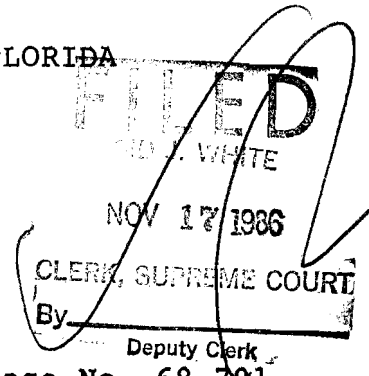
O/A 1-7-87

IN THE SUPREME COURT OF FLORIDA




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 REPLY BRIEF

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

William L. Earl, Esquire
Thomas T. Ankersen, 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

CASES — PAGE

PAGE

STATUTES



FLORIDA LAWS

PAGE

FLORIDA ADMINISTRATIVE CODES



SECONDARY AUTHORITIES

## I.

## DER IS NOT A STATEWIDE WATER BOARD WITH OVERRIDING, CONCURRENT CONSUMPTIVE USE PERMITTING AUTHORITY

Respondent St. Johns River Water Management District ("St. Johns") and Amicus Department of Environmental Regulation ("DER") argue that because Chapter 373 addresses "waters of the state" and gives DER certain powers regarding water management districts, the legislature vested DER with concurrent, overriding statewide consumptive use permitting powers that make it, in effect, a super water management district. This assertion overlooks the history of existing statutory language and the legislature's express rejection on two occasions of the statewide water board concept.

### A. The Legislature Has Twice Rejected the Concept of a State Water Authority

In 1972, the legislature rejected the Model Water Code's recommended establishment of a state water board with broad regulatory, supervisory, and planning authority. See Maloney, Ausness and Morris, A Model Water Code, §§ 1.05, 1.06, 1.09, 1.10 (1972). As enacted, Chapter 373 deleted those sections of the Model Water Code relating to the establishment of such a board. See Ch. 72-299, Laws of Fla. (codified at Ch. 373, Fla. Stat. (1985)).

Again in 1983, the legislature rejected bills which would have created a "state water commission." Fla. H.R. 999 (1983);

Fla. S. 577 (1983). These proposed amendments to Chapter 373, while maintaining existing water management districts, would have created "one state agency responsible for the supply of water to all areas of the state." Fla. H.R. at 3; Fla. S.B. at 3. Thus, the concept St. Johns now urges this Court to imply has twice been rejected by the legislature.

### B. Legislative History Shows DER Has No Concurrent, Statewide Consumptive Use Permitting Jurisdiction

St. Johns and DER rely on selected provisions of Chapter 373 to lend credence to their assertion that DER has overriding, concurrent, or residual consumptive use permitting authority. See, e.g., Brief of St. Johns at 18-21; Brief of DER at 5-7. They argue that DER's general supervisory powers over water management districts, and its authority to exercise the powers of a particular water management district, vest DER with statewide consumptive use permitting authority that DER may delegate to the districts. See Brief of St. Johns at 21; Brief of DER at 6. This argument is erroneous.

In adopting the 1972 Act, the legislature necessarily recognized that some newly created districts did not possess the technical expertise or financial resources to implement consumptive use permitting programs. DER and its predecessor did have the resources and expertise. Logically, therefore, the legislature authorized DER to exercise "any power herein authorized to

be exercised by a water management district." Ch. 72-299, § 2(3), Laws of Fla. (codified at § 373.016(3), Fla. Stat. (1985)); Ch. 72-299, § 5(7), Laws of Fla. (codified at § 373.26(7), Fla. Stat. (1985)). Generally, consumptive use permitting power was originally vested in either DER or the district, not DER and the district. § 373.219(1), Fla. Stat. (1985); see Telophase Society of Florida, Inc. v. State Board of Funeral Directors and Embalmers, 334 So.2d 563, 567 (Fla. 1976) ("'or' when used in a statute is generally construed to be in the disjunctive").

Under St. Johns's theory, that DER is a statewide consumptive use permitting authority that may delegate statewide authority to the districts, the statute should, but does not, provide that water management districts may exercise any authority authorized to be exercised by the Department. See § 373.26(7), Fla. Stat. (1985). DER's consumptive use permitting authority under Chapter 373 is, therefore, derivative of the water management districts, not the other way around as asserted by DER and St. Johns. Brief of DER at 7; Brief of St. Johns at 18-21. Moreover, whatever permitting powers DER may have had once, it has now delegated. See Fla. Admin. Code Rule 17-101.040(10)(a).

