STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE E. MIDDLEBROOKS, d/b/a WEKIVA FALLS RESORT, Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondent.	)	CASE NO. 89-2396
STS LAND ASSOCIATES, L.P., Petitioner, vs. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT and CLARENCE E. MIDDLEBROOKS, Respondents.	)	CASE NO. 89-2397

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Mary Clark, held a formal hearing in the above-styled case on September 6-8, 1989, in Orlando, Florida.

APPEARANCES

For Petitioner, Clarence E. Middlebrooks:	Robert A. Routa, Esquire P.O. Box 6506 Tallahassee, FL 32314
For Petitioner, S.T.S. Land Associates:	Kathleen L. Blizzard, Esq. and Frank E. Matthews, Esquire 123 S. Calhoun Street Tallahassee, FL 32301
For Respondent, St. Johns River Water Management District:	Wayne E. Flowers, Esquire St. Johns River Water Management District P.O. Box 1429 Palatka, FL 32078-1429

STATEMENT OF THE ISSUES

This proceeding concerns Clarence E. Middlebrook's application #2-069-0785AUSMV for a consumptive use permit for his project at Wekiva Falls Resort.

Staff of the St. Johns River Water Management District have recommended approval of the application with certain specific limiting conditions.

Petitioner, Middlebrooks, contends that the limitations placed on the approval are inappropriate and are so onerous as to preclude the continued use of his facility for public bathing. Petitioner, STS, claims that the present recreational use is not a reasonable beneficial use, interferes with existing legal users of water and is not in the public interest. STS urges limitations more restrictive than those proposed by the district staff.

The basic issue for resolution, therefore, is what conditions should be placed on an approval of Middlebrook's application relating to recreational use. Approval of his application relating to an existing household consumptive use permit is not at issue.

The parties have stipulated that STS has standing as a petitioner in this proceeding. In addition, in their prehearing statement filed on August 28, 1989, the parties have stipulated that the 14-inch and 28-inch standpipes on the Wekiva Falls Resort are governed by and subject to the provisions of Chapter 373, F.S., and Chapter 40C-2, F.A.C. and are legally considered to be wells for purposes of this proceeding.

PRELIMINARY STATEMENT

The convoluted procedural history of this case begins in 1985, when Petitioner Middlebrooks applied to the district for a consumptive use permit for domestic usage of water flowing from 24-inch and 14-inch metal pipes at Petitioner's recreational facility. The outcome of that application was a Final Order by the district dated May 13, 1987, adopting a detailed recommended order issued in DOAH CASE #86-2101 after a two-day formal administrative hearing. The Final Order approved Petitioner's application for consumptive use of 31.7 million gallons per year with conditions recommended by the staff; found it had jurisdiction over Petitioner's wells and permitting authority over Petitioner's recreational use of water; and required Petitioner to file a new application for permit for the recreational use of water, which application would have to satisfy criteria relating to a "new", as opposed to "existing" use of water.

That order was affirmed in Middlebrooks v. St. Johns River Water Management District 529 So2nd 1167 (Fla 5th DCA 1988).

Petitioner Middlebrooks reapplied to the district on September 11, 1988. Staff initially recommended denial, then after additional information was obtained, ultimately recommended approval with conditions, in a technical staff report (TSR) dated March 24, 1989.

Both Middlebrooks and STS Land Associates, L.P., filed timely petitions for formal administrative proceedings in response to the proposed agency action.

At the request of the parties, and after referral to the Division of Administrative Hearings, the cases were consolidated and set for hearing in orders dated June 1, 1989, and June 16, 1989, respectively.

Petitioner Middlebrooks filed motions for continuance on July 27, 1989, and August 23, 1989; both were denied. A third motion for continuance was made at the commencement of the formal hearing on September 6, 1989. That motion was also denied.

Certain exhibits and testimony were proffered by Middlebrooks at the hearing in support of his due process claims related to the motions for continuance. Those exhibits, M-18, M- 21, M-22, M-23 and M-25, and transcript pages 95-104 and 119-121, are included in the record in response to the proffer request.

Also at the commencement of the hearing, motions for official recognition were granted; St. John's River Water Management District's motion in limine was taken under advisement; and STS' motion to exclude exhibits was denied without prejudice for renewal of the motion as to specific exhibits during the hearing. The latter two motions are now moot. All evidence presented by Petitioner Middlebrooks, with the exception of that designated as proffer described above, has been considered and weighed in the preparation of this recommended order.

At the final hearing, Petitioner Middlebrooks presented the following witnesses: Glenn Bryan, accepted as an expert in surveying; Richard Alt, accepted as an expert in chemical analysis; Lawson Snyder; Martin Roessler, accepted as an expert in water biology and water quality; David Toth, accepted as an expert in hydrology; William Shell; Charles Spivey; James Modica; and C.E. Middlebrooks.

The following exhibits offered by Petitioner Middlebrooks were received in evidence: A, M-1(a), (b), (c) and (d), M-2, M-8, M-9, M-10, M-11, M-13, M-14, M-16, M-17, M-19, M- 31, M-45, M-51, M-52, M-58, M-64 and M-65.

STS presented the testimony of Harvey Howard Harper, accepted as an expert in limnology, water chemistry, water quality and biology; John Morse, accepted as an expert in groundwater hydrology; Mary Miracle; and Joan Irwin. STS exhibits #2, 3, 3a, 4, 5, 7, 8, 9 a & b, 11, 12, 13, 16a, b, and c, and 21 were received in evidence.

St. Johns River Water Management District presented the following witnesses: David Toth; Lance Hart, accepted as an expert in wetlands ecology; Carol Fall, accepted as an expert in water chemistry and water quality; Douglas Thompson, accepted as an expert in surveying and determination of navigability; James Frazee, accepted as an expert in hydrology and hydrogeology; Jeffrey Elledge, accepted as an expert in hydrology and civil engineering; and Benny Jones. The district's exhibits #1-9 were received in evidence.

The transcript was filed at the Division of Administrative Hearings on November 15, 1989. All three parties submitted proposed recommended orders. Petitioner Middlebrooks' motion to strike the district's proposed recommended order is DENIED. The district received its transcript on November 21, 1989, due to a misunderstanding by Middlebrooks regarding the requirements of Section 120.57(1)(b)7, F.S. (1989), that he furnish a copy of the transcript to the district. The district's proposed recommended order was filed within twenty days of its receipt of the transcript.

Specific rulings on the Petitioners' proposed findings of fact are found in the attached appendix. The findings proposed by the St. Johns River Water Management District are adopted herein.

