

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WEST COAST REGIONAL WATER)
SUPPLY AUTHORITY,)
)
Petitioner,)
and)
)
PINELLAS COUNTY,)
)
Intervenor,)
)
vs.)
)
SOUTHWEST FLORIDA WATER)
MANAGEMENT DISTRICT,)
)
Respondent.)

CASE NO. 87-4644

FREEMAN F. POLK,)
)
Petitioner,)

vs.)
)
WEST COAST REGIONAL WATER SUPPLY)
AUTHORITY (CONSUMPTIVE USE PERMIT)
NO. 203650, CYPRESS CREEK WELL)
FIELD), and SOUTHWEST FLORIDA)
WATER MANAGEMENT DISTRICT,)

CASE NO. 87-4645

Respondents,)
)
and)
)
PINELLAS COUNTY,)
)
Intervenor.)

FREEMAN F. POLK,)
)
Petitioner)

vs.)
)
WEST COAST REGIONAL WATER SUPPLY)
AUTHORITY (CONSUMPTIVE USE PERMIT)
NO. 204290, CROSS BAR RANCH WELL)
FIELD), and SOUTHWEST FLORIDA)
WATER MANAGEMENT DISTRICT,)

CASE NO. 87-4647

Respondents.)
and)

PINELLAS COUNTY,)	
)	
Intervenor.)	
_____)	
WEST COAST REGIONAL WATER)	
SUPPLY AUTHORITY,)	
)	
Petitioner,)	
and)	
)	
PINELLAS COUNTY,)	
)	
Intervenor,)	CASE NO. 88-1169
)	
vs.)	
)	
FREEMAN F. POLK AND)	
SOUTHWEST FLORIDA WATER)	
MANAGEMENT DISTRICT,)	
)	
Respondents.)	
_____)	

RECOMMENDED ORDER

The final hearing was held in this matter in Tampa, Florida, on February 27 through March 2, 1989, before Donald D. Conn, Hearing Officer, the Division of Administrative Hearings.

APPEARANCES

West Coast	Edward P. de la Parte, Jr., Esquire
Regional Water	Douglas N. Wyckoff, Esquire
Supply	705 East Kennedy Boulevard
Authority:	Tampa, Florida 33602
Freeman F. Polk:	Thomas E. Cone, Jr., Esquire
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	Tampa, Florida 33602
Pinellas County:	John T. Allen, Jr., Esquire
	Chris Jayson, Esquire
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	St. Petersburg, Florida 33711
Southwest Florida	Bram D. E. Canter, Esquire
Water Management	306 North Monroe Street
District:	Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

The issue in this case is whether the Southwest Florida Water Management District (District) should approve applications to renew consumptive use permits filed on behalf of the West Coast Regional Water Supply Authority (Authority), Pinellas County (County), and Freeman F. Polk (Polk), and if so, what conditions should be included in the permits. The District proposes to issue renewed

permits to these applicants with specified conditions, but Polk seeks certain additional condition; to the permits sought by the Authority and the County, and similarly, the Authority and County seek the imposition of additional conditions on Polk's permit. The parties seek these additional conditions to insure that the permitted uses will not interfere with any legal use of water existing at the time of the applications, and will also not cause the water table to be lowered so that lake stages or vegetation are adversely and significantly affected on lands other than those owned, leased or controlled by the applicants.

PRELIMINARY STATEMENT

At the hearing, the Authority and County called a total of five witnesses and introduced seventy-seven exhibits, nine witnesses were called and fifty-six exhibits introduced by Polk, and the District called three witnesses and introduced four exhibits. The transcript of the hearing was filed on May 3, 1989, and the parties requested and were granted an extension until June 9, 1989 to file proposed recommended orders. The Appendix to this Recommended Order contains a ruling on each timely filed proposed finding of fact.

FINDINGS OF FACT

The following findings are based upon relevant stipulations of the parties:

1. The Authority is a special taxing district of the State of Florida encompassing Pasco, Pinellas and Hillsborough Counties, which was created by interlocal agreement on October 25, 1974. It is responsible for the design, construction, operation and maintenance of facilities in locations, and at times, necessary to insure that an adequate supply of water will be available to all persons residing within its boundaries.

2. The District is an agency of the State of Florida which is charged with regulating consumptive uses of water in a sixteen county area, including Pinellas, Pasco and Hillsborough Counties. It has implemented a permitting program that requires all persons seeking to withdraw water in excess of an annual average daily rate of 100,000 gallons, and a maximum daily rate of 1,000,000 gallons, to obtain a consumptive use permit.

3. The Cypress Creek Wellfield is located on a 4,895 acre site in central Pasco County, lying east of U.S. 41 between State Roads 52 and 54. The District owns 3,623 acres of this Wellfield, and the remaining 1,272 acres are owned by the City of St. Petersburg. Construction on the Cypress Creek Wellfield commenced in 1974, and it currently consists of thirteen production wells, numerous monitor wells, several thousand feet of transmission lines, two 5 gallon storage tanks, a pump station and several buildings.

