

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

MAY 14 2014

TIM RHODES  
COURT CLERK

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OKLAHOMA FARM BUREAU LEGAL )  
FOUNDATION, et al., )  
 )  
 Petitioners, )  
 )  
 v. )  
 )  
 OKLAHOMA WATER RESOURCES BOARD, )  
 )  
 Respondent, )  
 )  
 v. )  
 )  
 TISHOMINGO NATIONAL FISH )  
 HATCHERY, et al., )  
 )  
 Other Parties of Record. )

Case No. CV-2013-2414

District Judge Barbara Swinton

**RESPONSE AND OBJECTION TO MOTION FOR DISCOVERY AND HEARING ON  
PROCEDURAL IRREGULARITIES AND FOR SCHEDULING CONFERENCE**

Respondent Oklahoma Water Resources Board ("OWRB") objects to that portion of the Petitioners' Motion for Discovery and Hearing on Procedural Irregularities and for Scheduling Conference that requests discovery and an evidentiary hearing to obtain additional evidence. In support of this objection, Respondent submits the following:

The instant case is an action for judicial review of a final order of an administrative agency in an individual proceeding, as provided by the Oklahoma Administrative Procedures Act ("APA") at 75 O.S. § 318 and following. Section 321 of title 75 is the statute that governs the scope of the review by the court on appeal. Section 321 provides in pertinent part:

"The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court."  
(Emphasis added.)

Thus, the general rule is that the review is "confined to the record". The only exception the law allows for the court to look beyond the record is limited to cases of alleged irregularities in procedure not shown in the record, and even then the statute permits, but does not require, such a review: "testimony thereon may be taken in the court" (emphasis added).

### **AUTHORITY AND ARGUMENT**

#### **PETITIONERS' CLAIMS OF IMPROPER *EX PARTE* COMMUNICATIONS HAVE ALREADY BEEN LITIGATED AND ARE BARRED BY COLLATERAL ESTOPPEL.**

In their motion, Petitioners allege improper *ex parte* communications between OWRB staff and the Hearing Examiner, in an attempt to persuade this Court to invoke the exception to the rule and allow the taking of evidence outside the record. Petitioners' attempt fails.

Petitioner Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. ("ASAPFO") and Petitioner Environmental Federation of Oklahoma ("EFO") herein previously raised, litigated and lost these same allegations against Respondent when the Supreme Court of Oklahoma decided the case of *Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Okla. Water Resources Bd.*, 2013 OK 29 ("the ASAPFO case"). All of the Petitioners are foreclosed from relitigating these issues by the doctrine of collateral estoppel. Accordingly, their motion must be denied.

Collateral estoppel, or "issue preclusion", applies to Petitioners' motion for discovery because (1) there is an identity of parties in the earlier *ASAPFO* case and this case, (2) the issues raised by the pending motion for discovery were material and specifically raised in the *ASAPFO* case, and (3) those issues were finally determined in the *ASAPFO* case.

"The doctrine of collateral estoppel, or also commonly referred to as 'issue preclusion,' bars relitigation of an issue determined in a previous proceeding where there is an identity of parties in the former and latter action, or the parties in the former and latter actions are in

privity.” *Gasrock Capital, L.L.C. v. Endevo Eureka, L.L.C.*, 2013 OK CIV APP 98 ¶25. “For invocation of issue preclusion there need not be a prior adjudication on the merits (as is often the case with res judicata) but only a final determination of a material issue common to both cases.” *Id.*, citing *Oklahoma Dept. of Public Safety v. McCrady*, 2007 OK 39, ¶7, 176 P.3d 1194, 1199.

“Under the doctrine of collateral estoppel, a judgment, whether in favor of plaintiff or defendant, is conclusive in a subsequent action between the parties on a different claim, as to issues raised in the subsequent action which were actually litigated and determined in the prior action; the test in each case is whether a given issue was necessary to the determination in the former trial.” *Laws v. Fisher*, 1973 OK 69 ¶6, quoting *Hankins v. District Court of Jackson County*, 1967 OK 28.

