

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

DEC -9 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

**OWRB’S OBJECTION AND RESPONSE TO PETITIONERS’ MOTION FOR
IN CAMERA INSPECTION OF DOCUMENTS**

Respondent Oklahoma Water Resources Board (“OWRB”) hereby submits its Objection and Response to the Motion for *In Camera* Inspection of Documents (hereinafter “Petitioners’ Motion”) filed on November 21, 2014 by Petitioners Arbuckle Simpson Aquifer Protection Federation of Oklahoma, Oklahoma Aggregates Association, TXI, and Oklahoma Farm Bureau Legal Foundation (collectively “Petitioners”). Petitioners’ Motion, *for the third time in the last seven months*, seeks relief with respect to a single document – one which has already been produced in redacted form. The OWRB objects to the Petitioners’ Motion because it is untimely, and because the Motion is moot as a result of this Court’s prior rulings. The OWRB further responds that Petitioners’ Motion must be denied because Petitioners fail to make any showing of “extraordinary circumstances” which would overcome the explicit and long-recognized

protections of attorney work-product under Oklahoma law. In opposition to Petitioners' Motion, Respondent OWRB submits the following argument and authority:

ARGUMENT AND AUTHORITY

As a preliminary matter, Respondent OWRB hereby incorporates all responsive evidence, argument and authority previously submitted to the court in the present cause, including but not limited to the argument and authority submitted in the OWRB's Response and Objection to Motion for Discovery and Hearing on Procedural Irregularities and for Scheduling Conference (filed May 14, 2014) and the OWRB's Response and Objection to Petitioners' Motion to Compel Production of Unredacted OWRB Memorandum (filed August 12, 2014). Respondent further maintains its continuing objection to Petitioners' efforts to cast aside the rule that judicial review of agency final orders shall be confined to the record, as directed by 75 O.S. § 321. In addition to the aforementioned argument and authority, the OWRB states as follows:

I. PETITIONERS' MOTION IS UNTIMELY AND MOOT

After numerous motions, briefs, and hearings, and after more than 12 months of litigation in the present case, Petitioners' latest Motion, for the first time, requests that this Court examine an unredacted copy of the September 14, 2012 Attorney Memorandum *in camera*. Prior to the filing of Petitioners' Motion, Petitioners repeatedly and consistently argued for nothing less than production of the unredacted document *in toto*, and further urged that this relief was sought, in the Petitioners' own words, "at an absolute minimum[.]" Petitioners file the present motion in the wake of this Court's August 29, 2014 ruling from the bench, which denied in part Petitioners' Motion to Compel. Petitioners apparently hope that an *in camera* inspection of the document will change the Court's decision on their previous Motion to Compel. Because the Court already declined Petitioners' prior request to compel production of the unredacted September 14, 2012

Attorney Memorandum, Petitioners' Motion seeking an *in camera* inspection of the same document is untimely and moot.

II. THE COURT HAS DISCRETION TO DECLINE PETITIONERS' REQUEST

Oklahoma law strongly disfavors compelling the production of an attorney's advice to his or her client. *See* 12 O.S. § 3226(B)(3)(b) ("the court shall protect against the disclosure of the mental impressions, conclusions, opinions or legal theories of a party's attorney or other representative concerning the litigation."); *see also Ellison v. Gray*, 1985 OK 35, ¶ 16, 702 P.2d 360 (Court held that discovery of work product may only be had upon a "convincing showing" that (1) the substantial equivalent cannot be had without undue hardship, (2) that such information is exclusively within the knowledge of counsel, (3) that such information has been placed in issue by the party who seeks to prevent disclosure, and (4) that such discovery pertains only to work product interwoven with strictly relevant information or communications). Furthermore, even when the most convincing showing of need is made, the decision of whether to conduct an *in camera* review of documents in question is entirely within the trial court's discretion. *See* 12 O.S. § 3237(A)(2) ("The court may conduct an *in camera* review of the documents for which the privilege or other protection from discovery is claimed.").

Ultimately, the Petitioners did not prevail on their request to compel the production of the unredacted September 14, 2012 Attorney Memorandum. Petitioners failed to make the requisite "convincing showing" required under *Ellison v. Gray* in their Motion to Compel, and failed to persuade the Court at the August 29, 2014 hearing that "extraordinary circumstances" existed sufficient to overcome the Oklahoma Discovery Code's explicit and long-recognized protection of attorney work product from discovery. *See Scott v. Peterson*, 2005 OK 84, ¶ 8, 126 P.3d 1232 ("[O]pinion work product is not discoverable except in extraordinary circumstances.") Despite

the new and wholly unsupported claims of Petitioners' counsel in their latest Motion, the Petitioners failed to seek any alternative remedies prior to or during the August 29, 2014 hearing. Therefore, the Court decision to deny Petitioners request was well-founded and consistent with Oklahoma law and civil procedure.

