

**BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA**

In the Matter of the Application of)
the City of Oklahoma City for a) Permit Application No. 2007-0017
Regular Permit To Divert Stream Water)
in Pushmataha County, Oklahoma)

**ORDER GRANTING MOTION TO DISMISS
OKLAHOMANS FOR RESPONSIBLE WATER POLICY
FOR LACK OF STANDING
WITH REGARD TO PERMIT APPLICATION**

This matter was set for Pre-Hearing Conference on June 28, 2017. Subsequent to the Pre-Hearing Conference, an *Order Setting Formal Hearing and Prehearing Conference Order* was issued on July 7, 2017 and provided to Protestants and counsel by certified mail. An *Amended Order Setting Formal Hearing and Prehearing Conference Order* was similarly issued on, July 12, 2017.

On July 17, 2017 Counsel for the Applicant timely filed his Motion to Dismiss Oklahomans for Responsible Water Policy (hereafter "ORWP") for Lack of Standing on the basis that Protestant appeared to lack a legally protected interest which would be directly and adversely affected by approval of the application at issue pursuant to OAC 785:4-5-4 (b)(3).

On July 24, 2017 ORWP timely filed its Response to Applicant's Motion to Dismiss Oklahomans for Responsible Water Policy (hereafter "ORWP") for Lack of Standing on the basis that Protestant appeared to lack a legally protected interest which would be directly and adversely affected by approval of the application at issue pursuant to OAC 785:4-5-4 (b)(3).

The purpose of the Stream Water Use provisions, 82 O.S., §§ 105.1-105.32, of the Oklahoma Waters and Water Rights statutes at Title 82, is to provide for stability and certainty in stream water rights with an appropriation system of regulation which does not interfere with riparian domestic use. 82 O.S. § 105.1A.

In order to acquire beneficial use of stream water for purposes other than for riparian domestic use, an applicant makes application to the Board. 82 O.S. §105.9.

The Stream Water Use provisions provide a statutory right for all interested persons to file protests and make statements in support of or in opposition to a stream water permit application without cross examination if the statement is not intended as evidence. OAC 785:4-5-4(d); 82 O.S. §§105.11-105.12.

In order to be considered a party to the application process, however, a protestant must provide information showing how approval of the application may directly and adversely affect legally protected interests of the protestant. OAC 785:4-5-4(b); 82 O.S. §§105.11-105.12.

Procedural due process principles are generally not implicated where an agency's actions do not directly affect the legal rights of property owners or deprive them of a constitutionally protected interest. *See State ex rel. Corp. Com'n v. Tex. County Irr. And Water Res. Ass'n, Inc.*, 1991 OK 63, ¶ 12.

Legally protected interests are generally rights granted and/or protected by statute or constitution. *See e.g., Flast v. Cohen*, 392 U.S. 83, 103 (1968); *Baker v. Carr*, 369 U.S. 186, 207 (1962); *Murry County v. Homesales, Inc.*, 2014 OK 52, ¶ 17 (citing *Toxic Waste Impact Group, Inc. v. Leavitt*, 1994 OK 148, ¶ 9; *ISD 9 v. Glass*, 1982 OK 2, ¶ 10); *Democratic Party of Okla. v. Estep*, 1982 OK 106, ¶ 7.

Legally protected interests with regard to Oklahoma water are generally riparian or appropriative. *See Franco-American Charolaise, Ltd. v. OWRB*, 1990 OK 44, ¶ 3.

Thus, those persons able to show that the granting of Permit Application No. 2007-0017 would directly and adversely affect their legally protected interests would generally be limited to 1.) those persons who have a pending or prior appropriative right to the water at issue and 2.) those persons who own land appurtenant to the Kiamichi River, its tributaries or Sardis Lake who are a.) entitled to domestic riparian use or b.) hold a prior established right to other riparian use. *See id.*

ORWP alleges it has standing to seek relief on its own behalf but has shown nothing to indicate it has a legally protected interest which will be harmed by the granting of the pending permit application. Protestant OWRP's Response to Applicant's Motion to Dismiss ORWP for Lack of Standing.

