

OKLAHOMA WATER RESOURCES BOARD
OFFICIAL MINUTES
December 18, 2012

1. Call to Order

The regular monthly meeting of the Oklahoma Water Resources Board was called to order by Chairman F. Ford Drummond at 9:30 a.m., on December 18, 2012, in the Second Floor Board Room of the Oklahoma Water Resources Board Offices, located at 3800 N. Classen Boulevard, Oklahoma City, Oklahoma.

The meeting was conducted pursuant to the Oklahoma Open Meeting Law with due and proper notice provided pursuant to Sections 303 and 311 thereof. The agenda was posted on December 11, 2012, at 4:00 p.m., at the Oklahoma Water Resources Board's offices.

A. Roll Call

Board Members Present

Ford Drummond, Chairman
Linda Lambert, Vice Chairman
Tom Buchanan, Secretary
Bob Drake
Marilyn Feaver
Ed Fite
Rudy Herrmann
Richard Sevenoaks

Board Members Absent

Jason Hitch

Staff Members Present

J.D. Strong, Executive Director
Dean Couch, General Counsel
Joe Freeman, Chief, Financial Assistance Division
Julie Cunningham, Chief, Planning and Management Division
Derek Smithee, Chief, Water Quality Programs Division
Amanda Storck, Chief, Administrative Services Division
Mary Schooley, Executive Secretary
Josh McClintock, Director of External Affairs

Others Present

Jared Davidson, Public Finance Law Group, Oklahoma City, OK
Brian Woodward, Oklahoma Independent Petroleum Association, Oklahoma City, OK
Mark Walker, Movant and Protestants in MAY Proceeding, Oklahoma City, OK
Scott A. Butcher, Movant and Protestants in MAY Proceeding, Oklahoma City, OK
Jim Barnett, Doerner Sanders Daniels Anderson, Oklahoma City, OK
Luke Martin, Capitol Group, Oklahoma City, OK
Chris Phillips, Chickasaw Nation, Ada, OK
Marla Peek, Oklahoma Farm Bureau, Oklahoma City, OK
Mike Langston, Oklahoma Water Center, Stillwater, OK
Alan Woodcock, National Park Service and Fish & Wildlife Service, Tulsa, OK
Amy Ford, Citizens for the Protection of the Arbuckle Simpson Aquifer, Durant, OK
Krystina Phillips, Citizens for the Protection of the Arbuckle Simpson Aquifer,
Mike Wofford, OKAA/TXI, Oklahoma City, OK
Mike Mathis, Chesapeake Energy, Oklahoma City, OK
Tyler Powell, Office of the Secretary of Environment, Oklahoma City, OK
Carly Schnaithman, Office of the Secretary of Environment, Oklahoma City, OK
Jim Rodriguez, Oklahoma Aggregates Association, Oklahoma City, OK
Tom Liu, Bank of American Merrill Lynch, New York, NY
Charlie Swinton, BancFirst, Oklahoma City, OK

B. APPROVAL OF MINUTES

Chairman Drummond said the draft minutes of the November 14, 2012, Regular Meeting had been distributed, and he asked if there were corrections to the minutes. There were none, and he stated he would entertain a motion to approve the minutes.

Mr. Buchanan moved to approve the minutes of the November 14, 2012 meeting, and Mr. Herrmann seconded.

AYE: Herrmann, Fite, Feaver, Sevenoaks, Drake, Buchanan, Drummond
NAY: None
ABSTAIN: Lambert
ABSENT: Hitch

C. EXECUTIVE DIRECTOR’S REPORT

Mr. Strong began his report expressing holiday greetings. Mr. McClintock was absent and Mr. Strong reviewed the distributed legislative report that had been prepared. He said that report contained the legislative deadlines for the 54th Legislature, First Regular Session, which he reviewed. The members will gather on January 8 for organizational purposes, the deadline for introduction of measures is January 17, and the session will begin on Monday, February 4. Several water bills have been filed with a few regarding representation on the Board from Southeast Oklahoma. He reviewed the Senate and House Leadership, and also noted the various Senate Committees (largely the same as the previous year), stating the Appropriations Subcommittee on Natural Resources in the Senate will hear the OWRB appropriations and other

measures will be heard in the Energy Committee. He noted there is a new House Speaker, T.W. Shannon of Lawton, and the House has a large number of committees, 35, nearly double the number of the previous year. The Utility and Environmental Regulation Committee will hear non-appropriative bills, and the Natural Resources and Regulatory Services Subcommittee will hear the agency's appropriation bill. Mr. Strong reviewed the federal activity portion of the report, noting the committees pertinent to water resources. Chairman Drummond asked about the US COE meetings on Lake Eufaula; Mr. Strong said the COE, as part of the NEPA Act, has to conduct an environmental review as part of its shoreline development plan, and prior to making any changes to its operating plan. Staff will attend the meetings and be involved as necessary.

