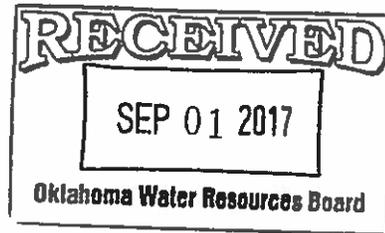


**BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA**

In the Matter of the Application of)
the City of Oklahoma City for a)
Regular Permit to Divert Stream Water)
in Pushmataha County, Oklahoma)
On Behalf of Loyd Boren, Patricia Boren,)
Amber Brasfield, Austin Conley, Norma)
Conley, Robert D. Conley, Frank Hilton,)
Denise Hilton, Justin Jackson, Debbie L.)
Leo dba Miller Lake Retreat, LLC, Larinda)
McClellan, Kevin Joseph Payne, Roger Dale)
Payne, Louise Redman Trust, Walter Myrl)
Redman, Kenneth Roberts, Ph.D., Diane)
Smith, and Kiamichi River Legacy Alliance)

Permit Application No. 2007-0017
Hearing Examiner
Lyn Martin-Diehl



PROTESTANT'S BRIEF IN SUPPORT OF DENIAL OF APPLICANT'S PERMIT

COMES NOW the above-mentioned Protestants ("Protestants"), both those named as parties and as interested persons, by and through their Attorney, Dr. Kevin R. Kemper ("Counsel"), to urge respectfully the Hearing Examiner to recommend that the Oklahoma Water Resources Board ("OWRB") should DENY the Application ("Application") of the City of Oklahoma City ("City") for a regular permit to divert stream water in Pushmataha County, Oklahoma. This Brief provides the substantive legal and factual arguments to support a denial of the Application.

FACTUAL BACKGROUND

On or about the year 2007, the City submitted the Application to the OWRB to appropriate water from the Kiamichi River. The record of the Hearing from August 21-25, 2017, should provide sufficient documentation for reference in the discussion, *infra*.

LEGAL AUTHORITY

The City has the burden under Title 82 of the Oklahoma Statutes and Title 785 of the Oklahoma Administrative Code to prove certain points of law before the OWRB Board can grant a Permit. The rule of law for this state proceeding is the state law, which is informed by the State of Oklahoma, Choctaw Nation of Oklahoma, Chickasaw Nation, City of Oklahoma City Water Settlement of August 2016 ("Tribal Agreement"). See Applicant's Exhibit 1.

First, Applicant must prove under Oklahoma law that water is available to be appropriated from a particular stream before the water can be removed out of that stream system:

For direct diversions from a stream, the determination of water available for appropriation shall take into consideration the mean annual precipitation run-off in the watershed above the point(s) of diversion, the mean annual flow, stream gauge measurements, domestic uses and all existing appropriations and other designated purposes in the stream system. The Board may consider other evidence or laws relating to stream flow or elevation, including but not limited to apportionment provisions of interstate stream compacts to which the State of Oklahoma is a party and the Oklahoma Scenic Rivers Act.

OAC § 785:20-5-5(a)(1).

Second, Oklahoma law protects domestic use at a specific amount:

Absent the presentation of more accurate evidence to the contrary, the Board shall estimate the amount of water required to satisfy domestic use to be six (6) acre-feet per household per year or three (3) acre-feet per non-household domestic use.

Id. at (2).

Third, appropriations of water involving Sardis Reservoir have specific requirements:

(3) If an application is made to appropriate water from water supply storage at Sardis Reservoir, an amount of 20,000 acre-feet of water shall not be considered available for appropriation unless the applicant's use is within one or more of the 10 county area of southeastern Oklahoma. The 10 counties include LeFlore, McCurtain, Pushmataha, Latimer, Haskell, Choctaw, Pittsburg, Coal, Atoka, and Bryan. The following conditions apply to this paragraph:

(i) Appropriations shall be granted first from the remainder of the yield of Sardis Reservoir; and

(ii) Water appropriated from the 20,000 acre-feet amount cannot be used as a substitute for water which is used out of southeastern Oklahoma; and

(iii) If the applicant's proposed use from the 20,000 acre-feet amount is for municipal or rural water district use, the service area must be within southeastern Oklahoma, and if the use from the 20,000 acre-feet is for industrial, commercial, irrigation or power use, the primary processes for such use must occur within southeastern Oklahoma; and

(iv) No water shall be released or withdrawn from water supply storage in Sardis Reservoir unless a lake level management plan for the applicant's use has been reviewed by the Oklahoma Department of Wildlife Conservation and is approved by the Board, provided that an approved lake level management plan shall have an emergency clause for domestic use.

Id. at (3).

Fourth, in assessing present or future need by Applicant, the Board has discretion to consider proposed beneficial use and population projections.