The legislature, in 1982, confirmed that the districts now are vested with direct authority to issue consumptive use permits:

> Section 8. Section 373.216, Florida Statutes, is amended to read:
>
> 373.216 Implementation of program for regulating the consumptive use of water. --The ~~department may authorize the~~ governing board of each ~~a~~ water management district shall, no later than October 31, 1983, ~~to~~ implement a program for the issuance of permits authorizing the consumptive use of particular quantities of water covering those areas deemed appropriate by the governing board.

Ch. 82-101, § 8, Laws of Fla. (codified at § 373.216, Fla. Stat. (1985)).

Since the last expression of legislative will is law, Askew v. Schuster, 331 So.2d 297, 300 (Fla. 1976), the districts and not DER have direct consumptive use permitting power. This is affirmed by more recent amendments that authorize district governing boards, but not DER, to adopt general permits under Chapter 373. See § 373.118, Fla. Stat. (1985).

Statutory history demonstrates that DER may supervise or that DER may in some circumstances exercise the powers a district may exercise, but DER does not have overriding or concurrent state-wide permitting jurisdiction. It is not a state water board.

II.

**THE LEGISLATURE HAS AUTHORIZED THE TRANSPORT OF WATER ACROSS COUNTY BOUNDARIES; IT HAS NOT AUTHORIZED THE CROSSING OF STATUTORY WATER MANAGEMENT DISTRICT BOUNDARIES**

St. Johns asserts that the boundaries of water management districts may be disregarded because the legislature in section 373.223(2), Florida Statutes, only delineated counties and did not delineate every municipality or specialized governmental unit in Florida. This position defies logic, law, and practicality.

Unlike municipalities and most special districts, the jurisdictional limits of both water management districts and counties are prescribed by general statute. See § 373.069, Fla. Stat. (1985) (water management district boundaries); Ch. 7, Fla. Stat. (1985) (county boundaries). In Chapter 373 the legislature deals with the boundaries of only two entities. It has expressly authorized that permits may be issued to transport water across county boundaries. § 373.223(2), Fla. Stat. (1985). Although in section 373.069 the legislature has explicitly delineated the boundaries of each water management district in Chapter 373, it has not authorized the crossing of these jurisdictional limits in section 373.223(2).

If the implied authority of section 373.223(2) to transcend jurisdictional boundaries were as clear as St. Johns suggests, then there would have been no need for the legislature to have amended Chapter 373 in 1976 to authorize an exception for

counties. See Ch. 76-243, § 10, Laws of Fla. (codified at § 373.223(2), Fla. Stat. (1985)); see also Tribune Company v. Public Records, P.C.S.O. #79-35504 Miller/Jent, 493 So.2d 480, 483 (Fla. 2d DCA 1986); State v. Nourse, 340 So.2d 966, 968 (Fla. 3d DCA 1976) (expressly mentioned exceptions to general proscription are narrowly construed against party seeking to take advantage of exceptions). As admitted by DER, the setting of jurisdictional boundaries of a water management district is "clearly a legislative function." DER Brief at 11-12. The lower court's implied authorization to transcend the legislatively established boundaries of water management districts should, therefore, be reversed absent clear legislative authority.

## III.

## THE STATUTORILY REQUIRED REASONABLE BENEFICIAL USE TEST CANNOT BE APPLIED BY ST. JOHNS WHEN IT SEEKS TO PERMIT WATER WITHDRAWALS BEYOND ITS JURISDICTIONAL BOUNDARIES

St. Johns and DER assert that potential problems in permitting beyond legislatively established boundaries are cured by DER's administrative rule requiring that consumptive use permits be issued by each affected district. Fla. Admin. Code Rule 17-40.05; see Brief of St. Johns at 23-24; Brief of DER at 9-10. This administratively fabricated dual permitting scheme avoids the essential question: whether respondent can issue an extra-territorial consumptive use permit without itself balancing both

the need for the withdrawal and the impacts on the resource -- as required by the reasonable beneficial use test. See Maloney, Capehart and Hoofman, Florida's "Reasonable Beneficial" Water Use Standard: Have East and West Met?, 31 U. Fla. L. Rev. 253, 270-77 (1979).

St. Johns will be unable to apply the reasonable beneficial use test to a water withdrawal beyond its statutory boundaries because, in the view of its principal architect, the 1972 Act was never intended to be applied beyond the jurisdiction of the governing board making the reasonable beneficial use determination:

> The question of whether, under all the facts and circumstances, a proposed use in a particular location is reasonable beneficial, does not interfere with existing legal uses, and is in the public interest, can best be determined by a board which convenes frequently, building up a reservoir of expertise in the area it regulates.

Id. at 277 (emphasis added).

Moreover, the statute's balancing requirement clearly contemplates consideration of all standards by a single governing board. The applicable language states that the governing board and not the governing boards are to issue permits. See § 373.219(1), Fla. Stat. (1985).