**A. Background of the ASAPFO case.**

In the maximum annual yield (“MAY”) proceeding below, the OWRB made a tentative determination of the MAY for the Arbuckle-Simpson Groundwater Basin as contemplated by 82 O.S. § 1020.5 and other applicable statutes. The OWRB scheduled a hearing on the tentative determination as provided by 82 O.S. § 1020.6, and designated a Hearing Examiner to conduct the hearing on behalf of the OWRB. At the hearing, OWRB staff presented evidence in support of the tentative determination, various persons presented additional evidence in support, and Petitioners ASAPFO and EFO and other persons presented evidence in opposition to the tentative determination. After the hearing, numerous parties in support and in opposition to the tentative determination filed briefs of legal argument. Thereafter, as it had done in numerous MAY proceedings for decades, OWRB staff communicated with and provided assistance to the Hearing Examiner in evaluating the evidence and legal arguments raised by the parties.

Before a final order by the OWRB could be issued, on January 4, 2013 Petitioner ASAPFO filed in the Supreme Court of Oklahoma an application to assume original jurisdiction and a petition for writs of prohibition and mandamus (*i.e.*, the *ASAPFO* case). On January 10, 2013, Petitioner EFO filed an application to intervene and participate in the *ASAPFO* case, which the Supreme Court granted. In briefing and argument in the *ASAPFO* case, Petitioners ASAPFO and EFO argued that the post-hearing communications between the OWRB staff and the Hearing Examiner violated the APA's prohibition against *ex parte* communications<sup>1</sup> - the same claims that Petitioners are now making in their motion for discovery. ASAPFO and EFO asked the Supreme Court to disqualify the Hearing Examiner, to remand and restart the proceeding with a new Hearing Examiner, and to prohibit *ex parte* communications between the Hearing Examiner and the OWRB and other agencies. In defense, the Respondent OWRB argued that the OWRB and its staff was not a "party" in the MAY proceeding, and the post-hearing communications were not prohibited *ex parte* communications but rather were permissible assistance in evaluating the parties' evidence and arguments.

Upon consideration of the issues raised by Petitioners ASAPFO and EFO, the Supreme Court held that

"[t]he OWRB is not a party to the MAY proceeding, and thus communication by the hearing officer with the OWRB is not covered by the *ex parte* communication prohibitions of 75 O.S. 2011 §313....[On the issue] of whether *ex parte* communications between the agency and its hearing officer in the context of the MAY proceeding are permissible...we hold they are...." (Emphasis added.)

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<sup>1</sup> Section 313 of title 75 provides:

"Unless required for the disposition of *ex parte* matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in an individual proceeding shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party, nor, in connection with any issue of law, with any party or his representative, except upon notice and opportunity for all parties to participate. An agency member (1) may communicate with other members of the agency, and (2) may have the aid and advice of one or more personal assistants."

ASAPFO, 2013 OK 29, ¶¶ 6, 9.

**B. Application of Collateral Estoppel Doctrine.**

Applying the elements of collateral estoppel, first of all it is clear that two of the Petitioners in this case were parties in the ASAPFO case. The Petitioners in this case include ASAPFO and EFO. Petitioner ASAPFO was the Petitioner that applied to the Supreme Court for original jurisdiction and petitioned for writs of prohibition and mandamus in the *ASAPFO* case. Petitioner EFO intervened and participated as fully as the named parties in the arguments before the Supreme Court referee in the *ASAPFO* case. Moreover, the other Petitioners in this case including but not limited to the Oklahoma Farm Bureau Legal Foundation, Oklahoma Aggregates Association, and TXI essentially are in privity with Petitioners ASAPFO and EFO: like ASAPFO and EFO, the other Petitioners participated in the MAY proceeding as parties who opposed the tentative MAY determination; like ASAPFO and EFO, the other Petitioners had the same interests of obtaining a final MAY determination that would allow use of more groundwater; and the other Petitioners were and are represented by the same attorneys as represented ASAPFO and EFO in the *ASAPFO* case and this case.

Second, the issues raised by the pending motion for discovery were material and specifically raised by both ASAPFO and EFO in the ASAPFO case. In their pending motion for discovery, Petitioners "allege that in the course of evaluating the evidence the Hearing Examiner received and considered *ex parte* communications to which they had no opportunity to respond...**Board staff responded directly to Petitioners' evidence and argument through *ex parte* communications not shown on the record.**" Petitioners' Motion for Discovery, etc., pages 1-2 (italics and bold in original). As support for their motion, Petitioners attached to their Motion for Discovery several items, including specifically:

Exhibit 1: an Affidavit of Emily Meazell dated February 8, 2013;

Exhibit 2: an Affidavit of L. Mark Walker dated November 8, 2012 with its own attached exhibits; and

Exhibit 3: a Supplemental Affidavit of L. Mark Walker dated January 9, 2013.