FINDINGS OF FACT

1. In their Prehearing Stipulation filed on August 28, 1989, the parties have agreed:

> A. Middlebrooks is a private individual who co-owns, along with his wife, and does business as the Wekiva Falls Resort in Lake County, Florida.
>
> B. STS is the owner of approximately 1,842 acres of land contiguous to the southern and western boundary of the Wekiva Falls Resort.
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> C. The District, a special taxing district created by Chapter 373, Florida Statutes, is charged with the statutory responsibility of the administration and enforcement of permitting programs pursuant to Part II of Chapter 373, Consumptive Uses of Water, specifically Sections 373-219 and 373.223, Florida Statutes, and Chapter 40C-2, Florida Administrative Code. The District is the agency affected in this proceeding.
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> D. On September 4, 1985, Petitioner submitted to Respondent a CUP application No. 2-069-0785AUS to withdraw a maximum of .123 million gallons per day (MGD), i.e. 31.7 million gallons per year (MGY) of water for household type use from two standpipes, one 14 inches in diameter and the other 24 inches in diameter, located on Petitioner's property in Lake County, Florida.
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> E. An administrative hearing was held regarding that application on November 6 and 7, 1986, and a final order was issued on May 14, 1987. The final order was appealed to the Fifth District Court of Appeal which issued its opinion on July 7, 1988 (529 So.2d 1167). Permit No. 2-069-0785AUS was issued by the District as result of these proceedings. Middlebrooks returned the permit by mail to the District.
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> F. On September 13, 1988, Middlebrooks submitted to Respondent a CUP application No. 2-069-0785AUS to request approval of a maximum of .123 MGD (31.7 MGY) of water for household type use, which was revised on February 21, 1989, to request a maximum 14.26 MGD of water from the two standpipes, one 14 inches in diameter and the other 24 inches in diameter, located on Middlebrooks' property in Lake County, Florida.
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> G. On March 20, 1989, District's staff gave notice of its intent to recommend approval with conditions of Petitioner's CUP application No. 2-069-0785AUS.
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> H. Both Middlebrooks' and STS' petitions for administrative hearing were timely filed with the District.

2. In 1968, C.E. Middlebrooks purchased the 140 acre tract on which the wells are located. The property is bounded on the east by the Wekiva River, and on the west by Wekiva River Road. At the time of purchase the property was underdeveloped and overgrown.

3. Shortly after purchase, Middlebrooks inspected the property and found an oval-shaped depression from which water was flowing. Such flow is common in

this area along the corridor of the Wekiva basin. These surficial seeps, also called artesian flows, emanate from the surficial and intermediate aquifers.

4. This, and other substantiative findings regarding the characteristics of the property, were made in the recommended order as adopted in the final order in case #86-2101, on May 13, 1987. Still, Petitioner insists that the water was from a natural spring.

The only new evidence presented by Petitioner regarding the existence of a "spring" is the testimony of William Shell, who in the late 1930's used to fish with his father in the tributaries and streams off of the Wekiva River. William Shell claims that he and his father took a 10-foot canoe back into the property and he swam and fished in the "spring".

Shell was imprecise as to the location of the spring and conceded that the site identified on a map attached to his statement could be as much as five miles off. His testimony as to the existence and location of a spring is unpersuasive in the face of the contrary historical evidence from aerial photographs, soils and geological survey maps, and the well driller's log describing the strata through which the 24-inch well was drilled.

5. In undertaking the development of the property, Middlebrooks dug out the area in which the wells were ultimately drilled, utilizing a dragline to clear out what is now the existing stream bed between the oval-shaped depression and the area which is now the marina (or canoe basin). Extensive dredging was done to develop the marina at a point approximately 200 feet west of the Wekiva River, and additional dredging was done to connect the marina to the Wekiva River in order to have access by boat to the Wekiva River. The stream which now extends from the western boundary to the Wekiva River is called Canoe Creek. In order to maintain the swimming area and the section of Canoe Creek extending eastward from the swimming area to the Wekiva River, it is necessary for Middlebrooks to dredge the area every two to three years.

6. In 1972 as a part of the development activities described above, Middlebrooks hired a well drilling contractor to drill a 14-inch well at a location within the oval-shaped depression. The well was drilled into the Floridan aquifer to a depth of 107 feet, and well casing 14 inches in diameter was driven to a depth of 58 feet.

7. In 1973 Middlebrooks hired a second well drilling contractor to construct a second well within the oval-shaped depression slightly ease of the 14-inch well. The second well was drilled into the Floridan aquifer to a depth of 120 feet, and well casing 24 inches in diameter was driven to a depth of 80 feet.

8. As part of his development activities, Middlebrooks constructed concrete towers around each of the wells and placed diffuser plates and planters on top of each to give the appearance of a waterfall. A concrete wall and sidewalk were constructed around the oval-shaped area. The water flowing from the wells discharges into the oval-shaped swimming area and then flows eastward through Canoe Creek until it reaches the Wekiva River.

9. Middlebrooks' business, known as Wekiva Falls Resort, has a total of 789 campsites located on the northern and southern sides of the property. The swimming area, which extends from the western end of the concrete-enclosed oval-shaped area where the wells are located, to the wooden bridge which crosses Canoe Creek just west of the marina, is licensed by the Florida Department of

Health and Rehabilitative Services (HRS) as a public bathing facility. Middlebrooks also offers canoe rentals and paddleboat tours of the Wekiva River, each of which originate from the marina. Middlebrooks' present business operation centers around the water-based recreational opportunities provided by the water emanating from the wells. The facility employs approximately seventeen persons.

10. Groundwater from the Floridan aquifer flows from the two wells under artesian pressure. Middlebrooks testified that he had calculated the discharge from the two wells to be 12.5 mgd and 12.72 mgd, although his records for the period from April 1986 through January 1989 showed average daily flow from the two wells to be 12.98 mgd. The prior final order entered in this matter determined average daily flow to be 12.47 mgd. Because these are artesian wells, flow varies depending on hydrologic conditions.

11. The gate valve for the 24-inch well was frozen in the open position approximately 12 years ago and has since been encased in concrete making it inoperable. There is a diverter valve at water level, which, if opened, would increase the flow volume from the well, but which has no control over the amount of water flowing through the top of the well. As the well is presently structured, water essentially free flows from the well; Middlebrooks can control flow from the 24-inch well only through manual insertion of a poppet valve which must be first hoisted to the top of the well with a crane and then mechanically inserted into the top of the well. The only time this device is used is when Middlebrooks shuts down the well in order to do dredging or other maintenance activities.

