6-4-04

STATE OF FLORIDA
SUWANNEE RIVER WATER MANAGEMENT DISTRICT

SUWANNEE RIVER WATER MANAGEMENT DISTRICT,

DOAH Case No.: 03-0955

Permit No.: 2-99-00130

AT

DRA-Clos

Petitioner,

vs.

FLORIDA CONFERENCE OF THE ASSOCIATION OF SEVENTH DAY ADVENTISTS, INC.

Respondent.

FINAL AGENCY ORDER

The Governing Board of the Suwannee River Water Management District hereby adopts this as its Final Order.

Pursuant to notice, this matter was heard before the Division of Administrative Hearings by its designated Administrative Law Judge Donald R. Alexander on March 10, 2004, in Live Oak, Florida, who entered his Recommended Order on June 10, 2004.

The Petitioner Agency filed exceptions to the Recommended Order on June 17, 2004, a copy of which is attached as Exhibit A to this Final Order and by reference is made a part hereof. The Suwannee River Water Management District, by and through its Governing Board, after review of the entire record in this cause, adopts Petitioner's Exception 1 to the Finding of Fact in paragraph 29, in that the last portion of the sentence: "this means that the borehole had to be physically connected to the cave system fitting Hornsby Springs or produce water at the same quality as that discharging from the spring", is not contained within Title 21, Code of Federal Regulations (C.F.R.), 165.110; therefore, there is no competent substantial evidence to base that

portion of the Finding of Fact in paragraph 29. Also, the cite contained in paragraph 29 of the Findings of Fact is incorrect in that it should be 21, C.F.R., §165.110(2)(vi). The Suwannee River Water Management District further adopts the exception to paragraph 29 of the Findings of Fact of the Administrative Law Judge in that the language within Title 21, C.F.R. §165.110, is more appropriately a matter of law or conclusion of law.

The District further adopts the exception filed by Petitioner to the Findings of Fact in paragraph 30 of the Administrative Law Judge's Recommended Final Order and finds that the permit in question provides: "The permit is classified as unconfined Floridan Aquifer for privately owned bottled water plant". At no place in the permit is it a permit for consumptive use of "spring" water. In fact, the District finds that the permit states only that withdrawals are to be out of the Floridan Aquifer. Title 21, C.F.R., 165.110(2)(vi), has to do with how the water can be labeled for marketing and the only thing said regulation appears to prevent Respondent from doing is possibly marketing it under the term "spring water". Therefore, the Finding of Fact is premised on an incorrect reading of the Code of Federal Regulations, which is inapplicable in this circumstance; in any event, and therefore, there is no competent substantial evidence to support the Administrative Law Judge's Finding of Fact in paragraph 30 of his Recommended Order. Also, since the permit and 21, C.F.R., 165.110(2)(vi), are more closely matters of law, the exception of Petitioner to paragraph 30 is adopted.

The District further adopts the exception filed by Petitioner as to the Finding of Fact in paragraph 31, because the unrebutted testimony was that under Respondent's permit, withdrawals could be taken from the aquifer even if the spring was not flowing. Respondent offered no proof of non-availability of water. Mr. Dinges, on page 50 of the Trial Transcript, testified that his conclusion was that the aquifer is still available for withdrawal. Mr. Dinges'

unrebutted testimony was further that the District never issued a water shortage plan that required permit holders to stop pumping, (Page 57 of the Trial Transcript), nor did Mr. Dinges have any indication that the aquifer would not have the water to meet the needs of this permit, nor has he been provided that information. (Page 57 and 58 of the Trial Transcript). There is also unrebutted testimony of Mr. Hornsby that the fact that the spring ceased flowing would not mean that the Respondent couldn't pump pursuant to the permit in question. (Page 164 of the Trial Transcript and Petitioner's Exhibit 2). The District further finds that the Code of Federal Regulations, 165.110(2)(vi), did not prevent Respondent from using water, only possibly from labeling it spring water. Therefore, the language of the regulation would be more appropriately of a conclusion of law firstly. The Finding of Fact is unsupported in the record and 21, C.F.R., 165.110(2)(vi), does not provide language that would support the Finding of Fact. Therefore, the Finding of Fact in paragraph 31 is not based on substantial competent evidence.

