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IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL FOUNDATION, et al.

Petitioners,

v.

OKLAHOMA WATER RESOURCES BOARD,

Respondent,

v.

TISHOMINGO NATIONAL FISH HATCHERY, et al.,

Other Parties of Record.

Case No. CV-2013-2414

PETITIONERS' COMBINED REPLY BRIEF TO THE RESPONSE BRIEFS OF OWRB AND CPASA

Petitioners make the following reply to the response briefs of the OWRB and CPASA.[1]

I. EITHER CPASA AND THE OWRB ARE CONFUSED ABOUT STREAM FLOWS OR THE MAY ORDER IS RIFE WITH ERROR

The OWRB and CPASA falsely accuse Protestants of confusing stream flows. Both claim in their briefs that Baseline Low Flow and the 75% Exceedance Flow are one and the same thing (CPASA Brief at p. 24; OWRB Brief at p. 15). Unfortunately for them, this issue was litigated and the Board's Order itself holds that they are different - not the same:

> Although the Working Group determined that a 25% reduction in **baseline low flow**…would be the maximum allowable reduction, it asked the USGS to consider whether the impact of pumping would reduce the **75% exceedance**…The record offers no rationale for this change. There is no indication how a conversion from the **75-percent exceedance** to **baseline low flow** would work, how it would impact fish habitat, or how using the **baseline low flow** instead of the **75-percent**

[1] In the interest of brevity, Petitioners do not reply to all of the erroneous statements and arguments contained in the OWRB and CPASA responses. Instead, Petitioners will address same at the oral argument.

> **exceedance** would have impacted the model results - nor is there any explanation to show that **the difference** would be immaterial. Tab 170, Bates No. 2608, ¶ 36-37.

The OWRB and CPASA cannot now argue to the contrary. Neither is appealing the Board's ruling herein and how could the OWRB do so - it is the Board's own ruling! Moreover, CPASA fully supported the adoption of the Board Order which holds they are different. Tab 168, Bates No. 2594 34:22 - 35:02, Amy Ford.

Their argument also puts them in the position of admitting the testimony is against them:

> Q: (by Mr. Walker) So when we see Baseline Low (Flow) on this chart (in the IFA), that is the Base Flow that we're talking about?
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> A: (by Mr. Smithee - the OWRB Chair of the Technical Advisory Group) No. That is the Baseline Low Flow on this chart, but that's not Base Flow.
>
> Q: Okay. What is Base Flow then?
>
> A: Base Flow is that - that flow that occurs at the location the majority of the time. At least 75% of the time (which, according to OWRB and CPASA in its briefs, this is the 75% Exceedance Flow). The Low Flow (Baseline Low Flow) is the lowest measured flow at any time. **There's a big difference**. Smithee, Tab 101, Vol. 10, 28:54-29:38.

Both the OWRB and CPASA now contend that Mr. Smithee was referring to the 75% Exceedance in this testimony, which means he is saying there is a big difference between the 75% Exceedance and Baseline Low Flow. And yet they contend they are the same. The OWRB and CPASA are now arguing against both the testimony of the OWRB Technical Advisory Group Chairman and the Board Order itself. It is the OWRB and CPASA who are confusing flow regimes contrary to the express rulings of the Board.

In their post-hearing brief filed below, Petitioners fully explained their position regarding the differences in the various stream flows exactly as Petitioners have explained it in this appeal. Tab 116, Bates Nos. 1861-1867. In response, CPASA admitted that Petitioners "established that these flows are not *identical*". Tab 131, Bates No. 1999 (emphasis in original). However,

applying a heavy dose of illogic, CPASA argued that this "did not establish they are *different*". *Id.* (emphasis in original). CPASA argued that the different flows were "similar enough" that they could be equated. *Id.* Of course, the Hearing Examiner and the Board rejected CPASA's argument, finding the flows are different. CPASA is not appealing that ruling herein, nor are Petitioners, therefore, CPASA is bound by the Board's determination on this point.

As to the OWRB, we know that the Hearing Examiner specifically solicited comments to Petitioner's post-hearing brief from OWRB staff. This resulted in the now infamous secret memorandum that this Court ordered the OWRB to produce. Notably absent in the secret memorandum is any claim that Petitioners' assertion regarding flow regimes is incorrect. Having received everyone's responses to Petitioners' claims regarding stream flows, including the OWRB's, the Hearing Examiner and ultimately the Board itself held that the flows are different.

