

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN DISTRICT COURT
OKLAHOMA COUNTY

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.)

AUG - 5 2015

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Case No. CV-2013-2414

District Judge Barbara Swinton

RESPONSE BRIEF OF RESPONDENT OKLAHOMA WATER RESOURCES BOARD

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RESPONSE BRIEF OF RESPONDENT OKLAHOMA WATER RESOURCES BOARD

Respondent Oklahoma Water Resources Board (“OWRB”) hereby submits its Response Brief in the above-captioned cause. The Petitioners’ appeal arises from the Findings of Fact, Conclusions of Law, and Board Order issued by the OWRB on October 23, 2013 (“MAY Order”). In support of the MAY Order, the OWRB submits the following brief in response to the Brief-In-Chief filed by the Petitioners on June 26, 2015:

INTRODUCTION AND BACKGROUND

Pursuant to Oklahoma Groundwater Law, 82 O.S. § 1020.1 *et seq.*, the OWRB initiated a hydrologic study of the Arbuckle-Simpson Groundwater Basin underlying parts of Murray, Pontotoc, Johnston, Garvin, Coal and Carter Counties in Oklahoma. After the completion of the hydrologic study and the adoption of a Tentative Determination of Maximum Annual Yield, the OWRB held a public hearing and presented evidence in support of the OWRB’s Tentative Determination, which proposed a Maximum Annual Yield (MAY) of 78,404 acre-feet, and an Equal Proportionate Share (EPS) of 0.20 Acre-feet per acre. All interested parties and members of the public were allowed to present evidence, cross-examine witnesses, and submit non-evidential “comments” during the proceedings. After the MAY hearing was concluded, the OWRB received additional evidence, motions, briefs, and comments that were included as part of the Administrative Record in this matter, which consists of 8 “Volumes” in separate binders, 174 “Tabs” which separate each distinctive document in the record, and 2,635 Bates-stamped pages. Documents added to the record by Order of the District Court are not Bates-stamped and will be referred to by name instead of Bates number. This brief will make reference to the Administrative Record by indicating the Volume number, Tab number, and Bates-stamped pages in the following format: AR Vol. __, Tab __, at [Bates-stamped page number].

An Administrative Record Index was compiled by the OWRB, and is included as part of the Administrative Record, and denotes the Volumes, Document Names, and Bates Stamp page numbers for all documents. The Administrative Record Index generally lists documents in the order in which they were received, but exceptions to chronological order are noted in the index.

During the process of the proceedings, an application for Writ of Mandamus was made to the Oklahoma Supreme Court. Orders issued by the Supreme Court are included in the Administrative Record in Volume 7, at Tabs 151, 152, 154, and 155. No other documents from the Supreme Court proceedings have been included.

STANDARD OF REVIEW – SUBSTANTIAL EVIDENCE IN THE RECORD

Judicial review of an agency’s final order is a special statutory proceeding governed by §§ 318 through 323 of Oklahoma Administrative Procedures Act (OAPA)¹. See 75 O.S. § 318(A)(1). Under the OAPA, the reviewing court “shall affirm the order and decision of the agency, if it is found to be valid and the proceedings are free from prejudicial error to the appellant.” 75 O.S. § 322(3). To constitute “prejudicial error,” the agency’s final order must prejudice the “substantial rights” of the appellant because its findings, inferences, conclusions, and decisions fall within one of the categories of error listed in § 322(1) of the OAPA. See 75 O.S. 322(1). Petitioners, in their Brief-in-Chief, have alleged that the OWRB’s Maximum Annual Yield determination is: (a) in violation of constitutional or statutory provisions; (b) made upon unlawful procedure; and (c) is arbitrary and capricious. *Petitioners Brief-in-Chief* at 7.

A. Constitutional and Statutory Provisions

There is a strong presumption that statutes enacted by the legislature are constitutional. *Black v. Ball Janitorial Service, Inc.*, 1986 OK 75, ¶ 5, 730 P.2d 510, 512. A reviewing court will uphold challenged statutes or statutory provisions unless it is clearly, palpably and plainly

¹ 75 O.S. §§ 250 *et seq.*

inconsistent with our fundamental law. *Id.* The interpretation made by the agency charged with the statute's implementation is to be given great weight when such interpretation was made contemporaneously with the enactment of the statute. *See Schulte Oil Co. v. Oklahoma Tax Com'n*, 1994 OK 103, ¶ 4, 882 P.2d 65, 68. Moreover, where the legislature has convened many times during a period in which an administrative agency has construed a statute, and where the legislature has not expressed its disapproval with that construction, the legislature's silence may be regarded as acquiescence in or approval of the agency's construction. *See United Airlines, Inc. v. State Bd. of Equalization*, 1990 OK 29, ¶ 28, 789 P.2d 1305, 1311-12.

B. Unlawful Procedure

MAY hearings are conducted pursuant to Article II of the OAPA and pursuant to the rules found in Title 785, Chapter 4 of the Oklahoma Administrative Code (OAC). 82 O.S. § 1020.6(A). Under those rules, Hearing Examiners are given the following:

Hearing Examiners are authorized to supervise, direct, preside over and conduct the hearing proceedings; to make and enter interlocutory rulings; to make and enter rulings on procedural or evidentiary questions or objections; to make and enter rulings on any other motions or objections arising during the course of the hearing; and, generally, to do all things necessary and incidental to conducting and completing the hearing and all other acts authorized under this Chapter.

OAC 785:4-3-4. The OAPA further explains agencies conducting Article II proceedings resolve fact and legal issues resulting in "the exercise of discretion of a judicial nature." 75 O.S. § 250.3(8).

In exercising discretion to rule on motions to strike and other evidentiary matters, a lower tribunal's decision will not be disturbed absent an abuse of that discretion. *Southwestern Bell Telephone v. State ex rel. Corp. Com'n*, 2007 OK 55, ¶ 30, 164 P.3d 150, 162. An abuse of discretion is "a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented." *Andrew v. State*, 2007 OK CR 23, ¶ 23, 164 P.3d 176, 187.

Alleged evidentiary errors that are preserved by objection are reviewed differently than alleged evidentiary errors that were not met with an objection. *Id.* at ¶ 24. A trial court can exercise discretion only when an attempt to introduce evidence is met with a contemporaneous objection; otherwise, a reviewing court may only overturn a decision for plain error. *See Lott v. State*, 2004 OK CR 27, ¶ 69, 98 P.3d 318, 340. Plain error is that error which is plain from the record, and which goes to the foundation of the case or takes from a defendant a right essential to his defense. *See Simpson v. State*, 1994 OK CR 40, ¶ 23, 876 P.2d 690, 698.

C. Arbitrary and Capricious

Petitioners' Brief does not distinguish whether their points of error relate to findings of fact or conclusions of law. Nevertheless, it has been well established that the standard of review for findings and determinations made by the OWRB in its MAY proceedings is "that of substantial evidence and further that the findings should not be reversed unless they are clearly erroneous." *Kline v. State, ex rel. Oklahoma Water Resources Bd.*, 1998 OK 18, ¶ 7, 759 P.2d 210. The burden of "substantial evidence" was explained by the Oklahoma Supreme Court in *Southwestern Bell Telephone v. State ex rel. Corp. Com'n*, 2007 OK 55, 164 P.3d 150:

The term "substantial evidence" means "more than a mere scintilla" but a quantum that may be less than the weight of the evidence. It is proof that possesses something of real and relevant consequence and that carries with it a fitness to induce conviction. In testing evidence for substantiality, a reviewing court must consider not only the evidence supporting the decision, but also the evidence which detracts from it. The court has held that searching a record for substantial evidence that supports an order does not entail a comparison of the parties' evidence to determine that which is most convincing. Instead, if the evidence supporting an order possesses a quality of proof inducing a conviction that the evidence furnished a substantial basis of facts from which the issue could be reasonably resolved, it is sufficient. In cases before the Commission involving the testimony of expert witnesses, a factual finding is supported by substantial evidence when the evidence is offered by a qualified expert who has a rational basis for his/her views, even if other experts disagree. It is for the Commission, not the court, to weigh conflicting expert testimony.

Id. at ¶ 36, 164 P.3d at 164 (footnotes omitted).²

The reasoning contained in the *Southwestern Bell* opinion is especially helpful in explaining how to apply the substantial evidence test to a particular set of facts. Citing support for its explanation of the substantial evidence test, as it exists in Oklahoma, the Court in *Southwestern Bell* draws from two earlier United States Supreme Court opinions that explained how the rule is supposed to work. The first was *Richardson v. Perales*, which explained that substantial evidence “means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” 402 U.S. 389, 401, 91 S.Ct. 1420 (1971), *cited in Southwestern Bell*, 2007 OK 55, at fn 54.

This “reasonable mind” standard is essentially the same standard applied by district courts when ruling on motions for directed verdict. This similarity was explored by another U.S. Supreme Court opinion cited in *Southwestern Bell*. The Court’s decision in *NLRB v. Columbian Enameling & Stamping Co.* involved the review of a final administrative order issued by the National Labor Relations Board. 306 U.S. 292, 59 S.Ct. 501 (1939). After recognizing that “substantial evidence” was the appropriate standard of review (*Id.* at 299), the U.S. Supreme Court explained the substantial evidence test by stating that “it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” 306 U.S. at 300, 59 S.Ct. at 505 (emphasis added). The *Columbian Enameling* case was not the first court to recognize the similarity between the substantial evidence test (applied to administrative findings) and the directed verdict standard (applied in jury trials). The Circuit Court of Appeals for the Fourth Circuit reached a similar conclusion in

² The *Southwestern Bell* opinion dealt with an appeal from an order of the Oklahoma Corporation Commission (OCC), which, unlike the OWRB, is exempt from Article II of the OAPA and whose final orders can be directly appealed to the Supreme Court. *See* 75 O.S. § 250.4(B). However, the standard of review for the OCC’s final orders is exactly the same standard that the OAPA requires of reviewing district courts. *See* 75 O.S. § 322(1)(e) (district court may set aside agency findings which are “clearly erroneous in view of the reliable, material, probative and substantial competent evidence[.]”).

the context of reviewing another administrative order. In its discussion of what “supported by substantial evidence” means when applied to a particular set of facts, the Court stated that “[t]he rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict.” *Appalachian Electric P. Co. v. Nat’l Labor Rel. Board*, 93 F.2d 985, 989 (4th Cir. 1938).

Thus, according to the standards described above, the appropriate level of deference to the OWRB’s findings depends on the nature of each of Petitioners’ challenges. No matter what level of deference is to be applied, a reviewing court should avoid re-weighing the evidence or “substitut[ing] its judgment” for that of the agency’s on factual matters. 75 O.S. § 322(1)(e). The comparison between the legal standards of deference afforded to agency findings and those applied to jury verdicts serves as a helpful analogy.

I. THE OWRB’S CONSTRUCTION OF 82 O.S. § 1020.9B, AND SENATE BILL 288 AS A WHOLE, IS CONSISTENT WITH THE STATUTORY PURPOSE

Petitioners challenge the construction and interpretation of the statute that required the OWRB to approve a maximum annual yield “that will ensure that any permit for the removal of water from a sensitive sole source groundwater basin will not reduce the natural flow of water from springs or streams emanating from said basin or subbasin.” 82 O.S. § 1020.9A(B)(2); 82 O.S. § 1020.9B(B)(2). In implementing this statute, it was noted that “natural flow” is not defined or explained in the statute, nor anywhere else in Senate Bill 288 (hereinafter abbreviated as “S.B. 288”). AR Vol. 1, Tab 3, at 6; AR Vol. 5, Tab 61, at 1480. The OWRB reasoned that the phrase “not reduce the natural flow” was not intended to prohibit any and all groundwater use. AR Vol. 5, Tab 61, at 1480. Such an interpretation would be inconsistent with well established state groundwater law and policies that promote the utilization of groundwater

resources and the adoption of reasonable use policies, and with S.B. 288 itself, which requires the determination of a MAY for the purpose of regulating the appropriation of groundwater. *Id.*; AR Vol. 1, Tab 3, at 6.