12. Early in 1989, the concrete tower encasing the 14- inch well fell over and had to be removed from the swimming area. The well casing was cut off at pool level, removing the gate valve on it. Although flow increased from the 14-inch well as a result of shortening the length of the casing above ground, Middlebrooks mechanically inserted a poppet valve into the top of the remaining casing in order to restrict flow. Middlebrooks contends that, with the restrictor device which is inserted in the 14-inch well, flow is essentially the same as it was before the casing was cut down and the valve removed.

13. In 1973, shortly after the 24-inch well was constructed, USGS did an analysis of the water coming from the well to determine chloride concentrations. Chloride concentrations were measured at that time to be 230 parts per million (ppm). Chloride concentration is a measure of salt content in the water. The benchmark figure for chloride concentration in water as determined by the United States Environmental Protection Agency (EPA) is 250 pp. Water which exceeds 250 ppm in chloride is nonpotable. At the time these wells were drilled, the water was potable.

14. At the base of the Floridan aquifer in the area in which Middlebrooks' property is located is a layer of seawater, extremely high in chloride concentrations, which became trapped when the ocean water which once covered Florida receded and dry land emerged. This water is called relic sea water and is necessarily very old water. Significant discharges through a well in this region can cause the interface between the fresh water in the Floridan aquifer and the relic sea water to move upward toward the cone of influence of the well and break. This is followed by turbulent mixing of relic sea water and fresh water and results in elevated chloride concentrations in the water discharged from the well. This water is sometimes referred to as connate water.

15. Subsequent tests of the chloride concentrations in Middlebrooks' well have been done, both as part of a regional study done by the district and in preparation for this litigation. These test results show significant changes in the chloride concentrations in the water flowing from Middlebrooks' wells. Samples taken by the district in March and October 1986 showed concentrations of 312 ppm in the 14-inch well and 296 ppm for the 24-inch well for March, and 300 ppm for each of the wells in October. The 14-inch well was sampled again by the district in March and April 1989 and showed levels of 335 ppm and 296 ppm respectively, and an April 1989 sample from the 24-inch well showed 317 ppm. Samples taken by Jammal and Associates on August 5, 1989, showed 280 ppm for the 14-inch well and 290 ppm for the 24-inch well. Averaged, these results show concentrations over the 1986-89 period of 304 ppm for the 14-inch well and 300 ppm for the 24-inch well. The changes observed from the 1973 test and the 1986-89 tests cannot be attributed to seasonal variations.

16. The only samples taken since 1974 from the wells which do not show significant changes in the chloride concentrations are samples which were collected by Middlebrooks himself. The validity of these results is less credible than the results outlined in the previous paragraph, given the expert testimony supporting the former results. Further, the results shown from the samples collected by Middlebrooks are questionable in light of the elevated levels of minerals (including chlorides) which were noted in the analysis of waters taken from Canoe Creek, through which the water coming from the wells flows to the Wekiva River. The water flowing from Canoe Creek is 17 times higher in chlorides than water in the Wekiva River. Chloride levels in the swimming pool area were measured by Dr. Harper at almost 300 ppm. Even Dr. Roessler, an expert called by Middlebrooks noted high levels of mineralization in the water flowing through Canoe Creek to the Wekiva River from the wells and agreed that reductions in flow from the wells would result in reduced chloride concentrations within Canoe Creek.

17. The importance of the significant increase in chloride concentrations in the water flowing from Middlebrooks' wells, as noted, is that the groundwater coming from those wells in no longer potable. Continued discharge from the wells at the current free flow level will aggravate the problem of increasing chloride levels in those wells and in the immediate vicinity of those wells. If no action is taken to address the upward movement of the saltwater-freshwater interface, there is a potential for transmittance of connate water to wells of adjacent landowners.

18. Reduction in the flows from Middlebrooks' wells would stabilize the saltwater-freshwater interface beneath his wells. This could result in lower chloride concentrations in the water flowing from Middlebrooks' wells, and at the very least, there would be no further aggravation of the problem.

19. Section 10D-5.120, Florida Administrative Code, governs public bathing facilities such as Middlebrooks', and essentially has two water quality requirements. The first is a flow-through requirement which specifies that there must be minimum flow of water through the facility of 500 gallons per bather per 24 hours. The second requirement is that total coliforms must not exceed 1000 most probable number of coliform organisms (mpn) per 100 milliliters.

20. Although Middlebrooks' HRS license for his public bathing facility does not limit the number of bathers who may use his facility, there is an existing injunction obtained against Middlebrooks by Lake County, Florida, which allows a maximum of 2500 persons on the entire premises per day. Middlebrooks

has made no effort in the past, nor does he presently make any effort to determine how many patrons actually use the bathing facilities on a daily basis. As the prior final order noted "for all the record shows, he may have never had that many (the maximum) since his permit was issued". The only evidence of actual usage of the bathing facilities showed a maximum of 290 persons in the pool area on a summer weekend. Regardless of how few, if any, persons utilize the bathing area under present conditions, the same amount of water flows from the wells daily.

21. The stream which extends from the western end of the swimming area to Wekiva River Road and then off site receives drainage during wet weather conditions from offsite areas. All of Canoe Creek including the portion west of the swimming area is essentially a catch basin for surface water drainage from Middlebrooks' property. Surface water drainage enters Canoe Creek through overland flow, through swales conveying stormwater to it, and through an assortment of stormwater drainpipes which drain parts of Middlebrooks' property as well as off-site areas. The water entering Canoe Creek from this surface water drainage is extremely high in total coliforms. There are no significant stormwater treatment facilities on the site.

22. A concrete weir with a spillway separates the swimming area from Canoe Creek west of the swimming area. The water in Canoe Creek immediately west of the swimming area is extremely high in total coliforms. A sump pump has been installed just west of the weir which, under normal weather conditions, is capable of pumping enough of the water into a roadside swale, thereby diverting it around the swimming area, to prevent this high coliform water from overtopping the weir and flowing into the swimming area. However, under rainfall conditions, the pump will not prevent this drainage from spilling over the weir and Middlebrooks does not run the pump continuously. Water has also been observed spilling over the weir into the swimming area under normal conditions. The higher coliform water which is pumped into the roadside swale is reintroduced into the swimming area through a culvert pipe midway between the oval area, where the wells are located, and the marina.

23. There is also an apparent influx of total coliforms through surficial seepage and other sources internal to Middlebrooks' property. One of these sources of coliforms could be the wastewater treatment plant operated by Middlebrooks on the property.

