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

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| In the Matter of the Application of<br>The City of Oklahoma City for a<br>Regular Permit to Divert Stream Water<br>In Pushmataha County, Oklahoma | )<br>)<br>)<br>) | Application No. 2007-0017 |

# PROPOSED
# FINDINGS OF FACT, CONCLUSIONS OF LAW AND BOARD ORDER

## INTRODUCTION

This matter arises out of the application filed by the City of Oklahoma City ("Applicant") for a regular permit to annually appropriate 115,000 acre feet of stream water from the Kiamichi River Basin as currently held in Sardis Lake and the Kiamichi River; to release water from Sardis Lake for delivery to the Point of Diversion in the general vicinity of Moyers Crossing, Pushmataha County, Oklahoma; and to divert annually and beneficially use water from the Kiamichi River Basin including Sardis Lake Reservoir and the Kiamichi River for municipal use by Oklahoma City and Oklahoma City's current and future wholesale and retail water customers and other public water supply entities in Oklahoma in accordance with the August 2016 Water Settlement Agreement ("Settlement Agreement") between the State of Oklahoma, the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the City of Oklahoma City ("Settlement Parties").[1]

The application was protested by eighty five (85) persons (including entities), twenty five (25) of whom were recognized as Parties as of the date of hearing. Twelve (12) persons failed to be present personally, via counsel or via representative to participate as a party in the hearing proceedings and failed to present good cause for said failure pursuant to OAC Section 785:4-7-3(b). Thus, there are thirteen (13) remaining Protestants as of the date of this order.

The matter was heard on August 21-24, 2017, before Lyn Martin-Diehl, Hearing Examiner on behalf of the Board. The hearing was opened; appearances were noted; witnesses were sworn; and evidence, testimony and argument were heard. Public Comments were received in person at the board offices on August 24-25, 2017 and by mail from August 25 through September 1, 2017, from persons who originally protested the permit application but were either a.) dismissed as Parties prior to the permit hearing and/or b.) failed to appear for the permit hearing itself.

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1 The Settlement Agreement was generated to resolve CIV-11-927W, *Chickasaw Nation and Choctaw Nation v. Mary Fallin, et al,* pending in the U.S. District Court, Western District of Oklahoma. By the terms of the Settlement Agreement it is not enforceable until all conditions precedent have been satisfied. *See* Settlement Agreement, Section 4. Said *conditions precedent include* among others: Applicant must have filed an Amended Permit Application with OWRB, and *the OWRB must have issued to the City a final permit to appropriate water that conforms to the terms of the Settlement Agreement. Id. See also,* Settlement Agreement, Section 4 available at http://www.owrb.ok.gov/legal/OKC2007-0017/OKC2007-0017.php. The Proceedings in this matter are held pursuant to Oklahoma law for the appropriation of stream water and to comply with the terms of the Settlement Agreement.

After the hearing was adjourned, the record remained open for Applicant and Protestants to file post-hearing briefs. The record was closed September 1, 2017 and a proposed order was prepared for the Board's consideration.

Based upon the Findings of Fact and Conclusions of Law below, the Board determines that the application should be approved and a permit should be issued subject to certain conditions specified below.

## FINDINGS OF FACT

Upon its evaluation of the evidence and additional records and facts officially noticed in the record, the Board hereby makes the following Findings of Fact, all of which are supported by substantial evidence:

### BACKGROUND AND SUMMARY OF THE APPLICATION

1. Applicant Oklahoma City has water storage rights in Sardis Lake Reservoir, McGee Creek Reservoir and has appropriative rights in Atoka Reservoir. The Sardis Lake Reservoir impounds Jack Fork Creek, a tributary of the Kiamichi River. The Kiamichi flows through Basin 6 to Basin 5 in Southeastern Oklahoma.

2. Applicant filed an application with the Board on March 13, 2007, for a permit to appropriate 80,000 acre feet per year from Sardis Lake via a diversion point located at approximately Moyers Crossing on the Kiamichi River (no legal description or coordinates provided).