III. PETITIONERS ARE NOT ENTITLED TO THE REMEDY OF THEIR CHOOSING

After unsuccessfully seeking the extreme remedy of compelled production of attorney work product, Petitioners now move this Court seek the remedy *in camera* inspection. However, Petitioners are not entitled to re-litigate issues which have already been determined simply because they now seek a different remedy. Oklahoma law vests the trial court with broad discretion to grant or deny discovery as the circumstances dictate, and the decision of the trial court will not be disturbed unless affected by an abuse of discretion. *La. Mun. Police Emps.' Ret. Sys. V. McClendon*, 2013 OK CIV APP 64, ¶ 12, 307 OK CIV APP 64; *Malloy v. Caldwell*, 2011 OK CIV APP 26, ¶ 12, 251 P.3d 183, 185; *Bank of Oklahoma, N.A. v. Briscoe*, 1995 OK CIV APP 156, ¶ 27, 911 P.2d 311, 318.

In this instance, the Court received briefs and heard oral argument for and against Petitioners' request to compel Respondent OWRB to produce the unredacted Attorney Fee Memorandum. Following that discussion, the Court considered a number of alternative remedies, discussing those alternatives with Petitioners' and Respondents' counsel at the August 29, 2014 hearing. While the Court would certainly have been justified in denying Petitioners' request entirely, the Court instead denied their motion only in part, and fashioned a sound, workable remedy which served to protect the legitimate interests of both the Petitioners and Respondents.

Rather than ordering production of the unredacted document or conducting an *in camera* review, the Court ordered the OWRB to produce an affidavit sponsored by the Hearing Examiner, Emily Hammond (Meazell), attached hereto as Exhibit 1. In that affidavit, the Hearing Examiner recounted the circumstances surrounding the September 14, 2012 Attorney Memorandum and definitively contradicted Petitioners' unsupported claims that the document contained new argument or evidence. The Petitioners' dissatisfaction with the remedy afforded by the Court at the August 29, 2014 hearing does not entitle them to re-litigate the same issues in the hopes of obtaining an entirely new remedy. Because Petitioners have already been granted an adequate remedy by the Court, Petitioners' request for an *in camera* inspection must be denied.

IV. RESPONDENT OWRB'S PRESENTATION OF EVIDENCE AND WITNESSES IN THE A-S MAY HEARING DOES NOT MAKE IT AN ADVERSE PARTY

Petitioners' oft-repeated argument that the OWRB's assertion of attorney work product privilege is somehow incompatible with their earlier participation in the Maximum Annual Yield (MAY) fails as a matter of law. The same argument was raised by Petitioners' counsel before the Oklahoma Supreme Court regarding *the same proceedings and the same document*¹ in *Arbuckle Simpson Aquiver Protection Federation of Okla., Inc. v. OWRB*, 2013 OK 29 (hereinafter "*ASAPFO*"). As they have in the present suit, the Petitioners in *ASAPFO* argued that because the OWRB presented evidence and questioned witnesses, any communications between the OWRB and the hearing examiner were prohibited, and that Petitioners were denied an impartial hearing. This argument was soundly rejected by the Court, which specifically stated that "We do not hold that the hearing officer failed to provide a fair and impartial hearing during

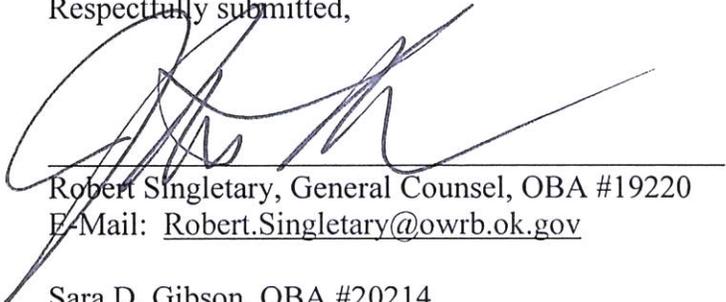
¹ The specific document in question is addressed in the *ASAPFO* opinion, 2013 OK 29 at ¶ 5, which states: "She [the hearing examiner] further admitted to communicating with the OWRB's Staff Attorney to obtain assistance in locating the evidence mentioned above." The *ASAPFO* court went on to explicitly hold that this communication was permissible in the context of the MAY proceeding. *Id.*, at ¶ 9.

the MAY proceeding in question[.]” *ASAPFO*, 2013 OK 29 at ¶ 16. Furthermore, the Court held that the OWRB was not an “adverse party,” as claimed by the Petitioners in their present Motion, and that the OWRB’s communications, including the September 14, 2012 Attorney Memorandum, were not *ex parte* communications prohibited by 75 O.S. § 313. *Id.*, at ¶¶ 6-9. Therefore, the main thrust of Petitioners’ Motion, the argument that the OWRB staff attorney was not permitted to communicate or assist the hearing examiner in the context of the MAY proceeding, has already been rejected by the Oklahoma Supreme Court.