ORWP alleges it and its non-appurtenant property owning members have standing to seek relief based on citizenship and taxpayer standing alone. Protestant OWRP's Response to Applicant's Motion to Dismiss ORWP for Lack of Standing.

A general grievance against government action or potential action doesn't confer standing. A concrete injury to a protected interest of the party seeking review is generally required. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992);

ORWP additionally alleges it has associational standing to seek relief on behalf of its members and based on its members' standing. Protestant OWRP's Response to Applicant's Motion to Dismiss ORWP for Lack of Standing.

An organization has standing to address injury to its members when a.) members would otherwise have standing to sue in their own right; b.) interests sought to be protected are germane to the association's purpose; and c.) *neither the claim asserted nor the relief requested requires individual members to participate in the action.* *Okla. Educ. Assoc. v. State ex rel, Oklahoma Legislature*, 2007 OK 30, ¶ 9.

ORWP lacks association standing with regard to its non-appurtenant property owner and non-property owning members because said members lack standing to sue in their own right. *See id; Franco-American Charolaise, Ltd. v. OWRB*, 1990 OK 44, ¶ 3. Said non-appurtenant property owning members and non-property owning members lack standing to protest as a party in their own right because they cannot show how their legally protected interests are directly and potentially adversely affected by approval of the application at issue. *See Franco-American Charolaise, Ltd. v. OWRB*, 1990 OK 44, ¶ 3.

ORWP lacks association standing with regard to appurtenant property owning members due to the fact that the claims asserted by said members require individual members to participate in the action. *See id; OAC: 785:4-5-4(B)(3).*

Claims as to pending and prior appropriative rights to water, land ownership and domestic riparian use or a prior established right to other riparian water use are property rights personal to said owners, some of whom are asserted to be members of ORWP. Further, said knowledge of ownership and prior and existing water uses are squarely within the personal

knowledge of the landowner and only secondarily known by an association of which the owner is a member.

For the reasons listed herein the Motion to Dismiss ORWP for Lack of Standing is **GRANTED**.

Persons, including organizations, dismissed as Protestants may, however, appear as interested persons to observe the Hearing proceedings during the argument and evidentiary portion and may make non-repetitive statements/presentations as to their opinions during the public proceedings portions of the proceedings. OAC 785:4-5-4(d). Public proceedings will commence when the Applicant and Protestants have concluded presentation of arguments and evidence. Said public proceedings are expected to occur on Friday, August 25, 2017, and potentially Monday, August 28, 2017.

IT IS SO ORDERD this 15 day of August, 2017.


Lyn Martin-Diehl
Hearing Examiner

CERTIFICATE OF MAILING

I hereby certify that on the 15th day of Aug, 2017, a true and correct copy of the forgoing document was mailed to the following persons electronically (if an email address was provided by the individual or entity) and by depositing it in the First Class U.S. Certified Mail, return receipt requested to the following addresses:

Brian M. Nazareus, Esq.
Special Counsel for City of OKC
Ryley Carlock and Applewhite
1700 Lincoln Street, Ste. 3500
Denver, Colorado 80203
bnazareus@rcalaw.com

City of Oklahoma City
ATTN: Sam Samandi, Engineering Manager
Utilities Department
420 West Main Street, Ste. 500
Oklahoma City, OK 73102
sam.samandi@okc.gov

Kevin R. Kemper, Ph.D., LL.M.
Law Office of Kevin R. Kemper
P.O. Box 2879
Norman, OK 73070
Dr2k@protonmail.com
REPRESENTING Loyd Boren; Patricia Boren;
Amber Brasfield; Austin Conley; Robert D.
Conley; Norma Conley; Frank Hilton; Denise
Hilton; Justin Jackson; Debbie L. Leo; Larinda
McClellan; Kevin Joseph Payne; Roger Dale
Payne; Walter Myrl Redman; Kenneth Roberts,
Ph.D., and Diane Smith

Ms. Judy Armstrong
P.O. Box 21
Clayton, OK 74536

Atoka County
Board of Commissioners
Atoka County Courthouse
200 East Court Street, Ste. 201W
Atoka, OK 74525
atokacommissioners@sbcglobal.net

Mr. Jason Brasfield
P.O. Box 2
Clayton, OK 74536

Mr. Rickie Briggs
172489 North 4480 Road
Nashoba, OK 74558
pushmataha@pine-net.com