4. The City of St. Petersburg, Pinellas and Pasco Counties, and the District have transferred their rights and privileges in this Wellfield, as well as the Wellfield facilities, to the Authority by contracts entered into in November, 1973, and August 1974.

5. Water produced at the Cypress Creek Wellfield is sold at cost by the Authority to users which include the City of St. Petersburg and Pinellas County. The water produced at this Wellfield comprises 29% of the County's total water system demand (20 million gallons a day), and 25% of the City of St. Petersburg's total system demand (10 million gallons a day). These water systems serve approximately 470,000 and 330,000 persons, respectively.

6. In March 1978, the District issued a six-year consumptive use permit to the Authority, the City of St. Petersburg, and the County authorizing an annual average and maximum daily withdrawal of 30 million gallons a day from the Cypress Creek Wellfield. The Authority also began a detailed ecological monitoring program in, and around, this Wellfield in 1978. A three-year permit was then issued to the Authority in December, 1982, authorizing withdrawals of 30 million gallons a day, annual average, and 40 million gallons a day, maximum daily, from the Wellfield. The District determined by Order No. 82-28, dated December 1, 1982, that an average annual daily rate of withdrawal of 30 million gallons, and a maximum daily rate of withdrawal of 40 million gallons from the Cypress Creek Wellfield was a reasonable-beneficial use, was consistent with the public interest, and would not interfere with any legal use of water existing at the time of that application.

7. An application for renewal of the Cypress Creek Wellfield consumptive use permit at the quantities permitted in 1982 was filed with the District on November 7, 1985, by the Authority, the County and the City of St. Petersburg. The continued withdrawal of water from the Cypress Creek Wellfield at an annual average daily rate of 30 million gallons, and a maximum daily rate of 40 million gallons is needed in order to meet the water supply demands of the residents of Pinellas and Pasco Counties, is in the interest of residents of Pinellas County, and will not cause the rate of flow of a stream or other watercourse to be lowered below the minimum rate of flow established by the District.

8. The regulatory level of the potentiometric surface established by the District for the Cypress Creek Wellfield has never been exceeded by prior withdrawals of water at permitted rates. Continued withdrawal of water from the Cypress Creek Wellfield at an annual average daily rate of 30 million gallons, and a maximum daily rate of 40 million gallons will not cause the potentiometric surface level to be lowered below sea level, or any regulatory level established by the District, will not cause the surface level of water to be lowered below any minimum established by the District, and will not significantly induce salt water encroachment.

9. The Cross Bar Ranch Wellfield is located on a 8,060 acre site in north central Pasco County, lying approximately one mile south of the Pasco-Hernando County line, and immediately east of U.S. 41. The Cross Bar Ranch Wellfield property has been owned by Pinellas County since 1976. Wellfield construction was completed in 1981.

10. By agreement entered into on April 11, 1979, the Authority is obligated to sell the County water produced from the Cross Bar Ranch Wellfield, but any excess not currently being used by the County may be sold to other members of the Authority. A significant amount of water produced at Cross Bar Ranch is pumped to the Cypress Creek Wellfield where it is combined with that Wellfield's water, and then distributed to Pinellas and Hillsborough Counties, as well as the City of St. Petersburg, for further distribution. The water produced at these two Wellfields in combination accounts for about 60% of the County's total water system demand.

11. Following pump tests performed from 1977 to 1979, as well as an ecological monitoring program, the District issued a modified consumptive use permit to the Authority by Order 80-9, dated February 6, 1980, for Cross Bar Ranch Wellfield. The District determined that withdrawals at an average daily rate of 30 million gallons, and a maximum daily rate of 45 million gallons from Cross Bar Ranch Wellfield was a reasonable beneficial use, was consistent with

the public interest, and would not interfere with any legal use of water existing at the time of that application.

12. On November 7, 1985, the Authority and County jointly applied to the District for renewal of the consumptive use permit for Cross Bar Ranch Wellfield at the current permitted quantities of an annual average daily rate of 30 million gallons, and a maximum daily rate of 45 million gallons. These withdrawal rates are needed in order to meet present and future water supply demands of the residents of Pinellas, Pasco and Hillsborough Counties, provide water for environmental mitigation, and make up water when one or more production facilities cannot pump at their permitted levels.

13. The withdrawal of water from Cross Bar Ranch Wellfield at permitted rates will not cause the level of the potentiometric surface to be lowered below sea level, or any regulatory levels established by the District, and will not significantly induce salt water encroachment. Jumping Gully is the only stream or watercourse in the vicinity under the influence of this Wellfield, and the District has not established a minimum rate of flow for Jumping Gully. Hydrologic data collected from monitor wells located at the Cross Bar Ranch Wellfield show the potentiometric surface has been above mean sea level during the operation of this facility.