A. Statutory Purposes of S.B. 288

S.B. 288, enacted and signed into law in 2003, created two new statutes, 82 O.S. §§ 1020.9A and 1020.9B, and amended one additional statute, 82 O.S. § 1020.9. AR Vol. 3, Tab 35. These legislative changes are reflected in §§ 1, 2, and 3 of S.B. 288, respectively. *Id.* Sections 1 and 2 put temporary moratoriums in place for the issuance of temporary groundwater permits and for the execution of contracts for the supply of municipal water supply involving a sensitive sole source groundwater basin. *Id.* Section 3 alters the current groundwater permitting procedure so as to create additional requirements for those seeking to permit the use of groundwater from a sensitive sole source groundwater basin. The only language in S.B. 288 explaining its purpose is found in § 1:

The Legislature finds that a moratorium is necessary on the issuance of certain temporary permits on certain sensitive sole source groundwater basins or subbasins to protect the health, safety and welfare of the people of Oklahoma.

AR Vol. 3, Tab 35, at 940 (emphasis added). Additionally, S.B. 288 should be construed so as to incorporate the same legislative purposes as the rest of Oklahoma Groundwater Law, which is to protect a wide range of beneficial uses, and to protect the "general economy, health and welfare of the state and its citizens[.]" 82 O.S. § 1020.2(A).

The purpose of protecting the "health, safety and welfare" of the public has always been considered a proper reason for the exercise of the state's police powers, and the Oklahoma Supreme Court has confirmed that the state's police powers are expansive enough to prohibit landowners from using their property in a manner that injures the rights of others. *Mid-*

Continent Life Ins. Co. v. City of Oklahoma City, 1985 OK 41, ¶ 12, 701 P.2d 412. Oklahoma law recognizes that the legislative purposes of protecting “health” and “safety” may be associated with the prevention of pollution or other harm to sensitive water resources, including artesian groundwater aquifers. See *Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, ¶ 18, 925 P.2d 546 (Agency decision to authorize landfill held contrary to the legislative purposes of “protecting the public health, safety and welfare and the environment of this State” where evidence showed that contamination of an artesian aquifer would likely occur).

B. Deference to the OWRB’s Interpretation

There is ample support in the administrative record for the fact that S.B. 288 was intended to protect a wide range of beneficial uses of the ground and surface water resources associated with the Arbuckle-Simpson Groundwater Basin. The hydrological study undertaken by the OWRB explicitly recognized the various beneficial uses that relied on the viability of the Arbuckle-Simpson Groundwater Basin:

Arbuckle-Simpson springs provide water for drinking water, livestock, fisheries, and recreation. Some springs, such as those at [Chickasaw National Recreation Area], have cultural and historical significance. Byrds Mill Spring, which flows about 8,000 gallons per minute (gpm), is the largest spring in Oklahoma and serves as the primary water supply for the City of Ada.

Springs and seeps sustain flow in several headwater streams originating in the aquifer, such as the scenic Blue River and Honey Creek at Turner Falls. Blue River, which drains a large part of the eastern Arbuckle-Simpson aquifer, is the largest stream that originates within the study area and the only free-flowing river in Oklahoma.

AR Vol. 3, Tab 31, at 756-59. The record further supports the economic importance of tourism and its connection to the ecological health of springs and streams:

Tourism and recreation are important to the economy of the area. Recreational facilities include Lake of the Arbuckles, Chickasaw National Recreation Area, Turner Falls Park, and Blue River Public Fish and Hunting Area, and several youth camps.

. . .

Springs are unique ecosystems that provide habitat for a wide diversity of aquatic and terrestrial life. Spring habitats differ from other flowing-water systems in that they have constant flow and temperature, exist as small and isolated habitat areas, and have a general lack of large predators.

Id.; AR Vol. 3, Tab 31, at 755-56.

Beyond the evidence cited from the hydrological study, there was ample testimony regarding the wide range of existing uses that would be affected as a result of increased groundwater withdrawals. OWRB Water Quality Division Chief Derek Smithee explained that the OWRB considered uses beyond just public water supply:

Q (Petitioners' counsel): Walk us through here on these left bullet points,³ what were the ways that you guys said "well we could consider natural flow to be this or this or this;" just walk us through that, if you would.

A (Derek Smithee): Umm we, we evaluated at our very first meeting, not only clarified the charge, Mark, as you -- at the previous slide -- we also said. and discussed, what are the purposes that this water is to be put towards, and what are the impacts and uses of this natural flow regime that we don't want to reduce. And it can be everything, as is mentioned there, recreation, water supply, fishing, ecological integrity, water quality, spring flow, stream flow, and others that were probably discussed.

AR Vol. 6, Tab 101, at No. 10 (10:31-11:20). Mr. Smithee went on to explain that the Work Group's and the OWRB's intent was to protect all present beneficial uses that relied on "natural flows." Specifically, Mr. Smithee stated "the water supply use was not the most sensitive endpoint, and that there were more sensitive endpoints that would be a better indicator that science would allow us to reach than water supply." AR Vol. 6, Tab 101, at No. 10 (15:11-15:33). The sum of all the evidence in the record, coupled with the legislature's stated purpose in § 1 of S.B. 288 of "protecting the health, safety, and welfare of the people of Oklahoma,"

³ This question was asked while a particular PowerPoint slide was displayed to the witness; that slide is found in the record at AR Vol. 4, Tab 41, at 1096.

supports the OWRB's construction of S.B. 288, as now codified in 82 O.S. §§ 1020.9, 1020.9A, and 1020.9B.

The OWRB's interpretation of S.B. 288, made as the scope of the hydrological study (2003-2009) was being defined, was the first attempt to administratively implement the legislative policy put in place by S.B. 288. The contemporary nature of this interpretation with S.B. 288's enactment and with the unsuccessful challenge to its constitutionality in *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, 148 P.3d 842, lends "great weight" to the level of deference that applies to OWRB's interpretation under the applicable standard of review. See *Schulte Oil Co.*, 1994 OK 103, at ¶ 4, discussed *supra* on p. 3. Furthermore, the state legislature's continued silence on the OWRB's interpretation of S.B. 288 (an interpretation certainly made public by the OWRB's Tentative MAY Order, offered in the early months of 2013) may be inferred as acquiescence in, or approval of the OWRB's construction. See *United Airlines*, 1990 OK 29, ¶ 28, discussed *supra* on p. 3.

There is no factual support in the record to support Petitioners' argument that the exclusive purpose of S.B. 288 was to protect future uses of groundwater. The findings set out in the U.S. Environmental Protection Agency's (EPA) sole-source aquifer designation do not support this position. See AR Vol. 1, Tab 14, at 115 (Findings limited to water "consumed" in aquifer service area and with current "drinking water demands."). In making their argument about the effects of the MAY determination on landowners, the Petitioner's lone citation to the administrative record was to the non-evidentiary comment portion of the OWRB's MAY hearing. See AR Vol. 6, Tab 101, at No. 10 (1:05:55-1:06:10). Without any support in the record, Petitioners' rely entirely on a distorted interpretation of the *Jacobs Ranch* case, utilizing language taken out of context to support their position that the sole purpose of S.B. 288 was to

protect the type of future, prospective groundwater withdrawals to which these Petitioners now claim a right, with the ultimate goal of selling it to municipalities for a profit.⁴

Petitioners' interpretation of S.B. 288 is contradicted not only by the legislature's stated purpose in § 1 of S.B. 288, but also by § 3 of S.B. 288. Section 3 of S.B. 288 requires the OWRB to ensure that groundwater permits do not "degrade or interfere with" the springs and streams emanating from the aquifer. *See* AR Vol. 3, Tab 35, at 941-42. If the legislature was concerned only with protecting future groundwater withdrawals, it seems counterintuitive that it would enact a policy prohibiting the reduction of the "natural flow" of springs and streams, much less a policy ensuring no degradation or interference with such springs or streams. The only plausible explanation for these provisions in S.B. 288 is that the legislature was concerned with protecting a broad array of uses, *inter alia*, presently-existing beneficial uses derived from the springs and streams emanating from the aquifer. Those established, existing uses include, but are not limited to, the municipal drinking water taken from the springs, creeks, and rivers that emanate from the basin - which are adequately protected by the MAY determination. Therefore, the MAY Order is free of error, and must be affirmed.

II. THE OWRB'S INTERPRETATION OF "NATURAL FLOW" IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT CLEAR ERROR.

A. Work Group and Hydrological Study

A Surface Water Technical Advisory Group ("Work Group") was formed by the OWRB, in part, to help scientifically illuminate the charges of Senate Bill 288 with respect to what will not reduce the natural flow of water from springs or streams emanating from the Arbuckle-Simpson Groundwater Basin. AR Vol. 4, Tab 41, at 1094. The Work Group first commissioned

⁴The "small plot farmers, ranchers and rural residents" described on page 9 of Petitioners' Brief-in-Chief are not required to get permits from the OWRB for domestic use (82 O.S. § 1020.3), and so would be unaffected by the MAY Order.

studies to determine the effect of reduced groundwater discharge into springs and streams. One such study was the *Indicators of Hydrologic Alteration (IHA) Analysis of Selected Streams on the Arbuckle-Simpson Aquifer* (AR Vol. 4, Tab 43), which gathered information about stream and spring flow characteristics such as water quality and flow variability, as well as information about seasonal and multi-year trends in observed spring and stream flows. *Id.* at 1210-11. The IHA study further suggested measurement techniques along with mathematical and statistical criteria that could be used to quantify the effects of reduced groundwater discharge from the Arbuckle-Simpson Aquifer. *Id.* at 1212-13.

Complementary to the IHA study were two Instream Flow Assessments (IFA) that studied certain representative springs and streams to determine the effect of reduced groundwater flow on the availability of fish habitat, which would affect the ecological integrity of these springs and streams. AR Vol. 3, Tabs 36 & 37. When examined together, the IHA and IFA studies provided the OWRB with valuable information regarding how groundwater reductions might affect the quantity and variability of flows that are naturally and presently occurring in the springs and streams emanating from the Arbuckle-Simpson Groundwater Basin. The IHA and IFA studies further provided information about what type of ecological and other effects might result from a range of scenarios involving reductions in groundwater discharge.

B. Scientific Evidence Relating to “Natural Flow”

In studying the springs and streams of the Arbuckle-Simpson Groundwater Basin, the evidence in the record indicated that a certain amount of variability in flow rates was the result of natural processes. AR Vol. 3, Tab 38, at 57. Streams emanating from the Arbuckle-Simpson Groundwater Basin were found to be most affected by seasonal trends, whereas springs were most affected by long-term precipitation patterns. AR Vol. 3, Tab 31, at 778-79. Evidence from

stream gauges in the Arbuckle-Simpson Groundwater Basin indicated that persistent and stable “baseflows” were present in these streams, even during droughts and dry seasons. *Id.* at 778; AR Vol. 4, Tab 43, at 1189.

“Baseflow” (or base flow, as it appears elsewhere in the record) is “the flow in a stream channel that represents groundwater discharge and not runoff from storms[.]” AR Vol. 1, Tab 18, at 265; *see e.g.* AR Vol. 2, Tab 27, at 646 (“Groundwater Component of Stream Flow: Baseflow”). Baseflows were found to be a significant component of the streams and rivers emanating from the Arbuckle-Simpson Groundwater Basin. AR Vol. 1, Tab 18, at 265-266. Evidence further showed that these baseflows had a significant impact on the ecological health of springs, streams, and rivers in the area. *See e. g.* Vol 3, Tab 36, at 947 (“unique habitat types that depend extensively on groundwater”); *and* AR Vol. 4, Tab 43, at 1193 (streamflow is a “master variable that regulates ecological integrity”). Specifically, the OWRB considered evidence showing that reductions in baseflows would have a detrimental effect on the ecology of springs and streams overlying the Arbuckle-Simpson groundwater basin. AR Vol. 3, Tab 31, at 778.