3. Applicant subsequently amended the application on March 17, 2010, for a permit to appropriate 136,000 acre feet per year from Lake Sardis via three potential diversion points; point one at Lake Sardis directly to Atoka Reservoir roughly along Highway 43; point two at Moyers Crossing on the Kiamichi River to McGee Creek Reservoir; or point three at the Kiamichi River and Highway 3 intersection to McGee Creek Reservoir.

4. Applicant subsequently sought to renew its amended application on March 15, 2013.

5. On January 11, 2017, Applicant filed its second amended permit application for a permit to appropriate 115,000 acre feet per year from Sardis Lake and the Kiamichi River from one of four diversion points at Moyers Crossing on the Kiamichi River. Potential diversion points include i.) N/2 of Section 33, T2S, R16EIM; ii.) SW/4 Section 33, T2S, R16ELIM; iii.) E/2 of Section 32, T2S, R16EIM; iv.) E/2 of Section 5, T3S, R16EIM; and v.) all of Section 4, T3S, R16EIM all in Pushmataha County, Oklahoma. Applicant has applied for authorization to divert water via pumping facilities the design and configuration of which have yet to be determined.

### NOTICE OF APPLICATION; PROTESTS

6. After the application was deemed ready for notification to interested persons,

Board staff prepared a notice for Applicant to publish in Pittsburg, McCurtain, Pushmataha, Latimer and Choctaw Counties. Applicant published notice of the application on March 2 and March 9, 2017 in The Antler's American, a newspaper of general circulation in Pushmataha County, the county in which the point of diversion is located; on February 28 and March 7, 2017 in the McCurtain Daily Gazette, a newspaper of general circulation in McCurtain County, a county adjacent to Pushmataha County; on February 28 and March 7, 2017 in The Hugo News, a newspaper of general circulation in Choctaw County, the adjacent downstream county; on February 28 and March 7, 2017 in the McAlester News-Capital, a newspaper of general circulation in Pittsburg County, a county in which Sardis Lake is located; and on March 2 and March 9, 2017 in the Latimer County News Tribune, a newspaper of general circulation in Latimer County, a county in which Sardis lake is located.[2]

7. Separate written protests against the application were received on or before the prescribed protest deadline of April 10, 2017 from eighty five (85) persons (including entities)[3] twenty five (25) of whom were recognized as parties as of the date of hearing.[4] Twelve (12) persons failed to be present personally, via counsel or via representative to participate as a Party in the hearing proceedings.[5] Thus, there were, subsequent to hearing and record closure, thirteen (13) remaining Protestants to the Application as follows: Imogene Hairrell Harris, 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 the Town of Talihina, Oklahoma.[6]

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2 Notice was deemed adequate pursuant to 82 O.S. § 105.11 and OAC:785-20-5-1. *See* July 28, 2017 Order Denying Motion to Dismiss for Inadequate Notice or Require Revised Publication.

3 Initially, eighty five (85) persons/entities filed protests. Sixty (60) persons/entities were dismissed as parties but permitted to offer public comments and objections against the granting of the permit pursuant to OAC 785:4-7-3(c). *See* Order Granting in Part and Denying in Part Applicant's Motion to Dismiss Sixty-two Parties, dated August 14, 2017; Order Granting Motion to Dismiss Oklahomans for Responsible Policy, dated August 15, 2017.

4 The twenty five (25) remaining Protestants as of the date of hearing included: Dale Carter; Donald Dawson, Tom Garrett, Imogene Hairrell Harris, Frank Hilton, Denise Hilton, Rebecca Hoel, Justin Humphrey, Dale Jackson, Justin Jackson, Linda Jackson; Debbie L. Leo dba Miller Lake Retreat, LLC, Paul Marcum, Larinda McClellan, Kevin Joseph Payne, Roger Dale Payne, Judy Pryor, Louise Redman Trust, Walter Myrl Redman, Kenneth Roberts, Ph.D., Phillip Russo, Diane Smith, Pamela Smith, Wendy Sprague, and the Town of Talihina, Oklahoma.

