

SOUTH FLORIDA WATER MANAGEMENT DISTRICT
GOVERNING BOARD
ATTORNEY/CLIENT SESSION

Agenda Item 40

ORIGINAL

- - -

3301 Gun Club Road
West Palm Beach, Florida
Thursday, April 13, 2017
1:20 p.m. - 1:40 p.m.

- - -

GOVERNING BOARD MEMBERS:

Daniel O'Keefe, Chairman
Kevin Powers, Vice Chair (by phone)
Sam Accursio, Board Member
Frederick Barber, Board Member
Federico Fernandez, Board Member
Mitchel Hutchcraft, Board Member
James Moran, Board Member
Melanie Peterson, Board Member

IN ATTENDANCE:

Peter Antonacci, Executive Director
Brian Accardo, General Counsel
Carlyn Kowalsky, District Attorney
James Nutt, District Attorney

Florida Court Reporting
561-689-0999

1 BE IT REMEMBERED that the following
2 attorney/client session was held at 3301 Gun Club Road,
3 West Palm Beach, Florida, on Thursday, April 13, 2017,
4 beginning at 1:20 p.m., with attendees as hereinabove
5 noted, to wit:

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7 CHAIR O'KEEFE: The Governing Board session
8 will now start with the attorney-client session. The
9 persons attending are Governing Board members present
10 and Kevin Powers by phone, Executive Director Antonacci
11 and District Attorneys Accardo, Kowalsky and Nutt.

12 MR. ACCARDO: So this attorney-client session
13 focuses on the Lake Point lawsuit. And I'm not here
14 seeking any additional authority, because we're already
15 in this lawsuit. We were sued, we're defendants; you
16 all know that. But I am here to get further direction,
17 get your opinion on litigation expenditures.

18 The last time we were all here together was
19 the fall of last year. And I reviewed that transcript
20 this morning, and I packed a lot of information into
21 that meeting, and several things have happened since
22 then.

23 Just to remind everybody, Lake Point's the
24 public-private partnership that kind of went awry on
25 the parcel of land that's on the eastern shore of Lake

1 Okeechobee, kind of on the border of Martin County and
2 Palm Beach County up along the C-44. And Jim's going
3 to pass around just a conceptual drawing of what that
4 public-private partnership, where that has gone, and
5 that's, again, just to jog your memory.

6 That was an agreement that the District
7 entered into in 2008 with Lake Point, and then, of
8 course, there was the subsequent agreement between the
9 District and Martin County. That's the Interlocal
10 Agreement where we basically -- I mean for shorthand,
11 we were middlemen. That agreement allowed Lake Point
12 to mine in Martin County, where they would not normally
13 have been allowed to mine.

14 The lawsuit was filed right at the end of
15 2012, beginning of 2013, so we've been in this lawsuit
16 for a while. The party on the other side has done a
17 lot of fighting so far in the case. You've read about
18 the public records case, which is related, although the
19 District wasn't a direct party.

20 They're well financed on the other side. The
21 Lake Point principals are billionaires, with a "b."
22 And there's clearly Martin County politics and
23 interests in play that, you know, we're not really
24 involved in, but the bottom line is we are defendants
25 in this lawsuit.

1 So one thing I noted when I reread the
2 transcript from last time is I came in here and I said,
3 look, I've got good news, I've got bad news, and I've
4 got ugly news, and I went through that. Well, this
5 time I only have bad and ugly news.

6 The good news from last time is still the
7 only good news in the case, and that's that we were
8 successful in defeating Lake Point's claim that the
9 contract between ourselves and Lake Point allowed them
10 to sell water. They didn't use that claim --

11 VICE CHAIR POWERS: Hey, Brian, can you
12 either move closer to the phone or move the phone
13 closer to you? I'm right on the edge of catching
14 everything you said.

15 MR. ACCARDO: Yes, sir, I'm really sorry.
16 Thank you.

17 So the good news from last time was the
18 District was successful on the water claim, and also
19 that the District was able to file counterclaims
20 against Lake Point. And if you recall, that was a big
21 deal, because, well, we had waited so long to do so and
22 we were very fortunate the judge let us get that in.

23 The bad news last time was about the costs,
24 and I'm going to talk more about that now. And the
25 ugly news concerned former staff at the District,

1 executive leadership of the District, how they were
2 furthering the Lake Point case. In that instance, they
3 were providing testimony in support of the water
4 project. Again, that claim failed, but their
5 participation with Lake Point still has remaining
6 repercussions. Jim will talk about that in a bit.

7 Okay, so last time we recognized that the
8 District had to retain outside counsel to defend this
9 claim. The Lake Point team is six, seven, eight
10 lawyers right now. We already know that there are
11 going to be additional lawyers brought in to try the
12 case for Lake Point.