As their main argument, both CPASA and the OWRB now claim that the following flow regimes - Baseline Low Flow, 75% Exceedance Flow, 25th Percentile Flow, and Base Flow - are all "synonymous" or "functionally equivalent". OWRB Response Brief, p. 31; CPASA Response Brief, p. 25. They understand they must make this argument, otherwise there is no connection between the MAY determination and the fish habitat study upon which it was supposedly based.

If they are correct, why did the modelers spend taxpayer dollars modeling the different flow regimes? If they are the same or functionally equivalent then modeling any one of them should have sufficed. More importantly, if they are the same or functionally equivalent, then the modeling results for the different flow regimes should be the same. This is where their argument totally falls apart. The modeling results clearly show that a .2 AF EPS results in a 71% reduction

in the 75% Exceedance Flow, whereas it only results in a 42% reduction in the 5-Year Average Flow. Tab 18, Bates Nos. 320-321. The evidence belies their claim. They are clearly not the same.

More troubling, however, is the fact that, by their new arguments, what the OWRB and CPASA are really arguing is that the Hearing Examiner and the Board did not understand the hydrological evidence before them, and that they did not understand basic concepts of stream flow. CPASA says as much in its brief:

> Because of Petitioners' efforts in confusion, the Hearing Examiner failed to understand that 75% exceedance flow, 25th percentile flow, baseline low flow, and base flow were functionally equivalent. CPASA Response at p. 25.

This is a tacit admission that the .2 AF final ruling was a result driven number, not one which derived from a firm grasp of basic hydrological concepts and sound science. If the Hearing Examiner did not understand they are the same then obviously the MAY Order does not hold they are the same. It is also disturbing that OWRB staff would allow the MAY Order to go to the Board for final approval, containing what it now contends is a clear error, without having brought the error to the Board's attention. By their new arguments, if true, the OWRB and CPASA expose the arbitrary and capricious nature of the MAY Order.

The MAY determination was unquestionably based upon the 5-Year Average Flow (with additional unsupported adjustments then made thereto). The OWRB's response brief acknowledges that the MAY is based upon the 5-Year Average Flow. OWRB Response Brief, p. 32. However, the 5-Year Average Flow is nowhere mentioned in the fish habitat study. Tab 36. And certainly there is nothing which correlates the 5-Year Average Flow to the Baseline Low Flow in the fish habitat study, which was the specific flow regime that the Technical Advisory Group used to come up with 25% as an acceptable reduction in "natural flow" (based upon the corresponding reductions in fish habitat associated with that particular flow regime). In short,

the efforts of the OWRB and CPASA to cobble together a connection between the criteria used to define an acceptable reduction in natural flow and the actual MAY fail miserably.

Lastly, both the OWRB and CPASA argue that, even if flows are not the same, the Board's determination is still valid because it exercised its "experience, expertise, and judgment". CPASA Response Brief, p. 25; OWRB Response Brief, p. 33. However, such argument provides no rationale for the Board's determination other than its own *ipse dixit*. The order itself must explain the criteria and rationale upon which the Board made its decision. Because it does not, it must be reversed.

II. THE ABSENCE OF SCIENTIFIC RIGOR UNDERLYING THE BOARD'S ORDER IS FUNDAMENTALLY UNFAIR TO GROUNDWATER OWNERS

Despite the above lack of scientific basis for its decision, OWRB asserts that it should be accorded great deference in its judgment and determination of the ASA MAY. But no deference can be granted by the reviewing court when the agency decision is clearly erroneous in view of the probative evidence in the record. 75 O.S. § 322. It is not enough that the evidence "informs" the result as asserted by the Hearing Examiner. Pertinent to the issue of deference is that same Hearing Examiner's own conduct already addressed by the Supreme Court's writ.

The Supreme Court in its Writ of Mandamus stated that the conduct of *both* the OWRB and the Hearing Examiner in the administrative action had established a perception of partiality against the Appellant/Protestants in this case.[2] Yet the Appellees argue that great deference should nevertheless be granted the agency that rubber-stamped the Hearing Examiner's findings and recommended order. However, because of the perception of partiality created by the

[2] *Application to Assume Original Jurisdiction and Petition for Writs of Mandamus and Prohibition*, Oklahoma Supreme Court, 2013 OK 29, ¶¶ 9-16: "B. Ex parte communications between the hearing officer and other agencies serving as witnesses, passed to the hearing officer through the OWRB, create the impression of partiality."