5 Twelve (12) persons failed to be present personally, via counsel or via representative to participate as a party in the hearing proceedings, including: Dale Carter; Donald Dawson, Tom Garrett, Rebecca Hoel, Justin Humphrey, Dale Jackson, Linda Jackson, Paul Marcum, Judy Pryor, Phillip Russo, Pamela Smith, and Wendy Sprague. Several persons originally protesting the permit application who were deemed parties, including Justin Humphrey, Dale Jackson, and Linda Jackson, chose only to take part in the public comment section of the proceeding, thereby waiving their rights as Protestant Parties. OAC Section 785:4-7-3(c).

6 Attorneys Kevin K. Kemper of Norman and Chris Chandler of Broken Bow, Counsel for all remaining Protestants post-hearing except the Town of Talihina, erroneously filed a Post-Hearing Brief and several Pre-Hearing briefs and documents, indicating that they represented persons who had already been dismissed as Parties from this proceeding. Said scrivener's errors have no procedural effect as to inclusion of said persons as Protesting Parties. The remaining thirteen Protesting Parties in this matter are as stated in Finding of Fact no. 7.

HEARING

8. The hearing was held as scheduled on August 21-24, 2017, at the Board's office in Oklahoma City. Applicant appeared at the hearing, represented by Attorneys Brian M. Nazerenus and Stacy Brownhill of Ryley Carlock & Applewhite, Denver, Colorado, and Attorney Craig Keith, City of Oklahoma City.

9. Attorneys Kevin K. Kemper of Norman, Oklahoma, and Chris Chandler of Broken Bow, Oklahoma, appeared for Protestants, Imogene Hairrell Harris, 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., and Diane Smith, several of whom appeared and offered testimony.

10. Mr. Don Faulkner, Mayor, appeared representing the Town of Talihina.

11. The hearing was opened, appearances were entered, witnesses were sworn, and the Applicant's and Protestants' evidence and arguments were heard.

12. On August 24-25, 2017 a period for public comment was opened pursuant to OAC 785:4-5-4(e) with regard to those persons who originally filed objections but who were deemed not to be parties pursuant to OAC 785:4-5-4(a). At the conclusion of the hearing and public comments provided, the hearing was then adjourned, but the record remained open until September 1, 2017 for receipt of additional public comments by 1.) persons who originally objected but were unable to attend the public comment portion of the proceedings, 2.) persons qualifying as parties who failed to intervene in the hearing to show good cause for failure to appear pursuant to OAC 785:4-7-3(c); and 3.) final briefs by Parties appearing at hearing. Thereafter, a proposed order was prepared, served on the parties, and presented to the Board for consideration at its October 10, 2017 meeting.

WATER AVAILABILITY FOR APPROPRIATION

13. Applicant has applied for a total of 115,000 acre feet of stream water per year subject to Sardis Lake Level Management Release Restrictions and Bypass Requirements contained in Section 6.1 of the Settlement Agreement. This amount would be taken from a diversion point on the Kiamichi River in the vicinity of Moyers Crossing, Pushmataha County. Applicant intends to use the water for municipal use by Oklahoma City and Oklahoma City's current and future wholesale and retail water customers and other public water supply entities in Oklahoma.

14. In evaluating the application, Board staff used a model developed pursuant to negotiation during the Settlement Agreement by a technical committee of designees of parties. The hydrological model ("the Kiamichi Basin Hydrologic Model" or "Kiamichi Model") was designed to represent settlement terms including water use conditions more stringent than previously contemplated including a lake level management plan for area lakes, 50 cubic feet per second bypass requirement at the proposed Moyers Crossing diversion point, a 20,000 acre feet set aside for future permitted use in the southeast region of the state and to satisfy OWRB stream water rules and statutes for permitting in the basin (settlement Agreement at 5.3.1.2-5.3.1.3).

