

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

QUAIL CREEK FARMS, INC.,)	
)	
Petitioner,)	
)	
vs.)	
)	Case Nos. 98-2417
CHARLES BASS and SOUTHWEST FLORIDA)	98-5607
WATER MANAGEMENT DISTRICT,)	
)	
Respondents.)	
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RECOMMENDED ORDER

A hearing was held in these cases in Tampa, Florida, on March 9 through 12, 1999, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner:	Timothy A. Hunt, Esquire Hill, Ward & Henderson, P.A. 101 East Kennedy Boulevard Suite 3700 Tampa, Florida 33602
For Respondent	Edward P. de la Parte, Jr., Esquire
Charles Bass:	David M. Caldevilla, Esquire Charles R. Fletcher, Esquire de la Parte, Gilbert & Bales 101 East Kennedy Boulevard Suite 3400 Tampa, Florida 33602
For Respondent	Margaret Lytle, Esquire
Southwest	Tony Muntchler, Esquire
Florida Water	Southwest Florida Water
Management	Management District
District:	2379 Broad Street Brooksville, Florida 34609-6899

STATEMENT OF THE ISSUE

The issue for consideration in these cases is whether the Southwest Florida Management District should issue to Charles Bass Water Use Permit 207025.04, which would authorize groundwater withdrawals from three wells for crop irrigation on a farm located in Hardee County, Florida.

PRELIMINARY MATTERS

On January 21, 1998, Petitioner, Quail Creek Farms, Inc., (Quail Creek), filed a petition for administrative hearing to challenge the Southwest Florida Water Management District's (District), January 2, 1998, notice of intention to issue Water Use Permit (WUP) 207025.04 to Respondent Charles Bass (Bass). The matter was referred to the Division of Administrative Hearings, and this hearing subsequently ensued.

In the interim, however, on October 16, 1998, the District issued to Bass Permanent Agricultural Exemption 9101145.00 which exempted 80 acres of the Bass property from District surface water permitting requirements. Quail Creek filed a request for hearing on the exemption as well, and this second issue was consolidated with the WUP issue for hearing. On February 24, 1999, Bass withdrew his request for the exemption, and subsequently moved to dismiss the challenge to the exemption. The undersigned did not rule on the motion to dismiss either before or at the formal hearing. It is found, however, that with the withdrawal of the exemption request, the exemption, though

granted by the District, is moot and of no force and effect, and Bass' motion to dismiss the challenge thereto is granted.

At the hearing on the remaining issue of the WUP, Quail Creek presented the testimony of Dayne R. Piercefield, a registered professional engineer and an expert in agricultural engineering, supplemental irrigation, agricultural irrigation practices and hydraulics; Eugene Drake, an employee of Quail Creek Farms; and David E. Ward, Jr., President of Quail Creek Farms, Inc. Petitioner also introduced Quail Creek Exhibits A through L. Respondent Bass presented the testimony of Nigel E. Morris, an ecologist and expert in the fields of ecology and agricultural permitting; John R. Garrett, a professional geologist and expert in the fields of hydrogeology water use permitting; and Mark A. Roberts, a former employee of Quail Creek Farms, Inc. Bass also introduced Bass Exhibits 1 through 66. The District presented the testimony of Brian S. Starford, a professional geologist and the water use regulation manager for the District's Bartow service office, and an expert in the fields of consumptive water use permitting and groundwater modeling; Philip R. Cohen, a registered professional engineer and expert in the fields of agricultural irrigation practices and irrigation engineering; and Robert Viertel, the director of regulation in the District's Bartow office and an expert in the fields of consumptive water use permitting and surface water permitting. The District also introduced District Exhibits 1 through 5.

A transcript of the proceedings was furnished and thereafter all parties submitted written matters, to include proposed findings of fact and conclusions of law, and arguments in support thereof, which were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Respondent, Southwest Florida Water Management District, was the state agency responsible for the management of water resources within the geographical area of 16 Florida counties which includes Hardee County, in which both properties in issue are located. The District's authority to issue consumptive use permits for groundwater is found in Chapter 373, Florida Statutes.

2. Petitioner, Quail Creek Farms, Inc., is a family-owned Florida corporation which incorporates approximately 2,350 acres in Hardee County, Florida. The property is used as a hunting preserve and for cattle and citrus farming. Quail Creek Farms, Inc., is located contiguous to and directly south of Respondent Bass' property, consisting of approximately 1,380 acres, also in Hardee County. The Bass property is actually owned by Golden County Farms, Inc., in which Bass is a principal, and which directly and through tenant farming operates a vegetable farming operation thereon.

