

BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA

**In the Matter of Determining the
Maximum Annual Yield for the
Arbuckle-Simpson Groundwater
Basin** underlying parts of Murray,
Pontotoc, Johnston, Garvin, Coal, and
Carter Counties

**PROTESTANTS' SUPPLEMENTAL BRIEF
IN RESPONSE TO STAFF'S RECOMMENDED
ORDER DENYING MOTION**

Protestants Oklahoma Farm Bureau Legal Foundation, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, TXI, and the Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc., (collectively "Protestants"), submit the following brief in response to Staff's Recommended Order Denying Motion ("Recommended Order"). As shown below, the Recommended Order misstates several principles of Oklahoma law and should not be entered. Rather, the Board¹ should first ascertain whether the Hearing Examiner will withdraw voluntarily, because 75 O.S. § 316 assumes a two-step process whereby the agency only disqualifies a hearing examiner after she refuses to withdraw. If the Hearing Examiner does refuse to withdraw, then the Board should enter an order disqualifying her and appoint another hearing examiner who has no prior involvement in the Maximum Annual Yield ("MAY") Proceeding and who can provide a fair and impartial hearing.

¹ Hereinafter, the entire agency commonly referred to as the Oklahoma Water Resources Board, including all of its employees and representatives, will be referred to using the acronym "OWRB". Where the distinction may be helpful, the nine-member administrative head of the OWRB is referred to as simply the "Board".

1. Fundamental Due Process And Article II Of The Oklahoma APA Prohibit Direct And Indirect Ex Parte Communications With The Hearing Examiner

The MAY Proceeding is a formal adjudication in which the agency resolves issues of law or fact through the exercise of judicial power. *Texas County Irr. & Water Res. Ass'n v. Oklahoma Water Res. Bd.*, 1990 OK 121, 803 P.2d 1119, 1124 (holding that MAY determination process is adjudicative); 82 O.S. § 1020.6 (explicitly requiring that the MAY hearing be conducted pursuant to Article II of the Oklahoma Administrative Procedures Act, governing individual proceedings); 75 O.S. § 250.3 (defining “individual proceeding”). Such proceedings are subject to the due process requirement that every litigant receive “the cold neutrality of an impartial judge.” *Johnson v. Bd. of Governors of Registered Dentists of State of Okl.*, 1996 OK 41, 913 P.2d 1339, 1347 (quoting *Sadberry v. Wilson*, 441 67tP.2d 381, 382, 384 (Okla.1968); *Craig v. Walker*, 824 P.2d 1131, 1132 (Okla.1992)). Thus, the Hearing Examiner, as the presiding official, is subject to the same standards of impartiality and recusal as a judge in Oklahoma district courts. *Cherokee Data Computer Parts & Serv., Inc. v. Oklahoma Dept. of Labor*, 2005 OK CIV APP 81, ¶ 15, 122 P.3d 56, 60; *Johnson*, 913 P.2d at 1347-48 (applying judicial standard to administrative officer). Likewise, Article II of the Oklahoma Administrative Procedures Act (“APA”) both prohibits ex parte communication and requires a hearing examiner to withdraw from any individual proceeding in which she cannot accord a fair and impartial hearing. 75 O.S. §§ 313 and 316.

2. OWRB Staff Admit They Had Ex Parte Communications With The Hearing Examiner Regarding Matters To Be Decided Through The MAY Proceeding

The documents produced in response to the Open Records Act Request referenced in the Protestant’s Motion demonstrate that the Hearing Examiner had both direct and indirect ex parte communications with the OWRB lawyer who participated in the Hearing on behalf of the OWRB. The documents also demonstrate that the Hearing Examiner had at least indirect ex parte communication with witnesses who testified at the hearing. These witnesses included OWRB staff and separate USGS staff whose testimony and reports constitute most, if not all, of the evidence presented by the OWRB in support of the Tentative MAY Determination. There is no dispute

that such direct and indirect ex parte communications occurred or that all such communication concerned issues to be resolved through the formal hearing as required by 82 O.S. § 1020.6.

3. The Hearing Examiner's Ex Parte Communications With OWRB Staff Violate The Prohibition

The Recommended Order incorrectly concludes that because the OWRB is not a party to the MAY Proceeding, the Hearing Examiner's ex parte communications with OWRB staff don't violate 75 O.S. § 313. It also incorrectly suggests — though it does not appear to explicitly conclude — that even if the OWRB is a party to an individual proceeding, the second sentence of § 313 authorizes ex parte communications between the Hearing Examiner and any employee of the agency. In fact, as shown below, the OWRB is a party to the MAY Proceeding and none of the ex parte communications are authorized by the second sentence of § 313. Because the ex parte communications violate § 313 as well as the fundamental due process required in all adjudicatory proceedings, the Hearing Examiner should withdraw or be disqualified.

3.1. THE OWRB IS A PARTY TO THE MAY PROCEEDING AND STAFF ARE PROHIBITED FROM EX PARTE COMMUNICATION WITH THE HEARING EXAMINER

In support of the conclusion that the OWRB is not a party to the MAY Proceeding, the Recommended Order cites the fact that Oklahoma groundwater statutes variously refer to both the agency and to “interested parties”. From this, the Recommended Order makes the dubious inference that these groups are mutually exclusive. However, the APA explicitly defines a party as “a person *or agency* named and participating, or *properly seeking and entitled by law to participate, in an individual proceeding.*” 75 O.S. § 250.3 (emphasis added). Thus, an agency that participates in an individual proceeding is a party regardless of whether it is formally named as a party in the caption. *Oklahoma Found. for Med. Quality v. Dep't of Cent. Services*, 2008 OK CIV APP 30, 180 P.3d 1, 2 (hereinafter *Med. Quality*). OWRB staff participated in the MAY hearing and were undoubtedly entitled to participate by both statute, 82 O.S. § 1020.6, and agency rule, OAC § 785:4-7-4. In fact, the OWRB was required to participate in the hearing to present the evidence

upon which the Tentative MAY was based. Thus, the OWRB is a party to the MAY proceeding and § 313 clearly prohibits the Hearing Examiner from communicating ex parte with OWRB staff about matters of fact or law.

In fact, any other conclusion would make the appeal of a MAY determination impossible. Because MAY determinations result from individual proceedings, they must be appealed under 75 O.S. § 318. *Texas County IWRA*, 1990 OK 121, 803 P.2d at 1123 n. 23. That provision requires that “the agency and all *other parties* of record” be served with a petition seeking judicial review. 75 O.S. § 318 (emphasis added). Courts have relied on the quoted language to hold that the agency must be named as a party to the appeal because they have a legally cognizable interest in the outcome. *Transwestern Pub., L.L.C. v. Langdon*, 2004 OK CIV APP 21, 84 P.3d 804, 806; *Med. Quality*, 2008 OK CIV APP 30, 180 P.3d 1, 4. OWRB’s status as a party should be apparent from the fact that it would be impossible to appeal the MAY Determination without naming the OWRB as a party.

3.2. OWRB STAFF’S EX PARTE COMMUNICATIONS WITH THE HEARING EXAMINER ARE NOT EXCUSED BY THE SECOND SENTENCE OF 75 O.S. § 313

The Recommended Order also wrongly suggests that the Hearing Examiner’s ex parte communications with OWRB staff are authorized by the second sentence of 75 O.S. § 313. This provision is only available to members of the Board, and neither of its exceptions applies to communications with OWRB technical staff.

The first sentence of § 313 generally prohibits “members or employees of an agency” who preside over an individual proceeding from communicating with any representative of a party except upon notice and an opportunity for all parties to participate. 75 O.S. § 313. The second sentence provides two specific exceptions to the general prohibition:

An agency member (1) may communicate with other members of the agency, and (2) may have the aid and advice of one or more personal assistants.

Unlike the prohibition, the exceptions are not available to agency employees. They are only available to the members of the agency. *Id.* The OWRB has nine members, none of whom is the Hearing Examiner. 82 O.S. § 1085.1; OAC 785:1-3-1. Further, neither of the enumerated exceptions applies to

communications with technical staff. The first exception only applies to communications between members of the Board, and the second exception only applies to communications between Board members and their “personal assistants” — staff who help members with ministerial and administrative tasks.