14. The District has renewed consumptive use permits for a period of ten years for the City of St. Petersburg, and the City of Lakeland Power Plant.

15. The Authority owns, leases or otherwise controls the area within both the Cypress Creek and Cross Bar Ranch Wellfields. Polk owns, leases or otherwise controls the property identified in his amended permit application of July 26, 1988.

16. Both the Authority's and Polk's permit applications were filed on the proper forms, and otherwise comply with the District's procedural requirements for consumptive use permits.

17. Each party has standing to participate in this case.

18. The proposed uses of water which are the subject of these proceedings are reasonable beneficial uses, and in the public interest.

19. The only permit criteria that remain at issue in this case are set forth in Rules 40D-2.301(1)(c) and (2)(e), Florida Administrative Code.

The following findings of fact are based upon the evidence presented at the hearing:

20. Polk was first issued a consumptive use permit for Ft. King Ranch in August, 1981, after both the Cypress Creek Wellfield and Cross Bar Ranch Wellfield had each been permitted to withdraw 30 million gallons per day. Polk's permit authorized him to withdraw ground water at an average annual rate of 420,000 gallons per day, and a maximum rate of approximately 1.94 gallons per day for irrigation of pasture grass and citrus, and cattle drinking water. A temporary consumptive use permit issued to Polk in August, 1981, was signed by him and states on its face that these additional groundwater withdrawals were necessary because of drought conditions. A modified permit was issued to Polk by the District in July, 1982, authorizing him to increase his withdrawals to an average annual rate of approximately 1.94 gpd, and a maximum rate of 5.9 gpd.

Polk's wells are not metered. Prior to August, 1981, Polk did not have man made surface or groundwater withdrawal on his property.

21. As it relates to this proceeding, the property owned, leased or otherwise controlled by Polk is known as the Ft. King Ranch, which is generally located between the Cross Bar Ranch and Cypress Creek Wellfields, and consists of approximately 6,000 acres. The Ft. King Ranch is comprised of five tracts which were separately acquired by Polk commencing in January, 1969, and ending in 1984. By 1978, Polk had acquired two of these five tracts. He leased a third tract beginning in 1971, before acquiring an ownership interest in 1981. These three tracts were designated parcels A, B, and C, and are located in the eastern and northern portion of the Ranch. These three parcels were the only tracts owned, leased or otherwise controlled by Polk at the time the first Cypress Creek and Cross Bar Ranch Wellfield permits were issued in 1978. The western tracts were acquired in 1982 and 1984, and were also referred to as the AL-BAR Ranch at hearing.

22. Polk uses the Ft. King Ranch for a cow-calf operation, and also sod farming and seeding. From 1969 to approximately 1978, there was sufficient surface water on the Ft. King Ranch for these farming activities to be carried out without irrigation or wells. Water holes used by cattle were always wet, and lakes on the property were used for swimming and fishing. His pasture, hay, seed and sod grasses received moisture solely from rainfall. However, Polk did not establish the amounts of water used in his operations prior to the issuance of Wellfield permits. In 1976, parcels A, B, and C were used for these purposes, although Polk has frequently changed the specific size and location of acreages devoted to these land uses.

23. In order to correct flooding that occurred on portions of the Ft. King Ranch during times of heavy rainfall, Polk sought the advice of the Soil Conservation Service in the mid-1970's. He was advised to construct a series of dikes and swales to control the flow of surface water on his property.

24. During 1980 and 1981, Polk constructed a network of swales and ditches to divert and control the flow of surface water from portions of the Ranch needing less water to those requiring wetter conditions, such as his sod and seed operation. The swales interconnect lakes and ponds on his Ranch. He also constructed a levee on the property, and installed a lift pump. These activities have converted most of the eastern portion of his ranch to improved pasture and sod grasses, and virtually eliminated native vegetation. Polk had no professional help in the construction of his ditch-swale systems, or the levee.

25. Beginning in approximately 1980, drier conditions were experienced at the Ranch. One of the ten driest years on record in this area occurred in 1980, and continued drought conditions in 1981 caused the District's Governing Board to declare a water shortage, and impose water conservation measures throughout the District. Some lakes and cypress swamps dried completely and failed to recharge to pre-1980 levels after rainfall. Due to reduced water availability since 1980, including drought conditions in 1985, Polk's calf weights have decreased, while the number of non-breeding cows has increased. Feed bills have increased due to reduced hay and grass production at the Ranch. Polk's bahia seed and sod crops have also declined since 1980 due to reduced surface water levels. Adequate and stable moisture is essential for seed production, and while such conditions did exist on the Ft. King Ranch prior to 1980, they have been absent since 1980.