(1) In considering the amount of water requested, the Board may review the efficiency of the works proposed to place the water to beneficial use and may order modifications to such works or that different works be utilized. (2) For a proposed public water supply or municipal use, the Board may review population projections for the area served or proposed to be served by the applicant.

Id. at (c). The OWRB Regulations define beneficial use as "the use of such quantity of stream or groundwater when reasonable intelligence and reasonable diligence are exercised in its application for a lawful purpose and as is economically necessary for that purpose." *Id.* at § 20-1-2. Moreover, they also "include but are not limited to

municipal, industrial, agricultural, irrigation, recreation, fish and wildlife, etc.” *Id.*

Then, the Board considers the possibility of interference with domestic and existing appropriative uses.

(1) For purposes of determination of interference with domestic uses of stream water, interference with domestic use of groundwater will not be considered.

(2) The Board may determine that conditions or restrictions are necessary to protect existing beneficial uses and rights and may establish and impose such conditions on certain stream flow whereby direct diversion may be allowed only during certain times of the year or when a certain level of stream flow or elevation in the stream is reached. In some cases, the Board may determine that water storage is necessary.

(3) If the Board determines water to be available for appropriation pursuant to 785:20-5-5(a) and (b) and the applicant agrees to the placement of a condition(s) on the permit that the proposed use will not interfere with domestic or existing appropriative uses and/or conditions or restrictions pursuant to 785:20-5-5(d)(2), it shall be a presumption that interference will not occur.

Id. at (d).

The Oklahoma Supreme Court, as explained in an earlier pleading by Protestants, has required the consideration of environmental factors when the OWRB considers a permit application. *Franco-American Charolaise, Ltd. v. Okla. Water Res. Bd.*, 855 P.2d 568, 575n40, 1990 OK 44 (Okla. 1990). The Court summarized the law:

The OWRB shall approve the ... appropriation only if it finds there is surplus water after providing for 1) all prior appropriations; 2) all riparian uses perfected under the 1963 amendments; 3) all riparian domestic uses; 4) all riparian uses approved as reasonable on remand; and 5) all anticipated in-basin needs.

Id. at 578.

As explained in earlier pleadings, reasonableness is a question of fact:

Factors courts consider in determining reasonableness include the size of the stream, custom, climate, season of the year, size of the diversion, type of use and its importance to society (beneficial use), needs of other riparians, location of the diversion on the stream, the suitability of the use to the stream, and the fairness of requiring the user causing the harm to bear the loss.

Id., quoting RESTATEMENT (SECOND) TORTS §850A (1979), <http://1.next.westlaw.com>.

This is further explained in another treatise as a way of working out the effects that the appropriation would have “upon society, the economy and the environment” – that is, reasonableness is the final test. 7 AMR. L. OF TORTS § 21:19, <http://1.next.westlaw.com>.

ARGUMENT

It is not reasonable to allow the City of Oklahoma City to take 115,00 acre-feet per year from a river system already struggling during times of drought. Applicant fails – despite copious exhibits, filings, and testimony from expensive expert witnesses – to prove that water is available for appropriation from the Kiamichi River. Further, Applicant fails to prove that it will not interfere with the present and future beneficial uses, as well as domestic and appropriated uses, if it takes the requested water from the Kiamichi River. Protestants urge the Hearing Examiner and the OWRB to consider carefully how the factual evidence on the record fails to address the particular requirements under the Oklahoma Statutes and OWRB Regulations under the Oklahoma Administrative Code. Applicant may not deviate from those requirements, and even the Tribal Agreement requires that a model attempting to measure water availability must be “evaluated in a manner consistent with” OWRB Regulations. See Applicant’s Exhibit 1, § 5.3.1.2.2.1. Oklahoma City already has water available, plus a City Water Conservation Plan.

See, e.g., Applicant's Exhibit 114. *In toto*, there is no reliable evidence that the City will run dry without the Kiamichi River water. The City Water Conservation Plan is aspirational, meaning there is no evidence yet whether it will fail to yield what the Oklahoma City metropolitan area needs for the future. Protestants do not concede that Applicant has met the other burdens under the law for a permit, but the following two major points provide the most pressing reasons to deny the Application.

I. The Application fails to prove that water is available from the Kiamichi River.

The Board has mandatory requirements for determining whether water is available for appropriation from a stream system. Again, the OWRB regulations state:

For direct diversions from a stream, the determination of water available for appropriation shall take into consideration the mean annual precipitation run-off in the watershed above the point(s) of diversion, the mean annual flow, stream gauge measurements, domestic uses and all existing appropriations and other designated purposes in the stream system. The Board may consider other evidence or laws relating to stream flow or elevation, including but not limited to apportionment provisions of interstate stream compacts to which the State of Oklahoma is a party and the Oklahoma Scenic Rivers Act.

OAC § 785:20-5-5(a)(1).