13 Martin County, it was reported this week
14 Martin County has spent in excess of \$3 million on
15 outside legal counsel. You can count their lawyers.
16 They're up past six as well.

17 And for our part, last time we talked about,
18 look, we were under a deadline, which we thought we
19 were going to trial within two months of that Governing
20 Board meeting, and we had brought in an outside firm;
21 that was the Hopping Green & Sams firm. They
22 specialize; generally, they represent miners usually,
23 so it was very fortunate for us they were able to get
24 up to speed on the issues quickly to help represent our
25 interests.

1 We promised last time that we would file a
2 motion for summary judgment on the mining claims.
3 Again, the water claims, we did file a motion and we
4 were successful. We filed a motion for summary
5 judgment on the mining claims. The Lake Point folks
6 answered that motion.

7 And we picked up from the judge during some
8 of his other rulings that he was not likely to grant
9 our summary judgment motion, given that there were
10 factual issues for the jury. So we withdrew that
11 summary judgment motion, because, well, we didn't think
12 we would win in front of that judge, and we knew the
13 judge was changing over.

14 So we still have that in our back pocket,
15 although Jim will tell you today that while we're going
16 to obviously do that, we're going to put forth our best
17 case, it's really likely that we're going to be at
18 trial. And right now trial is scheduled for the end of
19 July, August at this point in time. So we're a few
20 months out.

21 There was recognition in this room last time
22 when we talked about the cost of defending this case
23 that there are going to be costs. And the recognition
24 was that if we do, in fact, go to trial, those costs
25 are going to increase dramatically. And that's what's

1 going to happen. That is absolutely what's going to
2 happen in this case.

3 We talked last time about how we were
4 fortunate that Martin County had been defending this
5 case so vigorously, particularly with regards to the
6 mining claims. And they had spent over \$300,000 on
7 experts in the case, and really focusing on damages,
8 because there's the issue of liability and there's also
9 the issue of how has Lake Point been damaged, lost
10 mining sales, et cetera. And Lake Point, of course, is
11 claiming that the lost mining sales are in excess of
12 \$60 million, and so there's a lot of expert testimony
13 about that.

14 But we have not contributed to those expert
15 fees to date. We talked about how, the last time, how
16 we might have to start with that because we will be
17 exposed if Martin County settles this case and takes
18 their experts with them. So we're going to have to
19 start incurring expenses on those experts to lock them
20 up as our experts.

21 And again, I think I just mentioned it, but
22 again, Martin County has just spent \$300,000 on
23 experts, and again, we haven't spent much yet. So this
24 could be a case that exceeds over a million dollars.
25 It could be up to \$2 million in expenses on behalf of

1 the District defending it. It's just a well financed
2 opposition, and they're determined, and there's not a
3 settlement here.

4 They're, from what we understand, again from
5 the good work of Martin County's efforts, they're
6 upside down on their property. And they're clearly
7 politically motivated, and the effort and the amount
8 of -- the effort they put into the public records
9 trial, at which they were ultimately victorious, at
10 what cost? I don't know. A million dollars, but they
11 were victorious.

12 So that's the bad news. It continues to
13 escalate costs. I wanted you all to know that.

14 CHAIR O'KEEFE: Brian, can you tell us where
15 we are on costs today and if we have a budget from our
16 outside counsel through the trial?

17 MR. ACCARDO: Okay. We're creeping up on
18 \$500,000 to date, including the money that had been
19 spent for years now prior to my involvement. We think
20 it could double to try the case, and that's just that
21 outside counsel. That's not counting expert fees.

22 CHAIR O'KEEFE: That seems pretty high,
23 between now and a July trial, to spend another 500,000.

24 MR. ACCARDO: Okay.

25 CHAIR O'KEEFE: I think we should just really

1 try to manage that and ask for more detailed budgets
2 and really try to control them. Particularly if
3 they're billing at reduced rates, make sure that
4 they're not overworking the file. I mean I don't know
5 what billable rates we're getting charged, but I
6 presume it's pretty attractive compared to --

7 MR. ACCARDO: It is. We're fortunate. The
8 partner rate, the senior partner rate is \$325 an hour.
9 The associate rate is under \$200 an hour. We feel like
10 they are competitive rates. Your point is well taken
11 though, to manage the litigation expenditures, and Jim
12 does a good job of that and has questioned and gone
13 back and forth with them on bills as recently as this
14 week.

15 CHAIR O'KEEFE: But I find the better -- the
16 best way to control litigation expense is to make them
17 work on those budgets beforehand. Once a bill goes out
18 and then you're fighting over the bill, you've already
19 kind of lost the battle. So I think you need to really
20 push these guys hard, and if they give us a budget that
21 we don't approve, then we don't approve it. Especially
22 with, you know, the amount of time that we have between
23 now and trial, that's real money.