The Model State Administrative Procedure Act (“MSAPA”) further demonstrates that neither of § 313’s exceptions applies. Section 313 is a word-for-word adoption of the original MSAPA § 13, which was published in 1961. Though Oklahoma has not amended § 313 since it was enacted 1963, the MSAPA has gone through two major updates that help clarify the original language. The most recent version of the MSAPA— the 2010 Revised MSAPA —includes updated provisions that are explicitly based on the language still applicable in Oklahoma. A revised version of § 313(1) has become the following sentence of Revised MSAPA § 408(h):

If a presiding officer is a member of a multi-member body of individuals that is the agency head, the presiding officer may communicate with the other members of the body when sitting as the presiding officer and final decision maker.

See Official Comment to Revised MSAPA § 408 (attached as Exhibit 1). The official comment is treats the quoted sentence as a current equivalent to the provision Oklahoma adopted. Thus, the exception in § 313(1) only applies to communications between members of the Board. Section 313(2) has been combined with a new exception to become Revised MSAPA § 408(d).

The current provision based on § 313(2) allows a presiding officer to “communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff” and who has not served as an “investigator, prosecutor, or advocate at any stage of the case”. Ex. 1 (brackets reflecting alternate language in the original). Even then, the model statute requires that the communication “not augment, diminish, or modify the evidence in the record.” Revised MSAPA § 408(d). This exception is simply meant to allow Board members to work with personal assistants. It does not authorize ex parte communications with technical staff about the substance of the hearing.

The first exception in Revised MSAPA § 408(d) is also instructive, because it has not been adopted in the Oklahoma APA. This is a new exception for ex parte communication with “an individual authorized by law to provide legal advice.” *See* Ex. 1. No version of this exception was included

in the 1961 model statute that Oklahoma has adopted. Even if there were, the legal advisor can't be anyone who has served as an "investigator, prosecutor, or advocate at any stage of the case" and the communication can "not augment, diminish, or modify the evidence in the record." *Id.* These requirements are not simply prevailing administrative policy. They are derived from the fundamental due process required in all adjudications to ensure that the agency's separate functions are performed separately.

The Recommended Order distorts the meaning of § 313 by trying to read it with the following sentence from another section: "The agency's expertise, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence." 75 O.S. § 310(4). The Recommended Order pulls this phrase out of context and reads it with the second sentence from § 313 as authority for the position that any OWRB employee may assist the Hearing Examiner in evaluating any piece of the evidence — apparently even reports authored and testimony given by the employee. In context, however, it's clear the sentence quoted from § 310(4) says nothing about the propriety of communicating with staff off-the-record. In fact, the full subsection provides:

4. Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge. *Parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material noticed, including any staff memoranda or data, and they shall be afforded an opportunity to contest the material so noticed.* The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of the evidence.

75 O.S. § 310(4) (emphasis added). Section 310(4) requires that parties must get notice and an opportunity to respond to all facts on which the Hearing Examiner relies, including those within the agency's expertise. It makes no sense for the same subsection to explicitly require that parties have an opportunity to contest facts within the agency's expertise and then to cryptically authorize the Hearing Examiner to receive and rely on agency off the record.

The Revised MSAPA is again instructive. The current model further clarifies the language adopted as § 310(4) by splitting it into two provisions.

The first ensures that parties be given an opportunity to contest noticed facts, including those within the agency's expertise:

(7) The presiding officer may take official notice of all facts of which judicial notice may be taken and of scientific, technical, or other facts within the specialized knowledge of the agency. A party must be notified at the earliest practicable time of the facts proposed to be noticed and their source, including any staff memoranda or data. The party must be afforded an opportunity to contest any officially noticed fact before the decision becomes final.

The second provision allows the presiding officer to rely on her *personal* knowledge and expertise:

(8) The experience, technical competence, and specialized knowledge *of the presiding officer* or members of an agency head that is a multi-member body *that is hearing the case* may be used in evaluating the evidence in the hearing record.

Revised MSAPA § 404(8) (copy attached as Exhibit 2) (emphasis added). In short, the Hearing Examiner can no doubt use her own expertise to evaluate the evidence. But if she relies on the specialized knowledge of others, then she must do it on the record with an opportunity for parties to respond. Certainly, the agency's technical expertise does not create a license for its staff to supplement their own testimony, evidence, and argument off the record.

3.3. OWRB'S INTERPRETATION OF THE APA IS NOT AFFORDED ANY DEFERENCE AND ITS PRACTICE CANNOT EXCUSE EX PARTE COMMUNICATIONS

While the Recommended Order is right in noting that an agency is afforded deference in its interpretation of its own rules and statutes that it administers, it erroneously suggests that such deference extends to an agency's interpretation of the APA. Statutes requiring certain procedures of agencies broadly are not administered by those agencies nor are they within any agency's special expertise. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 110 S.Ct. 1384, 1390-91, 108 L.Ed.2d 585 (1990) (stating that deference to agency interpretation of statute would be inappropriate, because agency did

not administer that statute); *Crandon v. United States*, 494 U.S. 152, 174, 110 S.Ct. 997, 1010, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (rejecting deference, because statute in question “is not administered by any agency but by the courts”); *Air North Am. v. Department of Transp.*, 937 F.2d 1427, 1436-1437 (9th Cir.1991) (no deference to agency interpretation of APA, because agency not assigned special role by Congress in construing that statute). Thus, OWRB’s interpretation of the APA is not afforded any deference, and no agency rule — regardless of its longevity — can override statutory or fundamental due process requirements.

4. The Hearing Examiner’s Ex Parte Communications With USGS Staff Also Violate The Prohibition

Apart from the Hearing Examiner’s communications with OWRB employees who participated in the hearing as witnesses or representatives, the Hearing Examiner also had at least indirect ex parte communication with USGS employees who testified as witnesses at the hearing. The Recommended Order makes no reference or ruling with respect to these communications, and provides no basis on which such communications could be determined to comply with § 313. Such communication is improper under the same standards that apply to the communication with OWRB staff.

5. The Materials And Information Furnished to the Hearing Examiner Constitute New Evidence And Are An Improper Influence In The Deliberative Process

The ex parte communications with the Hearing Examiner were intended to influence her deliberative process. In a footnote, the Recommended Order makes the wholly unwarranted statement that “no extra-record evidence has been provided to the Hearing Examiner.” First, under § 313, it doesn’t matter whether ex parte communications only cite to evidence in the record. The Hearing Examiner simply cannot communicate ex parte — directly or indirectly — with any party about issues of law or with anyone about issues of fact. More importantly, the documents produced under the Open Records Act demonstrate that not only was evidence in the record selectively emphasized and deemphasized to influence the Hearing Examiner, but new evidence and argument were provided off the record and without notice or an opportunity to respond.

The lawyer who represented the OWRB in the hearing sent the Hearing Examiner a USGS Report that selectively emphasized evidence favorable to the Tentative MAY while ignoring unfavorable evidence. For example, the USGS report quotes testimony of Dr. Blaine Reely, one of the Protestants' experts, that was considered favorable while omitting and ignoring all of his testimony contradicting USGS's position. This intentional emphasis of some evidence and corresponding de-emphasis or exclusion of other evidence was carefully tailored to steer the Hearing Examiner to a particular conclusion.

The USGS Report provided to the Hearing Examiner also makes new assertions without any reference to the record. For example, the USGS Report states that:

The USGS Arbuckle-Simpson groundwater flow model and report (SIR 2011-5029) were subjected to rigorous USGS report and technical review processes before being approved.

This extra-record statement was clearly meant to try to counter the recorded testimony of Dr. Eileen Poeter, who pointed out various deficiencies in the report and the review process. The statement doesn't answer a technical question or explain agency policy. It's an unnoticed and off-the-record statement about the USGS's work meant to influence the Hearing Examiner's evaluation of its credibility and relative merit.

