IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL FOUNDATION, et al.,	)	FILED IN DISTRICT COURT OKLAHOMA COUNTY
Petitioners,	)	MAY 22 2014
v.	)	TIM RHODES COURT CLERK
	)	43
OKLAHOMA WATER RESOURCES BOARD	)	Case No. CV-2013-2414
Respondent,	)	
v.	)	
TISHOMINGO NATIONAL FISH HATCHERY, et al.	)	
Other Parties of Record.	)	

CPASA'S RESPONSE IN OPPOSITION TO PETITIONERS' MOTION FOR DISCOVERY AND HEARING ON PROCEDURAL IRREGULARITIES AND FOR SCHEDULING CONFERENCE

COMES NOW Citizens for the Protection of the Arbuckle-Simpson Aquifer (herein "CPASA") and submits this objection to Petitioners' Motion for Discovery and Hearing on Procedural Irregularities and for Scheduling Conference (herein "Petitioners' Motion). Specifically, Oklahoma statutes do not allow discovery in this instance and the Oklahoma Supreme Court resolved the alleged procedural irregularities of which Petitioners complain. In support of its objection, CPASA states as follows:

1. Section 321 Of Title 75 Does Not Provide The Requested Relief.

Petitioners rely upon section 321 of title 75 as the basis for their Motion. *See* Petitioners' Motion at 2 (". . . Petitioners ask the Court for an evidentiary hearing and limited discovery pursuant to 75 O.S. § 321"). Section 321 states in its entirety:

> 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. The court, upon request, shall hear oral argument and receive written briefs.

75 O.S. § 321.

At no point does the statute contemplate additional discovery—regardless of how limited. As such, Petitioners request for discovery must be denied.

2. Petitioners' Claims Are Barred By The Doctrine Of Collateral Estoppel.

CPASA joins in the arguments made by the Oklahoma Water Resources Board (herein "OWRB") regarding collateral estoppel and incorporates the OWRB's arguments herein.

Petitioners' Motion incorrectly alleges that the Hearing Examiner "received and considered *ex parte* communications to which [Petitioners] had no opportunity to respond." *See* Petitioners' Motion at 2. However, as the Oklahoma Supreme Court explicitly found, communications between the Oklahoma Water Resources Board (herein "OWRB") and the hearing examiner do ***not*** constitute ex parte communications. *See Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. v. OWRB, et al.*, 2013 OK 29, ¶ 6 (herein "ASAPFO) (Admin. Record Tab 154, 0002306-0002319). Moreover, Petitioners were given—and utilized—an opportunity to respond to a memorandum submitted by the United States Geologic Survey (herein "USGS"). *See* July 8, 2013 Order, Admin. Record, Tab 156, 0002321-0002324; *see also* Protestants' Response to USGS Report, Admin. Record, Tab 157, 0002325-0002377.

A. As Determined By The Oklahoma Supreme Court, Communications Between The Hearing Examiner And The OWRB Are Not Ex Parte Communications.

Petitioners complain of alleged *ex parte* communications between the Hearing Examiner and the OWRB. *See* Petitioners' Motion at 2 (alleging OWRB staff responded directly to Petitioners' evidence and argument through *ex parte* communications). However, in a case

making substantially the same allegations, the Oklahoma Supreme Court explicitly found that the "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**." *ASAPFO,* 2013 OK 29, ¶ 6 (emphasis added). Thus, Petitioners' allegations of *ex parte* communications between the Hearing Examiner and the OWRB must be rejected and Petitioners' request for discovery on this issue must be denied.

B. Petitioners Had Adequate Opportunity To Respond To The USGS Memorandum.

In *ASAPFO*, certain Petitioners alleged a USGS memorandum that was submitted to the Hearing Examiner constituted *ex parte* communication. In response, the Oklahoma Supreme Court ordered the Hearing Examiner to "provide notice of her ex parte communications to all parties to the MAY proceedings, and to include those communications in the record, as well as the responses of interested parties" in order to remedy the "appearance that the hearing officer is giving undue weight in making her final recommendation. . . ." *ASAPFO*, 2013 OK 29, ¶ 17.

Pursuant to the Court's order, the Hearing Examiner placed the USGS memorandum in the record and issued an order providing parties an opportunity to respond to the materials contained therein. *See* July 8, 2013 Order, Admin. Record, Tab 156, 0002321-0002324. Petitioners timely filed their response to the USGS report. *See* Protestants' Response to USGS Report, Admin. Record, Tab 157, 0002325-0002377. As such, any allegation by Petitioners that they were denied "any opportunity to contest" the USGS memorandum is disingenuous, at best. Accordingly, Petitioners' request for discovery on this issue must be denied.

CONCLUSION

WHEREFORE, for the reasons stated above, Citizens for the Protection of the Arbuckle-Simpson Aquifer respectfully request this Court deny Petitioners Motion, to set a schedule for briefing, and for such other relief as this Court deems proper.

Respectfully,

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