3. Historically, Bass has grown agricultural crops, including tomatoes, on the property at least since the 1940s. Though approximately 745 acres of the property were available for crop cultivation prior to 1984, and remain available for production, it appears that prior to 1991, not all available land was in use at any one time. Farmed in a checkerboard approach, normally between 150 and 200 acres were under cultivation at any one time, with a maximum acreage in production of 240 acres. However, since 1991, annual acreage in production has increased to a present level in excess of 700 acres.

4. Over the years, an amicable and friendly relationship between the Bass and Ward (Quail Creek) families has developed. Both properties are located in a rural area which also supports numerous similar farming operations within 10 to 20 miles of the properties. Use of the Bass property for crop farming, including tomatoes, is reasonable and consistent with land use practices in the area.

5. Over the years, Bass has used, and continues to use, a semi-closed, seepage irrigation system to irrigate the row crops grown on the property. A semi-closed, seepage irrigation system is one which manages the water table beneath the crop root zone through a series of furrows down which water is provided periodically and as necessary to ensure the crop has sufficient moisture for its growing needs. The water is pumped by well from below ground and is thereafter channeled by pipe to the farm

field for use. The water is released by spigot or valve into furrows between the raised crop rows from which it seeps into the ground to raise the water table to just below the root zone of the growing plants. The plants obtain the water from this level by capillary action. Only sufficient water to raise the water table to the proper level is released into the furrows, and to ensure against run-off, the field is surrounded by collector swales and perimeter ditches to catch and retain any excess water which might reach the farthest end of the row without seeping into the ground.

6. A semi-closed, seepage irrigation system, as is in existence on the Bass property, should result in only a minimal run-off if the system is properly maintained and operated. Irrigation systems are not designed to be the primary source of water for crops, but are designed to provide sufficient supplemental water, above and beyond natural rainfall, to satisfy the crop water need in a two-in-ten rainfall system (the driest two years out of ten). The greater the rainfall, the less irrigation water is needed, and it is the responsibility of the farmer to turn on and shut off the water to the furrows so as to provide only the water needed by the crop. It is not to the farmer's advantage to provide more water than is needed, for several reasons. The pumping of water is expensive due to the high cost of a power source for the pump. Also, too much water raises the water table to a level where the roots of the plant

are either too shallow to support the plant in times of less rainfall, or the roots drown in the overabundance of water.

7. The use of pumped groundwater for crop irrigation is reasonable and consistent with farming practices in the local area. Semi-closed, seepage irrigation of row crops is a common practice among row crop farmers in the area of the Bass property. The system utilized by Bass is typical of this type of system and its use is consistent with irrigation practices in the area.

8. Mr. Bass pumps his water from three wells on the property. The permit applies to the total amount of water taken by the three existing wells. One well is an 8-inch diameter well constructed to a depth of 800 feet and cased to a depth of 400 feet. The second well is a 12-inch diameter well which is drilled to a depth of 985 feet and cased to a depth of 195 feet. The third well is a 16-inch diameter well which is drilled to a total depth of 1,500 feet and cased down to 400 feet. Whereas wells one and three draw only from the Floridan Aquifer, well two draws from both the Floridan (lower) and intermediate aquifer.

9. Bass has had a water consumptive use permit issued by the District since 1983 based on which he has pumped water for crop irrigation. The original permit, 207025.00, issued in April 1983, authorized withdrawal from one well at an annual average rate of 253,000 gallons per day (GPD) and a maximum daily rate of 760,000 GPD. When the permit was renewed in February 1991 (207025.01), withdrawal was authorized from four wells for a

combined annual average rate of 1,280,000 GPD and a combined peak monthly rate of 6,000,000 GPD. The permit was modified by letter (207025.02) to change the location of one well without changing any of the permitted quantities. In August 1994, the current permit (207250.03) authorized withdrawal from only three wells with a combined annual average of 2,950,000 GPD and a combined peak monthly rate of 7,740,000 GPD. The current permit authorizes withdrawal of water for 745 acres for each of a spring and fall tomato crop, utilizing the semi-closed seepage irrigation system for both.