26. Due to the drier conditions which he noted in 1980 and 1981, Polk filed a formal complaint with the District in 1981. A site visit and pump test were conducted, and the District concluded that the Wellfields were causing less than a one foot drawdown in the Ft. King Ranch water table, and that dry conditions at his ranch were due primarily to drought. In 1985, Polk complained to the District again, and requested that it augment two lakes within the Ranch. After review of surrounding lake conditions, the District declined his request since Polk's lakes had not experienced water level declines atypical of lakes well beyond the influence of the Authority's Wellfields.

27. Studies of water level elevations in the area indicate that the effect of Cypress Creek Wellfield pumpage is quite small when compared to natural changes in water levels due to variable rainfall and evapotranspiration. Rainfall in this region is variable, and there has been a significant negative trend over time in surficial and potentiometric water levels that predates Wellfield pumpage.

28. According to J. B. Butler, who was accepted as an expert in hydrology, the swales, dikes and levees constructed by Polk have not caused the water table or surface water level reductions experienced since late 1981. Rather, these are an attempt to divert and retain water on the property, and even in their absence, there would be no significant flow of surface water across Ft. King Ranch from an east to west direction. In addition, Butler testified that a fence line berm constructed along the northern border of the Ranch is an insignificant obstacle to the flow of surface water from the north to south across the Ranch when compared to topographic features, and has had no impact on the water tables of the Ranch. However, evidence introduced at hearing established that as early as 1981, the staff of the District concluded that the swales and elevated fence lines could be aggravating low water conditions by increasing evaporation and leakage, and by excluding surface water which would have entered the Ft. King Ranch from the north.

29. The Authority offered competent substantial evidence to rebut the Butler testimony. Thomas Schanze, who was accepted as an expert in agricultural engineering, testified that Polk's elevated berm along his northern fence line has significantly restricted the flow of surface water onto Ft. King Ranch, and has contributed to the eastern portion of the Ft. King Ranch becoming a closed watershed. Between 1984 and 1986, approximately 700 million gallons of surface water have been excluded by Polk's water control and diversion activities. This exclusion has resulted in a diminished water table within the Ft. King Ranch of about one half foot compared with the water table on the northern side of the berm. Surface water cannot flow onto Polk's property until water levels immediately north reach flood stage. Aerial photographs of the Ft. King Ranch and surrounding properties show that the Polk property is significantly drier than surrounding properties, which include predominant wetlands. If the dry conditions experienced by Polk had been due to pumpage, the same dry conditions should be observed on surrounding properties and lands nearer the Wellfields. However, aerial photos show that lands closer to the Wellfields than Ft. King Ranch are less dry than the Ranch itself. This supports the position of the District and the Authority that Polk's own activities have had a significantly greater impact than pumpage on surface and groundwater levels.

30. The reduction in productivity of Polk's farming activities is reasonably related to his northern berm which serves as a dike, preventing water from flowing onto Ft. King Ranch, as well as drought conditions existing in 1980, 1981 and 1985. The cumulative effect of water excluded from this property and dry weather conditions is significant, and accounts for decreased

production. It was not established through competent substantial evidence that Polk's decreased production has resulted from any hydrologic impact of Wellfield pumpage.

31. The District's expert in hydrology and ground water modeling, Robert G. Perry, concluded that significant water table declines on Ft. King Ranch due to pumping from Cypress Creek and Cross Bar Ranch Wellfields could not be confirmed. Through groundwater flow modeling and statistical analysis, he concluded that a one foot water table drawdown contour resulting from withdrawals at the rate of 30 mgd for 30 days without any recharge would not reach the Ft. King Ranch. Even in a worse case scenario of 120 days without recharge and pumpage at Cypress Creek of 30 mgd for 30 days, then 40 mgd for 30 days, and finally 30 mgd for 60 days, Perry concluded that the one foot water table drawdown contour would not reach Polk's Ranch. There is some evidence that under a worse case condition, pumpage at the Cross Bar Ranch Wellfield could result in the one foot water table drawdown contour intersecting a small portion of the western tract of the Ft. King Ranch, but this tract was not owned or leased by Polk in 1978, when the first Wellfield permits were issued.

32. Conflicting evidence based upon steady state modeling by Craig Hutchinson of the United States Geological Survey was introduced on behalf of Polk to establish that the cumulative impact of the Wellfields could induce a significant drawdown in the water table in the area between the Wellfields, including the Ft. King Ranch. However, this evidence is rejected as less credible than the analysis conducted by Park and Phillip Davis, who was also accepted as an expert in hydrology and groundwater flow modeling. The steady state approach used by Hutchinson is inappropriate for analyzing the effects of wellfield withdrawals on the water table, because the water table is a dynamic system which is never at steady state. The transient groundwater simulation model used by the District is better suited for an analysis of impacts to the water table, although it does tend to overpredict such impacts, since it accounts for changes in rainfall. The Hutchinson analysis is also unreliable since it is based upon artificially derived antecedent water levels, rather than observed levels. Finally, he did not have required predevelopment water table data, and thus, could not verify water table predictions derived from his steady state model. A transient groundwater flow computer model used by Terry Bengtsson to estimate greater potentiometric surface and water table declines due to withdrawals from the Wellfields than predicted by Park or Davis was discredited, and shown to be unreasonable, by the results of a 28 day pump test in September and October, 1988.