Mr. Strong continued his report on recent meetings saying that mediation is continuing with the Choctaw/Chickasaw lawsuit and there will be time later in the agenda under executive session for an update by the Attorney General's office. He had attended the Western States Water Council infrastructure symposium in Phoenix following the November board meeting; spoke to Leadership Oklahoma at Ada (12/1); met with the American Farmers and Ranchers Policy Committee (12/6); spoke to the Weatherford Rotary (12/12); met with the Water Resources Research Grant committee (12/12); and met with the Environmental Federal of Oklahoma Board (12/13). He concluded his report saying the Board's Finance Committee met Monday afternoon, and the next Board meeting will be January 15, 2013 at 9:30. He anticipated that meeting will also be the rulemaking hearing—there are rules for every division—and could also be the meeting when the Board takes up the final order of the Maximum Annual Yield of the Arbuckle Simpson Aquifer; it could be a long Board meeting with both those items. Mr. Strong announced that General Counsel Dean Couch has announced his upcoming retirement, either the end of December or soon thereafter.

Mr. Buchanan was complimentary of the roundtable panels at the Governor's Water Conference.

D. Monthly Budget Report

Ms. Amanda Storck addressed the members and referred to the distributed budget report through the month of November 2012. She said there is 75% of the agency funding available and 58% of the fiscal year remaining. Ms. Storck concluded her report.

Questions by the Board members included whether the agency has received Gross Productions Tax funds, "payments to local governments" (indirect costs) which is OSF terminology, and what is included in the category "administrative expense."

2. FINANCIAL ASSISTANCE DIVISION

A. Consideration of and Possible Action on a Proposed Order Approving Increase in Obligation of Clean Water Funds for Vian Public Works Authority, Sequoyah County. Recommended for Approval. Mr. Joe Freeman, Chief, Financial Assistance Division, stated to the members this item is for the consideration of a request for an \$100,000.00 increase in approved Clean Water SRF loan funds by the Vian Public Works Authority. At the February 13 Board meeting, the Board approved a \$1,555,000.00 loan for construction of an approximately 850,000 gallon primary wastewater basin, approximately 2.5 million gallon secondary

wastewater basin, construct a lift station, and install a flow meter. The original cost estimate was developed in May 2011 and subsequently DEQ required additional project features that were not taken into account by the local engineer before the project went out for bid. As a result, bids came in higher than the May 2011 cost estimate. In order to be able to build the project, Vian will be going from a synthetic liner to a clay liner, modifying a ramp and requesting the \$100,000.00 increase in loan funds. All other terms of the loan remain the same as approved by the Board in February. With the increase, the debt-coverage ratio stands at approximately 1.3-times. Staff recommended approval of the increase in obligation of funds.

Mr. Dennis Fletcher, Town Trustee and Mr. Gene Grinstead, Town Administrator, were present in support of the request for increase obligation of funds.

Mr. Fite moved to approve the request for increase of funds to the Vian Public Works Authority, and Ms. Lambert seconded.

AYE: Herrmann, Fite, Feaver, Sevenoaks, Drake, Lambert, Buchanan,
Drummond

NAY: None

ABSTAIN: None

ABSENT: Hitch

3. SUMMARY DISPOSITION AGENDA ITEMS

Any item listed under this Summary Disposition Agenda may, at the requested of any member of the Board, the Board's staff, or any other person attending this meeting, may be transferred to the Special Consideration Agenda. Under the Special Consideration Agenda, separate discussion and vote or other action may be taken on any items already listed under that agenda or items transferred to that agenda from this Summary Disposition Agenda.

A. Requests to Transfer Items from Summary Disposition Agenda to the Special Consideration Agenda, and Action on Whether to Transfer Such Items.

There were no requests to transfer items from the Summary Disposition Agenda to the Special Consideration Agenda.

B. Discussion, Questions, and Responses Pertaining to Any Items Remaining on Summary Disposition Agenda and Action on Items and Approval of Items listed.

Chairman Drummond asked if there were changes to the Summary Disposition Agenda items. Ms. Julie Cunningham stated that item 3.D.3., regarding an agreement with AMEC, is being replaced with Supplemental Agenda item 6.A.1.

Chairman Drummond suggested the Board consider the Summary Disposition agenda items and substitute the Supplemental agenda at the same time. Mr. Strong added that Supplemental item 6.A.2. should be withdrawn from the Board's consideration.

Ms. Lambert moved to approve the Summary Disposition items and Supplemental Agenda item 6.A.1., and Mr. Drake seconded.

AYE: Herrmann, Fite, Feaver, Sevenoaks, Drake, Lambert, Buchanan,
Drummond

NAY: None

ABSTAIN: None

ABSENT: Hitch

The following items were approved:

C. Financial Assistance Division Items:

1. Rural Economic Action Plan (REAP) Grant Applications:

<u>Item No.</u>	<u>Application No.</u>	<u>Entity Name</u>	<u>County</u>	<u>Amount Recommended</u>
None				

D. Consideration of and Possible Action on Contracts and Agreements, Recommended for Approval:

1. Professional Services Contract with HISINC, LLC to perform assignments which assist the Board in implementing the Board's NFIP and other floodplain management responsibilities.
2. *Memorandum of Agreement with the Bureau of Reclamation for Upper Washita Basin Study. Item withdrawn*
3. *Extension and Amendment Agreement with AMEC Environmental & Infrastructure, Inc. for additional time and compensation relating to Phase 2 of development of water allocation model for Verdigris River Stream System.
Item withdrawn/substituted by 6.A.1.*