15. Pursuant to the Settlement Agreement, the Kiamichi Model was presented to OWRB staff for review.

16. OWRB staff reviewed the Kiamichi model, finding that it adequately represented settlement terms and satisfied OWRB stream water rules and statutes for permitting in the basin. (August 7, 2017 memo to file 8/7/17 by Elise Sherrod and Anthony Mackey regarding Calculations for Stream Water application #2007-17, City of Oklahoma City, Pushmataha County).

17. In evaluating the application, the Board Staff preliminarily calculated that at the Applicant's proposed diversion point at Moyer's Crossing on the Kiamichi River:

- the estimated available water at the diversion point is estimated to be 749,172 acre feet per year; (*Id.*)
- the estimated permitted usage at and above the diversion point is 7,192 acre feet per year; (*Id.*)
- the estimated domestic usage above the diversion point is 20,722 acre feet per year (*Id.*); and
- thus, the total water available for appropriation at the diversion point as determined by staff when using the Kiamichi Model is 721,258 acre feet per year. *Id.*[7]

18. No evidence presented regarding available stream flow was more accurate than Board Staff calculations based on the Kiamichi Model.

19. The Kiamichi model calculations were, however, contested by the Protestants based on claims of i.) flawed scientific methodology as to assumptions regarding domestic usage within the model, ii.) software used to run the model allegedly unsuited to scientific purposes relating to stream flow, iii.) model fails to consider whether adequate instream or environmental flow[8] will be available to wildlife and fish subsequent to appropriation of stream water by Applicant at the requested amount, and iv.) the settlement terms failed to consider views of

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7 Incidentally, the Kiamichi Model estimation of total water available for appropriation at the diversion point is substantially similar to one previously developed by Board Staff in 2010 using more conventional modeling methods. Previously, preliminary figures estimated the watershed upstream of the diversion point contained approximately 1,002 square miles of drainage area upstream of the diversion point with an average precipitation runoff of 15-16 inches per year. Water available above the diversion point was estimated to be 835,327 acre feet/year of available water as calculated by the then existing watershed model with a resulting total of water available for appropriation at the diversion point of 640,151 acre feet per year. (March 30, 2010 memo to file by Bob Sandbo regarding Permit 2007-017 attached to 2010 amended permit materials as included in the 2017 first amended permit application).

8 Oklahoma law neither defines nor directly accounts for instream flow ("ISF") in its system of appropriating water among users. Oklahoma instead indirectly accounts for ISF via its domestic use policy, Scenic River and Outstanding Resource Waters statutes as well as reservoir releases and Interstate River Compacts provisions. *See* http://www.owrb.ok/gov/supply/ocwp/instreamflow.php.

citizens local to the Kiamichi basin.

20. Protestants failed, however, to present relevant alternative calculations for the Board's consideration or offer a specific alternative to the recommended calculations. Protestants simply contend that the model is flawed and suggest that the Board deny Applicant's permit based on Protestant's concerns and require further study of instream flow needs for environmental and aesthetic concerns.

21. Protestants' proposal is, however, not contemplated by the Board's rules regarding calculation and appropriation of stream water flow and cannot be considered by the Hearing Examiner in this case.

22. The Board adopts the Kiamichi model calculations as verified by Board staff and finds that the amount of 721,258 acre feet (749,127 acre feet of runoff minus 20,722 acre feet for upstream domestic use minus 7,192 acre feet for existing upstream appropriations) is available for appropriation on an annual basis at the proposed diversion point. This amount is in excess of the amount of 115,000 acre feet per year requested by Applicant from this diversion point.

23. Based upon the facts set forth in Finding of Fact no. 17, the Board finds that unappropriated water is available at the diversion point and in the amounts applied for by the applicant.

PRESENT OR FUTURE NEED

24. Applicant presented both testimony and data produced by demographic professionals indicating that population in Oklahoma City and virtually all surrounding Central Oklahoma communities will increase beyond water currently available to those communities.

25. Further, Oklahoma City utility personnel presented testimony and data indicating Oklahoma retail and wholesale sales of waters in the central Oklahoma area have increased 5.6 percent per year from 2010-2017. *See* Applicant's Ex. No. 104, Record, p. 530.