Other materials provided to the Hearing Examiner and prepared by OWRB staff (Derek Smithee), state that different regimes for measuring stream flow (i.e. the 75th percentile flow and baseline flow) "are functionally equivalent". See Email and Attachment from Dean Couch to Mark Walker (Dec. 17, 2012) (Attached as Exhibit 3). No evidence to this effect was presented at the hearing. This statement was intended to try to respond to and refute the evidence that was presented at the hearing — and was discussed in Protestants' post-hearing brief — which showed that the reports presented by the OWRB cannot be not logically traced to the Tentative MAY Determination because the model and the fish habitat study address different flow regimes. This is a direct response to Protestant's brief, but unlike it was made in secrecy without any notice or opportunity to respond. Protestants' counsel have been advised that this information was transmitted to the Hearing Examiner.

Individual proceedings — under fundamental principles and by

statutory definition — resolve contested issues using a carefully constructed record available to everyone and affording all interested persons an opportunity to respond. Ex parte statements intended to influence the Hearing Examiner’s deliberation can play no acceptable part in such proceedings. Now, an Open Records Act request has revealed that such ex parte communications were made and kept secret from the Protestants. Though the communications were specifically intended to influence the Hearing Examiner, they were not recorded, and now there is no complete record for meaningful appellate review.

Perhaps the most troubling part of the ex parte communications is that they came from witnesses who testified at the hearing. Several were called by the OWRB — through counsel who also participated in ex parte communications — to testify in support of the Tentative MAY Determination. It defeats the entire purpose of Article II individual proceedings to have advocates and witnesses discussing the issues with the Hearing Examiner off the record. Worse, it defies fundamental due process and even basic fairness for witnesses to secretly “assist” the Hearing Examiner evaluate *their own testimony*. Having witnesses highlight evidence they find supportive of their testimony while omitting or diminishing all contrary evidence clearly influences and interferes in the Hearing Examiner’s deliberative process. Protestants would love to have their experts help the Hearing Examiner evaluate the hearing testimony and other evidence — especially if they didn’t have to tell other parties what was said or even notify them that anything had been said at all. However, the prohibition on ex parte communication is a cornerstone on which individual proceedings are built. You simply cannot have an adjudication on the record if ex parte communication is permitted.

6. The Board Should Only Act On The Motion After The Hearing Examiner Has Refused To Withdraw Voluntarily

Before the Board takes any action on Protestants’ Motion, it ought to give the Hearing Examiner a chance to withdraw voluntarily. It is generally appropriate for an adjudicator to have an opportunity to withdraw, and Protestants’ Motion specifically sought to afford one to the Hearing Examiner. Also, 75 O.S. § 316 requires a hearing examiner to withdraw if she cannot provide a fair and impartial hearing, before it provides for a party to

request disqualification. Under appropriate circumstances, an adjudicator may choose to withdraw even if she could not be compelled to do so. In matters of great importance, such as this, an adjudicator may feel that it is appropriate to withdraw to avoid the mere appearance of partiality or impropriety. Thus, the Board should ascertain whether the Hearing Examiner will withdraw voluntarily before it acts on Protestants' motion to disqualify.

7. If The Hearing Examiner Refuses to Withdraw, The Board Should Disqualify Her And Assign Another

As shown above, the Hearing Examiner has had prohibited ex parte communications regarding the issues to be determined through the hearing. The full extent of such communication is not known, because the OWRB is withholding additional documents subject to the Open Records Act request and refuses to even provide a description of what is being withheld. *See* ORA Correspondence (attached as Exhibit 4). Nevertheless, it is apparent from the documents produced that the communications were specifically targeted to issues that Protestants most strongly contested. If the Hearing Examiner does not voluntarily withdraw, the Board should disqualify her and assign a new hearing examiner who has no prior involvement and can provide a fair and impartial hearing. In any event, due to the misstatements of law discussed above, the Board should not enter the Recommended Order.

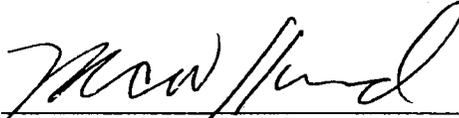
Respectfully submitted,


L. MARK WALKER, OBA#10508
SCOTT A. BUTCHER, OBA #22513
CROWE & DUNLEVY, P.C.
20 N. Broadway, Suite 1800
Oklahoma City, OK 73120
Tel: (405) 235-7783
Fax: (405) 272-5287
mark.walker@crowedunlevy.com

ATTORNEYS FOR PROTESTANTS
OKLAHOMA FARM BUREAU
LEGAL FOUNDATION,
OKLAHOMA AGGREGATES
ASSOCIATION, AND

ENVIRONMENTAL FEDERATION
OF OKLAHOMA

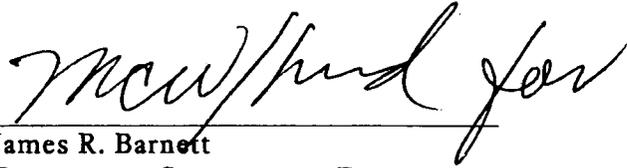
AND



Michael C. Wofford
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
201 Robert S. Kerr Ave., Suite 700
Oklahoma City, OK 73102-4203
(405) 319-3500
(405) 319-3509

ATTORNEYS FOR OKLAHOMA
AGGREGATES ASSOCIATION AND
TXI

AND



James R. Barnett
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
201 Robert S. Kerr Ave., Suite 700
Oklahoma City, OK 73102-4203
(405) 319-3500
(405) 319-3509

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

CERTIFICATE OF SERVICE

I certify that on December 18, 2012 a copy of the above document was emailed to the addresses shown on Exhibit A and mailed to the parties shown on Exhibit B.



Scott A. Butcher

EXHIBIT A

jason@aamodt.biz
krystina@aamodt.biz
christy@aamodt.biz
michelle@aamodt.biz
peter.fahmy@sol.doi.gov
Alan.Woodcock@sol.doi.gov
mark.walker@crowedunlevy.com
scott.butcher@crowedunlevy.com
mwofford@dsla.com
jbarnett@dsla.com
Peter_Burck@fws.gov
kerry_graves@fws.gov
dchaffin@fishculplaw.com
kyle.murray@ou.edu
bflanigan@txi.com
david.ocamb@sierraclub.org
shon.aguero@landmarkbank.com
bonnenwoody@yahoo.com
skywalk@brightok.net
annaandwayne@cableone.net
mwbaker61@hotmail.com
t@losdos.org
mdass_2001@yahoo.com
terry@sokradio.com
karajamae@yahoo.com
staceyinez05@yahoo.com
bright.nathaniel@gmail.com
colgaryburdine@yahoo.com
sueopsahl@yahoo.com
inda.byrd@chickasaw.net

stephanie.carson@chickasaw.net
tim.carson@chickasaw.net
ccaters@mscok.edu

patcastellow@yahoo.com
fajrchapman@yahoo.com
beemabros@gmail.com
florence.coble@yahoo.com
conversem@oge.com
coopjob@yahoo.com
momof3boys@yahoo.com
sdeen@paeinc.net
tdeen@paeinc.net
mdeen@paeinc.net
ddonaho@cableone.net
donahoattorney@brightok.net

jndrom@wildblue.net
jennydun@msn.com
s_riquel@hotmail.com
txdicedealer@yahoo.com
kasy_fincher@yahoo.com
gainey@brightok.net
secretteacher@gmail.com
chery.lenn@yahoo.com
hallofgold@yahoo.com
amwilliams79@sbcglobal.net
rangediva@hotmail.com
copwilson369@yahoo.com
amywisran@gmail.com
jwisian@gmail.com
innkeeper@sulphurspringsinn.com
jvick@ga-inc.net
cody.wainscott@chickasaw.net
tathom@cableone.net
johnd61@brightok.net
priscillastevens@gmail.com
electionlady1@yahoo.com
dsummers@paeinc.net
msummers31@sbcglobal.net
mel.long@att.net
slsherrell@gmail.com
brentshields@chickasaw.net
preprjay@hotmail.com
abbiea@hotmail.com
fishingcowboyblue@yahoo.com
fred@oilspecialist.com
dahome@att.net
brenda.rolan@chickasaw.net
robinross1086@yahoo.com
krousey4@yahoo.com
btroyse0524@cableone.net
whittyrue@gmail.com
relaxing.vacation@yahoo.com
popedonna@rocketmail.com

