SOUTH FLORIDA WATER MANAGEMENT DISTRICT, a water management district organized and existing under the laws of the State of Florida,

Plaintiff,

v.

THE STATE OF FLORIDA, AND THE TAXPAYERS, PROPERTY OWNERS AND CITIZENS WITHIN THE JURISDICTION OF THE SOUTH FLORIDA WATER MANAGEMENT DISTRICT, INCLUDING NONRESIDENTS OWNING PROPERTY OR SUBJECT TO TAXATION THEREIN AND OTHERS CLAIMING ANY RIGHTS, TITLE OR INTEREST IN THE CERTIFICATES OF PARTICIPATION HEREIN DESCRIBED, OR TO BE AFFECTED IN ANY WAY THEREBY,

Defendants,

_____/

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL DISTRICT OF FLORIDA, IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 2008-CA-031975

CONCERNED CITIZENS' MEMORANDUM OF LAW IN OPPOSITION TO VALIDATION OF "COPs"

Defendants **Christopher Shupe, Miller Couse, Carey Soud, John Ahern, John C. Perry, Sr.,** and **Concerned Citizens of the Glades, Inc.,** (collectively, the "Concerned Citizens") object to and oppose the validation of the "certificates of participation" ("COPs") proposed to be issued by or on behalf of the South Florida Water Management District (the "District") and respectfully request that this Court deny the request by the District for validation of the proposed COPs.

The Concerned Citizens object to and oppose validation of the proposed COPs on the following grounds:

1. The COPs will be invalid, if issued, because they have not been approved by vote of the District electors as required by Article VII, Section 12 of the Constitution of the State of Florida.

2. The COPs will be invalid, if issued, because the Legislature of the State of Florida has not approved the River of Grass Acquisition Project, as required by Article VII, Subsection 11(f) of the state constitution.

3. The COPs cannot be validated because the District has not established a trust indenture under which a trustee will certify the proper expenditure of the proceeds of the COPs, as required by Subsection 75.04(2) of Florida Statutes.

4. The COPs will be invalid, if issued, because the District has not complied with the notice requirements contained in the "Everglades truth-in-borrowing" provisions of Section 373.45924 of Florida Statutes.

5. The COPs will be invalid, if issued, because they will violate the public-purpose requirements of Article VII, Section 10, of the state constitution.

Additionally, the Concerned Citizens adopt and incorporate herein all arguments in the brief by New Hope Sugar Company and Okeelanta Corporation entitled "Opposition to Validation of Bonds and Motion to Set Discovery and Hearing Schedule of New Hope Sugar Company and Okeelanta Corporation" served on December 11, 2008.

STANDING

Section 75.07 of the Florida Statutes provides that "any property owner, taxpayer, citizen or person interested may become a party to the action by moving against or pleading to the complaint at or before the time set for hearing." The Concerned Citizens all have standing under these criteria.

Defendants Christopher Shupe, Miller Couse, and Carey Soud are all property owners and citizens within the jurisdiction of the District. They are also the officers and directors of Defendant Concerned Citizens of the Glades, Inc. Defendant John Ahern is an elected Councilman with the City of Moore Haven and is a property owner and citizen within the jurisdiction of the District. Defendant John C. Perry, Sr. is a property owner and citizen within

the jurisdiction of the South Florida Water Management District. Defendant Concerned Citizens of the Glades, Inc., is a not-for-profit corporation organized and operating under Florida law, with its principal address within the boundaries of the District. The corporation and all its members are persons interested in the outcome of the River of Grass Acquisition Project, and the corporation was established by its members to oppose the project.

The Concerned Citizens therefore have standing to move against and plead to the District's Complaint in this action and, thereby, become parties to this action. The Concerned Citizens served their collective Answer to the Complaint on January 23, 2009.

SCOPE OF INQUIRY

The scope of this Court's inquiry in the COPs validation proceeding is limited to determining (i) whether the District has the authority to issue the COPs, (ii) whether the purpose of the obligation is legal, and (iii) whether the COPs issuance complies with the requirements of law. *City of Gainesville v. State*, 863 So. 2d 138 (Fla. 2003); *Roper v. City of Clearwater*, 796 So. 2d 1159 (Fla. 2001); *Keys Citizens for Responsible Government, Inc. v. Fla. Keys Aqueduct Authority*, 795 So. 2d 940 (Fla. 2001). The questions of law and fact to be decided in the bond validation also include whether the proposed COPs and the obligations and contractual relationships to be created by the COPs and their related instruments, directly or indirectly, principally or collaterally, are within the authority of law. *State v. Citrus County*, 157 So. 4 (Fla. 1934).

This Court must consider (i) whether the District observed the proper procedure in the exercise of its power to issue the bonds, (ii) whether the proposed issue and the obligations to be created are authorized by statute, and (iii) whether the issuance violates the Florida Constitution.

City of Ft. Myers v. State, 117 So. 97 (Fla. 1928); *State v. Citrus County*, 157 So. 4 (Fla. 1927); *State v. Town of Bellaire*, 170 So. 434 (1936).

ARGUMENT

I. The COPs will be invalid, if issued, because they have not been approved by vote of the District electors as required by Article VII, Section 12 of the Constitution of the State of Florida.

The Constitution of the State of Florida imposes substantial burdens and requirements on governmental bodies issuing the long-term debt – rightfully so. One such requirement is that governmental debt that will burden property owners by virtue of being payable from property taxes must first be approved by the voters. Specifically, Subsection 12(a) of Article VII of the state constitution provides the following:

> **SECTION 12. Local Bonds.**—Counties, . . . special districts and local governmental bodies with taxing powers may issue bonds [and] certificates of indebtedness . . . payable from ad valorem taxation and maturing more than 12 months after issuance only:
> (a) to finance or refinance capital projects authorized by law and *only when approved by vote of the electors* . . . . [Emphasis added.]

The underpinning of the District's COPs, like all COPs, is a rather intricately-woven group of financing instruments. At its core, the District will be making "Basic Lease Payments" under its "Master Lease Purchase Agreement" (the "Master Lease"). *See* form of Master Lease (attached as Exhibit B to District Resolution No. 2008-1027, which in turn is Exhibit A to the Complaint). Those Basic Lease Payments are tantamount to, and are at least equal to, the principal and interest coming due on the COPs. *See* § 3.3, Master Lease. The holders of the COPs will receive payments of the principal and interest on the COPs, when due, by way of the Basic Lease Payments to be made by the District to the trustee under the Master Trust Agreement (Exhibit C to District Resolution No. 2008-1027, which is Exhibit A to the Complaint).

Therefore, if the District's Basic Lease Payments are to be "payable from ad valorem taxation" for purposes of Subsection 12(a) of Article VII, the COPs will be valid only if approved by District voters. Furthermore, if referendum approval is required, the holding of a referendum is a condition precedent to filing the Complaint. § 75.03, Fla. Stat. (2008). The Complaint must "set out . . . the holding of an election and the result when an election is required . . . ." § 75.04(1), Fla. Stat. (2008).

Thus, the question before this Court is whether the underlying Basic Lease Payments to be made by the District, from which the holders of the COPs will receive their principal and interest payments, when due, are "payable from ad valorem taxation" for purposes of Subsection 12(a) of Article VII. If they are, the COPs will be invalid, if issued, and the Court must deny the District's request for validation.

An analysis of Florida case law shows that COPs financings have been held not to require referendum approval under Subsection 12(a). However, the District's proposed COPs, which are the subject of this action, are distinguishable on the facts of this financing and are subject to the referendum-approval requirement of Subsection 12(a).

A. Florida Case Law.

The Supreme Court of Florida decided long ago that a "mortgage on the court house" was tantamount to an indirect pledge of ad valorem taxing power and, therefore, would be valid only if approved by referendum as required by Subsection 12(a) of Article VII. *Nohrr v. Brevard County Educational Facilities Authority*, 247 So. 2d 304 (Fla. 1971). In *Nohrr*, the court held

that "revenue bonds secured by a mortgage on the physical properties to be financed could not be issued by public bodies unless approved at an election."[1] *Nohrr*, 247 So. 2d at 310.

In addition to the "no mortgage" doctrine, the Supreme Court in 1982 invalidated a bond financing that (i) pledged non-ad valorem revenue as security for the bonds, but (ii) was accompanied by a covenant to the bondholders that had "the effect of requiring increasing ad valorem taxation." The court said that the bonds would likewise require a referendum under Subsection 12(a) of Article VII.

In *County of Volusia v. State*, 417 So. 2d 968 (Fla. 1982), the county requested validation of bonds, the payment for which was secured by the county's pledge of all legally available, unencumbered non-ad valorem revenues of the county. However, the county also entered a covenant with the bondholders "to do all things necessary to continue receiving the [non-ad valorem] revenues . . . ." *Volusia County*, 417 So. 2d at 969. The covenant was part of the security for the bonds. *Id.*

Although the court acknowledged its previous cases in which it validated non-ad-valorem-revenue bonds that would have only an "incidental effect" on ad valorem taxation, it decided that the county had gone too far in *Volusia County*. *Id.* at 971. The court concluded that the covenant "to do all things necessary to continue to receive the various [pledged non-ad valorem] revenues . . . will inevitably lead to higher ad valorem taxes during the life of the bonds, which amounts to" a pledge of ad valorem taxes for purposes of Subsection 12(a). *Id.* at 972.

The upshot is that the Florida Supreme Court will find bonds and other certificates of indebtedness, such as the District's COPs, invalid for failure to be approved at referendum if the

[1] The Supreme Court has since receded somewhat from this no-mortgage doctrine, but only when the government agency issuing the debt has no ad valorem taxing power. *Wilson v. Palm Beach County Housing Authority*, 503 So. 2d 893 (Fla. 1987).

financing (i) contains a right on the part of bondholders to foreclose a mortgage on public property or (ii) involves covenants resulting "inevitably" in higher property taxes.

Faced with these two precedents, the Supreme Court considered COPs financings in 1990. The case was *State v. School Board of Sarasota County*, 561 So. 2d 549 (Fla. 1990), a copy of which is attached hereto as **Attachment A**. It involved three separate cases consolidated for review pertaining to COPs financings for the school boards in Sarasota County, Collier County, and Orange County.

The COPs financings in those cases involved largely the same structure as the COPs proposed by the District. The school board documents declared that "money from several sources, including ad valorem taxation, will be used" to service the debt. *Sarasota County* 561 So. 2d at 551. Similarly, the District admits that its payments to service its COPs debt "may include ad valorem revenues." Complt. ¶11.

In *Sarasota County*, the court said the following about whether Subsection 12(a) applies to COPs financings:

> What is critical to the constitutionality of the bonds is that, after the sale of the bonds, a bondholder would have no right, if [funds] were insufficient to meet bond obligations . . . to compel by judicial action the levy of ad valorem taxation. . . . [T]he governing bodies are not obligated nor can they be compelled to levy any ad valorem taxes in any year.
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> In *State v. Brevard County*, 539 So. 2d 461 (Fla. 1989), we interpreted the "maturing more than 12 months after issuance" language of Article VII, Section 12. The *Brevard* agreements provided traditional lease remedies and preserved the county's right, in adopting its annual budget, to terminate the lease without further obligation. We held that Article VII, Section 12 was not violated. As in *Brevard*, the agreements here give the [school] boards *freedom to decide anew each year, burdened only by lease penalties, whether to appropriate funds for the lease payments*. [Emphasis added.]

Sarasota County, 561 So. 2d at 552. The court further addressed the issue in *Volusia County*, *supra*, and concluded that the constitutional defect in the bonds in that case did not apply to the COPs financing because in *Sarasota County* there were "no interrelated promises which will inevitably lead to an increase in ad valorem taxation." *Id.* at 553.

Finally, the court addressed the no-mortgage rationale of *Nohrr* and decided that it does not apply to COPs financings:

> There is no mortgage with right of foreclosure. Here the bondholders are limited to lease remedies and *the annual renewal option preserves the boards' full budgetary flexibility*. [Emphasis added.]

Id. at 553.

Consequently, in the face of *Nohrr* and *Volusia County*, the Supreme Court made its crucial distinction: because the school boards had "full budgetary flexibility" and the "freedom to decide anew each year, burdened only by lease penalties, whether to appropriate funds" to service the COPs debt, the school boards' COPs did not require a referendum under Subsection 12(a) of Article VII.

As we will see below, the facts of the District's COPs are entirely distinguishable from the facts of the COPs financings in *Sarasota County* and, therefore, must first be approved at referendum as required by Subsection 12(a) of Article VII of the state constitution.

B. The District will not have "freedom to decide anew each year" whether to pay its debt.

While the Supreme Court of Florida was satisfied that the school boards in *Sarasota County* had the "freedom to decide anew each year" whether to pay their COPs debt, the District will not be so lucky. Once it purchases the massive amount of land with its COPs proceeds in excess of $1.0 billion, the forces of law and public policy will strip the District of any option to elect in any year simply not to appropriate funding to service its debt.

The River of Grass Acquisition Project is not described in the Complaint, but Resolution No. 2008-1109 adopted by the District's Governing Board on November 13, 2008, describes the project as the purchase of approximately 187,000 acres of land from U.S. Sugar Corporation. The total principal amount of COPs authorized by the Governing Board on October 9, 2008, in its Resolution No. 2008-1027 (Complt., Exhibit A) is not limited. The resolution does state in its section 3 that the District was "initially" authorizing up to $2.2 billion in debt.

Of that $2.2 billion in "initial" debt, some $1.34 billion will be used, purportedly, to purchase the 187,000 acres from U.S. Sugar.

By any measure, the magnitude of the land purchase is staggering.

Furthermore, once the purchase is closed, U.S. Sugar is allowed to remain on the property and continue its sugar-cane operations for at least six years, maybe longer.

Against this backdrop, will the District have the crucial "freedom to decide anew each year" whether to pay the principal and interest on its COPs? Hardly.

The agreements underpinning the COPs say that, if the District elects in any one year not to appropriate funding for its Basic Lease Payments, neither the trustee under the Master Trust Agreement nor the owners of the COPs can compel the District either to levy ad valorem taxes or to appropriate funds. Complt., ¶¶11-12. However, if and when the District were to exercise its option not to pay its debts, the trustee has the unconditional right under the Master Lease to terminate the Master Lease (and all separate "Schedules to Lease" thereunder), to evict the District if the Governing Board otherwise does not surrender possession, and to occupy, possess, and lease and sublease all the lands acquired by the District with COPs proceeds. Master Lease, §§ 3.5, 3.6. The trustee otherwise can sell and liquidate the "Facilities" located on the acquired lands. *Id.*

There we have it. If those principal and interest payments on the COPs get too fiscally burdensome or otherwise pesky for any reason, the District has its option to walk away. There will be no legal right to compel the Governing Board either to appropriate funds or to levy ad valorem taxes. The District will have what the *Sarasota County* court deemed so crucial to avoid the referendum requirement of Subsection 12(a) of Article VII: the "freedom to decide anew each year" whether to pay its COPs creditors.

Or will it?

The Governing Board will hardly be able to just walk away from its River of Grass Acquisition Project. Legal and public-safety and public-policy imperatives will not let the District walk away. The River of Grass Acquisition Project is a project that, in parlance currently in vogue, is too big to fail.