Mr. Michael Brittingham
P.O. Box 96
Moyers, OK 74551
Mike009674557@yahoo.com

Mr. Brad Burgett
436942 E 1855 Loop
Rattan, OK 74562

Mr. Dale Carter
424448 E 1835 Rd.
Finley, OK 74543

Choctaw County
Board of County Commissioners
300 East Duke
Hugo, OK 74743

Mr. Kenneth Conley
168704 State HWY 2
Clayton, OK 74536
donconley@yahoo.com

Ms. Kimberly Conley
P.O. Box 971
Clayton, OK 74536

Shannon Conley
P.O. Box 628
Clayton, OK 74536
Shannon2conley@yahoo.com

George R. Crims, III
P.O. Box 77
Albion, OK 74521
repositlife@yahoo.com

Mr. Hunter Davis
413430 E. 1870 Rd.
Antlers, OK 74523

Mr. Jerry Davis
413430 E. 1870 Rd.
Antlers, OK 74523

Ms. Melissa Davis
413430 E. 1870 Rd.
Antlers, OK 74523

Ms. Nicole Davis
413430 E. 1870 Rd.
Antlers, OK 74523

Mr. Donald Dawson
HC 66, Box 235
Moyers, OK 74557

Mr. Charles R. DeWeese
P.O. Box 862
Antlers, OK 74523

Mr. Russell Doughty
P.O. Box 1731
Noble, OK 73068
rustymonroe@gmail.com

Mr. Loy and Ms. Jane Dunlap
435779 East 1931 Road
Rattan, OK 74562

Mr. Tom Garrett
HC 66 Box 42
Moyers, OK 74557
tom@kriver.com

Mr. Don Hairrell
17400 State Highway 2
Clayton, OK 74536

Ms. Theresa Harper
HC 66, Box 580
Moyers, OK 74557

Ms. Imogene Hairrell Harris
174812 State Highway 2
Clayton, OK 74536
Imogene2016@outlook.com

Ms. Susan Herbert
2524 S. Harvard Pl., Apt. B
Tulsa, OK 74114
sherbuhuss@yahoo.com

Mr. Kevin N. Hilley
3827 Bowser Ave., Apt. #8
Dallas, TX 75219

Ms. Rebecca Hoel
210 N.E. "C" Street
Antlers, OK 74523

Representative Justin J.J. Humphrey
The Oklahoma House of Representatives
2300 North Lincoln Blvd.
Oklahoma City, OK 73105-4805
Justin.humphrey@okhouse.gov

Mr. Syed Raziullah Hussaini
2524 S. Harvard Pl., Apt. B
Tulsa, OK 74114
Syed-hussaini@utulsa.edu

Ms. Georgia Irwin
P.O. Box 1084
Talihina, OK 74571

Ms. Erin Iski
4330 S. Norfolk Ave.
Tulsa, OK 74105
eviski@gmail.com

Mr. Dale Jackson
P.O. Box 100
Clayton, OK 74536
bugobble@yahoo.com

Ms. Linda Jackson
P.O. Box 7
Tuskahoma, OK 74574

Jamie Johnson
168839 St HWY 2
Clayton, OK 74536
jaimetestco@yahoo.com

Mr. Dennis Kerr
College of Engineering and Natural Sciences,
Department of Geosciences
The University of Tulsa
800 South Tucker Ave.
Tulsa, OK 74104
Dennis-kerr@utulsa.edu

Latimer County
Board of Commissioners
Attn: Latimer County Clerk
109 North Central, Room 103
Wilburton, OK 74578

LeFlore County
Board of County Commissioners
ATTN: LeFlore County Clerk
P.O. Box 218
Poteau, OK 74953

F. Jerrold Gutierrez
dba Miller Lake Retreat, LLC
P.O. Box 25
Moyers, OK 74557

Mr. Paul Marcum
P.O. Box 654
Antlers, OK 74523
pmarcum@questmhsa.com

Marshal County
Board of Commissioners
1 County Courthouse Street, Room 106
Madill, OK 73446