24. Other than the part-time operation of the sump pump, which was installed for aesthetic reasons rather than water quality reasons, Middlebrooks has done nothing to control the numerous sources of total coliforms to his swimming area, nor does he propose any modifications to accomplish this in his application. Instead he has relied and proposes to continue to rely on the 12.5 mgd flow of water from his wells to dilute the total coliforms entering the swimming area in order to meet the HRS standards for water quality. Middlebrooks dismisses any alterations to the site to address these total coliforms sources as "impractical".

25. To the contrary, it is practical, technologically feasible, and economically feasible to control the introduction of coliform to the swimming area and meet HRS standards by preventing introduction of coliforms rather than relying on massive amounts of groundwater to meet the standards through dilution. One means would be to operate a sump pump around the clock instead of only on a part-time bases. Installation of additional toilet facilities for campers would reduce the use of Canoe Creek and its vicinity as a toilet. More importantly, treatment facilities such as retention and detention areas to treat

stormwater runoff before it enters Canoe Creek, as well as diverting the water around the oval part of the swimming area, would enable Middlebrooks to comply with HRS total coliforms standard without the necessity of utilizing 12.5 mgd of groundwater.

26. Reducing the flow of water from Middlebrooks' wells in accordance with the recommendations contained in the District's staff report would not cause blowouts or any other adverse geological consequences on his property or elsewhere. As indicated earlier, this region is characterized by artesian flow, and there is the potential for increased discharges from springs or other discharge points within the vicinity of Middlebrooks' property if flow is reduced from his wells. Overall, the area should return to a more naturally balanced system such as existed before the wells were constructed. The flow which discharges presently through the wells produces enough water to supply the domestic needs of 90,000 people. Reduction in the discharge from the wells would make additional water available for use for other beneficial purposes within the area as the water which now discharges from Middlebrooks' wells could be withdrawn at other locations within the vicinity of Middlebrooks' property. Through properly spacing wells and limiting their depth, (skimming well fields) these other uses of water could occur without aggravating the existing problem with chloride concentrations.

27. Middlebrooks and one of his employees described water upwelling within the swimming area on one occasion when flow was stopped from the wells. While this would not be unusual in an area characterized by artesian flow, it may also be an indication that well construction problems exist with either or both of the wells. Having the wells geophysically logged as is required in the permit conditions proposed by district staff, would reveal, among other things, whether the well is properly grouted and sealed. If the wells are not properly sealed contaminated connate water could be allowed to move upward and interchange with other water-bearing zones, resulting in chloride contamination in those zones as well.

28. The aquatic and wetland habitat associated with Canoe Creek can be divided into three distinct segments: (1) the intermittent stream extending westward from the weir and spillway to Wekiva River Road (hereinafter "the intermittent stream"); (2) the swimming area which begins at the weir and extends to the bridge just west of the marina (hereinafter "the swimming area"); and (3) the marina which encompasses the dredged boat basin and that portion of Canoe Creek extending eastward from the marina. These three segments have varying importance as aquatic or wetland habitats and can be separately characterized according to the impacts which would be felt from a reduction in the flow of water from the wells as recommended by the district staff report.

29. The intermittent stream is characterized by slow flowing or stagnant water. There are species indicative of a wetland system associated with the channel here, although the banks of the stream have been mowed and maintained. Aquatic and wetland dependent species do utilize this part of the stream; however, they are in less abundance than in other parts of Canoe Creek. Because the hydrology of this portion of the stream is not affected by the flow from the wells, there would be no impact on this area if flow from the wells is reduced.

30. The swimming area, which consists entirely of hard sand, is devoid of biological activity as a result of the regular mechanical maintenance performed on it by Middlebrooks, leaving no vegetation in the channel. Although there are aquatic species which utilize primarily the oval-shaped part of the swimming area, many of these are exotic species. In any event, there would continue to

be a flow of water to maintain that environment. The southern bank of Canoe Creek in the swimming area down to the water's edge has been cleared, sodded, and is maintained as a lawn. There are no wetland plant species in this area. There are trees along the northern bank of the stream in this area, and it is less disturbed than the southern bank; however, the understory has been removed. Overall, there would be minimal impact to the aquatic and wetland species within the creek itself, and no impact to plant species along the banks of the creek if flows are reduced in accordance with the District staff' s recommendation.

31. The marina area and the creek eastward of it provide the most abundant and productive part of the creek for aquatic species. This portion of the creek is at the same grade as the Wekiva River and therefore is in equilibrium with the river. Water levels are controlled by the pulse of the river, rather than the flow from the wells, and will be unchanged by reduction of flow from the wells. Although there would be a reduction in the amount of water moving through this area, there would be little, if any, impact to the functions of this portion of the creek as an aquatic habitat if the reduction in flow recommended in the district staff report were accomplished.

32. Viewed as a whole, Canoe Creek, because of the wells and the alterations made to the site by Middlebrooks, is an altered natural environment with an artificially created and maintained ecosystem. The primary natural feature associated with this property is the riverine forested wetlands which extend approximately 200 feet inland from the Wekiva River. This area lies within the floodplain of the river and is influenced by the rise and fall of the river. These wetlands would not be affected at all by reduction in flows from the wells.

33. Middlebrooks has contended that the flow from his wells provides a benefit to the Wekiva River by improving water quality in the river. Extensive water quality data showing the quality of discharges from Canoe Creek, versus ambient conditions in the river both upstream and downstream of Canoe Creek, do not support this assertion. The flow from Canoe Creek does not reduce temperatures in the river nor does it provide a thermal refuge for fish. Dissolved oxygen levels in the water flowing out of Canoe Creek are virtually the same as in the Wekiva River upstream of the creek. Chloride concentrations in the Canoe Creek discharge are 17 times higher than in the river itself. Total coliforms are higher in the Canoe Creek discharge than in the river itself. Although there is a slight reduction in nutrients as a result of the Canoe Creek flow, this slight reduction has no impact in a fast moving system such as the Wekiva River. Significantly, the flow from Canoe Creek violates State Water Quality Standards for specific conductivity (an indicator of the level of mineralization.) The probable source of this violation is the mineralized water flowing from Middlebrooks' wells. Reduction in flows from the wells would not degrade water quality in the Wekiva River and would likely eliminate the source of a specific conductance water quality violation.