The evidence further indicated that a strong correlation existed between baseflows of different springs and streams overlying the basin. AR Vol. 4, Tab 43, at 1196-97. This correlation in baseflows was used by scientists to estimate flow in springs and spring-fed creeks based on contemporaneous measurements from nearby USGS stream gauges. *Id.*; AR Vol. 3, Tab 36, at 953-54; and Tab 37, at 1001-02. These estimations were used by both IFA studies, which measured the reduction in natural habitat⁵ for certain indicator fish species that would

⁵ As a means to quantify habitat loss, the IFAs used a metric called “Weighted Usable Area” (WUA), which is defined as “the area in the stream in the wetted channel weighted to the suitability of the habitat.” AR Vol. 3, Tab 36, at 953, and Tab 37, at 1001.

occur over a range of reductions in baseflow⁶ (reduced from 1% to 70%). AR Vol. 3, Tab 36, at 958, and Tab 37, at 1006.

The results from the IFA studies, when viewed within the greater context of the other technical studies and gathered data, demonstrated what type of effect groundwater withdrawals might have on the naturally occurring ecological conditions observed in springs and streams emanating in whole or in part from the Arbuckle Simpson Groundwater Basin. AR Vol. 4, Tab 41, at 1111. The Work Group agreed that reductions in groundwater discharge of no more than 10-25 percent would preserve existing water uses that depend on natural range and variability of flows observed from springs and streams emanating from the Basin. AR Vol. 4, Tab 41, at 1111. It was this range that was recommended to the authors of the modeling study to use as a starting point in the modeling analysis. *Id.* at 1111-12.

C. Petitioners' Confusion Regarding the Evidence in the Record

The arguments made in Petitioners' Brief-In-Chief are rife with mixed-up definitions, misinterpretation of witness testimony, and unsupported assumptions that ultimately lead to the erroneous conclusion that the MAY Order is arbitrary and capricious. A careful reading of the record, particularly the groundwater modeling, and IHA and IFA reports, reveals that Petitioners consistently confuse the definitions of various flow indices, and as a result, misunderstand the substantial evidence in the record supporting the OWRB's findings and determinations.

The evidentiary record contains reference to several flow indices, including Baseflow,⁷ Seventy-five percent (75%) exceedance,⁸ Baseline,⁹ and Baseline - Low Flow.¹⁰ Based on the

⁶ The IFA studies actually use the term "baseline" flows to describe the flows observed at their spring and spring-fed creek study sites; for reasons more fully explained hereafter, there is no practical difference between "baseline" flows and baseflows from these springs – both represent the flow at these locations resulting from groundwater discharge.

⁷ Defined on p. 13, *supra*, as the groundwater component of stream flow.

⁸ Defined as the 25th Percentile flow value in the USGS modeling report. *See* AR Vol. 1, Tab 18, at 318.

⁹ Defined as the median flow value for a particular month. *See* AR Vol. 3, Tab 36, at 948.

seasonal and multi-year flow characteristics observed for the springs and streams of the Arbuckle-Simpson area, there is little practical difference, if any, between baseflow and baseline low flow (both are approximations of the persistent groundwater discharge that makes up a large part of the streams and rivers emanating from the basin). *See* AR Vol. 4, Tab 43, at 1196 (Study of hydrographs indicate that base flow and low flow portions of the flow regime were most strongly representative of groundwater effects).

Petitioners' Brief-In-Chief (on page 35, for example) erroneously asserts that "base flow" is synonymous with "75th Percentile Flow." In support of this factually inaccurate claim, Petitioners cite only a single verbal exchange between Petitioners' counsel and OWRB's Derek Smithee. As demonstrated in the record, Mr. Smithee's testimony is taken out of context, and additional words are inserted into the quotation. These additional words alter the meaning of Mr. Smithee's testimony. When asked to describe base-flow, Mr. Smithee described it as "that flow that occurs at that location the majority of the time. At least 75 percent of the time." AR Vol. 6, Tab 101, at No. 10 (28:54-29:38). Petitioners interpreted this testimony to mean that base flow is equivalent to 75th Percentile Flow. This is a reverse interpretation of the actual usage of the term base-flow. Mr. Smithee was actually describing the 75% exceedance, which is a low-flow indicia that is equivalent to the 25th Percentile and is roughly equivalent to base flow in the springs and spring-fed streams of the Arbuckle Simpson. One value, 25th Percentile (or 75% exceedance), is an acceptable and commonly used approximation of base-flow, while the other, 75th Percentile (25% exceedance), represents higher value flows that are more likely to contain data outliers and measurement errors. *See* AR Vol. 4, Tab 43, at 1196 (high-flow events may contain appreciable error, whereas estimation error is less of a factor with lower flow portions of the flow regime).

¹⁰ Defined as the median flow value during low flow months of August – October. *See* AR Vol. 3, Tab 36, at 957.

Petitioners' incorrect understanding of flow indices, in confusing a commonly used index of baseflow with a highly error-prone index of high flow, is more than a trivial inaccuracy. This flawed understanding is fatal to the Petitioners' principal arguments in their Propositions of Error Nos. III and V, and the general proposition that the OWRB did not follow sound science in its determination of the Maximum Annual Yield. *See* Petitioners' Brief-in-Chief at 20, 33-42. The Petitioners build upon this erroneous definition of baseflow throughout their Brief-in-Chief as they use it to attack the OWRB's factual findings and legal conclusions.

The MAY Order reflects that the OWRB equated the phrase "natural flow" to that flow necessary to support the natural habitat of the subject streams. The natural habitat of the subject streams is used as an indicator of the flow necessary to support beneficial uses. *See* AR Vol. 8, Tab 170, at 2606, ¶ 29. This finding is supported by substantial evidence in the record, and is well within the agency's discretion in implementing S.B. 288. Petitioners' direct the Court to no statute, case law, or evidence in the record that would fairly contradict this finding. Therefore, the MAY Order must be affirmed.

III. The MAY Order is the Product of a Proper Adjudication Under Article II of the Administrative Procedures Act, Not an Improper Delegation of Authority or Rulemaking as Purported by Petitioners

Petitioners erroneously argue that OWRB's use of the recommendation of the Working Group described below violates the rulemaking requirements of Article I of the Oklahoma Administrative Procedures Act and was an improper delegation of the Board's authority. *See* Petitioners' Brief-in-Chief at 9-11. In the matter at hand, the MAY Order's determination related to natural flow was not an improper rulemaking. Furthermore, the convening of the Work Group and the consideration of the Work Group's recommendations were not an improper delegation of authority.

A. MAY Order's Determination Related to Natural Flow is the Product of a Proper Adjudication

Petitioners argue that the Working Group's recommendations related to the amount of stream flow necessary to avoid a reduction in the natural flow of the area's springs and streams constitute an administrative rule and, therefore, the consideration of these recommendations during the development of the tentative MAY determination was a violation of the rulemaking requirements of Article I of the Oklahoma Administrative Procedures Act. *See* Petitioners' Brief-in-Chief at 10. The Petitioners correctly identify and define the term "rule" within the Administrative Procedures Act; however, the Petitioners application of the definition is flawed. The Petitioners' argument fails because the statutes that require agencies to follow the rulemaking process established in the Oklahoma Administrative Procedures Act only apply to agency decisions that meet the definition of a rule. *See* 75 O.S. §§ 250.3(17), 303(A). The Supreme Court of Oklahoma has stated that the Administrative Procedures Act's definition of a rule "does not require every agency decision to be in the form of a rule." *See Okla. Public Employees Ass'n v. Okla. Dept. of Central Services*, 2002 OK 71 ¶ 33, 55 P.3d 1072, 1086 (Okla. 2002). The definition of a "rule" in the Oklahoma Administrative Procedures Act specifically excludes "the issuance, renewal, denial, suspension, or revocation or other sanction of an individual specific license" and "orders by an agency." 75 O.S. § 250.3(17)(a), (e). Clearly, the MAY Order is an "order by an agency."

Furthermore, the relevant groundwater statute is clear that a MAY determination is the product of an adjudicative process under Article II of the Administrative Procedures Act. *See* 82 O.S. § 1020.6. In addition, the Oklahoma Supreme Court has recognized the adjudicative nature of a MAY determination and held that such a determination is not an administrative rule subject to the rulemaking requirements of the Administrative Procedures Act. *See Texas County Irr. and*

Water Resources Ass'n v. OWRB, 1990 OK 121, ¶ 11, 803 P.2d 1119, 1123-24. In fact, the Oklahoma Supreme Court has also previously held that the very MAY proceeding at issue in this case was an adjudicative proceeding and not a rulemaking. See *Arbuckle Simpson Aquifer Protection Federation of Oklahoma, Inc. v. OWRB*, 2013 OK 29, ¶ 10, 343 P.3d 1266, 1270-71 ("The MAY proceeding in question is an adjudicative proceeding, as opposed to a rulemaking proceeding."). As recognized by the Supreme Court of the United States, "[i]t is well established that agencies may adopt interpretations of their statutory mandates as necessary to carry out adjudications." AR Vol. 8, Tab 170, at 2615 (citing *SEC v. Chenery Corporation*, 332 U.S. 194, 202-03, 67 S. Ct. 1575, 1580 (1947)).¹¹ In *Chenery*, the Supreme Court held:

[A] problem may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-by-case basis if the administrative process is to be effective. There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.

SEC v. Chenery Corporation, 332 U.S. at 203, 67 S.Ct. at 1580. As demonstrated by the voluminous and specialized nature of the administrative record in this case, the determination of the amount of flow necessary to avoid a reduction in natural flow is an extremely specialized determination that would vary significantly if OWRB was required to make a similar determination for another groundwater basin (*i.e.*, if the U.S. EPA designated another "Sensitive Source Aquifer" in Oklahoma). Moreover, this determination is an interpretation of the mandates of S.B. 288 that is necessary in order to carry out the required adjudication. Accordingly, the MAY Order (including the determination related to natural flow) is not an administrative rule subject to the rulemaking requirements of Article I of the Administrative

¹¹ Petitioners argue that *Chenery* was decided under federal law, not Oklahoma law, *see* Petitioners' Brief-in-Chief at 10; however, the Petitioners failed to identify any Oklahoma Supreme Court decision inconsistent with this general principle of administrative law.

Procedures Act; rather, the order constitutes an administrative adjudication subject to the requirements of Article II of the Administrative Procedures Act.

B. Consideration of the Work Group's Recommendations was Not an Improper Delegation of OWRB Authority

Petitioners incorrectly argue that the Working Group convened by OWRB somehow resulted in an improper delegation of the OWRB's authority. *See* Petitioners' Brief-in-Chief at 10. Prior to releasing proposals for formal public participation, working groups are commonly used by state and federal administrative agencies in order to gather stakeholder input during initial development of rules and/or the consideration of policy issues. In fact, several of the attorneys representing the Petitioners in this matter are currently participating in a working group formed by OWRB related to the potential development of new water quality standards. These working groups can provide a valuable forum for the exchange of information between agencies and various stakeholders, and can help provide agencies with ideas useful in developing the initial proposals that may ultimately be subject to formal public participation. Working groups may provide information at the beginning of the process that allows for a more efficient development of agency proposals and help avoid obstacles that may be more difficult to address later in the process.

As previously discussed, S.B. 288 requires OWRB to approve a MAY that ensures that there is no reduction in the "natural flow" of the area's springs and streams. Implicit in the approval of such a MAY is a determination of the flow necessary to avoid a reduction in the natural flow of these springs and streams. OWRB interpreted S.B. 288's reference to "natural flow" to encompass the "essential component of the natural habitat of area streams," and undertook an analysis of the effect of groundwater use on the ability of the area's streams to provide that natural habitat. *See* AR Vol. 8, Tab 170, at 2606. As part of that effort, OWRB

exercised its statutory authority¹² and convened a Working Group that included, among others: at least one landowner; a National Park Service representative; a Bureau of Reclamation representative; a U.S. Fish & Wildlife representative; Oklahoma State University representatives; USGS representatives; and OWRB staff. *See* AR Vol. 8, Tab 170, at 2607. Pursuant to statute, interested parties are entitled to participate in the MAY determination process. *See* 82 O.S. § 1020.6(A) ("Any interested party shall have the right to present evidence in support or opposition thereto."); *see also* OAC 785:30-9-3(f). The date, time, and location of the Work Group meetings were posted on OWRB's website and were open to all interested persons. In addition, OWRB is authorized to cooperate with state and federal agencies in developing a MAY determination. *See* 82 O.S. § 1020.4; *see also* OAC 785:30-9-1. Consequently, it is reasonable for OWRB to take into consideration the experience, expertise, and perspectives of such a Working Group during the development of a proposed determination that will be subject to formal public review and participation.