33. According to Rick Stebnisky, who was called on behalf of Polk and accepted as an expert in groundwater hydrology, the combined effect of pumping at the Cross Bar Ranch and Cypress Creek Wellfields has resulted in a significant reduction in water table and potentiometric surface levels at Ft. King Ranch, with such reductions being greater in the southern areas than northern portions of Polk's property. He testified that drawdowns have been noted since pumping began at Cypress Creek in April, 1976, with greater drawdowns occurring closest to the Wellfields, and for this reason drawdowns appear to be related to pumping rather than drought conditions.

34. However, Stebnisky's conclusions were drawn from an overly simplistic hydrographic analysis which ignored factors other than pumpage, such as reduced rainfall, regional trends, surface drainage and non-wellfield pumpage, according to Robert G. Perry, an expert in hydrology and groundwater modeling. Stebnisky was not accepted as an expert in groundwater flow modeling. It was also established that some of the basic assumptions used by Stebnisky in predicting

drawdowns were inaccurate, and not based upon accepted hydrologic principles. Therefore, when weighed and considered against other expert testimony, including that of Perry and Dr. J. I. Garcia-Bengochea, Ph.D., an expert in hydrology and environmental engineering, the testimony of Stebnisky is found to lack credibility.

35. While Dr. Garcia-Bengochea agreed with the testimony of Stebnisky that the potentiometric surface and water table levels on the Ft. King Ranch had been somewhat reduced due

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individual well meters, regardless of whether on-site wetlands are being augmented, and is sufficiently accurate for use in evaluating the impact of withdrawals on the water table and Floridan Aquifer. As a condition for renewal of the Authority's permits, the District has required that flow measuring devices or methods be installed for each augmentation discharge point, although generally augmentation of lakes and wetlands within wellfields is not metered.

37. The allowable drawdown levels of potentiometric surface for the Cypress Creek Wellfield established by the District have never been reached. The lowest levels occurred during severe drought conditions in 1981 and 1985. However, even during these times, the lowest potentiometric surface level was 8.53 feet above regulatory levels. Notwithstanding the testimony of Philip Waller, an expert in hydrology, pumping from Polk's irrigation Wellfields have not had a significant impact on the Cypress Creek Wellfield because Waller's model assumptions are extreme, according to Robert G. Perry, whose field of expertise includes groundwater modeling. These unrealistic assumptions included that Polk would operate his irrigation wells at maximum capacity for 120 days, and that there would be no recharge, even though irrigation, like rainfall, would be expected to result in some recharge. Even under these extreme assumptions, Waller's modeling only produced a one foot drawdown at Cypress Creek Wellfield, which would still be well within regulatory levels established by the District, based upon data for the drought years of 1981 and 1985.

38. Since 1979, Cypress Creek Wellfield has averaged approximately 30 million gallons per day, with the maximum withdrawal occurring in May, 1983, when it averaged 34.2 mgd. From 1981 to 1985, the average withdrawals from Cross Bar Ranch Wellfield remained stable at 13 mgd, but since 1986, the pumpage has increased to over 15 mgd due, in part, to the use of water from Cross Bar to compensate for contaminated wells shut down at the Eldridge-Wilde Wellfield.

39. For purposes of Rule 40D-2.301(1)(c), Florida Administrative Code, the District does not consider the use of water that occurs naturally, without pumping or diversion, for use on crops or other agricultural purposes to be, an existing legal use of water, because it does not require a permit. The District does not apply Rule 40D-2.301(2)(e) to protect agricultural crops, but rather to protect naturally occurring vegetation. When an application to renew a consumptive use permit is reviewed by the District, and that renewal does not seek an increase in the quantity of water withdrawals, "legal users" are those present prior to the original permit.

40. On May 17, 1988, a Final Order was entered in DOAH Case No. 88-0693R declaring the District's Rules 40D-2.301(3)(b), (c), and (d), Florida Administrative Code, which otherwise would apply in this proceeding, to be an invalid exercise of delegated legislative authority.

41. The Authority's applications were declared complete by the District on June 18, 1987, and the District staff recommended issuance of these permits on August 14, 1987. Modifications to the draft permit were made by the District on December 28, 1988, and these modified draft permits are acceptable to the Authority. The latest draft permits contain stated conditions which include the requirement that the Authority directly measure the amount of water it uses to augment the water level of on-site wetlands. On February 22, 1989, the Authority and the District filed a Joint Notice of Settlement in Case Number 87-4644 by which they settled their dispute as to the duration of consumptive use permit renewals for the Wellfields, and provided for a ten year permit for Cypress Creek, and a six year permit for Cross Bar Ranch Wellfield. Polk submitted his original permit application on April 13, 1987, and then amended his request on July 26, 1988. The District has proposed to issue a draft permit to Polk, with stated conditions.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this cause. Section 120.57(1) Florida Statutes.