josh.presley@chickasaw.net
harprv@pridigy.com
harpu@prodiger.net
blessedbudah@yahoo.com
adalene_rhodes@sbcglobal.net
jprhodes@sbcglobal.net
sowens@bancfirst.com

swelden05@hotmail.com
mwnewt@gmail.com
lannymurphy@att.net
shawna.murphy@adaok.com
richard_murray1@att.net
bob.pat@sbcglobal.net
randyneasbitt@yahoo.com
sarah.miracle@sbc.global.net
jamowbray@swbell.net
edrajm@netzero.net
tjm545@gmail.com
tmerrell@arbucklebank.net
chris_murray@hotmail.com
janiet.mathis@att.net
jtlester@arbuckleonline.com
johnkrittenbrick@att.net
mlanesandsons@yahoo.com
bettycole.50@att.net
d.kndy74@yahoo.com
jim.johnson@chickasaw.net
shylyrain@yahoo.com
kimberlyjohnson06@yahoo.com
mrjpiano@hotmail.com
gary.joiner@chickasaw.net
billy1645@aol.com
jimhunter45@hotmail.com
harbert_ranch@hughes.net
ottedido@cableone.net
cngarone@hotmail.com
stacey.gibney@chickasaw.net
goodsoncharlene@yahoo.com
rangediva@hotmail.com
kmeyers@ou.edu

EXHIBIT B

Bill Holley
City of Sulphur
600 W. Broadway
Sulphur, OK 73086

Edward T. Tillery
210 W. Grant Ave.
Pauls Valley, OK 73075

Marla Peek
Oklahoma Farm Bureau
2501 N. Stiles
Oklahoma City, OK 73105

Tommy Kramer
215 N. 4th
Durant, OK 74701

Richard Day
3284 State Highway 1 W
Roff, OK 74865

Jim Rodriguez
Oklahoma Aggregates Association
3500 N. Lincoln
Oklahoma City, OK 73072

George Mathews
426 Westchester
Ada, OK 74820

Gary Kinder, City Engineer
City of Ada
231 S. Townsend
Ada, OK 74820

D. Craig Shew
Box 1373
Ada, OK 74821-1373

James Dunegan, City Manager, City
of Durant
P.O. Box 578
Durant, OK 74702

Jerry L. Tomlinson, Mayor
City of Durant
P.O. Box 578
Durant, OK 74702
Guy Sewell
1100 E. 14th St.
Ada, OK 74820

Dave Roberson
P.O. Box 235
Sulphur, OK 73086

Lewis Parkhill, Mayor
City of Tishomingo
409 S. Mickle
Tishomingo, OK 73460

C.J. Maxwell, Jr.
4500 Highway 7 West
Tishomingo, OK 73460

Cody Holcomb
Ada Public Works Authority
231 S. Townsend
Ada, OK 74820

Kelly Hurt
P.O. Box 299
Allen, OK 74825

Jonathan Gourley
901 N.W. 37th St.
Oklahoma City, OK 73118

Jona Tucker
Nature Conservancy of Oklahoma
31700 CR 3593
Stonewall, OK 74871

Gary J. Montin
P.O. Box 202
Connerville, OK 74836

Bill Brunk
P.O. Box 280
Fittstown, OK 74842

Thomas J. Enis
100 N. Broadway, Suite 1700
Oklahoma City, OK 73102

Joseph Morrow
23475 CR 3500
Roff, OK 74865

Bruce Noble National Park Service
Chickasaw National Recreation Area
1008 W. 2nd Street
Sulphur, OK 73086

Kevin Blackwood
P.O. Box 2352
Ada, OK 74821

Fred Chapman
Chapman Properties
P.O. Box 1754
Ardmore, OK 73401

Dick Scalf
P.O. Box 851
Ada, OK 74820

Shannon Shirley
2370 N. Daube Ranch Road
Mill Creek, OK 74856

Chuck Roberts
21745 CR 3510
Fitzhugh, OK 74843

Ronnie Wartchow
26440 CR 3520
Roff, OK 74865

Carolyn Sparks
P.O. Box 502
Sulphur, OK 73086

Charles Morrow
24044 Highway 1 W.
Roff, OK 74865

Floy Parkhill
409 S. Mickle St.
Tishomingo, OK 73460

Velta Wingard
Wingard Water Corporation
10371 CR 1620
Fitzhugh, OK 74856

Paul Warren
P.O. Box 60
Mill Creek, OK 74856

Julie Aultman
P.O. Box 1209
Ardmore, OK 73402

Jerry Lamb
12160 CR 1690
Roff, OK 74865

James T. Johnson
J.B. Johnson
1133 Fletcher Road
Sulphur, OK 73086

Charles Roos
7955 CR 1670
Roff, OK 74865

Carl Adcook
1035 Republic NW
Ardmore, OK 73401

Joyce Allgood
717 4th S.E.
Ardmore, OK 73401

Dean Arnold
3900 N. Deadman Springs Rd.
Milburn, OK 73450

Deborah Arnold
3900 N. Deadman Springs Rd.
Milburn, OK 73450

Mark Atkins
7481 Mesquite Ridge
Sanger, TX 76266

Patricia Baker
147 Mark Rd.
Lone Grove, OK 73443

Dayna Baker
601 L. St. N.E.
Ardmore, OK 73401

Monica Bell
1019 Burch
Ardmore, OK 73401

Johnny P. Bryant
2201 Oakglen Dr.
Ardmore, OK 73401

James Butler
620 A N.W. #1
Ardmore, OK 73401

Kenneth J. Byisma
407 Ash
Ardmore, OK 73401

Tracy Campbell
2021 4th N.W. #83
Ardmore, Ok 73401

Michael Castellow
201 Country Club Rd.
Ardmore, OK 73401

Norma Chaney
1160 W. Webb Rd.
Tishomingo, OK 73460

Jill Clark
1908 7th N.W.
Ardmore, OK 73401

Jon Collins
460 Willowridge
Ardmore, OK 73401

Kenneth Copeland
57 Wistaria
Lone Grove, OK 73443

Amanda Copeland
57 Wistaria
Lone Grove, OK 73443

Betty Crabtree
23011 Indian Meridian Rd.
Pauls Valley, OK 73075

Joyce Crosby
800 Rosewood
Ardmore, OK 73401
Josh Davidson
692 Spring Hope Rd.
Ardmore, OK 73401

Howard and Jean Drew
2232 Clover Leaf Pl.
Ardmore, OK 73401

Kathy Eye
236 S. Pichens Rd.
Madill, OK 73446

Judy G. Fisher
P.O. Box 234
Fittstown, OK 74842

Tammie Durbin
337 Lakeside Rd.
Ardmore, OK 73401

Dan Elkins
1301 Division
Sulphur, OK 73086

Arlinda Elkins
1301 Division
Sulphur, OK 73086

James Gallgher
3302 Rancho Lane
Ardmore, OK 73401

Benji
602 1/2 W. Tishomingo
Sulphur, OK 73086

Estee Brunk
5610 Merrimac
Dallas, TX 75206

Robert Brunk
5610 Merrimac
Dallas, TX 75026

Macy Wisran
P.O. Box 500
Ardmore, OK 73401

Larry Wood
1412 Sunny Lane
Ardmore, OK 73401
Jeanie Upson
924 Sioux
Ardmore, OK 73401