As the complaint indicates, the District has a "lawful mandate" to restore and clean up the Everglades. Complt., ¶24. The District is undertaking the River of Grass Acquisition Project "to continue its mandate." Complt., ¶26. Acquiring the land and "assets" of U.S. Sugar is part of the District's five-year plan. The massive land acquisition is a "major component" of the Everglades restoration, for which the District has a lawful mandate. Complt., ¶30. Indeed, acquisition of the U.S. Sugar property rises to a "due and reasonable necessity" for the District. *Id.*

When the District approved its COPs resolution on October 9, 2008 (Exhibit A to the Complaint), attached as Exhibit A to the resolution was a staff report from three senior District staff members. The staff report lays out just how indispensable the acquired land will be for Everglades restoration and the public-safety and public-policy imperatives that support the acquisition:

- The Herbert Hoover Dike is a "threat to public health, safety, and property" because "piping" or internal erosion from seepage is occurring in the dike. If water levels in Lake Okeechobee are not controlled, there is "potential to cause catastrophic life safety, economic and environmental consequences" if a breach occurs. Staff Report, pgs. 4, 5.

- The additional lands acquired through the River of Grass Acquisition Project will allow additional water storage outside of the lake, subsequently reducing the threat. Staff Report, pg. 5.

- The acquired lands will allow the District to manage the movement of vast amounts of water from north of Lake Okeechobee and from the lake itself to the southern Everglades using a highly-managed system of reservoirs and treatment facilities. Staff Report, pg. 7.

- The River of Grass Acquisition Project is "an amazing opportunity" to advance Everglades restoration efforts by improving the quantity, quality, timing, and distribution of water supporting the Everglades ecosystem – and to do so to a degree not possible with projects planned to date. Staff Report, pg. 10.

- The River of Grass Acquisition Project goes "far beyond the expectations of any restoration project contemplated to date and holds promise to restore much of the historic connection between the Everglades marshes and Lake Okeechobee." Staff Report, pg. 11.

- For the first time in nearly two decades of restoration planning, the District has the opportunity "to go beyond the limited capabilities of isolated storage and wells in small surface-water reservoirs" and "to achieve large-capacity surface storage with the capability of moving [the District] much closer to meeting the needs of the natural system and reconnecting the areas of the region to a greater extent than would be possible otherwise." Staff Report, pg. 16.

- Improving the marsh/watershed linkage "has been faced with large uncertainties without a proven and practical means to these ends – until the 'River of Grass Acquisition Project.'" Staff Report, pg. 17.

- The acquisition of the land "will serve as a foundation for storing and sustaining Everglades marsh habitats and the fish and wildlife that require these resources to thrive." Staff Report, pg. 18.

- The land acquisition has the potential to produce a quantum jump in treatment capacity and water quality improvement moving [the District] far beyond treatment capabilities online or planned to date. Staff Report, pg. 19.

The District's Staff Report contains a collection of public-policy and public-safety imperatives that render it simply impossible for the District to exercise any fictional "freedom to

decide anew each year" whether to pay its COPs creditors or lose possession and control of the land to be acquired with the COPs proceeds. From the standpoint of public policy and public safety, defaulting on the District's COPs debt in some future year is utterly unthinkable.

There are legal imperatives as well, both statutory and judicial. First, state statutes unquestionably make Everglades restoration the *uber* priority for the District.

- The Everglades Forever Act (§ 373.4592, Fla. Stat.) requires the District to undertake interim and long-term actions to restore the Everglades. *See also* Rule 62-302.540(2)(a), Fla. Admin. Code.

- The Legislature has approved the "Everglades Protection Area Tributary Basins Conceptual Plan for Achieving Long-Term Water Quality Goals Final Report" dated March, 2003. Furthermore, the Legislature has mandated that the pre-2006 projects identified in the Long-Term Plan (which do *not* include the River of Grass Acquisition Project) must be implemented by the District without delay. § 373.4592(3)(b), Fla. Stat.

- The Legislature has authorized and mandated that the District implement the Everglades Construction Project. § 373.4592(4)(a), Fla. Stat.

- The Legislature has determined that "the Everglades Construction Project represents by far the largest environmental clean up and restoration program of this type ever undertaken, and the returns from substantial public and private investment must be maximized so that the available resources are managed responsibly." § 373.4592(1)(h), Fla. Stat.

- The District is mandated to operate the Everglades Construction Project to provide additional inflows to the Everglades Protection Area (§ 373.4592(4)(b)2, Fla. Stat.) and to maximize the water quantity benefits and improve the hydro-period of the Everglades Protection Area. § 373.4592(4)(b)3, Fla. Stat.

- The Legislature has authorized the District "to proceed expeditiously with implementation of the Everglades Program." The Legislature intends that "plans and programs for improving the water quality reaching the Everglades" be expedited. § 373.4592(1), Fla. Stat.

In addition to the above statutory priorities, the District is operating under a 1991 settlement agreement in the case of *United States v. South Florida Water Management District*, Case No. 88-1886-CIV-HOEVELER; Memorandum of Opinion and Order Entering Settlement Agreement as Consent decree, 847 F. Supp. 1567 (S.D. Fla. 1992), *aff'd in part and rev'd in*

part, remanded, 28 F. 3rd 1563 (11th Cir. 1994); *cert. denied*, 115 S. Ct. 1956 (1995). The settlement agreement contains a fundamental commitment by the United States, the State of Florida, and the District to achieve the water quality and the water quantity needed to preserve and restore the unique flora and fauna of Everglades National Park and the Loxahatchee National Wildlife Refuge. Consequently, Everglades restoration efforts by the District are not only compelled by sound public policy and urgent public-safety issues, but also by a binding consent decree entered into by the federal government, the state, and the District some 18 years ago.

The settlement agreement compels an ambitious strategy to restore and preserve the Everglades ecosystem. It establishes interim and long-term total phosphorous limits for the Everglades National Park and the Loxahatchee National Wildlife Refuge.

In light of the public-policy, public-safety, and legal imperatives for the District's Everglades-restoration efforts, it is simply fiction to suggest that the District would ever have the "freedom to decide anew each year" whether it wants to pay its debt and keep the lands it acquires with the COPs proceeds. By the District's own admission, the tens of thousands of acres – initially, 187,000 acres – are crucial to the biggest priority in the District's agenda. It is entirely unforeseeable that any circumstances will arise in the future under which the District could or would walk away from the property.

Thus, this case is entirely distinguishable from the COPs validated by the Supreme Court of Florida in *Sarasota County*, *supra*. There is and there will be no such freedom for the District to opt out of this debt.

C. Without dispute, the source of payment of the COPs is ad valorem taxation.

The District's Complaint was a bit coy about the source of revenue that the District plans to use or will have to use to pay the principal and interest coming due on the COPs. In paragraph

11 of the Complaint – in perhaps the shortest sentence in the Complaint – the District admits that, of the funds it will appropriate each year to pay the debt, "such funds may include ad valorem revenues."

The District was less coy in its fiscal year 2009 budget document. On page 129 of the budget document (**Attachment B**) the District admits that

> As with the first COPs, issued in November 2006, the District would fund the debt service on this [2009] COP issuance using both the ad valorem property tax revenues committed to [the comprehensive Everglades restoration plan] annually, and the millage that is levied within the Okeechobee basin to implement the provisions of the Everglades Forever Act.

The debt service on a projected COPs issue of $1.3 billion is not a small number. The budget document admits that, annually, its payment to the COPs holders "could be as much as $108 million." Attachment B, pg. 129.

D. The District's COPs require referendum approval under Subsection 12(a) of Article VII.

The District cannot rely on *Sarasota County* for an exemption to the referendum requirements of Subsection 12(a) of Article VII. The case here is simply distinguishable from the school board financings in *Sarasota County*.

The District cannot walk away, ever, from this debt. Once acquired, this property would be indispensable to the biggest single long-term legal, environmental, and operational priority that the District has and will have for decades. Once acquired, this property is indispensable to the District's compliance with the 1991 Consent Decree, *supra*. Once acquired, this property will be indispensable to efforts to remove the threat to persons and property of a catastrophic failure of the Herbert Hoover Dike.

Sarasota County provides no precedent whatsoever for the District's use of COPs without approval by the voters to finance the River of Grass Acquisition Project. This Court must deny

validation of the COPs for failure of the District to obtain voter approval as required by Subsection 12(a) of Article VII of the state constitution.

II. The COPs will be invalid, if issued, because the Legislature of the State of Florida has not approved the River of Grass Acquisition Project, as required by Article VII, Subsection 11(f) of the state constitution.

The state constitution imposes a second constraint on debt obligations issued by the District. The constitution requires that, when an agency of the state such as the District wants to issue revenue bonds, the agency cannot do so unless and until the Legislature has approved the particular project or facility to be financed by the agency's debt. Specifically, Subsection 11(f) of Article VII of the state constitution reads as follows:

> (f) Each project, building, or facility to be financed or refinanced with revenue bonds issued under this section shall first be approved by the Legislature by an act relating to appropriations or by general law.

Revenue bonds "issued under" that section of the state constitution are described in Subsection 11(d):

> (d) Revenue bonds may be issued by the state or its agencies without a vote of the electors to finance or refinance the cost of state fixed capital outlay projects authorized by law, and purposes incidental thereto . . . .

In paragraph 26 of its Complaint, the District declares that the "Initial Project" to be funded with the proceeds from the sale of its COPs is the River of Grass Acquisition Project.

Accordingly, this Court must determine whether Subsection 11(f) of Article VII applies to the District's proposed COPs and, if so, whether the District has obtained legislative approval of its proposed land purchase. The test for whether the subsection applies is two-pronged: whether the District is a "state agency" for purposes of Subsection 11(d) of Article VII and whether the COPs are "revenue bonds" for purposes of Subsection 11(f) of Article VII. If the two-pronged test is met, Subsection 11(f) will, indeed, apply to the District's COPs, and the

Court will have to deny validation, because the District has ignored this requirement and made no attempt to obtain approval by the Legislature of its proposed land acquisition.

As the following analysis shows, Subsection 11(f) of Article VII does indeed apply to the COPs.

A. The District is a "state agency" for purposes of Subsection 11(d) of Article VII.

The requirement for legislative approval pertains only to projects being financed with revenue bonds issued by the state and its agencies. *See* Art. VII, §§ 11(d) and (f), Fla. Const. There is little argument that the District is not a state agency for purposes of Section 11 of Article VII.

First, *the District characterizes itself* as "an agency of the State of Florida." In fact, the District characterizes itself – repeatedly – as an agency of the state in the very documents before this Court:

- In the first sentence of the Master Lease, and again in the first sentence of the form of "Ground Lease" (respectively, Exhibits B and D to Governing Board Resolution No. 2008-1027, which in turn is Exhibit A to the Complaint), the District recites that one of the parties to those agreements is "the Governing Board, acting as the governing body of the South Florida Water Management District ..., *an agency of the State of Florida* and a water management district." [Emphasis added.]

- In the Master Lease the District defines itself in Section 1.1 (pg. 6) as the "District," which means "the South Florida Water Management District, *an agency of the State of Florida* and a water management district ...." [Emphasis added.]

- The same definition of the District, likewise declaring it "an agency of the State of Florida," is contained in the Master Trust Indenture (pg. 6), which is Exhibit C to the Governing Board resolution found at Exhibit A to the Complaint.

- In Section 2.10 of the Master Lease (pg. 18), the Governing Board "represents, covenants, and warrants" that it is "the governing body of the District, *an agency of the State of Florida* ...." [Emphasis added.]

- In the prospectus – usually called an "official statement" – published by the District in 2006 to provide disclosure of material information to prospective buyers of the District's first certificates of participation (*see* Complaint, ¶31), the District refers repeatedly to itself as an agency of the State of Florida (*See* pp. 2 and 46 and similar definitions and representations as described above in the forms of master lease agreement, ground lease, and trust indenture contained in the exhibits to the 2006 official statement). Excerpts of the 2006 official statement are attached hereto as **Attachment C**.

Therefore, in the context of issuing long-term debt instruments, including specifically these proposed COPs, the District unequivocally deems itself to be an agency of the state.

The District is quite correct to conclude that it is a state agency. The statutory scheme governing the five water-management districts in Florida is replete with provisions that treat the five districts as garden-variety state agencies. For example:

- Like nearly all state agencies, the five water-management districts were created by the Legislature, by general law. § 373.069, Fla. Stat.

- Like the heads of other state agencies, the members of the governing boards of the five districts are all appointed by the Governor. § 373.073(1), Fla. Stat.

- Like the heads of other state agencies, the members of the governing boards of the five districts must all be confirmed by the Senate. *Id.*

- Similarly to other state agencies, the appointment of the executive director of each district is subject to approval by the Governor and confirmation by the Senate. § 373.079(4)(a), Fla. Stat.

- The budget for each water management district is submitted each year to the Executive Office of the Governor for approval or disapproval, in whole or in part. § 373.536(5), Fla. Stat.

- As with other state agencies, the District is a "state agency" subject to periodic "sunset review" by the Legislature under the Florida Government Accountability Act. § 11.905(1)(f), Fla. Stat.

Chapter 20 of Florida Statutes sets forth the organizational structure for the executive branch of state government. In Section 20.03, "agency" is defined as follows:

> (11) "Agency," *as the context requires*, means an official, officer, . . . department, division, bureau, board, section, or other unit or entity of government. [Emphasis added.]

The definition of "agency" in Chapter 20, therefore, would include water management districts as "another unit or entity of government." The Legislature expressly declares in the definition that a state agency will include a unit or entity of government "as the context requires."

In the context of borrowing, the District clearly deems itself to be an agency of the state.

The thrust of the statutes governing the structure and control of water-management districts, therefore, is that they are all treated as state agencies, at least for purposes of incurring debt, such as the District's proposed COPs.

The Concerned Citizens could not find judicial opinions that address the question of whether water-management districts are state agencies specifically for purposes of Subsection 11(f) of Article VII. The only two cases that come close are *State v. Florida Hurricane Catastrophe Fund Finance Corporation*, 699 So. 2d 685 (Fla. 1997) and *State v. Inland Protection Financing Corporation*, 699 So. 2d 1352 (Fla. 1997). Both cases were bond validation cases before the Supreme Court. The *Hurricane Catastrophe Fund* case alluded in its footnote 4 to arguments by the state that the bonds would violate Subsections 11(a) and 11(d) of Article VII. 699 So. 2d at 687. Apparently, the legislative-approval requirement of Subsection 11((f) was not argued by the state. The court validated the bonds, but the opinion does not address expressly the question of whether the corporation was a "state agency" for purposes of Section 11.

In *Inland Protection Financing Corporation*, that corporation was held not to be a "state agency" and its bonds were held not to be "state bonds" for purposes of Section 11 of Article VII. 699 So. 2d at 1357. In its footnote 4, the court declared, somewhat curiously, that it had likewise decided in *Hurricane Catastrophe Fund* that the corporation in that case was not a state agency. One is hard pressed to find any indication in its opinion that it did indeed make that

finding. Regardless, neither opinion sets forth any reasoning for such findings, and neither opinion addressed whether Subsection 11(f) applied to the bonds in those cases.

Consequently, neither case governs this Court in this bond-validation proceeding. The corporations in those cases are both limited-purpose corporate entities created by the Legislature solely to finance two state special-purpose funds. The fund in the first case was to provide hurricane relief. The second fund was created for clean up of petroleum-storage tanks throughout the state. The court's decisions regarding these limited-purpose financing corporations hardly constitute precedent for the state's five water-management districts.

A more useful and instructive case is *Grimshaw v. South Florida Water Management District*, in which Judge Donald Middlebrooks concluded, with extensive analysis, that the District is "an arm of the State of Florida," not just a corporation or political subdivision of the state, for purposes of the Eleventh Amendment of the United States Constitution. *Grimshaw v. South Florida Water Management District*, 195 F. Supp. 2nd 1358 (M.D. Fla. 2002) a copy of which is attached hereto as **Attachment D**. In its analysis, the court listed seven other cases in which the District was found to be a state agency. *Id.* at 1360 (fn. no. 1). The court acknowledged that Florida courts "have shown some inconsistency" in characterizing the District. For example, the District has been found not to be a state agency for purposes of the Drug Free Workplace Act, found at Section 112.0455 of Florida Statutes. *Id.* at 1364. However, *Grimshaw* otherwise sets forth compelling factual rationale and legal authority to deem the District to be a state agency for most purposes, but especially for purposes of Subsection 11(f).