E. Applications for Temporary Permits to Use Groundwater:

1. Applewood MHP, L.L.C., Oklahoma County, #2011-590
2. Tracy Lee Willis, Caddo County, #2012-631
3. Tracy Lee Willis, Caddo County, #2012-632
4. Alvin Wayne & Rita Lois Hawkins, Washita County, #2012-634
5. Mark & Sallie Lamb, Grant County, #2012-649
6. Don A. & Martha A. Lyon, Payne County, #2012-650
7. The Don Fox & Melba G. Fox Revocable Trust, Harmon County, #2012-655
8. Select Energy Services, Alfalfa County, #2012-659
9. Phillip A. Carol L. Muller, Jackson County, #2012-663
10. Billie D. & Kathryn A. Tate, Caddo County, #2012-668

F. Applications to Amend Temporary Permits to Use Groundwater:

1. Western Farms, Inc., Caddo County, #1975-840
2. Phillip Matt & Kellie D. Muller, Jackson County, #1997-507
3. Stephens County RWD No. 5, Grady County, #1998-593
4. Michael & Julie Terrel, Woods County, #2011-664
5. *City of Medford, Grant County, #1977-778* *Item added*

G. Applications for Regular Permits to Use Groundwater:

1. Buffalo Wallow, L.L.C., Cimarron County, #2012-619
2. Tyler M. & Amanda L. Kamp, Harper County, #2012-629
3. Clinton Laundry & Cleaners, Inc., Custer County, #2012-640

4. Stephens Land & Cattle Company, Inc., Thomas A. Stephens & Phyllis Stephens Trust #1, and Phyllis Stephens, Texas County, #2012-646
5. Calvert C. Martin, Nelson E. Martin, Linda N. Livergood, and Jennie L. Pratt, Blaine County, #2012-651
6. Pony Creek Farms, Inc., Texas County, #2012-654
7. Randy B. & Dominique Lehr, Texas County, #2012-657
8. Schylar L. Fowler & Jo Ann Fowler Living Trust, Texas County, #2012-662

H. Applications to Amend Regular Permits to Use Groundwater:

1. Tyler M. & Amanda L. Kamp, Beaver County, #1976-515
2. Pony Creek Farms, Inc., Texas County, #1978-646

I. Applications to Amend Prior Rights to Use Groundwater:

1. Phillip A. & Carol L. Muller, Jackson County, #1954-138
2. Phillip A. & Carol L. Muller, Jackson County, #1956-443

J. Applications for Regular Permits to Use Stream Water:

1. Metsudah, L.L.C., Sequoyah County, #2012-044
2. Tommy Fain, Adair County, #2012-053
3. Edwin & Tuesday Evers, Washington County, #2012-055
4. Chase Burns, Caddo County, #2012-058
5. Dell Bennett, Washington County, #2012-059
6. Tanner Ranch, Rogers County, #2012-060

K. Well Driller and Pump Installer Licensing:

1. New Licenses, Accompanying Operator Certificates and Activities:
 - a. Licensee: ADCO, Inc. dba Artesian Water Well Drilling DPC-0884
 1. Operator: Ronald N. Adney OP-1941
 - Activities: Groundwater wells, groundwater test holes and observation wells
Pump installation
 - b. Licensee: Scruggs Inc. DPC-0886
 1. Operator: Jeremy D. McBride OP-1942
 - Activities: Groundwater wells, groundwater test holes and observation wells
Pump installation
 2. Operator: John P. Wagstaff OP-1943
 - Activities: Groundwater wells, groundwater test holes and observation wells
Pump installation
 - c. Licensee: Hamilton Investment Group DPC-0888
 - Operator: Tracey A. Knight OP-1945
 - Activities: Groundwater wells, groundwater test holes and observation wells
Pump installation
2. New Operators, Licensee Name Change, and/or Activities for Existing Licenses:
 - a. Licensee: Able Environmental Drilling, LLC DPC-0746
 1. Operator: Raynaldo H. Soto OP-1948
 - Activities: Groundwater wells, groundwater test holes and observation wells
 2. Operator: Chad Vaughan OP-1949

- Activities: Groundwater wells, groundwater test holes and observation wells
Monitoring wells and geotechnical borings
- b. Licensee: Layne Christenson DPC-0123
- 1. Operator: Douglas Assenmacher OP-1937
Activities: Pump installation
- 2. Operator: Nathan Davis OP-1947
Activities: Groundwater wells, groundwater test holes and observation wells
Heat exchange wells
- 3. Operator: Leonard Billings OP-1946
Activities: Pump installation
- c. Licensee: Associated Environmental Industries, Corp. DPC-0269
- 1. Operator: Joseph N. Datin OP-1747
Activities: Groundwater wells, groundwater test holes and observation wells
Monitoring wells and geotechnical borings
Pump installation

