IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL FOUNDATION, et al.,	)	
Petitioners,	)	
v.	)	**Case No. CV-2013-2414**
OKLAHOMA WATER RESOURCES BOARD,	)	
Respondent,	)	**District Judge Barbara Swinton**
v.	)	
TISHOMINGO NATIONAL FISH HATCHERY,et al.,	)	
Other Parties of Record.	)	

MOTION TO SUPPLEMENT ADMINISTRATIVE RECORD

Petitioners Oklahoma Farm Bureau Legal Foundation, Pontotoc County Farm Bureau, Oklahoma Independent Petroleum Association, Environmental Federation Of Oklahoma, Oklahoma Cattlemen's Association, Oklahoma Aggregates Association, TXI, and Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. (collectively "Petitioners") move the Court for an order including the attached memorandum — "Evidentiary issues - Answers 9-14-2012" — in the record so that it may be addressed in the parties' appellate briefing.

This is a petition for judicial review of an order of the Oklahoma Water Resources Board pursuant to 75 O.S §§ 318 *et seq*. By statute, the Board is to provide the Court with a certified copy of the entire record, which should include all pleadings, motions, and evidence or data

received or noticed by the hearing examiner. *Id.* §§ 309(F) and 320. This Court may also take additional testimony on alleged procedural irregularities not shown in the record. *Id.* § 321.

The attached memorandum was only recently disclosed to Petitioners and was not included in the copy of the record submitted to this Court for judicial review. However, it was solicited and received by the hearing examiner as a response to the Petitioners' arguments during the proceeding that is the subject of this administrative appeal and should be included in the record. After the close of the evidentiary hearing, the hearing examiner spoke with Dean Couch, then OWRB's General Counsel, and Jerry Barnett, then OWRB's staff attorney, to ask for help finding evidence on certain issues. (*See* Meazell Aff. ¶¶ g.–h. (attached as Exhibit 2).) Specifically, the hearing examiner needed help to find evidence that could respond to evidence Petitioners (Protestants at the hearing below) presented at the hearing and arguments raised in their post-hearing briefing. (E-mail from Dean Couch to Bob Fabian and Chris Neel (Aug. 14, 2012) (attached as Exhibit 3).) In response, the hearing examiner received the attached memorandum from Mr. Barnett on September 14, 2012. (Meazell Aff. ¶ j.; E-mail from Jerry Barnett to Emily Meazell (Sep. 14, 2012 (attached as Exhibit 4); Hammond Aff. ¶ 6 (attached as Exhibit 5).) The attached memorandum is organized into three sections around the specific issues for which the hearing examiner sought help finding evidence. (*compare* Ex. 1 and Ex. 3.) The hearing examiner made specific factual findings on each of these issues, which were ultimately adopted by the Board. (*See* Final Order at Findings of Fact 22 and 23 (regarding amount of water in storage), 44–47 (regarding modeling procedures), and 14–18 (regarding study of aquifer areas).)

As part of this Court's review of the underlying proceedings and the decision of the Board that is the subject of this action, Petitioners will ask the Court to examine and consider the

propriety and substance of the hearing examiner's findings on each of the issues addressed by the attached memorandum. There are also several procedural issues for review that relate — some directly and others indirectly — to the attached memorandum. As such, the attached memorandum should be received and considered by the Court as part of the record for its review of the Board's Order.

Respectfully submitted,

L. Mark Walker, OBA #10508
Scott A. Butcher, OBA #22513
CROWE & DUNLEVY
A Professional Corporation
Braniff Building
324 North Robinson Avenue, Suite 100
Oklahoma City, Oklahoma 73102

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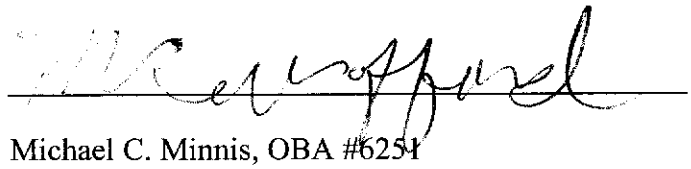
ATTORNEYS FOR PETITIONER ARBUCKLE-SIMPSON AQUIFER PROTECTION FEDERATION OF OKLAHOMA, INC.