Petitioners claim that "the construction of 'natural flow' applied in the Board's Order was conclusively determined well before the hearing on the MAY." *See* Petitioners' Brief-in-Chief at 11. It is correct that the Working Group's recommendation was determined before the MAY hearing; however, any implication that the hearing examiner or the members of the Board "conclusively determined" the appropriate construction of natural flow prior to the hearing is incorrect. Again, the purpose of the Working Group was to inform OWRB staff in the development of a tentative MAY determination to be proposed to the Board (on which the hearing would ultimately be held). Naturally, the Working Group's recommendation would need

¹² 82 O.S. § 1085.2(1) ("In addition to any and all other authority conferred upon it by law, the Oklahoma Water Resources Board shall also have authority . . . to do all such things as in its judgment may be necessary, proper or expedient in the accomplishment of its duties . . .").

to be provided prior to the MAY hearing. However, neither the Hearing Examiner nor the members of the Board were bound to accept or follow the comments and/or recommendations of the Working Group. In other words, in no way did the Working Group prevent or limit OWRB staff, the Hearing Examiner, or any member of the Board from considering any other evidence or recommendations.

In support of their argument, the Petitioners attempt to rely on the Oklahoma Court of Civil Appeal's decision in *Spring Creek Conservation Coal. v. Oklahoma Dep't of Wildlife Conservation* for the proposition that "the Board may not delegate its responsibility to set policy to staff, let alone others." *See id.* at 10 (quoting 2007 OK CIV APP 26, ¶ 9, 156 P.3d 55, 57). However, the Court of Civil Appeals, in *Spring Creek Conservation Coal.*, held that the rulemaking provisions of the Administrative Procedures Act required the members of the Wildlife Commission to fully consider the public comments made on the proposed rules at issue. *See Spring Creek Conservation Coal.*, 2007 OK at ¶¶ 7-9, 156 P.3d at 57 ("The process employed here is inherently flawed because it allows employees to make the decisions entrusted by statute to the members of the Commission as to relevance or other factors raised in the public comments which may bear upon the rule-making process.")(emphasis added). As demonstrated above, the matter at hand does not involve a rulemaking; consequently, the decision in *Spring Creek Conservation Coal.* and the underlying rulemaking requirements in Article I of the Administrative Procedures Act are inapplicable. Regardless, the process utilized in the cited case was to merely inform the Commissioners that "[t]he majority of the comments were in favor of the proposals." *See id.* at ¶ 8. In *Spring Creek Conservation Coal.*, the Commissioners were not even provided summaries of the public comments. *See id.* In contrast, the comments and other evidence provided by the interested parties in regard to OWRB's MAY Order were

submitted directly by the interested parties (or their legal representatives) to the Hearing Examiner¹³ and/or the Board.¹⁴

IV. THE PETITIONERS FAIL TO SHOW THAT THE EXCLUSION OF UNTIMELY AND INADMISSIBLE EVIDENCE RESULTED IN THE BOARD'S ORDER BEING MADE UPON UNLAWFUL PROCEDURE.

Petitioners' assertion that the OWRB disobeyed the Writ of Mandamus issued by the Supreme Court essentially boils down to a single question: Whether the Hearing Examiner's evidentiary ruling -- striking a portion of materials submitted under the guise of post-hearing "response" -- prejudiced a substantial right of the Petitioners. Because the stricken materials were outside the scope of responses allowed by the Supreme Court's mandate, and because the materials were otherwise inadmissible, incompetent, irrelevant, immaterial, untimely, and unfairly prejudicial to the rights of other parties, their exclusion was not error.

As explained in page 3-4, *supra*, the standard of review for the Hearing Examiner's ruling on a motion to strike is abuse of discretion, whereas the standard of review for the Hearing Examiner's admission of evidence in the absence of any objection is plain error. *See Southwestern Bell*, 2007 OK 55, ¶ 30; *see also Lott*, 2004 OK CR 27, ¶ 69. Faced with the challenge of overcoming these greatly deferential standards, it appears the Petitioners hope to improve their chances by attacking the integrity and neutrality of the OWRB's Hearing Examiner, beginning with a grossly incorrect explanation of the Supreme Court's opinion in

¹³See OAC 785:4-7-4 ("Each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, to object to the introduction of evidence, to impeach any witness regardless of which party called him first to testify, to rebut evidence presented, and to call and examine an adverse party or witness as if under cross-examination. Board members and staff may participate as appropriate, using their technical knowledge and experience for the primary purpose of developing a full, fair, accurate and complete hearing on all issues relevant to the hearing. Questioning of witnesses will generally be permitted only by the attorneys of parties so represented, or by parties appearing on their own behalf, or by members of the Board or its staff.").

¹⁴See OAC 785:4-9-2(a)("At the regular meeting of the Board in which an Examiner's proposed Order . . . is to be considered and acted upon by the Board, no new testimony or evidence may be presented or entertained. Upon request, briefs and oral arguments on the Examiner's proposed Order may be presented, but a reasonable time limit for argument shall be fixed.").

Arbuckle Simpson Aquifer Protection Federation of Okla., Inc. v. OWRB, 2013 OK 29 ("ASAPFO").

It must be pointed out that, contrary to the repetitive and inflammatory verbiage used by Petitioners, the Supreme Court found no actual bias on the part of the Hearing Examiner and specifically stated that "[w]e do not hold that the hearing officer failed to provide a fair and impartial hearing" *ASAPFO*, 2013 OK 29, ¶ 16. Rather, the Court was singularly concerned with the Hearing Examiner's receipt of an unsolicited email message from OWRB staff (with whom communications were allowed) that contained a memorandum from an employee of the USGS (a party with whom *ex parte* communications were prohibited). *Id.* at ¶ 5. The Court found that the failure to disclose this communication gave the proceedings "the appearance of not being as fair and impartial as they should be." *Id.* at ¶ 16. It was this appearance, not any actual bias, that the Supreme Court successfully remedied with its Writ of Mandamus. In fact, the Court even acknowledged the Hearing Examiner's sworn assertion that the USGS memo "did nothing to actually influence the hearing officer's actions and decisions." *Id.*; *see also* AR Vol. 8, Tab 164, at 2547 (USGS memo was disregarded). Petitioners' description of the *ASAPFO* case must not, therefore, be taken at face value.

The Petitioners insinuate that the relief afforded by the Supreme Court was somehow inadequate by citing Justice Watt's dissenting opinion (while conveniently ignoring Justice Taylor and Justice Winchester's dissent, which asserted that Petitioners were not entitled to any relief). Petitioners' efforts in this regard are frivolous, as there is no higher court in the State that could somehow overrule or modify the *ASAPFO* decision (Petitioners' request for rehearing was denied). Furthermore, the Court's determination of procedural issues and substantive rights in *ASAPFO* is final and controlling in this appeal under Oklahoma's law of the case doctrine. *See*

Harmon v. Craddock, 2012 OK 80, ¶ 12, 286 P.3d 643 (“[A]ll issues decided in an earlier appeal, either expressly or impliedly, are firmly established and may not be reconsidered in any subsequent stage of the proceedings”).

The Writ of Mandamus required the Hearing Examiner to provide notice of the *ex parte* communication to all parties “and to include that communication and the responses of interested parties into the administrative record.” *ASAPFO*, 2013 OK 29, ¶17. Petitioners have not challenged the Hearing Examiner's notice of the USGS memo. Petitioners contend, however, that the Hearing Examiner improperly struck a portion of their response, while admitting CPASA's response into the record. It must first be pointed out that, shortly after responses to the USGS memo were received, dueling Motions to Strike were filed by Petitioners and CPASA. AR Vol. 8, Tabs 158 and 161, respectively. Petitioners sought to strike what they thought were untimely submissions of hearsay evidence regarding Petitioners' respective identities and the makeup of their organizations, as well as deposition testimony from one of Protestants' experts who did not appear at the hearing. AR Vol. 8, Tab 158, at 2389-90. CPASA sought to strike an affidavit from Protestants' expert, Eileen Porter, that was not responsive to the USGS memo and consisted of entirely new, untimely¹⁵ expert opinion testimony and extremely unreliable hearsay statements as "underlying facts" (facts that were not solicited by cross-examination as § 2705 of the Oklahoma Evidence Code requires). Despite Protestants' stated opposition to what it considered "new evidence" attached to CPASA's Response to the USGS memo,¹⁶ the Protestants made no objection to its admission at that time.

¹⁵ After the close of the hearing on May 16, 2012, the Hearing Examiner advised the parties that she would temporarily leave the record open to allow for responsive evidence, on the condition that the party offering such evidence files a motion explaining why such responsive evidence could not have been presented during the hearing. AR Vol.6, Tab 101, No. 13 (1:23:25-1:25:20). Petitioners filed no such motion.

¹⁶ CPASA's Response attached what appears to be the same "written protocol" for the USGS peer review process, a document that was discussed by Protestants' expert Eileen Porter on cross-examination at AR Vol. 6, Tab 101, No. 9 (6:14-7:30), and by Scott Christenson at *Id.* at No. 13 (6:00-6:20).

The Hearing Examiner granted Petitioners' Motion to Strike with respect to CPASA's statements regarding the Petitioners' identities,¹⁷ and CPASA withdrew the deposition testimony by agreement. CPASA's Motion to Strike Petitioners' expert affidavit was also granted. The Petitioners' arguments gave the Hearing Examiner little choice but to strike Eileen Porter's affidavit, since Petitioners' justification for including the affidavit was the bold assertion that the *ASAPFO* decision required continued discovery, hearings, direct and cross examination of witnesses, and rebuttal evidence by the parties. AR Vol. 8, Tab 163, at 2521. Obviously, this was not a fair reading of the *ASAPFO* decision, which did "not require . . . a restart of the proceedings." *ASAPFO*, 2013 OK 29, ¶ 16.

Under the abuse of discretion standard, the Hearing Examiner's ruling on CPASA's Motion to Strike must be "clearly erroneous" and "clearly against the logic and effect of the facts presented." The *ASAPFO* Court did nothing to abrogate or supplant the Hearing Examiner's authority and discretion afforded by the OAPA and Chapter 4 of the OWRB's Rules (OAC 785:4). The *ASAPFO* decision did, by focusing so heavily on the "appearance" of fairness in the proceedings, acknowledge that the USGS memo was not and ultimately would never be relied upon by the Hearing Examiner in drafting the proposed final order for the Board's consideration. Since the USGS memo was not material to the MAY Order, then it is axiomatic that the responses were similarly immaterial to the final result of the proceedings. In light of these considerations, it cannot be said that the Hearing Examiner, by making evidentiary rulings according to the principles in the OAPA and the Oklahoma Evidence Code, acted in a clearly erroneous manner or that her decision was clearly against the logic and effect of the facts.

¹⁷ Because both Petitioners' and CPASA made successful motions to strike evidence following the period in the aftermath of the *ASAPFO* decision, and because reference to CPASA's later-stricken evidence was contained in CPASA's response to the USGS memo, statements by the OWRB's Executive Director to the effect that the parties were treated equally were substantially correct.

Likewise, there was no "clear error" in admitting CPASA's post-mandate evidence in the absence of an objection from any party.