This means that *any* calculation for the availability of water *must* account for certain variables. Thus, Protestants argue that the Tribal Agreement serves as a welcome first step towards resolving the issues about the Kiamichi River Basin ("Basin"), but Applicant has failed to develop an "Adequate Hydrologic Model" under state law.

First, “the mean annual precipitation run-off in the watershed above the point(s) of diversion” says what it means (emphasis added). Applicant only has used historical data from the 1920s until the 1970s from a gage that no longer exists that also had been located downstream from the proposed diversion point. Mean means a kind of average, so the failure to use contemporary data fundamentally fails to show a mean that is meaningful. See Protestants’ Exhibit 1, which links to the contemporary *and* historical USGS Water Data available for three stations along the Kiamichi River. See generally also Protestants’ Exhibits 6-7, which provide meaningful data and explanations of key issues. Applicant submitted its Exhibit 23, which is a report about southeastern Oklahoma water, but that report was created in part by

Second, “the mean annual flow” means exactly that. Again, Applicant has not provided clearly a specific mean (unless it is buried in the overly-complicated STELLA model), nor has it provided annual flow data since the 1970s, before Sardis Lake had been built. The in-stream flow now is tied to the retention and release from Sardis Lake.

Third, Applicant fails to account for all of the “domestic uses and all existing appropriations and other designated purposes in the stream system.” For instance, Applicant claims to calculate domestic use to be six (6) acre-feet per 160 acres, assuming falsely that each household has or even averages 160 acres. This is contrary to the OWRB regulations, which mandates that “the Board shall estimate the amount of water required to satisfy domestic use to be six (6) acre-feet per household per year or three (3) acre-feet per non-household domestic use.” *Id.* at

(a)(1). The Tribal Agreement provides for the six (6) acre-feet per 160 acres, but the OWRB is not bound to that parameter; in fact, the terms of the Tribal Agreement cannot be considered because, as one of Applicant's witness admitted, it is not currently enforceable. See Applicant's Exhibit 4, Water Infrastructure Improvements for the Nation Act, P.L. No. 114-322 (Dec. 16, 2016). Further, Applicant fails to provide adequate information about "other designated purposes in the stream system," meaning that it has not identified and quantified those uses adequately.

Moreover, Applicant uses a questionable statistical model – the *STELLA* model, or Kiamichi River Basin Model – that cannot give 100 percent quantitative certainty to its findings. See Applicant's Exhibit No. 85. No reliable statistical model can do that, and no credible scientist would promise that, despite testimony from Applicant's pertinent engineer, Jenny Bywater. In fact, she followed that comment with an admission that some years analyzed were not reliable. Also, in a memorandum from Elise Sherrod and Anthony Mackey of the OWRB, certain calculations were performed with a "Kiamichi-Atoka Simulation Model v47." See Protestants' Exhibit 3. It is not clear from the record whether that model is the same as the *STELLA* model. At first glance, one might assume that the measurements could justify the appropriation. It even asserts that 880,376 acre-feet per year would be available for appropriation out of the Kiamichi River system. *Id.* at 3. However, upon closer examination, the reported methodology is incomplete and does not appear to report "the mean annual precipitation run-off in the watershed above the point(s) of diversion, the mean annual flow, and stream gauge

measurements ... and all existing appropriations and other designated purposes in the stream system. " OAC § 785:20-5-5(a)(1). It does report certain domestic set-asides, though it is not clear whether that is six acre-feet per year per household or per 160 acres.

A unique and pertinent fact is that the Kiamichi River does not run directly into or out of Sardis Lake, but rather Sardis Lake dams Jack Fork Creek, the primary tributary of the Kiamichi River. Applicant asked to appropriate water from the Kiamichi River.

II. Applicant fails to prove that it will not interfere with the present and future beneficial uses, as well as domestic and appropriated uses, if it takes the requested water from the Kiamichi River.

Before and during the Hearing in August of 2017, Applicant focused arguments upon narrow ideas about domestic and appropriated uses. Protestants provided Exhibit 2, which lists certain appropriated uses with active permits within one mile of the Kiamichi River. Applicant asserts that these represent the limit of in-basin use. Protestants, instead, are more concerned about the interference with present and future beneficial uses.

The OWRB in numerous documents lists a variety of beneficial uses. Again, the Regulations say beneficial uses "include but are not limited to municipal, industrial, agricultural, irrigation, recreation, fish and wildlife, etc." *Etcetera* is defined in *Black's Law Dictionary, 7th Ed.*, as [a]nd other things. The term [usually] indicated additional, unspecified items in a serious." *Etcetera* speaks volumes – it

means *any* reasonable use of the Kiamichi River. Protestants have provided protests, sworn testimony, and public comments to demonstrate how they use the Kiamichi River in numerous, significant ways.