10. In 1991, Bass significantly increased the number of acres under cultivation. A District visit to the property in December 1991, revealed grading and construction activities under way. Acreage under cultivation had increased to approximately 700 acres in tomatoes planted in raised rows under plastic. Disking and ditching had taken place in and around 4.56 acres of wetlands, and a new surface water management system had been constructed on approximately 25 acres of previously uncultivated land. Water was observed being discharged from the ditches on the Bass property onto Quail Creek land, which resulted in a flooding of portions of Quail Creek, the clogging of canals, and the death of several wooded areas presumably due to excess water.

11. In February 1992, the District issued a Compliance Notice to Bass advising him that the land readjustment activities under way constituted construction of an unpermitted surface

water management system and was a violation of statute and departmental rule. On March 23, 1992, Bass questioned the District's determination that a permit was required, but three days later, on March 26, 1992, the District issued a Notice of Violation.

12. Adverse impacts continued to occur to Quail Creek property, allegedly due to Bass's activities. Finally, in September 1992, Bass applied for a general construction permit from the District for a surface water management system. As a part of this system for which a permit was sought, Bass's engineers addressed the historical farming pattern on the property and attempted to resolve several problems by incorporating into the design certain features which were supposed to slow down the runoff from the Bass farm fields.

13. On June 29, 1993, the District and Bass entered into a Consent Order which found that 745 acres of farm fields and related surface water facilities had existed prior to October 1, 1984, and, therefore, did not require a surface water management permit for their continued use. Quail Creek was not a party to this Consent Order. In addition, however, the District found that 25 acres of farm fields and related facilities had been created after October 1, 1984, and those acres required a surface water management permit for their continued use. Bass applied for and obtained the required permit (40105.05.00) from the District on April 23, 1993. Bass was also required to

pay a monetary penalty to the District. On May 24, 1994, the District transferred the surface water management permit to a permanent operation status.

14. Bass's WUP permit 207025.03 was due to expire on February 14, 1997, and he filed an application (207250.04) to renew it on February 13, 1997. In his application, Bass requested authority to withdraw water from his existing three wells at a combined annual average rate of 4,783,500 GPD and a combined peak monthly rate of 8,030,300 GPD for the existing semi-closed seepage irrigation of two 745-acre tomato crops, one each in the spring and the fall. The 745 acres to be used for these two crops have been determined to either not require a surface water management permit under the Consent Order or be covered under the existing surface water management permit 40105.05.00.

15. After Bass's application for renewal was received by the District in February 1997, as a part of the processing it was referred to a professional geologist, Mr. Balser, who, in March 1997, requested additional information. Balser's request included a reference to a "required" Environmental Resource Permit Agricultural Rule Exemption. The use of the term "required" in reference to that element was in error as it is not required but only recommended. Nonetheless, Bass applied for the exemption on September 15, 1997. Action on the renewal application had been delayed until after the application for the

exemption was filed, and the District granted the exemption on October 16, 1998. Processing of the renewal application then continued until Bass withdrew his request for the exemption on February 23, 1999.

16. In the course of evaluation of Bass's renewal application, the District utilized its Agricultural Water Use Calculation Model to review the reasonableness of the requested quantities, and a groundwater flow model identified as "MODFLOW" to evaluate the impacts of the proposed withdrawals under the permit. Use of this model indicated that the quantities of water requested by Bass were reasonable and needed for his proposed agricultural operation. However, there also was some possibility shown that the withdrawals might adversely impact some off-site wells. As a result, Mr. Balser suggested to Bass that the quantities of water sought under the permit be reduced.

17. Consistent with that request, on December 9, 1997, Bass amended his renewal application so as to reduce the acreage allotment for both the spring and fall crops from 745 acres to 600 acres each planting. This resulted in a reduction in the annual average withdrawal rate by 1,053,800 GPD, and in the peak monthly rate by 1,563,000 GPD. With the receipt of this amendment in quantities requested, the District declared the application complete. Utilizing the models described, Mr. Balser determined that the amount of supplemental water requested by Bass was reasonable and consistent with the District's permitting

criteria. These findings were approved by the reviewing authority.

