Water Management Districts were established so that their boundaries conform closely to hydrologic lines. Although a water management district may have more than one river basin within its geographic area, the lands affected by or affecting any given river basin should be within the jurisdiction of a single water management district. The independence of those districts from one another permits diverse approaches to management of water resources. Water management problems vary from one district to another and solutions acceptable to a District's residents may also vary from district to district.

F. Maloney, S. Plager, R. Ausness and B. Canter, Florida Water Law, 210 (1980) (emphasis supplied).

More importantly, the legislature established a two-tiered system with general supervisory powers in DER, section 373.026(7), Florida Statutes, and with actual consumptive use permitting to be delegated to the water management districts. § 373.216, Fla. Stat. (1985). Recognition of the importance of this regional concept is reflected in section 373.016(3), Florida Statutes:

> The Legislature recognizes that the water resource 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 the various water management districts . . .

(emphasis added).

Contrary to the assertions of St. Johns and DER below, DER is not a statewide consumptive use permitting authority, nor may it authorize the regional water management districts to exercise statewide consumptive use permitting jurisdiction.[39] In enacting the Water Resources Act, the legislature intended for DER to play two roles with respect to the independent water management districts. First, DER would exercise general supervision over the districts in the development of state water resources policy. § 373.026(7), Fla. Stat. (1985). Second, DER would serve as an interim permitting authority for those water management districts that remained unprepared to implement their own permit systems. See § 373.016(3), Fla. Stat. (1985); § 373.026(7), Fla. Stat. (1985). DER was authorized to exercise any power authorized to be exercised by a water management district. See Ch. 72-299, Part I, § 3, § 5(7), Laws of Fla. Subsequently, however, the legislature mandated that each water management district implement consumptive use permitting. Ch. 82-101, § 8, Laws of Fla. (codified at § 373.216, Fla. Stat. (1985)). DER, by rule, has

---

[39]/ App. 63, St. Johns Response to Order to Show Cause; App. 79, DER's Response to Order to Show Cause.

divested itself of whatever consumptive use permitting powers it may have had within the boundaries of each water management district. See Fla. Admin. Code Rule 17-101.040(10)(a). This is consistent with the mandate of section 373.016(3).

The statutory language does not contemplate, nor have the parties below asserted, statutory authority for DER exercising concurrent consumptive use permitting jurisdiction with the water management districts. This is particularly true because the legislature recently required each district to implement a consumptive use permitting program by 1983, and, in fact, each has done so. See § 373.216, Fla. Stat. (1985); Fla. Admin. Code Rules 40A-2.031, 40B-2.031, 40C-2.031, 40D-2.031, 40E-2.031.

The legislature's logic behind confining consumptive use permitting power to within the boundaries of each water management district is apparent. If unknown and unforeseeable applicants from one district of the state are permitted to withdraw water from any district, irrespective of legislatively established district boundary lines, Chapter 373's carefully crafted balance between regional permitting and planning, envisioned by Chapter 373, will be undermined.[40] Such a bold change should not be

---

40/ St. Johns itself describes the important relationship between permitting and planning in the allocation of water within its boundaries. Fla. Admin. Code Rule 40C-2.012(2).

> (2) The policy of the District is to structure and execute its planning and research functions in order to increase the District's knowledge and understanding of water resources within the District and the problems of, or associated with, the District's water resources to develop a regulatory program based on and reflecting the District's continually increasing knowledge and understanding of those water resources.

judicially accomplished by implying statutory authority to allow interdistrict permitting through DER's general supervisory powers.

D. The Decision Below Improperly Bifurcates the Reasonable Beneficial Use Permitting Test.

Under the Water Resources Act, applicants proposing new consumptive uses of water within a water management district must establish that the use: (1) is reasonable beneficial, (2) will not interfere with existing legal users, and (3) is consistent with the public interest. See § 373.223(1), Fla. Stat. (1985).

The reasonable beneficial use test is the cornerstone of the consumptive use permitting standard. It requires that the water management district evaluate an application both in terms of the need for the water and the impact of the withdrawal on district environmental and water resources. See, Maloney, Capehart, Hoofman, "Florida's Reasonable Beneficial Use Water Standards: Have East and West Met?," 31 U. Fla. L. Rev. 253 (1979); A Model Water Code at 170. Thus, before issuing a water use permit, the governing board of a district must balance the need for the water with the impact on the resource of withdrawing such water. See also App. 86, Fla. Admin. Code Rule 17-40.04(2).