V. THE OWRB'S USE OF THE MODELING STUDY WAS REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE.

As part of its comprehensive hydrological study of the Arbuckle-Simpson groundwater basin, the OWRB collaborated with the USGS to describe the hydrogeology of the groundwater basin and to develop a complex computer model to simulate the groundwater discharge from the groundwater basin. The USGS model and simulations served the purpose of providing helpful information to the OWRB that would inform its decisions with respect to the effect of groundwater withdrawals on the springs and streams emanating from the basin. Petitioners, in their Brief-In-Chief, seek to persuade this Court that the modeling study and simulations were so permeated with errors that the mere consideration of these studies as part of OWRB's MAY determination would render the findings arbitrary and capricious. As established by the Supreme Court's decision in *Kline v. State, ex rel. Oklahoma Water Resources Bd.*, the OWRB's MAY Order must be affirmed if it is supported by substantial evidence and should not be reversed unless clearly erroneous. 1998 OK 18, ¶ 7, 759 P.2d 210.

The MAY Order makes specific findings related to a number of details about the groundwater model and simulations that were challenged during the MAY proceedings. AR Vol. 8, Tab 170, at 2608-2611. These findings are generally responsive to Petitioners' contentions regarding error in the USGS's chosen storage coefficient and its treatment of the top layer of the aquifer as a "confined" layer for the purposes of the groundwater simulations. *Id.* The major flaw in Petitioners' argument (and in the testimony of Petitioners' expert witnesses) was that their contentions were not supported by actual measured values or fully developed successful alternate models or simulations. For example, Petitioners expected the OWRB to find

that USGS's employee Scott Christenson's use of 0.008 as a storage coefficient was wrong, but offered no information regarding what the purported "correct" storage coefficient(s) should be, or whether the use of that coefficient or coefficients would make any difference in the final determination. AR Vol. 8, Tab 170, at 2609, ¶ 45. Petitioners' argument is that the model was based on assumptions that were overly simplified, and therefore "not ready" to be used in decision making. This approach completely ignores the fact that the USGS model showed an "almost perfect calibration, or match" to actual observed spring and stream flows originating from the basin when simulated for known conditions during the years 2004-2008. AR Vol. 8, Tab 170, at 2611, ¶ 53.

Therefore, when the evidence is weighed according to the standard of review set forth in *Kline*, it is clear that ample evidence exists in the record to support, in this example, the use of 0.008 as the storage coefficient. The USGS's calculation of storage coefficient by several regional methods, the comparison of those calculations to estimated storage coefficients for the same area by previous studies, and the use of a fully developed model that successfully simulates actual measured spring and stream flow over a period of years, all confirm the use of 0.008 as an appropriate storage coefficient. AR Vol. 1, Tab 18, at 282-83. On the other hand, the evidence submitted in opposition to the use of this coefficient consists of largely untested, unverified opinion testimony. The summation of this testimony is that the USGS's use of just a single coefficient is an oversimplification in the model and should be replaced with some combination of other coefficients. No evidence of what the "correct" value(s) should be was presented. Furthermore, the record reflects that Petitioners have no responsive evidence to the OWRB's well supported conclusion that the actual measured spring and stream flow most strongly corresponds to the recharge rate, and not to the storage coefficient. AR Vol. 8, Tab 170, 2610 (¶

46); AR Vol. 1, Tab 18, at 317. In fact, the USGS's expert modeler, Scott Christenson, testified that it was the recharge rate, and not the storage coefficient, that most significantly impacted spring and stream flow:

Q: This is important, because what storage coefficient you plugged into that model is going to make a big difference –

A: I disagree.

Q: -- of the effect of groundwater withdrawals on the springs and streams --

A: I disagree. The storage coefficient isn't that important. That's why we didn't emphasize it. It's the recharge rate.

AR Vol. 6, Tab 101, at No. 6 (34:34- 34:54); *see also* AR Vol. 3, Tab 31, at 778-79 (spring flow is most affected by long-term precipitation patterns, *i.e.*, recharge).

Under the substantial evidence test, the Court must find that there is substantial evidence supporting the OWRB's findings in this regard, because there is no actual data, measurements, or fully developed simulations found in the record to oppose these findings. Petitioners' extensive discussion of the qualifications of Eileen Porter does not change the fact that there was no actual data or modeling in the record to support that testimony. The MAY Order recognizes that experts on both sides were "highly qualified." Under the substantial evidence test, the fact that experts disagree is not sufficient to overturn the agency's findings. As the Oklahoma Supreme Court stated in Southwestern Bell, 2007 OK 55, at ¶ 36:

In cases before the Commission involving the testimony of expert witnesses, a factual finding is supported by substantial evidence when the evidence is offered by a qualified expert who has a rational basis for his/her views, even if other experts disagree. It is for the Commission, not the court, to weigh conflicting expert testimony.

A review of several other cases applying the substantial evidence test confirms that when the record contains the testimony of qualified experts and the existence of meaningful evidence both

in support and in opposition of an agency's order, the order must be affirmed. *See, e.g., Sharp v. 251st Street Landfill, Inc.*, 1996 OK 109, ¶¶ 29-31, 925 P.2d 546 (“Expert hydrologist’s testimony sufficient to affirm injunction granted by trial court, even when expert opinion submitted in opposition indicated some of hydrologist’s views may have been incorrect); and *Turpen v. Oklahoma Corp. Com’n*, 1988 OK 126, ¶¶ 43-53, 769 P.2d 1309 (OCC’s Order supported by substantial evidence where expert accountants disagree regarding how directory revenues should have been imputed, and where OCC’s staff “relied on actual figures” while opposing expert merely expressed “concern” that figures were misleading, and produced no evidence to back up that concern). Petitioners’ extensive discussion of Eileen Porter’s stricken affidavit in pages 23-24 of its Brief-in-Chief does not change the fact that the substantial evidence test still requires that the MAY Order be upheld, even if this unreliable and untimely hearsay evidence had been considered as part of the record. Therefore, the MAY Order must be affirmed as it is supported by “substantial evidence” in the record, and is not “clearly erroneous.”

VI. THE OWRB’S DETERMINATION OF MAXIMUM ANNUAL YIELD IS BASED ON REASONABLE CRITERIA WHICH ARE SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

As discussed in Part II, *supra*, many of the Petitioner’s propositions of error arise from an incorrect understanding of the concepts of baseflow, baseline low flow, and 75% exceedance of stream flow. That flawed understanding led Petitioners to argue that there was no rational connection between the flow regimes in the IFA studies, the Work Group’s recommendation, and the results of the groundwater modeling. Petitioners’ conclusions are wrong on all accounts.

First, Petitioners’ factual premise on page 35 of their Brief-in-Chief that “[t]he 75th Percentile Flow was not studied, measured or addressed in the IFA” is demonstrably false. Both IFA studies contain several pages of figures that compare habitat area (WUA) for various fish

species over a 12-month period for various types of flow measurements. An example, taken directly from Figure 15 of the first IFA (AR Vol. 3, Tab 36, at 988) is shown below:

Excerpt from Figure 15 of the IFA of Streams Draining the A-S Aquifer

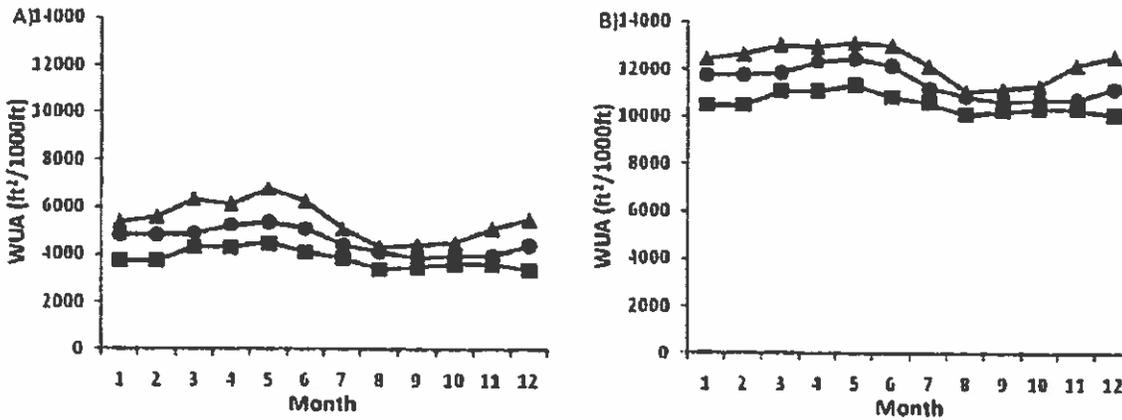
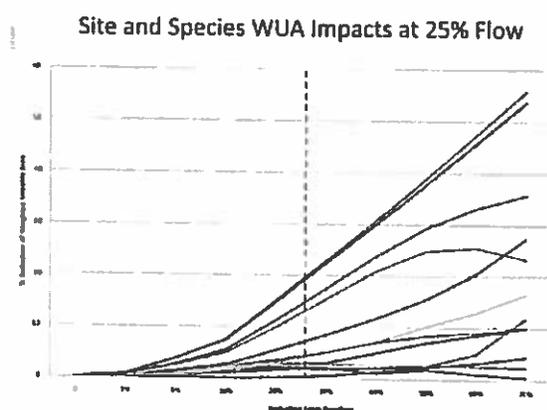


Figure 15: Time series analysis at monthly median (black circle), 25th percentile (black square), and 75th percentile (black triangle) discharge for Spring Creek: A) adult southern redbelly dace, B) juvenile redbelly dace, and C) orangethroat darter.

Since Petitioners’ factual premise (that these flow regimes were not studied or analyzed in the IFAs) is demonstrably false, Petitioners’ ultimate conclusion (that “it is not known what changes in fish habitat correspond to reductions in 75th Percentile Flow”) is also false.

The record contains substantial evidence to support the fact that the above-described information from the IFAs was consolidated into what was commonly called “the master slide.” AR Vol. 6, Tab 101, at No. 10 (23:21-23:58). The “master slide” depicted “WUA Impacts” (habitat area) as measured at 25th Percentile flow (75% exceedance) over a range of reductions in baseflow. The final two slides of the Work Group’s PowerPoint presentation (AR Vol. 4, Tab 41) demonstrate that the Work Group’s ultimate recommendation of a range of flows to examine in the modeling study was rationally related to the information in the IFA Studies:

“Master Slides” (Pages 1111-12 from AR Vol. 4, Tab 41)



Conclusion

- From a technical perspective, it was generally agreed that no substantial impact would occur if the 75% exceedance of total flow were reduced between 10 and 25%.
- The group encouraged adaptive management and a spring, stream and groundwater monitoring program to assure that these resources react as expected post implementation.
- There was also some discussion about possibly establishing buffer zones or special protection areas.

The two slides displayed above show that the final recommendation of permissible reductions in baseflow was derived from the relationships between habitat area (WUA) and 25th Percentile flow values measured in the IFA studies. A comparison between the title of the slide on the left (“Site and Species WUA Impacts at 25% Flow”) and the language in the first conclusion in the slide shown on the right (“75% exceedance of total flow”) make it clear that the Work Group correctly understood that these terms were synonymous and were commonly used approximations of baseflow. In fact, the x-axis for the figure on the left reads “Reductions in Baseflow.” As demonstrated above, it cannot be said that the OWRB’s findings are “clearly erroneous” and not based on “substantial evidence in the record.”

Petitioners’ continued error is also evident in their arguments that the flow regimes simulated in the modeling study do not match the flow regimes examined in the IFA studies or the recommendations of the Work Group. Again, Petitioners’ factual premise is based on a mistaken interpretation of the evidence; therefore, their conclusions are also erroneous and refuted by substantial evidence. The USGS Modeling Report, found in the administrative record at Tab 18 of Volume 1, clearly reports that simulations were calibrated and successfully completed for 75% exceedance flows and base flows at particular locations based on known

conditions during a five-year interval from 2004 to 2008. *See e.g.* AR Vol. 1, Tab 18, at 323 (“Table 23. Depletion of 75-percent exceedance of streamflow for water years 2004-08[.]”).