18. On January 2, 1998, the District indicated its intention to issue a ten-year renewal permit to Bass authorizing withdrawals at a combined annual average rate of 3,729,700 GPD, and a combined peak monthly rate of 6,467,300 GPD for irrigation of both a spring and fall tomato crop of 600 acres each on the Bass property. Incorporated in the permit were the standard permit conditions provided for by Rule 40D-2.381(3), Florida Administrative Code, and seven special conditions tailored specifically for this permit. This proposed agency action was modified by the District on March 9, 1999, when it moved back the deadline for the Tailwater Feasibility Report called for in Special Condition 6 from May 1, 1998 to December 1, 1999, and added two other special conditions. With the exception of those modifications, the January 2, 1998, proposed agency action has not been changed.

19. The changes in the withdrawal gallons stipulated in the permit include an increase of 779,700 GPD in the annual average rate currently permitted, but a decrease of 1,272,700 GPD in the peak monthly rate. The notice of proposed agency action was sent by certified mail to Petitioner on January 2, 1998, and received on January 5, 1998. Quail Creek filed its petition for administrative hearing with the District on January 21, 1998,

sixteen days after receipt of the notice of proposed agency action.

20. There is little doubt that Petitioner has suffered an increase in surface water problems on its property since late 1991, when Bass first increased the number of acres he had in row crop production. Petitioner claims that by that time approximately 700 acres of tomatoes were planted under plastic, and that disking and ditching had occurred around and in a 4.56-acre wetlands parcel on the Bass property. Petitioner's investigation indicated that a new surface water management system had been constructed on 25 acres of previously unfarmed land and that water was being discharged from the Bass ditches on to Quail Creek Farms which resulted in an alteration of the area hydrology.

21. In January 1992, Quail Creek's president, Mr. Ward, observed extensive amounts of water flowing into Quail Creek's canal systems as a result of super saturation of the Bass cropland. Mr. Ward is convinced this was due to increased water from irrigation which was applied to land already saturated by unusually heavy rains experienced in the area at that time. In early February 1992, following a 1.2-inch rainfall, Mr. Ward, accompanied by his foreman, Mr. Drake, toured the Quail Creek property abutting the Bass farm and noticed that the water in the Quail Roost canal system rose by two to three feet after the rain. Mr. Ward is convinced the rise in water level is a direct

result of irrigation being applied to land already saturated by the rain.

22. In March 1992, District officials viewed the property in issue and determined that surface water management construction was being undertaken by Bass, and as a result of subsequent negotiations, the technicalities regarding the permitting of this system were worked out to the satisfaction of the District.

23. The outflow of surface water from the Bass farm onto Quail Creek did not abate however. In April 1992, measures were undertaken which were designed to curb the continued flooding by adding additional dirt to the Quail Creek dike. This did not correct the problem, however. In June 1993, photographs of the area in question revealed that large amounts of soil had been washed off the Bass property into the Quail Creek ditch near the lone 60-inch culvert at the junction with the north canal. Quail Creek also increased the size of its culverts in an effort to provide some relief from the flooding.

24. By the end of summer in 1995, Quail Creek management again found it necessary to add more dirt to the top of its dikes in an effort to stem the water flow from the Bass property, and to dredge again the canal in an effort to stem the flow of water coming from the Bass property. As late as February 1997, it continued to dig from its canals dirt which it contends had been placed there by the flood waters coming from Bass's property. It

also added a 66-inch culvert to that already installed in an effort to control the water flow.

25. During the period in issue, several noticeable factors have taken place on the Quail Creek property just south of its property line with Bass which may be attributed to excessive water influx. Included among these are the death of oak trees, the death of grass areas and areas of other vegetation, and the clogging of Quail Creek's drainage system.

26. Rule 40D-2.301, Florida Administrative Code, is the rule applied by the District in its determination of permit entitlement. This rule requires an applicant for a permit to demonstrate that the proposed water use is beneficial, is in the public interest, and will not interfere with any existing legal use of water. The applicant can demonstrate these requirements by providing the reasonable assurances outlined in subsections (a) through (n) of the cited rule section.

27. To be sure, while the major emphasis of water use permitting relates to the effect of the withdrawal on quality and availability of water remaining for the use and enjoyment of others, consideration is also given in the Basis of Review (BOR) to the impacts of withdrawals and discharges on the surface water management system design in terms of percolation rates, storage volumes, design changes, and the like. The standards and criteria listed in the BOR are to be used to provide the reasonable assurances required by the rule.