L. Dam and Reservoir Construction:

None

M. Permit Applications for Proposed Development on State Owned or Operated Property within Floodplain Areas:

1. Oklahoma Department of Transportation, Sequoyah County, #FP-12-19
2. Oklahoma Department of Transportation, Craig County, #FP-12-20
3. Oklahoma Department of Transportation, Bryan County, #FP-12-23
4. Oklahoma Department of Transportation, Craig County, #FP-12-24
5. Oklahoma Department of Transportation, Payne County, #FP-12-25
6. Oklahoma Department of Transportation, Harmon County, #FP-12-26
7. Oklahoma Department of Transportation, Woodward County, #FP-12-27
8. Oklahoma Department of Transportation, Jackson County, #FP-12-28
9. Oklahoma Department of Transportation, Jackson County, #FP-12-29
10. Oklahoma Department of Transportation, Oklahoma County, #FP-12-30
11. Oklahoma Department of Transportation, Oklahoma County, #FP-12-31
12. Northeastern Oklahoma A & M College, Ottawa County, #FP-12-34

6. Supplemental Agenda

A. Contracts and Agreements Recommended for Approval.

1. Extension and Amendment Agreement with AMEC Environmental & Infrastructure, Inc. for additional time for Phase 1 and Phase 2 of development of water allocation model for Verdigris River Stream System.
2. *Consideration of Addendum to Lease Agreement for 3800 North Classen Boulevard OKC offices to Address Scheduling of Wall Painting and Carpet Replacement and*

Partial Cost of Temporary Modular Panel and Office Equipment Moving for Carpet Installation, Recommended for Approval. Item withdrawn.

4. QUESTIONS AND DISCUSSION ABOUT AGENCY MATTERS AND OTHER ITEMS OF INTEREST.

A. There were no items for the Board's consideration.

5. SPECIAL CONSIDERATION

For INDIVIDUAL PROCEEDINGS, a majority of a quorum of Board members, in a recorded vote, may call for closed deliberations for the purpose of engaging in formal deliberations leading to an intermediate or final decision in an individual proceeding under the legal authority of the Oklahoma Open Meeting Act, 25 O.S. 2001, Section 307 (B)(8) and the Administrative Procedures Act, 75 O.S. 2001, Section 309 and following.

A majority vote of a quorum of Board members present, in a recorded vote, may authorize an executive session for the purposes of CONFIDENTIAL COMMUNICATIONS between the public body and its attorney concerning a pending investigation, claim, or action if the public body, with the advice of its attorney, determines that disclosure will seriously impair the ability of the public body to process the claim or conduct the pending investigation, litigation, or proceeding in the public interest, under the legal authority of the Oklahoma Open Meetings Act, 25 O.S. 2001, Section 307(B)(4).

A. Consideration of and Possible Action on Proposed Order with Findings of Fact and Conclusions of Law recommended for approval in the following matter: Application for Temporary Permit to Use Groundwater No. 2011-541, Don & Bonnie Irons, Kay County, Oklahoma:

1. Summary – Ms. Julie Cunningham, Chief, Planning and Management Division, stated to the members that this item is for the consideration of an application to amend a temporary permit to use groundwater in Kay County. She said the applicant requested a temporary permit to withdraw a total of 1,400 acre-feet per year to operate a center-pivot system to irrigate 794.3 acres to produce various crops. The record showed the applicant has met the requirements of the groundwater law: has a valid right to the dedicated land, the land overlies the Alluvium & Terrace Deposits of the Salt Fork of the Arkansas River (a maximum annual yield study has not been completed therefore each landowner is entitled to two acre-feet of water per acre of land dedicated), irrigation is a beneficial use, and waste will not occur.

Ms. Cunningham stated the application was protested by an adjacent landowner who expressed concern the proposed use of groundwater would detrimentally affect the domestic use of surface water. However, the evidence in the record did not support the claim that interference would occur, and protestant's objections are not supported by the Oklahoma Groundwater Law which provides an analysis of what impact the withdrawal may cause to the stream water is only relevant to basins designated "sensitive sole source." The Arbuckle Simpson is the only sole source aquifer in Oklahoma.

Therefore, Ms. Cunningham stated, staff determined the applicant has met the four points of law, the applicant is entitled to its equal proportionate share of groundwater. Staff recommended approval of the proposed findings of fact, conclusions of law and Board order.

2. Discussion and presentations by parties – Mr. Jim Barnett, representing the applicant, was in attendance. Mr. Barnett said the Town of Marland was originally another protestant. He said the applicant applied for a less amount of water than entitled to and that resolved their concern. The testimony of their expert witness, Mr. Blaine Reeley, that the permit would not affect the spring-fed pond as the inflow to that pond is actually from a different area. Mr. Barnett said they found the order to be appropriate, and supported the Board’s approval.

There were no representatives of the protestant in attendance at the meeting.

There were no questions by the Board members.

3. Possible Executive Session; and

4. Return to open meeting and possible vote or action on any matter discussed in the Executive Session, if authorized. The Board did not vote to enter executive session.