In summary, analysis of pertinent statutes, analogous court cases, and the characterizations the District itself applies to itself gives this Court no basis to conclude that the District is anything other than an agency of the state for purposes of Section 11 of Article VII.

B. The COPs are "revenue bonds" for purposes of Subsection 11(f) of Article VII.

In setting forth the requirements and limitations for bonds issued by the state and its agencies, Section 11 of Article VII creates a dichotomy between (i) bonds pledging the state's full faith and credit and (ii) revenue bonds. The dichotomy results in the District's COPs being "revenue bonds" for purposes of the legislative-approval requirement in Subsection 11(f).

If the state is to issue bonds pledging "the full faith and credit" of the state – that is, pledging the taxing power of the state – there must first be approval of the bonds by the voters. Art. VII, §11(a), Fla. Const. All other types of bonds "issued by the state or its agencies" are revenue bonds, which are defined in Subsection 11(d) as bonds that "shall be payable solely from funds derived directly from sources other than state tax revenues." In other words, if the state or a state agency issues bonds payable from state tax revenues, for which the state pledges its full faith and credit, the bonds are what commonly are known as "full faith and credit" or "general obligation" bonds. They are governed by Subsections 11(a), (b), and (c). Otherwise, the bonds are "revenue bonds" and are governed by Subsections 11(d), (e), and (f).

The District's proposed COPs are revenue bonds, not full-faith-and-credit bonds. The full faith and credit of the state are expressly, emphatically, and repeatedly not pledged for the payment of the District's proposed COPs. Complt., ¶13; Master Trust Agmt., §3.1; Master Trust Agmt., Exh. A, Pg. A-2. Instead, the District's proposed COPs are payable, as contemplated by Subsection 11(d), "solely from funds derived directly from sources other than state tax revenues." Although some of its annual operating budget is funded by grants from the state, the District has no substantial access to or control over revenue sources that would be considered "state tax revenues." The ad-valorem-tax revenues that water-management districts receive cannot be "state tax revenues" as contemplated by Subsection 11(d) because the state itself is not

allowed to levy ad valorem taxes. Art. VII, §1(a), Fla. Const. Therefore, the ad-valorem-tax revenues that the District will use to make its "Basic Lease Payment" under the Master Lease – which will constitute the payment of principal and interest on the COPs debt – will be funds from sources "other than state tax revenues."

Consequently, Subsection 11(d) of Article VII deems the District's proposed COPs to be "revenue bonds," and the legislative-approval requirement under Subsection 11(f) unquestionably applies to the COPs.

C. The Legislature of Florida has not approved the River of Grass Acquisition Project, as required by Subsection 11(f) of Article VII of the state constitution.

Subsection 11(f) of Article VII says that *each* project that a state agency undertakes with revenue-bond financing must "first be approved by the Legislature" either by general law or by appropriations act.

The District is a state agency.

The District's proposed COPs are revenue bonds.

The "River of Grass Acquisition Project" is in every respect a *project.* It is characterized by the District as the "River of Grass Acquisition *Project.*" It is a land-acquisition project standing on its own. It is not acquisition of right-of-way or a construction site that is merely incidental to some other construction project.

As declared by the District, the COPs are being issued "to finance and refinance certain capital projects, programs and works as approved by the District from time to time (the 'Project')." Complt. ¶5. The District has a mandate to restore the Everglades ecosystem. Complt. ¶26. Pursuant to that mandate, it is undertaking projects, one of which is the "River of Grass Acquisition Project." *Id.* That land acquisition is to be the "Initial *Project.*" *Id.* The

land-acquisition project is the first project among many projects that are to be financed with the COPs. *Id.*

In summary, all the elements of Subsection 11(f) are met. Therefore, the legislative-approval requirement applies to the COPs.

The District has not pleaded compliance with or intent to comply with the requirement of Subsection 11(f). Furthermore, there is no evidence that the District complied with the requirement, but simply has not pleaded it. One scours the statutes and comes up empty handed.

In contrast, it is easy to find state agencies that comply with Subsection 11(f) and obtain general-law approval of their specific projects. For example, the Broward County Expressway Authority had express approval under general law to construct the Sawgrass Expressway, the Deerfield Expressway, and the I-595/Port Everglades Expressway. § 348.243(1)(b), Fla. Stat. (2008). The Orlando-Orange County Expressway Authority has general law authorization to construct and finance its Northwest Beltway Part A, its Western Beltway Part C, its Wekiva Parkway, its Maitland Boulevard Extension, and its Northwest Beltway Part A. §§ 348.7543, 348.7544, 348.7545, 348.7546, and 348.7547, Fla. Stat. (2008).

A number of District projects, including Everglades-restoration projects, have been approved by the Legislature by general law, but not the River of Grass Acquisition Project. For example, the Legislature has expressly approved the Everglades Construction Project under Subsection 373.4592(4)(a) of Florida Statutes. The Legislature has approved the Lake Okeechobee Watershed Construction Project under Subsection 373.4595(3)(b) of Florida Statutes. The pre-2006 projects identified by the District in its "Everglades Protection Area Tributary Basins Conceptual Plan for Achieving Long-Term Water Quality Goals Final Report," dated March of 2003 (the "Long-Term Plan"), have also been approved. § 373.4592(3)(b), Fla.

Stat. However, the land-acquisition project to be funded by the COPs is not included in those pre-2006 projects in the Long-Term Plan. Indeed, the Long-Term Plan contains no mention whatsoever of the River of Grass Acquisition Project.

Finally, in Section 373.4592 of Florida Statutes, known as the "Everglades Forever Act," the Legislature describes its "Everglades Program," but limits it to "the program of projects, regulations, and research provided by this section . . . ." § 373.4592(2)(h), Fla. Stat. The District's proposed purchase is nowhere to be found among the "program of projects" in that act.

In summary, there is no legislative approval whatsoever in general law for the River of Grass Acquisition Project. Furthermore, there is no reference of any kind to the River of Grass Acquisition Project in an appropriations act.

Therefore, if the COPs are issued, they will be invalid because the land-acquisition project which they will finance has not been approved by the Legislature as required by Subsection 11(f) of Article VII of the Constitution of the State of Florida.

III. The COPs cannot be validated because the District has not established a trust indenture under which a trustee will certify the proper expenditure of the proceeds of the COPs, as required by Subsection 75.04(2) of Florida Statutes.

Instruments of debt, such as COPs, must be issued in strict compliance with the provisions of the statute authorizing their issuance; otherwise they will not be validated. *Bay County v. State*, 157 So. 1 (Fla. 1934); *Davis v. Ryan*, 151 So. 416 (Fla. 1933); *Merrell v. City of St. Petersburg*, 109 So. 315 (Fla. 1926); *McSwain v. Special Road and Bridge Dist. No. 2, De Soto County*, 88 So. 479 (Fla. 1921). The proposed COPs issuance is not in strict compliance with subsection 75.04(2) of the Florida Statutes because the documents attached to the Complaint fail to impose on the trustee any contract duty to certify to the District or any other party as to the proper expenditure of the proceeds of the COPs.

A. Subsection 75.04(2) of the Florida Statutes.

Subsection 75.04(1) of the Florida Statutes sets forth generally what is required to be included in a bond-validation complaint. Subsection 75.04(2) applies to independent special districts, such as the District, and requires the following:

> (2) In the case of an independent special district as defined in s. 218.31(7), the complaint shall allege the creation of a trust indenture established by the petitioner for a bonded trustee acceptable to the court *who shall certify the proper expenditure of the proceeds of the bonds.* [Emphasis added.]

The District is an independent special district as defined in subsection 218.31(7) of the Florida Statutes. Subsection 218.31(7) defines a special district as "an independent special district as defined in s. 189.403(3)." Subsection 189.403(3) provides in part that a district that includes more than one county, such as the District, is an independent special district. Further, the Division of Housing and Community Development, Florida Department of Community Affairs, is in charge of registering all special districts in Florida. §189.412, Fla. Stat. (2008). The Division of Housing and Community Development maintains an "official list of special districts online". This list classifies the South Florida Water Management District as an "independent" special district.

To comply strictly with the statutes, specifically Subsection 75.04(2), the District is required to do two things. First, the District must allege in its Complaint the creation of a trust indenture established by the District. Second, the trust document must include language requiring the trustee to certify whether the expenditure of the proceeds of the COPs has been proper. The District made the required allegation in the Complaint; however, the District failed to include any trustee-certification requirement in either the Master Trust Agreement or in any other COPs document.

B. The District's Complaint for Validation.

Presumably in an attempt to comply with Subsection 25.04(2), the District alleges in Paragraph 20 of its Complaint the following:

> 20. By resolution, and as required by law, the Governing Board is authorized and required to choose a qualified banking institution to serve as Trustee which is authorized to do business in Florida, accepts trusts under Florida law, and has the ability to accept and administer the trust created by the Master Trust Agreement, and *such Trustee shall be obligated to certify to the proper expenditure of the proceeds of the COPs* and be a fiduciary for the certificate holders. [Emphasis added.]

Although Paragraph 20 alleges that "such Trustee shall be obligated to certify to the proper expenditure of the proceeds of the COPs," there is no mention whatsoever in the form of trust indenture or in the other documents and exhibits attached to the Complaint that the Trustee will "be obligated" to make such a certification.

In that respect, the Complaint is entirely in error and misleading.

The Florida Supreme Court has found it perfectly acceptable to leave blanks in trust indenture documents, to be filled in at the time of execution. *Dorman v. Highlands County Hospital*, 417 So. 2d 253 (Fla. 1982); *GRW Corp. v. Dep't of Corrections*, 642 So. 2d 718 (Fla. 1994). For instance, in *Dorman*, the appellants claimed that that complaint did not evidence a "present" creation of a trust indenture. The court explained that the bond resolution, and its definition of "trustee," stated that one of three banks will be designated as the trustee in a subsequently adopted resolution. The 107-page trust indenture contained numerous blanks, which the court presumed would be filled in at the time of execution. The court found that, with respect to the documents, everything necessary had been done. *Dorman*, 417 So. 2d at 254.

In *GRW Corp.*, the court validated a lease-purchase agreement as a government-financing mechanism for the construction of a correctional facility. GRW argued that the lease-purchase

agreement could not be validated because the Department of Corrections had left some of the provisions blank and had failed to include certain required provisions. *GRW Corp.*, 642 So. 2d at 720. The Florida Supreme Court rejected the argument, finding instead that there was authority to enter into the lease-purchase agreement, the purpose of the agreement was legal, and the proceedings authorizing the obligation were proper. The court explained that some requirements that needed to be included in the lease-purchase agreement had not yet been determined, and that some other requirements were included in a management agreement that was not part of the financing instrument before the court for review. *Id.* at 721.

The court validated the bonds in *Dorman* and *GRW Corp.*, but the District's financing documents are distinguishable from those cases. Here, it is not just a matter of blanks yet to be filled in. Subsection 75.02(2) requires that the District create a trust indenture under which the trustee – whatever institution is hired for that job – is contractually obligated to monitor and oversee the expenditure of COPs proceeds – in excess of $1 billion just for this land-acquisition project – and to certify eventually that the proceeds were spent properly. Absent a provision in the trust indenture, no trustee will go to the time, expense, and effort to do that work.

Neither the District's form of Master Trust Agreement (Exhibit C to the Governing Board's Resolution 2008-127, which is Exhibit A to the Complaint) nor any other documents pertaining to the District's COPs impose any such contract obligation on the eventually-to-be-hired trustee. The trustee's responsibilities are set forth in Article VI of the Master Trust Agreement, but all of Article VI is silent as to any duty to certify to the proper use of the COPs proceeds. The other documents likewise are all silent.

Although in its paragraph 20 the Complaint alleges that which Subsection 75.04(s) of Florida Statutes requires, the allegation is demonstrably false. The District has not complied with Subsection 75.04(2). The validation of the COPs must, therefore, be denied.

IV. The COPs will be invalid, if issued, because the District has not complied with the notice requirements contained in the "Everglades truth-in-borrowing" provisions of Section 373.45924 of Florida Statutes.

The proposed COPs issuance is not in strict compliance with Section 373.45924 of Florida Statutes because the District has not published the required truth-in-borrowing statement. For that reason, validation of the COPs must be denied.

Section 373.45924 of Florida Statutes sets forth three requirements of the District when it "proposes" to borrow or otherwise finance with long-term debt a project for restoration of the Everglades under the Everglades Forever Act (§ 373.4592, Fla. Stat. (2008))[2]. Specifically, subsection 373.45924(2) requires the following:

> (2) Whenever the South Florida Water Management District proposes to borrow or to otherwise finance with debt any fixed capital outlay projects or operating capital outlay for purposes pursuant to s. 373.4592, it shall develop the following documents to explain the issuance of a debt or obligation:
>
> (a) A summary of outstanding debt, including borrowing.
>
> (b) A statement of proposed financing, which shall include the following items:
> 1. A listing of the purpose of the debt or obligation.
> 2. The source of repayment of the debt or obligation.
> 3. The principal amount of the debt or obligation.
> 4. The interest rate on the debt or obligation.
> 5. A schedule of annual debt service payments for each proposed debt or obligation.

[2] The Concerned Citizens do not contest that the District is *authorized by statute* to do a project such as the River of Grass Acquisition Project; however, as set forth in section II above, the Concerned Citizens assert that the River of Grass Everglades Project itself has not been *approved by the Legislature* because, among other reasons, it is not specifically included in section 373.4592 of the Florida Statutes. The "Everglades Long-Term Plan" and "Everglades Program" are described and set forth (or otherwise referenced) in subsections 373.4592(3) and (4) and would most definitely include the River of Grass Acquisition Project, had it been approved by the Legislature as required by Subsection 11(f) of Article VII of the state constitution.

(c) A truth-in-borrowing statement, developed from the information compiled pursuant to this section, in substantially the following form:

The South Florida Water Management District is proposing to incur $ (insert principal) of debt or obligation through borrowing for the purpose of (insert purpose). This debt or obligation is expected to be repaid over a period of (insert term of issue from subparagraph (b)5.) years from the following sources: (list sources). At a forecasted interest rate of (insert rate of interest from subparagraph (b)4.), total interest paid over the life of the debt or obligation will be $ (insert sum of interest payments).

The truth-in-borrowing statement shall be published as a notice in one or more newspapers having a combined general circulation in the counties having land in the district. Such notice must be at least 6 inches square in size and shall not be placed in that portion of the newspaper where legal notices and classified advertisements appear.

The District is at a point well beyond "proposing" to finance its land purchase, yet to the knowledge of the Concerned Citizens the District has not yet published the truth-in-borrowing statement required under Subsection (2)(c), above.

Chapter 97-258, Laws of Florida, codified in part at Section 373.45924 of Florida Statutes, provides increased oversight and accountability of the District in its responsibility to implement Everglades programs and activities. The law created a joint legislative committee on Everglades oversight and increased financial accountability of the District by requiring the District to disclose certain information when it proposes to incur debt.

Clearly, the Legislature intended that the District would publish the truth-in-borrowing statement prior to the COPs validation hearing. The District is most definitely past the "proposing to borrow" stage.