## IV.

## DER'S DUAL PERMITTING SCHEME IS NOT CONTEMPLATED BY CHAPTER 373 BECAUSE IT WILL RESULT IN PROCEDURAL AND SUBSTANTIVE CHAOS

Assuming arguendo that St. Johns could somehow satisfy the statutorily required reasonable beneficial use test, the lack of statutory contemplation of DER's dual permitting scheme is demonstrated by the chaos it creates in the appellate process. Final orders of water management districts may be appealed either to the Governor and Cabinet sitting as the Florida Land and Water Adjudicatory Commission ("FLWAC"), pursuant to section 373.114, Florida Statutes, or to a district court of appeal pursuant to section 120.68(2), Florida Statutes. An analysis of dual permitting appeals in the context of district courts of appeal shows the impracticality and lack of legislative contemplation of DER's dual permitting scheme.

Assuming permit applications were filed with St. Johns and the South Florida Water Management District, the governing board of each agency, if petitioned, must conduct a formal administrative hearing, render proposed findings of fact and conclusions of law, and enter a final order. See § 120.57(1), Fla. Stat. (1985). The final order of each district is then appealed to the appropriate district court, see § 120.68(2), Fla. Stat. (1985), which may not substitute its judgment as to the weight of the evidence on any disputed finding of fact. § 120.68(10), Fla.

Stat. (1985); see, e.g., Markham v. Fogg, 458 So.2d 1122, 1126 (Fla. 1984).

Thus, district courts reviewing appeals from "dual" interdistrict permitting decisions under DER's rule will be faced with findings of fact by two different triers of fact concerning the same issues and no means to resolve them. Since one district (St. Johns) may well be interested in getting water to fuel growth within its boundaries, and another (South Florida) may be worried about the impact of massive groundwater withdrawals from within its jurisdictional area, the potential for conflicting findings of fact on identical issues is very real.[1]

The obvious procedural problems resulting from attempting to resolve conflicting findings, possibly before different appellate courts addressing identical issues, only show that Chapter 373 does not contemplate "dual" interdistrict permitting as required by DER's rule. The adoption of such an unworkable rule, in turn, reveals the fatal flaw in St. Johns's case. There is neither legislative policy nor are there legislative standards applicable to interdistrict permitting to guide DER in its adoption of its interdistrict permitting rule. Since DER itself has no independent statewide consumptive use permitting authority, the lower court's finding of implied authority should be reversed.

---

1/ This same problem arises in appeals to FLWAC since its review is "appellate in nature and shall be based on the record below." § 373.114, Fla. Stat. (1985) (emphasis added).

V.

## AUTHORIZING INTERDISTRICT PERMITTING OF WATER IS A FUNDAMENTAL LEGISLATIVE POLICY DETERMINATION NOT A TECHNICAL, ADMINISTRATIVE DECISION

DER asserts that the issue of interdistrict permitting of water use is a "narrow function" turning on "technical analysis of water resources." See Brief of DER at 17. St. Johns posits that the decision to authorize interdistrict transport is a "subordinate function." See Brief of St. Johns at 36. Microtel, Inc. v. Florida Public Service Commission, 464 So.2d 1189 (Fla. 1985), is relied upon to support this assertion.

In Microtel, this Court held that the legislature had met the requirements of Florida's nondelegation doctrine by initially making the "fundamental and primary policy decision that there be competition in long distance telephone service." Id. at 1191. Unlike Microtel, the legislature in the case at bar has yet to express the fundamental policy decision that interdistrict permitting is authorized.

It is St. Johns and DER, not the legislature, that have made the initial policy decision to authorize interdistrict transport of water in the face of what the lower court described as the absence of express statutory authority. Osceola County v. St. Johns River Water Management District, 486 So.2d 616, 620 (Fla. 5th DCA 1986). To permit DER, an administrative agency, to determine fundamental public policy in the first instance is to

make that agency the "lawgiver." Askew v. Cross Key Waterways, 372 So.2d 913, 919 (Fla. 1978). Such a profound policy decision should not be made by administrative agencies predicated solely on implied statutory authority.

### A. There are No Standards Governing Interdistrict Permitting in Chapter 373, Florida Statutes

Assuming arguendo that the legislature had expressed its policy decision to allow interdistrict permitting, the non-delegation doctrine would still be violated because there are no legislative standards to guide such a permitting policy. Respondent asserts that the standards for intradistrict permitting in Chapter 373 are adequate.[2]

Legislative standards governing the issuance of normal intradistrict permits make no mention of interdistrict permitting. The inability of St. Johns to apply the reasonable beneficial use standard beyond its statutory boundaries has been described. St. Johns also places great reliance on the broad public interest test of sections 373.223(1)(c) and (2), Florida Statutes, as a sufficient standard. See Brief of St. Johns at 37.