Also, Applicant spent enormous amounts of time attempting to squash any testimony or other evidence relating to whether the permit would have a deleterious effect upon the flora and fauna – and, in particular, endangered species – of the Kiamichi River. Perhaps the most intellectually honest testimony from a witness of the Applicant came from Paul Leonard, who clearly stated that “environmental” would include humans, too. Still, the testimony and documentary evidence from Dr. Caryn Vaughn brings a devastating and disturbing conclusion – the endangered species of mussels in the Kiamichi River basin likely would not survive the proposed appropriation of water. *See* Protestants’ Exhibits 31-38. Mr. Leonard testified he felt Applicant could get through the permitting process; he offered no meaningful testimony as to the effects of the proposed withdrawal on the stream’s ecosystem, nor was he qualified to do so. The science provided by a scholar who participates in blind peer reviewed research cannot be reconciled at this time with the studies purchased from engineers hired by the Applicant.

More importantly, as testified during the Hearing, Pushmataha County is the poorest county in Oklahoma if you measure its income and *ad valorem* tax base. However, as demonstrated before and during the Hearing, Pushmataha County possesses water, upon which its economy and future growth depends. The Legislature, in providing protections for beneficial uses, intended to make certain that an out-of-stream appropriation does not ruin a river or the future of the people

along that river. The OWRB, therefore, has a mandate through statute to make certain that neither Oklahoma City nor any other municipality take water in a way that causes great harm. The points of law to prove out-of-stream appropriation must be considered in the context of all of Title 82 of the Oklahoma Statutes and Title 785 of the Oklahoma Administrative Code, as well as in the context of the Oklahoma Constitution.

In conclusion, Applicant fails to prove that water is available for appropriation from the Kiamichi River. Further, Applicant fails to prove that it will not interfere with the present and future beneficial uses, as well as domestic and appropriated uses, if it takes the requested water from the Kiamichi River. Also, it is not clear whether Applicant meets the other points of law required; for instance, it could put the water to its own beneficial use, but Protestants object to the idea that wholesaling water is a beneficial use. Still, Protestants are more concerned the faulty statistical modeling used by Applicant, as well as the lack of conclusive proof that it would protect present and future beneficial uses of the Kiamichi River system by those who live and work along it.

WHEREFORE, for premises considered, Protestants respectfully urge the Hearing Examiner to recommend that the OWRB should DENY the Application on the grounds discussed, *supra*.

SUBMITTED this 1st day of September, 2017:

Kevin R. Kemper

KEVIN R. KEMPER, OBA# 32968
ATTORNEY FOR NAMED PROTESTANTS
c/o PO Box 2879
Norman, OK 73070

Phone: (405) 404-4938
Fax: (405) 561-4031
dr2k@protonmail.com
Oklahoma bar number 32968

CERTIFICATE OF MAILING

I hereby certify that on or about the 1st day of September, 2017, a true and correct copy of the foregoing document was e-mailed to the following addresses.

DATED this 1st day of September, 2017.

City of Oklahoma City c/o
Brian M. Nazareus, Special Counsel
Ryley, Carlock & Applewhite
1700 Lincoln St., Suite 2500
Denver, CO 80203
bnazareus@rcalaw.com

Town of Talihina
c/o Don Faulkner
PO Box 354
Talihina, OK 74571
don.faulkner@sbcglobal.net

Kevin R. Kemper

KEVIN R. KEMPER

Coleman, Joyce

From: Dr2k [dr2k@protonmail.com]
Sent: Friday, September 01, 2017 10:53 AM
To: Nazareus, Brian; Coleman, Joyce; Don.faulkner@sbcglobal.net; Chris Chandler; Brownhill, Stacy L.
Subject: Permit 2007-0017: Protestants Brief
Attachments: Permit App. No. 2007-0017 Protestants Proposed Order and Memorandum of Law.pdf

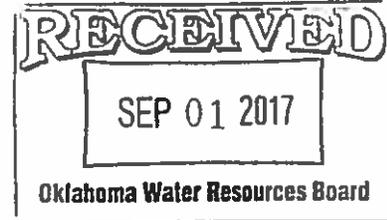
Dear all,

Please confirm timely receipt of Protestants' final Brief.

I hope you have a lovely Labor Day holiday!

Dr. Kevin R. Kemper

Kevin R. Kemper, Ph.D., LL.M.
Law Office of Kevin R. Kemper
PO Box 2879
Norman, OK 73070
Phone: (405) 404-4938
Fax: (405) 561-4031
E-mail: dr2k@protonmail.com
<http://www.kevinrkemper.com/attorney>
Attorney licensed in Oklahoma:
Oklahoma Bar Assoc. #32968;
Osage Nation Bar Assoc. #212;
Blackfeet Nation Bar Assoc.
Chickasaw Nation Bar Assoc.



Sent with ProtonMail Secure Email.