Hearing Examiner's inappropriate conduct, the court must temper deference to the agency with what one writer has termed "searching scrutiny" of the purported science the agency used in an attempt to justify its decision. In fact, the same writer has stated that judicial review *should seek to maximize scientific accuracy* in agency decision-making, and that failure to do so will undermine the legal system's values of fairness and legitimacy. These points against deference to an agency's claims of scientific accuracy were made by the Hearing Examiner herself in other publications.[3]

Petitioners agree with the principle that courts should rigorously evaluate the science which purports to support an agency order. This Court should evaluate deference in the light of what has already happened here. The reviewing court should supply the rigor that has been comprehensively lacking in the OWRB's treatment of the science, which it claims to have relied upon in its decision reduce landowners' right to use groundwater by 90%.

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[3] Emily Hammond Meazell, "Scientific Avoidance: Toward More Principled Judicial Review of Legislative Science", Indiana Law Journal, Vol. 84:239. In her law review article, Hearing Examiner Meazell makes the points that:

(1) Courts should not always give deference to the executive when considering an appeal that turns on purported scientific accuracy. At p. 239, Professor Meazell states: "Contrary to conventional wisdom, for example, there are times when courts are the institutions with the comparative institutional advantage regarding science. In addition, this principle of deference assumes a low-level standard of review, so it does not account for how a court should proceed when the scientific issues are relevant to matters that are subject to a more searching scrutiny."

(2) Courts should not practice "scientific avoidance". At p. 239, Professor Meazell states that the court avoiding scrutiny of science "is based on a number of assumptions that do not always hold true."

(3) Inaccuracy in decision-making is unfair and illegitimate. Professor Meazell at p. 242: "First, accuracy in decision making is closely tied to perceptions of fairness and legitimacy. With society's faith in science comes an inherent belief that scientific "truth" is inextricably linked to fairness. *A result contrary to science, therefore, seems fundamentally unfair.* Judicial review should seek to maximize scientific accuracy; failure to do so undermines the legal system's values of fairness and legitimacy." [Emphasis added.]

III. THE FISH HABITAT DEFINITION OF NATURAL FLOW WAS OBJECTED TO AS BEING IN VIOLATION OF THE APA RULEMAKING REQUIREMENTS IN PROTESTANT'S POST-HEARING BRIEF TO THE OWRB; IT IS OF FUTURE EFFECT AND GENERAL APPLICABILITY, *I.E.*, A "RULE" UNDER THE APA

A. Protestants Raised Below the Failure of OWRB to Follow APA Rulemaking Procedures in Defining Natural Flow

CPASA claims in its response brief at p. 27, *et seq.,* that Petitioners have raised the issue of the OWRB's failure to follow APA rule-making procedures for the first time on appeal. However, Petitioners did raise this issue in the proceeding below. In their post-hearing brief below, Petitioners state clearly, "[t]he Smithee committee's determination of the meaning of the term 'natural flow' also constituted agency rulemaking which did not comply with the APA rulemaking requirements". Tab 116, Bates No. 1856.

B. Interpretation of the Statutory Provision "Natural Flow" by the OWRB is a Rule under the APA

Further CPASA argues at its response brief at p. 29 that the "OWRB's determination of natural flow has no 'general applicability and future effect.'" CPASA argues that the Technical Advisory Group which defined "natural flow" as preservation of fish habitat was only an "advisory" group that made "recommendations" to the OWRB on the "interpretation" of natural flow. However, what the group was named or how it characterized its rulemaking does not change the fact that its so-called "recommendation" was the interpretation of natural flow which formed the supposed justification for the MAY Order. The APA states precisely that a "rule" is an agency statement that "interprets" law or policy. 75 O.S. § 250.3/15. CPASA at page 29 of its brief admits that OWRB issued "its interpretation of natural flow". CPASA then goes back-and-forth, in other places characterizing the "interpretation" of OWRB on natural flow as OWRB's "determination" of natural flow, as if it were a matter of calculation instead of definition. But the only calculations that OWRB performed were done after it decided to

interpret natural flow as fish habitat preservation, and any "calculations" or "determinations" it made were based on that re-definition of natural flow. Petitioners object to the OWRB's decision to re-define "natural flows" as fish habitat preservation. Once OWRB did that, without rulemaking, any calculations it performed on the basis of that re-definition are beside the point.

No matter the words used, OWRB clearly decided that the rationale in support of its MAY Order would be to equate "natural flow" with fish habitat preservation. The decision by OWRB to base its final order on its "interpretation" of the term natural flow as being equivalent to fish habitat preservation constitutes a rule without rulemaking under the APA.