One purpose of this COPs validation proceeding is for this Court to settle – literally for once and for all – whether the proceedings authorizing the District's COPs were valid. If the Legislature has required the District to publish a truth-in-lending statement, and the District has

not published the statement, then the District has not strictly complied with a material procedural requirement of Florida Statutes. The COPs cannot be validated.

V. The COPs will be invalid, if issued, because they will violate the public-purpose requirements of Article VII, Section 10, of the state constitution.

The Concerned Citizens adopt and incorporate herein the argument in the brief by New Hope Sugar Company and Okeelanta Corporation entitled "Opposition to Validation of Bonds and Motion to Set Discovery and Hearing Schedule of New Hope Sugar Company and Okeelanta Corporation" served on December 11, 2008, pertaining to the violation of the public-purpose requirements of Article VII, Section 10 of the state constitution if the proposed COPs are issued. The Concerned Citizens reserve their right to assert a defense based on Section 10 of Article VII, both at the hearing on this action and on appeal.

RESPECTFULLY SUBMITTED this 3rd day of February, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by overnight courier to the following this 3rd day February, 2009:

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relevant to show the extent of the wounds which the victim suffered which was in turn relevant to the issue of premeditation. While this claim was preserved for appellate review, it is well established that counsel need not raise every nonfrivolous issue revealed by the record. *See Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). One of appellate counsel's responsibilities is to "winnow out" weaker arguments on appeal and to focus upon those most likely to prevail. *Smith v. Murray*, 477 U.S. 527, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). This Court has consistently held that simply because photographs are offensive or such as "might tend to inflame the jury," they are nevertheless admissible as long as they are relevant. *Henderson v. State*, 463 So.2d 196 (Fla.), *cert. denied*, 473 U.S. 916, 105 S.Ct. 3542, 87 L.Ed.2d 665 (1985). Photographs must only be excluded when they demonstrate something so shocking that the risk of prejudice outweighs its relevancy. *Alford v. State*, 307 So.2d 433 (Fla.1975), *cert. denied*, 428 U.S. 912, 96 S.Ct. 3227, 49 L.Ed.2d 1221 (1976). With respect to this argument, Provenzano falls short on both prongs of the test prescribed by *Strickland v. Washington*.

[16] Finally, Provenzano argues that his appellate counsel was ineffective for failing to argue that the jury's sentencing responsibility was diminished in violation of *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Counsel cannot be deemed ineffective for failing to argue this point because no objections were made to the comments which are now said to violate *Caldwell*. The United States Supreme Court has recently held that in order to make this contention, an appropriate objection must be made. *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989).

Remaining Claims

Provenzano's remaining claims are without merit and need not be discussed.

Conclusion

We affirm the order denying the motion for postconviction relief. However, the state attorney shall disclose to Provenzano's attorney those portions of his file covered by chapter 119 as interpreted in *State v. Kokal*, 562 So.2d 324 (Fla.1990). The two-year time limitation of Florida Rule of Criminal Procedure 3.850 shall be extended for sixty days from the date of such disclosure solely for the purpose of providing Provenzano with the opportunity to file a new motion for postconviction relief predicated upon any claims under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), arising from the disclosure of such files. In this manner, Provenzano will be placed in the same position as he would have been if such files had been disclosed when they were first requested. The petition for habeas corpus is denied. The stay of execution is also vacated, although the death warrant which prompted these proceedings has long since expired.

It is so ordered.

EHRLICH, C.J., and OVERTON, McDONALD, SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.

STATE of Florida, Appellant,

v.

SCHOOL BOARD OF SARASOTA COUNTY, Appellee.

STATE of Florida, Appellant,

v.

SCHOOL BOARD OF COLLIER COUNTY, Appellee.

STATE of Florida, Appellant,

v.

FLORIDA SCHOOL BOARDS ASSOCIATION, INC., Appellee.

Nos. 74979, 75009 and 75154.

Supreme Court of Florida.

April 26, 1990.

School boards and not-for-profit entity brought actions against State to validate

ground lease of school land to not-for-profit entities, boards' leaseback of facilities to be constructed, and trust agreements conveying entities' lease rights to trustees that were to market bonds and disburse funds to finance construction. The Circuit Court, Sarasota, Collier, and Orange Counties, Stephen L. Dakan, Charles T. Carlton, and W. Rogers Turner, JJ., validated obligations. State appealed. The Supreme Court held that: (1) boards could bring action to validate leases and trust agreement, and (2) referendum approval of bonds was not required.

Affirmed.

McDonald, J., dissented and filed opinion in which Overton, J., concurred.

1. Schools ⇐97(4½)

Statute permitting political subdivision to bring circuit court action to determine authority to incur bonded debt permitted school boards to bring action to validate ground leases of their land to not-for-profit entities, boards' leaseback of facilities to be constructed, and trust agreements conveying entities' lease rights to trustees that were to market bonds and disburse funds to finance construction of facilities. West's F.S.A. § 75.02.

2. Schools ⇐97(4)

Bonds that financed construction of school facilities on property leased to not-for-profit entities that leased facilities to school boards and conveyed lease rights to bond trustees were not payable from ad valorem taxation and did not need to be approved by referendum; obligations were not supported by pledge of ad valorem taxation. West's F.S.A. Const. Art. 7, § 12; West's F.S.A. §§ 230.23, 230.23(9)(b)5.

Earl Moreland, State Atty., and Henry E. Lee, Asst. State Atty., Twelfth Judicial Circuit, and Michael Moran of Joy, Gause, Genson & Moran, Sarasota, Joseph P. D'Alessandro, State Atty., and Michael J. Provost, Asst. State Atty., Twentieth Judicial Circuit, Naples, Lawson Lamar, State Atty., and Carol Levin Reiss, Asst. State Atty., Ninth Judicial Circuit, Orlando, for appellant.

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CORRECTED OPINION

PER CURIAM.

We review three final judgments validating certain obligations [1] pursuant to chapter 75, Florida Statutes (1989). We have jurisdiction. Art. V, § 3(b)(2), Fla. Const.; § 75.08, Fla.Stat. (1989). We affirm the final judgments.

Pursuant to resolutions, the School Boards of Sarasota, Collier and Orange Counties (boards) entered into agreements supporting the bonds and certificates of participation (bonds) under review. These agreements provide for the lease of public land owned by the boards to not-for-profit entities (by way of ground leases), the con-

1. In the case of Sarasota County, tax-exempt bonds up to $135,000,000; in the case of Collier County, tax-exempt certificates of participation up to $47,500,000; in the case of Orange County (No. 75,154), tax-exempt bonds up to $230,000,000.

struction or improvement of public educational facilities upon the leased lands and the annual leaseback of the facilities to the respective school boards (by way of facilities leases), and the conveyance of the lease rights of the not-for-profit entities [2] to trustees (by way of trust agreements). The trustees are to market the bonds and disburse funds to finance construction of the facilities. Title to the public lands remains in the respective school boards. Title to the facilities constructed with the proceeds of the bonds passes to the respective school boards at the end of the term of the ground lease. In the cases of Sarasota County and Collier County, the ground-lease term is up to thirty years. In the case of Orange County, the ground-lease term is fifteen years.

Money from several sources, including ad valorem taxation, will be used to make the annual facilities' lease payments.[3] If, in any year, a board does not appropriate money to pay the lease, the board's obligations terminate without penalty and it cannot be compelled to make payments.[4] The board then has two options. It may purchase the facilities and terminate the ground lease. Alternatively, it may surrender possession of the facilities and lands for the remainder of the ground-lease term and is free to substitute other facilities for those surrendered. The trustee may relet the facilities for the remainder of the leases' term or sell its interest in the leases to generate revenue to pay bondholders. As an additional precaution, insurance has been purchased for the benefit of bondholders to cover the risk of insufficient revenue. Amounts received in excess of that owed to bondholders must be paid to the board as ground rent.

[1] We are presented with two basic issues: whether the agreements at issue here may be validated pursuant to chapter 75, Florida Statutes (1989), and, if so, whether article VII, section 12, Florida Constitution (1968), requires referendum approval for the bonds' validation.

Section 75.02 provides that a political subdivision of the state may determine its authority to incur bonded debt by filing a complaint in circuit court.[5] In *State v. City of Daytona Beach*, 431 So.2d 981 (Fla. 1983), we held that the city's complaint to

2. Appellee Florida School Boards Association, Inc. is one such not-for-profit entity.

3. The boards have identified four revenue sources for lease payments: (1) monies paid to them from Florida's Educational Finance Program; (2) monies derived from the Public Education Capital Outlay and Debt Service Trust Fund; (3) monies received from the local government infrastructure sales surtax levied pursuant to section 212.055(2) (1989), Florida Statutes (1989); and (4) to the extent not paid from the foregoing sources, up to one-half of the boards' *receipts from the levy of up to two mills of capital outlay millage*, authorized by section 236.25(2), Florida Statutes (1989), to pay lease-purchase obligations. The first three sources are non-ad valorem sources; the fourth is from ad valorem taxes.

4. For a discussion of the "nonappropriation mechanism" as a device to permit financing of essential governmental functions consistent with constitutional debt limitations, see Note, *State and Municipal Lease-Purchase Agreements: A Reassessment*, 7 Harv.J.L. & Pub.Pol'y 521 (1984) (authored by Reuven Mark Bisk).

5. Section 75.02, Florida Statutes (1989), provides:

> Plaintiff.—Any county, municipality, taxing district or other political district or subdivision of this state, including the governing body of any drainage, conservation or reclamation district, and including also state agencies, commissions and departments authorized by law to issue bonds, *may determine its authority to incur bonded debt* or issue certificates of debt and the legality of all proceedings in connection therewith, including assessment of taxes levied or to be levied, the lien thereof and proceedings or other remedies for their collection. For this purpose a complaint shall be filed in the circuit court in the county or in the county where the municipality or district, or any part thereof, is located against the state and the taxpayers, property owners, and citizens of the county, municipality or district, including nonresidents owning property or subject to taxation therein. In actions to validate bonds or certificates of debt issued by state agencies, commissions or departments, the complaint shall be filed in the circuit court of the county where the proceeds of the bond issue are to be expended, or where the seat of state government is situated, and shall be brought against the state and the taxpayers, property owners and citizens thereof, including nonresidents owning property or subject to taxation therein.
>
> (Emphasis added.)

validate an "interlocal agreement" [6] pursuant to chapter 75 was proper because the agreement was evidence of the city's indebtedness to pay designated revenues to assist in servicing bonds which the interlocal agreement supported. In the instant cases, likewise, the supporting agreements—the facilities and ground leases and the trust agreements—are evidence of the boards' indebtedness. They constitute obligations of the boards, so long as funds are appropriated, to pay the designated revenues to the trustees to assist in servicing the bonds. *Id.* at 982.

Appellant argues that the benefits of chapter 75 validation proceedings are conferred on political subdivisions of the state, not private parties. The state asserts that it is the not-for-profit entities and trustees, rather than the school boards, who are employing chapter 75 procedures to impress the court's imprimatur upon this type of "creative" bond financing. We rejected this argument in *State v. Brevard County*, 539 So.2d 461 (Fla.1989). We accordingly find that the boards are proper plaintiffs within the meaning of section 75.02.

[2] Regarding the bonds' validity, the issue presented is whether a referendum is required by article VII, section 12 of the Florida Constitution (1968). We conclude that because these obligations are not supported by the pledge of ad valorem taxation, they are not "payable from ad valorem taxation" within the meaning of article VII, section 12, and referendum approval is not required.[7]

In *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla.1980), we interpreted the words "payable from ad valorem taxation" in article VII, section 12 and held that a referendum is not required when there is no direct pledge of the ad valorem taxing power. We noted that although contributions may come from ad valorem tax revenues: "What is critical to the constitutionality of the bonds is that, after the sale of the bonds, a bondholder would have no right, if [funds] were insufficient to meet the bond obligations ... to compel by judicial action the levy of ad valorem taxation.... [T]he governing bodies are not obliged nor can they be compelled to levy any ad valorem taxes in any year." *Id.* at 898–99. The agreements here, as in *Miami Beach*, although supported in part by ad valorem revenues, expressly provide that neither the bondholders nor anyone else can compel use of the ad valorem taxing power to service the bonds.

In *State v. Brevard County*, 539 So.2d 461 (Fla.1989), we interpreted the "maturing more than twelve months after issuance" language of article VII, section 12. The *Brevard* agreements provided traditional lease remedies and preserved the county's right, in adopting its annual budget, to terminate the lease without further obligation. We held that article VII, section 12 was not violated. As in *Brevard*, the agreements here give the boards freedom to decide anew each year, burdened only by lease penalties, whether to appropriate funds for the lease payments.

The state's fall-back position is that if an approving referendum is not constitutionally required, section 230.23(9)(b)5., Florida Statutes (1989), mandates a referendum in this instance.[8] We disagree. The perti-

6. The interlocal agreement provided that the city guaranteed to the county certain payments each fiscal year in order to support county revenue bonds. The bonds that the agreement supported had been validated in a separate earlier proceeding.

7. Article VII, section 12 of the Florida Constitution, provides:

> Local bonds.—Counties, school districts, municipalities, special districts and local governmental bodies with taxing powers may issue bonds, certificates of indebtedness or any form of tax anticipation certificates, payable from ad valorem taxation and maturing more than twelve months after issuance only:
>
> (a) to finance or refinance capital projects authorized by law and only when approved by vote of the electors who are owners of freeholds therein not wholly exempt from taxation; or
>
> (b) to refund outstanding bonds and interest and redemption premium thereon at a lower net average interest cost rate.

8. Section 230.23, Florida Statutes (1989), in relevant part provides:

> 230.23 *Powers and duties of school board.*—The school board, acting as a board, shall

nent statutory section is a general grant of power to school boards with a proviso that if "the rental is to be paid from funds received from ad valorem taxation and the agreement is for a period greater than 12 months, an approving referendum must be held." We view the referendum requirement in this section as no more than a codification of the referendum requirement set forth in the constitution.

The state contends that *County of Volusia v. State*, 417 So.2d 968 (Fla.1982), precludes validation in this instance. We disagree. In *Volusia*, the obligations were supported by the pledge of all legally available unencumbered revenues other than ad valorem taxation, along with a promise to fully maintain the programs and services which generated the non-ad valorem revenue. We held that referendum approval was required because the interrelated promises "in effect constitutes a promise to levy ad valorem taxes." *Id.* at 971. The instant case is not analogous. We have here no interrelated promises which will inevitably lead to an increase in ad valorem taxation.

The state in addition argues that validation is precluded by *Nohrr v. Brevard County Educational Facilities Authority*, 247 So.2d 304 (Fla.1971). In *Nohrr*, we held that a bond-supporting agreement which granted a mortgage with right of foreclosure violated the predecessor to article VII, section 12, absent an approving referendum. The rationale of *Nohrr* does not apply to the instant case. There is no mortgage with right of foreclosure.[9] Here the bondholders are limited to lease remedies and the annual renewal option preserves the boards' full budgetary flexibility.

Appellees, in addition to asking us to validate these bonds, invite us to reinstitute the "essential governmental function" referendum-exception first enunciated in *Tapers v. Pichard*, 124 Fla. 549, 169 So. 39 (1936). We rejected the exception in *State v. County of Dade*, 234 So.2d 651 (Fla. 1970), and decline to reinstate it here.

Our approval of these financing arrangements does not constitute an endorsement of the bonds and certificates of indebtedness to be issued. Questions of business policy and judgment are beyond the scope of judicial interference and are the responsibility of the issuing governmental units. *Town of Medley v. State*, 162 So.2d 257 (Fla.1964).

We affirm the judgments of validation.

It is so ordered.

EHRLICH, C.J., and SHAW, BARKETT, GRIMES and KOGAN, JJ., concur.