34. The 12.5 million gallons per day of groundwater which flows through Middlebrooks' wells (as distinguished from the 31.7 million gallons per year that is used for household type use) is primarily used by him to enable him to charge visitors to swim in the water. Any other uses of the water are secondary. The absolute deadline for making application to the District for continuation of existing uses and thereby to be evaluated as an existing legal user was September 11, 1985. The first application filed by Middlebrooks for an allocation of water for a use other than household type use was filed on September 13, 1988, exactly three years after the deadline for the use to be

classified as and evaluated as an existing use. No exemption was sought or claimed for the water supplying the swimming area prior to the September 11, 1985, deadline.

CONCLUSIONS OF LAW

35. The Division of Administrative Hearings has jurisdiction in this proceeding pursuant to Section 120.57(1), F.S.

36. Petitioner Middlebrooks has the burden of establishing his entitlement to the requested permit. Capeletti Brothers v. Department of General Services, 432 So2nd 1359 (Fla 1st DCA 1983)

37. Notwithstanding Middlebrooks' argument that denial of his motions for continuance violated due process, he has been aware of the issues in this proceeding at least since 1985. This recent proceeding has afforded him the opportunity to fully expose most of those same issues for the second time. A careful reading of the recommended and final orders in case #86-2101, along with all of the evidence presented in the instant proceeding reveals very little new material.

38. Middlebrooks' standpipes are "wells" subject to regulation by the District. C.E. Middlebrooks v. St. Johns River Water Management District, 529 So2nd 1167 (Fla 5th DCA 198B).

39. The district has the authority to require permits for consumptive uses of water and to impose such reasonable conditions as are necessary to assure that such use is consistent with the overall objectives of the district and is not harmful to the water resources of the area. Section 373.219, F.S.

40. The wells that are the subject of this proceeding are subject to the consumptive use permitting requirements of the district. Rule 40C-2.041, F.A.C.

41. Section 373.223, F.S., provides in pertinent part:

> 373.223 Conditions for a permit. --
> (1) To obtain a permit pursuant to the provisions of this chapter, the applicant must establish that the proposed use of water:
> (a) Is a reasonable-beneficial use as defined in Section 373.019(4);
> (b) Will not interfere with any presently existing legal use of water; and (c) Is consistent with the public interest.
> * * *
> Section 373.226, F.S. provides:
> 373.226 Existing uses.--
> (1) All existing uses of water, unless otherwise exempted from regulation by the provisions of this chapter may be continued after adoption of this permit system only with a permit issued as provided herein.
> (2) The governing board or the department shall issue an initial permit for the continuation of all

> uses in existence before the effective date of implementation of its part if the existing use is a reasonable beneficial use as defined in Section 373.019(4) and is allowable under the common law of this state.
> (3) Application for permit under the provisions of subsection (2) must be made within a period of 2 years from the effective date of implementation of these regulations in an area. Failure to apply within this period shall create a conclusive presumption of abandonment of the use, and the user, if he desires to revive the use, must apply for a permit under the provisions of Section 373.229.
> (emphasis added)

42. Whether the use at issue is an "existing use" or a new use, the "reasonable-beneficial" use test must still be met.

43. As found in paragraph #34, above, Middlebrooks missed the application deadline as to his non-household use of water. Whether that deadline was "tolled", as he argues, by virtue of his unsuccessful appeal of the District's order in Case #86-2101, is of no consequence.

44. Middlebrooks has failed to prove that continued withdrawal of approximately 13 million gallons of water per day to support his public bathing facility is a "reasonable- beneficial use" as defined in Section 373.019(4), F.S.:

> (4) `Reasonable-beneficial use' means the use of water in such quantity as is necessary for economic and efficient utilization of a purpose and in a manner which is both reasonable and consistent with the public interest.

45. The "Applicants' Handbook, Chapter 40C-2, F.A.C." has been adopted by reference in Rule 40C-2.101, F.A.C.

46. Section 10.3 of the handbook provides these reasonable beneficial use criteria:

> 10.3 Reasonable Beneficial Use Criteria
> Based upon the statutory guidance and the delineation of factors found in State Water Policy, the Governing Board has determined that the following criteria must be met in order for a use to be considered reasonable beneficial:
> (a) The use must be in such quantity as is necessary for economic and efficient utilization. The quantity applied for must be within acceptable standards for the

designated use (see Section 12.0 for standards used in evaluation of need/allocation).
(b) The use must be for a purpose which is both reasonable and consistent with the public interest.
(c) The source of the water must be capable of producing the requested amounts of water. This capability will be based upon records available to the District at the time of evaluation. An eight of [sic] ten year capability will be considered acceptable.
(d) The environmental or economic harm caused by the consumptive use must be reduced to an acceptable amount. The methods for reducing harm include: reducing the amount of water withdrawn, modifying the method or schedule of withdrawal, or mitigating the damages caused (see also subsections 9.4.3 and 9.4.4 of this Handbook).
(e) To the degree which is financially, environmentally, and socially practicable, available water conservation and reuse measures shall be used or proposed for use.
(f) The consumptive use should not cause significant saline water intrusion or further aggravate currently existing saline water intrusion problems.
(g) The consumptive use should not cause or contribute to flood damage.
(h) The water quality of the source of the water should not be seriously harmed by the consumptive use.
(i) The water quality of the receiving body of water should not be seriously harmed by the consumptive use. A valid permit issued pursuant to Section 17-4.24 or Section 17-4.26, F.A.C., shall establish a presumption that this criterion has been met.

47. All of the above-referenced criteria are applicable to the instant case with the exception of paragraphs c and g. A brief analysis of each of these relevant criteria demonstrates that the proposed use is not a reasonable-beneficial use.

a. and b: The quantity requested for this recreational use is unprecedented. No other recreationally-based consumptive use authorized by the District even approximates that which is requested in this case. The use requested is primarily and exclusively intended to facilitate private proprietary gain by Middlebrooks. The public benefits marginally by having a recreational amenity if it pays the admission and rental charges levied by the proprietor. The public does not benefit in any other manner and the resource degradation and wasteful allocation of water is contrary to the public interest. The aquifer is being depleted by Middlebrooks' withdrawal of relic seawater and the chloride concentrations in that aquifer have increased as a result of the withdrawal.

d. The environmental and economic harm created by the consumptive use has not been reduced to any acceptable level. The discharge of a huge quantity of water which violates state water quality standards and potable water standards for chloride represents environmental and economic harm which will not be somewhat reduced by the district's proposed reduction to 6.99 mgd for one year. Alternate treatment methods for bacteriological problems and other mitigating measures must be initiated by Middlebrooks.

e. No water conservation or reuse measures are employed or proposed. In fact, conservation or recirculation efforts have not been investigated.

f. The consumptive use has increased the salt water/fresh water interface by as much as 40 feet in some locations and it has resulted in a 50-60 mg/1 increase in chloride concentrations.

h. The water quality of the aquifer has been and continues to be adversely impacted particularly by the increase of chlorides documented over a 10-15 year period.

i. The water quality of the Wekiva River has been adversely impacted through by the increased mineralization of that river and the specific conductance violations at the point of discharge.