28. The "reasonable demand" criterion requires a showing that agricultural irrigation is necessary in an amount certain. This information is normally provided using the AGMOD, a computer program based on the Blaney-Criddle methodology, which is used to determine supplemental irrigation requirements for a particular crop, using specific soil type, rainfall, and other variables for a 2 in 10 year drought event. The quantity of supplemental irrigation needed, as estimated by AGMOD, is generally the minimum amount of water needed under drought conditions for optimal crop production, and it does not include any allowance for waste or runoff. This model, AGMOD, has been proven reliable in the field, and provides to the District a consistent approach for use in evaluating WUP requests.

29. In the instant case, the evidence indicates the AGMOD simulation utilized was properly set up and run. Under the circumstances of this case, it is found that Bass has demonstrated, by a preponderance of the evidence, that his proposed water request will satisfy a reasonable demand, and the use of the water for crop cultivation is a reasonable use for the water. By the same token, the use and proposed method of irrigation are reasonable for the area, and the quantities estimated by AGMOD reflect the supplemental irrigation requirements of the specific crop Bass proposes to cultivate on the acreage allowed. Notwithstanding Petitioner's contention that Bass has not shown a need for additional water and should be

limited to that amount of water at the rate in his current permit, no convincing evidence to support this contention was introduced. To the contrary, it would appear that if Bass were limited to irrigation at the current rate of withdrawal, and should a 2-in-10-year drought occur, he would be able to irrigate only approximately 475 of his 600 acres. Assuming proper operation and maintenance of the system, the water from irrigation should not contribute to flooding of Quail Creek property.

30. An applicant is also required to provide reasonable assurances that the proposed use will not cause quantity or quality changes which adversely impact water resources, including both ground and surface waters. This criteria addressed changes caused by withdrawal of water from the ground or a surface body of water and do not envision changes resulting from the subsequent use of the water, such as runoff. In other words, the question is whether Bass's use of the water will result in a diminishment of Petitioner's water assets.

31. To determine this, water managers utilize MODFLOW, a groundwater flow computer model which identifies draw-down impacts caused by the proposed peak monthly withdrawal rate during a 90-day period with no effective rainfall. This computer model, developed by the United States Geological Survey, is widely accepted as a predictive tool by experts in the hydrology and hydrogeology communities, including the District.

32. Petitioner has asserted that runoff of irrigation water from the Bass property, caused by unnecessary irrigation of property heavily covered by impenetrable plastic mulch, which is already saturated by rainfall, will cause the adverse changes to both the quality and quantity of water available to it which the rule envisions. This is, however, an interpretation of the rule which is contrary to the District's historic interpretation and is not supported by the preponderance of the evidence. In any case, Petitioner has failed to present evidence to establish that the standing and run-off water shown in the photographs placed in evidence, and which allegedly had an adverse impact on surface water management on Quail Creek Farms, was the result of irrigation rather than the excessive rainfall experienced in the area at the time. To the contrary, the testimony of Mark Roberts, the former ranch hand, raised a serious question regarding the source of the runoff. Mr. Roberts recalls that in 1992 and 1993, when the alleged flooding of Petitioner's property took place, the source of the flood waters was Petitioner's property rather than that of Bass.

33. The evidence of record indicates that the water use proposed for use under the permit application will not cause changes in either the quality or quantity of the water resources available. Results of the MODFLOW analysis done by the District in this case indicates that the draw-down of the water table at the parameters explored will be less than one foot, and an impact

of this minimal magnitude is too small to cause an adverse change in either the quantity or quality of the water resource within the measurement parameters.

34. Another factor for consideration in the evaluation of a permit application is the requirement that the applicant provide reasonable assurances that the proposed use will not cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resources. It must be noted here that the impacts referenced in the rule in this regard are impacts resulting from the withdrawal, and not such other factors as runoff. In the evaluation of withdrawal results, MODFLOW is the tool most often used. Again, use of MODFLOW indicates that the anticipated draw-down occasioned by the anticipated withdrawals will be less than one foot. This impact is considered minimal and not likely to cause any adverse impact to the protected areas cited.

35. Still another factor for consideration in permit application evaluation is the requirement that the applicant give reasonable assurances that the proposed use will not cause water levels or rates-of-flow to deviate from the ranges set forth in Chapter 40D-8, Florida Administrative Code. The District has not adopted water levels or rates-of-flow for those water bodies envisioned by this rule other than to establish minimum levels for some lakes within its jurisdiction. However, none of these

lakes are on or near the Bass property, and this requirement is not applicable to the instant application.