In addition to the simulation of 75% exceedance flows, the modeling study completed simulations using the five-year average stream flows for Blue River and Pennington Creek, five-year average base flows for all streams, simulated daily stream flows, and concentrated withdrawal simulations during the same time period. Simulations were made examining short-term as well as long-term, cumulative effects of various amounts of groundwater. *Id.* at 318, 322. The modelers discussed the differences in simulated reductions and the reasons for those differences. *Id.* at 322. The modelers also pointed out some unavoidable limitations because many of the other creeks and streams did not have stream gauge data with which the simulation could be calibrated. *Id.* The simulated total base flow from all streams was displayed in Table 24, which included the following information regarding total base flow depletion:

Excerpt from Table 24 of the Modeling Study

Simulation	Total Depletion (5-year Avg. Base Flow)
EPS = 0.125	21.6 %
EPS = 0.250	47.3 %

See AR Vol. 1, Tab 18, at 323.

Based in part upon the results reported in the Modeling study, the OWRB determined that the proper Equal Proportionate Share (EPS) was 0.20 acre-feet per acre, which is within the two simulation results displayed above. The determination is consistent with the Work Group’s recommendation of a total base flow reduction of 25%. The OWRB’s chosen EPS also falls within the range of simulated results for daily flows and for the 5-year average stream flows of Blue River (17.2% - 35.63%) and Pennington Creek (18.18% - 36.22%), to which the model was

successfully calibrated and optimized. AR Vol. 1, Tab 18, at 319. This evidence also supports the OWRB's determination.

Because of the persuasive effect of the foregoing evidence, and the cumulative effect of all other evidence in the administrative record, Oklahoma law requires that the MAY Order be affirmed because it is supported by substantial evidence and cannot be shown to be "clearly erroneous." The fact the OWRB's chosen criteria was not reduced to a singular mathematical calculation does not mean that it was "arbitrary and capricious," as Petitioners suggest. As the MAY Order reflects, the Board's determination was within the bounds of the existing regulatory framework and resulted from an application of both expertise and judgment. AR Vol. 8, Tab 170, at 2611-12, ¶ 56.

With respect to the EPS, the OWRB did not use a direct linear interpolation between the model simulations described above. Rather, the OWRB balanced the modeling results and the well-established principles and policy set forth by Oklahoma Groundwater Law encouraging beneficial use of groundwater, and selected an EPS that was less restrictive on the removal of groundwater. Thus, by selecting an EPS at 0.20 acre-feet per acre, the OWRB used its expertise and judgment (within the acceptable boundaries demonstrated by modeling results) in a manner that strongly considered the landowners' rights to make use of groundwater resources. Petitioners cannot claim that they have been prejudiced by the OWRB's use of discretion and judgment when the result actually increases their ability to use groundwater.

As discussed in pages 6-7 above, the substantial evidence test is essentially the same test applied to a motion for directed verdict in jury trials. The Board's findings, like a jury verdict, shall be upheld if supported by substantial evidence in the administrative record. When speaking of jury verdicts, the Oklahoma Supreme Court has stated "[i]t must be of practically universal

knowledge, and especially to the profession and the courts, that verdicts of jurors are more or less the result of compromise. It would be next to impossible to reach a verdict in every case, if this were not so." *St. Louis & S.F. R. Co. v. Brown*, 1914 OK 451, ¶ 4, 144 P. 1075. Because the determination of an EPS of 0.20 acre-feet per acre, and the resulting MAY of 78,404 acre-feet, are well within the range supported by the entire administrative record, Petitioners cannot show that these determinations are clearly erroneous, arbitrary, or capricious. Therefore, it is appropriate that the MAY Order, supported by substantial and persuasive evidence, be affirmed.

VII. THE MAY ORDER'S RESTRICTION ON THE USE OF GROUNDWATER IS A PROPER EXERCISE OF THE STATE'S POLICE POWER

A. The Oklahoma Supreme Court has Determined that such Restrictions of the Use of Groundwater are a Proper Exercise of the State's Police Power

The Supreme Court of Oklahoma has held that "[w]hile a governmental taking of private property for public use must be compensated, a reasonable government regulation of the property is not compensable." *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, ¶ 52, 148 P.3d 842, 855-56, *as corrected* (Nov. 6, 2006)(citing *Suntide Inn Operating Corp. v. State*, 1977 OK 204, 571 P.2d 1207, 1209). The Supreme Court of Oklahoma has also stated on numerous occasions:

[A]cts done in the proper exercise of the police power, which merely impair the use of property, do not constitute a taking within the meaning of the constitutional requirements as to the making of compensation for the taking of property for public use, and accordingly do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action for the injuries sustained. In other words, regulations which the state, in the exercise of its police power, authorizes with respect to the use of property are entirely independent of any question of compensation for such use. The question of compensation has no influence in establishing them. The exercise of the police power, therefore differs from the exercise of the right of eminent domain, which involves the appropriation of private property to public use, and requires, in its lawful exercise, pecuniary compensation for the loss inflicted on the owner.

Jacobs Ranch, 2006 OK 34, ¶ 52, 148 P.3d at 856 (emphasis added)(quoting *Suntide Inn Operating Corp. v. State*, 1977 OK 204, 571 P.2d 1207, 1210, and *Gibbons v. Missouri, K &*

T.R. Co., 1930 OK 108, 285 P. 1040; and citing *Phillips Petro. Co. v. Corporation Comm'n*, 1956 OK 313, 312 P.2d 916, and *Matton v. City of Norman*, 1980 OK 137, 617 P.2d 1347). In regard to the exercise of the police power to regulate groundwater resources, the Oklahoma Supreme Court has specifically stated:

Police power is an attribute of state sovereignty. *Gibbons v. Missouri K. & T. R. Co.*, 1930 OK 108, 285 P. 1040, *Syllabus by the Court*. It is generally an inherent power of the state legislature that extends to the whole system of internal regulation by which the state preserves public order, prevents offenses against the state, and insures to the people the enjoyment of rights and property reasonably consistent with like enjoyment of rights and property by others. *Id.* Through the exercise of its police power, the Legislature determines what is necessary for the peace and welfare of the people. *Edmondson v. Pearce*, 2004 OK 23, ¶ 34, 91 605, 623.

The Legislature may exercise its police power to regulate any property within the jurisdiction of the state when regulation is necessary to secure the general safety, the public welfare, and the peace and good order of the community. *Gibbons*, 285 P. at 1042. The Legislature may exercise its police power to regulate the use and enjoyment of property when the free exercise of such use is detrimental to the public interest. *Phillips Petro. Co. v. Corp. Comm'n*, 1956 OK 313, 312 P.2d 916.

It is a basic principle that water is a natural resource, *Sheldon v. Grand River Dam Auth.*, 1938 OK 76, 76 P.2d 355; *Anderson-Prichard Oil Corp. v. Okla. Corp. Comm'n*, 1951 OK 234, 241 P.2d 363; *Kline v. Okla. Water Resources Bd.*, 1988 OK 18, 759 P.2d 210, which the state may regulate for the health, welfare and safety of the people. See, *Wyoming v. Colorado*, 259 U.S.419, 42S.Ct. 552, 66 L.Ed. 999 (1922); *Fort Gratiot Sanctuary Landfill, Inc. v. Mich. Dept. of Natural Resources*, 504 U.S. 353, 365, note 6, 112 S.Ct. 2019, 2026-2027, 119 L.Ed.2d 139 (1992). The Legislature may exercise its police power to protect the state's water irrespective of the rights of private owners of the land most immediately concerned. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908). For the health, welfare and safety of its citizens, the Legislature may regulate a landowner's use and enjoyment of water resources to prevent waste and infringement on the rights of others. *Franco-American Charolaise, LTD v. Okla. Water Resources Bd.*, 1990 OK 44, 855 P.2d 568, 576; *Kline v. Okla. Water Resources Bd.*, 759 P.2d at 217.

Jacobs Ranch, L.L.C. v. Smith, 2006 OK 34, ¶¶ 24 -26, 148 P.3d at 849-50 (emphasis added).

As discussed further below, the restrictions on the use of groundwater resulting from OWRB's

MAY Order are a proper exercise of the state's police power and do not constitute a taking of private property for a public use under either the Oklahoma or federal constitutions.

B. Petitioners' Argument that the May Order's Restrictions on the Use of Groundwater is an Unconstitutional Takings is without Merit

It appears that the Petitioners are essentially arguing that OWRB's MAY Order is an unconstitutional taking of private property without just compensation under both the Oklahoma and federal constitutions, because: (1) the restrictions on the use of groundwater purportedly appropriate private water for a public use; and (2) the restrictions are so limiting as to effectively deny water right holders all use of their water right. *See* Petitioners' Brief-in-Chief at 45-49. In asserting this argument, Petitioners acknowledge that the Supreme Court of Oklahoma's decision in *Jacobs Ranch* provides that "[c]ompensation is not necessarily required when the state 'prohibit[s] a property owner from making certain uses of her private property.'" *See* Petitioners' Brief-in-Chief at 46 (quoting *Jacobs Ranch*, 2006 OK at ¶ 51, 148 P.3d at 855). However, in the five pages of the Petitioners' Brief-in-Chief dedicated to making this takings argument, the one sentence quoted above is the only reference to the Supreme Court of Oklahoma's decision upholding the constitutionality of the very statute upon which the restrictions on the use of groundwater contained in the MAY Order are based.

In *Jacobs Ranch*, the plaintiffs/appellants argued, *inter alia*, that S.B. 288 constituted a taking of private property without just compensation contrary to the U.S. Const., Fifth Amendment, Takings Clause, and the Okla. Const., art. 2, § 24. *See Jacobs Ranch*, 2006 OK at ¶ 50, 148 P.3d at 855. The Court disagreed, stating that "[t]he general rule is that the Legislature may restrict the use and enjoyment of the state's water resources by exercise of its police power for the preservation of the public health, safety and welfare without compensating the property owner." *See Jacobs Ranch*, 2006 OK at ¶ 50, 148 P.3d at 855 (citing *Franco-American*

Charolaise, LTD v. Okla. Water Resources Bd., 1990 OK 44, ¶ 16, 855 P.2d 568, 576). The Court then specifically recognized that the legislation upon which the MAY Order is based "regulates the state's water resources expressly 'to protect the health, safety and welfare of the people of Oklahoma.'" See *Jacobs Ranch*, 2006 OK at ¶ 51, 148 P.3d at 855 (quoting 82 O.S. Supp.2003, 1020.9A(A)).

In *Jacobs Ranch*, the taking challenge to S.B. 288 focused on the moratorium against OWRB issuing certain temporary groundwater permits until a hydrologic study was completed and a MAY approved, and on S.B. 288's permanent requirement that prior to the issuance of any regular permit (which again may not be issued until the agency conducts a MAY) OWRB must determine that the use is not likely "to degrade or interfere with springs or streams emanating from water originating from a sensitive sole source groundwater basin."¹⁸ Again, the Supreme Court of Oklahoma disagreed with these challenges and upheld the constitutionality of S.B. 288. In regard to the requirement that OWRB determine that the use is not likely to degrade or interfere with the subject springs and streams, the Court specifically stated:

We view the additional requirements on applicants [to determine whether a proposed use is likely to degrade or interfere with springs or streams emanating from water originating from a sensitive sole source groundwater basin] for regular permits to be proper regulation of the state's water resources in the exercise of the Legislature's police power. We conclude that . . . the additional permit requirement [does] not constitute a taking of property for public use under the constitutions of the United States and the State of Oklahoma.

Jacobs Ranch, 2006 OK at ¶ 53, 148 P.3d at 856(emphasis added).

¹⁸See *Jacobs Ranch*, 2006 OK at ¶¶ 30, 53, 148 P.3d at 850, 856 ("The challenged amendments impose a moratorium against the transfer of water for out-of-basin municipal and public use and inject a conservation requirement to the utilization regime. As amended, the groundwater law requires a permit applicant to show that the withdrawal of water is not likely to degrade or interfere with springs or streams emanating in whole or in part from water originating from the sensitive sole source groundwater basin.")(emphasis added).