McDONALD, J., dissents with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, dissenting.

Today the Court approves form over substance. The financial schemes employed in these cases are the equivalent to the issuance of bonds and pledging ad valorem taxes to support them. Thus, I totally disagree that the bonds in question can be approved without a referendum from the owners of freeholds as required by article VII, section 12 of the Florida Constitution.

exercise all powers and perform all duties listed below:

....

(9) SCHOOL PLANT....

....

(b) *Sites, buildings, and equipment.*—

....

5. Enter into leases or lease-purchase agreements, in accordance with the requirements and conditions provided in s. 235.056(3), with private individuals or corporations for the rental of necessary grounds and educational facilities for school purposes or of educational facilities to be erected for school purposes. Current or other funds authorized by law may be used to make payments under a lease-purchase agreement. Notwithstanding any other statutes, if the rental is to be paid from funds received from ad valorem taxation and the agreement is for a period greater than 12 months, an approving referendum must be held.

9. In the case of Orange County, the not-for-profit entity intends to mortgage its leasehold interest in the facilities as security for the bonds. Since the mortgage does nothing to encumber the interest of the school board, it is insignificant to the resolution of whether a referendum is required. In this regard, Orange County is no different from the companion cases.

I believe it pure sophistry to say that "these obligations are not supported by the pledge of ad valorem taxation." Majority at 552. If ad valorem taxes are not levied and paid each year for the duration of the agreements the school boards default not only all interest acquired under the agreement for the remainder of the agreement, but they also lose the right to use the preowned property for the remainder of the agreement. Never before have we approved a nonreferendum bond where ad valorem taxes have been involved to the extent they are involved in these cases. By approving these financing agreements we have approved a method of nullifying the provisions of article VII, section 12, Florida Constitution.

It is true that in *State v. Miami Beach Redevelopment Agency*, 392 So.2d 875 (Fla.1980), we approved a bond supported in part by ad valorem taxes. I hasten to point out, however, that the extent of that pledge was the *tax increment* created by the development. These bonds, on the other hand, come from existing ad valorem tax sources, and the schools do not increase the tax base. *State v. Miami Beach Redevelopment* stated:

> What is critical to the constitutionality of the bonds is that, after the sale of bonds, a bondholder would have no right, if the redevelopment trust fund were insufficient to meet the bond obligations and the available resources of the county or city were insufficient to allow for the promised contributions, to compel by judicial action the levy of ad valorem taxation.

392 So.2d at 898. That same court in the same opinion, however, also said:

> On the other hand, when a project is financed by the sale of bonds to be repaid with revenues produced by the project supplemented by governmental funds derived from ad valorem taxation, an approving vote of the electorate is required.
>
> [I]n no instance has this Court upheld the pledge of gross revenue of a facility coupled with a supporting pledge of ad valorem taxes. When gross revenues have been pledged with collateral support for operating the facility, the supporting revenues pledged have always been derived from sources other than ad valorem levies.

State v. Halifax Hospital District, 159 So.2d 231, 233 (Fla.1963).

Id. at 897–98.

These financing schemes are secured by a pledge of ad valorem taxes, at least on a year-by-year basis. This contrasts with the financing plan approved in *State v. Brevard County*, 539 So.2d 461 (Fla.1989), where ad valorem taxes were not a part of the financing agreement. If certificates are secured by a pledge of ad valorem taxes, they are bonds and must be approved by the voters. *Klein v. City of New Smyrna Beach*, 152 So.2d 466 (Fla. 1963).

In practical effect a school board must levy, collect, and pay ad valorem taxes or forfeit its ability to supply a school plant. No school board will do that. When this circumstance exists, the realities of the situation should supercede the technical inability to require the levy of ad valorem taxes. As we did in *Volusia County v. State*, 417 So.2d 968 (Fla.1982), we should require approval of the affected ad valorem taxpayers before these financial arrangements obtain approval from this Court.

OVERTON, J., concurs.

Daniel Joseph POPE, Petitioner,

v.

STATE of Florida, Respondent.

No. 74163.

Supreme Court of Florida.

April 26, 1990.

Rehearing Denied June 27, 1990.

Sentence departing from the guidelines without written reasons was imposed by

SOUTH FLORIDA WATER MANAGEMENT DISTRICT

BUDGET DOCUMENT

sfwmd.gov

FISCAL YEAR
2009

Alternative Financing for Potential Major Land Purchase

In spite of reductions in the projects mentioned above, the District's budget shows a net increase because it includes $1.7 billion in anticipated proceeds from certificates of participation (COPs) which are expected to be issued in FY2009. This amount is for the potential purchase of approximately 180,000 acres of land for Everglades Restoration. The annual debt service on this COP issuance is expected to be about $100 million annually. The District has used this funding source before to expedite the construction of Everglades projects. As with the first COPs, issued in November 2006, the District would fund the debt service on the new COP issuance using both the ad valorem property tax revenues committed to the Comprehensive Everglades Restoration Plan (CERP) annually, and the millage that is levied within the Okeechobee Basin to implement the provisions of the Everglades Forever Act. Some reductions were made in various programs in order to re-direct ad valorem funds to debt service for this unprecedented land purchase opportunity. As of the budget adoption on October 1, 2008, contract negotiations were still underway on this potential historic real estate transaction.

Adequate Reserves

In 2008 the District established specific reserves as part of preparation for future hurricane season events. The District's FY2009 budget includes $10.4 million in reserves for hurricane response and $5 million for additional fuel costs to pump water during tropical storm events. This is in addition to contingency reserves of $7.7 million for other emergencies, unexpected expenditures or decreases in projected revenues. District reserves are at about the same level as last year in spite of reductions in operating revenues.

Staffing Level Considerations

After careful review of the District's existing full-time staffing resources and requirements for the new fiscal year it was determined that it made good business sense to replace some contractors with Full-Time Equivalent (FTE) employees for long-term mission critical work.

In FY2009, the approved budget includes an additional 20 new staff positions, bringing its FTE total to 1,828. These new positions will primarily support telemetry equipment installation and maintenance, water quality monitoring and water use permitting activities. These employees will replace the need for outside contractors working on core, long-term functions, at an estimated $1.4 million savings and cost-avoidance to the District this year.

Regulatory and Legislative Issues

As a regional governmental agency created by the Florida Legislature in 1949, the South Florida Water Management District's roles and responsibilities are defined and greatly impacted by changes in regulatory and legislative actions. Key examples include passage of the Everglades Forever Act (EFA) in 1994 which mandated the construction of six stormwater treatment areas to reduce phosphorus levels from stormwater run-off and other sources before it enters the Everglades. In 2003, the Florida Legislature amended the EFA to authorize implementation of the initial phase of the Long-Term Plan, provide funding to continue water quality restoration in the Everglades, and clarified the law to allow funds to be spent on additional water quality improvements. The Long-Term Plan's initial 13-year phase (FY2003–FY2016) includes stormwater treatment area enhancement construction, operation, maintenance, and monitoring of the Everglades Construction Project.

- Annual lease payments (debt service) are made by the government agency solely from its "legally available revenue" to the corporation, which the corporation then uses to make payments to the certificate holders.
- After the certificates have been entirely repaid, the local government typically has the option to purchase the capital project it has been leasing for a nominal cost from the corporation.

(COPS can only be used to finance capital costs related to construction or acquisition and may not be used to finance ongoing operating costs).

Financial Ratings

The District enjoys favorable ratings on its bonds. The Special Obligation Bonds are rated AAA/A+ by Standard & Poor's, AAA/A- by Fitch, and Aaa/A1 by Moody's. The COPs are rated AAA/AA+ by Standard and Poor's, AAA/AA- by Fitch and Aaa/Aa1 by Moody's. A bond rating indicates the investment quality of the bonds which is based on an assessment of the economic and financial condition of the agency, and is reflective of the overall managerial expertise of the agency. The District continuously strives to maintain this superior bond rating for its obligations in order to realize more favorable borrowing costs.

The District's current debt and its impact on the FY2009 operating budget is shown in the following table:

Impact on Current Operating Budget

Existing Debt	Original Issue	Outstanding as 9/30/2008	Fiscal Year of Maturity	Principal Due in FY2009	Interest Due in FY2009	Total FY2009 Requirement
Major Fund - Acceler8 [COPs]						
COPs	546,120,000	538,445,000	2037	9,015,000	26,268,594	35,283,594
Major Fund - Okeechobee Basin						
Bank Loan	4,827,374	2,068,874	2011	689,625	63,620	753,245
Non-Major Funds						
2002 Refunding	23,810,000	17,495,000	2016	1,935,000	609,614	2,544,614
2003 Refunding	34,550,000	28,830,000	2016	3,040,000	1,330,557	4,370,557
Bank Loan	8,000,000	5,714,286	2013	1,142,857	216,000	1,358,857
Sub-Total	66,360,000	52,039,286		6,117,857	2,156,171	8,274,028
Total	617,307,374	592,553,160		15,822,482	28,488,385	44,310,867

Future Debt and Implications for the Budget

As of this writing, the District is in the process of negotiating the acquisition of the land and assets of the U. S. Sugar Corporation, at an estimated cost of $1.75 billion. This acquisition, unprecedented for the District in its size and scope, would be considered a major milestone in the protection and restoration of the Everglades. Depending on the outcome of negotiations, it is estimated that up to $1.7 billion of the cost could be financed through the issuance of a second COP in FY2009. The District is statutorily authorized to use COPs as a financing mechanism, pursuant to Section 373.584 of the Florida Statutes.

The annual debt service on the resulting COP issuance could be as much as $108 million. As with the first COPs, issued in November 2006, the District would fund the debt service on this COP issuance using both the ad valorem property tax revenues committed to CERP annually, and the millage that is levied within the Okeechobee Basin to implement the provisions of the Everglades Forever Act.

NEW ISSUE - Book-Entry-Only **RATINGS: See "RATINGS" herein.**

In the opinion of Edwards Angell Palmer & Dodge LLP, Special Tax Counsel, based upon an analysis of existing law and assuming, among other matters, compliance with certain covenants, the portion of the Basic Lease Payments designated and paid as interest to the Series 2006 Certificate holders is excluded from gross income for Federal income tax purposes under the Internal Revenue Code of 1986. The portion of the Basic Lease Payments designated and paid as interest to the Series 2006 Certificate holders is not a specific preference item for purposes of the Federal individual or corporate alternative minimum taxes, although such portion of the Basic Lease Payments is included in adjusted current earnings when calculating corporate alternative minimum taxable income. However, no opinion is expressed with respect to the Federal income tax consequences of any payments received with respect to the Series 2006 Certificates following termination of the Master Lease as a result of non-appropriation of funds or the occurrence of an event of default thereunder. Special Tax Counsel is also of the opinion that the Series 2006 Certificates and the Series 2006 Lease and the interest portion of the Basic Lease Payments are exempt from taxation under the existing laws of the State of Florida, except as to estate taxes and taxes imposed by Chapter 220, Florida Statutes, on interest, income or profits on debt obligations owned by corporations, banks and savings associations; provided, however, that no opinion is expressed with respect to the payment or reporting of intangible personal property tax following termination of the Master Lease. See "TAX EXEMPTION" herein.

$546,120,000
CERTIFICATES OF PARTICIPATION, SERIES 2006
Evidencing Undivided Proportionate Interests of the Owners thereof in Basic Lease Payments to be Made by the Governing Board of the SOUTH FLORIDA WATER MANAGEMENT DISTRICT, As Lessee, Pursuant to a Master Lease Purchase Agreement with South Florida Water Management District Leasing Corp., as Lessor

Dated: Date of Delivery **Due:** October 1, as shown on inside cover page

The Certificates of Participation, Series 2006 (the "Series 2006 Certificates") offered hereby evidence undivided proportionate interests in Basic Lease Payments (defined herein) to be made by the Governing Board (the "Governing Board") of the South Florida Water Management District (the "District"), pursuant to a Master Lease Purchase Agreement, dated as of November 1, 2006 (the "Master Lease"), by and between the South Florida Water Management District Leasing Corp., a not-for-profit Florida corporation (the "Corporation"), as lessor, and the Governing Board, as lessee, as supplemented by Schedule 2006 dated as of November 1, 2006 by and between the Governing Board and the Corporation (collectively, the "Series 2006 Lease"). The Series 2006 Lease will be entered into, and the Series 2006 Certificates are being issued, to (i) provide for the lease-purchase financing of the acquisition, construction, installation and equipping of certain facilities and improvements to land for the restoration, protection and preservation of the Everglades ecosystem pursuant to the Acceler8 Project as further described herein; (ii) refinance certain interim financings of the District; and (iii) pay certain costs of issuance of the Series 2006 Certificates, including the premium on a financial guaranty insurance policy. The Corporation has assigned the Basic Lease Payments and substantially all of its interest in the Series 2006 Lease to Deutsche Bank National Trust Company, Charlotte, North Carolina, as trustee (the "Trustee") pursuant to the Series 2006 Assignment Agreement (as defined herein). See "THE MASTER LEASE PROGRAM" herein.

The Series 2006 Certificates will be issued in fully registered form registered in the name of Cede & Co., as nominee for The Depository Trust Company, New York, New York ("DTC"). Individual purchases of Series 2006 Certificates will be made in denominations of $5,000 or any integral multiple thereof. The Series 2006 Certificates are being issued pursuant to the provisions of a Master Trust Agreement, as supplemented by the Series 2006 Supplemental Trust Agreement, each dated as of November 1, 2006 by and between the Corporation and the Trustee. The interest portion of the Basic Lease Payments represented by the Series 2006 Certificates is payable on October 1 and April 1 of each year, commencing April 1, 2007. The principal and interest portions of the Basic Lease Payments evidenced by the Series 2006 Certificates will be paid by the Trustee to Cede & Co., as nominee for DTC and registered owner of the Series 2006 Certificates, subsequently disbursed to DTC participants and thereafter, to the beneficial owners of the Series 2006 Certificates, all as further described in this Offering Statement. See "THE SERIES 2006 CERTIFICATES - Book-Entry-Only System" herein.

The principal portions of the Basic Lease Payments represented by the Series 2006 Certificates are subject to optional, mandatory sinking fund and extraordinary prepayment prior to maturity as described herein.

THE GOVERNING BOARD IS NOT LEGALLY REQUIRED TO APPROPRIATE MONEYS TO MAKE LEASE PAYMENTS (AS DEFINED HEREIN). LEASE PAYMENTS ARE PAYABLE FROM FUNDS APPROPRIATED BY THE GOVERNING BOARD FOR SUCH PURPOSE FROM CERTAIN AVAILABLE FUNDS AUTHORIZED BY LAW AND REGULATIONS OF THE STATE OF FLORIDA. NEITHER THE DISTRICT, THE GOVERNING BOARD, THE STATE OF FLORIDA, NOR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF IS OBLIGATED TO PAY, EXCEPT FROM GOVERNING BOARD APPROPRIATED FUNDS, ANY SUMS DUE UNDER THE SERIES 2006 LEASE FROM ANY SOURCE OF TAXATION, AND THE FULL FAITH AND CREDIT OF THE DISTRICT, THE GOVERNING BOARD, THE STATE OF FLORIDA OR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF IS NOT PLEDGED FOR PAYMENT OF SUCH SUMS DUE THEREUNDER. SUCH SUMS DO NOT CONSTITUTE AN INDEBTEDNESS OF THE DISTRICT, THE GOVERNING BOARD, THE STATE OF FLORIDA OR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF WITHIN THE MEANING OF ANY CONSTITUTIONAL OR STATUTORY PROVISION OR LIMITATION. NEITHER THE CORPORATION, THE TRUSTEE, NOR THE SERIES 2006 CERTIFICATE HOLDERS MAY COMPEL THE LEVY OF ANY AD VALOREM TAXES BY THE DISTRICT, THE GOVERNING BOARD, THE STATE OF FLORIDA OR ANY POLITICAL SUBDIVISION OR AGENCY THEREOF TO PAY ANY SUMS, INCLUDING THE BASIC LEASE PAYMENTS, DUE UNDER THE SERIES 2006 LEASE. SEE "RISK FACTORS" HEREIN.