5. Vote on whether to approve the Proposed Order as presented or as may be amended, or vote on any other action or decision relating to the Proposed Order.

Mr. Fite moved to approve the application to amend temporary permit to use groundwater, #2011-541, and Mr. Sevenoaks seconded.

AYE: Herrmann, Fite, Feaver, Sevenoaks, Drake, Lambert, Buchanan,
Drummond

NAY: None

ABSTAIN: None

ABSENT: Hitch

B. Consideration of and Possible Action on staff’s recommended intermediate order denying “Motion to Recuse/Disqualify Hearing Examiner and to Stay Proceeding” in pending proceeding to determine maximum annual yield for Arbuckle-Simpson Groundwater Basin.

1. Summary – Mr. Jerry Barnett, Staff Attorney for the OWRB, addressed the members and stated this item is for the consideration of a motion that was filed by certain parties participating in the pending proceeding to determine the maximum annual yield for the Arbuckle-Simpson Basin. He said there are several steps that govern this particular type of proceeding including the Groundwater Law (GWL), the Administrative Procedures Act (APA), and rules of the Board. Considering a motion in this proceeding is governed by Article 2 of the APA, basically a quasi-adjudication, where this Board is acting as a court—not acting as a rulemaking body—and as such there are various rules and requirements, both in the GWL and the APA, which must be adhered to. Section 313, Title 75, of the APA which is basically a prohibition on ex parte communication between the decision-makers—Board members—or in the stead of the Board members, a hearing examiner; prohibition on ex parte communication between the decision-maker and the parties in the case. Mr. Barnett said the motion is presented because some of the parties in the proceedings are contending that the communications that have occurred, are occurring, between staff and the hearing examiner, Ms. Emily Mizzell, and that those communications are in violation of the prohibition on ex parte communications.

Mr. Barnett continued that the staff’s position, and the Board’s practice, has been that the staff is not a party in these kinds of proceedings, and he submitted that prohibition is not

applicable to the communication between the staff and the hearing examiner that has occurred so far. He said there is distinction in the statute (1020.6 GWL) in the language between what the Board does, and in this case the Board is to set the tentative determination of the maximum annual yield (MAY) for a groundwater basin, and is to hold a hearing in that basin area and interested parties are mentioned in the statute as having the opportunity to come to that hearing and present evidence in support or opposition to the tentative determination. He said there is also a distinction in the permanent Board rule on presentation of evidence and witness testimony at Board hearings, generally, and there is a distinction between the references to parties and what they can and should do, and Board staff and the role of Board staff in hearings. He explained that Board staff can be called upon by the hearing examiner to participate in the case as appropriate and lend assistance to the hearing examiner as appropriate. There are also a number of other statutes and rules that authorize staff assistance for the hearing examiner and Board members, and communication between the staff and the decision-maker: Section 313(APA) which says, "agency members may communicate with other members of the agency and may have the aid and advice of one or more personal assistants," and Section 310 (APA) states, "and agency may utilize the experience, technical competence, specialized knowledge of the agency in evaluating the evidence." Mr. Barnett submitted that members of the Board have the knowledge and experience each brings to the table in any decision that is brought before the Board members and that experience, technical competence and specialized knowledge also comes from your staff, and it is the Board's longstanding practice to rely on staff for recommendations, and staff gives the Board the benefit of experience and knowledge in making recommendations in assisting the Board in coming to decisions in contested cases. Finally, he said, there is the longstanding practice of the agency and its staff in these proceedings to reach determinations of MAYs. He said he had been working at the Board since the 1980s, and it had been his experience that when conducting the tentative determinations, hearings and final determinations, the staff has assisted the hearing examiner, freely communicates with the hearing examiner and the staff assists the Board in making a recommendation, in evaluating the evidence that is in the record, and in helping the Board come to a final decision on those matters.

In staff's view, Mr. Barnett stated, the motion is without merit and believes it should be denied. Staff has prepared a recommended order denying the motion, and recommended approval by the Board.

2. Discussion and presentations by parties. Mr. Jerry Barnett said there are attorneys in attendance representing those parties that made the motion, and also one attorney in attendance that is representing parties that have filed a response against the motion. Chairman Drummond instructed that he will allow one person representing the motion to disqualify to speak to the Board for five minutes, and allow one person representing the response to speak to the Board for five minutes, followed by questions by the Board. Chairman Drummond stated the Board had received all the documents that had been presented: motion to disqualify, response to motion to disqualify, and all exhibits.