The Agency adopts Petitioner's exception to the conclusion of law in paragraph 37 of the Recommended Final Order of the Administrative Law Judge as the regulation cited, 21, C.F.R., 165.110(2)(vi), had only to do with the labeling of the water as spring water and is immaterial and irrelevant in this matter. The permit in question does not speak to spring water. The uncontroverted evidence shows the permit could have been used but was not used and any non-use was a choice of Respondent. Therefore, as a matter of law, this does not constitute extreme hardship beyond Respondent's control.

The District rejects Respondent's first exception to the Findings of Fact in paragraph #10 in the Recommended Final Order of the Administrative Law Judge, as the finding of fact was based upon substantial competent evidence.

The District rejects Respondent's second exception to the Findings of Fact in paragraph

#11 in the Recommended Final Order of the Administrative Law Judge, as the finding of fact was based upon substantial competent evidence.

The District rejects Respondent's third exception to the Findings of Fact in paragraph #12 in the Recommended Final Order of the Administrative Law Judge, as the finding of fact was based upon substantial competent evidence.

The District rejects Respondent's fourth exception to the Findings of Fact in paragraphs #14, 15, 16 and 17 in the Recommended Final Order of the Administrative Law Judge, as the findings of fact were based upon substantial competent evidence.

The District rejects Respondent's fifth exception to the Findings of Fact in paragraphs #18, 19, 20, and 21 in the Recommended Final Order of the Administrative Law Judge, as the findings of fact were based upon substantial competent evidence.

The District rejects Respondent's sixth exception to the Findings of Fact in paragraph #21 in the Recommended Final Order of the Administrative Law Judge, as the finding of fact was based upon substantial competent evidence.

The District rejects Respondent's seventh exception to the Conclusion of Law in paragraph #36 in the Recommended Final Order of the Administrative Law Judge, as the finding of fact was based upon substantial competent evidence.

The District rejects Respondent's eighth exception to the Conclusion of Law in paragraph #38 in the Recommended Final Order of the Administrative Law Judge, as the finding of fact was based upon substantial competent evidence.

APPEARANCES

For Petitioner: Bruce W. Robinson, Esquire
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For Respondent: Patrice F. Boyes, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent's water use permit should be revoked for non-use of the permit for a period of two years or more.

PRELIMINARY STATEMENT

On February 4, 2003, Petitioner, Suwannee River Water Management District (District), filed an Administrative Complaint and Notice of Intent to Revoke Water Use Permit (Complaint) seeking to revoke Water Use Permit No. 2-99-00130, held by Respondent, Florida Conference of the Association of Seventh-Day Adventists, Inc., "for non-use of the water supply allowed by the permit for a period of two (2) years or more, pursuant to Florida Administrative Code [Rule] 40B-2.341, Fla. Stat. 120.60, and Fla. Stat. §373.243."

On March 4, 2003, Respondent filed its Petition for Formal Administrative Hearing (Petition), requesting a formal hearing to contest the District's proposed agency action. The matter was referred to the Division of Administrative Hearings on March 10, 2003, with a request that an Administrative Law Judge be assigned to conduct a hearing. By Notice of Hearing dated April 4, 2003, a final hearing was scheduled on May 20, 2003, in Live Oak, Florida. On April 23, 2003, the parties filed a Joint Stipulated Motion to Abate Proceedings

(Motion). The Motion was granted, and the matter was temporarily abated, pending efforts by the parties to settle the case. On July 29, 2003, the parties requested that the matter be rescheduled for final hearing. Thereafter, a final hearing was rescheduled for December 4, 2003, and then again to December 10, 2003, at the same location. On December 4, 2003, Respondent's unopposed Motion to Abate the case pending settlement negotiations was granted. On February 13, 2004, the parties advised that no settlement had been reached and requested that the matter be rescheduled. A final hearing was then scheduled on March 10, 2004, in Live Oak, Florida.