24 MR. NUTT: At this juncture, this case has
25 gone in phases with respect to, I mean it's a burst of

1 resources and spending. When we first got involved in
2 it, we realized we were so under water in the case, we
3 were three months from trial, and it took a tremendous
4 amount of effort.

5 This case has been so -- it's kind of
6 ridiculous when you have counsel and the billionaire
7 clients who don't care about money. They can really
8 skate you, and they can work up all sorts of issues
9 that you either react to or you don't.

10 And that immediate period where we were
11 trying to get a counterclaim in, we were trying to
12 fight the water claim, we were trying to figure out how
13 they were tying us to the mining claims, since our
14 prior group, prior counsel didn't even believe that the
15 mining claim applied to us, it was a scramble; it was a
16 tremendously expensive period of about four months.

17 Well, it settled down, we quieted it down and
18 we recouped. And their expert came, and realizing that
19 they now had to convert over from the water claim on us
20 to the mining claim, they retooled their story. They
21 came in with a new expert update, and the expert would
22 be able to use these to show patterns. But they
23 morphed their case significantly in December.

24 And so in January we were looking at we were
25 expecting to go to trial, hoping the September-October

1 timeframe. Two weeks ago the judge shortcut that and
2 said, no, I'm going to push you to trial earlier.

3 They're changing the story. There's a lot of
4 new witnesses that are coming on witness lists we just
5 received last week. Well, we've got witnesses, upwards
6 of 30 witnesses on each side. And when you look at
7 budgets and you start adding that up, it does run up
8 very quickly.

9 So I know to think of a number, and I don't
10 know if you want to know, but I could go through some
11 of the story of what they're putting together. This is
12 going to be an extremely fast moving, shifting case.
13 It's going to take a significant lift of outside
14 counsel time, and as Brian has said, the experts' time.

15 CHAIR O'KEEFE: Well, I don't mean to suggest
16 we be so cheap that we don't spend the dollars that it
17 takes to properly defend the District and we save
18 \$150,000 in attorneys' fees and expose ourselves to
19 potentially millions of dollars of damages. But I do
20 think a lot of times, particularly when you're working
21 with a firm that has agreed to a discounted rate and
22 then they just kill you on the number of hours that
23 they're throwing in the file --

24 MR. NUTT: Your point about budgets is well
25 taken, and we're working that up. But I also wanted to

1 give a realistic expectation that the budgets are going
2 to be high, and it's going to be because there's a
3 tremendous -- this really is. And we've got a witness
4 problem. I was just going to kind of go --

5 MR. ACCARDO: Please don't go there.

6 MR. NUTT: Let me just go through quick the
7 story of what they're putting together, if I could,
8 just five minutes really.

9 Again, we mentioned this started out as a
10 water quality project --

11 MR. ACCARDO: Kevin, can you hear?

12 MR. NUTT: Can you hear me, Kevin?

13 VICE CHAIR POWERS: Yes, I can hear you.
14 Thanks for asking.

15 MR. NUTT: This came in three parts. They
16 came in, and our theory of this case is basically bait
17 and switch. They came in, they sold us on the water
18 quality project, and we donated through the District so
19 that they would get the exemption and mine and make
20 money on the sales of mining.

21 They were hit in 2008, 2009 with the market
22 crash. It turns out the quality of the rock was not
23 good enough for the dike. They changed -- that's when
24 the water project came about. Our employees were
25 considering it. They were working with them on

1 potentially morphing this into a water project.

2 What happened during that period of time is
3 we didn't enforce performance of the contract, so
4 deadlines were missed. We didn't provide things to
5 them that they needed to be able to do the water
6 project that we had agreed to do because our project
7 manager was down there saying: I don't know what the
8 project's going to be in a month from now. So
9 everybody was put on hold.

10 So you have basically almost two years of a
11 period of time where we were not performing, and this
12 is our risk in this case. We have witnesses who didn't
13 necessarily know why we weren't performing. It was
14 because we were entertaining a water project.

15 Then in 2013 Martin County got upset because
16 this project wasn't moving, wasn't what they had agreed
17 to in their agreement, and they basically came out --
18 and then there were articles that we were going to
19 steal their water and send it all to West Palm Beach.
20 And the political machinery just blew up. That's where
21 the public records issues arose. People -- Maggie
22 Hurchalla is a defendant in this case for interfering
23 with the project.

24 We would not go up to Martin County and
25 support them. Essentially what happened is we turned

1 and we sent them a letter in 2013 and said no, you need
2 to perform. And they said, well, we can't because of
3 all the screw-up things that you didn't do. And they
4 filed litigation immediately.

