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STATE OF FLORIDA
NORTHWEST FLORIDA WATER MANAGEMENT DISTRICT

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DIVISION OF
ADMINISTRATIVE
HEARINGS

NORTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,

Petitioner,

ORDER No.: SWP-05000000-05-01

vs.

DOAH CASE NO. 05-0859 *DRA
Closed*

FRANK MARCOTTE,

Respondent.

_____ /

FINAL ORDER

THIS CAUSE came before the Governing Board of the Northwest Florida Water Management District (the District) pursuant to Sections 120.569 and 120.57(1), Florida Statutes for the purpose of issuing a final order in the above-styled proceeding, including consideration of the Administrative Law Judge's (ALJ's) Recommended Order and the exceptions filed by the Respondent, Frank Marcotte.

On September 20, 2005, the ALJ issued his Recommended Order, a copy of which is attached hereto and incorporated herein by reference as Exhibit A. On October 5, 2005, the Respondent, Frank Marcotte, served his Exceptions To Recommended Order and filed same with the Division of Administrative Hearings instead of filing with District. For purposes of this proceeding the District treats the Respondent's exceptions as timely and appropriately filed. The matter came before the District Governing Board on October 27, 2005.

RECOMMENDED ORDER

The ALJ found and concluded by a preponderance of the evidence that the District had established that Respondent is impounding water without a permit; that the drain pipe under Old Bethel Road is unserviceable and needs to be replaced; that the impoundment of water threatens the integrity of Old Bethel Road; and that corrective action should be taken.

STATEMENT OF THE ISSUE

The issue is whether the Respondent should take corrective action by opening and removing a drain gate and dewatering an impoundment known as Lake Susan in Okaloosa County, Florida.

STANDARDS OF ADMINISTRATIVE REVIEW

Section 120.57(1), Florida Statutes authorizes an agency to reject or modify an administrative law judges's conclusions of law and interpretations of administrative rules over which it has substantive jurisdiction. Accordingly, the referring agency has the primary responsibility of interpreting statutes and rules within its regulatory jurisdiction and expertise. Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987, 989 (Fla. 1985); Florida Public Employee Council, 79 v. Daniels, 646 So.2d 813, 816 (Fla. 1st DCA 1994).

Subsection 120.57(1) also prescribes that an agency may not reject or modify the findings of fact of an administrative law judge "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence". Accord. Florida Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987); Wash & Dry Vending Co. v. Dept. Of Business Regulation, 429 So.2d 790 (Fla. 3d DCA 1983).

A reviewing agency may not reweigh the evidence presented at the DOAH formal hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992). Such matters are evidentiary issues to be determined by the administrative law judge, as trier of fact. Heifitz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); Wash & Dry Vending Co., 429 So.2d at 792.

**RULING ON RESPONDENT'S EXCEPTIONS
TO RECOMMENDED ORDER**

The Respondent states eight (8) Exceptions To Recommended Order. They are considered as follows:

1. The District rejects Respondent's first exception. See Statement of the Issue, above. To the extent this exception involves findings of fact and conclusions of law, the ALJ's findings of fact and conclusions are based upon competent substantial evidence and a correct statement of law.

2. The District rejects Respondent's second exception. The condition of the pipe underlying Old Bethel Road is a factual issue and the ALJ's findings are based upon competent substantial evidence. Likewise, the ALJ's finding that the issue as to responsibility for replacement of the pipe does not obviate the requirement for an authorizing permit to impound waters of the state is a correct statement of fact and law and based upon competent substantial evidence. Further, the ALJ's finding that the District did not involve itself in the dispute between the Respondent and the County is supported by competent substantial evidence.

3. The District rejects Respondent's third exception. This exception appears to reargue for different corrective action than that recommended by the ALJ. To the extent that the exception appears to challenge a finding of fact or conclusion of the law, such findings and conclusions are based upon competent substantial evidence and a correct statement of law.

4. The District rejects Respondent's fourth exception. This exception appears to reargue issues at hearing and seeks to have the District reweigh evidence. To the extent that the exception appears to challenge a finding of fact or conclusion of the law, such findings and conclusions are based upon competent substantial evidence and a correct statement of law.