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ATTORNEYS FOR PETITIONERS OKLAHOMA AGGREGATES ASSOCIATION AND TXI

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing was mailed, by depositing it in the U.S. Mail, postage prepaid, this 24 day of March, 2015, to:

Deanna L. Hartley
Krystina E. Phillips
Environmental Law Center, PLLC
1723 East 15th Street, Suite 100
Tulsa, Oklahoma 74104

Rob Singletary
Sara D. Gibson
Jonathan Allen
Oklahoma Water Resources Board
3800 North Classen Blvd.
Oklahoma City, Oklahoma 73118

Evidence to answer inquiries by Professor Meazell: 9/14/2012

1. Amount of water in storage: 9,408,461 AF vs. "about 11,000,000" AF

The latter figure is in OWRB Exhibit 5 (the March 13, 2012 Tentative Order approved and signed by the Board) at page 3, Tentative Finding paragraph no. 6. It is based in part on an average saturated thickness of 3,400 feet (id.).

The former figure is in OWRB Exhibit 4 (the PowerPoint presentation made by Julie Cunningham at the February 13, 2012 Board meeting). It is based in part on an average saturated thickness of 3,000 feet (id.).

Staff's evaluation is that this difference is immaterial for the reasons stated in OWRB Exhibit 5 at page 6 and following, particularly the last sentences of Tentative Conclusions paragraphs nos. 3 and 4 and paragraph no. 5.

2. "Why Scott Christenson used the model he did rather than the model used by Dr. Poeter"

OWRB Exhibit 10, Slides 30 and 31;
Testimony of Scott Christenson, Hearing Recording Part 6, 1:00 through 4:30 and following; and
OWRB Exhibit 1:

Abstract, page 1 first paragraph and page 2 third paragraph and following; and
Pages 80-89

Staff points out that Dr. Poeter did not develop a different model of her own; she used the model used by Christenson and USGS, and asserted that the parameter for the storage coefficient should be changed. Aside from this different input, she did not recalibrate the model and did not run it to see what the result would be. See the testimony of Dr. Poeter, Hearing Recording Part 9, 10:40 through 12:42:

> "...I believe that the other issues will also make a difference, but I did not take the time to start working on those and recalibrate the model. I mean, even with my addition of unconfined storage coefficient I'm not saying that's the right number, or that it gives us the right answer. It was just that I said, whoa, this is an issue; I wonder how much difference including the unconfined zone can make. And so I made a very simple run to find that out. Now if someone decides that they're going to change the model and put that in and they really need to consider the whole calibration over again, because now it may not match the streams any more and so those values might need to be adjusted. Not just storage coefficient but recharge – I mean, there's a lot of work to be done.
>
> "[By Mr. Aamodt] Q: Sure. Well, when you were testifying on direct earlier, I wrote down a piece of your testimony –
>
> "A: Um-hum.

EXHIBIT
1

"Q: - and I, word for word, and I want to make sure –

"A: Okay.

"Q: - you'll stand behind that. And you stated that you don't know how much difference any of your conclusions would make. Do you stand behind that statement? Fair enough?

"A: Yes, I have not made the runs to find out how much difference. They could be very large. They could not be so large. You have to find out.

"Q: Or there could be no difference at all.

"A: Unlikely. When you change something in the model, usually something changes. In the second [inaudible] important, but something changes."

* * *

Testimony of Dr. Poeter, Hearing Recording Part 9, 18:06 and following:

"[By Mr. Aamodt:] Q: Well after you went to that higher level did you bring yourself back and analyze other, any other issues?

"A: No because this is not, this is not my job to get this model right. All I wanted to know is does it make a difference if I have an unconfined aquifer. And I said, well, it does. Now maybe the numbers are different. But, you know, that, that's a six-year, 6 1/2 million dollar study. I worked on this for two weeks.

"Q: Sure. That, that's, that's my point exactly."