26. Pursuant to Oklahoma Administrative Code § 785:20-5-5(c)(2), consultants for the Applicant determined that Oklahoma City and the Central Oklahoma communities which form its retail and wholesale customer base will have an estimated population of between 1.07 million and 1.6 million persons by 2060. *See* Applicant's Ex. No. 57, Record pages 96-113.

27. Oklahoma City estimates that water demand is 180 gallons per capita per day. Record, pages 113, 140.

28. Based on this information, Applicant has a future need in excess of the requested 115,000 acre-feet per year for public water supply and municipal use purposes.[9]

29. Protestant offered no alternative calculation for the amount of water needed by Applicant.

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9 1.6 million persons multiplied by 180 gallons per person per day converts to approximately 322,600.3 acre feet per year needed to meet future water needs based on current water usage patterns.

30. Applicant presented evidence that it had considered and found no alternative source of stream water offering similar volume, quality and affordability similar to that offered by the Kiamichi which is readily available to the Applicant. *See* Record pages 142-3, 157-162.

31. Because the water is readily available from Sardis Lake and the Kiamichi River as requested by the Applicant, it is not necessary to consider the availability of groundwater as an alternative source for the water.

32. Nonetheless, the Applicant has shown that groundwater of good quality is unavailable in the central Oklahoma area from which to draw needed water. *Id.*

BENEFICIAL USE

33. Applicant's proposed use of public water supply and municipal use has been recognized by the Board as a beneficial use. It appears that reasonable intelligence and reasonable diligence will be exercised by the Applicant in use of this stream water for a lawful purpose and as is economically necessary for that purpose. The Board finds that the Applicant's intended use is a beneficial use of stream water.

NO INTERFERENCE WITH DOMESTIC OR EXISTING APPROPRIATIVE USES

34. The preliminary calculations of Board staff based on the Kiamichi model estimated domestic usage on the Kiamichi River below the proposed diversion point to be 13,694 acre-feet per year. Protestant did not contest this preliminary calculation.

35. Protestants claim that the Kiamichi Model underestimates domestic use because it relies on a quantification of 6 acre feet per household per year. The household calculation is based on one household per 160 acres in the basin.

36. Protestant provided no alternative basis for quantification of domestic use.

37. OAC 785:20-5-5(a)(2) provides that "[a]bsent 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 .. . ."

38. Further, pursuant to its domestic use policy, the OWRB regularly sets aside six acre-feet of water per year per 160 acres of land to protect domestic uses which assumes one household per quarter section (160 acres) or four per square mile (640 acres). *See* http://www.owrb.ok/gov/supply/ocwp/instreamflow.php.

39. The preliminary calculations of Board staff based on the Kiamichi model estimated existing appropriative usage on the Kiamichi River below the proposed diversion point to be 2,508 acre-feet per year.

40. Protestant did not challenge the appropriative use claims.

41. Upon consideration of the evidence on this issue, the Board finds that the permit should contain a general condition prohibiting interference with domestic or existing

appropriative uses. Such conditions as well as settlement requirements including i.) a 250 cubic feet per second maximum diversion rate, b.) a 50 cubic feet per second bypass restriction past the diversion point and c.) a 20,000 acre feet set aside for southeastern Oklahoma future appropriative water users,[10] are protective of domestic and existing appropriative uses during dry years and other low flow times. With such conditions in place, the Board finds that the applicant's proposed use will not interfere with domestic or existing appropriative uses.

NO INTERFERENCE WITH ANTICIPATED USES WITHIN BASIN DUE TO TRANSPORT OUTSIDE STREAM SYSTEM OF ORIGIN

42. Because the Applicant seeks to transport water for use outside the stream system where the water originates, the Board must consider and disallow any proposed use which would interfere with existing or proposed beneficial uses within the stream system and the needs of the water users therein. The Board must review the needs of the area of origin every five years to provide for adequate water for future needs. OAC 785:20-5-6.

43. The Board evaluates the water needs of each region within Oklahoma based on its legislatively assigned duty to protect the state's water resources. 82 O.S. § 1E.