The scheduled payment of the principal and interest portions of Basic Lease Payments represented by the Series 2006 Certificates, when due, will be insured by a financial guaranty insurance policy to be issued by Ambac Assurance Corporation concurrently with the delivery of the Series 2006 Certificates. See "FINANCIAL GUARANTY INSURANCE POLICY" herein.

Ambac

SEE THE INSIDE COVER PAGE FOR THE MATURITIES, PRINCIPAL AMOUNTS, INTEREST RATES, YIELDS AND INITIAL CUSIP NUMBERS FOR THE SERIES 2006 CERTIFICATES.

This cover page contains certain information for quick reference only. It is not, and is not intended to be, a summary of this transaction. Investors must read the entire Offering Statement to obtain information essential to the making of an informed investment decision.

The Series 2006 Certificates are offered when, as and if delivered and received by the Underwriters, subject to the approving legal opinion of Edwards Angell Palmer & Dodge LLP, West Palm Beach, Florida, Special Tax Counsel, and certain other conditions. Certain legal matters will be passed on for the Governing Board and the Corporation by Sheryl Wood, Esquire, General Counsel, and for the Underwriters by their Co-Counsel, Moskowitz, Mandell, Salim & Simowitz, P.A., Fort Lauderdale, Florida, and the Law Offices of Steve E. Bullock, P.A., Miramar, Florida. Public Financial Management, Inc., Orlando, Florida is the Financial Advisor to the District. It is expected that the Series 2006 Certificates will be available for delivery through the facilities of DTC in New York, New York on or about November 15, 2006.

Citigroup

Goldman, Sachs & Co.
Lehman Brothers
Merrill Lynch & Co.

Morgan Stanley & Co. Incorporated
UBS Investment Bank

Estrada Hinojosa & Company, Inc.
Loop Capital Markets, LLC

M.R. Beal & Company
Raymond James & Associates, Inc.
RBC Capital Markets

The date of this Offering Statement is October 26, 2006.

supplemented by the Series 2006 Supplemental Trust Agreement dated as of November 1, 2006 (the "Series 2006 Supplemental Trust Agreement" and, together with the Master Trust Agreement, the "Trust Agreement") by and between the Corporation and Deutsche Bank National Trust Company, Charlotte, North Carolina, as trustee (the "Trustee"). The Corporation has assigned substantially all of its interest in the Series 2006 Lease to the Trustee pursuant to the Series 2006 Assignment Agreement (as defined herein).

The scheduled payment of the principal and interest portions of Basic Lease Payments represented by the Series 2006 Certificates, when due, will be guaranteed under a financial guaranty insurance policy (the "Financial Guaranty Insurance Policy") to be issued by Ambac Assurance Corporation (the "Insurer") concurrently with the delivery of the Series 2006 Certificates. See "FINANCIAL GUARANTY INSURANCE POLICY" herein.

The District

The South Florida Water Management District (the "District") is an agency of the State of Florida (the "State") and a water management district that is organized, exists and operates pursuant to the Florida Water Resources Act of 1972, Chapter 373, Florida Statutes, as amended (the "Act"). The District encompasses all or part of 16 counties in central and southern Florida, including Broward, Miami-Dade, Palm Beach, Collier and Lee counties. The District's primary responsibility is to manage the water and related land resources within its jurisdiction. Pursuant to the Act, the District is responsible for regional flood control, water supply and water quality protection and ecosystem restoration management, within its territorial boundaries, including without limitation restoring and cleaning up the Everglades ecosystem (the "Everglades") in accordance with the Comprehensive Everglades Restoration Plan and various Federal and State statutes. The Governing Board acts as the governing body of the District. Various Federal, State and local sources of revenue, including ad valorem taxes from the District's area, are available to the District for its operating and capital needs, as more fully described under "REVENUE SOURCES OF THE DISTRICT" herein. See "THE DISTRICT" herein.

The Corporation

The South Florida Water Management District Leasing Corp. (the "Corporation") is a Florida not-for-profit corporation formed by the District in October 2005 for the primary purpose of acting as lessor under the Master Lease with the Governing Board, including particularly for the Acceler8 Project. The sole member of the Corporation is the Governing Board. The Board of Directors of the Corporation consists of the members of the Governing Board and its officers are Governing Board members and employees. See "THE CORPORATION" herein.

The Comprehensive Everglades Restoration Plan – Acceler8 Project

Over 50 years ago, the US Army Corps of Engineers (the "Corps") began construction of an extensive system of canals, levees, dikes and reservoirs from south of Orlando to Florida Bay, including the Everglades, to counteract the effects of hurricanes and droughts. The system had

approval by the Governor of the State. See "THE SERIES 2006 LEASE – Budget and Appropriation" and "- Budget Subject to Approval of State Governor" herein.

Ad Valorem Taxation

The District is empowered to levy ad valorem taxes on real and tangible personal property within the District. Although a source of revenues available for payment of the Series 2006 Certificates, ad valorem taxes do not secure the Series 2006 Certificates. See"REVENUE SOURCES OF THE DISTRICT" and "AD VALOREM TAX PROCEDURES" herein.

Five-Year Plan

In accordance with the provisions of the Act, in 1981 the District adopted a Five-Year Plan for the acquisition of lands or interests therein for water management, water supply, and the conservation and protection of water resources within the District. The District has, at least annually, re-adopted and amended its Five-Year Plan. Most recently updated on March 1, 2006, the current Five-Year Plan provides for a five-year facilities and work plan totaling approximately $3,713,887,583 and is expected to be funded from Federal, State and local revenue sources, as well as additional Certificates issued pursuant to the District's master lease program, including the Series 2006 Certificates.

Florida Government Accountability Act

On May 5, 2006, the Florida Legislature passed the "Florida Government Accountability Act," (Chapter No. 2006-146, Laws of Florida 2006) (the "Sunset Act"), which was signed into law by Governor Bush on June 9, 2006 and became effective on July 1, 2006. The Sunset Act creates "Legislative Sunset Advisory Committees," which are charged with conducting sunset reviews of various State agencies, including the District. The District will be the subject of a sunset review on July 1, 2008. Pursuant to the Sunset Act, an agency will be abolished on June 30 following the date of sunset review unless the State Legislature votes to continue such agency. The Sunset Act also provides that an agency may not be abolished unless the Legislature finds that adequate provision has been made for the transfer to a successor agency of all the duties and obligations relating to bonds, loans, promissory notes, lease-purchase agreements, installment sales contracts, certificates of participation, master equipment financing agreements, or any other form of indebtedness such that the security therefor and the rights of bondholders or holders of other indebtedness are not impaired.

In the event the District is dissolved, unless otherwise provided by law, the State Division of Bond Finance would be assigned the task of carrying out all covenants contained in the Series 2006 Certificates and in the resolutions authorizing the issuance of the Series 2006 Certificates, and performing all obligations required thereby. Additionally, the State or a designated State agency is required under the Sunset Act to provide for the payment of the Series 2006 Certificates in accordance with the terms thereof, the Series 2006 Lease and the Trust Agreement, until the Series 2006 Certificates, including interest thereon, are paid in full.

slim on evaluation, the ALJ seems to have looked at Jennifer's dysthymic disorder, attention deficit hyperactivity disorder, and specific learning disorder together. R. 11, 13. The ALJ did not err in doing so.

Fourth, Fontanez contends that the Commissioner erred by failing to consider the combined effect of Jennifer's impairments in determining whether her impairment equaled a listing. To the extent that the ALJ looked at Jennifer's impairments in determining whether she met, medically equaled, or functionally equaled the Listings, he looked at her impairments in combination. Fontanez's real argument is that the ALJ did not properly assess functional equivalence in light of Jennifer's impairments, as previously discussed. The ALJ did, however, properly considered the combined effect of Jennifer's impairments.

VI. *CONCLUSION*

For the reasons stated above, the decision of the Commissioner should be **REVERSED and REMANDED under Sentence Four** for proceedings not inconsistent with this opinion.

Failure to file written objections to the proposed findings and recommendations in this report pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 6.02 within eleven days of the date of its filing shall bar an aggrieved party from a *de novo* determination by the district court of issues covered in the report, and shall bar an aggrieved party from attacking the factual findings on appeal. Any party appealing this decision shall file and serve a copy of the oral argument transcript.

Aug. 13, 2001.

Herbert J. GRIMSHAW, Plaintiff,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT, Defendant.

No. 00-9134-CIV.

United States District Court, S.D. Florida.

Feb. 7, 2002.

Employee of water management district brought suit alleging violation of Age Discrimination in Employment Act and retaliation. Water management district moved to dismiss or, in alternative for summary judgment, on ground of immunity from suit under Eleventh Amendment. The District Court, Middlebrooks, J., held that water management district was arm of State of Florida entitled to Eleventh Amendment immunity.

Motion granted.

1. Federal Courts ⇐265

Eleventh Amendment immunity is not waived or abrogated by the Age Discrimination in Employment Act (ADEA). U.S.C.A. Const.Amend. 11; Age Discrimination in Employment Act of 1967, § 2 et seq., 29 U.S.C.A. § 621 et seq.

2. Federal Courts ⇐265, 269, 270

Eleventh Amendment's bar against suits in federal courts extends to the state and its instrumentalities, but it does not extend to counties, municipal corporations, or other political subdivisions of the state. U.S.C.A. Const.Amend. 11.

3. Federal Courts ⇐269

In deciding whether a state instrumentality may invoke the state's immunity, the inquiry focuses on the nature of the entity created by state law in order to determine whether it should be treated as an arm of the state. U.S.C.A. Const. Amend. 11.

4. Federal Courts ⇐418

Whether particular agency is arm of state entitled to Eleventh Amendment immunity is question of federal law, which can be answered only after considering provisions of state law that define agency's character. U.S.C.A. Const.Amend. 11.

5. Federal Courts ⇐269

Following factors are relevant in determining whether agency is entitled to Eleventh Amendment immunity: (1) how the state law defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds from; and (4) who is responsible for judgments against the entity. U.S.C.A. Const.Amend. 11. West's F.S.A. § 373.016.

6. Federal Courts ⇐269

Regional water management district was arm of State of Florida entitled to Eleventh Amendment immunity; Florida legislature defined districts as operating under state control to perform state function with regional component, Florida exercised virtually absolute control over district's personnel, budget, policies and operations, Florida provided substantial portion of district's funds and exercised budget item control over all its resources, and, as practical matter, state's treasury was directly implicated by any judgment against district, both through budget and importance to State's future of maintaining financial viability of district. U.S.C.A. Const.Amend. 11; West's F.S.A. Const. Art. 2, § 7; West's F.S.A. § 373.016.

7. Federal Courts ⇐269

An arm of the state for purposes of the Eleventh Amendment is an entity that undertakes state functions and is politically accountable to the state. U.S.C.A. Const.Amend. 11.

Isidro Manuel Garcia, Maria Kate Boehringer, Garcia, Elkins & Carbonell, West Palm Beach, FL, for plaintiff.

James Edward Nutt, South Florida Water Management District, West Palm Beach, FL, for defendant.

ORDER ON MOTION TO DISMISS, OR IN THE ALTERNATIVE, SUMMARY JUDGMENT

MIDDLEBROOKS, District Judge.

I. INTRODUCTION

This is a case about federalism, governmental structure and control, and water. The issue presented is whether the South Florida Water Management District (the "District" or "SFWMD") is immune from suit in federal court by reason of the Eleventh Amendment to the United States Constitution. The Judges of this district have reached opposite conclusions concerning this issue.[1] Moreover, in an unpub-

1. SFWMD was determined to be a state agency in the following cases: *Nicholas G. Aumen, Ph.D. v. South Florida Water Management District,* Case No. 99-8928-Civ-Ryskamp (S.D.Fla. Mar. 28, 2000); *Miccosukee Tribe of Indians of Florida v. United States,* 980 F.Supp. 448 (S.D.Fla.1997); *Bensch v. Metropolitan Dade County,* 952 F.Supp. 790 (S.D.Fla.1996); *Indian Trials Water Control District v. South Florida Water Management District, et al.,* Case No. 96-8528-Civ-Ryskamp (S.D.Fla. Dec. 10, 1996). It was not accorded immunity in the following cases: *Miccosukee Tribe of Indians of Florida v. South Florida Water Management District et al.,* Case No. 98-6056-Civ-Ferguson, 1999 WL 33494862 (S.D.Fla. Sept. 30, 1999); *It Corporation v. South Florida Water Management District,* 97-8872-Civ-Highsmith (S.D.Fla. July 20, 1998); *see also Thomas v. South Florida Water Management District,* Case No 96-896-Civ-Fawsett (M.D.Fla. March 23, 1998).

lished opinion, the Eleventh Circuit found it unnecessary to decide the dispute, commenting that whether the District should be considered an arm of the state or a political subdivision is a close question. *Miccosukee Tribe of Indians v. United States*, 163 F.3d 1359 (11th Cir.1998)(unpublished), *cert. denied* 528 U.S. 810, 120 S.Ct. 41, 145 L.Ed.2d 37 (1999); *see also Miccosukee Tribe of Indians of Florida v. Florida State Athletic Comm'n*, 226 F.3d 1226, 1233, n. 9 (11th Cir.2000). In this case, however, the issue is presented squarely and I am mindful of the admonition that Eleventh Amendment immunity is a threshold issue in the nature of a jurisdictional bar. *See Bouchard Transportation Co. v. Florida Dep't of Environmental Protection*, 91 F.3d 1445, 1448 (11th Cir.1996).

I therefore requested the parties to fully develop the record on this issue, permitted testimony, and was provided the benefit of legal memoranda and oral argument. After review, I conclude that the South Florida Water Management District should be considered an arm of the State for the purposes of the Eleventh Amendment.

II. BACKGROUND

A. *South Florida Water Management District*

Florida is divided into five water management districts established by Chapter 72–299, Laws of Florida, the Florida Water Resources Act of 1972. Legislative authority for the districts is found in Chapter 373 Florida Statutes. The South Florida Water Management District's mission is to manage and protect the water resources within its boundaries by improving water quality, flood control, natural systems, and water supply within the region. The District's jurisdiction contains two primary hydrologic basins: the Okeechobee basin and the Big Cypress Basin.[2] The Okeechobee basin is based on the Kissimmee–Okeechobee–Everglades (KOE) ecosystem which stretches from Central Florida's Chain of Lakes to Lake Okeechobee, and south to the Florida Keys. It includes the southeast coast, the Everglades Agricultural Area and the Everglades National Park. The Big Cypress Basin includes Collier county in the south west part of Florida, a part of Monroe county, the Big Cypress National Preserves and the 10,000 Islands. The District includes a population of approximately 6 million people, encompasses all or part of 16 counties in total and covers an area of 17,930 square miles.[3]

2. The water management districts were drawn according to hydrologic features to mirror water flows which do not follow traditional political boundaries. For example, the flow of the water to the Everglades has been described as follows:

> It is poured into Lake Okeechobee from north and west, from the fine chain of lakes which scatter up and down the center of Florida, like bright beads from a string. They overflow southward. The water is gathered from the northwest through a wide area of open savannas and prairies. It swells the greatest contributing streams, the Kissimmee River, and the Taylor River and Fisheating Creek, and dozens of other smaller named and unnamed creeks or rivulets, and through them moves down into the great lake's tideless blue-misted expanse.
>
> The water comes from the rains. The northern lakes and streams, Okeechobee itself, are only channels and reservoirs and conduits for a surface flow of rain water, fresh from the clouds. A few springs may feed them, but no melting snow water, no mountain freshets, no upgushing from caverns in ancient rock. Here the rain is everything.