Anna Vines
86 Laurel
Lone Grove, OK 73443

John M. Thompson III
819 Bixby
Ardmore, OK 73401

Roselyn Tiner
P.O. Box 178
3005 US Highway 70
Wilson, OK 73463

Luanne Snodgrass
91 Overland Rt.
Ardmore, OK 73401

Donnel Somers
34237 E. CR 1650
Wynnewood, OK 73098

Claudia F. Spalding
3801 So. Wiley Road
Milburn, OK 73450

David R. Spalding
3801 So. Wiley Road
Milburn, OK 73450

Ellen Spraggins
118 P N.E.
Ardmore, OK 73401

James H. Stevens
627 W. 21
Ada, OK 74820

Barbara J. Stevens
627 W. 21
Ada, OK 74820

Jerry Summers
701 S. Turner
Ada, OK 74820

Mary Silverman
1200 Holly
Ardmore, OK 73401

E.J. Shipman
3073 E. Highway 22
Tishomingo, OK 73460

Retha Rousey
1470 Enterprise
Ardmore, OK 73401

Carin Salazar
416 P St. N.E.
Ardmore, OK 73401

C.D. Robertson, Jr.
8900 OK Highway 7E
Wapanucka, OK 73461

Christiane Robinson
1378 8th N.W.
Ardmore, OK 73401

James Rowland
8834 Egypt Road
Milburn, OK 73450

Phyllis Perry
1960 Woodridge Dr.
Newalla, OK 74857

Ed Perryman
404 Eastwood Circle
Ardmore, OK 73401

Richard Powell
1415 Holt
Ardmore, OK 73401

Rosemary Poythress
515 8th N.W.
Ardmore, OK 73401

Mark T. Presley
8 10 S.E.
Ardmore, OK 73401

Yvonne Pruitt
500 S. Highland
Ada, OK 74820
Lois J. Rasseo
320 B SW
Ardmore, OK 73401

Norma L. Paschall
P.O. Box 1133
Ardmore, OK 73401

Catherine Pendergrast
4727 Cass Lane
Connerville, OK 74836

Lucille J. Norman
1400 W. Ott Lane
Pontotoc, OK 74820

Rhonda Newton
205 Country Club Rd.
Ardmore, OK 73401

Doris Murray
606 N. Kemp
Tishomingo, OK 73460

Virgil M. Mowbray
1220 Beverly
Ardmore, OK 73401

Beverly McMillan
5487 Myall Rd.
Ardmore, OK 73401

Walter E. Mullendore
8003 Joan T. White Rd.
Ft. Worth, TX 76120

Roy David Mullens
41255 E. Co. Rd 1510
Pauls Valley, OK 73075

Richard K. Muller
6642 N. Dogwood Road
Ardmore, OK 73401

F. Lovell McMillin
814 Wood N. Creek Rd.
Ardmore, OK 73401

Zeno McMillin
7995 South Lone Cedar Road
Mannsville, OK 73447
Rosemary McBee
23695 Wolfcrest Way
Wister, OK 74966

Debra McCurry
1 Overland Rt.
Ardmore, OK 73401

Ebony McDonald
1914 Knox Road, Apt. 807
Ardmore, OK 73401

Michael Long
8905 Hwy 7 E
Wapanucka, OK 73441

Heather McGee
9801 Silver Lake Drive
Oklahoma City, OK 73162

Mark Lumry
10707 Evans Road
Marietta, OK 73448

Norma J. Mantzke
28 T & C Circle
Ardmore, OK 73401

Tom Locke
906 Oaktree Lane
Ardmore, OK 73401

Elizabeth Kennedy
2158 Highway 77 5
Davis, OK 73030

Martha Kimbrough
607 W. Kemp
Tishomingo, OK 73460

John Kimbrough
607 W. Kemp
Tishomingo, OK 73460

Ellen T. Innis
1501 Persimmon Lane
Ardmore, OK 73401

Mark Hughes
337 Lakeside Road
Ardmore, OK 73401
Brenda Jones
1623 W. Broadway Place
Ardmore, OK 73401

Sharon Keith
5256 Myall Road
Ardmore, OK 73401

Talon Hyatt
2719 N. Shearer Road
Mill Creek, OK 74856

Paul Hall
11815 Wistinsond Road
Mill Creek, OK 74856

Vicki Harbert
2502 E. Harbert Road
Tishomingo, OK 73460

Mike Harris
2004 7th N.W.
Ardmore, OK 73401

Pat Gray
7100 E. Egypt Road
Milburn, OK 73450

Rhoda Grayham
1020 8th N.E.
Ardmore, OK 73401

Gabe Greene
5601 Bullet Prairie
Tishomingo, OK 73460

Gary Green
5601 Bullet Prairie
Tishomingo, OK 73460

Justin Grimes
605 N.W. Blvd.
Ardmore, OK 73401

Darrell Gipson
612 Sunset Road
Ada, OK 74820

Jason R. Girard
713 Ash N.W.
Ardmore, OK 73401

Gary Good
409 10th N.W.
Ardmore, OK 73401

Uniform Laws Annotated

Revised Model State Administrative Procedure Act 2010 Act (Refs & Annos)

Article 4. Adjudication in Contested Case

Model State Administrative Proc.Act 2010 § 408

§ 408. Ex Parte Communications.

Currentness

(a) In this section, “final decision maker” means the person with the power to issue a final order in a contested case.

(b) Except as otherwise provided in subsection (c), (d), (e), or (h), while a contested case is pending, the presiding officer and the final decision maker may not make to or receive from any person any communication concerning the case without notice and opportunity for all parties to participate in the communication. For the purpose of this section, a contested case is pending from the issuance of the agency's pleading or from an application for an agency decision, whichever is earlier.

(c) A presiding officer or final decision maker may communicate about a pending contested case with any person if the communication is required for the disposition of ex parte matters authorized by statute or concerns an uncontested procedural issue.

(d) A presiding officer or final decision maker may communicate about a pending contested case with an individual authorized by law to provide legal advice to the presiding officer or final decision maker and may communicate on ministerial matters with an individual who serves on the [administrative] [personal] staff of the presiding officer or final decision maker if the individual providing legal advice or ministerial information has not served as investigator, prosecutor, or advocate at any stage of the case, and if the communication does not augment, diminish, or modify the evidence in the record.

(e) An agency head that is the presiding officer or final decision maker in a pending contested case may communicate about that case with an employee or representative of the agency if:

(1) the employee or representative:

(A) has not served as investigator, prosecutor, or advocate at any stage of the case;

(B) has not otherwise had a communication with any person about the case other than a communication a presiding officer or final decision maker is permitted to make or receive under subsection (c) or (d) or a communication permitted by paragraph (2); and

(2) the communication does not augment, diminish, or modify the evidence in the agency hearing record and is:



(A) an explanation of the technical or scientific basis of, or technical or scientific terms in, the evidence in the agency hearing record;

(B) an explanation of the precedent, policies, or procedures of the agency; or

(C) any other communication that does not address the quality or sufficiency of, or the weight that should be given to, evidence in the agency hearing record or the credibility of witnesses.

(f) If a presiding officer or final decision maker makes or receives a communication in violation of this section, the presiding officer or final decision maker:

(1) if the communication is in a record, shall make the record of the communication a part of the hearing record and prepare and make part of the hearing record a memorandum that contains the response of the presiding officer or final decision maker to the communication and the identity of the person that communicated; or

(2) if the communication is oral, shall prepare a memorandum that contains the substance of the verbal communication, the response of the presiding officer or final decision maker to the communication, and the identity of the person that communicated.

(g) If a communication prohibited by this section is made, the presiding officer or final decision maker shall notify all parties of the prohibited communication and permit parties to respond in a record not later than 15 days after the notice is given. For good cause, the presiding officer or final decision maker may permit additional testimony in response to the prohibited communication.

(h) If a presiding officer is a member of a multi-member body of individuals that is the agency head, the presiding officer may communicate with the other members of the body when sitting as the presiding officer and final decision maker. Otherwise, while a contested case is pending, no communication, direct or indirect, regarding any issue in the case may be made between the presiding officer and the final decision maker. Notwithstanding any provision of [state open meetings law], a communication permitted by this subsection is not a meeting.

(i) If necessary to eliminate the effect of a communication received in violation of this section, a presiding officer or final decision maker may be disqualified under Section 402(d) and (e), the parts of the record pertaining to the communication may be sealed by protective order, or other appropriate relief may be granted, including an adverse ruling on the merits of the case or dismissal of the application.