Mr. Mark Walker, represents some of the protestants that have filed this motion. He said this is a serious matter and serious problem, and he is concerned that if it is not addressed now prior to the annual yield proceeding, as winds its way through the courts, in two years could be back before the Board. He said the problem is caused by the conduct of the hearing examiner, not suggesting any ill motive, but just happened and is impermissible. The MAY hearing was held in May, over two days and everyone had an opportunity to put on witnesses and evidence, supplement that evidence, and created the record on which the Board would make a decision in

this case. He said the record is very important, is what everyone will look at and what the appellate court will look at in determining the adequacy of any decision. He said the Board participated in the hearing, with attorney Jerry Barnett who put on witnesses and was a full participant. Mr. Walker said that it has been learned since that the hearing examiner has had secretive communications with staff and witnesses of staff and other agencies about those witnesses' testimony, about the issues in the case, and about the issues the protestants raised in the brief filed with the Board, attempting to rebut the arguments made in the brief. He said new evidence was received in these communications that was not presented at the hearing, and he had no opportunity to cross examine and make a record in response, and there is no record before the Board of the nature of these communications. Mr. Walker said this is fundamentally wrong, there cannot be secretive meetings and decisions made upon that without affording the parties their rights in the proceeding. He agreed with Mr. Barnett that the MAY hearing is held pursuant to 82 O.S. 1020.6 and he discussed the instructions regarding individual proceedings under the APA, the proceeding is like a court and the hearing examiner sits as a judge to receive evidence and build a record on which a decision will be made. Secondly, the OWRB must participate in the proceedings and introduce evidence in support of the tentative MAY. He said that the proposed order suggests that Board is not a party to the MAY, but in the APA (75 O.S. 250.3) by definition any person, agency that participates and has the opportunity to hear evidence at a hearing is a party. His argument about whether the Board is a party is because the APA says a hearing examiner shall not communicate directly or indirectly with any person or party regarding an issue of fact, and shall not communicate with any party about an issue of law. He said it is about creating a record that everyone knows what the decision is based upon. He said Mr. Barnett suggested there are exceptions, where the Board may rely upon the expertise of staff and avoid the prohibition, and he mentioned a 1964 law review article that discusses ex parte prohibition that (Sec. 313) the provision precludes secret consultation between the decider and other members of agency staff ...or other outsiders. He contended there cannot be one record the hearing examiner relies on, and one record for others to live with. Regarding the use of the expertise of the Board, he argued that Section 310 regarded the Board taking judicial notice of facts within its expertise but must provide notice to everyone and makes that a part of the record.

Mr. Walker said he is preparing to file a brief today that says agency custom and practice has no deference in regard to the APA and is the law that applies to all agencies and must be interpreted uniformly. He said the problem is these discussions were with witnesses that testified at the hearing and were allowed to supplement their testimony outside the record and he did not have that opportunity. He said he would not have known about the communications but had submitted an Open Records Act request, some of which he has received, but not all. He mentioned there were phone conferences where the testimony was communicated to her, but he didn't know what was said, and she had notes which have been withheld; written communications summarizing what witnesses had said and that has been withheld. He said he does not know what has been said and she will now make a decision on information neither he nor the appellate court will be privy to. Mr. Walker stated the Board can make whatever decision it wants, but it ought not to be on secretive information received, and he asked the Board grant the motion and disqualify the hearing examiner.

Chairman Drummond invited the representatives of the party that filed a response to address the members.

Ms. Krystina Phillips, representing CPASA (Citizens for the Protection of the Arbuckle Simpson) stated to the members that they filed a motion in opposition to the protestants' motion to recuse. She said the argument essentially regards two main points which the law clearly answers: (1) regarding the Board did not participate in the MAY hearing as a party-- O.S. 1020.6 requires the Board to present evidence to support its tentative MAY decision, which it did, and that any interested party can then present evidence in support of or opposition to and the Board did its statutory duty as required and the parties could enter evidence supporting their opinions; and (2) that ex parte communications are prohibited only with the final decision-maker; the hearing examiner is not the final decision-maker, nor is the Board's staff the final decision maker -- as Mr. Walker said, the Board can make whatever decision it chooses—the Board is the final decision-maker. There is not communication between the Board and parties; the hearing examiner simply gives a recommendation to the Board. She said in addition to this ancillary matter, CPASA objects to any supplemental motion by the protestants that may be filed, she would not have time to review and respond, and she asked the Board not to consider.

Chairman Drummond asked if staff have other comments. Mr. Barnett stated he did not; Mr. Strong said legal arguments have been made both ways, and statutes can be interpreted different ways, and it seems cut and dried in this case. As a practical matter, he said he agreed that all parties deserved a fair hearing before this Board in whatever action it may take—whether an individual proceeding, MAY determination, a permit, or rulemaking (which is a different procedure under the APA), and staff goes to great lengths to make sure people get a fair hearing. Mr. Strong said Mr. Walker suggested the Board has the final order, but it does not, but that will be the opportunity to see whether the hearing examiner's decision is based on what's in the record or not in the record. Regardless of whether staff has assisted the hearing examiner, and the statute was read which provides that, the hearing examiner knows she will have to make her decision based on the record that the parties had the opportunity to supplement and review, and this Board as it takes final action should always be cautious that is the case. He said the Board hasn't had that opportunity, that staff does not know what the final order looks like to know whether the recommendation is based on any information extraneous to the record.

Chairman Drummond invited questions by the Board members. Mr. Sevenoaks said he had three questions: (1) does the role of the hearing examiner such that they need to be totally isolated from the Board and staff, i.e., collect information and make a recommendation to the Board; (2) he is concerned about the alleged "secret" conversations; is the hearing examiner allowed to "go outside" the isolated role and get additional information from staff; and (3) what is the Board's relationship with staff, is input from staff allowed?

