

IN THE SUPREME COURT OF FLORIDA

Case No. SC09-1817

SC09-1818

Lower Case No.: 2008-CA-031975-XXXX-MB

NEW HOPE SUGAR COMPANY and
OKEELANTA CORPORATION, et. al.

Defendants/Appellants,

vs.

SOUTH FLORIDA WATER
MANAGEMENT DISTRICT,

Plaintiff/Appellee.

**NOTICE OF ORDER IN RELATED CASE AND SUGGESTION OF
MOOTNESS**

Appellants, New Hope Sugar Company and Okeelanta Corporation, hereby submit this notice of the March 31, 2010 Order of Chief United States District Judge Federico Moreno of the United States District Court for the Southern District of Florida in *United States v. South Florida Water Management District, et. al.*,¹ and suggest that this Order renders the present controversy moot or at the very least suggests that the matter ought be remanded to the circuit court for consideration of the question of mootness.

¹ *United States v. South Florida Water Management District, et. al.*, Southern District of Florida Case No. 88-1886 (“*US v. SFWMD*” and “*the Order*,” as appropriate; the Order is attached as App-1)

I. Notice of Related Order in *US v. SFWMD*.

US v. SFWMD is the original lawsuit over Everglades restoration. It was filed in 1988 and has had a long and significant history.² Operating under a settlement agreement and consent decree in that case, now Senior U.S. District Judge William Hoeweler and more recently Chief Judge Federico Moreno of the Southern District of Florida have overseen restoration for the past two decades.

On March 31, 2010, Chief Judge Moreno entered the attached Order, ruling in favor of the Miccosukee Tribe of Indians, which had long sought to have the court require completion of the Everglades Agricultural Area Storage Reservoir and related projects (EAA Reservoir) by Appellee, the South Florida Water Management District (SFWMD). The EAA Reservoir is a major Everglades restoration project that was partially completed at the time the U.S. Sugar deal was first announced, but was abandoned by SFWMD along with other previously-approved projects -- specifically to accommodate the budgetary impact of the purchase.

The Tribe had argued that the EAA Reservoir project was a required project under the Southern District's consent decree, and that it was promised to that court

² In 1991 Florida Governor Lawton Chiles appeared before then presiding U.S. District Judge William Hoeweler and "turned in his sword," thus triggering a settlement between the parties that remain now under the jurisdiction of Chief Judge Moreno.

as a remedy to improve water quality and water deliveries. Although SFWMD initially denied that the EAA Reservoir project had been cancelled due to the U.S. Sugar deal – the purpose for which bond validation is sought in the instant case -- SFWMD later admitted that it could not afford the debt service on the certificates of participation (COPs) at issue in this appeal without sacrificing the reservoir.

Moreover, Kirk Burns , counsel for SFWMD, specifically stated to Chief Judge Moreno in a hearing on December 1, 2009, that if SFWMD had to complete the EAA Reservoir it could not “proceed with closing on the U.S. Sugar Deal.” As the transcript succinctly sums up “there’s not enough money for both.” (*See* Transcript excerpt attached as App-2). In related court papers, SFWMD admitted that due to this budget constraint the reservoir and other restoration projects were “put on hold as the District tries to close on the U.S. Sugar lands transaction.” *US v. SFWMD* DE 2100 at 2 (attached as App-3).

Given that the land purchase and EAA Reservoir were mutually-exclusive options, SFWMD had argued in *US v. SFWMD* that it should not be required to build the reservoir and should instead be allowed to pursue issuance of the COPs and purchase of the U.S. Sugar land. Chief Judge Moreno disagreed, finding that the court could not allow parties to arbitrarily abandon projects. He also found, based on his review of the order on appeal in the present case, that the bond

validation only provided for “73,000 acres to be purchased with no money to buy the remaining 107,000 acres or to construct any projects on the land” and thus *did not provide for projects* that would replace those sacrificed in favor of the land acquisition. App-1 at 10.

Chief Judge Moreno accordingly ordered SFWMD to build the EAA Reservoir and rejected arguments that he should allow the project to be sacrificed in favor of the land acquisition.³ The question for this Court becomes whether there is still a live controversy given SFWMD’s position that it could not “proceed down both paths simultaneously” were Judge Moreno to do exactly what he did. *See* App-1. If SFWMD cannot afford to issue the COPs, there is nothing left in the present case but an advisory opinion issued below that should be vacated as moot.⁴ Moreover, by proceeding in that fashion, the Court sets off for another day the myriad constitutional issues presented by this appeal, as well as the interrelation between the pending APA appeal (Case No. 10-330) and these proceedings, which

³ The Order directs SFWMD to build the reservoir and submits to a special master the question of timing of the project.