Finally, CPASA claims that the interpretation of OWRB of the term "natural flow" as being equivalent to fish habitat preservation is not a rule because it was imbedded in the OWRB's final order in this case, making it an "order" and not a "rule". There is nothing in the APA that allows an agency to adopt a rule interpreting a statute of general applicability, as the Court in *Jacobs Ranch* decided this is, and then cover its failure to follow rulemaking procedures by imbedding the rule in an agency order.

C. The interpretation of the definition of "natural flow" was of future effect

The record reflects that prior to holding the individual proceeding to determine the fate of the owners of the groundwater in the Arbuckle Simpson Aquifer, the OWRB convened a group led by OWRB staff to define the term "natural flow of water from springs or streams emanating from said basin" found in 82 Okla. Stat. § 1020.9.B. Next, the OWRB-led group selected a definition of "natural flow" based solely upon its estimation of what stream flow would suffice to protect the habitat of certain fish species selected by the group. This definition was then intended to form the basis of the computer modeling and then the MAY determination itself. The Board ultimately claimed to have based the MAY on this definition.

At no point in this process did the OWRB adopt the fish-habitat definition of "natural flow" by following the rulemaking provisions of the Oklahoma Administrative Procedures Act.

Now CPASA asserts that its fish-habitat definition of "natural flow" is not a rule as meant by the APA, because according to OWRB it was not of "future effect" but was contemporaneous with either the passage of the underlying legislation or the issuance of the final order. A cursory reading of the statute, which does not contain the word "fish", and of the testimony of the OWRB staff member that claimed the fish habitat committee reflects that neither is the case. The rule was adopted by OWRB and later it was relied upon to justify the MAY. The OWRB "fish habitat preservation" definition of the statutory term "natural flow" was created by the OWRB and supposedly used to establish the MAY; therefore when it was adopted it was of "future effect" and is a rule of the agency as defined in the APA which applies to all sole source aquifers currently existing or subsequently created.

D. The rule was of general applicability

CPASA claims at page 29 of its brief that the OWRB interpretation of the term "natural flows" is not a rule because it is not of general applicability. It states this is so because the Arbuckle Simpson Aquifer's "unique hydrogeologic characteristics" and "unique flow relationship" make it "unlikely the OWRB could apply its interpretation of natural flow to any other groundwater basin." There is nothing in the record to establish such a claim. Once again CPASA attempts to confuse the definitional decision of OWRB with its subsequent use in calculating stream flows for fish habitat. Further, and decisively, the holding in *Jacobs Ranch L.L.C.* quoted below makes it clear that application of a law to a particular aquifer is not relevant to the issue of its general applicability.

CPASA asserts that the fish-habitat preservation definition of "natural flow" is not of general applicability because it only applies to the Arbuckle Simpson and is "unlikely" to ever be

applied anywhere else. This view directly contradicts the ruling of the Oklahoma Supreme Court in *Jacobs Ranch L.L.C. v. Smith*, 2006 OK 34. The argument in SB 288 was that it constituted an unconstitutional special law. However, the Court ruled it is not:

> In order for a law to be general in its nature and to have a uniform operation, it is not necessary that it shall operate upon every person and every locality in the state. A law may be general and have a local application or apply to a designated class if it operates equally upon all the subjects within the class for which it was adopted.... the court must determine if the legislative classification rests upon a reasonable difference that bears a rational relation to the purposes and goals of the legislation.... In summary, the challenged sensitive sole source groundwater basin legislation is a law of a general nature. The legislative classification of "sensitive sole source groundwater basins" is reasonable and rationally related to the purpose of the legislation. *Jacobs Ranch L.L.C. v. OWRB*, *ibid.*, ¶¶ 36, 37, 46.

If the challenged provision fails the reasonable and rational test, the Court stated that it would be arbitrary and could not stand on that ground. *Ibid.*, ¶ 37. Thus the Court ruled that the statutory scheme containing the term "natural flow" is a law of general applicability. As such, when the OWRB adopted the "fish habitat" definition of "natural flow", it was applying a law of generally applicability into a definition that requires the rulemaking process of the APA in order to be valid.

The OWRB argues that if the Legislature had wanted to change all this it could have done so in the legislative sessions that have occurred since the "fish habitat" definition was adopted by the OWRB. Nothing in Oklahoma jurisprudence establishes that the passage of time makes an illegal rule to be legal if it was not adopted under the APA. The legislature requires regulations to be adopted under APA procedures in part so that it, the lawmakers, and the Governor, will have formal notice of the new rule and an opportunity to approve it or turn it down. 75 O.S. §§ 252, 255, 303, 303.1, 308, 308.1, 308.3. It should surprise the legislature and the court to know that a state agency feels it can adopt a rule without notice to the legislature as that body has

prescribed in law, and to further assert that, with the passage of the next session, the rule somehow nevertheless becomes lawful.