36. An applicant must also provide reasonable assurances that the proposed use will utilize the lowest water quality useable by the applicant for the intended purpose, or a lower quality water if available and useable for a portion of the intended use. Included within the "lower quality water" category is such water as recovered agricultural tailwater and collected storm water.

37. In the instant case, the evidence shows that Bass will use the lowest quality water that is available and economically feasible for use. The majority of Bass's water comes from the Floridan Aquifer which is of poorer quality than the intermediate aquifer under the Bass property. As to other potential sources, the evidence indicates that if the MODFLOW allotments are followed, there should be no tailwater available for use, and the use of collected storm water is neither feasible nor consistent with local agricultural practices.

38. One of the requirements for issuance of a permit is a showing of reasonable assurances that the proposed use will not significantly induce saltwater intrusion. It is the opinion of District evaluators, and the evidence of records shows, that the property in issue is too far from a saltwater source for there to be any meaningful risk of lateral saltwater intrusion as a result of the proposed withdrawals. Further, the MODFLOW analysis

suggests that the impact of groundwater withdrawal as a result of the permitted activity would be too light to cause any upcoming of saline water from a lower aquifer.

39. Another permit requirement relates to the applicant providing reasonable assurances that the proposed use will not cause pollution of the aquifer. Information available to the District indicates there are no known contaminants in the aquifer system in the vicinity of the Bass property, and because of the rural nature of the property the existence of such plumes is unlikely. However, even were one or more to exist, MODFLOW indicates the withdrawals proposed under the permit applied for would be minimal and unlikely to cause or permit any contamination.

40. The applicant is also required to provide reasonable assurance that the proposed water use will not adversely impact off-site land uses existing at the time of the application. Quail Creek has indicated that its property is used for cattle and citrus cultivation, and the photographic evidence presented by it would clearly indicate that the specific land receiving the off-site flow is used primarily for cattle grazing. Evidence of cattle deaths, as presented, failed to indicate that the deaths were the result of water flow over the land. In any case, the thrust of the rule deals with the result of withdrawal, not the subsequent consumptive use of the runoff onto the property. In this case, there is no evidence that the proposed water

consumption by Bass which exceeds his present consumption rate will have any connection to Petitioner's use of its land off the pumping site.

41. The District rules also require an applicant to provide reasonable assurances that the proposed use will not adversely impact an existing legal withdrawal. MODFLOW analysis clearly indicates that proposed water consumption by Bass will not adversely impact any existing withdrawals. The modeling done reveals that the proposed withdrawals will result in a draw-down in the water table outside the Bass property by less than a foot. The draw-down in the aquifer outside the Bass property will not exceed 5 feet except in the case of one area 4,900 feet to the north of the Bass property. Quail Creek Farms, which lies to the south of the Bass property should not be effected. These draw-downs are well within the parameters set forth in BOR 4.8, which holds that draw-downs in the water table of less than 2 feet, and draw-downs in the aquifer of less than five feet are presumed not to cause adverse impacts to existing legal withdrawals. However, to ensure against any off-site impact as a result of approval of the instant permit, the District has included Special Condition 2 in the proposed permit which requires Mr. Bass to investigate and mitigate impacts to existing wells located within 4,900 feet of these production wells.

42. The District has not applied that provision of the Rule 40D-2.301(1)(j) to the instant application evaluation. It

contends that the provision of BOR 4.9 which interprets that rule to require the utilization of local water resources to the maximum extent possible before considering more remote alternate sources does not apply to applications for the withdrawal of water to be used on the same property from which withdrawn. Quail Creek disagrees with the District position, and suggests that before Bass should be given permission to pump more water from the ground, he should make use of collected storm water. This suggestion is not consistent with the District's long-term interpretation of the rule.

43. The rule under consideration here also requires the applicant to provide reasonable assurances that his proposed use will incorporate water conservation measures. In the instant case, the evidence shows that Bass uses pipes rather than open ditches to convey the water from the well-head to the irrigation ditches. This minimizes evaporation. He also operates an on-going leak detection and maintenance program for the system. He conducts a continuing analysis of the system's efficiency. He avoids daytime irrigation and other practices so as to minimize evaporation. He has considered and continues to consider the feasibility of converting his system to a more efficient one. He has developed an irrigation schedule designed to maximize efficiency of delivery; and he has endeavored to reduce or eliminate runoff of water both to conserve water and to protect streams.