Although several cases have upheld general standards as adequate, such cases, unlike the instant case, have also involved express legislative policy grants underlying such standards.

---

2/ Contrary to St. Johns's assertions, the standards issue was briefed and argued below. See R. 107-110, Osceola's Consolidated Reply.

Brewster Phosphates v. State, Department of Environmental Regulation, 444 So.2d 483 (Fla. 1st DCA), cert. denied, 450 So.2d 485 (Fla. 1984), and Albrecht v. Department of Environmental Regulation, 353 So.2d 883 (Fla. 1st DCA 1977), cert. denied, 359 So.2d 1210 (Fla. 1978), are cited as examples of the proposition that general standards, such as the public interest standard, are adequate where extensively "fleshed out" by the applicable statute. Both of these cases, however, were predicated upon express legislative policy. Neither involved implied legislative authority.

Brewster involved a challenge to a DER rule designating the Little Manatee River as an "Outstanding Florida Water." Brewster, 444 So.2d at 485. The rule was promulgated by DER under authority of section 403.061(27), Florida Statutes, which expressly empowered DER to designate by rule a special category of water bodies, "Outstanding Florida Waters," "worthy of special protection because of their natural attributes." Id. Based on this express legislative authorization and a reading of the statute in pari materia, the district court ruled that there were adequate standards to guide DER's designation of the Little Manatee River as an Outstanding Florida Water. Id. at 486. Brewster might support St. Johns's position in the instant case, but only if the legislature had provided express statutory authority for interdistrict transfers supported by numerous relevant criteria.

St. Johns additionally asserts that this case is governed by a "licensing" or "police power exception" to the nondelegation doctrine. Brief of St. Johns at 37; Florida Waterworks Association v. Florida Public Service Commission, 473 So.2d 237 (Fla. 1st DCA 1985), cert. denied, 486 So.2d 596 (Fla. 1986). A recent case which also concerns this exception is Astral Liquors, Inc. v. Department of Business Regulation, 463 So.2d 1130 (Fla. 1985). However, Astral undermines rather than sustains St. Johns's assertion. Astral upheld the validity of section 561.32(2), Florida Statutes, against a nondelegation challenge on grounds that in beverage licensing proceedings "the legislature is not required to provide specific rules to cover all conceivable situations that may confront the agency." Astral, 463 So.2d at 1132. In the statute at issue in Astral, however, the legislature had provided express statutory language authorizing the questioned agency action: denial of a beverage license transfer when charges were outstanding. See § 561.32(2), Fla. Stat. (1985).

In the instant case, the legislature is not being asked to respond to "all conceivable" water permitting situations. It is being asked, and is constitutionally required, to provide both an express legislative policy and some minimal standards for inter-district transfers. It has provided neither. The district court should, therefore, be reversed.

## VI.

## CONCLUSION

St. Johns has provided this Court with no authority for a finding that the legislature has expressly or impliedly authorized it to issue a permit for the withdrawal of water beyond its statutorily defined jurisdictional limits. If St. Johns's attempt to permit interdistrict water diversions is to be allowed, it should be by clear legislative authority, not by administrative fiat, based on implied statutory authority with no meaningful standards for review.

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

Respectfully submitted,

Neal D. Bowen, Esq.
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 19th day of November, 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.
County Attorney
Osceola County
17 South Vernon Avenue
Kissimmee, Florida 32741

Stephen P. Lee, Esq.
County Attorney
Marion County
111 S.E. 25th Avenue
Ocala, Florida 32671

Edward B. Helvenston, Esq.
Assistant County Attorney
Pasco County Government
Center
7530 Little Road
New Port Richey, Florida 32935

Mary E. Harlan, Esq.
Office of County Attorney
Polk County
P. O. Box 60
Bartow, Florida 33830

William E. Curphey, Esq.
County Attorney
Brevard County
1515 Sarno Road
Melbourne, Florida 32935

Clifton A. McClelland, Jr., Esq.
Potter, McClelland, Griffith,
Jones & Marks, P.A.
700 So. Babcock Street, Ste. 400
Melbourne, Florida 32902

Edward P. de la Parte,Jr., Esq.
de la Parte, Gilbert, and
Gramovot, P.A.
705 East Kennedy Boulevard
Tampa, Florida 33602

Carol A. Forthman, Esq.
Assistant General Counsel
State of Florida Department
of Environmental Regulation
Twin Towers Office Building
2600 Blair Stone Road
Tallahassee, Florida 32399-2400

By _____
William L. Earl