The OWRB "fish habitat preservation" definition of the statutory term "natural flow" is of general applicability and future effect, and thus it is a rule adopted by OWRB without following the APA rulemaking processes. As such, it cannot support the MAY determination. 75 O.S. § 308.2.

IV. THE HEARING EXAMINER VIOLATED THE SUPREME COURT'S MANDATE

In their responses, the OWRB and CPASA chose to ignore the fact that the Oklahoma Supreme Court specifically held that the secret USGS memorandum constituted new "testimony". CPASA argues that it is not new evidence, but its opinion obviously cannot override the Supreme Court's ruling.

Because the USGS memorandum was new evidence, it was understood that the responses of the parties which the Supreme Court ordered the Hearing Examiner to receive could include new evidence. CPASA submitted new evidence with its submission. It tries to justify this by the odd argument that its submission constituted an exception to the hearsay rule. CPASA Response Brief, p. 31. Of course, the entire USGS memorandum constituted hearsay because it was an out of court declaration, and yet the Supreme Court ordered that it be received into the record to attempt to cure the appearance of bias resulting from its secretive receipt. Most of Petitioners' response which the Hearing Examiner struck is not hearsay at all and, to the extent it contained any hearsay, it too was admissible under the exception that experts may rely upon hearsay in formulating their opinions. 12 O.S. § 2703; *Brown v. USA Truck, Inc.*, 2013 WL 646828, *3 (W.D. Okla. 2013) (applying the federal counterpart Rule 703 upon which § 2703 is based). Hearsay has nothing to do with the Supreme Court's writ of mandamus.

Both the OWRB and CPASA now argue that Petitioners should have filed a motion to strike the new evidence contained in CPASA's response to the USGS memorandum and that, therefore, any error created by the Hearing Examiner receiving CPASA's new evidence but striking Petitioners' evidence is Petitioners' own fault. Because the Oklahoma Supreme Court's writ of mandamus contemplated and authorized the submission of new responsive evidence, there was no basis for Petitioners to move to strike CPASA's new evidence, just as there was no basis for the Hearing Examiner to strike Petitioners' evidence. In their response to CPASA's motion to strike, Petitioners pointed out to the Hearing Examiner that CPASA, like Petitioners, had submitted new evidence in response to the USGS memorandum because everyone understood that this was permitted under the writ of mandamus. Tab 163, Bates Nos. 2520-2521. And yet the Hearing Examiner knowingly received CPASA's new evidence but struck Petitioners' evidence.

The OWRB attempts to conflate Petitioners' motion to strike with CPASA's motion to strike, arguing that Petitioners' motion to strike gave the Hearing Examiner "little choice" but to grant CPASA's motion. OWRB Response Brief, p. 25. In fact, there is no correlation between the two motions.

Immediately after the MAY hearings, all parties submitted their post-hearing briefs. In its post-hearing brief filed on 06/14/2012, CPASA included materials and extensive quotes from testimony in *other proceedings* which were not part of the MAY record. Tab 131, Bates Nos. 2000-2002. Because of this, Petitioner immediately filed a motion to strike same. Tab 140. This evidence and motion had nothing to do with the secret USGS memorandum as its existence was not discovered until months later after the Open Records Act request was made. Rather than timely ruling on this motion, the Hearing Examiner ignored it for sixteen months.

CPASA's motion to strike related strictly to the Oklahoma Supreme Court's writ of mandamus and its attempt to cure the appearance of bias created by the Hearing Examiner's receipt of the secret USGS memorandum. Again, because the Supreme Court held that the USGS memorandum constituted new testimony, it contemplated that the responses thereto could include new evidence. The Hearing Examiner's striking of Petitioners' evidence submitted pursuant to the Supreme Court's writ must be judged solely by whether it complied with the Supreme Court's mandate. The review of same has nothing to do with the Hearing Examiner's rulings on Petitioners' completely unrelated motion to strike regarding CPASA's post-hearing brief.