44. However, to ensure maximum compliance with the spirit and letter of the rule, the District has attached Special Conditions 5 and 6 to the permit. Special Condition 5 requires Bass to continue implementing best management practices, and Special Condition 6 requires him to look into the feasibility of implementing a tailwater recovery system. If the run-off to Petitioner's property is the result of irrigation and not rainfall, and this has not been effectively shown, implementation of a tailwater recovery system should substantially reduce, if not eliminate, it. Quail Creek contends these conditions will not effectively address the problem because, it alleges, Bass has been less than forthcoming in the representations made in his application. This allegation is not effectively supported by the evidence, however. Only Mr. Piercefield, testifying for Petitioner, indicated that on his few visits to the Bass property he had not observed any best management practices implemented, nor had he seen any evidence of them in the District's file. The witnesses' testimony is not persuasive either in content or in presentation.

45. Another requirement of the rule in question is for the applicant to provide to the District reasonable assurances that it will incorporate reuse measures to the greatest extent practicable. BOR 4.11 has defined "reclaimed water" as treated wastewater effluent. The District has properly concluded that wastewater effluent is not currently available for use by

Bass on his property and is not likely to be available in the foreseeable future. Petitioner contends, however, that the rule applies to water resources other than treated effluent, such as storm water. This interpretation is contrary to the District's long-standing interpretation and practice, and Petitioner has not supported it with any creditable evidence of record. Accepting, arguendo, the correctness of Petitioner's interpretation, however, there is no indication that it would be technically and/or economically feasible to utilize storm water for irrigation on the Bass property.

46. A requirement of the review process is that the applicant provide the District with reasonable assurances that the proposed use will not cause a waste of water. Waste is defined in BOR 4.12 as causing excess water to run into a surface water system. That is exactly what Petitioner claims is happening here. However, Petitioner has not presented credible evidence to demonstrate that it is irrigation water which is running onto its property. On the other hand, the evidence indicates that the Bass water allocation is based on a properly developed and run AGMOD simulation which estimates the minimum amount of supplemental irrigation water needed. It does not provide enough water for waste or runoff.

47. If Bass properly operates and maintains his semi-closed irrigation system, and it is to his economic advantage to do so, its use would result in only minimal runoff. In addition, the

implementation of Special Condition 6, calling for a tailwater recovery system, would further preclude the run-off of any excess irrigation water and recycle it for further irrigation. In the event all this fails, or in the event of unusual and unexpected excessive rain should occur, Special Condition 7 in the permit provides recourse to Petitioner.

48. A final requirement of the permitting rule is the need for the applicant to provide the District with reasonable assurances that the proposed use will not be otherwise harmful to the water resources of the District. Petitioner contends that Bass has not shown compliance with BOR 2.2, which holds that a permit application is not complete until the surface water management permit application required by the District is deemed complete and the impact of withdrawals on the applicant's existing permitted surface water management system is evaluated. This requirement is not included in the permitting rule of the District, 40D-2.301(1), and the District has historically not required a showing of compliance.

49. The District has taken the position here, however, that Bass has complied with the provision. In this case, a surface water management permit application was not required because the area of the Bass property to be used for the growing of crops was exempted from surface water management permitting by the District in 1993. In addition, the withdrawal impact was evaluated for Bass's existing 25 acre permitted surface water management system

as a part of the MODFLOW analysis, and this analysis showed that the projected withdrawal of groundwater would lower the water table by much less than one foot. The District considers this to be a minor impact and it is so found.

50. Taken as a whole, the evidence of record indicates that Bass operates an efficient and well-maintained irrigation system which, used properly, is not likely to cause the run-off attributed to it by Petitioner. Support for this determination is seen in the fact that at the time of the worst flooding, rainfall in the area was at significant highs. This is supported by the testimony of Mr. Garrett, the hydrologist. In addition, the evidence also shows that at those times of flood, the Bass wells either were not operating at all or were operating at less than permitted production. Further, it would be economically inappropriate for Bass to flood his fields with more than necessary water because of the cost of pumping, and the resultant damage to crops.

CONCLUSIONS OF LAW

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

52. As the applicant for a water use permit, Bass has the initial burden to demonstrate his entitlement to the permit sought. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778,787. Once, however, the applicant has presented

credible evidence of entitlement to the permit, the burden shifts to the opponent, here Quail Creek Farms, Inc., Petitioner, to go forward with the evidence. If Petitioner fails to carry the burden as to controverted facts by a preponderance of the evidence, the applicant must receive the permit.