44. Board staff formulated the Oklahoma Comprehensive Water Plan ("OCWP") in 2012 which relates to water needs with regard to the state in its entirety. http://www.owrb.ok/gov/supply/ocwp/ocwp.php. The OCWP is an ongoing work subject to update and consisting of study findings and series of reports by Board staff and other groups such as the Instream Flow Advisory Group. *See* http://www.owrb.ok/gov/supply/ocwp/instreamflow.php.

45. Board staff has to date studied the water needs of southeastern Oklahoma during i.) litigation and the resulting Settlement Agreement and formulation of the related Kiamichi Model at issue herein, ii.) during ongoing litigation between OWRB and the United States regarding Sardis Reservoir,[11] as well as iii.) during transfer of the Sardis Reservoir between Oklahoma City and OWRB.[12]

46. Ongoing studies and information about proposed or potential needs may be used by the Board in evaluating the needs within the area of origin of water to be appropriated for out

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10 The Settlement Agreement recognizes a requirement already present in OAC 785:20-5-5(b)(3) with regard to Diversions from Sardis Lake.

11 CIV-11-927W, *Chickasaw Nation and Choctaw Nation v. Mary Fallin, et al,* pending in the U.S. District Court, Western District of Oklahoma.

12 Originally built by the US Army Corp of Engineers for Flood Control and Supply Storage in 1982, the Water Conservation Storage Commission (predecessor to the Water Resources Board) of the State of Oklahoma and the United States contracted for the state to assume control over Sardis to sell water to municipalities and industrial customers in Oklahoma and to make 50 annual payments to the United States as reimbursement for the cost of the dam and lake. Sales of water failed to offset payments, and Oklahoma defaulted in 1997. Litigation ensued. *See* CIV-11-275W, *Oklahoma Water Resources Board v. United States of America, et al,* pending in the U.S. District Court, Western District of Oklahoma, stayed pending enforceability of the Settlement Agreement in Chickasaw Nation et al, the Settlement Agreement in Okla. Water Resources Board. The Water Resources Board transferred its interest in the Sardis Reservoir to Oklahoma City Water Utilities Trust on June 15, 2010. See Applicant's Ex. 5, 112.

of stream system use. *See* OAC 785:20-5-6(b).

47. The Kiamichi Model protects domestic uses in the basin by calculating a six acre feet per 160 acre household for estimated domestic water use as a set aside which is removed from the modeling as water unavailable from appropriation. *See*, Finding of Fact Nos.15 to 22 *infra*.

48. The 20,000 acre feet set aside from Sardis Lake water supply storage further protects the future water needs of southeastern Oklahoma by limiting the use of such water to permit applicants within the ten county area of southeastern Oklahoma. *See* OAC 785:20-5-5(b)(3).

49. Based on all available evidence the Board finds that the proposed use is not anticipated to interfere with any existing or proposed beneficial uses within the stream system or the needs of the water users therein. Further, there appears to be adequate water available for future water needs within the Basin for municipal, industrial, domestic and other beneficial uses.

## CONCLUSIONS OF LAW

50. Based upon applicable law, and as applied to the above Findings of Fact and evidence in the record, the Board draws the following Conclusions of Law:

SUBJECT MATTER JURISDICTION

51. The Board has subject matter jurisdiction to adjudicate applications for stream water use permits according to the Oklahoma Stream Water Use Law, 82 O.S., Section 105.1 et seq. as amended, particularly Sections 105.9 through 105.12.

PERSONAL JURISDICTION; DUE PROCESS

52. Due and proper notice of this proceeding was given as required by 82 O.S., Section 105.11, and all interested persons have been afforded due process of law and an adequate opportunity to be heard. The Protestants who filed timely written protests, were recognized to have legally protected interests which could be directly and adversely affected by the granting of the requested permit, and appeared at the hearing in person or through a representative (i.e., those identified in Finding of Fact no. 7) have met the procedural requirements to be considered Parties in this proceeding. All other persons have defaulted and abandoned their interests, if any, for failure to perfect their issues according to applicable procedures and failure to appear. OAC Section 785:4-7-3(c).