After the Supreme Court's writ and the Hearing Examiner's order that responses to the USGS memorandum be submitted, and realizing that the Hearing Examiner would soon issue her proposed MAY Order, Petitioners reminded the Hearing Examiner that she had never ruled upon Petitioners' unrelated motion to strike. Tab 158, Bates Nos. 2378-2379. However, the Hearing Examiner's subsequent ruling on Petitioners' motion to strike had nothing to do with the USGS memorandum and Petitioners' entitlement to respond thereto and, therefore, such ruling provides no justification whatsoever for the Hearing Examiner's improper striking of Petitioners' evidentiary submission in violation of the Supreme Court's writ of mandamus.

V. CPASA'S STANDING ARGUMENT DOESN'T HAVE A LEG TO STAND ON

For the first time on appeal, CPASA raises the question of Petitioners' standing. The right to participate in Maximum Annual Yield proceedings is broadly defined. 82 O.S. § 1020.6 provides that "any interested party shall have the right to present evidence in support or opposition" thereto. *See also*, OAC 785:30-9-3(f). In *Jacobs Ranch L.L.C. v. Smith*, 2006 OK 34, 148 P.3d 842, 855, in reviewing Senate Bill 288, the Oklahoma Supreme Court held:

> We have already determined that the challenged legislation (SB 288) relates to a subject of common interest throughout the state and that it regulates the state's water resources through the exercise of the state's police powers for the health, welfare and safety of the public. Clearly, the regulation of groundwater resources for the benefit of the public is a *statewide concern*.
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> ***
>
> The Oklahoma Legislature has the...responsibility to allocate this precious natural resource for the benefit of the *whole state*. The State's water resources is a subject over which the Oklahoma Legislature must...act with prudence for the benefit of *all the citizens of 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*. *Id.* at 857 (emphasis added).

In the context of Maximum Annual Yield proceedings, and particularly those subject to Senate Bill 288, the question of "interest" in the proceeding is broadly defined because of the public interest that is involved. The MAY determination for the ASA raises statewide public issues because, *inter alia*, it will determine whether there is sufficient ASA groundwater for out of basin sales to municipalities and other persons or entities who may desire to purchase same, which is what gave rise to SB 288 in the first place. Because it is a matter of statewide concern, "interest" is not limited to any particular locality.

In its post-hearing brief filed below, CPASA expressly recognized the interests of Petitioners as public advocacy organizations with direct interests in this matter. For example, CPASA acknowledged that Petitioner Environmental Federal of Oklahoma ("EFO") "is a non-profit organization providing Oklahoma companies a voice in the formulation and implementation of state and federal environmental laws, regulations and policies" and that EFO "was one of the key players attempting to transfer approximately 80,000 acre-feet of water from the Arbuckle-Simpson Aquifer to out-of-basin municipalities". Tab 131, Bates No. 1989, fn 3.

With respect to Petitioner Oklahoma Aggregate Association ("OKAA"), CPASA admitted below that, "OKAA began in 2000 when various aggregate companies operating in

Oklahoma decided to band together to, among other things, 'promote the best interests of its members in matters where member interests are common'", and that "mines over the Arbuckle-Simpson Aquifer shows it (OKAA) pumps approximately 1,000 acre-feet of water out of its pits each year". *Id.*, fn 1. Elsewhere in the record specific mines overlying the ASA were identified. Tab 94, Bates Nos. 1746-1747. Elsewhere in the record the issue of the need for mining companies to pump ASA "pit water" out of mines was discussed. Tab 92, Bates Nos. 1740-1741; Tab 94, Bates No. 1748.

CPASA similarly recognized below that Petitioner "Oklahoma Farm Bureau Legal Foundation (OFBLF) was created in 2001 by the Oklahoma Farm Bureau Board of Directors for the purpose of entering the legal arena to protect private property rights and production agriculture". Tab 131, Bates No. 1989, fn 3. Elsewhere in the record the Oklahoma Farm Bureau demonstrated that its voting members include 3,770 farmers in the six counties covered by the MAY Order and how the MAY, if adopted, will adversely affect their interests. Tab 98, Bates Nos. 1775-1778. Elsewhere in the record an individual acknowledged that he is a member of the Farm Bureau and uses water from the ASA. Tab 107, Bates No. 1828. Like its statewide counterpart, Petitioner Pontotoc County Farm Bureau advocates on behalf of its member farmers and ranchers located in Pontotoc County which is underlain by the ASA, and CPASA does not challenge its standing.