The instant case provides a graphic example of how the permitting of interdistrict diversions without legislative authority or standards will undermine the policy behind the reasonable

beneficial use test. Brevard failed to provide South Florida with requested information on water resource impacts in Osceola County.[41] Nevertheless, St. Johns, Brevard's home district, was proceeding to a hearing on the permit without resource impact information.[42] Thus, St. Johns determined that Brevard's need for the use met the reasonable beneficial standard without applying or considering the impact upon the resource as required under the two-part balancing test mandated by the legislature in Chapter 373.[43] This parochial "only look at the needs in our district" approach is precisely what the legislature sought to prevent by establishing five regional water management districts. Each district balances water needs in the district against the impact of water withdrawal by employing the reasonable beneficial use test. Obviously, the legislature did not intend to enable water management districts to bifurcate the reasonable beneficial use test by issuing permits without evaluating and weighing need versus impact on the resource. The lower court's decision inevitably compels this result.

41/ App. 27, Affidavit of Dr. Gleason, Water Resources Director, South Florida Water Management District (emphasis in original).

42/ App. 11, Osceola County's Petition for Writ of Prohibition.

43/ App. 25, Affidavit of R. Moresi, former Director, Division of Resource Management, St. Johns River Water Management District.

E. Extra-Territorial Permitting Cannot Be Reconciled with Numerous Other Provisions of Chapter 373

A court should adopt that construction which can be harmonized and reconciled with other provisions of the same act. E.g., Woodgate Development Corporation v. Hamilton Investment Trust, 351 So.2d 14, 16 (Fla. 1977); State ex rel. School Board of Martin County v. Department of Education, 317 So.2d 68 (Fla. 1975). The lower court's creation of implied authority does not harmonize with the unique nature and regional consumptive use permitting scheme of Florida's Water Resources Act.

In addition to destroying the legislatively mandated, reasonable-beneficial use balancing test, extra-territorial permitting by water management districts is inconsistent with numerous other provisions of Chapter 373. For example, statutory provisions for declaration of water shortages in section 373.246, Florida Statutes, represent an instance where the failure of the legislature to grant express statutory authority for trans-district permitting of water makes eminent sense. Subsection (1) of section 373.246 requires the governing board or department to formulate a water shortage plan for implementation. § 373.246(1), Fla. Stat. (1985). Subsection (2) enables the governing board or department to declare a water shortage within the district, and impose such restrictions on consumptive users as may be necessary to protect the water resources of the area from serious harm. § 373.246(2), Fla. Stat. (1985). The statute

further provides that if the governing board finds an emergency exists due to a water shortage within any area of the district, the governing board may issue final orders, including prohibiting use of water resources of the district. § 373.246(7), Fla. Stat. (1985).

Nothing in this section grants authority for one district to impose its water shortage plan on another district to protect either the users or the resource. Nor is there any authority which would suggest which district's plan should prevail in the event of an emergency. Were St. Johns able to authorize water transport or withdrawal from another district, does it not follow that it could also impose its water shortage plan upon that district to assure the viability of its own extra-territorial source? Such a result would promote district provincialism and wreak havoc on the resource planning responsibilities of both districts.

Another example of the implausibility of implied extra-territorial permitting jurisdiction exists in Chapter 373 provisions relating to existing legal users and competing applicants. Section 373.233, Florida Statutes, provides a means for the districts to resolve conflicts among competing applicants for the district's water resources. Section 373.223(1)(b), Florida Statutes, protects existing legal users against new applicants. If St. Johns were authorized to issue extra-territorial permits, must existing legal users in the district where the resource is

located apply in each and every water management district to ensure that their rights are protected against foreign applicants seeking extra-territorial permits from foreign districts?

The lower court's creation of implied statutory authority can only create chaos. If the legislature desires to implement extra-territorial water permitting, it can do so very easily by amending Chapter 373 and providing guidelines for district interactions. The lower court's finding of implied extra-territorial permitting authority is inconsistent with the statutory scheme of Chapter 373 and should be reversed.