Mr. Strong responded by saying not to be persuaded by the word "secretive" as if it were a covert operation, staff has stipulated and is presenting today that the fair reading of the law is that the hearing examiner is allowed to communicate with staff and receive technical assistance. Mr. Sevenoaks asked then if the witnesses, not the parties but an expert witness, are allowed to have communication outside the hearing with the hearing examiner. Mr. Couch answered it is just the staff, or those acting as the staff as part of the proceeding of a MAY. He said that here initially a witness was a Board employee but is now employed by the USGS, same person, and as far as a communication to gather technical expertise to evaluate separately the evidence that is already presented. A somewhat subtle distinction, but very real, the evidence is that which will be in the record that this Board must rely on and make its final decision. He interjected, the hearing examiner does not make a decision, or the findings and conclusions, but simply proposes

that which a review of the official formal record that all parties had an opportunity to review and supplement, the hearing examiner reviews that and simply proposes something the nine member Board can reject, change, based on the record as it decides. Mr. Sevenoaks asked about outside the record and if those communications are authorized, and Mr. Couch responded with staff only, not other parties and expert witnesses. Mr. Sevenoaks said, then, the hearing examiner cannot have communications with any other expert witnesses or parties outside of the hearing, and the allegation that has been made is there was communication with the hearing examiner outside of the hearing, and Mr. Strong injected, with OWRB staff, who also served as witness in the proceedings. Ms. Lambert said that OWRB staff then serves two roles. Mr. Couch explained GWL and MAY provides for a hearing and the presentation of evidence—written documents, as well as staff as witness, but the hearing examiner requested evaluation using expertise of the agency to evaluate very complex technical information provided by the parties. Ms. Lambert asked if the hearing examiner spoke with anyone except staff of the OWRB as was proposed by Mr. Walker, and Mr. Couch answered the communication was with himself and Mr. Barnett.

Mr. Walker stated the hearing examiner had communications with Mr. Scott Christenson who is not staff of the OWRB but USGS who authored a report responding to his expert's testimony, which Mr. Barnett forwarded to the hearing examiner. Mr. Barnett responded the nature of the communication was a two-page memorandum authored by Scott Christenson and Ms. Osborn of the USGS (former OWRB employee), and assisting the hearing examiner to find in the record where there were answers to questions she raised and questions raised by Mr. Walker's post hearing brief. Staff submits that is permissible, to assist the hearing examiner, to assist this Board. Ms. Lambert asked if they were serving in a research capacity, and Mr. Barnett stated the memo is attached to the motion in the materials provided, and that is his view. Chairman Drummond clarified that no evidence outside the record was introduced in that, and Mr. Barnett said that is correct; there is a difference of position, but staff's position is that what was communicated to the hearing examiner is permissible.

Mr. Walker responded that Section 313 says no communication. The argument has been that it is okay if its staff, but the USGS is not staff and doesn't matter what they are talking to them about, but that it is prohibited. Secondly, he said and what will be filed today in a brief, is that he is still getting information from an Open Records' request from Mr. Couch which will be attached to what he will file that there was evidence presented in the ex parte communications that went beyond the record and he will describe that. He contended the hearing examiner wanted to hear from the OWRB witnesses what his witnesses testified to, which there was opportunity at the hearing to respond and Mr. Barnett called Mr. Christenson and Ms. Osborn as rebuttal witnesses after other witnesses testified, so they already had a chance to respond. He said they now have an opportunity to shape the hearing examiner view on the evidence by emphasizing what they thought is important, not mentioning the evidence he presented.

Chairman Drummond asked if there were any other questions or discussion by the Board.

3. Possible Executive Session, and
4. Return to open meeting and possible vote or action on any matter discussed in the Executive Session, if authorized. The Board did not vote to enter executive session.
5. Vote on whether to approve the intermediate order as presented or as may be amended, or vote on any other action or decision relating to the intermediate order

Mr. Drake said that he expected those hired to do the job, and if they do not, they will be replaced but until then, he will support the position of the people that he hires. With that statement made, he moved that the Board accept the order denying the motion to recuse/disqualify the hearing examiner and to Stay Proceeding. Mr. Herrmann seconded.

Mr. Sevenoaks said the Board has worked on this issue for some time, it's important to the Board there is transparency about the way the Board conducts its business, and he is concerned about this matter being appealed and there won't be a final judgment until it is out of the courts and the Board could be sitting here in two years going through the process on the hearing examiner; he may not be ready to make a decision today.

Mr. Fite said no one had discussed anything to do with the record on the Arbuckle Simpson with him, he has had no communication whatsoever, and he had an open mind. He said he is ready for it to come to the table, to digest it and make a decision.

Chairman Drummond said where there are two lawyers, there are two difference legal opinions, but there is also a recommendation by staff.

Mr. Sevenoaks said it begs the question about communications with the hearing examiner in the future and about the guidelines. Ms. Lambert said even with that there are two perspectives; the hearing examiner is not the ultimate judge, this Board is the ultimate judge.