Mr. Brody McClellan
P.O. Box 89
Finley, OK 74543

McCurtain County
Board of Commissioners
P.O. Box 1078
Idabel, OK 74745

Oklahomans for Responsible Water Policy
c/o Chris Chandler, Coordinator
400 North Main
Broken Bow, OK 74728
chris@orwp.org

Pittsburg County
Board of County Commissioners
115 East Carl Albert
McAlester, OK 74501

Poteau Valley Improvement Authority
c/o Mick LaFevers, Chairman
25768 US Highway 270
Wister, OK 74966-9124
Tote-a-poke@clnk.com

Ms. Judy Pryor
409514 E. 1880 Rd.
Antlers, OK 74523-1315
Jpryor5380@yahoo.com

Pushmataha County Commissioners
304 S W "B" Street
Antlers, OK 74523

Mr. Phillip Russo
P.O. Box 1057
Antlers, OK 74523
Xfire6@msn.com

Mr. Johnny C. Self
P.O. Box 55
Rattan, OK 74562

Ms. Marcia Self
P.O. Box 55
Rattan, OK 74562
Marciaself50@yahoo.com

Ms. Pamela Smith
P.O. Box 1057
Antlers, OK 74523
pamnugent@yahoo.com

Ms. Wendy Sprague
HC 66
Box 235
Moyers, OK 74557

Town of Talihina
c/o Don Faulkner
P.O. Box 457
Talihina, OK 74571
don.faulkner@sbcglobal.net

Dr. Dale Teeters, Ph.D.
243 North Ridge Ave.
Sand Springs, OK 74063
Dale-teeters@utulsa.edu

Ms. Sharon Tipps
190751 N 4110 Rd.
Antlers, OK 74523-7406

Mr. Wayne Tipps
190751 N 4110 Rd.
Antlers, OK 74523-7406

Mr. Jerry Tolbert
P.O. Box 175
Moyers, OK 74557

Mr. Mike Tolbert
P.O. Box 175
Moyers, OK 74557

Mr. Mitchell Tompkins
Address Not Provided

United States Department of the Interior
Fish and Wildlife Service, Division of
Ecological Services
ATTN: Jonna Polk, Field Supervisor
9014 East 21st Street
Tulsa, OK 74129

Ms. Lawanda Vaughan
421628 E. 1920 Rd.
Antlers, OK 74523
Terryvaughan6352@gmail.com
Lawandavaughan2174@gmail.com

Ms. Sue Ann Vaughan
421692 E. 1920 Rd.
Antlers, OK 74523
sueannvaughan@gmail.com

Mr. Terron Vaughan
421692 E. 1920 Rd.
Antlers, OK 74523
Tdv31186@yahoo.com

Terry Vaughan
421628 E. 1920 Rd.
Antlers, OK 74523
Terryvaughan6352@gmail.com
Lawandavaughan2174@gmail.com

Mr. Doug and Ms. Linda West
P.O. Box 89
Moyers, OK 74557
linda@oiopro.net
doug@oiopro.net

Dr. William T. Potter, Ph.D.
Professor of Chemistry and Biochemistry
University of Tulsa
800 South Tucker Ave.
Tulsa, OK 74104-3189

Ms. Nadean Osborn
P.O. Box 264
Moyers, OK 74557

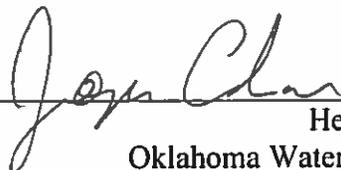
Ms. Marla Marcum
P.O. Box 654
Antlers, OK 74523
mmarcum@questmhsa.com

Mr. Curtis Johnson
168839 ST. HWY 2
Clayton, OK 74536
curtistestco@gmail.com

Courtesy Copies sent by email only to the following:

Craig Keith
Nathan Madenwald
Wayne Kellogg
Tye Baker
Steve McHugh
Mark Showell
Krystina Phillips

Craig.keith@okc.gov
Nathan.madenwald@okc.gov
Wayne.kellogg@chickasaw.net
tbaker@choctawnation.com
steve@trlawtm.net
lcnt@att.net
krystina@iaelaw.com


Hearing Clerk of the
Oklahoma Water Resources Board