At the final hearing, Petitioner presented the testimony of Jon M. Dinges, District Director of Resource Management and accepted as an expert, and H. David Hornsby, a District Water Quality Analyst. Also, it offered Petitioner's Exhibits 1-7, which were received in evidence. Exhibits 6 and 7 are the depositions of Phil Younts and Randee Reynolds. Respondent presented the testimony of Jon M. Dinges, District Director of Resource Management; Rand Edelstein, Jr., a professional geologist and accepted as an expert; and Phil Younts, its executive director. Also, it offered Respondent's Exhibits 1-18. All were received in evidence except Exhibits 15 and 16. Exhibits 6-11 are the depositions of Jerry A. Scarborough, William H. Kirk, H. David Hornsby, David Still, Jon M. Dinges, and Rand Edelstein, Jr. Finally, the undersigned took official recognition of Section 373.243, Florida Statutes (2002),[1] Florida Administrative Code Rule 40B-2.341, 21 C.F.R. § 165.110, and the Summary of CS/HB 4060, as adopted by the House of Representatives in 1972.

The Transcript of the hearing was filed on April 15, 2004. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to May 14, 2004. The same were timely filed by the parties, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

a. Background

1. The District is a state agency, charged with the responsibility of issuing water use permits under Chapter 373, Florida Statutes, and Florida Administrative Code Chapter 40B-2, for the geographic area under its statutory jurisdiction. Northern Alachua County is within that geographic jurisdiction.

2. Respondent is a Florida corporation with offices at 700 Northwest Cheeota Avenue, High Springs, in northern Alachua County. It owns approximately 700 acres in High Springs (west of Interstate Highway 75) on which it operates a church retreat and summer camping and recreational facility known as Camp Kulaqua. The property surrounds, and is contiguous to, Hornsby Spring, a first-order magnitude spring (having a flow rate of 100 cubic feet per second [CFS] or greater) which, under normal conditions, discharges into the nearby Santa Fe River. Hornsby Spring is one of 296 documented springs within the District's jurisdiction.

3. After receiving an overture from a representative of a private water bottling company, on September 28, 1999, Respondent filed an application for a General Water Use Permit in Township 7 South, Range 17 East, Section 26, in High Springs. In its application, Respondent represented that it desired a daily allocation of 2,000,000 gallons; that it intended to install two 12-inch wells, each having a capacity of 1,400 gallons per minute, just east of, and upgradient from, Hornsby Spring; and that all water withdrawals would be used in conjunction with a privately-owned commercial spring water bottling facility to be located on its property. The application also represented that the facility would employ 36 persons and operate 168 hours per week.

4. The application was reviewed by a former District hydrogeologist, William H. Kirk. During the review process, and in response to Mr. Kirk's request for more information, Respondent provided a comparison of the requested allocation with the overall flow of Hornsby Spring. This was because Mr. Kirk was concerned that the requested allocation was "a bit high," and he wanted to ensure that the issuance of the permit would not cause harm to, or adversely affect, the water resources.

5. Under a professional guideline that Mr. Kirk used, if the applicant could show that the cumulative amount being withdrawn was to be less than ten percent of what the available data showed to be the mean spring flow, the District would consider it to be "an acceptable impact." Notwithstanding Mr. Kirk's use of this guideline, the District points out that there is no District rule or policy sanctioning the ten percent rule, and at hearing it denied that this standard is used by the District in assessing water use applications. Further, the Permit itself does not refer to a relationship between spring flow and the size of the allocation. Even so, this analysis was considered by Mr. Kirk in determining whether Respondent had given reasonable assurance that the spring would not be impacted.

6. In its response to the request for additional information, Respondent reduced its requested allocation to 750,000 gallons per day and indicated that if a bottling plant were to be constructed on its property, approximately 700,000 gallons of the total allocation would be consumed in "bulk transfer and bottling," with the remainder for camp use. More specifically, Respondent indicated that it would allocate 490,000 gallons per day for bulk transport, 210,000 gallons per day for spring bottling water, and 50,000 gallons per day for incidental uses at its property.