CPASA recognized below that Petitioner "Oklahoma Independent Petroleum Association was created to give the state's independent oil and gas producers a unified voice...Today, the OIPA is made up of more than 2,000 members in the crude oil and natural gas exploration/production industry and affiliated businesses. It is the state's largest oil and gas advocacy group". Tab 131, Bates No. 1990, fn 4. With the South Central Oklahoma Oil Play

("SCOOP") in Garvin County and the Woodford Shale Play in Coal County, both ASA counties, the Court can take judicial notice that use of ASA water in those counties is of interest to the oil and gas industry sufficient to justify its advocacy group presenting the industry's position on this issue of statewide concern.

CPASA recognized below that Petitioner Arbuckle-Simpson Protection Federation of Oklahoma, Inc. ("Federation") is comprised of the same ASA landowners who attempted to sell ASA water to out-of-basin municipalities and who made certain challenges to SB 288 in *Jacobs Ranch, L.L.C. v. Smith*, 2006 OK 34, 148 P.3d 842. Tab 131, Bates Nos. 1990-1991, fn 6. Moreover, the Federation was the party in whose favor the Oklahoma Supreme Court granted the writ of mandamus in this very proceeding.

In its response brief in this appeal, CPASA acknowledges that Oklahoma Cattlemen's Association has at least one member with direct interests in the ASA. CPASA Response Brief, p. 9, fn 7.

Here, Petitioners, as interested parties, presented evidence in opposition to the proposed MAY on this matter of public concern, as they were unquestionably entitled to do. When the OWRB ruled against Petitioners' position, they became "aggrieved" parties as referenced in 75 O.S. § 318, whose substantial rights as interested parties were prejudiced.

In light of the foregoing admissions by CPASA below, Petitioners challenge CPASA's good faith basis to question standing at this juncture.[4] Protestants submit that their interests in this matter of public interest provide ample standing. Moreover, because CPASA does not

[4] Petitioners acknowledge that the Hearing Examiner struck the footnotes in CPASA's post-hearing brief which contain some of the above-described admissions by CPASA. Petitioners cite same only to demonstrate that CPASA *knows* Petitioners have standing, that if this issue is remanded to the OWRB for an evidentiary hearing on standing that Petitioners will easily prove same, and that, therefore, CPASA's standing challenge is spurious.

challenge the standing of all Petitioners, it is ultimately a moot point. However, if the Court believes that a further evidentiary showing of standing is necessary, because this is a fact-based issue raised for the first time on appeal, Petitioners are entitled to an evidentiary hearing and the Court must remand the action back to the OWRB to conduct same. *Combs v. U.S.*, 408 U.S. 224, 227-228 (1972) (must remand to lower court for evidentiary hearing where standing first raised on appeal); *Murphy v. State*, 32 So.3d 122, 125 (Fla. Ct. App. 2009); *Field Club Home Owners League v. Zoning Board of Appeals of Omaha*, 814 N.W.2d 102 (Neb. 2012) (appellate court must remand to lower court for such evidentiary hearing).

VI. THE OWRB PROVIDES NO ADEQUATE JUSTIFICATION FOR MAKING UP A NEW DEFINITION OF NATURAL FLOW OUT OF WHOLE CLOTH

In its response the OWRB attempts to justify its making up its own definition of "natural flow" based on fish habitat by claiming that there is no definition of such term in SB 288. OWRB Response Brief, p. 6. Of course there is the plain and ordinary meaning of such term which is the normal rule of statutory construction, but the OWRB rejected such definition. Tab 170, Bates No. 2614, ¶ 11.

More importantly, however, the phrase has a longstanding definition provided by the Oklahoma Supreme Court in *Franco-American Charolaise, Ltd. v. OWRB*, 1990 OK 44, 855 P.2d 568. In *Franco*, the Court was required to determine what the term "natural flow" means in the context of 60 O.S. § 60 which allows the use of stream water so long as it does not "prevent the natural flow" thereof. Notably, the Court did not hold that the term has anything to do with fish habitat. Instead it held that the use of stream water by upstream riparians and appropriators is allowed and that the withdrawal of such water does not "prevent the natural flow" so long as it does not interfere with the reasonable uses of downstream riparian owners.

At the MAY Hearing, the OWRB was unable to explain why it had not used this long established definition of natural flow, which actually looks at the volume of water that can be withdrawn without preventing natural flow, instead of making up an entirely new definition out of whole cloth. Tab 101, Bates No. 1810, Vol. 1 48:16 - 52:12.