Editors' Notes

COMMENT

2011 Electronic Pocket Part Update.

Section 408 governs ex parte communications. Many of the provisions in this section are new, but some are based upon 1961 MSAPA Section 13, and 1981 MSAPA Section 4-213. Ex parte communication provisions are also contained in the federal Administrative Procedure Act, 5 U.S.C. Section 557(d).

Subsection (a) is new and provides a definition of “final decision maker” for purposes of this section.

The first sentence of subsection (b) is a revised version of 1981 MSAPA Section 4-213(a),(c). One major difference between the two provisions is that the 1981 MSAPA limited the prohibition on types of ex parte communications to those relating to any issues in the proceeding, and subsection (b) is broader and prohibits any communication concerning a pending contested case. Another difference is that there are four exceptions to the prohibition that are referenced in current subsection (b), whereas 1981 MSAPA Section 4-213(b) had three exceptions. The second sentence of subsection (b) is new and provides a specific definition of when a proceeding is pending for purposes of subsection (b). Subsection (b) prohibits ex parte communications but recognizes four exceptions to the prohibition that are codified in subsections (c), (d), (e), and (h).

Subsection (c) contains two exceptions. The first exception is for disposition of ex parte matters authorized by statute, and this exception is based upon 1961 MSAPA Section 13, and 1981 MSAPA Section 4-213(a),(c). The second exception is new and applies to communications related to uncontested procedural issues. This exception does not apply to contested procedural issues nor does it apply to issues that do not easily fall into the procedural category. For example, other communications not on the merits but are related to security or to the credibility of a party or witness are prohibited by subsection (b). See *Matthew Zaheri Corp., Inc. v. New Motor Vehicle Board* (1997) 55 Cal. App. 4th 1305.

Subsection (d) contains two exceptions. The first exception is new and allows communications by a presiding officer or final decision maker with an individual authorized by law to provide legal advice to the presiding officer or final decision maker. This recognizes the role of agency counsel in advising agency officials in adjudication. The second exception for communications on ministerial matters with staff who work for the presiding officer or final decision maker is based upon 1961 MSAPA Section 13(2), and 1981 MSAPA Section 4-213(b). Both exceptions require that the communicating individual that provides legal advice or ministerial information to the presiding officer or final decision maker must not have served as an investigator, prosecutor or advocate in the same contested case and that the communication must not augment diminish or modify the evidence in the record. The first requirement of separation of functions is similar to the requirements of Section 402(b) for presiding officers. The second requirement, relating to augmenting, diminishing, or modifying the evidence in the record, is based upon 1981 MSAPA Section 4-213(b)(ii).

Subsection (e) is new and provides an exception for communications about a pending contested case between an agency employee or representative and the agency head acting as a presiding officer or final decisions maker in that case. The exception is limited by the conditions stated in subsections (e)(1), and (2). Subsection (e)(1) requires that the employee or representative (a) not have served as an investigator, prosecutor or advocate in the contested case, and (b) not have had an ex parte communication that would be improper for the agency head acting as presiding officer or final decision maker to make or receive. Subsection (e)(1)(A) is based upon 1981 MSAPA Section 4-214(a). Subsection (e)(1)(B) is based upon 1981 MSAPA Section 4-213(b)(i). Subsection (e)(2) is based upon 1981 MSAPA Section 4-213(b)(ii). Subsections (e)(2)(A)(B) and (C) are new and provide alternative descriptions of types of communications that are allowed under this exception. Subsections (e)(2)(A)(B)(C) were added based on a compromise reached by the drafting committee after lengthy discussion. The opposing positions on the issue of whether there should be an ex parte communications exception for agency head communications with employees are 1) no exception for agency head communications with employees, and thus no subsection (e); and 2) an exception for agency head communications with employees with subsection (e)(2) but not subsections (e)(2) (A),(B), or (C). The first alternative was supported by the National Conference of Administrative Law

Judges, a section of the Judicial Division of the American Bar association. The second alternative was supported by the Section on Administrative Law and Regulatory Practice of the American Bar Association. The current compromise is more restrictive than (e)(2) because a communication has to satisfy one of the alternatives under (e)(2)(A)(B)(C) in addition to meeting the (e)(2) requirements of not augmenting, diminishing, or modifying the evidence in the agency hearing record.

Subsection (f) is based upon 1981 MSAPA Section 4-213(e).

Subsection (g) is a revised version of 1981 MSAPA Section 4-213(e). The major differences are that subsection (g) provides for a 15 day time period after notice for a party to respond in writing to the prohibited communication and under subsection (g) the presiding officer must find that there is good cause shown to permit additional testimony in response to the prohibited communication.

The first sentence of subsection (h) is a revised version of 1961 MSAPA Section 13(1) and of the first clause of 1981 MSAPA Section 4-213(b). The second sentence of subsection (h) is new and prohibits ex parte communications between the presiding officer and the agency head or other person or body to whom the power to hear or decide is delegated. This sentence is based upon California Govt. Code Section 11430.80. The third sentence of subsection (h) is new.

Subsection (i) is a revised version of 1981 MSAPA Section 4-213(f).

LIBRARY REFERENCES

2011 Electronic Pocket Part Update.

Administrative Law and Procedure ¶314, 443.1.

Westlaw Topic No. 15A.

C.J.S. Public Administrative Law and Procedure §§ 125 to 129, 264 to 266.

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Model State Administrative Proc. Act 2010 § 408, ULA ADMIN PROC 2010 § 408

Uniform Laws Annotated

Revised Model State Administrative Procedure Act 2010 Act (Refs & Annos)

Article 4. Adjudication in Contested Case

Model State Administrative Proc.Act 2010 § 404

§ 404. Evidence in Contested Case.

Currentness

The following rules apply in a contested case:

- (1) Except as otherwise provided in paragraph (2), all relevant evidence is admissible, including hearsay evidence, if it is of a type commonly relied on by a reasonably prudent individual in the conduct of the affairs of the individual.
- (2) The presiding officer may exclude evidence in the absence of an objection if the evidence is irrelevant, immaterial, unduly repetitious, or excludable on constitutional or statutory grounds or on the basis of an evidentiary privilege recognized in the courts of this state. The presiding officer shall exclude the evidence if objection is made at the time the evidence is offered.
- (3) If the presiding officer excludes evidence with or without objection, the offering party may make an offer of proof before further evidence is presented or at a later time determined by the presiding officer.
- (4) Evidence may be received in a record if doing so will expedite the hearing without substantial prejudice to a party. Documentary evidence may be received in the form of a copy if the original is not readily available or by incorporation by reference. On request, parties must be given an opportunity to compare the copy with the original.
- (5) Testimony must be made under oath or affirmation.
- (6) Evidence must be made part of the hearing record of the case. Information or evidence may not be considered in determining the case unless it is part of the hearing record. If the hearing record contains information that is confidential, the presiding officer may conduct a closed hearing to discuss the information, issue necessary protective orders, and seal all or part of the hearing record.
- (7) The presiding officer may take official notice of all facts of which judicial notice may be taken and of scientific, technical, or other facts within the specialized knowledge of the agency. A party must be notified at the earliest practicable time of the facts proposed to be noticed and their source, including any staff memoranda or data. The party must be afforded an opportunity to contest any officially noticed fact before the decision becomes final.



(8) The experience, technical competence, and specialized knowledge of the presiding officer or members of an agency head that is a multi-member body that is hearing the case may be used in evaluating the evidence in the hearing record.

Editors' Notes

COMMENT

2011 Electronic Pocket Part Update.

Subsection (1) is based upon the second sentence of 1981 MSAPA Section 4-215(d).