53. The basic criteria for approval of applications for consumptive use permits of water are outlined in Section 373.223(1), Florida Statutes, which requires applicants to demonstrate to the approval authority that the proposed water use is a reasonable-beneficial use; that it will not interfere with any presently existing legal use of water; and that it is consistent with the public interest. Based on the authority contained in this statute, the Southwest Florida Water Management District has promulgated Rule 40D-2.301(1) Florida Administrative Code, which establishes conditions for issuance of consumptive use permits and which clarifies and implements the basic requirements of the statute. This rule requires an applicant to provide reasonable assurances, within the parameters of 14 separate areas of interest, that the proposed use of the water satisfies the conditions for issuance.

54. Rule 40D-2.301(1), Florida Administrative Code, requires the applicant to provide reasonable assurances that the requested water use:

(a) is necessary to fulfill a certain reasonable demand;

(b) will not cause quantity or quality changes which adversely impact the water resources, including both surface and ground waters;

(c) will not cause adverse environmental impacts to wetlands, lakes, streams, estuaries, fish and wildlife, or other natural resources;

(d) will not cause water levels or rates of flow to deviate from the ranges set forth in Chapter 40D-8;

(e) will utilize the lowest water quality the applicant has the ability to use;

(f) will not significantly induce saline water intrusion;

(g) will not cause pollution of the aquifer;

(h) will not adversely impact off-site land uses existing at the time of the application;

(i) will not adversely impact an existing legal withdrawal;

(j) will utilize local water resources to the greatest extent practicable;

(k) will incorporate water conservation measures;

(l) will incorporate reuse measures to the greatest extent practicable;

(m) will not cause water to go to waste; and

(n) will not otherwise be harmful to the water resources within the District.

55. Rule 40D-2.301(3), Florida Administrative Code, requires the District, in its evaluation of an application for a consumptive use water permit, to utilize standards and criteria

contained in the Basis of Review for Water Use Permit Applications (BOR) which is found in Rule 40D-2.091, Florida Administrative Code.

56. A thorough consideration of the evidence presented at the hearing establishes that Bass has provided the reasonable assurances required that his proposed water use complies with the conditions for issuance of the permit outlined in Rule 40D-2.301(1), Florida Administrative Code. In arriving at that conclusion, one must evaluate the application in light of the Three Prong Test mentioned above.

57. A proper analysis of the situation confronted here reveals that the thrust of the water regulations is to fully protect the rights to water in this state. The Florida Water Resources Act of 1972, codified in Part II of Chapter 373, Florida Statutes, states that the purpose of the Act is to provide for conservation of the available water resources while maximizing the beneficial use of the resources. Quail Creek Farms' complaint alleges injuries caused by surface run-off, and it is not this injury for which the specific process in issue here was designed to protect.

58. Utilizing the criteria set out of Rule 40D-2.301(1), Florida Administrative Code, as clarified and interpreted consistent with the BOR, it is clear that Bass has provided to the District the reasonable assurances called for that are called for in the Three Prong Test and the Code provision. By the same

token, Quail Creek has failed to demonstrate by a preponderance of the evidence that Bass's use is inconsistent with the requirements, spirit, and intent of the regulatory legislation and the rules implemented thereunder.

SUPPLEMENTAL MATTERS

59. On February 24, 1999, Bass filed a Motion To Tax Attorney's Fees, Experts' Fees, and Costs against Quail Creek, citing as authority therefore Sections 120.569(2)(c) and 120.595(1), Florida Statutes. Both sections provide for the taxing of monetary sanctions against a party who the administrative law judge finds participated in the proceeding for an improper purpose. Subsection (e) of Section 120.595(1), defines participation for an improper purpose as participation primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity. Though, as found above, Quail Creek's protest against the issuance of the renewal of Bass's permit was not supported by a preponderance of the evidence, that shortcoming does not rise to the level of impropriety so as to support the taxing of fees and costs. Therefore, the Motion To Tax Attorneys' Fees, Experts' Fees, and Costs is denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Southwest Florida Water

Management District enter a Final Order approving water use permit 207025.04 to Charles Bass as proposed.

DONE AND ENTERED this 27th day of April, 1999, in
Tallahassee, Leon County, Florida.

ARNOLD H. POLLOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.