⁴ When a case becomes moot while on appeal the proper remedy is to remand to the lower court with directions to vacate the order below. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

might also become moot depending upon whether the U.S. Sugar deal is to go through or not.

II. Suggestion of Mootness

Case Nos. 09-1817 and 09-1818, the parallel appeals to the bond validation final judgment of the 15th Judicial Circuit, are scheduled for oral argument on April 7, 2010. In addition, the District Court of Appeal, Third District, has transferred to this Court Case No. 10-330, which are related challenges under the Florida Administrative Procedure Act of the determination to undertake the U.S. Sugar land acquisition and cancel other restoration projects, including the EAA Reservoir.

This case presents weighty issues of constitutional law, including a request for a radical extension of existing precedent on COPs. While such questions need to be considered if SFWMD intends to issue the COP debt, there is no basis to delve into such matters if SFWMD cannot follow through with the debt issuance and land acquisition. Given the positions taken before Chief Judge Moreno, it appears there is no longer a live controversy, as SFWMD asserts that there is not enough money available to issue the COPs and comply with Judge Moreno's Order.

Moreover, the Bond Validation proceeded under financial projections created based on SFWMD data as of May 13, 2009. Since that time, however, projections of SFWMD revenues and affordability of the purchase debt have changed significantly, resulting in SFWMD's primary financial advisor, Public Financial Management (PFM), calling into question whether significant issuance of new debt is a viable option.⁵ (A copy of the PFM Report is attached as App-4.) And, the substantial cost of building the EAA Reservoir – which SFWMD thought needed to be avoided to afford the COP issuance -- was not considered below, as SFWMD had by then cancelled that and other Everglades restoration projects to make room in its budget for the U.S. Sugar deal. This renders the factual findings below obsolete.

Based upon present circumstances, it now appears that SFWMD will not consummate the U.S. Sugar acquisition and issue the COP debt. And, even were this not the case, it appears the appeal is travelling on a record that no longer reflects the present fiscal situation. Even before Chief Judge Moreno's Order, SFWMD had serious reservations of affordability. After that Order, by its own admission, SFWMD cannot complete the U.S. Sugar acquisition.

⁵ This report was issued before Chief Judge Moreno's Order in *US v. SFWMD*, and therefore the concerns already existed prior to SFWMD being required to complete the EAA Reservoir and other shelved projects.

This Court has long held that a case becomes moot where no practical result could be obtained from judicial action. *See Godwin v. State*, 593 So. 2d 211 (Fla. 1992) (an appeal is moot when “judicial determination can have no actual effect.”); *DeHoff v. Imeson*, 15 So. 2d 258 (Fla. 1943) (“An appeal should be dismissed where no practical result could be attained by reviewing the questions therein contained.”). As the Supreme Court of the United States recently explained in *Alvarez v. Smith*, “an actual controversy must exist at all stages of review, not just when the complaint is filed.” *Alvarez v. Smith*, ___ U.S. ___, 130 S. Ct. 576, 580 (2009). A controversy is clearly lacking if SFWMD cannot proceed with the COPs regardless of the outcome before this Court.

Moreover, the Bond Validation appeals call on this Court to decide serious constitutional questions. It is a well-established axiom that a court should not decide a constitutional question unnecessarily or render a merely advisory opinion on such issues.⁶ Unless SFWMD truly intends to pursue the transaction, such an improper constitutional decision is all that would result from this case, and

⁶ *See, e.g., Liner v. Workers Temporary Staffing, Inc.*, 990 So. 2d 473 (Fla. 2008) (“this Court should refrain from deciding constitutional questions when the case may be resolved on other grounds.”); *In re: Holder*, 945 So. 2d 1130 (Fla. 2006) (“we have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on non-constitutional grounds.”).

SFWMD's counsel has openly acknowledged before Chief Judge Moreno that it cannot do so if the EAA Reservoir (an \$800 million+ project) is undertaken.

When a controversy ceases to exist while the case is on appeal, the proper remedy is to vacate the order below so as to preserve the rights of all parties.