STREAM WATER LAW; ELEMENTS TO BE DETERMINED

53. Title 82 O.S., Section 105.12 provides that before the Board takes final action on an application for a stream water permit, the Board must determine whether:

(a) There is unappropriated water available in the amount applied for;
(b) The applicant has a present or future need for the water and the use to which the applicant intends to put the water is a beneficial use. In making this determination, the Board shall consider availability of all stream water sources

and such other relevant matters as the Board deems appropriate;

(c) The proposed use does not interfere with domestic or existing appropriative uses; and

(d) If the application is for the transportation of water for use outside the stream system wherein the water originates, the proposed use does not interfere with the existing or proposed beneficial uses within the stream system and the needs of the water users therein.

If these elements are properly established, Section 105.12 and OAC Section 785:20-5-4 require the Board to approve the application by issuing a permit to appropriate water.

CONCLUSIONS ON PRESCRIBED ISSUES

54. The Board concludes that the record shows (i) there is unappropriated water available in the amount applied for; (ii) Applicant has a present or future need for the water in the amount of 115,000 acre feet per year and Applicant intends to put the water to a beneficial use; (iii) the proposed use will not interfere with domestic or existing appropriative uses if it is appropriated subject to certain conditions; and (iv) the proposed use does not interfere with the existing or proposed beneficial uses within the stream system and the needs of the water users therein. Further, the Board has reviewed the needs of the area pursuant to 82 O.S. §105.12 and determined that there is adequate water for municipal, industrial, domestic and other beneficial uses. Accordingly, the application must be approved by issuing a permit to appropriate 115,000 acre feet of stream water per year, subject to the conditions specified below.

55. The law supports Protestants' position that an appropriator of stream water must not interfere with domestic or existing appropriative uses from that stream. The Board is satisfied that the facts, together with the permit conditions specified in Finding of Fact No. 41, support a determination that Applicant's proposed use will not interfere with these Protestants or other water uses from this stream or within the stream system.

OTHER ISSUES

56. Protestants raised several other issues during this proceeding. Protestants asserted that Applicant's use may interfere with the flow of the Kiamichi River, particularly during periods of extreme drought often exacerbated by the concurring factor of high heat, which may result in low or no flow in the river. Lack of flow then results in decreased aesthetic value of the river, loss of natural aquatic and wildlife--particularly environmentally sensitive mussels, loss of use by local residents and loss of tourism—an essential element of southeastern Oklahoma's economy. To the extent these and other issues have not been specifically addressed in the Findings of Fact or Conclusions of Law herein, the Board concludes that such contentions either are not supported by the record, not supported by the law, or are beyond the scope of the Board's jurisdiction in this proceeding, and therefore should not be addressed by the Board.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that application no. 2007-17 in the name of the City of Oklahoma City shall be and the same is hereby approved. The permit shall authorize diversion of:

- 115,000 acre feet from one of four diversion points on the Kiamichi River at the i.) N/2 of Section 33, T2S, R16EIM; ii.) SW/4 Section 33, T2S, R16ELIM; iii.) E/2 of Section 32, T2S, R16EIM; iv.) E/2 of Section 5, T3S, R16EIM; and v.) all of Section 4, T3S, R16EIM all in Pushmataha County, Oklahoma. The permit shall specify that the diversion rate shall not exceed 250 cubic feet per second.

IT IS FURTHER ORDERED that the permit shall state, in addition to the conditions requested in the second amended application and the other usual stream water permit conditions, the following conditions:

> "The use of stream water under this permit shall not interfere with domestic or existing appropriative uses. If any such interference is proven after the permit is issued, then this permit may be modified, suspended or revoked as appropriate in order to abate and prevent such interference."

IT IS SO ORDERED by the Oklahoma Water Resources Board in regular and open meeting this ___day of October, 2017.

OKLAHOMA WATER RESOURCES BOARD

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Jason Hitch, Acting Chairman

(SEAL)
ATTEST:

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Stephen B. Allen, Secretary