48. According to Middlebrooks, it is reasonable and beneficial that he be allowed to withdraw 13 mgd in order to dilute the total coliform bacteria levels found in the artificially maintained bathing area. Middlebrooks refuses to address the total coliform standard established by Section 10D- 5.120(1), F.A.C., in any other manner except for dilution. Florida water law clearly establishes that no landowner has an automatic right to withdraw water for consumptive uses, and Middlebrooks has proffered no evidence other than his claim of ownership to establish the reasonable-beneficial use of his proposed withdrawal. See Section 373.2235, Florida Statutes and Village of Tequesta v. Jupiter Island Corp., 371 So2d 663 (Fla. 1979).

49. Middlebrooks' disregard for water reuse or conservation is typified by his refusal to approximate the number of bathers to utilize this facility. Notwithstanding his 15 years of operation and his direct involvement in this recreational amenity, Middlebrooks steadfastly refuses to estimate an average daily swimming population.

50. It is axiomatic, as Hearing Officer Parrish concluded in his recommended order in DOAH Case No. 86-2101, that a "use of water which needlessly wastes water is not a reasonable use of water." (See Middlebrooks d/b/a as Wekiva Falls Resort v. St. Johns River Water Management District, DOAH Case No. 86-2101, Recommended Order, page 21.)

51. Middlebrooks failed to prove that Canoe Creek was navigable as of March 3, 1845, when the state acquired title, and consequently Middlebrooks did not establish that the creek is part of the Wekiva River Aquatic Preserve.

52. Moreover, the existence of the aquatic preserve does not diminish or restrict the District's ability to regulate the consumptive use of water therein. Middlebrooks v. St. Johns River Water Management District, 529 So2d 1167, 1170. (Fla 5th DCA 1988)

53. Reduction of flow, so long as available alternative means of reducing coliform incidence are utilized, will not degrade the waters of the creek or the Wekiva River and will not harm its flora and fauna.

54. The district's categorization of Middlebrooks use of water as "water-based recreation" is correct. Although there are public health requirements which must be met in order for Middlebrooks to operate his public bathing facility, this is a secondary purpose for use of the water. As has been concluded previously herein, the amount of water proposed to meet the public health standard by Middlebrooks is largely unnecessary.

55. The conditions appended to the permit are reasonable and appropriate under these circumstances. Specific note is made of the condition that Middlebrooks install operable valves on the wells. The existing system for controlling flow by Middlebrooks is totally impractical for making the types of day to day adjustments which will be necessary in order to comply with the permit requirements proposed by the District. In addition, Section 373.206, F.S., requires that wells such as these have operable valves. Thus, this requirement is necessary not only for compliance with the permit condition, but also for compliance with existing law.

56. It is also reasonable to allow Middlebrooks the one year of use at the 6.99 million gallons a day for recreational use recommended by District staff prior to requiring that further reductions be made to 500 gallons per person using the swimming facility. This will allow the daily usage records to be established and will allow the initiation of alternative techniques of coliform control necessary to maintain the property as a licensed bathing facility.

RECOMMENDATION

Based on the foregoing, it is hereby, RECOMMENDED:

That a final order be entered by the District Board approving the issuance of a consumptive use permit to C.E. Middlebrooks for the amounts and under the terms and conditions established in the District's Technical Staff Report dated March 24, 1989.

DONE AND RECOMMENDED this __31st__ day of January, 1990, in Tallahassee, Leon County, Florida.

_____
MARY CLARK
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
__31st__ day of January, 1990.

APPENDIX

The following constitute specific rulings on the findings of fact proposed by the Petitioners.

FACTS PROPOSED BY PETITIONER MIDDLEBROOKS

1-8	Adopted in paragraph 1.
9-12	The existence of a prior "springs" was not proven by a preponderance of evidence and these findings are rejected, with the exception of the date of purchase, which is adopted in paragraph 2.
13	Rejected as unnecessary.
14-18	See 9-12, above.
19-36	Rejected as unnecessary or subordinate to the facts found.
37	Adopted in paragraph 10.
38-43	Rejected as unnecessary or subordinate.
44	Adopted in paragraph 10.
45-46	Adopted in substance in paragraph 24.
47, 48	Adopted in part in paragraph 9. The extent of use was not established.
49	Rejected, except as to the existence of the injunction, which is adopted in paragraph 20. This injunction was apparently the result of neighbors' concern over a proposed rock concert to be held at the site.
50	Adopted in paragraph 19.
51-53	Rejected as unnecessary or subordinate.
54, 55	Rejected as unsupported by the weight of evidence.
56	Rejected as contrary to the weight of evidence.
57	Adopted in paragraph 12.
58	Rejected as unsupported by the evidence.
59-63	Rejected as unnecessary or subordinate.
64-79	Rejected as contrary to the evidence.
80-81	Rejected as unnecessary or subordinate.
82	Rejected as contrary to the evidence.
83	Rejected as unnecessary.
84	Rejected as contrary to the evidence.
85-90	Rejected as unnecessary or subordinate.
91	Adopted in substance in paragraph 9.
92	Rejected as contrary to the evidence (the "efficiency" of the bathing area).
93	Adopted in part in paragraph 20, otherwise rejected as unnecessary.
94-99	Rejected as cumulative. These same facts are addressed above.
100-101	Adopted in part in paragraph 22.
102-168	Rejected as cumulative. These same facts are addressed above.
109-113	Rejected as contrary to the evidence.
114	Rejected as cumulative
115-118	Rejected as contrary to the evidence.
119	Rejected as unnecessary and irrelevant.
120	Rejected as contrary to the evidence.
121	Rejected as irrelevant.

FACTS PROPOSED BY PETITIONER STS

1 Adopted in substance in paragraphs 1 and 5.
2 Adopted in substance in paragraphs 3 and 4.
3 Adopted in paragraphs 6 and 7.
4 Rejected as unnecessary.
5 Adopted in substance in paragraph 4.
6 Adopted in substance in paragraph 5.
7 Addressed in the Preliminary Statement.
8 Adopted in paragraph 11, conclusions of law.
9 Adopted in paragraph 33.
10 Adopted in substance in paragraphs 24 and 25.
11 Adopted in paragraphs 19 and 25.
12 Adopted in substance in
13 paragraphs 22 and 23.
14 Adopted in paragraph 33.
15 Adopted in substance in paragraph 17.
16 Adopted in substance in paragraph 15.
17 Adopted in substance in paragraph 16.
18 Rejected as contrary to the evidence.
19-22 Rejected as unnecessary or subordinate.