7. By reducing the allocation from 2,000,000 gallons per day to 750,000 gallons per day, Respondent's requested average daily allocation represented only 0.4 percent of the average daily spring flow as measured over the last 28 years. The reduced allocation satisfied Mr. Kirk's concern that Respondent demonstrate a reasonable demand and a reasonable need for that allocation, and he recommended approval of the application.[2]

8. On February 25, 2000, the District approved the application and issued Water Use Permit No. 2-99-00130 (Permit).[3] The Permit authorizes an average daily withdrawal of 0.7500 million gallons per day (750,000 gallons per day) or a maximum daily withdrawal and use of 0.7500 million gallons per day with an annual allocation not to exceed 273.750 million gallons (273,750,000 gallons) per calendar year in conjunction with the operation of a privately-owned water bottling plant. The Permit expires on February 25, 2020.

9. After the Permit was issued, under the regulatory process in place, Respondent was required first to obtain a permit for a temporary test well which would be used to collect information concerning the site of the proposed activity, and to then file an application for permits authorizing the construction and operation of the two 12-inch production wells.

10. The Permit contains a number of conditions, two of which require a brief comment. First, Condition No. 2 provides that "[t]his permit is classified as unconfined [F]loridan aquifer for privately owned bottled water plant." This means that all water withdrawals must be made from the unconfined Floridan aquifer, as opposed to the spring head of Hornsby Spring. (Respondent's proposed siting of its two production wells 660 yards east of the spring is consistent with this provision.) Second, Condition No. 4 provides that "[t]he permittee shall submit daily pumpage records on a monthly basis to the [District]." Pumpage reports are filed by permittees so that the District can determine whether the permit is actually being used, and if so,

to ensure that the amount of water being withdrawn under the permit does not exceed the authorized allocation. As it turned out, pumpage reports were never filed by Respondent. (However, the record shows that the District has never strictly enforced this requirement for any permittee.)

11. In late 2002, the District staff undertook a review of the nine water bottling permit holders within its jurisdiction, including Respondent. That category of permit holders was selected for review because of the small number of permits and the limited resources of the District staff. (In all, the District has probably issued several thousand permits to other types of users.) On February 4, 2003, the District served its Complaint under the authority of Sections 120.60 and 373.243, Florida Statutes, and Florida Administrative Code Rule 40B-2.341. As grounds for revoking the permit, the District alleged that there was "non-use of the water supply allowed by the permit for a period of two (2) years or more."

12. Although Respondent contends that it should have been given an opportunity to correct the nonuse allegation before the Complaint was issued, nothing in the Administrative Procedure Act or District rules requires that this be done. Until the issuance of the Complaint against Respondent in early 2003, and similar Complaints against eight other permit holders at the same time, the District had never invoked this statutory provision.[4] There is no evidence to support Respondent's contention that the Complaints were issued for "purely political reasons."

13. On March 4, 2003, Respondent requested a formal hearing challenging the District's proposed action. In the parties' Pre-Hearing Stipulation, the issues have been broadly described as follows: whether Section 373.243(4), Florida Statutes, is to be strictly or liberally construed; whether Respondent's nonuse is based upon extreme hardship for reasons beyond its control; and whether the District is equitably estopped from permit revocation. (According to the District,

even if the Permit is revoked, such revocation is without prejudice to Respondent reapplying for, and receiving, another permit so long as it meets all applicable requirements.)

b. Equitable Estoppel

14. Respondent first contends that the District is estopped from revoking its Permit on the theory that, under the circumstances here, the doctrine of equitable estoppel applies. For that doctrine to apply, however, Respondent must show that the District made a representation as to a material fact that is contrary to a later asserted position; that Respondent relied upon that representation; and that the District then changed its position in a manner that was detrimental to Respondent. See, e.g., Salz v. Dep't of Admin., Div. of Retirement, 432 So. 2d 1376, 1378 (Fla. 3d DCA 1983).

15. The District issued Respondent's Permit on the condition that Respondent operate in conformity with all pertinent statutes and regulations. This finding is consistent with language on the face of the Permit, which states that the Permit "may be permanently or temporarily revoked, in whole or in part, for the violation of the conditions of the permit or for the violation of any provision of the Water Resources Act and regulations thereunder."