Alvarez, 130 S. Ct. at 581. Thus, if SFWMD -- as it told Judge Moreno -- cannot complete the debt-issuance now that it has been ordered to build the EAA Reservoir, the matter should be remanded to the lower court and the order on appeal vacated.

As explained by the United States Supreme Court:

[W]e normally do vacate the lower court judgment in a moot case because doing so “clears the path for future relitigation of the issues between the parties,” preserving “the rights of all parties,” while prejudicing none “by a decision which ... was only preliminary.”

Id., citing *Munsingwear*, 340 U.S. at 40. This same line of U.S. Supreme Court cases provides that vacatur of the lower court order “must be decreed for those judgments whose review is...prevented through happenstance -- that is to say, where a controversy presented for review has become moot due to circumstances unattributable to any of the parties.” *U.S. Bancorp*, 513 U.S. at 23 (citations omitted). Likewise, “vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court.” *Id.*

In this case mootness results from commitments made by SFWMD to a federal court, which SFWMD then sought to walk away from without following the process for changing its restoration plans or even acknowledging that they were changed. This led Chief Judge Moreno to hold the agency to its prior commitments, an action which SFWMD has taken the position cannot be reconciled with the U.S. Sugar deal. Thus, vacatur of the order below is the proper remedy.

And, if this Court is not certain of precisely what the facts are to its satisfaction, the proper course would be, alternatively, to remand the matter to Circuit Judge Donald Hafele to determine the facts after an evidentiary hearing and resubmit the matter to the Court for further action if any matters are left for determination or vacate his prior order if the controversy has indeed become moot.

Conclusion

SFWMD has stated that it cannot both fund the U.S. Sugar acquisition debt and proceed with the EAA Reservoir. Given that the reservoir is now required by a federal court order, there is a serious question as to whether the resolution of the bond validation presents a live controversy. Rather than ruling on constitutional questions in what would amount to an advisory opinion, New Hope suggests that the best course of action is remand to the trial court for a determination as to

whether the COP issuance and U.S. Sugar deal is acquisition is still viable in light of the federal court order. If the two priorities cannot be simultaneously funded – as SFWMD has stated -- then New Hope suggests there is no longer a live controversy in the instant case, and the order below should be vacated as moot.

Respectfully submitted,

Joseph P. Klock, Jr. Esq. FBN 0156678
Gabriel E. Nieto, Esq., FBN 0147559
Juan Carlos Antorcha, Esq., FBN 0523305
RASCO KLOCK REININGER PEREZ
ESQUENAZI VIGIL & NIETO
283 Catalonia Avenue
Coral Gables, FL 33134
Telephone: (305) 476-7100
Facsimile: (305) 476-7102

By: _____
Joseph P. Klock, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid, this 5th day of April, 2010 to:

<p>Diane D. Tremor, Esq. Chris H. Bentley, Esq. Rose, Sundstrom & Bentley, LLP 2548 Blirstone Pines Drive Tallahassee, Florida 32301 (850) 877-6555 (850) 656-4029 (Fax) dtremor@rsbattorneys.com chb@rsbattorneys.com</p>	<p>Kirk L. Burns, Esq. Office of General Counsel South Florida Water Management District PO BOX 24680 West Palm Beach, Florida 33416-4680 (561) 682-6546 (561) 682-6276 (Fax)</p>
<p>E. Thom Rumberger, Esq. Noah D. Valenstein, Esq. Rumberger, Kirk & Caldwell, P.A. P.O. Box 10507 Tallahassee, FL 32303 850.2226550 850.2228783 (Fax)</p>	<p>Dexter W. Lehtinen, Esq. Lehtinen Riedi Brooks Morcarz, P.A. 7700 N. Kendall Drive, Suite 303 Miami, FL 33156 305.279.1166 305.279.5082 (Fax)</p>
<p>Randall W. Hanna, Esq. Christine E. Lamia, Esq. Frederick J. Springer, Esq. Bryant Miller Olive P.A. 101 North Monroe Street, Suite 900 Tallahassee, FL 32301 850.222.8611 850.222.8969 (Fax)</p>	

By: _____

Gabriel E. Nieto

Case No. SC09-1817

SC09-1818

Lower Case No.: 2008-CA-031975-XXXX-MB

4816-4594-8165, v. 1