1. The Restrictions on the Use of Groundwater Set Forth in the MAY Order are Not an Appropriation of Private Property for Public Use

Petitioners incorrectly assert that the MAY Order's restrictions on the use of groundwater result in the "overt appropriation" of that water to a public use, and that "[b]oth Oklahoma and federal cases hold that government action causing private water to be available for public use is categorically a taking." Petitioners' Brief-in-Chief at 45 and 47. As mentioned above, the Supreme Court of Oklahoma has already determined that restrictions on the use of groundwater to protect the springs and streams at issue in this case are considered the regulation of the use of property and are a proper exercise of the state's police power; therefore, such regulations are not the "taking" of private property for a public use. *See Jacobs Ranch*, 2006 OK at ¶¶ 2, 53, 148 P.3d at 846, 856. The MAY Order at issue in this case is merely the implementation of the requirements set forth in S.B. 288. As previously stated, the Oklahoma Supreme Court has recognized that the express purpose of the MAY Order's underlying legislation is "to protect the health, safety and welfare of the people of Oklahoma." *See Jacobs Ranch*, 2006 OK at ¶ 50, 148 P.3d at 855.

Not only did the Court in *Jacobs Ranch* reject the challenge to the portion of S.B. 288 requiring a moratorium¹⁹ on the issuance of permits until OWRB approves a MAY that ensures that no permit will reduce the natural flow of water from the subject springs and streams, but the Court also specifically rejected the challenge as it related to the requirement that no permits be issued until it is determined whether the use is likely to degrade or interfere with such springs or

¹⁹*See Jacobs Ranch*, 2006 OK at ¶¶ 1, 53, 148 P.3d at 846, 856 (upholding the constitutionality of 82 O.S. § 1020.9A(B)(1), which provides "[a] moratorium is hereby established on the issuance of any temporary permit that would lead to any municipal or public water supply use of groundwater from a sensitive sole source groundwater basin or subbasin outside of any county that overlays in whole or in part said basin or subbasin."). Also related is § 1020.9A(B)(2), which provides "[s]aid moratorium shall be in effect until such time as the Oklahoma Water Resources Board conducts and completes a hydrologic study and approves a maximum annual yield that will ensure that any permit for the removal of water from a sensitive sole source groundwater basin or subbasin will not reduce the natural flow of water from springs and streams emanating from said basin or subbasin."

streams.²⁰ See *Jacobs Ranch*, 2006 OK at ¶ 53, 148 P.3d at 856. Implicit in the Court's decision is a determination that such reductions on the use of groundwater do not constitute an appropriation of privately owned groundwater for a public use.

Since the Petitioners chose not to directly address the Court's decision in *Jacobs Ranch*, it is difficult to anticipate their response to the Court's decision. If the Petitioners' are attempting to imply that the Court in *Jacobs Ranch* only addressed the establishment of the moratorium in § 1(B)(1) of S.B. 288, then the Petitioners would have to assume that the Court did not consider the sentence immediately following in § 1(B)(2) that provides that the moratorium shall be in effect until the OWRB approves a MAY that ensures that the natural flow from the area springs and streams will not be reduced. The Court not only upheld the moratorium until the MAY was approved, but also recognized that S.B. 288 required that the MAY ensure that the natural flow of the area springs and streams not be reduced.²¹ It is easily argued that Court upheld the entirety of S.B. 288. See *Jacobs Ranch*, 2006 OK at ¶ 2, 148 P.3d at 846 ("We conclude the challenged legislation is valid and uphold the legislation codified at 82 O.S.Supp.2003, §§ 1020.9, 1020.9A and 1020.9B.").²² Assuming, *arguendo*, that the Court's decision did not apply to S.B. 288 in its entirety, the portion of the Court's decision upholding the constitutionality of S.B. 288's requirement that no permit be issued until it is determined whether the use is likely to degrade or

²⁰See *Jacobs Ranch*, 2006 OK at ¶¶1, 53, 148 P.3d at 846, 856 (upholding the constitutionality of 82 O.S. §§ 1020.9(A)(1)(d), which provides "[b]efore the [OWRB] takes final action on an application, the Board shall determine from the evidence presented, from the hydrologic surveys or reports and from other relevant data available to the Board and applicant, whether: . . . the proposed use is likely to degrade or interfere with springs or streams emanating in whole or in part from water originating from a sensitive sole source groundwater basin . . ."). Also related is § 1020.9(A)(2)(d), which provides "[t]he Board shall approve the application by issuing a regular permit, if the Board finds that: . . . the proposed use is not likely to degrade or interfere with springs or streams emanating in whole or in part from water originating from a sensitive sole source groundwater basin . . ."

²¹See *Jacobs Ranch*, 2006 OK at ¶ 1, 148 P.3d at 846.

²² Even if the constitutionality of all of S.B. 288 was not presented to the Court, there is no doubt that the Court considered all of the provisions implemented through the MAY Order in making its decision and could have struck down any portion it deemed unconstitutional. See *Matter of McNeely*, 1987 OK 19, 734 P.2d 1294, 1296 ("The dispositive issue here - one of public law - was neither raised nor briefed by the parties. When public-law issues are present this court may, on review, resolve them by application of legal theories that were not tendered below."); see also *In Re: Oklahoma Capitol Improvement*, 1998 OK 25.

interfere with such springs or streams appears to resolve the very same concept. In other words, if a regulatory requirement restricting the removal of groundwater to an amount not likely to degrade or interfere with the subject springs and streams is a proper use of the state's police power, then so is a regulatory requirement restricting the removal of groundwater to an amount not reducing the natural flow of such springs and streams. In this regard, there is no difference in restricting the use of groundwater so as to not degrade or interfere with the subject springs and streams and restricting the use of groundwater so as to ensure that the natural flow of such springs and streams is not reduced.

Again, the Oklahoma Supreme Court has already determined that the restrictions on the use of groundwater required under S.B. 288 are a proper exercise of the state's police powers and not a categorical unconstitutional takings as purported by the Petitioners. More directly, in regard to the exercise of the state's police power and restrictions on the use of groundwater, the Court has stated:

The utilization and the conservation of the state's water resources are rightfully subjects for legislative regulation. The Oklahoma Legislature not only has the power but also the profound responsibility to allocate this previous natural resource for the benefit of the whole state. The state's water resources is a subject over which the Oklahoma Legislature must be vigilant and act with prudence for the benefit of all the citizens in the state. Unquestionably, a statewide comprehensive policy for both the utilization and the conservation of the state's water is crucial to the health and welfare of every inhabitant in this state.

See Jacobs Ranch, 2006 OK at ¶ 57, 148 P.3d at 857 (emphasis added). Arguably, the Court's decision in *Jacobs Ranch* decided the very question at issue here. *See Jacobs Ranch*, 2006 OK at ¶ 2, 148 P.3d at 846 ("We conclude the challenged legislation is valid and uphold the legislation codified at 82 O.S.Supp.2003, §§ 1020.9, 1020.9A and 1020.9B.") and 2006 OK at ¶ 53, 148 P.3d at 856 (upholding the constitutionality of both the moratorium until OWRB approves a MAY ensuring no reduction in natural flow and the conservation permit requirement

related to degradation and interference with the streams and springs). At a minimum, the Court's decision provides a directly applicable determination that the same type of restrictions on the use of groundwater required under different subsections of S.B. 288 (as implemented through the MAY Order) are also a proper use of the state's police power. Absent a demonstration that property was taken for a public use, a compensable takings may not occur. *See Franco-American*, 1990 OK at ¶ 16, 855 P.2d at 576 (quoting *Phillips Petroleum Co. v. Corporation Com'n*, 312 P.2d 916, 921 (Okla. 1956) ("[T]he police power is usually exerted merely to regulate the use and enjoyment of property by the owner, or, if he is deprived of his property outright, it is not taken for public use, but rather destroyed in order to promote the general welfare")).

2. The MAY Order Merely Restricts the Use of Groundwater, It Does Not Abolish the Right to Such Use

Petitioners also argue that although the state may generally regulate the use of property, if that regulation goes too far it will result in either a regulatory partial taking or a *per se* taking. *See* Petitioners' Brief-in-Chief at 46. Petitioners argue that the MAY Order "prohibits owners from possessing, using, or disposing of at least 13,000,000 acre-feet of groundwater," and that such a restriction constitutes a takings requiring just compensation even if only "a small portion of a person's holdings" are restricted. *See* Petitioners' Brief-in-Chief at 47 and 49. It appears that Petitioners are arguing that the MAY Order both outright abolishes the use of groundwater, constituting an unconstitutional taking, and regulates it to such a degree as to constitute a regulatory taking. *See* Petitioners' Brief-in-Chief at 46. As discussed below, Petitioners' arguments are without merit.

First, applying the logic of this argument would mean that any MAY determination that resulted in a significant reduction in the use of groundwater would *per se* result in a takings

requiring just compensation for the amount reduced. In *Kline v. OWRB*, the Supreme Court of Oklahoma rejected such an interpretation in holding that OWRB's restriction on groundwater removal through a MAY determination does not constitute a taking of property without just compensation. *See Kline v. OWRB*, 1988 OK 18, ¶¶ 5-6, 759 P.2d 210, 212 (Okla. 1988)(*as corrected* Feb. 25, 1988) ("[T]he Legislature may regulate and restrict the use and enjoyment of landowners of the natural resources of the state such as subterranean waters Such legislation does not infringe the constitutional inhibitions against . . . taking property without just compensation.").

Second, the Petitioners' abolishment argument focuses only on the amount of groundwater not authorized for use under the MAY Order and fails to consider the use that is authorized. More specifically, the Petitioners' argument that the restriction on the use of groundwater set forth in the MAY Order amounts to the abolishment of all use of that restricted groundwater ignores the fact that the MAY Order provides for the permanent use of 0.2 acre-feet of groundwater per surface acre (*i.e.*, the order allows the use of 78,404 acre-feet of groundwater by surface owners each year or 1,568,080 acre-feet over the basin life identified in the Order). *See* AR Vol. 8, Tab 170, at 2611 and at 2617. The 78,404 acre-feet of groundwater allocated under the MAY Order is not a trivial amount as argued by the Petitioners, especially considering the fact that the five year annual average amount of actual groundwater use reported from the basin for the five year period ending in 2008 was barely above 5,700 acre-feet.²³ *See* Vol. 1, Tab 18, at 287. Similarly, the average annual reported groundwater use from the basin between 1964 and 2008 was less than approximately 4,300 acre-feet. *See id.* In support of its position, Petitioners focus on the *Franco-American* decision to argue that the restrictions on the use of

²³ These numbers are specific to the eastern part of the aquifer; however, in the entire aquifer, there were only two additional permitted users not included. *See* Vol. 1, Tab 18, at 286.

groundwater are an unconstitutional takings. See Petitioners' Brief-in-Chief at 45-48. However, consistent with the Court's decision in *Jacobs Ranch*, the type of use restrictions at issue in this matter are easily distinguishable from the regulation at issue in *Franco-American*.

In *Franco-American*, the Court held that the challenged legislation did not merely place a restriction on the prospective use of the riparian water right, but actually abolished the prospective use of such stream water under a riparian right. See *Franco-American*, 1990 OK at ¶ 17, 855 P.2d at 577 ("We, therefore, hold that the 1963 water law amendments are fraught with a constitutional infirmity in that they abolish the right of riparian owners to assert their vested interest in the prospective reasonable use of the stream."). Here, as acknowledged by Petitioners, the MAY Order merely identifies the amount of groundwater that may be removed from the basin each year, it does not eliminate or abolish all such use. See AR Vol. 8, Tab 170, at 2611; see also Petitioners' Brief-in-Chief at 49 ("All told, the order reduces each owner's holdings by nearly 90% from 1.9 to just 0.2 acre-feet of groundwater per surface acre.").