3. Why the eastern portion of the aquifer was primarily studied

OWRB Exhibit 1 (the USGS Study Report) page 5, second column, second full paragraph:

"The hydrogeologic study and groundwater-flow model were focused on the eastern Arbuckle-Simpson aquifer because (1) the data needed to build the model are sparse in the western and central Arbuckle-Simpson aquifer, (2) the eastern Arbuckle-Simpson aquifer is the largest part of the aquifer by area and volume, (3) most of the current (2011) groundwater withdrawals from the aquifer are from the eastern Arbuckle-Simpson aquifer, and (4) the largest (by flow) streams and springs sourced from the aquifer are on the eastern Arbuckle-Simpson aquifer. Although the study emphasized the eastern Arbuckle-Simpson aquifer, understanding of the eastern part of the aquifer requires studying the entire aquifer, especially with respect to the geology."

For evidence of the scope and depth of the other studying and work done leading up to the Tentative Order (i.e., much work was done besides the work and modeling pertaining to the eastern portion of the aquifer), see:

> Exhibit 18 of CPASA et al. Joint Exhibits Presented at Prehearing Conference ("Arbuckle-Simpson Hydrology Study/Final Report to the U.S. Bureau of Reclamation", or "Final Report to BuRec"); Executive Summary at Bates MAY-00636 through MAY-00638; pages 13-15 at Bates MAY-00648 through MAY-650; and Appendix A at Bates MAY-00675 through MAY-00677; and
>
> Testimony of Noel Osborn, Hearing Recording Part 13, 42:45 through 49:30.

AFFIDAVIT

STATE OF NORTH CAROLINA)
)
COUNTY OF Forsyth)

I, Emily Hammond Meazell, being first duly sworn, upon my oath state:

1. I am currently employed as a Professor of Law at the Wake Forest University School of Law in Winston-Salem, North Carolina. Prior to the current 2012-2013 academic year, I was employed as Associate Dean for Academic Affairs, Associate Director of the Law Center, and Associate Professor at the University of Oklahoma College of Law in Norman, Oklahoma.

2. Beginning in March 2012 I served as a Hearing Examiner on a contractual basis for the Oklahoma Water Resources Board ("OWRB") in an administrative proceeding to determine the maximum annual yield ("MAY") of the Arbuckle-Simpson Groundwater Basin located in south central Oklahoma. I will refer to that proceeding as the "A-S MAY Proceeding."

3. In the course of my work as Hearing Examiner in the A-S MAY Proceeding:
   a. I conducted a pre-hearing conference on May 9, 2012, in Ada, Oklahoma, during which I granted in part and denied in part certain Protestants' Motion in Limine;
   b. I conducted a hearing on the record on May 15 and May 16, 2012 in Sulphur, Oklahoma;
   c. Following the hearing, I gave participants the opportunity to file post-hearing briefs and took the matter under advisement. Because the parties may have needed additional time to assess the expert evidence that was presented for the first time at the hearing, I also stated that I would permit motions to admit additional evidence. Only one party sought to do so on a matter unrelated to the MAY; this motion and its disposition are addressed in the Proposed Findings of Fact, Conclusions of Law, and Board Order ("Proposed Order"), which is attached hereto as Exhibit 1 and speaks for itself;
   d. Although entirely hypothetical, had a party moved to submit additional evidence relevant to the MAY itself, I would have considered such motion and, had I granted such motion, I would have re-opened the record to permit full adversarial consideration of the evidence;
   e. In July 2012, I began drafting the Proposed Order for recommendation to the OWRB members;
   f. In drafting the Proposed Order, I considered the evidence admitted into the record, and the briefs and other materials filed after the hearing by the parties;
   g. In August 2012, I communicated by telephone with Dean Couch, who was OWRB's General Counsel at the time, to inquire about obtaining