43. The applicant for a permit has the burden of proving entitlement to the permit which is sought. Florida Department of Transportation v. J.W.C. Co., 396 So.2d 778 (Fla. 1st DCA 1981). The District has issued draft permits to the Authority and Polk evidencing an intent to approve their consumptive use permit applications, with stated conditions. Therefore, at hearing the applicants and the District initially established a prima facie case in support of the issuance of these permits. Thereafter, each applicant was allowed to present its case concerning additional conditions or mitigation which should attach to the other applicant's permit.

44. Chapter 373, Part II, Florida Statutes, governs the District's review and approval of applications for consumptive use permits, and in accordance with its statutory responsibilities, the District has adopted Rule Chapter 40D-2, Florida Administrative Code, which implements the declared water policy of the District relating to the consumptive use of water. See also Rule Chapter 17-40, Florida Administrative Code. The parties stipulated that the only criteria for the issuance of a consumptive use permit which remain at issue are found at Rules 40D-2.301(1)(c) and (2)(e), Florida Administrative Code. These provisions state:

- 40D-2.301 Conditions for Issuance of Permits.
- (1) The intended consumptive use:
 - (c) Will not interfere with any legal use of water existing at the time of the application.
- (2) Issuance of a permit will be denied if the withdrawal of water:
 - (e) Will cause the water table to be lowered so that the lake stages or vegetation will be adversely and significantly affected on lands other than those owned, leased, or otherwise controlled by the applicant.

45. An agency's interpretation of statutes which it is charged to implement, and rules which it has adopted to carry out its statutory responsibilities, must be given great weight. When such interpretation is reasonable, and consistent with judicial decisions and the purpose of the enabling statute, it should be sustained and applied to the facts of the case at bar, although a different interpretation may be possible, or even preferable. *Pan American World Airways, Inc. v. Florida public Service Commission, et al.*, 427 So.2d 716, 719 (Fla. 1983); *Department of Health and Rehabilitative Services v. Framat Realty, Inc.*, 407 So.2d 238, 241 (Fla. 1st DCA 1981); *Department of Commerce, Division of Labor v. Matthews Corp.*, 358 So.2d 256 (Fla. 1st DCA 1978).

Rule 40D-2.301(1)(c) - Interference With Existing
Legal Uses of Water

46. Polk contends that his use of naturally occurring groundwater in the soils on the Ft. King Ranch from 1968 to 1978 constitutes an "existing legal use of water" which is entitled to protection under the above-cited provision of Rule 40D-2.301(1)(c), and Section 373.223(1)(b), Florida Statutes. He urges that his agricultural activities which occurred before the issuance of the first consumptive use permits for either the Cross Bar Ranch or Cypress Creek Wellfields should be recognized as an "existing" use in order to protect him, a preexisting passive user, from his neighbors' later-permitted withdrawals.

47. It was established at hearing that when the District is reviewing an application to renew a consumptive use permit, it interprets the terms of Rule 40D-2.301(1)(c) to relate back to the date of the initial permit, so long as the amount of water to be used, well locations, and other substantive aspects of the project have not changed. Thus, renewal of a permit does not change the priority of users relative to other legal users of water. Protection of prior users is a reasonable and logical interpretation of this statutory and rule provision, and appears to be consistent with the intent of Chapter 373, Part II, Florida Statutes. See *Maloney, et al., A Model Water Code*, Univ. of Fla. Press (1972). Since both Authority Wellfields were originally permitted in 1978, prior to the time when Polk obtained his permit for the withdrawal of water for use on Ft. King Ranch in 1981, Polk's claim of interference relates to his unpermitted use at the time the District issued the first permits for the Cross Bar Ranch and Cypress Creek Wellfields.

48. It should be noted that when Chapter 373 took effect in 1972, existing unpermitted water users were given two years to apply for a permit for their uses, and if they failed to do so, they were conclusively presumed to have abandoned their uses unless such uses were expressly exempted from regulation under Chapter 373. See Section 373.226, Florida Statutes (1972). After this two year period, the only recognized "legal uses of water" were permitted uses, and exempted uses. As already discussed, Polk's use was not permitted when the Authority's Wellfields were permitted. It is also evident that Polk's uses were not expressly exempted since only domestic uses are so exempted. Section 373.219(1), Florida Statutes. Polk's uses do not qualify as "domestic" since such uses are defined to include individual household "drinking, bathing, cooking or sanitation." Section 373.019(6). Therefore, any claim to a prior legal use which Polk may have asserted has been conclusively abandoned by his failure to obtain a permit prior to 1981, and his inability to qualify his use of water for crop cultivation and agriculture as an exempted use.