F. All Doubts Concerning the Exercise of an Asserted Administrative Power Should Be Resolved Against its Exercise.

An administrative agency is a creature of statute. It possesses only those powers expressly conferred by statute or necessarily implied therefrom. E.g., Florida Bridge Co. v. Bevis, 363 So.2d 799, 802 (Fla. 1978); State Department of Transportation v. Mayo, 354 So.2d 359, 361 (Fla. 1977).

Agencies such as DER and the various water management districts cannot expand their jurisdiction beyond that of their legislative mandate. See, e.g., Florida Department of Law Enforcement v. Hinson, 429 So.2d 723, 724 (Fla. 1st DCA 1983); State Department of Environmental Regulation v. Falls Chase Special Taxing District, 424 So.2d 787, 793 (Fla. 1st DCA 1982). To allow one agency, as has the lower court, to derivatively expand the scope of another agency's legislatively established

geographical jurisdiction is even more erroneous.

Legislative history and rules of statutory construction demonstrate that section 373.223(2), Florida Statutes, does not provide water management districts with implied power to allocate water resources outside their boundaries. Doubts about the lawful existence of the asserted implied power to issue permits for interdistrict diversions should be resolved against the exercise thereof. See City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So.2d 493, 496 (Fla. 1973).

Where Chapter 373 speaks clearly by the absence of any mention of authority to permit interdistrict diversions, expressly authorizes other diversions, and provides an overall statutory scheme contrary to the lower court's holding, this Court must conclude that the legislature did not intend such implied administrative authority. The decision below should be reversed.

II.

THE LOWER COURT'S FINDING OF IMPLIED STATUTORY AUTHORITY VIOLATES THE NON-DELEGATION PROHIBITION OF ARTICLE II, SECTION 3 OF THE FLORIDA CONSTITUTION.

The district court's decision directly conflicts with this Court's holding in Askew v. Cross Key Waterways, 372 So.2d 913 (Fla. 1978). Cross Key holds that the legislature may not delegate the "fundamental legislative task of determining which geographic areas and resources are in greatest need of protection." Id. at 919. Conflict exists because the court below found implied statutory authority for an administrative agency, the DER, to exercise the fundamental legislative task of authorizing a water management district to issue permits for water located outside that district's statutorily described geographic jurisdiction.[44]

Florida's non-delegation doctrine is rooted in the fundamental democratic principle of separation of powers. Unlike its federal counterpart, Article II, Section 3 of the Florida Constitution expressly provides that:

> Branches of government. - The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

44/ The non-delegation doctrine issue and this Court's Cross Key decision were argued and briefed for the lower court. App. 36.

(emphasis added).

This Court has repeatedly held that the legislature may not abdicate its law-making function to administrative agencies. E.g., Department of Business Regulation v. National Manufactured Housing Federation, Inc., 370 So.2d 1132, 1135 (Fla. 1979); D'Alemberte v. Anderson, 349 So.2d 164, 169 (Fla. 1977); Conner v. Joe Hatton, Inc., 216 So.2d 209 (Fla. 1968). Recently, in Orr v. Trask, 464 So.2d 131, 134 (Fla. 1985), this Court again reiterated its "historically strict view that Article II, Section 3 of the Florida Constitution, prohibits the delegation of legislative powers absent meaningful legislative standards and guidelines." See generally Martin, "Legislative Delegations of Power and Judicial Review - Preventing Judicial Impotence," 8 FSU L. Rev. 43 (1980).

The non-delegation doctrine essentially provides that (1) the legislature may not abdicate its responsibility for fundamental and primary policy decisions such as delineating the scope of agency jurisdiction, and (2) the legislature must supply adequate guidelines to guide administrative agencies in tasks which are properly delegated. Cross Key, 372 So.2d at 925. E.g., Dickinson v. State, 227 So.2d 36, 37 (Fla. 1969). Neither of these tests are met by the lower court's holding.

A. The Authority to Modify the Boundaries of Agency Jurisdiction May Not Be Delegated.

The legislative branch may not delegate to an agency of the executive branch the policy function of designating the

geographic area of concern subject to agency regulation. Cross Key, 372 So.2d at 920. In Cross Key, the legislature attempted to delegate, to the Administration Commission, authority to establish "areas of critical state concern," within which the Administration Commission would then regulate land use. Id. at 914. Unlike the instant case, the attempted delegation in Cross Key was based on express statutory authorizing language accompanied by standards, albeit inadequate standards.[45] Nonetheless, this Court found the attempted delegation in Cross Key constitutionally defective because it "reposits in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection." Id. at 919.