EXHIBIT
2

assistance from the OWRB staff in locating evidence in the record on certain issues;

h. Following Dean Couch's assurance that such assistance was contemplated by applicable statutes and regulations, and based on my own independent evaluation of the same, I also communicated with Jerry Barnett, then OWRB's Staff Attorney, to obtain such assistance;
i. At no time following the hearing did I contact or request anything from the United States Geological Survey ("USGS") or its employees or representatives;
j. I received an email from Jerry Barnett on September 14, 2012 which included information from OWRB staff referencing where evidence in the record could be found on certain issues;
k. I received an unsolicited email from Dean Couch on September 28, 2012 that included a memorandum written to Jerry Barnett by retired USGS employee Scott Christenson and current USGS employee Noel Osborn. That email and memo are attached hereto as Exhibit 2 and speak for themselves;
l. After certain Protestants in the A-S MAY Proceeding filed a "Motion to Recuse/Disqualify Hearing Examiner and To Stay Proceeding" on November 8, 2012, the OWRB's Dean Couch and Jerry Barnett advised me that the governing statute required the issue to be decided by the OWRB members;
m. I postponed completing the Proposed Order until late December 2012, after the OWRB members issued their order on December 18, 2012 denying the "Motion to Recuse/Disqualify Hearing Examiner and To Stay Proceeding";
n. On December 27, 2012, I transmitted the Proposed Findings of Fact, Conclusions of Law, and Board Order to OWRB;
o. It is my understanding that, with transmittal of the Proposed Order, my service as Hearing Examiner in the A-S Proceeding is complete;
p. At all times during the A-S Proceeding, I conducted myself in an impartial, unbiased manner; and
q. 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.

Further affiant sayeth not.

Emily Hammond Meazell

The foregoing was acknowledged before me this 8th day of February, 2013 by Emily Hammond Meazell.

Sonya Casstevens Jones
Notary Public

My Commission Expires: 10-7-2015

(SEAL)

Sonya Casstevens Jones
Notary Public
Forsyth County, State of North Carolina
My Comm. Exp. 10-7-2015

From: Fabian, Bob
To: "Noel I Osborn";
cc: Couch, Dean; Cunningham, Julie; Neel, Chris; "Stanley T Paxton"; "Scott Christenson (schris@usgs.gov)";
Subject: FW: Emily Meazell - assistance
Date: Wednesday, August 15, 2012 2:48:00 PM
Attachments: Arb-SimpTOProtestantsPostHearingBrief5-31-12.pdf.html
ArbSimp Tentative Order, Signed 3-13-12.pdf.html

Noel,

Please see Dean's email below. We need to visit about the review of the evidence and testimony addressing any questions Ms. Meazell needs.

Bob Fabian

Robert S. Fabian
Technical Program Manager
Oklahoma Water Resources Board
3800 N. Classen Blvd.
Oklahoma City, OK
405-530-8800
rsfabian@owrb.ok.gov
www.owrb.ok.gov

From: Couch, Dean
Sent: Tuesday, August 14, 2012 4:22 PM
To: Fabian, Bob; Neel, Chris
Cc: Cunningham, Julie; Barnett, Jerry; Strong, J.D.
Subject: Emily Meazell - assistance

Trebor, Chris,
I talked to Emily Meazell this morning about the draft Proposed Final Order and her plans to get it out by the end of this week. She was a little hesitant at first, but we agreed that a hearing examiner for the OWRB can utilize the assistance of agency staff in preparing a proposed final order. We also agreed that in providing that assistance to the hearing examiner, staff can review evidence submitted in the record then use staff expertise to explain the evidence to the hearing examiner, but the hearing examiner cannot rely on matters outside the record, so staff cannot rely on matters outside the record. Clear as mud?

EXHIBIT
3

That said, Emily indicated that she was having problems finding evidence in the record to address some of the issues raised in the Protestants' brief filed by Mark Walker of Crowe and Dunlevy (attached). Also attached FYI is a signed copy of the Tentative Order approved March 13. Two or three issues she specifically mentioned that she had not been able to clarify from the record: (1) amount of water in storage mentioned as 9 MAF in one place, but 11 MAF in another, (2) why Scott Christenson used the model he did rather than a model by Poeter (sp?), and (3) why the eastern portion was primarily studied.

I told Emily that we would take a shot at putting together a list of issues raised in the attached brief, then address those one by one with references to evidence in the record (e.g. exhibit number and page, or testimony presented at the hearing) and with staff 'expertise' to explain where necessary.

We might need to get together in the next couple days to see where we are on this. I told her we would try to get the list and responses ASAP. Let me know how I can help.