49. Even if he had not abandoned his right to claim a prior legal use, it was established at hearing that the District does not interpret that phrase

"legal use of water" to include water that occurs naturally, without pumping or diversion. The term is reasonably applied to mean manmade groundwater or surface water withdrawals since these activities require a permit from the District. Water must be physically withdrawn or diverted to qualify as a legal use of water A Model Water Code, supra at 179. A water right is not established except by positive act to capture the water. Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663, 667 (Fla. 1979).

50. It is, therefore, evident that Polk's passive use of water prior to the time the Authority's Wellfields were first permitted is not entitled to protection under Rule 40D-2.301(1)(c) since he has not established any protected legal use of water existing prior to the issuance of consumptive use permits to the Authority. Nevertheless, even if such a protected use had been shown, Polk has failed to establish that there has been any "interference" with his use resulting from the permitted withdrawals from the Cross Bar Ranch or Cypress Creek Wellfields. A showing of "interference" is expressly required by the terms of Rule 40D-2.301(1)(c). The evidence adduced at hearing shows that Polk's reduced agricultural productivity and increased expenses have resulted from drier conditions existing on the Ft. King Ranch since 1981 due primarily to severe drought conditions in 1980, 1981 and 1985, as well as his own construction of a system of swales and ditches, and a fence line berm along the northern boundary of his property.

51. Specifically, the more credible and persuasive evidence in the record establishes that the Authority's Wellfields account for only a small portion of the water table fluctuations occurring on Ft. King Ranch, and variable rainfall, as well as Polk's own actions, have been the primary causes of these changes. Pumpage from Cypress Creek and Cross Bar Ranch Wellfields is causing a drawdown of approximately one foot in the water table at, or near, the Ft. King Ranch. This small effect would not account for the cattle watering and crop reduction problems of which Polk complains. Aerial photographs showing significantly wetter conditions on lands surrounding the Ft. King Ranch, particularly to the north, were graphic evidence of the impact of Polk's own system of swales, ditches and berms. The expert testimony offered by the District and the Authority, particularly that of Robert Perry, Thomas Schanze, and Dr. J. I. Garcia-Bengochea, outweighs the evidence on this point offered by Polk, which was primarily based upon the work of Rick Stebnisky and J. B. Butler.

52. The Authority claims that Polk's proposed irrigation well withdrawals will interfere with its ability to operate the Cypress Creek Wellfield without exceeding established regulatory levels. The Cypress Creek Wellfield received its first permit prior to Polk's first permit, and, thus, Wellfield pumpage is an "existing legal use of water" for purposes of Rule 40D-301(1)(c). However, the evidence does not establish that Polk's withdrawals will "interfere" with the Authority's "existing legal use of water" because it was not shown that Polk's irrigation activities would cause regulatory levels for the Cypress Creek Wellfield to be exceeded. Credible and persuasive testimony was presented by Robert Perry on behalf of the District which established that even under extreme conditions and assumptions, Polk's irrigation wells would produce only a one foot drawdown at Cypress Creek Wellfield, and this would still be well within regulatory levels established by the District. Any interference to the Wellfield is purely speculative, and not supported by competent substantial evidence in the record.

Rule 40D-2.301(2)(e) - Adverse Affect on Lake
Stages Or Vegetation From Lowered Water Table

53. Turning to the provisions of Rule 40D-2.301(2)(e), Polk contends that his crops are "vegetation," as that term is used in this rule, and that pumpage from the Authority's Wellfields has caused the water table to be so lowered that this "vegetation" has been adversely and significantly affected. It was established at hearing, however, that this rule has never been applied or interpreted by the District to protect agricultural crops. Rather, it only applies to naturally occurring, native vegetation such as would be found in wetland areas. This interpretation is consistent with the plain meaning of the terms used in this rule, and nothing in the record suggests this is an unreasonable interpretation. *Shell Harbor Group, Inc. v. Department of Business Regulation*, 487 So.2d 1141 (Fla. 1st DCA 1986). Polk's agricultural and surface water management system activities have left virtually no native vegetation on the eastern tract, and thus the "vegetation" portion of Rule 40D-2.301(2)(e) is not applicable in this case.

54. The greater weight of the evidence does not support Polk's final argument that pumpage from the Wellfields has caused the water table to be so lowered that lake stages on the Ft. King Ranch have been adversely and significantly affected, in violation of Rule 40D-2.301(2)(e). The Ft. King Ranch has not experienced water level fluctuations significantly different from other lakes in the region which are beyond the influence of the Wellfields. The more reasonable and persuasive estimates of the impact of the two Wellfields on the water table underlying the Ft. King Ranch were presented by Perry and Dr. Garcia-Bengochea, using historical and actual test data. These experts concluded that the water table has dropped less than one foot due to Wellfield withdrawals. In contrast, Polk presented only lay testimony about lakes and ponds on his property, and could offer no historical water level data about water elevations prior to 1978. Therefore, even if agricultural crops were considered to be "vegetation" for purposes of Rule 40D-2.301(2)(e), the evidence does not support Polk's assertion that Wellfield pumpage has reduced the surface of the water table under the Ft. King Ranch so as to significantly and adversely affect these crops and any lakes located on his Ranch.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Southwest Florida Water Management District enter a Final Order approving the consumptive use permit applications of the West Coasts Regional Water Supply Authority and Pinellas County for the Cross Bar Ranch and Cypress Creek Wellfields, with conditions proposed by the District, and also approving the consumptive use permit application of Freeman F. Polk, with conditions proposed by the District.