The court in Cross Key borrowed a quote from the lower court to bring home the difficulties in conferring unfettered jurisdiction upon an agency:

> Up to the acreage limit, the Commission is empowered to supersede as it chooses the local governments regulating development in historic Pensacola or St. Augustine, or at the shores of the Atlantic and Gulf of Mexico to a depth of a thousand feet, or in all acreage on the Suwannee and St. Johns and their tributaries or, indeed, in all the Florida Keys. If Cedar Key, Ybor City, Palm Beach and the path of the King's Road are found to be historic resources of satisfactory importance, they too may be designated.

45/ See Cross Key, 372 So.2d at 914, for a description of the express delegation and accompanying standards invalidated in that case.

Cross Key, 372 So.2d at 919 (citing Cross Key Waterways v. Askew, 351 So.2d 1062, 1069 (Fla. 1st DCA 1977)).

The instant case provides yet another example of what will happen if an administrative agency is permitted to usurp the "fundamental legislative task" of establishing the limits of permitting jurisdiction under Chapter 373. Under the lower court's holding, the DER may, for example, authorize the South Florida Water Management District -- whose jurisdiction has been carefully circumscribed by the legislature to conform, as nearly as practicable, to hydrologic boundaries -- to issue a permit to transport water the length of the state from Lake Jackson in Leon County, for consumption in Orlando, Miami, or Key West. Just as in Cross Key, this administrative overreaching of legislative geographic boundaries allows an agency to circumvent the legislature and designate "the geographic area of concern which will be subject to . . . regulation." Cross Key, 372 So.2d at 920.

The exclusive legislative nature of the power to define the geographic limits or applicability of jurisdiction is also reflected in cases holding that a city council or county commission may not delegate the legislative authority to modify or amend geographic zoning districts. E.g., Josephson v. Autrey, 96 So.2d 784, 788 (Fla. 1957); State v. Roberts, 419 So.2d 1164, 1165 (Fla. 2d DCA 1982). In the instant case, the boundaries are not zoning districts but legislatively established, geographically defined water management districts. In both instances,

describing or modifying the geographic boundaries of such districts is a legislative function. In the present case, it is not the Act itself which is unconstitutional, but the interpretation and creation of implied authority forced upon the legislation by the court below. The decision below should be reversed.

B. Chapter 373 Provides No Meaningful Legislative Standards or Guidelines.

Assuming the legislature could constitutionally delegate to DER, and DER, in turn, could delegate to St. Johns, the authority to permit withdrawal and transport of water located outside the geographic borders of the district, there are no meaningful legislative standards to guide such a double delegation. The absence of standards also eliminates the means by which a court could review the limits of such permitting authority.

In Cross Key, this Court held that "administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program." Cross Key, 372 So.2d at 925. See also Harrington & Company, Inc. v. Tampa Port Authority, 358 So.2d 168, 170 (Fla. 1978); Dickinson v. State, 227 So.2d 36, 38 (Fla. 1969). In the present case, there are absolutely no legislative standards as to how far one water management district may go in seeking to import water from another area of the state.

Although there is no "litmus test" to determine whether a

legislative standard does or does not meet muster, one commentator has suggested that the "important thing . . . is to require the legislature to 'legislate as far as practicable.'" Martin, "The Delegation Issue in Administrative Law - Florida vs. Federal," 52 Fla. B.J. 35, 38 (January, 1979).

In the instant case, the legislature has not legislated as "far as practicable." It has failed to provide even express statutory authority for the action at issue - interdistrict permitting - much less legislative standards to govern DER or water management districts in carrying out such authority. There are no statutory standards for interdistrict diversions of water. See Ch. 373, Fla. Stat. (1985). See also Kemp, "Interbasin Transfers of Water in Florida," 56 Fla. Bar J. 9, 12 (1982). Unlike Cross Key, where the legislature at least attempted to provide standards which this Court held to be invalid, the decision below rests on implied authority to apply nonexistent legislative standards.