DC

From: Barnett, Jerry
To: "meazeleh@wfu.edu";
cc: Couch, Dean;
Subject: Followup on evidentiary issues
Date: Friday, September 14, 2012 11:08:26 AM
Attachments: Evidentiary issues - Answers 9-14-2012.docx.html

---

Hello Professor Meazell,

I am sorry it has taken so long to get this to you. I am afraid one of the primary culprits for the delay has been my own self-inflicted down time which I suspect you have heard about from Dean. I am mending remarkably well but I don't need to be trying (again) to act like a 25-year-old any time soon. ☺

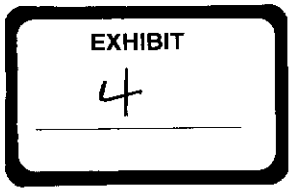
What I have compiled in the attachment (with our technical staff's assistance) focuses on answering the three questions that Dean relayed to us from his conversation with you back on August 14. I wanted to send you this first, to see if the form and content are helpful or if you would prefer something more or even something else.

I also wanted to ask, for my own benefit, if you could identify specifically the additional evidentiary issues, from Mark Walker's post-hearing brief or otherwise, for which you would like us to find answers in the record. I know that Dean volunteered that we would work on a listing of those issues and furnishing pertinent responses from the record, but in all candor I am dense and struggling with this. I have noted many issues raised in Mr. Walker's brief, but it seems to me that many of them are legally argumentative, or factual issues which are not particularly material or necessary for the Board to decide. If it is not too presumptuous of me, I thought it would save us and you time and effort if you could direct me to the issues you want us to work on, and we will get those items addressed in a second installment. Please let me know what I need to do and we will do our best to move forward. You can email me back, or call me (405-530-8803), as is most convenient for you.

I hope you are well-settled in and enjoying this new chapter in your life.

Thank you for your patience, and have a good weekend,

Rowdy



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Petitioners,	
v.	**Case No. CV-2013-2414**
OKLAHOMA WATER RESOURCES BOARD,	
Respondent,	**District Judge Barbara Swinton**
v.	
TISHOMINGO NATIONAL FISH HATCHERY,et al.,	
Other Parties of Record.	

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,

EXHIBIT
5

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.

Veronica Sevier
Notary Public, DC

VERONICA SEVIER NOTARY PUBLIC DISTRICT OF COLUMBIA Exp. 2/14/2017

My commission expires:
FEBRUARY 14, 2017

My commission number is:
NONE

Exhibit 1: Redacted Attorney Memorandum

Evidence to answer inquiries by Professor Meazell: 9/14/2012

1. Amount of water in storage: 9,408,461 AF vs. "about 11,000,000" AF

The latter figure is in OWRB Exhibit 5 (the March 13, 2012 Tentative Order approved and signed by the Board) at page 3, Tentative Finding paragraph no. 6. It is based in part on an average saturated thickness of 3,400 feet (id.).

The former figure is in OWRB Exhibit 4 (the PowerPoint presentation made by Julie Cunningham at the February 13, 2012 Board meeting). It is based in part on an average saturated thickness of 3,000 feet (id.).

[redacted]

2. "Why Scott Christenson used the model he did rather than the model used by Dr. Peeter"

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Testimony of Scott Christenson, Hearing Recording Part 6, 1:00 through 4:30 and following; and
OWRB Exhibit 1:
Abstract, page 1 first paragraph and page 2 third paragraph and following; and
Pages 80-89

[redacted]

[redacted]

3. **Why the eastern portion of the aquifer was primarily studied**

OWRB Exhibit 1 (the USGS Study Report) page 5, second column, second full paragraph:

> "The hydrogeologic study and groundwater-flow model were focused on the eastern Arbuckle-Simpson aquifer because (1) the data needed to build the model are sparse in the western and central Arbuckle-Simpson aquifer, (2) the eastern Arbuckle-Simpson aquifer is the largest part of the aquifer by area and volume, (3) most of the current (2011) groundwater withdrawals from the aquifer are from the eastern Arbuckle-Simpson aquifer, and (4) the largest (by flow) streams and springs sourced from the aquifer are on the eastern Arbuckle-Simpson aquifer. Although the study emphasized the eastern Arbuckle-Simpson aquifer, understanding of the eastern part of the aquifer requires studying the entire aquifer, especially with respect to the geology."