DONE AND ENTERED this 10th day of July, 1989, in Tallahassee, Florida.

Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of July, 1989.

APPENDIX TO RECOMMENDED ORDER, CASE NOS. 87-4644,
87-4645, 87-4647, & 88-1169

Rulings on the District's Proposed Findings of Fact:

1. Adopted in Findings 6, 21.
2. Rejected as unnecessary.
3. Adopted in Finding 6.
4. Adopted in Finding 38.
5. Adopted in Finding 21.
6. Adopted in Finding 11.
7. Adopted in Finding 38.
- 8-11. Adopted in Finding 20.
12. Adopted in Finding 21.
- 13-14. Adopted in Finding 22.
15. Adopted in Finding 27.
16. Adopted in Finding 25.
- 17-19. Adopted in Findings 25, 26.
- 20-22. Adopted in Findings 26, 28.
- 23-48. Adopted in Findings 31 through 35.
- 49-60. Adopted in Findings 28 through 30.
- 61-64 Adopted in Finding 36.
- 65-68. Adopted in Finding 37.

Rulings on the Authority's Proposed Findings of Fact:

1. Adopted in Finding 1.
2. Adopted in Findings 4, 10.
3. Adopted in Finding 2.
- 4-6. Adopted in Finding 39.
7. Adopted in Finding 18.
8. Adopted in Findings 21, 22.
9. Adopted in Finding 40.
- 10-11. Adopted in Finding 3.
- 12-14. Adopted in Finding 36.
15. Adopted in Findings 6, 38.
16. Adopted in Finding 5.
- 17-19. Adopted in Findings 6, 21.
20. Adopted in Findings 7, 16.
- 21-23. Adopted in Finding 41.
- 24-25. Adopted in Finding 9.
- 26-27. Adopted in Finding 36.
28. Adopted in Findings 11, 38.
29. Adopted in Finding 10.
30. Adopted in Finding 11.
- 31-32 Adopted in Findings 11, 21.
33. Adopted in Findings 12, 16.
- 34-36. Adopted in Finding 41.
37. Adopted in Finding 21.
38. Adopted in Finding 24.
39. Adopted in Finding 29.
40. Adopted in Finding 24.
- 41-42. Adopted in Finding 22.
- 43-45. Adopted in Finding 25.
46. Adopted in Finding 26.

47. Adopted in Finding 25.
48. Adopted in Finding 26.
49. Adopted in Findings 26, 28.
- 50-53. Adopted in Finding 20.
54. Adopted in Findings 20, 21.
55. Adopted in Finding 20.
56. Adopted in Finding 37.
57. Rejected as not based on competent substantial evidence.
58. Adopted in Finding 41.
59. Rejected as unnecessary.
- 60-62. Adopted in Finding 35.
63. Adopted in Finding 36.
- 64-70. Adopted in Findings 34, 35.
- 71-76. Adopted in Findings 33 through 35.
- 77-78. Rejected as unnecessary and irrelevant.
- 79-80. Adopted in Finding 34.
- 81-87. Adopted in Finding 32.
- 88-91. Adopted in Findings 26 through 35.
- 92-96. Adopted in Findings 29, 30, but otherwise Rejected as unnecessary and cumulative.
97. Adopted in Finding 28.
98. Adopted in Finding 29.
- 99-100. Adopted in Finding 30.
- 101-102. Adopted in Finding 37.
103. Rejected as unnecessary and cumulative.
104. Adopted in Finding 37.
105. Rejected in Finding 37.
106. Adopted and Rejected in part in Finding 37

Ruling on Pinellas County's Proposed Finding of Fact: (The County also adopted the Authority's Proposed Findings.)

1. Rejected since the statement proposed by the County is not a finding of fact, but simply a statement on the evidence. Evidence which was not admitted at hearing has not been considered.

Rulings on Polk's Proposed Findings of Fact:

1. Adopted in Finding 3.
2. Adopted in Findings 9, 10.
3. Adopted in Finding 21.
4. Rejected in Findings 6, 11, 21.
5. Adopted in Finding 22.
6. Adopted and Rejected in part in Findings 25 through 27.
- 7-8. Rejected in Findings 25 through 27.
9. Adopted in Finding 25.
10. Adopted in Finding 24.
- 11-13. Rejected in Findings 24, 29, 30.
14. Adopted in Finding 37.
15. Rejected as argument on the evidence and not a proposed finding of fact.

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