Subsection (2) is based upon 1981 MSAPA Section 4-212(a), and upon 1961 MSAPA Section 10(1). Subsection (1) codifies the rule that hearsay evidence is admissible in contested case hearings whether or not a hearsay exception applies. This is a relaxed standard for admissibility in contrast to the evidence rules in civil jury proceedings in which hearsay evidence would not be admissible unless a hearsay exception applied. See Section 413(f) for the legal residuum rule and the reliability alternatives. Under subsection (2) evidence is unduly repetitious if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. In most states a presiding officer's determination that evidence is unduly repetitious may be overturned only for abuse of discretion. The term statutory in subsection (2) refers to evidence rules that are codified by statute in some states with an evidence code (See California Evidence code).

Subsection (3) is new but codifies generally accepted practices for evidentiary objections.

The first sentence of subsection (4) is based upon 1961 MSAPA Section 10 (1) and 1981 MSAPA Section 4-212(d). The second and third sentences of subsection (4) is based upon 1961 MSAPA Section 10 (2), and 1981 MSAPA section 4-212(e).

Subsection (5) is based on 1981 MSAPA Section 4-212(b), Government Code Section 11515, and 1961 MSAPA Section 10(4).

The first and third sentences of subsection (6) are new. The second sentence of subsection (6) is based on 1981 MSAPA Section 4-215(d), first sentence.

Subsection (7) is based generally on 1961 MSAPA Section 10 (4), and on 1981 MSAPA Section 4-212(f).

Subsection (8) is based upon 1961 MSAPA Section 10(4), fourth sentence, and 1981 MSAPA Section 4-215(d), third sentence.

LIBRARY REFERENCES

2011 Electronic Pocket Part Update.

Administrative Law and Procedure ¶¶459, 461, 476, 477.

Westlaw Topic No. 15A.

C.J.S. Public Administrative Law and Procedure §§ 236 to 238, 241 to 243, 257, 267.

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Model State Administrative Proc. Act 2010 § 404, ULA ADMIN PROC 2010 § 404

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Mark Walker

From: Couch, Dean [DACOUCH@owrb.ok.gov]
Sent: Monday, December 17, 2012 5:02 PM
To: Mark Walker
Cc: Strong, J.D.; Barnett, Jerry
Subject: Open Records request

Mark,

Attached is a copy of the August 17, 2012, draft response prepared by Derek Smithee to my request for an evaluation of evidence to address the four issues noted.

As to your inquiry in your December 3, 2012, letter about the \$35.00 copy charge for the compact disc recording of the Board meeting audio, please see Board rule 785:5-1-15.

Dean Couch
General Counsel
Oklahoma Water Resources Board



**Derek Smithee's response to the
Arbuckle/Simpson Maximum Annual Yield Post-Hearing Brief of
Protestants' Attorney Mark Walker dated May 31, 2012**

What follows are my brief "responses" to Mark Walker's Post-Hearing Brief in opposition to the Arbuckle/Simpson Tentative Maximum Annual Yield/Equal Proportionate Share dated May 31, 2012.

Issue #1 – On page #5 it states that "Mr. Smithee then hand selected the committee which later came up with the definition of "natural flow" that now forms the basis for the Tentative MAY ..."

Response: Members of this group WERE hand selected – but not by Mr. Smithee but rather through a formal solicitation and informal discussion both within and without the OWRB. Contrary to the assertion, it was not formed with the intent to predetermine or bias the result. In fact numerous prospective members were solicited that declined – among them several landowners. The nature of this committee required not only the willingness to serve, but also a background and training in this matter.

Issue #2 – On page #6 it states that "Although the Smithee committee considered "water supply" as one of the possible ways in which to define natural flow, inexplicably and arbitrarily it chose to reject water supply as the criteria to measure reduction in natural flow....and why the tentative MAY condemns the use of groundwater for water supply in preference to fish population. See also page #10 "the specific fish were selected because they were the "most sensitive" to reductions in stream flow."

Response: S.B. 288 did not charge the Smithee committee with ONLY protecting water supply, but with protecting the natural flows. Clearly there are many uses of stream water other than water supply, including those outlined in the Walker brief. As the workgroup discussions evolved, it became clear through discussions with water supply experts at the ODEQ and municipality's, that water supply needs were clearly LESS dependent upon flow reductions than other uses like ecological integrity and recreation. In as much as unlimited funds were not available to study impacts to each and every purpose to which stream water can be used, the committee chose to study what they believed to be the most sensitive. Clearly protecting a less sensitive water supply use at the expense of ecological integrity (or other uses), was not the intent of the Bill.

Issue #3 – On page #11 it states that “the underlying intent of his committee was to help set a MAY that would protect fish population – not fish habitat – it was improper for the committee to ultimately base its recommendations strictly on a fish habitat study...”

Response: It is common practice in studies of this type to measure incremental changes in fish habitat resulting from changes in flow and infer corresponding changes in fish community structure and aquatic ecosystem integrity. While it is true that specie responses to these flow and habitat changes vary, and may even be increased (i.e. Prey becomes easier to capture when confined to small pools thus benefitting predators while harming prey) – the charge was to avoid or limit EITHER positive or negative impacts . In the end, the committee “blended” all habitat studies to determine when threshold impacts (whether positive or negative) occurred and thus altering the aquatic community structure that occurs with any change in “natural flows”. Inferring fish and community impacts to habitat alteration is commonplace even though empirically quantifying them is difficult.

Actually measuring fishery impacts DIRECTLY is possible, but would have been prohibitively expensive and require the artificial modification of spring/stream flow over many miles of streams overlying the Arbuckle/Simpson aquifer. Clearly an indirect measure of habitat change is advantageous over a direct measure which would necessitate drying out a stream and totally collapsing an entire aquatic ecosystem.

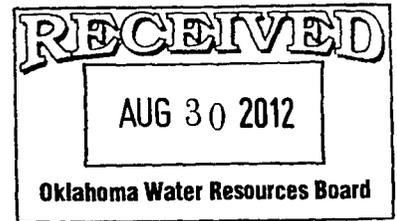
Issue #4 – On page 15 it states “for some unexplained reason, the committee chose to advise the computer modeler, Mr. Christianson, to model the results of a 25% reduction in the 75th Percentile Flow – not the Baseline Low Flow upon which the committee based its recommendation.”

Response: No statutory or regulatory definition for “Baseline Flow” exists and S.B. 288 is clearly drafted to require consideration of more than water supply. A model cannot be run on a concept or definition, but rather requires the use of an empirical value. Recognizing these issues, the Committee agreed that the 75th percentile flow was an accurate approximation of baseline flow and utilized that term when communicating to the modeling team. Although they may not be technical or statutory equivalents, for the purpose of fulfilling our mandate they are functionally equivalent.

Feel free to contact me if you have any questions.

Derek

August 17, 2012



VIA HAND DELIVERY

August 30, 2012

Oklahoma Water Resources Board
3800 North Classen Blvd.
Oklahoma City, OK 73118
405-530-8800
405-530-8900 (fax)

Re: OPEN RECORDS ACT REQUEST – In the Matter of Determining the Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin

Dear Sir or Madam:

Pursuant to the Oklahoma Open Records Act, 51 O.S. §§ 24A.1-24A.24, (“Act”) please promptly provide copies of all records relating in any way to the determination of the Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin (“Determination”) created by, received by, or otherwise coming into the custody, control or possession of the Oklahoma Water Resources Board (“OWRB”), its members, or its staff on or after May 17, 2012. This request specifically includes, but is not limited to, records relating to meetings and/or other communication with the Hearing Examiner or any other legal or natural persons. This request also specifically includes records relating to internal meetings and other communication between and among OWRB members, OWRB staff, and/or other OWRB agents or representatives as well as any memoranda or notes made, finalized, revised, or added to any OWRB file on or after May 17, 2012 regardless of the date of the initial draft.

With respect to this request, the term “record” is used in the broadest sense consistent with the Act, including any and all recorded information within the scope of 51 O.S. § 24A.3(1), regardless of physical form or characteristic. If your office is aware of any records subject to this request over which it does not have custody or access, please provide prompt notice of where such records may be obtained.

If any portion of this request is denied, the undersigned request a detailed index or similar written statement individually describing each record withheld and all reasons for its being withheld. Such descriptions should include a citation to specific legal authority for the withholding the record described. To expedite this request, the undersigned would be willing to discuss specific instances of withholding in advance of a final response from your office. Pursuant to 51 O.S. § 24A.5(2), any reasonably segregable portion of a record containing exempt material shall be provided after deletion of the exempt portions.