5. The District rejects Respondent's fifth exception. This exception appears to reargue for different corrective action than that recommended by the ALJ. To the extent that the exception appears to challenge a finding of fact or conclusion of the law, such findings and conclusions are based upon competent substantial evidence and a correct statement of law.

6. The District rejects Respondent's sixth exception. This exception appears to reargue for different corrective action than that recommended by the ALJ. To the extent that the exception appears to challenge a finding of fact or conclusion of the law, such findings and conclusions are based upon competent substantial evidence and a correct statement of law.

7. The District rejects Respondent's seventh exception. This exception appears to reargue for different corrective action than that recommended by the ALJ. To the extent that the exception appears to challenge a finding of fact or conclusion of the law, such findings and conclusions are based upon competent substantial evidence and a correct statement of law.

8. The District rejects Respondent's eighth exception. This exception appears to reargue for different corrective action than that recommended by the ALJ. To the extent that the

exception appears to challenge a finding of fact or conclusion of the law, such findings and conclusions are based upon competent substantial evidence and a correct statement of law.

ORDER

Having ruled on all the Exceptions To Recommended Order and being otherwise fully advised, IT IS ORDERED:

A. The Recommended Order (Exhibit A) is adopted in its entirety and incorporated herein by reference.

B. The charges in the administrative complaint are sustained.

C. Within fifteen days from the date of this Final Order, the Respondent shall begin dewatering the impoundment known as Lake Susan at the maximum rate considered safe by Respondent's engineer.


D. Within forty-five days from the date of this Final Order, Respondent shall have Lake Susan completely dewatered and shall completely remove the drain gate to ensure that the impoundment remains completely dewatered.

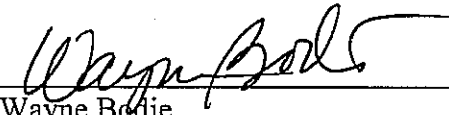
Any party to this proceeding has the right to seek judicial review of the Final Order pursuant to Section 120.68, Florida Statutes, by the filing of a Notice of Appeal pursuant to Rule 9.110, Florida Rules of Appellate Procedure, with the District's Agency Clerk, District Headquarters, 81 Water Management Drive, Havana, Florida 32333; and by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the First District Court of Appeals. The Notice of Appeal must be filed within 30 days from the date this Final Order is filed with the District's agency clerk.

DONE AND ORDERED this 27th day of October, 2005 at District Headquarters, 81

Water Management Drive, Havana, Florida.

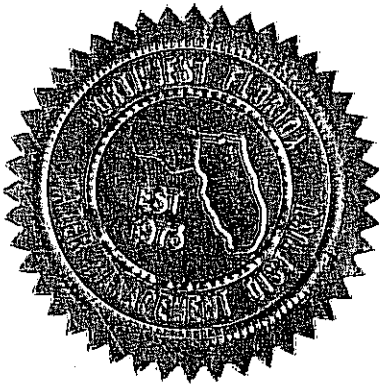
**NORTHWEST FLORIDA WATER
MANAGEMENT DISTRICT**

Attest 
Agency Clerk

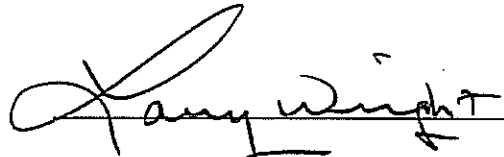
BY: 
Wayne Bodie

Chairman of the Governing Board
81 Water Management Drive
Havana, Florida 32333
Telephone: 850-539-5999

(Seal)



I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail to D. MICHAEL CHESSER, ESQUIRE, Chesser & Barr, P.A., 1201 Eglin Parkway, Shalimar, Florida 32579, and KEVIN X. CROWLEY, ESQUIRE, PENNINGTON, MOORE, WILKINSON, BELL & DUNBAR, P.A., 215 South Monroe Street, 2nd Floor, Tallahassee, Florida 32301 and the HONORABLE DONALD R. ALEXANDER, DIVISION OF ADMINISTRATIVE HEARINGS, The Desoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060 this 27th day of October, 2005.


Larry R. Wright, Agency Clerk