16. Respondent relied on the District's representation that it could use the Permit so long as it complied with all statutes and regulations. In reliance on that representation, in addition to staff time, after its Permit was issued, Respondent expended "somewhere around" $70,000.00 to $74,000.00 for conducting water quality testing; sending cave divers underground to ascertain the correct location of the portion of the aquifer on which to place its production wells; drilling a 6-inch test well in August 2000; obtaining the City of High Springs' approval in March 2000 for industrial zoning on a 10-acre tract of land on which to site a "water plant"; and engaging the services of a professional who assisted Respondent in "seeking out businesses and getting the

right qualifications of the spring water to make sure that it was a marketable water."

17. The District has never asserted anything different from its original position: that if Respondent complied with all statutes and rules, it could continue to lawfully make water withdrawals under its Permit. The issuance of the Complaint did not represent a change in the District's position. Because a change in position in a manner that was detrimental to Respondent did not occur, the necessary elements to invoke the doctrine of equitable estoppel are not present.

c. Was the Permit Used?

18. A preliminary review by District staff indicated that Respondent had never filed the daily pumpage reports on a monthly basis and had never requested permits authorizing the construction of the two 12-inch production wells. These preliminary observations were confirmed at final hearing, along with the fact that Respondent has never entered into an agreement with a water bottling company (although draft agreements were once prepared); that Respondent has never constructed a water bottling facility; and that no operations were ever conducted under the Permit. Therefore, the evidence supports a finding that Respondent did not use its Permit for the two-year period after it was issued, as alleged in the Complaint. Respondent's contention that the evidence fails to support this finding belies the evidence of record.

19. In an effort to show that it actually used the Permit, Respondent points out that in August 2000 it applied for, and received a permit to construct, an unmetered 6-inch test well in association with its General Water Use Permit. (Respondent sometimes erroneously refers to the test well as a test production well. This is incorrect as the well is a test well, and not a production well.) After the test well was installed, at some point Respondent says it began withdrawing approximately 50,000 gallons per day of water from that well for incidental uses

associated with the operation of Camp Kulaqua.[5] These withdrawals were made on the assumption that the test well permit fell under the broad umbrella of the General Water Use Permit. (Respondent also has a permitted 6-inch diameter well and an unregulated 4-inch well on its premises, both of which are used for water supply needs at Camp Kulaqua.)

20. It is true, as Respondent asserts, that its Permit authorized incidental withdrawals of up to 50,000 gallons per day for unspecified uses at Camp Kulaqua. However, these withdrawals are authorized under the General Water Use Permit and not the test well permit. The two permits are separate and distinct. On the one hand, a test well is intended to be temporary in nature and used only for the purpose of test well development and collecting information regarding the height of the aquifer and water quality at the site of the proposed activity. Conversely, withdrawals for any other purpose, even incidental, must be made from the production wells, which are only authorized by the General Water Use Permit.

21. Before a test well can be used for normal consumptive purposes, the permit holder must seek a modification of the permit to include it as a part of its general water use permit. Here, no such modification was sought by Respondent, and no authorization was given by the District. Therefore, Respondent's incidental water uses associated with its test well cannot be counted as "uses" for the purpose of complying with the use requirement in Section 373.243(4), Florida Statutes. In light of the District's credible assertion to the contrary, Respondent's contention that it is common practice to lawfully withdraw water from a test well for incidental consumptive purposes has been rejected. (It is noted, however, that the District has not charged Respondent with violating the terms of its test well permit.)

d. Extreme Hardship

22. Under Section 373.243, Florida Statutes (which was enacted in 1972), the District is

authorized to revoke a water use permit "for nonuse of the water supply allowed by the permit for a period of 2 years." However, if the user "can prove that his or her nonuse was due to extreme hardship caused by factors beyond the user's control," revocation of the permit is not warranted.

23. The phrase "extreme hardship caused by factors beyond the user's control" is not defined by statute or rule. In the context of this case, however, the District considers an extreme hardship to occur under two scenarios. First, if the aquifer level has dropped so low due to drought conditions that a permit holder cannot access the water through its well, its nonuse is excusable. Alternatively, if an emergency order has been issued by the District directing permit holders (including Respondent) to stop pumping due to certain conditions, an extreme hardship has occurred. (Presumably, a severe water shortage would precipitate such an order.) In this case, the District issued a water shortage advisory, but not an emergency order, due to a "severe drought," indicating that users could still pump water, but were encouraged to voluntarily reduce their usage. This advisory remained in effect from the summer of 1998 until the spring of 2003, when a severe drought ended. However, no emergency order was ever issued by the District.

24. Respondent contends that its nonuse was due to an extreme hardship caused by factors beyond its control. More specifically, it argues that a severe drought occurred in Alachua County during the years 1998-2003, and that under these conditions, federal regulations prevented it from withdrawing water for bottling purposes, which was the primary purpose for securing a permit. Further, even if it had withdrawn water during these drought conditions, such withdrawals could have adversely impacted Hornsby Spring and constituted a violation of a District requirement that water resources not be adversely impacted. Because an investment of several hundred thousand dollars was required to drill and install the two production wells, Respondent contends it was not financially prudent to make that type of investment and begin

operations until normal spring conditions returned. These contentions are discussed in greater detail below.

25. Around September 7, 1999, a representative of a water bottling company first approached Respondent about the possibility of the two jointly operating a water bottling plant and/or transporting water in bulk from Respondent's property. Prompted by this interest, less than three weeks later, Respondent filed its application for a water use permit (although at that time it did not mention on the application that off-site bulk transfers would occur), and a permit was eventually issued in February 2000. Later, and through a professional firm it employed, Respondent had discussions with representatives of several bottling companies, including Great Springs Waters of America (Great Springs) and Perrier Group of America. Apparently, these more serious discussions with a potential suitor did not take place until either late 2000 or the spring of 2001.

26. Periodic measurements taken by District staff at Hornsby Spring reflected natural drought conditions from April 2000 to April 2003. As noted earlier, this was the product of a "severe drought" which took place between the summer of 1998 and the spring of 2003; the drought was one of a magnitude that occurs only once in every 50 to 100 years. During the years 2000 through 2002, the spring had zero flow or was barely flowing much of the time.[6] Had Respondent pumped water during 20 out of the 24 months after the Permit was issued, it could have potentially violated the requirement that it not harm Hornsby Spring. This fact is acknowleged by a District witness who agreed that if the "spring is not flowing, . . . [pumping] would have an [adverse] impact." Even as late as October 2003, the spring had tannic discoloration caused by the lengthy drought conditions. The parties agree, however, that there is no water shortage in the District at the present time.

27. To illustrate the difficulty that it experienced in obtaining a joint venture partner for water bottling purposes, Respondent established that in the spring of 2001, a Great Springs representative visited the site when the spring was "barely flowing." For obvious reasons, Respondent could not "bring a party there who would want to enter into a business [agreement]" under those conditions. These same conditions remained in effect during most of the two year period.

28. The District points out, however, that even though the spring was low or barely flowing, so long as the aquifer itself was not too low, Respondent could still withdraw water from the aquifer, since Condition 2 of the Permit authorizes withdrawals from the aquifer, and not the spring. The reason for this apparent anomaly is that when a spring ceases to flow, the aquifer has simply dropped below the level of the spring vent; even under these circumstances, however, there may still be a substantial quantity of water in the aquifer available for pumping.

29. Assuming that it could still lawfully pump water when the spring was dry or barely flowing without causing adverse impacts to the spring, Respondent was still subject to federal regulations which govern the bottling of spring water. See Title 21, Part 165, C.F.R. For spring water to be marketed as bottled "spring water," 21, C.F.R., § 165.119(2)(vi), requires that the water "be collected only at the spring or through a bore hole tapping the underground formation feeding the spring."

30. The regulation goes on to provide that "[i]f spring water is collected with the use of an external force [such as by a pump], water must continue to flow naturally to the surface of the earth through the spring's natural orifice." This regulation obviously does not prohibit Respondent from pumping water, since that authority lies within the District's exclusive jurisdiction.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

32. Because Respondent's Permit is at risk, the District must prove by clear and convincing evidence that the allegations in its charging document are true. Thus, it must prove that Respondent did not use its Permit during the two-year period after it was issued. At the same time, Respondent has the burden of establishing, if necessary, entitlement to the statutory defense of "extreme hardship" under Section 373.243(4), Florida Statutes.

34. The District's authority for issuing the Complaint is found in Section 373.243, Florida Statutes, which provides as follows:

> The governing board or the department may revoke a permit as follows:
>
> (4) For nonuse of the water supply allowed by the permit for a period of 2 years or more, the governing board or the department may revoke the permit permanently and in whole unless the user can prove that his or her nonuse was due to extreme hardship caused by factors beyond the user's control.

35. In addition, Florida Administrative Code Rule 40B-2.341 provides that

> The Board may, at any time after notice and hearing, revoke a permit, in whole or in part, temporarily or permanently pursuant to the provisions of s. 373.243 and s. 120.60(7), Florida Statutes.

36. By clear and convincing evidence, the District has established that Respondent's Permit was not used between the time it was issued in February 2000 and February 2003, when the Complaint was filed. Because there was "nonuse of the water supply allowed by the permit for a period of 2 years or more," the District has met its burden of proving that the allegations are true. For the reasons set forth in Findings of Fact 19-21, the undersigned has rejected Respondent's contention that water drawn from the test well constitutes "use" under its General

Water Use Permit.

37. The underlying allegations in the Complaint have been proven, and Respondent has failed to establish entitlement to the statutory defense of extreme hardship caused by factors beyond its' control, namely, a severe drought.

38. Respondent still could have used water from the Floridan Aquifer for bottled water and therefore, Respondent has failed to establish entitlement to the statutory defense of extreme hardship caused by factors beyond its' control.

39. Finally, for the reasons set forth in Findings of Fact 14-17, the doctrine of equitable estoppel does not apply. In view of the conclusion in paragraph 37, it is unnecessary to reach the other issues raised by Respondent.

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Permit No. 2-99-00130, issued by Suwannee River Water Management District to Phil Younts on behalf of the Florida Conference of the Association of the Seventh Day Adventists, Inc., is revoked based upon non-use exceeding two (2) years pursuant to Fla. Stat.§373.243 and 40B-2.341, F.A.C.

DONE AND ENTERED this 10th day of August, 2004, in Live Oak, Suwannee County, Florida.

SUWANNEE RIVER WATER MANAGEMENT DISTRICT

Attest: _____ BY: _____
Secretary

William D. Pope
Chairman of the Governing Board
9225 County Road 49
Live Oak, Florida 32060
Telephone: 386/362-1001

(Seal)

ENDNOTES

1/ Unless otherwise noted, all future references are to Florida Statutes (2002).

2/ Because of the relatively small allocation being sought by Respondent, the permit was reviewed and approved by the staff, rather than by the District Governing Board. In this case, Mr. Kirk made a recommendation to the Director of Resource Management for approval, who then gave final approval for the issuance of the permit.

3/ The Permit was actually jointly issued to Phil Younts, who is the executive director of the corporation, and Respondent. However, the Administrative Complaint was filed against Phil Younts, as the permit holder. At hearing, the parties agreed that the Florida Conference of the Association of Seventh-Day Adventists, Inc., is the proper Respondent in this proceeding.

4/ Of the eight other permit holders against whom a Complaint was issued, one voluntarily relinquished its permit, while in return for dismissal of the charges, the other seven agreed to modify their permits to eliminate the right to transfer water by bulk transport off their property.

5/ The test well was unmetered until October 2003, and there is nothing of record to indicate how Respondent determined that its withdrawals from the test well prior to that date amounted to around 50,000 gallons per day. In any event, according to Respondent's expert, the water was used for the "purpose of construction" of the well itself, "water supply for the [campground] swimming pool," and a "small volume" for water sampling purposes.

6/ The record reflects that only a handful of the 296 springs within the District's jurisdiction experienced the same degree of impact from the drought that Hornsby Spring did.