The undersigned promise to pay all reasonable copying costs that are chargeable under the Act upon presentation of an invoice with the records requested. Though this request is made

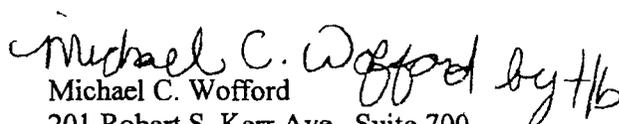


jointly by all of the undersigned, the requested copies and/or any index of exempt materials should be delivered to the address provided below for L. Mark Walker. If, at any point, the copying costs of are expected to exceed \$500.00, please use the email address or phone number provided below to contact L. Mark Walker immediately to discuss arrangements. Any other questions regarding this request should similarly be directed to L. Mark Walker.

Sincerely,



L. Mark Walker
20 N. Broadway, Suite 1800
Oklahoma City, OK 73102
(405) 235-7783
mark.walker@crowedunlevy.com



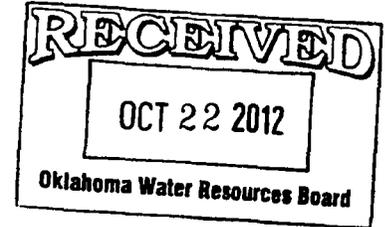
Michael C. Wofford
201 Robert S. Kerr Ave., Suite 700
Oklahoma City, OK 73102
(405) 319-3504
mwofford@dsla.com

L. Mark Walker
Direct Tel: (405) 235-7783
Direct Fax: (405) 272-5287



mark.walker@crowedunlevy.com

October 22, 2012



VIA HAND DELIVERY

Dean Couch
General Counsel
Oklahoma Water Resources Board
3800 N. Classen Boulevard
Oklahoma City, OK 73118

Re: Open Records Act Request – Arbuckle-Simpson M.A.Y Proceeding

Dear Dean:

As I am sure you are aware, on August 30, 2012, Michael Wofford and I submitted an Open Records Act request essentially seeking all OWRB records relating to the Arbuckle-Simpson Maximum Annual Yield matter which were created on or after the last day of the Maximum Annual Yield (“M.A.Y.”) hearing held on May 17, 2012. This request was all inclusive, and included such things as modeling runs or simulations performed after the hearing, all reports commenting upon the evidence or arguments of the parties to the M.A.Y. hearing regardless of who generated same, internal emails and all other communications relating to the M.A.Y., as well as Outlook calendar invitations and acceptance/decline receipts reflecting meetings relating to M.A.Y. on or after May 17, 2012.

I spoke with Anissa around September 12 and was told that the responsive documents had all been collected and were ready to be produced as soon as they were “reviewed”. Subsequently, Scott Butcher and I each spoke to Anissa and were separately told that the documents had been reviewed, but that they also needed to be reviewed by Jerry Barnett who was out until October 8.

On Friday, October 19, Scott Butcher received a phone message from Anissa stating the following:

“I finally got an answer on the open records request and what they have decided is to wait on producing anything until Emily has submitted the order to the Board, which should be soon, within the next few weeks, I’m assuming. Dean and Jerry are basically citing 51 O.S. § 24A.9 to keep it confidential until the order goes to the Board.”

51 O.S. § 24A.9 provides that a public official may keep as confidential personal notes and personally created materials. It does not protect any emails, memos, computer modeling or

OKLAHOMA CITY
20 NORTH BROADWAY, SUITE 1800
OKLAHOMA CITY, OK 73102-8273
TEL: 405 235.7700 • FAX 405 239.6651

www.crowedunlevy.com

other material shared with anyone other than the person who created it. Moreover, if the OWRB intends to assert privilege and withhold documents covered by the Open Records Act request, then the OWRB needs to immediately provide a privilege log so that we can evaluate and, if necessary, challenge any asserted privilege claim.

At the August 2012 Board meeting, the Executive Director told the Board that the Hearing Examiner's proposed order was expected in early September. It was shortly *after* that meeting that we submitted our Open Records Act request. At the next Board meeting for September 2012, the Executive Director advised the Board for the first time that the Hearing Examiner had questions for staff to which she wanted to get answers before finalizing the proposed order. From this it is clear that there have been communications with staff that go beyond the personal notes of the Hearing Examiner. Further, it is apparent that the content of the answers provided by staff will influence the Hearing Examiner's deliberations and decision.

As you know, the OWRB participated as a party at the M.A.Y. hearing. Jerry Barnett appeared as counsel for the OWRB and presented several witnesses, both on direct and rebuttal. In accordance with 82 O.S. § 1020.7, the OWRB presented evidence in support of the tentative M.A.Y. The Hearing Examiner then gave everyone 15 days to submit additional evidence on the condition they could justify why they failed to present such evidence at the hearing. The OWRB chose not to submit further evidence. Similarly, although permitted by the Hearing Examiner, the OWRB chose not to submit a closing brief and chose not to respond to the closing briefs of others.

The concern in submitting the Open Records Act request is transparency in the M.A.Y. process. We want to make sure that OWRB staff or others involved in the M.A.Y. process are not generating evidence, information or arguments that might influence the Hearing Examiner's decisional process without becoming a part of the record or affording the parties an opportunity to respond. The fact that the OWRB has now decided to withhold *all* documents responsive to the Open Records Act request only heightens this concern.

82 O.S. § 1020.6 provides that M.A.Y. hearings shall be conducted as individual proceedings pursuant to 75 O.S. § 308a, *et seq.* 75 O.S. § 313 provides that, in all individual proceedings, a hearing examiner shall not communicate with any person or party with regard to any issue of fact, and shall not communicate with any party with regard to any issue of law. Therefore, it is perfectly legitimate for anyone to make an Open Records Act request to ensure that no such communications have occurred.

Here, because the OWRB participated as a party to a public hearing, there should not be any back door communications outside the record between the Hearing Examiner and OWRB staff. Any such communications would appear to be a violation of 75 O.S. § 313, and the withholding of such communications a violation of 51 O.S. § 24A.5 subject to 51 O.S. § 24A.17.

At this point we request the OWRB take the following immediate actions:

- (1) Provide a written response to our Open Records Act request setting forth the OWRB's official position so that there is a record for review;

October 22, 2012
Page 3

- (2) To the extent any documents are being withheld under a claim of privilege, provide a privilege log; and
- (3) Produce all other responsive documents immediately.

We also request an in-person meeting this week to more fully discuss these issues.

Sincerely,



L. Mark Walker
For the Firm

LMW/paj
cc: Mike Wofford
Scott Butcher

L. Mark Walker
Direct Tel: (405) 235-7783
Direct Fax: (405) 272-5287

mark.walker@crowedunlevy.com

November 8, 2012

Dean Couch
General Counsel
Oklahoma Water Resources Board
3800 N. Classen Boulevard
Oklahoma City, OK 73118

Re: Open Records Act Request

Dear Dean:

Thank you for your letter dated November 2, 2012 and the documents furnished therewith. From a somewhat hurried review of the documents provided, I have a few follow up questions:

1. With regard to the documents that were withheld on the basis of a claimed privilege, would you please provide us with a privilege log so that we can assess whether we wish to challenge any such claim?

2. From the documents provided it appears that the USGS may have done some additional modeling after the M.A.Y. hearing under contract with the OWRB. Was this done and, if so, will you please produce the work and model results and all documents which reflect who received the results or information regarding same?

3. The documents provided indicate that you asked Derek Smithee to provide his notes regarding his review of Protestants' brief so that you could provide them to the hearing examiner. A copy of at least some of Mr. Smithee's notes were provided, however, the transmittal communication of same to the hearing examiner was not. Would you please provide same? Please provide those notes and all communications with the hearing examiner regarding same.

4. The documents provided indicate that you sent Noel Osborn's notes regarding the Protestants' brief to the hearing examiner. There were some notes prepared by Ms. