

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)

**MOTION IN LIMINE TO EXCLUDE THE U.S. FISH AND WILDLIFE SERVICE'S
APRIL 10, 2017 LETTER**

The City of Oklahoma City (“City” or “Applicant”), respectfully moves the Hearing Examiner to enter an order excluding the letter from the U.S. Fish and Wildlife Service (“FWS”) dated April 10, 2017 (“Letter”) from admission into evidence in this matter. In support thereof, the Applicant presents as follows.

I. BACKGROUND

In 1962, the U.S. Congress conducted a feasibility study that recommended building three reservoirs in the Kiamichi River Basin of Southeast Oklahoma – Sardis (originally named Clayton), Hugo, and Tuskahoma – for the primary purposes of flood control and water supply. See S. Doc. No. 145, at 6, 9, 87th Cong., 2d Sess. (1962), attached as Exhibit A¹. According to the feasibility study, Sardis Lake was not economically justified when considered for the single purpose of flood control, but rather, its justification depended upon development for water supply storage. See *id.* at 45. Later that year, in the Flood Control Act, Congress authorized the U.S. Army Corps of Engineers to construct Sardis Lake in accordance with the study. See Flood Control Act of 1962, Pub. L. No. 87-874, § 201, 76 Stat. 1173, at 15, attached as Exhibit B.

The Corps of Engineers constructed Sardis Lake in 1982. Prior to construction, pursuant to the 1974 Contract, the predecessor to the Oklahoma Water Resources Board (“OWRB”)

¹ Copies of the Exhibits are available at this link: <https://rcalaw.sharefile.com/d-s7db4bbf136f41f3b>. If you are unable to access the Exhibits via the link, please contact us and we will provide you with hard copies.

received the right to use the water supply storage capacity in Sardis Lake and agreed to pay the federal government for all costs associated with the water supply storage, attached as **Exhibit C**. In 2010, the Applicant and the Oklahoma City Water Utilities Trust (“OCWUT”) entered a Storage Transfer Agreement with the OWRB, under which the OWRB transferred to the Applicant and the OCWUT all of its rights and obligations under the 1974 Contract, including its right to use the water supply storage capacity of Sardis Lake, attached as **Exhibit D**.

In August 2016, the State of Oklahoma, the Choctaw Nation of Oklahoma, the Chickasaw Nation, and the Applicant signed a settlement agreement concerning, among other things, the City’s use of Sardis Lake, attached as **Exhibit E** (“Settlement Agreement”). Section 6 of the Settlement Agreement included provisions for Sardis Lake release restrictions, bypass flow requirements at the downstream point of diversion, City water conservation requirements, and a set-aside of Sardis Lake storage capacity for local use. Shortly thereafter, Congress approved the Settlement Agreement, attached as **Exhibit F** (“Settlement Act”). Pursuant to both the Settlement Agreement and the Settlement Act, the OWRB, the Applicant, and the OCWUT will enter an “Amended Storage Contract Transfer Agreement,” which will relieve the OWRB of its obligations under the 1974 Contract and transfer all of the OWRB’s interests in the water supply storage capacity of Sardis Lake to the Applicant and the OCWUT, subject to the terms of the Settlement Agreement and the Settlement Act. *See* Settlement Agreement, Exh. 4 (draft Amended Storage Contract Transfer Agreement); Settlement Act, § 5 (approval of the Amended Storage Contract Transfer Agreement).

On January 10, 2017, the Applicant filed its second amended permit application to the OWRB in conformance with Section 6 of the Settlement Agreement, attached as **Exhibit G** (“Application”). The Application specified that the permit would provide a right to 115,000 acre

feet per year, to be taken from five potential points of diversion along the Kiamichi River in the general vicinity of Moyers Crossing in Pushmataha County, Oklahoma, at a diversion rate not to exceed 250 cubic feet per second. The water would be used for municipal purposes by the Applicant and its current and future wholesale and retail water customers. The Application further acknowledged that the Applicant's proposed use "shall conform with all requirements specified in the Settlement Agreement," which include lake level limitations, water conservation measures, and Kiamichi River bypass flow requirements. *See* Settlement Agreement, § 6.1. The Application's exhibits provided an accounting of the lake level limitations and a summary of the Applicant's water conservation measures.

On April 10, 2017, the FWS submitted its Letter, attached as **Exhibit H**. The Letter raised concerns about the environmental effects of the OWRB permit sought by the Applicant on native species and habitats that are protected as federal trust resources of the Kiamichi River; species of conservation concern, i.e., variably recognized vulnerable species; and sport species.

On April 21, 2017, the FWS submitted another letter "to clarify that the Service's April 10, 2017, letter was submitted as comments on the pending application, and *not as a protest or objection to the permit.*" (Emphasis added.) This letter is attached as **Exhibit I**.

The Kiamichi River basin has not been designated by the Oklahoma Legislature as a "scenic river area" under the Scenic Rivers Act, 82 O.S. § 1452. Nor has the OWRB designated any part of the Kiamichi River basin under the water quality stream standard of "Outstanding Resource Waters" pursuant to O.A.C. § 785:45-3-2(a). A copy of the OWRB's water quality designation for the Moyers Crossing segment of the Kiamichi River ("Kiamichi River including Hugo Lake to U.S. Hwy 271 Bridge near Clayton") is on page 61 of "Oklahoma's Water Quality

Standards” Appendix A, attached as **Exhibit J** (describing beneficial use designations and limitations for additional protection on page 31).²

II. LEGAL AUTHORITY

Motions in limine are recognized by Oklahoma case law. *Clark v. Turner*, 99 P.3d 736, 741 (Okla. Ct. App. 2004). A motion in limine allows a court to decide evidentiary issues in advance of trial “thereby avoiding delay and ensuring an evenhanded and expeditious trial.” *Walsh v. United States*, 2009 U.S. Dist. LEXIS 27238, *4, 2009 WL 3755553 (N.D. Okla. 2009); *see also Clark*, 99 P.3d at 741 (A motion in limine can “preclude the introduction of prejudicial matters to the jury.”). “Decisions on in limine motions can save the parties time and expense in preparing and presenting their case for trial.” *Walsh*, 2009 U.S. Dist. LEXIS at *4; *cf.* O.A.C. § 785:4-5-2(b) (pre-hearing conferences may be held to facilitate the production of relevant documents).

All evidence and testimony offered at an OWRB hearing must be relevant and material to the matter subject of the application and hearing. O.A.C. § 785:4-7-5(b); *see* 82 O.S., § 1085.10; OWRB Chapter 4: Rules of Practice and Hearings; *cf.* 12 O.S. § 2401 (“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.). Evidence and testimony which is clearly irrelevant, immaterial, incompetent or unduly repetitious or cumulative may be excluded or limited. O.A.C. § 785:4-7-5(b).

Any interested person may file a written protest, objection or comment to any permit application. O.A.C. § 785:4-5-4(a); *see* 75 O.S. § 309; 82 O.S. § 1085.2. However, “[p]ersons

² The OWRB’s role in setting water quality stream standards for Oklahoma Rivers is described at pages 36-37 of the Executive Report for the 2012 Oklahoma Comprehensive Water Plan.

who submit objections or comments to an application,” rather than a protest, “will not be deemed to be parties.” O.A.C. § 785:4-5-4(e)(2).

Before taking final action on an application, the OWRB determines from the evidence whether (1) unappropriated water is available in the amount applied for; (2) the applicant has a present or future need for the water and use to which the applicant intends to put the water is a beneficial use; (3) the proposed use does not interfere with domestic or existing appropriative uses; and (4) if the application is for the transportation of water for use outside the stream system wherein the water originates, that certain provisions are met. O.A.C. § 785:20-5-4(a); *see* O.A.C. § 785:20-5-5 (factors relating to statutory elements for application approval); *see also* 82 O.S., §§ 105.1 *et seq.*, 1085.2. If the OWRB determines that these four elements and the applicable provisions of Chapter 20 have been established, then the OWRB “*shall approve the application by issuing a permit to appropriate water.*” O.A.C. § 785:20-5-4(b) (emphasis in original).

Further, O.A.C. § 785:20-5-5(e) allows for the consideration of “additional factors,” including protection of instream flows, for streams that have been designated as a “scenic river area” under the Scenic Rivers Act, 82 O.S. § 1991, § 1452, or streams designated by the OWRB as “Outstanding Resource Waters” pursuant to O.A.C. § 785:45-3-2(a). To reiterate, the Kiamichi River does not fall under either of these exceptions.

III. ARGUMENT

The Letter should be excluded because it is not “relevant and material” to the hearing. The Letter is irrelevant because the statutory elements for application approval do not include consideration of the potential environmental effects of a proposed permit on Oklahoma streams, like the Kiamichi River, that have not been designated as a “scenic river area” or “Outstanding

Resource Waters.” See O.A.C. §§ 785:20-5-4(a), 785:20-5-5; see also 12 O.S. §§ 2401-2402.

Similarly, the Letter is unduly cumulative because it attempts to inject into the proceeding unrelated environmental concerns. The Applicant does not dispute that it is required to comply with numerous environmental laws; however, those requirements are not before the Hearing Examiner in this matter.

Moreover, while the Applicant acknowledges that the strict rules of evidence need not be observed in Board hearings, the Letter also constitutes inadmissible hearsay. In its April 21, 2017 letter, the FWS explicitly acknowledged that its earlier Letter was “submitted as comments” and “not as a protest or objection” to the permit. Therefore, the FWS is not a party to the proceeding. See O.A.C. § 785:4-5-4(e)(2). Because the FWS does not have party status, it may not make a statement intended as evidence at the hearing. See O.A.C. § 785:4-5-4(d)-(e). Accordingly, admitting the Letter in the absence of the FWS’s testimony at the hearing would constitute hearsay without any applicable exceptions. Cf. 12 O.S. §§ 2801-2803 (Hearsay means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, and is generally not admissible). Given the highly technical nature of the issues raised in the Letter, admission of this hearsay into evidence would be prejudicial to the Applicant.

In addition, Oklahoma has adopted the concept of notice pleading, under which pleadings are supposed to provide notice of claims and defenses. See 12 O.S. § 2001; *Finnell v. Jebco Seismic*, 67 P.3d 339, 343 (Okla. 2003). In water proceedings, an application is analogous to a complaint, and a letter of opposition is analogous to an answer. The FWS’s effort to raise environmental issues amounts to a completely separate claim for relief. Thus, not only does the FWS’s Letter not comply with the statutory elements of O.A.C. § 785:20-5-4, it also does not

comply with the concept of notice pleading and is insufficient to place these issues before the Hearing Examiner in this matter.

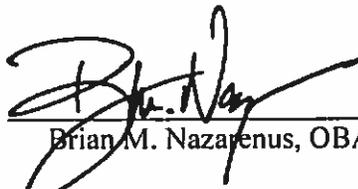
IV. CONCLUSION

The Letter from the FWS dated April 10, 2017, should be barred under O.A.C. § 785:4-7-5(b) because it is irrelevant and unduly cumulative to the statutory elements for application approval. Further, it constitutes inadmissible hearsay and does not comply with the concept of notice pleading. In short, it is inappropriate for the FWS to attempt to use this proceeding for the purpose of seeking resolution of issues involving environmental statutes. Addressing these issues at this stage of the proceeding would unfairly expand the Applicant's burden and is not before the Hearing Examiner in this matter.

WHEREFORE, the Applicant respectfully requests that the Hearing Examiner order that the Letter from the FWS dated April 10, 2017 be excluded from admission into evidence at the August 21, 2017 formal evidentiary hearing.

Respectfully submitted this 7th day of July, 2017.

RYLEY CARLOCK & APPLEWHITE

By: 

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SPECIAL COUNSEL FOR THE APPLICANT
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Certificate of Service

The undersigned certifies that on this 7th day of July, 2017, a true and correct copy of the foregoing **MOTION IN LIMINE TO EXCLUDE THE U.S. FISH AND WILDLIFE SERVICE'S APRIL 10, 2017 LETTER**, with all exhibits, was filed and served via regular U.S. Mail, and via e-mail to those who provided e-mail addresses, to the following:



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