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==========

AGENCY FINAL ORDER

==========

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

CLARENCE E. MIDDLEBROOKS, d/b/a
WEKIVA FALLS RESORT,

Petitioner,

DOAH CASE NO. 89-2396
SJRWMD FILE OF RECORD
NO. 89-750

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT,

Respondent.

STS LAND ASSOCIATES, L.P.

Petitioner,

DOAH CASE NO. 89-2397
SJRWND FILE OF RECORD
NO. 89-778

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT and
CLARENCE E. MIDDLEBROOKS,

Respondents.
_____/

FINAL ORDER

On February 2, 1990, the St. Johns River Water Management District ("District") received a Recommended Order in the above-captioned matter from Mary Clark, a hearing officer from the Division of Administrative Hearings ("DOAH"). A copy of the Recommended Order is attached hereto as Exhibit "A". Exceptions to the Recommended Order were timely filed by Petitioner Clarence E. Middlebrooks ("Middlebrooks"). No other parties to this matter filed exceptions to the Recommended Order. Respondent District served its response to the exceptions filed by Petitioner Middlebrooks on March 8, 1990.

RULING ON EXCEPTIONS

The exceptions of Petitioner Middlebrooks call into question a number of factual findings made by the DOAH hearing officer. The Governing Board's authority to reject factual findings which are supported by competent, substantial record evidence is closely circumscribed by law. Section 120.57(1)(b)10., Florida Statutes (F.S.). Reedy Creek Improvement District v. State, Department of Environmental Regulation, 486 So.2d 642 (Fla. 1st DCA 1986); City of Umatilla v. Public Employees Relations Commission, 422 So.2d 905 (Fla. 5th DCA 1982); ERM South v. Department of Environmental Regulation, 10 FALR 3151 (Order issued May 24, 1988). To the extent that the hearing officer chose to credit the testimony of one expert witness over a competing line of testimony of another expert witness, a finding based upon such testimony will not be disturbed by the agency head. it is well settled that findings of fact

by hearing officers which rest on testimonial indicia such as witness demeanor or credibility are accorded great weight and are not lightly disturbed. Wash & Dry Vending Co. v. State, Department of Business Regulation, 429 So.2d 790 (Fla. 3rd DCA 1983). Exception #1 Petitioner Middlebrooks claims that a portion of finding of fact no. 3 is contrary to the evidence. The hearing officer, in describing an oval depression from which water was flowing, found that: "these surficial seeps, also called artesian flows, emanate from the surficial and intermediate aquifers." This finding is well supported by competent, substantial e evidence in the form of the testimony of James Frazee (TR: 581) accepted as an expert in hydrology and hydrogeology; therefore, the exception is rejected. Exception #2 This exception argues Petitioner's proposition that "the water was from a natural spring" is not inconsistent with the final order in DOAH Case #86-2101. The referenced final order concluded that no geological or hydrogeological information indicated the existence of a spring and that at the time the first well was drilled, no spring was observed by the driller. (Finding of Fact #12 in DOAH Case #86-2101) In his exceptions to the Recommended Order entered in the referenced case, Petitioner Middlebrooks contended there was an apparent inconsistency between the finding that no hydrogeological data indicated the existence of the spring and the finding he cites in the instant exception. That exception was specifically rejected by the governing Board. The hearing officer's statements in the first paragraph are supported by the final order in DOAH Case #86-2101 and the record in this case.

Exception #3 Petitioner Middlebrooks characterizes as "not supported" that portion of finding of fact #4 which found Mr. Shell's testimony to be "imprecise as to the location of the spring and conceded that the site identified on a map attached to his statement could be as much as five miles off." The Governing Board will not disturb the hearing officer's characterization of the quality or precision of Mr. Shell's testimony, as this matter is uniquely within the realm of the hearing officer's judgment, as she had the opportunity to observe, among other things, the witness' demeanor and to judge his credibility. Mr. Shell's uncertainty as to the location of the spring and the witness' referenced concession concerning the site identified on a map attached to his affidavit are set forth at pages 42-43 of the transcript. There is competent substantial evidence supporting the hearing officer's findings; therefore, the exception is rejected.

Exception #4 Petitioner contends in this exception that the well driller's log describing the strata through which the 24-inch well was drilled constitutes no evidence contrary to his assertion that a spring existed. Petitioner supports his exception with an explanation of how the geology of the site precluded any lithology indicating the existence of a spring-from appearing in the bore's stratigraphic column. Petitioner cites no expert opinion or other evidence in the record to support his geologic explanation. Moreover, the testimony of Mr. Frazee, qualified as an expert in hydrogeology and hydrology, provides competent substantial evidence supporting the conclusion that the stratigraphy of the soil boring from the 24-inch well failed to show characteristics which would be seen had the well been drilled into a spring bore. (TR: 582-83)

Additionally, other competent substantial evidence was presented by Respondent District which contradicted Petitioner's evidence purporting to show the existence of a spring at the site. (TR: 471, 522-23, 567-68, 573) The exception is rejected due to the presence of competent substantial evidence to support the hearing officer's finding of fact #4.

Exception #5

Citing Section 17-550.310, Florida Administrative Code, Petitioner Middlebrooks takes exception to the statement in finding of fact #13 that "water which exceeds 250 ppm in chloride is nonpotable." Both Petitioner Middlebrooks and Respondent District, in its response to this exception, are partially correct in their contentions. The standard of 250 ppm chloride is a secondary drinking water standard (Section 17-550.320, Florida Administrative Code); as such, this standard is applicable to community water systems but not to non-community water systems. Water which exceeds 250 ppm in chloride would not meet the maximum contaminant level for that parameter applicable to community water systems; such water would not exceed the water quality standard applicable to non-community water systems. The Governing Board clarifies the referenced conclusion in finding of fact #13 as stated above.

2nd Exception #5 Petitioner Middlebrooks takes exception to the following phrase in finding of fact #16: "reductions in flow from the wells would result in reduced chloride concentrations within Canoe Creek." His contention that Dr. Toth's testimony contradicted this phrase is based on a mischaracterization of Dr. Toth's testimony found on page 375 of the transcript. The hearing officer's finding is supported by the record evidence, (TR: 304, 367, 469, 584), and therefore the exception is rejected.