MARJORY STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS 14, (Pineapple Press, Inc. 1997).

For a map of the District see http://www.sfwmd.gov/histo/3_counties.html.

3. Florida faces major water management challenges driven in part by a population that is projected to increase from nearly 16 million

The South Florida Water Management District is governed by a nine member board, appointed by the Governor, subject to confirmation by the Florida Senate. Pursuant to Section 373 of the Florida Statutes, SFWMD has substantial fiscal and regulatory authority, and for the current fiscal year its budget is $728.6 million. The funds are comprised of local property taxes, levied pursuant to the District's ad valorem taxing power, monies paid for licenses, permits and fees, general revenue appropriated by the legislature and federal funds.

The District has a self-insurance fund which it uses to pay worker's compensation, automobile liability and general liability claims and judgments. The District determines the fund amount based upon its loss experience. The current balance of the self-insurance fund is $6,259,508. It is estimated that 80 percent of that fund is currently comprised of revenue from ad valorem taxation.

B. *Procedural History*

This action was filed pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* Plaintiff, Dr. Herbert Grimshaw, II, is currently employed as a Senior Environmental Scientist in SFWMD's Okeechobee Division. (Complaint at ¶ 5). Plaintiff asserts that he was subjected to a number of adverse employment actions by the Defendant due to his age (Plaintiff is over 40 years old), including being placed on probation and being terminated. (Complaint at ¶ 15). The District terminated Dr. Grimshaw in July of 1998. (Complaint at ¶ 23). The Plaintiff was then rehired on June 8, 1999. (Complaint at ¶ 24). Plaintiff filed this two count action on December 22, 2000. Count I charges SFWMD with age discrimination in violation of the ADEA and Count II alleges retaliation. Plaintiff asserts that his termination was based on his age and that the Defendant retaliated against him for filing a grievance of discrimination following his return to SFWMD. The Defendant has filed a motion to dismiss or in the alternative for summary judgment asserting Eleventh Amendment Immunity. A hearing was held on January 29, 2002.

III. STANDARD OF REVIEW

A motion to dismiss is appropriate only when it is demonstrated "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). For the purpose of the motion to dismiss, the Complaint is construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. *See Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). Regardless of the alleged facts, however, a court may dismiss a Complaint upon a finding in favor of the moving party on a dispositive issue of law. *See Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir.1993).

[1] Summary judgment is appropriate only when there are no genuine issues of

in fresh water use from about 7.2 billion gallons a day in 1995 to about 9.3 billion gallons a day in 2020; (2) pollution from existing and ongoing development is impairing the quality of surface waters; (3) nitrate contamination threatens many of the major spring systems; (4) contaminated development in high-risk low-lying areas is increasing the potential for flooding; (5) water within the year 2000 to about 20.7 million by 2020. These include: (1) a projected increase drawals to meet human needs are causing harm to natural systems; and (6) the most severe drought in recorded history is causing water shortages in many parts of the State. *See* December 2001 Water Plan, Department of Environmental Protection, State of Florida at http://w ww.dep.state.fl.us/water/waterpolicy/index.htm.

material fact and the movant is entitled to judgment as a matter of law. *See* FED. R.CIV.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The moving party bears the burden of meeting this exacting standard. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). In applying this standard, the evidence, and all reasonable factual inferences drawn therefrom, must be viewed in the light most favorable to the non-moving party. *See Arrington v. Cobb County*, 139 F.3d 865, 871 (11th Cir.1998); *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir.1997). The issue presented in this matter is a dispositive issue of law. Under either analysis, a finding that SFWMD is entitled to immunity would require the Court to dismiss this action.[4]

IV. DISCUSSION

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State. U.S. CONST. amend XI.

Although the express language of the Amendment encompasses only suits brought against a state by citizens of another state, the Supreme Court has held that it also prohibits suits against a state by its own citizens. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996); *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); *see also Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146, 113 S.Ct. 684, 689, 121 L.Ed.2d 605 (1993) ("The Amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity."). "The Eleventh Amendment largely shields States from suit in federal courts without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Authority Trans–Hudson Corporation*, 513 U.S. 30, 39, 115 S.Ct. 394, 400, 130 L.Ed.2d 245 (1994).

[2–4] The Amendment's bar against suits in federal courts extends to the state and its instrumentalities, but it does not extend to counties, municipal corporations, or other political subdivisions of the state. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 572, 50 L.Ed.2d 471 (1977). In deciding whether a state instrumentality may invoke the state's immunity, the inquiry focuses on the nature of the entity created by state law in order to determine whether it should be treated as an arm of the state. *Regents of the University of California v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 904, 137 L.Ed.2d 55 (1997). Ultimately, the question of whether a particular agency has the same kind of independent status as a county or instead is an arm of the State and therefore "one of the United States" within the meaning of the Eleventh Amendment is a question of federal law. However, that federal question can be answered only after considering the provisions of state law that define the agency's character. *Id.* at n. 5.

[5] In determining whether the Eleventh Amendment provides immunity to a particular entity, the Eleventh Circuit examines the following factors: (1) how the

4. Florida's Eleventh Amendment immunity has not been waived or abrogated by the Age Discrimination in Employment Act. *See Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000) (holding that the ADEA did not validly abrogate the state's Eleventh Amendment immunity from suits by private individuals).

state law defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds from; and (4) who is responsible for judgments against the entity. *See Miccosukee Tribe of Indians of Florida v. Florida State Athletic Comm'n*, 226 F.3d 1226, 1231; *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1509 (11th Cir.1990); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730, 732 (11th Cir.1984).

A. *Definition of SFWMD under State Law*

[6] Article II, section 7 of the Florida Constitution states "[i]t shall be the policy of the state to conserve and protect its natural resources and scenic beauty. Adequate provision shall be made by law for the abatement of air and water pollution and of excessive and unnecessary noise." This provision has been described by the Florida Supreme Court as a statement of policy and a mandate to the Florida Legislature. *See Askew v. Cross Key Waterways*, 372 So.2d 913, 914 (Fla.1978). Pursuant to this direction, which was adopted as part of the 1968 revision to the Constitution, the Florida Legislature enacted the Florida Water Resources Act, Chapter 72–299, Laws of Florida, which established Florida's water management framework.

In Section 373 of the Florida Statutes, the Florida Legislature has made the following findings and policy declaration:

> The waters in the state are among its basic resources. Such waters have not heretofore been conserved or fully controlled to realize their full beneficial use.
>
> * * * * * *
>
> Because water constitutes a public resource benefitting the entire state, it is the policy of the Legislature that the waters in the state be managed on a state and regional basis.
>
> * * * * * *
>
> The Legislature recognizes that the water resources problems of the state vary from region to region, both in magnitude and complexity. It is therefore the intent of the legislature to vest in the Department of Environmental Protection or its successor agency the power and responsibility to accomplish the conservation, protection, management and control of the waters of the state with sufficient flexibility and discretion to accomplish these ends through delegation of appropriate powers to the various water management districts. The department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent practicable such power should be delegated to the governing board of a water management district.

FLA. STAT. § 373.016

> * * * * * *
>
> It is the finding of the legislature that the general regulatory and administrative functions of the districts herein authorized are of general benefit to the people of the state and should substantially be financed by general appropriations. Further, it is the finding of the legislature that water resources programs of particular benefit to limited segments of the population should be financed by those most directly benefitted. To those ends, this act provides for the establishment of permit application fees and a method of ad valorem taxation to finance the works of the district.

1972 Fla. Laws ch. 299, part V, § 1(1).

> * * * * * *
>
> It is further declared the policy of the Legislature that each water management district, to the extent consistent with effective management practices, shall approximate its fiscal and budget policies and procedures to those of the state.

FLA. STAT. § 373.016

Through these provisions, the Legislature defines the water management districts as operating under state control to perform a state function with a regional component.

The unusual structure and taxing power of the water management districts quickly sparked litigation. In *St. Johns River Water Management District v. Deseret Ranches of Florida Inc.*, 421 So.2d 1067 (Fla.1982), the Florida Supreme Court considered a challenge to the constitutionality of the establishment of a River Basin ancillary to a Water Management District as well as the taxing power of the districts. While the peculiarities of Florida law giving rise to the case are not necessary to the issue here, the gravamen of the dispute was whether the laws enacting the districts were directed to "entities, interests, rights, and functions *other than those of the State.*" *Id.* at 1069. The Florida Supreme Court held that the "statewide water management plan created and implemented by Chapter 373 is primarily a state function serving the state's interest in protecting and managing a vital natural resource." *Id.*

The Florida Supreme Court also rejected the challenge to the ad valorem taxing power of the districts. It was argued that if the district served a state function then its ad valorem taxing power violated Article VII, section 1(a), of the Florida Constitution which prohibits State ad valorem taxes. The Court agreed that "[t]he fact that water resource conservation, control, planning and development are state functions does not make them exclusively, so . . . It is clear that simply because a water management district furthers a state function, policy, or purpose does not prevent it from levying ad valorem taxes where the local function, policy, or purpose is similarly vital to the local district area." *Id.* at 1070–71, *quoting Deseret Ranches of Florida, Inc. v. St. Johns River Water Mgmt. District*, 406 So.2d 1132, 1140 (Fla. 5th DCA 1981).

Other than the Supreme Court's holding that the Districts serve a "state function," Florida courts have shown some inconsistency in describing the SFWMD.[5] For example, in *Florida Sugar Cane League, Inc. v. South Florida Water Mgmt. District*, 617 So.2d 1065, 1066 (Fla. 4th DCA 1993), the Fourth District Court of Appeals described SFWMD as a "regulatory state agency" subject to the provisions of the Florida Administrative Procedure Act, Chapter 120, Florida Statutes. However, in *Martinez v. South Florida Water Management District*, 705 So.2d 611, 612 (Fla. 4th DCA 1997), that same Court pointed to the "amorphous" nature of the District and found it not to be a State agency for purposes of the Drug Free Workplace Act, Section 112.0455, Florida Statutes.

In arguing that SFWMD should be treated as a political subdivision like a county or city rather than as an instrumentality or arm of the state, the Plaintiff places great weight upon the Florida Supreme Court's decision in *Canaveral Port Authority v. Dep't of Revenue*, 690 So.2d 1226 (Fla.1996). The issue in that case was whether Brevard County could assess ad valorem taxes on property owned by the Canaveral Port Authority and leased to private entities engaged in non-governmental activities.

5. In *United States v. Southern Florida Water Mgmt. District*, 28 F.3d 1563 (11th Cir.1994), *cert. denied sub nom. Western Palm Beach County Farm Bureau, Inc. v. United States*, 514 U.S. 1107, 115 S.Ct. 1956, 131 L.Ed.2d 848 (1995) the Eleventh Circuit described the SFWMD and the Department of Environmental Regulation as "two state agencies." However, in the context used, the Court may have simply been contrasting state as opposed to federal agencies.

The Florida Supreme Court determined that

> [O]nly the State and those entities which are expressly recognized in the Florida Constitution as performing a function of the state comprise 'the state' for purposes of immunity from ad valorem taxation. What comprises 'the state' is thus limited to counties, entities providing the public system of education, and agencies, departments, or branches of state government that perform the administration of the state government.

Id. at 1228.

The Court held that the Canaveral Port Authority was not such an entity and therefore not immune from ad valorem taxation.

For several reasons, I do not consider this case dispositive or even helpful to the Eleventh Amendment analysis. First, in defining "the State" for purposes of immunity from ad valorem taxation, the Florida Supreme Court includes political subdivisions such as counties, cities, and school boards which are not entitled to Eleventh Amendment immunity. Eleventh Amendment immunity and ad valorem taxation immunity are different concepts serving different purposes with different analytical frameworks.

Moreover, despite some expansive language in the dissent about a variety of special districts, the majority opinion in *Canaveral* did not decide the issue of the SFWMD's immunity from ad valorem taxation. As noted above, in *Deseret Ranches*, the Florida Supreme Court determined that the water management districts serve a state function. The Florida Constitution also identifies the South Florida Water Management District, or its successor agency as responsible for administering the Everglades Trust Fund, a State trust fund established by constitutional amendment in 1996 and therefore it may fall within *Canaveral Port Authority's* definition of the state. Finally, *Canaveral* did not reference, and presumably left undisturbed, an earlier decision that water management districts are immune from ad valorem taxation. *Andrews v. Pal-Mar Water Control Dist. Dep't of Revenue*, 388 So.2d 4 (Fla. 4th DCA 1980).[6]

In examining how SFWMD is characterized under state law, I also find significant the manner in which its finances are reported. Under the generally accepted accounting principles promulgated by the Government Accounting Standards Board and as implemented by the Comptroller of Florida, the District is treated as a "component unit" of the State government which is considered the primary government. The District's finances are therefore reported as part of the state's financial statements.[7] The District's financial

6. The differences between the Canaveral Port Authority and SFWMD for purposes of Eleventh Amendment analysis are apparent. The Port Authority is governed by elected port commissioners. The Legislature also directed that the Authority could be sued in a district court of the United States. *See* 1953 Fla. Laws ch. 28922, art III.

7. According to the testimony of Aaron Bassinger, the Budget Director of the District, a primary government must meet three specific criteria: (1) it must be a legally separate entity; (2) it must be fiscally independent; and (3) its governing body must be elected. Examples of primary government include the state, a city, a county, a school board. A component unit must also meet specific criteria: (1) it must be legally separate; (2) it must be fiscally dependent on the primary government; and (3) its governing board must not be elected but appointed by the primary government. *See also* MILLER GOVERNMENTAL GAAP GUIDE ch. 4 (2000) *quoting* GASB 14, par. 20 ("The nature and the significance of the relationship between the [component unit] and a primary government are such that to exclude the entity from the financial reporting

reports are required to contain a notation that it is a component unit of the State of Florida.

B. *Degree of State Control*

The degree of control the state exercises over SFWMD is pervasive and substantial. The Governor, subject to confirmation by the Florida Senate, appoints the members of the District's governing board. FLA. STAT. § 373.073. The Governor has the authority to remove from office any officer of a water management district. FLA. STAT. § 373.076(2). The appointment of the executive director is subject to approval by the Senate. FLA. STAT. § 373.079(4)(a).

The Governor and the Cabinet, sit as the Florida Land and Water Adjudicatory Commission (the "Commission"). The Commission has authority to review any order or rule of the District. If they determine such order or rule to be inconsistent with chapter 373, Florida Statutes, they can require the District to initiate rulemaking proceedings to amend or repeal the challenged order or rule. FLA. STAT. § 373.114.

The Governor is authorized to approve or disapprove, in whole or in part, the budget of each water management district and to analyze each budget as to the adequacy of fiscal resources available to the District and the adequacy of the District expenditures. FLA. STAT. § 373.536(5)(a). Any provision rejected by the Governor shall not be included in a district's financial budget. FLA. STAT. § 373.536.

The District's budget director testified that in practice, the Governor's control of the district's finances extends to every aspect of the district's operation from questions and required justifications on major restoration projects, to computer equipment, travel, training, number of employees, salary and merit increases. The Governor's review has even extended to such minuscule matters as objections concerning the expense of watering plants at the District's headquarters and the coffee and donuts served at District meetings. According to the budget director, the Governor has also directed major reprioritizations of district expenditures by issuing a directive that an additional $10.7 million be allocated within the District's budget to the Comprehensive Everglades Restoration Plan with the resulting budgetary shortfalls rippling across every program that the District undertakes.