VII. *JACOB'S RANCH* COULD NOT DETERMINE WHETHER THE ORDER EFFECTED AN UNCONSTITUTIONAL TAKING, BECAUSE IT CONSIDERED A FACIAL CHALLENGE TO S.B. 288 MORE THAN SIX YEARS BEFORE THE ORDER WAS EVEN ISSUED

The Board and CPASA assert that the Oklahoma Supreme Court's opinion in *Jacobs Ranch, L.L.C. v. Smith*, preemptively blessed the Board's order more than six years before it was even issued. 2006 OK 34, 148 P.3d 842, (Nov. 6, 2006). However, nothing in the opinion upholding SB 288 against a facial challenge excuses the Order from constitutional requirements.

Jacob's Ranch first held that SB 288 did not effect a taking by imposing a moratorium to preserve the status quo. *Id.* at ¶ 53, 148 P.3d at 856. This holding has no implications for the Order appealed here, because it was expressly based on the temporary nature of the moratorium:

> We view this moratorium on temporary permits as a temporary restriction, at most, on the plaintiffs'/appellants' use of their water.

Id. By contrast, the Order perpetually prohibits landowners from making any use of nearly 90% of the groundwater they own under Oklahoma law.

Jacob's Ranch also held that SB 288 did not effect a taking by requiring the Board to determine that the groundwater use proposed by an applicant for an individual permit is not likely to degrade or interfere with springs or streams. This holding also has no implications for the order appealed here, because it relates to a procedural requirement for individual permit applications. In fact, the Order itself explicitly calls for entirely separate rulemaking proceedings to implement this provision of SB 288 because it pertains to site-specific determinations about individual permits. Tab 18, Bates Nos. 2615–16, ¶¶ 17 and 18. Moreover, the finding required

by this provision is not concerned with the amount of groundwater that may be withdrawn but with the use to which withdrawn groundwater may be put:

> The Board shall determine...whether...the use to which the applicant intends to put the water is a beneficial use...and the proposed use is likely to degrade or interfere with springs or streams

Tab 35, Bates Nos. 941–942. By contrast, the Order categorically limits the maximum amount of groundwater that a landowner may withdraw regardless of the owner's proposed use and even if that proposed use will not degrade or interfere with any springs or streams at all.

In short, respondents' reliance on *Jacob's Ranch* is misplaced because the issues presented on that facial challenge to SB 288 are not the same as those presented by the Order.

A. Unlike any prior MAY determination, the Order categorically prohibits any use of 90% of available groundwater to provide fish habitat in public streams

The Board and CPASA rely on *Kline v. OWRB* to assert that no MAY determination can constitute a taking of property. 1988 OK 18, 759 P.2d 210. However, the MAY determination in *Kline* determined the total amount of groundwater available and allocated it proportionately to all the overlying landowners. In other words, the determination in *Kline* "limited" each landowner's proportionate share of groundwater only to protect the proportionate shares of all other owners. It authorized the use of *all of the groundwater in the basin by its respective owner.* Here, the Order determined that there is 14,645,760 AF available, but only authorizes the use of 1,568,080 AF. Tab 170, Bates No. 2605, ¶¶ 22–24. More than 13,000,000 AF of privately owned groundwater is condemned in perpetuity with no potential use by anyone.[5] Moreover,

[5] Petitioners' make no argument that the temporary equal proportionate share of 2 acre feet is a vested right. Rather, the vested right is the recognized ownership of groundwater. The MAY determination quantifies the amount of groundwater each landowner owns, here 1.8 AF per surface acre.

such restriction is not imposed to protect the reciprocal rights of others, but to provide fish habitat for the State.

B. Respondents' efforts to distinguish other highly instructive cases are unavailing

CPASA tries to distinguish *Franco-Am. Charolaise, Ltd. v. OWRB*, 1990 OK 44, 855 P.2d 568, by erroneously asserting that the statute extinguished *all* riparian rights since even non-riparians are entitled to domestic use. In fact, as the very statute they cite provides, domestic use is guaranteed for riparians only:

> Any person has the right to take water for domestic use *from a stream to which he is riparian* or to take stream water for domestic use *from wells on his premises.*

82 O.S. § 105.2 (emphasis added). The Board tries to distinguish *Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276 (Fed. Cir. 2008), by relying on the court's rejection of the government's argument that it merely required water to be left in the river. In *Casitas*, the district only had an interest in water that had been diverted from the river. *Id.* at 1281. Here, however, groundwater is owned in place. 60 O.S. § 60.

CONCLUSION

By their responses, neither the OWRB nor CPASA has presented any arguments or authorities which counter Petitioners' demonstration that the MAY Order must be reversed and remanded.

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I hereby certify that on this 25th day of August, 2015, a true and correct copy of the above and foregoing was mailed, by depositing it in the U.S. Mail, postage prepaid to:

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