

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAC A. GRECO, GILMORE A. DOMINGUEZ,)	
FIRST FLORIDA BANK, N.A., et al.,)	
)	
Petitioners,)	
vs.)	CASE NOS. 89-3187
)	89-3188
WEST COAST REGIONAL WATER SUPPLY)	89-3189
AUTHORITY and SOUTHWEST FLORIDA)	
WATER MANAGEMENT DISTRICT,)	
)	
Respondents,)	
and)	
)	
CHILPUB, INC., and)	
WIREGRASS RANCH, INC.,)	
)	
Intervenors.)	
)	

RECOMMENDED ORDER OF DISMISSAL

This matter came to be considered by telephone conference call on April 17, 1990, by Donald D. Conn, Hearing Officer, Division of Administrative Hearings, upon a Joint Motion to Relinquish Jurisdiction filed on behalf of Petitioners and Respondents on April 4, 1990, which is opposed by Intervenors. The parties to this proceeding are represented as follows:

APPEARANCES

For Petitioners:	David L. Smith, Esquire
	Jeffrey A. Aman, Esquire
	712 South Oregon Street
	Tampa, FL 33606
For Respondents:	Bram Canter, Esquire
	306 North Monroe Street
	Tallahassee, FL 32302
	Southwest FL Water Management District
	Edward P. de la Parte, Jr., Esquire
	Barbara B. Levin, Esquire
	705 East Kennedy Boulevard
	Tampa, FL 33602
	West Coast Regional Water Supply Authority

For Intervenor: James S. Moody, Jr., Esquire
P. O. Box TT
Plant City, FL 34289-9040
Wiregrass Ranch, Inc.

Enola T. Brown, Esquire
P. O. Box 3350
Tampa, FL 33601-3350
Chilpub, Inc.

STATEMENT OF THE ISSUE

The issue at this stage of the proceeding is whether jurisdiction should be relinquished to the Southwest Florida Water Management District based upon the withdrawal of Petitions filed herein on behalf of the Petitioners, and the filing of a stipulation and settlement agreement executed on behalf of the Petitioners and Respondents.

FINDINGS OF FACT

1. By Notices of Referral dated June 7, 1989, and filed June 16, 1989, the Southwest Florida Water Management District (District) transmitted to the Division of Administrative Hearings (DOAH) certain Petitions filed on behalf of Petitioners which opposed the issuance of a consumptive use permit numbered 208426 by the District to the West Coast Regional Water Supply Authority (Authority). These Petitions were assigned Case Numbers 89-3187 through 89-3189 by DOAH, and were consolidated for all further proceedings.

2. On August 18, 1989, Chilpub, Inc. (Chilpub), filed a Petition to Intervene, which was granted by Order entered on September 6, 1989.

3. On October 20, 1989, Wiregrass Ranch, Inc. (Wiregrass), filed a Petition to Intervene, which was granted by Order entered on October 31, 1989.

4. The Petitions filed on behalf of Chilpub and Wiregrass were filed at DOAH, and specifically sought leave to intervene in Cases Numbered 89-3187 through 89-3189 in order to oppose the issuance of permit number 208426 to the Authority. Following the granting of these Petitions, Chilpub and Wiregrass have participated in this proceeding as Intervenor

5. On or about November 8, 1989, the Authority provided Wiregrass with a copy of the Notice of Proposed Agency Action which is the subject of this proceeding, pursuant to Rule 40D-2.101, Florida Administrative Code. However, subsequent to receiving this Notice of Proposed Agency Action, Wiregrass failed to file with the District any Petition in its own right seeking to initiate a proceeding under Section 120.57(1), Florida Statutes, to challenge the issuance of permit number 208426 to the Authority.

6. Notices of Withdrawal of Petitions for Formal Hearing were filed on behalf of the Petitioners in Cases Numbered 89-3187 through 89-3189 on April 4, 1990, and on that same date, the Petitioners and Respondents filed their Joint Motion to Relinquish Jurisdiction. A copy of the Stipulation and Settlement Agreement executed by the Petitioners and Respondents was filed on April 9, 1990.