In addition to *Franco-American*, the Petitioners attempt to rely on the Federal Circuit Court of Appeals' decision in *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276 (2008), and the Supreme Court of the United State's decision in *International Paper Co. v. United States*, 282 U.S. 399, 51 S.Ct. 176 (1931). The Petitioners rely on the holding in *Casitas* for the proposition that the diversion of a municipal water district's water for a public use (*i.e.*, the preservation of an endangered species) by the government results in a physical taking. See Petitioners' Brief at 48. In *Casitas*, the Bureau of Reclamation ("BOR") entered into a contract for the construction of a water project with a municipal water district. Under the contract, the municipal water district had to pay back the cost of construction plus operation and maintenance costs over a forty year period. In return, the contract provided the municipal water district with

"the perpetual right to use all water that becomes available through the construction and operation of the project." *See Casitas*, 543 F.3d at 1281-82. The municipal water district had the right to use the water through a state issued water right and pursuant to the contract with the BOR. Almost forty years later, the West Coast steelhead trout was listed as endangered species and, consequently, the BOR required the municipal water district to: (1) construct a fish ladder facility; and (2) divert water from the project to the fish ladder. The Federal Circuit held that the action was a physical taking; however, the court repeatedly focused its determination on the fact that the government "actively caused the physical diversion of water." *See Casitas*, 543 F.3d at 1291-92, 1295 ("[T]he government admissions make clear that the United States did not just require that water be left in the river, but instead physically caused Casitas to divert water away from the [water project] and towards the fish ladder. Where the government plays an active role and physically appropriates property, the *per se* taking analysis applies."). The *Casitas* decision does not apply in this case, because the present situation deals with a MAY Order that does require water to be left in the basin. Moreover, the present situation does not involve water that has already entered the structure of a water project nor does it involve a governmental entity actively causing the physical diversion of water.

In *International Paper*, the State of New York granted the Niagara Falls Power Company the right to divert 10,000 cubic feet of water per second from the Niagara River for the purpose of power generation. *See International Paper*, 282 U.S. at 404-05, 51 S.Ct. at 176. The power company then leased 730 cubic feet per second to the International Paper Company. Under New York law, these actions created a property right in the amount of water granted to the parties. In 1917, the United States requisitioned all the power capable of being produced, including the power that could be produced by using the water granted to International Paper. The requisitions

contained the promise of “fair and just compensation” for the power delivered. *Id.* at 177. International Paper Company then petitioned to recover compensation for property rights in the water allegedly taken by the United States for war purposes. The Court held that International Paper fully owned the rights to the water and that:

[T]he Government intended to and did take the use of all the water power in the canal; that it relied upon and exercised its power of eminent domain to that end; that, purporting to act under that power and no other, it promised to pay the owners of that power

Id. at 178. In *International Paper*, the petitioner held a recognized property right in the amount of the water granted in the contract. While Oklahoma law recognizes that the groundwater under the land is owned by the owner of the surface, the right to use this groundwater is governed by the Oklahoma Groundwater Law. *See* 60 O.S. § 60. The law provides that a surface owner is entitled to a temporary amount of 2 acre feet per acre until such time that the equal proportionate share is determined. As discussed in detail below, the law does not create any vested right in the amount temporarily authorized. Additionally, in *International Paper*, the Government relied upon its eminent domain powers to take the power generated, going so far as to promise fair and just compensation for the power diverted. In the matter at hand, OWRB is not acting under the eminent domain provisions of the Oklahoma Constitution, but instead under the powers granted to it under the Oklahoma Groundwater Law. The exercise of these powers has already been recognized by the Oklahoma Supreme Court as a valid exercise of the state’s police powers and not a taking. *See Jacobs Ranch*, 2006 OK at ¶ 2, 148 P.3d at 846, 856.

Third, when attempting to quantify the amount of groundwater use restricted as a result of the MAY Order, it is important to start with an accurate portrayal of the existing property right. Petitioners repeatedly claim that 13,000,000 acre-feet of privately owned groundwater is appropriated for a public use through OWRB's implementation of S.B. 288. *See* Petitioners'

Brief-in-Chief at 45 and 49 ("[T]he Board's order condemns more than 13,000,000 acre-feet of privately owned groundwater, prohibiting its use for any purpose."). This assertion is inaccurate. The actual reduction in the amount of groundwater available for use by surface owners under the MAY Order is far less than that purported by Petitioners for several reasons:

a. Petitioners' Calculations Ignore the Requirements of S.B. 288

The Petitioners' calculations completely dismiss the requirements of S.B. 288. These requirements cannot simply be removed from consideration. S.B. 288 requires that OWRB approve a MAY that ensures that no permit will reduce the natural flow of water from the area springs and streams, and also requires that OWRB not issue permits for a use that is likely to degrade or interfere with such springs or streams. *See* 82 O.S. §§ 1020.9A(B) and 1020.9(A). As previously demonstrated, these requirements have been upheld by the Oklahoma Supreme Court. *See Jacobs Ranch*, 2006 OK at ¶¶ 2, 53, 148 P.3d at 846, 856. In approving a MAY, OWRB does not have the discretion to simply ignore the requirements of S.B. 288. Board decisions must comply with all valid statutory requirements that are applicable. *See OWRB v. Texas County Irr. And Water Resources Ass'n, Inc.*, 1984 OK 96, ¶ 24, 711 P.2d 38, 47-48 ("Board's issuance of a permit must meet all statutory requirements, including 'allocation for reasonable use' and 'restriction of the production' based upon information provided by hydrologic survey. We interpret inquiry into these matters to be legally necessary and reasonable in order that the water resources of our state may be utilized responsibly.")(citation omitted); *see also Caruth v. State*, 1923 OK 980, ¶ 7, 223 P. 186 ("Laws are presumed to be valid and must be so treated and acted upon by subordinate executive functionaries as constitutional and legal until their unconstitutionality or illegality has been judicially determined" and there is "no authority to decline the performance of such duties. . . ."). Petitioners' position that 13,000,000 additional

acre-feet of groundwater should have been allocated under the MAY would leave no unallocated water in the basin and, therefore, could not ensure that any permits for the removal of groundwater are not likely to degrade or interfere with the area springs and streams or that the natural flow of such springs and streams is not reduced. In other words, any MAY Order for this basin allocating the amount of groundwater proposed by the Petitioners would fail to comply with the statutory requirements set forth in S.B. 288. Accordingly, it would be inappropriate to compare the amount of groundwater allocated under the MAY Order to the amount referenced in the Petitioners' calculation.

b. The Right to Use Groundwater is Not Permanently Quantified Until After OWRB Approves a MAY

The Petitioners' calculation is also based on the mistaken premise that the property interest associated with groundwater is a guaranteed amount. *See* Petitioners' Brief-in-Chief at 49. The right to an unlimited or even a specific amount of groundwater is not recognized in Oklahoma's Groundwater Law. *See* 82 O.S. § 1020.2(A) ("It is hereby declared to be the public policy of this state . . . to utilize the ground water resources of the state, and for that purpose to provide *reasonable regulations for the allocation for reasonable use* based on hydrologic surveys of fresh ground water basins or subbasins to determine a restriction on the production, based upon the acres overlying the ground water basin or subbasin.")(emphasis added). Oklahoma's Groundwater Law only allows OWRB to grant regular permits after the completion of a hydrologic study and the approval of a MAY. *See* 82 O.S. § 1020.11(A). Until OWRB approves of a MAY for a groundwater basin, no minimum amount of water is permanently allocated or guaranteed. *See* 82 O.S. § 1020.6(D) ("The Board may, in subsequent basin or subbasin hearings, and after additional hydrologic surveys, increase the amount of water allocated but shall not decrease the amount of water allocated."). Prior to the approval of such a

MAY, OWRB is only authorized to issue permits that are temporary in nature. *See* 82 O.S. § 1020.11(B).²⁴ In other words, the right to use groundwater is not permanently quantified until allocated in an approved MAY.

The precise amount of groundwater that would be allocated through a MAY determination is not guaranteed even in the unlikely event that there was a perfect consensus on: the boundaries of the basin; the total land area overlying the basin; the amount of water stored in the basin; the rate of recharge to the basin; the amount of total discharge from the basin; the transmissibility of the basin; and any potential pollution of the basin from natural sources. For example, the MAY determination would likely result in a different allocation depending on the life of the basin. The relevant statute provides that the basin life must be *at least* 20 years; however, a longer basin life may be utilized if determined to be appropriate. *See* 82 O.S. § 1020.5(B). All other factors being equal, a longer basin life would likely result in a larger total allocation of groundwater depending on the rate of recharge. Inversely, a longer basin life would also likely result in a lower MAY and EPS.

Accepting the Petitioners' premise that the amount of groundwater use allocated under the MAY Order should be compared to the maximum amount of water available in the aquifer without considering applicable statutory requirements, such as those set forth in S.B. 288, creates a false choice. A MAY for the basin at issue that failed to take into account the requirements of

²⁴OWRB is authorized to grant temporary permits for no less than two (2) acre-feet annually for each surface acre of land. *See* 82 O.S. § 1020.11(B)(2). However, this two (2) acre-feet is not assured indefinitely. For example, these temporary permits *must be revalidated annually*, are *subject to revocation or cancellation*, and are subject to protest. *See id.* at § 1020.11(B); *see also OWRB v. Texas County Irr. And Water Resources Ass'n, Inc.*, 1984 OK 96, ¶ 22, 711 P.2d 38, 47 (quoting *Lowrey v. Hodges*, 1976 OK 132, 555 P.2d 1016 ("[a] temporary permit is not tantamount to a regular permit in that the statute provides it must be revalidated annually.' Automatic revalidation is directly inconsistent with the position taken by this Court in *Lowrey* that '[i]t [a temporary permit] is thus subject to review on a yearly basis and possible nonrenewal', and ignores the statutory mandate to the Board to provide reasonable regulations for the allocation for reasonable use of fresh ground water resources.")(citations omitted). Moreover, the temporary allocation of two (2) acre-feet *may be reduced* if requested by a majority of the surface owners of the land. *See id.* at § 1020.11(B)(2).

S.B. 288 would be unlawful. Moreover, groundwater in Oklahoma is indisputably a property right; however, the permanent quantification of that right does not occur until after a MAY is approved. Comparing the amount of groundwater allocated for use in an approved MAY to an amount calculated without taking into consideration applicable statutory requirements (and making assumptions on others such as the life of the basin) is not appropriate for purposes of attempting to demonstrate an unconstitutional taking.

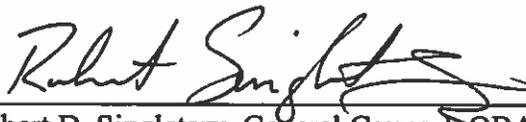
The Petitioners' takings claim fails because the restrictions on the use of groundwater set forth in the MAY Order do not result in an appropriation of private property for a public use nor in the abolishment of the right to the use of groundwater. Rather, the MAY Order is a proper exercise of the state's police power used in this instance to restrict the use of groundwater in order to protect the health, safety, and welfare of the people of Oklahoma as declared in S.B. 288 and as recognized by the Oklahoma Supreme Court. As discussed above, the Oklahoma Supreme Court determined in *Jacobs Ranch* that the express purpose of the statute underlying the MAY Order is "to protect the health, safety and welfare of the people of Oklahoma," 2006 OK at ¶ 50, 148 P.3d at 855, and further stated that "[u]nquestionably, a statewide comprehensive policy for both the utilization and the conservation of the state's water is crucial to the health and welfare of every inhabitant in this state." 2006 OK at ¶ 57, 148 P.3d at 857. In addressing Petitioners' taking argument that the proposed MAY violated the Constitution's prohibition on the taking of private property without just compensation, the MAY Order concluded that "the Oklahoma Supreme Court has already upheld the constitutionality of Senate Bill 288 against a takings challenge; because that statute provides the basis of the Board's authority, Protestants' argument amounts to an attempt to revisit an issue that the Court has already decided." AR Vol. 8, Tab 170, at 2616. Similarly, Petitioners' taking argument before

this Court amounts to yet another attempt to revisit an issue that has already been decided by the Oklahoma Supreme Court, the Hearing Examiner, and the Board. For the reasons set forth above, the Petitioners' argument should once again be rejected.

CONCLUSION

Petitioners have failed to show that a substantial right has been prejudiced due to any error of law, unlawful procedure, or by erroneous findings. In light of the considerable supporting evidence in the administrative record, the OWRB's MAY Order must be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of August, 2015, a true and correct copy of the above and foregoing instrument was mailed by regular US mail, postage prepaid, to all persons listed below and on the following pages.



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