The Petitioners' basic allegation of *ex parte* communications, and each one of these three Exhibits offered in support of the Petitioners' motion for discovery, were all thoroughly argued and vetted by Petitioners ASAPFO and EFO before the Supreme Court in the *ASAPFO* case. Petitioners' Motion for Discovery, etc. Exhibit 2 (the November 8, 2012 Affidavit of L. Mark Walker) was included as Tab 11 in the "Index to Appendix" filed by ASAPFO on January 4, 2013 in the *ASAPFO* case. Upon information and belief, Petitioners' Motion for Discovery, etc. Exhibit 3 (the January 9, 2013 Supplemental Affidavit of L. Mark Walker) was submitted by EFO during oral argument before the Supreme Court referee in the *ASAPFO* case on January 10, 2013. And Petitioners' Motion for Discovery, etc. Exhibit 1 (the February 8, 2013 Affidavit of Emily Meazell) was first submitted in the *ASAPFO* case as Tab 2 in the "Respondents' Appendix" filed by Respondent OWRB on February 12, 2013; then it was referred to by Petitioner ASAPFO during a second oral argument before the Supreme Court referee on February 14, 2013.

What was the result in the *ASAPFO* case of all these claims, affidavits and arguments by ASAPFO and EFO about *ex parte* communications? The answer satisfies the third test for the doctrine of collateral estoppel: this issue was finally adjudicated in the previous case. The Supreme Court expressly held in the *ASAPFO* case that, subject to one exception, the communications between OWRB staff and the Hearing Examiner were permissible and were not

covered by the *ex parte* communication prohibitions of 75 O.S. § 313.<sup>2</sup> The Court went on to state that certain other communications by witnesses outside the OWRB from the U.S. Geological Survey ("USGS") that had been transmitted to the Hearing Examiner by OWRB staff "[lent] the proceedings the appearance of not being as fair and impartial as they should be...." *ASAPFO*, 2013 OK 29, ¶16. To remedy this "appearance that the hearing officer is giving undue weight in making her final recommendation to the desires of the USGS and OWRB", the Supreme Court issued a writ of mandamus that "compell[ed] the hearing officer to provide notice of her *ex parte* communications to all parties to the MAY proceeding, to disclose the contents of those communications to the parties, and incorporate those communications and responses to them into the record." *ASAPFO*, 2013 OK 29, ¶17.

By her Order dated July 8, 2013, the Hearing Examiner gave to the parties in the MAY proceeding the required notice and opportunity to file responses to the USGS communication. Petitioners ASAPFO and EFO took this opportunity to file multiple responses and motions. These and the other responses filed by other parties were duly considered by the Hearing Examiner before she prepared her October 3, 2013 proposed order, which the OWRB ultimately approved.

### **C. Conclusion.**

The irregularities alleged by Petitioners in their Motion for Discovery, etc. in this case have already been litigated by two of the Petitioners, and adjudicated by the Supreme Court, in the *ASAPFO* case. Petitioners' claims are barred by collateral estoppel.

Even if Petitioners' allegations were not precluded, there is no authority for the relief they seek. The only exception to the general rule of "review confined to the record" is that "testimony [on alleged irregularities not shown in the record] may be taken in the court". 75 O.S. § 321.

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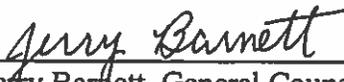
<sup>2</sup> *ASAPFO*, 2013 OK 29, ¶¶6, 9; excerpts quoted *supra* at page 4.

Section 321 does not authorize "discovery" or "limited discovery" as requested in Petitioners' motion.

For all the foregoing reasons, there is no basis for Petitioners' Motion for Discovery. Respondent submits that the Motion for Discovery must be denied.

WHEREFORE, Respondent OWRB respectfully requests the Court to deny the Petitioners' Motion for Discovery, to set a schedule for briefing and other proceedings as appropriate, and for such other relief as the Court deems proper.

Respectfully submitted,

  
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This is to certify that on May 14, 2014, a true and correct copy of the above and foregoing instrument was mailed by regular mail, postage prepaid, to those persons listed on the following pages:

  
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