5 When we got the litigation, for three
6 years they've been posturing and setting this up. We
7 didn't pay attention to the mining issues. We didn't,
8 you know, for whatever -- however you want to look back
9 and say it, the reality is neither staff nor the legal
10 office got them going, got this project back on track
11 during that period of time.

12 We've lost a lot of windows, and what's
13 happened, we lost a lot of witnesses. Our witnesses at
14 the time, one's in California, Melissa's, you know --
15 people are hiding, whatever have you. So we have a lot
16 of gaps, and it's very hard to put together a case and
17 fill gaps and plug omissions.

18 And so like I said, there's over 70 witnesses
19 listed now on each side of the thing, and we're trying
20 to patchwork that together because of all the things
21 that we basically discovered in the last three months
22 through the work. And it's taken that. And that's
23 part of the reason the fees are up, is because we've
24 been reacting to things and learning things and trying
25 to devise, you know, basically our theories of the

1 case. So you've got that. And we've won the water
2 issue.

3 And they're coming out, they have Fishkind,
4 who's an expert, a pretty well known expert in
5 economics, testifies in all sorts of areas, not just
6 mining, very good in front of a jury and tells his
7 interesting tale of extremely complex analysis that
8 leads to \$60 million.

9 We have our counterclaim, which deals with
10 more actions on the property that weren't authorized
11 and subordinated and things that they did that really
12 prevent them from performing. And so this is all going
13 to play out over probably a three week trial. So if
14 you add up the time of preparing for the jury trial and
15 even putting that on with a good team of trial lawyers,
16 you're looking at a lot of money.

17 MR. HUTCHCRAFT: In Martin County's
18 withdrawal of the local development order, did they
19 cite any actions or inactions by the District as a
20 rationale --

21 MR. NUTT: No.

22 MR. HUTCHCRAFT: -- for their withdrawal?

23 MR. NUTT: No. No, they were focused on Lake
24 Point not doing what they're supposed to do. They
25 never -- Martin County, to date, has not turned on us

1 and said, oh, you're the reason for the problem. But
2 like I say, in about the last three or four months,
3 that potential has arisen, and we've got to guard
4 against that, because they issued MOBs and said we're
5 not going to let you mine anymore because it's not a
6 public project and you won't donate your property.
7 Lake Point said, well, I couldn't donate my property
8 because the District wouldn't help me get the permits
9 that are necessary, a precondition to donating the
10 property. And you get in these 360s.

11 So there's a very great concern that Martin
12 County will sit there and say, well, we did everything
13 right because they weren't performing, the MOBs were
14 correct. The fact that this wasn't becoming a public
15 works project was correct. Martin County wasn't
16 getting the benefit. So we have to walk that line and
17 keep a relationship with Martin County.

18 MR. HUTCHCRAFT: Well, I think, you know, the
19 politics have clearly changed in Martin County from
20 when this all started.

21 MR. NUTT: Yes.

22 MR. HUTCHCRAFT: And I believe there's
23 probably a desire on the County's part to --


24 MR. NUTT: Yes.

25 MR. HUTCHCRAFT: If we can get out of this

1 and roll more exposure to the District, I think that
2 will do it.

3 MR. NUTT: And protecting against that is
4 getting the story together and getting the witnesses
5 together.

6 And the other thing is working with Martin
7 County to get out of it. Right now they can't just let
8 Lake Point mine, even though they have, because they've
9 never enforced -- for five years they haven't
10 enforced -- basically nine years. So Lake Point's just
11 been mining along.

12 We're talking in mediation. We're going to
13 go to a mediation in June about the possibility that
14 Martin County 

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19 But I don't think so. I think they're out
20 for -- at the end of the day, I think they're out for
21 vengeance. They want this to be painful, they want it
22 to be hard, and they want to punish the governments
23 that wronged them. And it makes for an interesting
24 case. That was the ugly part.

25 MR. ACCARDO: That's where we're at. We owed

1 you an explanation. A lot has happened in the last
2 several months in particular. The case was on a bit of
3 a hiatus while those other two parties fought about
4 public records. That's over, so it's back, you know,
5 with us again.

6 CHAIR O'KEEFE: Any questions?

7 Attorney/client session is now concluded.

8 Let's get back to chambers.

9 (Whereupon, at 1:40 p.m., the proceedings
10 were concluded.)

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C E R T I F I C A T E

THE STATE OF FLORIDA)
)
COUNTY OF PALM BEACH)

I, Susan S. Kruger, do hereby certify that I was authorized to and did report the foregoing proceedings at the time and place herein stated, and that the foregoing pages comprise a true and correct transcription of my stenotype notes taken during the proceedings.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of May, 2017.



Susan S. Kruger

Susan S. Kruger

Florida Court Reporting
561-689-0999