The Eleventh Circuit has stated that where the budget of an entity is submitted to the state for approval, it is presumed for the purposes of evaluating the degree of state control and the entity's fiscal autonomy, that the entity is an agency of the state. *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d at 1509; *Harden v. Adams*, 760 F.2d 1158, 1163 (11th Cir. 1985), *cert. denied* 474 U.S. 1007, 106 S.Ct. 530, 88 L.Ed.2d 462; *Fouche v. Jekyll Island–State Park Auth.*, 713 F.2d 1518, 1520 (11th Cir.1983). The degree of state control exercised over SFWMD is very compelling.

C. *Where Funds are Derived*

The various water management districts receive funding from a variety of sources including general appropriations from the state. According to the testimony of Sandra Howard, a government analyst with the Department of Environmental Protection ("DEP") and formerly with the Office of the Governor, the overall budget for the five water management districts is approximately $2 billion annually. While it varies

entity [i.e. the primary government] would render the financial statements misleading or incomplete.").

from year to year because of large acquisitions, state funding is between 20 to 30 percent of that annual amount.

The state provides monies through general appropriations for general operations of the districts, for special projects and specific purposes through the budget of the Department of Environmental Protection, and funding for unexpected expenses. As an example, Ms. Howard testified that during the past year the South Florida Water Management District lacked sufficient funding to deal with a severe drought and obtained additional funds in mid budget year from DEP.

The water management districts also have the ability to raise revenues through ad valorem taxes. The overall ceiling for such taxes applicable to the South Florida Water Management District is set in the Florida Constitution as 1.0 mill. FLA. CONST. art. VII, § 9. The Florida Legislature has authorized SFWMD to levy taxes for purposes of Chapter 373, Florida Statutes, up to a total millage rate of .8 mill, an amount less than the constitutional cap. FLA. STAT. § 373.503(3)(a)5. Presently, SFWMD assesses at .697 mills. According to the District's budget director, the District has requested tax increases since 1998 but has been denied such increases by the Governor.

As noted previously, the current annual budget for SFWMD is $728.6 million. Of that amount, approximately 35 to 45 percent comes from ad valorem taxes; 20 to 30 percent comes from state funding; federal funding approximates another 10 to 15 percent, with permit revenues and fees accounting for the remainder. The proportion between these funding sources varies from year to year based upon what major projects the District undertakes. For example, at present the District has embarked on the Comprehensive Everglades Restoration Plan ("CERP"), a massive restructuring of South Florida's existing flood control network. The projected cost of the program is $8.2 billion with costs split equally between the state and federal government. To finance CERP, the Florida Legislature established the Everglades Trust Fund, administered by SFWMD. Funds deposited into the Trust Fund include: (1) toll revenues; (2) an Everglades agricultural privilege tax; (3) a C–139 agricultural privilege tax; (4) special assessments; (5) ad valorem revenues; (6) federal funding; (7) Preservation 2000 funds; (8) additional funds appropriated by the Legislature for Everglades restoration; (9) gifts; and (10) any additional funds which become available. FLA. STAT. § 373.45926(4). The variety of funding reflects the magnitude of the project and its importance to the state.[8]

D. *Responsibility for Judgments*

As noted above, the District is self-insured. Based upon its claims history, an amount is budgeted to its self-insurance fund. Currently, that amount is approximately $6 million. Since the fund is primarily used for worker's compensation

8. The Everglades have special significance to Floridians:

> There are no other Everglades in the world. They are, they have always been, one of the unique regions of the earth, remote, never wholly known. Nothing anywhere else is like them: their vast glittering openness, wider than the enormous visible round of the horizon, the racing free saltness and sweetness of their massive winds, under the dazzling blue heights of space. They are unique also in the simplicity, the diversity, the related harmony of the forms of life they enclose. The miracle of the light pours over the green and brown expanse of saw grass and of water, shining and slowmoving below, the grass and water that is the meaning and the central fact of the Everglades of Florida. It is a river of grass. MARJORY STONEMAN DOUGLAS, THE EVERGLADES: RIVER OF GRASS 5–6.

claims and because most of the District's employees are funded from ad valorem sources, approximately 80% of the fund is supported by ad valorem resources. The self-insurance fund, like all other budget items of the District goes through the state budget process.

To the District budget director's knowledge, the self-insurance fund has never been depleted. He also does not recall any instance where the District has been required to seek assistance from the state in connection with an employment related claim or judgment; however, there has been an instance where state trust funds were used to pay a judgment of approximately $40 million in connection with land acquisition.

The Plaintiff argues that in order to be accorded Eleventh Amendment immunity, any judgment against the SFWMD *must* be paid out of the state treasury. The Plaintiff contends that function and control are irrelevant considerations, that the only determinative factor is whether sufficient funds are available from sources other than the state to pay any likely judgment in this case.

In arguing that function and control are irrelevant and that the single dispositive issue is whether the judgment must be paid from the state treasury, the Plaintiff relies upon what I believe to be a strained interpretation of the Supreme Court's decision in *Hess v. Port Authority Trans-Hudson Corp., supra.*[9] I do not believe that the facts and holding of *Hess* support the plaintiff's construction. Significantly, the Eleventh Circuit has continued to rely upon its four factor test after *Hess. See e.g. Miccosukee Tribe v. Florida State Athletic Comm'n,* 226 F.3d at 1231; *Shands Teaching Hospital and Clinics, Inc. v. Beech Street Corp.,* 208 F.3d 1308 (11th Cir.2000). Moreover, since *Hess,* the Supreme Court has emphasized the necessity for an examination of the nature of the entity created by state law to determine whether it should be treated as an arm of the state instead of "convert[ing] the inquiry into a formalistic question of ultimate financial liability." *Regents of the Univ. of California v. Doe,* 519 U.S. at 430, 117 S.Ct. at 904.

The facts of *Hess* are also markedly different from those presented here. The Port Authority in *Hess* was established through a bistate compact between New York and New Jersey and was conceived as a financially independent entity with funds primarily derived from private investors. Debts of the authority were not obligations of either founding states and the states did not appropriate funds to the authority. The Port Authority's compact and implementing legislation barred it from drawing on state tax revenue and imposing any charges on either state although the legislation provided for up to $100,000 from each state to cover certain administrative expenses upon advance approval of the governors of both states and appropriation by their legislatures. The Supreme Court noted that the authority had received no money from New York or New Jersey since 1934, because revenues

9. The Plaintiff also cites to the Eleventh Circuit's decision in *Travelers Indemnity Co. v. School Bd. of Dade County,* 666 F.2d 505 (11th Cir.1982), *cert. denied,* 459 U.S. 834, 103 S.Ct. 77, 74 L.Ed.2d 74, but quotes a portion of the opinion out of context and misstates its holding (Plaintiff's Response, p. 17). The question before that Court there was whether a subordinate political entity not normally a part of the state for Eleventh Amendment purposes, i.e. a school board, nonetheless obtained protection if the suit against it arose from a contract for which the state provided funds. 666 F.2d at 507. As the subsequent decision in *Shands Teaching Hospital and Clinics, Inc.* demonstrates, *Traveler's* did not establish a requirement that monies must be paid directly by the state treasury in order to qualify for Eleventh Amendment immunity. 208 F.3d 1308.

from the authority's operations cover all expenses.

Contrary to plaintiff's assertion, the Supreme Court did not consider function or control irrelevant but analyzed those factors and found them, as applied to the Port Authority, to be pointing in differing directions. The Court found that although the state courts had referred to the Port Authority as an agency of the states, the legislation did not so describe it, and that its functions were not readily classified. *Hess*, 513 U.S. at 44–45, 115 S.Ct. at 403. The court also noted that while each state could exert significant authority, no state alone could direct its activities. "Gauging actual control, particularly when an entity has multiple creator-controllers, can be a 'perilous inquiry.'" 513 U.S. at 47, 115 S.Ct. at 404 (citations omitted). The Court placed substantial weight on a third factor—the Port Authority's anticipated and actual financial independence and its long history of paying its own way.[10]

The Port Authority maintained that its private funding and financial independence created a different impact upon New York and New Jersey which should be considered. Operating profitably, the Port Authority dedicates some of its surplus to public projects the states would otherwise be required to undertake such as bus services. A judgment against it therefore would, by reducing the surplus available for such purposes, affect the treasuries of the two states.

The Court rejected this argument:

> The proper focus is not on the use of profits or surplus, but rather is on losses and debts. If the expenditures of the enterprise exceed receipts, is the State in fact obligated to bear and pay the resulting indebtedness of the enterprise? When the answer is "No" both legally and practically—then the Eleventh Amendment's core concern is not implicated.

Hess, 513 U.S. at 51, 115 S.Ct. at 406.

The facts here are different. There are not multiple sovereigns, only one. No profits are realized, instead a substantial portion of the District's revenues come from the state and all expenditures are controlled by the state. The state has in the past participated in paying a judgment against the District. If expenditures exceed receipts, either the state must approve the elimination of programs or services, allow the District to raise additional ad valorem funds within the cap authorized by the Constitution, or expend additional money from the state treasury.

SFWMD operates under state law pursuant to a constitutional mandate and it performs a state function. The state exercises virtually absolute control over its personnel, budget, policies and operations. A substantial portion of its funds comes from the state and the state exercises budget item control over all of its resources. SFWMD was not conceived of as an independently financed agency; the Florida Legislature found that the districts "should be substantially financed by general appropriations." 1972 Fla. Laws ch. 299, part V, § 1(1). While a judgment is legally enforceable against the District, as a practical matter the state's treasury is directly implicated both through the budget process and by the reality that the

10. The Court contrasted the Port Authority facts with those in *Morris v. Washington Metro. Area Transit Authority*, 781 F.2d 218 (D.C.Cir.1986), a decision it found "compatible with our approach." "[W]here an agency is so structured that as a practical matter, if the agency is to survive, a judgment must expend itself against state treasuries, common sense and the rationale of the eleventh amendment require that sovereign immunity attach to the agency." *Hess*, 513 U.S. at 50, 115 S.Ct. at 405, n. 20 (*quoting Morris*, 781 F.2d at 227).

state in order to execute its water management function and plan for the future must maintain the financial viability of the District.

Current Eleventh Amendment jurisprudence emphasizes the integrity retained by each state in the federal system. The Amendment operates to protect a state's autonomy, its ability to set its own agenda, to control its own internal machinery, and to plan for the future. To many, Florida is known as the Sunshine State. But to those who live along its rivers, springs, and lakes, enjoy its shorelines and river of grass, and rely upon its waters to drink and water crops, Florida's existence seems more fragile than the expectation that the sun will rise each morning.[11] The water management districts work to further the state's critical objective of preserving its water supply.

[7] While the facts of this case fit within the confines of the majority opinion in *Hess*, the structure of the water management district also demonstrates the wisdom of Justice O'Connor's dissenting opinion on behalf of four members of the Court. Florida has sought to combine state direction and control with regional flexibility based upon hydrologic boundaries. That innovation should be respected by the courts. An arm of the State is an entity that undertakes state functions and is politically accountable to the state. *Hess*, 513 U.S. at 61, 115 S.Ct. at 411 (O'Connor, J. dissenting). The lines of oversight by the state of SFWMD are clear and substantial.[12] In this case each Eleventh Amendment test—the four factors of the Eleventh Circuit, the emphasis on the state treasury of the *Hess* majority, and the control-centered formulation of Justice O'Connor—lead to the same con-

11. The DEP's 2000 Status Report on Regional Supply Planning states:

> Many of our natural systems are highly dependent on water: they require specific amounts of water for a particular length of time during the right season of the year. In South Florida, water is needed to support the Everglades; in Central and North Florida, groundwater is needed to support the flow of 600 springs; in North Florida, water is needed to maintain base flows in major river systems including the Apalachicola, Suwannee, and St. Johns. Along the entire coastline, adequate fresh water flows are needed to maintain the proper salinity in our estuaries, which support diverse wildlife habitats and valuable sport and commercial fisheries. These extraordinary natural features have attracted people to this state, and sustaining them while ensuring adequate water supply, is a fundamental challenge for water management.

The Report is available at http://www.dep.state.fl.us/water/waterpolicy/index.htm.

12. Perhaps nothing demonstrates the control by the State over SFWMD more dramatically than the settlement of the Everglades litigation brought by the federal government. On May 21, 1991, Florida Governor Lawton Chiles walked into the federal courthouse in Miami and stated:

> I came here today convinced that continuing the litigation does not solve the problem to restore the Everglades. I am more than ever convinced of that ... We talked about water in the glass ... I am ready to stipulate today that the water is dirty. I think that [what this is] about Your Honor ... is how do we get clean water? What is the fastest way to do that? I am here and I brought my sword. I want to find out who I can give that sword and I want to be able to give that sword and have our troops start the reparation, the clean up ... We want to surrender. We want to plead that the water is dirty. We want the water to be clean, and the question is how we can get it the quickest.

Transcript of Hearing Proceedings, May 21, 1991, in *United States v. South Fla. Water Mgmt. Dist.*, No. 92-4314 (S.D. Fla. filed 1988), available at *http://exchange.law.miami.edu/everglades*.

The Governor showed up with his sword after changing SFWMD's chairman, the composition of its board, its executive director, and firing its outside counsel.

clusion. In order to obtain the vindication of state sovereignty protected by the Amendment, the South Florida Water Management District should be deemed an arm of the state.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss, or in the alternative, for Summary Judgment is GRANTED. This action is dismissed by reason of the Eleventh Amendment. The action must be brought, if permitted, in the courts maintained by the State of Florida.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this __ day of February, 2002.

Henry COOK and C & S Industrial Supply, Inc., Plaintiffs,

v.

CITY OF CUTHBERT, GEORGIA, Willie Martin, et al., Defendants.

No. 4:00–CV–156–3(CDL)

United States District Court, M.D. Georgia, Columbus Division.

Feb. 14, 2002.

African–American contractor brought action alleging that city's decision to stop payment on check violated federal civil rights laws. On city's motion for summary judgment, the District Court, Land, J., held that: (1) failure to pay pursuant to state court injunction did not violate contractor's rights, and (2) city officials were entitled to qualified immunity.

Motion granted.

1. Civil Rights ⇐118

City's compliance with valid state court order requiring it to stop payment on check to African–American contractor and tactical decision to consent to order pending resolution of merits of competitor's challenge to bid process was not racially motivated, and thus did not violate contractor's rights under §§ 1981 and 1983, where city awarded contract to contractor, even though it was 150% higher than other competitive bid, and bid had not been awarded to anyone else. 42 U.S.C.A. §§ 1981, 1983.

2. Civil Rights ⇐118

City's compliance with state court injunction requiring it to stop payment on check to African–American contractor was not pretext for racial discrimination, and thus did not violate contractor's rights under §§ 1981 and 1983, where competitor's success in underlying state court action would have voided contract, city attorney had good faith belief that issues in litigation would be resolved expeditiously, and contractor failed to intervene in action. 42 U.S.C.A. §§ 1981, 1983.

3. Civil Rights ⇐207(1)

For purposes of § 1983 liability, claims against government officers and employees in their official capacities are treated as claims against governmental unit for whom they were employed. 42 U.S.C.A. § 1983.

4. Civil Rights ⇐214(4)

City officials' compliance with valid state court order requiring them to stop payment on check to African–American contractor and tactical decision to consent to order pending resolution of merits of underlying litigation did not violate clearly established federal or constitutional right, and thus officials were entitled to qualified immunity from liability under § 1983. 42 U.S.C.A. § 1983.