CONCLUSIONS OF LAW

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

8. It is well settled that when Petitions which initiated an administrative action are withdrawn by the Petitioners, and when the main parties to such an action have executed a settlement agreement which resolves all factual matters in dispute between Petitioners and Respondent, an Intervenor may not maintain the action in the absence of the original parties. *Humana of Florida, Inc. v. DHRS*, 500 So.2d 186 (Fla. 1st DCA 1986), rev.den. 506 So.2d 1041 (Fla. 1987; *Rudloe v. Dept. of Environmental Regulation*, 517 So.2d 731 (Fla. 1st DCA 1987). An Intervenor's rights in an action are subordinate to the rights of the main parties, and when the matters which lead the original parties to commence an administrative action have been settled, an Intervenor cannot perpetuate such action unless he has availed himself of his own point of entry and initiated an action in his own right.

9. In this case, Wiregrass argues that since it was allowed to Intervene in this matter on October 31, 1989, it became a full party, and it would have been a useless and unnecessary act for it to file, in its own right, a Petition for Administrative Hearing under Section 120.57(1) following receipt of a copy of the Notice of Proposed Agency Action which the Authority sent to it on or about November 8, 1989. Admittedly, it ignored its own point of entry which arose under Rule 40D- 2.101, Florida Administrative Code, following receipt of this actual Notice. However, Wiregrass, argues that the Petition to Intervene which it did file meets all the substantive requirements for an initiating Petition under Section 120.57(1), and that "technical" failures in procedure should not be used to thwart its request for a hearing.

10. In support of its position, Wiregrass relies upon the case of *Yachting Arcade, Inc. v. Riverwalk Condominium Assoc., Inc.*, 500 So.2d 202 (Fla. 1st DCA 1986). However, the facts of this case are distinguishable from those under review in *Yachting Arcade*. In this present case, Intervenors never filed a Petition seeking to initiate an administrative action with the District, but simply filed a Petition to Intervene with DOAH in Cases Numbered 89-3187 through 898-3189. In *Yachting Arcade*, the Petitioners did file their Petition with the Department of Environmental Regulation, which thereafter transmitted the Petition to DOAH for hearing.

11. Generally under Section 120.57(1), Florida Statutes, agencies may choose to have administrative hearings conducted by their agency head, a member thereof, or by a Hearing Officer assigned by DOAH. It is the agency, in this case the District, which must initially decide whether to hear a case itself, or utilize a DOAH Hearing Officer. DOAH cannot assume jurisdiction over a Section 120.57(1) matter unless it is transmitted to DOAH by the affected agency.

12. Intervenors in this case never filed their Petition with the District, but rather filed it with DOAH, as was proper for a Petition to Intervene. However, since the main parties in the action into which Wiregrass intervened have subsequently entered into a settlement and withdrawn their Section 120.57(1) Petitions, Wiregrass now seeks to have its previous Petition, which was never filed with the District, construed as a Petition for Administrative Hearing in its own right. To agree with Wiregrass would be to ignore the clear meaning and effect of Section 120.57(1) which confers jurisdiction on DOAH only

when an affected agency chooses to have a Hearing Officer conduct the proceedings, and transmits the matter to DOAH for hearing.

13. The Joint Motion to Relinquish Jurisdiction should be granted, notwithstanding the opposition of Intervenor, not only because the case law is clear that an Intervenor may not maintain an action when the main parties to the action have entered into settlement and withdrawn the initiating Petitions, but also because to construe Wiregrass' Petition to Intervene as a Petition for Administrative Hearing under Section 120.57(1), Florida Statutes, would be to deny the District its right to an initial review of such Petition in order to decide whether to conduct the proceeding itself, or to confer jurisdiction on DOAH by transmitting the Petition to DOAH for hearing.

RECOMMENDATION

Based upon the foregoing, it is recommended that the District enter a Final Order dismissing the Petitions filed herein, and issuing permit number 208426 to the Authority.

DONE AND ENTERED this __19__ day of April, 1990 in Tallahassee, Florida.

DONALD D. CONN
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Filed with the Clerk of the
Division of Administrative Hearings
this __19__ day of April, 1990.

COPIES FURNISHED:

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