1. Administrative Standards Cannot Fill a Legislative Void.

Because there are no legislative standards, and due to the obvious need for such standards, DER has attempted to administratively promulgate its own standards to govern transport of water across district boundaries. In its rules, DER purports to fill the void of legislative standards with administrative guidelines requiring that the transport be otherwise consistent with the

public interest, that the present and projected needs of the supply area be reasonably determined, that the major costs, benefits, and environmental impacts be adequately determined, and that the transport and use be approved by each district involved. Fla. Admin. Code Rule 17-40.05.

Legislative standards are needed to avoid chaos when five water management districts seek to obtain water not available in their own districts by permitting water use and withdrawal from other districts. DER's attempts to administratively bootstrap interdistrict permitting standards is, no doubt, well intentioned. Unfortunately, the constitutionally required test of meaningful legislative standards can only be met by the legislature:[46]

> Legislators are presumably elected, at least to some extent, on the basis of their stand on various issues. It only seems to make sense that we should require those legislators to legislate 'as far as practicable' so that the so called 'fundamental policy decisions' will be made by them instead of the administrative expert/ bureaucrat whose tenure in office will most likely be unaffected by his/her responsiveness or unresponsiveness to the will of the people.

The lower court's decision allows DER to use implied statutory authority to promulgate self-conceived administrative standards. The decision below, therefore, does not meet the

---

46/ Martin, "The Delegation Issue in Administrative Law - Florida vs. Federal," 52 Fla. B.J. 35, 39 (Jan. 1979).

separation of powers requirements of Article II, Section 3, of the Florida Constitution.

C. There Can Be No Meaningful Judicial Review of Interdistrict Permitting Absent Legislative Standards.

One purpose of requiring meaningful legislative standards is to provide benchmarks by which to gauge the lawfulness of administrative actions. See generally Martin, "Legislative Delegations of Power and Judicial Review - Preventing Judicial Impotence," 8 FSU L. Rev. 43 (1980). As this Court noted in Cross Key:

> A corollary of the doctrine of unlawful delegation is the availability of judicial review . . . When legislation is so lacking in guidelines that neither the agency nor the court can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.

Cross Key, 372 So.2d at 919.

Given the complete absence of legislative standards for reviewing the permitting of interdistrict diversions, neither this Court nor any other court will be able to undertake a meaningful review of the legality of future interdistrict permitting decisions. No one will know when, where, and how far a water management district may go in issuing permits for water transport to supplement that available within its own district. The instant case is one in which the absence of express authority

and any legislative standards makes administrative agencies the lawgiver and not the administrator of the law. Cross Key, 372 So.2d at 919. The decision below should be reversed.

CONCLUSION

There is no express statutory authority for water management districts to issue permits for water beyond their legislatively delineated jurisdictional limits. The lower court's holding of implied statutory authority has no basis in statutory history or language. Even assuming implied authority existed, the exercise of such implied authority violates Article II, Section 3, Florida Constitution, by delegating to an administrative agency the legislative function of transgressing or modifying its jurisdictional boundaries.

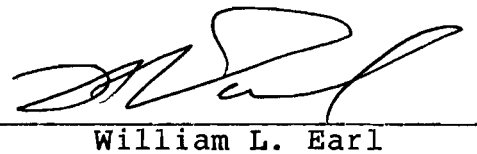
The "implied power" to permit interdistrict diversions -- without legislative standards to determine how, when, or where such permits are lawful -- makes such authority both highly controversial and potentially disruptive of Florida's existing, regional water permitting system. If the permitting of interdistrict diversions is to be allowed it should be upon clear legislative authority, not judicial fiat based on implied authority with no standards for review.

WHEREFORE, Osceola County respectfully requests that this Court reverse the decision below and mandate issuance of a writ prohibiting Respondent St. Johns from issuing permits for withdrawal or transportation of water located beyond its legislatively delineated boundaries.

Respectfully submitted

Neal D. Bowen, Esquire
Osceola County Attorney
Co-Counsel for Petitioner
17 South Vernon Avenue
Kissimmee, Florida 32741
(305) 847-1200

PEEPLES, EARL & BLANK, P.A.
Counsel for Petitioner
One Biscayne Tower, Suite 3636
Two South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 358-3000

By: 
William L. Earl

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of September, 1986, a true copy of the foregoing has been provided by United States mail to the following:

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

Neal D. Bowen, Esq.
Osceola County Attorney
17 South Vernon Avenue
Kissimmee, Florida 32741

By _____
William L. Earl