Exceptions #6 and #7 Petitioner Middlebrooks presumably is claiming in these exceptions that competent substantial evidence is lacking to support the following findings: If no action is taken to address the upward movement of the saltwater-freshwater interface, there is a potential for transmittance of connate water to wells of adjacent landowners. Reduction in the flows from Middlebrooks' wells would stabilize the saltwater-freshwater interface beneath his wells. This could result in lower chloride concentrations in the water flowing from Middlebrooks' wells, and at the very least, there would be no further aggravation of the problem Petitioner's argument relies in part on a mischaracterization of Dr. Toth's testimony at page 375 of the transcript. Petitioner then represents much of his proposed findings of fact 71-78, and 82 to support his contention that a reduction in flow would not in any way impact chloride content in the ground water or in neighboring wells. These proposed findings of Petitioner were rejected by the hearing officer as contrary to the evidence. The Governing Board will not usurp the role of the hearing officer and engage in re-weighing the factual evidence presented by opposing parties. The hearing officer's findings are supported by competent substantial evidence in the testimony of Dr. Toth (TR: 367), Mr. Morris (TR: 469) and Mr. Frazee (TR: 584), all accepted as experts. Accordingly, these exceptions are rejected.

Exception #8 Petitioner Middlebrooks takes exception to the finding: "the only evidence of actual usage of the bathing facilities showed a maximum of 290 persons in the pool area on a summer weekend." Petitioner cites the testimony of Dr. Harper who related the number of persons he saw on August 5, 1989, and on August 13, 1989. Petitioner is correct in that the hearing officer's finding is not entirely accurate. The finding should reflect that the only evidence of actual usage of the bathing facility showed a maximum of 290 persons in the pool area on a summer Saturday and 180 persons on a summer Sunday. The finding is hereby corrected as stated above. This corrected finding is supported by competent substantial evidence. (TR: 415-17).

Exceptions #9 and #10 Petitioner takes exception to the underlined portion of the following finding: "Other than the part-time operation of the sump pump which was installed for aesthetic reasons rather than water quality reasons,

Middlebrooks has done nothing to control the numerous sources of total coliforms to his swimming area, nor does he propose any modifications to accomplish this in his application." Petitioner also takes exception to all of finding of fact #25 which deals with the practicality and feasibility of controlling the introduction of coliforms into the swimming area. The testimony is clear that other than the sump pump which does not operate continuously, the Petitioner has instituted no other controls, nor does he propose any, to limit the introduction of coliforms into the swimming area. (TR: 138, 228-30) Finding of fact #25 is supported by competent substantial evidence in the form of expert testimony by Dr. Harper, accepted as an expert in limnology, water chemistry, water quality and biology (TR: 422, 425, 438, 441, 446); Ms. Fall, accepted as an expert in water chemistry and water quality (TR: 553-.4); and Mr. Elledge, accepted as an expert in hydrology and civil engineering (TR: 666-67). For the above-stated reasons, these exceptions are rejected.

Exception #11 This exception characterizes as "misleading" the findings that:

> The flow which discharges presently through the wells produces enough water to supply the domestic needs of 90,000 people. Reduction in the discharge from the wells would make additional water available for use for other beneficial purposes within the area as the water which now discharges from Middlebrooks' wells could be withdrawn at other locations within the vicinity of the Middlebrooks' property.

As explained in Respondent District's response to this exception, these findings are not misleading. The findings are supported by competent substantial evidence in the form of the expert testimony by Mr. Elledge (TR: 666), Mr. Morris (TR: 472), and Mr. Frazee (TR: 584-85). Therefore, this exception is rejected.

Exception #12 Petitioner Middlebrooks takes exception to the comment by the hearing officer in conclusion of law #3 that the instant proceeding reveals very little new material. It is of little consequence to the conclusions of law in this case how one characterizes the quantity of new material in this case compared to the previous case. Petitioner's comments are seen as more of a closing argument rather than presentation of a contrary legal conclusion supported by legal argument. The hearing officer's conclusion need not be disturbed.

Exception #13 Petitioner Middlebrooks appears to argue that the following underlined part of conclusion of law #9 has no findings of fact to support it: "The aquifer is being depleted by Middlebrooks' withdrawal of relic seawater and the chloride concentrations in that aquifer have increased as a result of the withdrawal." It is axiomatic that when water is being used in unnecessary amounts which could otherwise be utilized for beneficial uses, the ground water resource is being depleted. There is ample competent substantial evidence in the record to support the referenced conclusins, and findings of fact nos. 14-18, 20, 24-26 and others, support these conclusions.

Exception #14 Petitioner Middlebrooks takes exception to finding of fact #34 and conclusion of law #7 which conclude that no exemption was sought or claimed for the water supplying the swimming area prior to the September 11, 1985 deadline for the use to be classified and evaluated as an existing use. Those statements are both factually and legally correct. Petitioner Middlebrooks did

not request an allocation of water for water-based recreation until 1988. Nothing
filed with the District previously constituted a request for an exemption.

ORDER

WHEREFORE, having considered the Recommended Order of the hearing officer, the Exceptions thereto filed by Petitioner Middlebrooks, and the Response to Exceptions filed by Respondent District, and having further reviewed the transcript of the hearing and being otherwise fully advised in the premises, it is thereupon:

ORDERED that the hearing officer's Recommended Order dated January 31, 1990, is hereby adopted in full, subject to those modifications noted hereinabove, as the final action of the St. Johns River Water Management District and it is

ORDERED that C.E. Middlebrooks is hereby granted a consumptive use permit for the amounts and under the terms and conditions established in the District's Technical Staff Report dated March 24, 1989.

DONE AND ORDERED this __12__ day of March, 1990.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

_____
SAUNDRA H. GRAY, CHAIRMAN
GOVERNING BOARD

RENDERED this __13__ day of March, 1990.

_____
PATRICIA C. SCHULTZ
DISTRICT CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing FINAL ORDER was hand delivered to the District Clerk, St. Johns River Water Management District, P. O. Box 1429, Palatka, FL 32178-1429; and that a true and correct copy of same was served by United States Mail this __12__ day of March, 1990, to the following counsel of record:

ROBERT A. ROUTA, ESQUIRE
Attorney for Petitioner C. E. Middlebrooks
Post Office Box 6506
Tallahassee, Florida 32314-6506

and

FRANK E. MATTHEWS, ESQUIRE
Attorney for STS Land Associates, L.P.
Post Office Box 6526
Tallahassee, Florida 32314-6526.

SAUNDRA H. GRAY