Chairman Drummond asked for further comments, and Mr. Couch stated for clarification the motion is to approve what is in the packet, the proposed order on pages 5080-5083.

Mr. Herrmann asked about the new information that was suggested would be filed and Mr. Strong replied staff did not know what that is, and that will be dealt with at that time. Mr. Sevenoaks asked if that would delay the Board's action in January, and Mr. Drake asked that be discussed later. Mr. Herrmann added that anything that is an issue relative to evidence the Board will have an opportunity to hear and evaluate before the Board makes the decision; whatever is at issue will still be at issue until the Board makes a decision.

Chairman Drummond asked the Board to consider the issue of the motion to recuse at this time, and he called for the vote.

AYE: Herrmann, Fite, Feaver, Sevenoaks, Drake, Lambert, Drummond
NAY: None
ABSTAIN: Buchanan (recuse from this issue)
ABSENT: Hitch

Mr. Buchanan stated he is a member of the Oklahoma Farm Bureau State Board and therefore a member of the Legal Foundation which was a party of the action under discussion.

- C. Items transferred from Summary Disposition Agenda, if any.
There were no items transferred from the Summary Disposition Agenda.

6. CONSIDERATION OF SUPPLEMENTAL AGENDA ITEMS, IF ANY

The Supplemental Agenda items were considered under the Summary Disposition Agenda.

7. PROPOSED EXECUTIVE SESSION

Chairman Drummond

As authorized by the Oklahoma Open Meeting Act in Section 307(B)(4) of Title 25 of the Oklahoma Statutes, an executive session may be held for the purpose of confidential communications between a public body and its attorney concerning a pending investigation, claim, or action if the public body, with the advice of its attorney, determines that disclosure will seriously impair the ability of the public body to process the claim or conduct a pending investigation, litigation or proceeding in the public interest.

Pursuant to this provision, the Board proposes to hold an executive session for the purpose of discussing Chickasaw Nation and Choctaw Nation v. Fallin, et al., Oklahoma Water Resources Board v. United States on behalf of the Choctaw Nation et al. and Tarrant Regional Water District v. Herrmann, et al.

Statement by legal counsel advising on whether disclosure of the discussion of the litigation will seriously impair the ability of the Board and State to conduct the present and proposed litigation in the public interest.

Chairman Drummond read the statement above regarding the Board’s proposed executive session. He asked if legal counsel would advise the Board move into executive session, and Mr. Couch stated he did so advise.

A. Vote on whether to hold Executive Session upon determination that disclosure of the discussion of the litigation will seriously impair the ability of the Board and State to conduct the present and proposed litigation in the public interest. Before it can be held, the Executive Session must be authorized by a majority vote of a quorum of members present and such vote must be recorded.

Ms. Lambert moved the Board enter into Executive Session, and Mr. Herrmann seconded.

AYE: Herrmann, Fite, Feaver, Sevenoaks, Drake, Lambert, Buchanan, Drummond

NAY: None

ABSTAIN: None

ABSENT: Hitch

B. Designation of person to keep written minutes of Executive Session, if authorized.

Chairman Drummond designated Executive Secretary Mary Schooley to keep written minutes of the Executive Session.

C. Executive Session, if authorized.

The Board entered Executive Session at 10:48 a.m. on Tuesday, December 18, 2012.

Return to open meeting and possible vote or action on any matter discussed in the Executive Session.

Mr. Buchanan moved to return to Regular Session, and Ms. Lambert seconded.

AYE: Herrmann, Fite, Feaver, Sevenoaks, Drake, Lambert, Buchanan, Drummond

NAY: None

ABSTAIN: None

ABSENT: Hitch

The Board returned to Regular Session at 11:20 a.m. on Tuesday, December 18, 2012.

8. VOTE(S) ON POSSIBLE ACTION(S), IF ANY, RELATING TO MATTERS DISCUSSED IN EXECUTIVE SESSION IF AUTHORIZED.

The Board did not vote on any matter discussed in Executive Session.

9. NEW BUSINESS

Under the Open Meeting Act, this agenda item is authorized only for matters not known about or which could not have been reasonably foreseen prior to the time of posting the agenda or any revised agenda.

There were no New Business items; however, Mr. Drake asked for more time in considering the Arbuckle-Simpson matter.

Chairman Drummond reminded members the next meeting is January 15, 2013, in Oklahoma City.

10. ADJOURNMENT

There being no further business, Chairman Drummond adjourned the meeting of the Oklahoma Water Resources Board at 11:22 a.m. on Tuesday, December 18, 2012.

OKLAHOMA WATER RESOURCES BOARD

_____/s/_____
F. Ford Drummond, Chairman

_____/s/_____
Linda P. Lambert, Vice Chairman

_____/s/_____
Edward H. Fite

_____/s/_____
Rudolf J. Herrmann

_____/s/_____
Marilyn Feaver

_____/s/_____
Richard Sevenoaks

_____/Absent_____
Bob Drake

_____/s/_____
Jason W. Hitch

ATTEST:

_____/s/_____
Tom Buchanan
(SEAL)