CONCLUSION

WHEREFORE, In light of the foregoing, Respondent OWRB respectfully prays that this Court deny the Petitioners' Motion for *In Camera* Inspection of Documents as it is untimely, moot, improper and contradicted by relevant authority and facts of the case. Respondent OWRB further prays for attorney fees and costs, and for such other relief as the Court deems proper.

Respectfully submitted,



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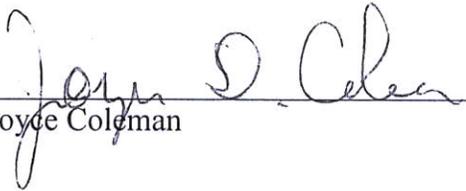
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OKLAHOMA WATER RESOURCES BOARD

CERTIFICATE OF SERVICE

This is to certify that on December 9, 2014, a true and correct copy of the above and foregoing instrument was mailed by US mail, postage prepaid, to all persons listed below and on the following pages.



Joyce Coleman

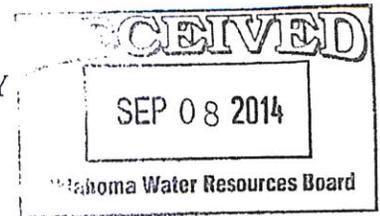
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AND TXI

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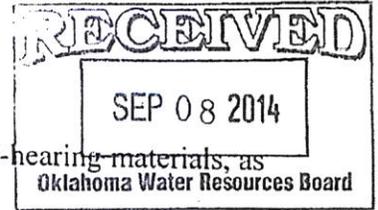
District Judge Barbara Swinton

AFFIDAVIT OF HEARING EXAMINER

COUNTY OF _____)
 DISTRICT OF COLUMBIA - SS) SS
 STATE OF _____)

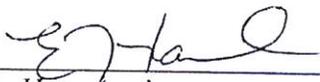
Emily Hammond, the undersigned affiant, being of lawful age and duly sworn, states as follows:

1. I am Professor of Law at the George Washington University Law School, and I have previously taught at University of Oklahoma College of Law, and Wake Forest University School of Law.
2. During my time at the University of Oklahoma College of Law and for some months thereafter, I also served as a part-time hearing examiner for the Oklahoma Water Resources Board (Board) from 2007-2013.
3. In May of 2012, I presided over the prehearing conference and two-day hearing for the determination of the Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin underlying parts of Murray, Pontotoc, Johnston, Garvin, Coal, and Carter Counties in Oklahoma ("A-S MAY Proceeding").
4. At the conclusion of the A-S MAY Proceeding, I issued an order setting forth a timeframe during which the parties had the opportunity to file post-hearing briefs,

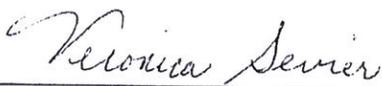


responses, and comments. All the named parties submitted post-hearing materials, as did many other individuals.

5. Thereafter, I began drafting a Proposed Findings of Fact, Conclusions of Law, and Board Order ("Proposed Order") for consideration by the nine-member Board at one of its regular meetings.
6. In the process of preparing the Proposed Order, I sought assistance from the legal staff of the Board in locating testimony or other evidentiary materials on certain issues in the extensive record taken during and after the hearing. The Board's legal staff also provided input and reference to other portions of the record that they thought might assist me regarding those same issues.
7. A redacted memorandum from the Board's legal staff is attached hereto as "Exhibit 1."
8. Based on my recollection of the memorandum in question, and my recent review of the unredacted memorandum to refresh my memory, I can confirm that the redacted portions of the memorandum contained no new evidence, data, or technical information.
9. Likewise, the redacted portions of the memorandum contained no new arguments or comments that had not already appeared in the record.
10. In accordance with the mandate of the Oklahoma Supreme Court in *Arbuckle Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Oklahoma Water Resources Board*, 2013 OK 29, I disclosed certain communications to all interested parties, and received responses from said parties to the record.
11. The Proposed Order was provided to all parties before being considered by the Board.
12. The Proposed Order is based entirely and exclusively on the record in the A-S MAY Proceeding. The Proposed Order further addresses this matter and speaks for itself.


Emily Hammond

DISTRICT OF COLUMBIA:SS
Subscribed and sworn to before me this 4th day of September, 2014.


Notary Public, DC

My commission number is:

NONE

My commission expires:

FEBRUARY 14, 2017

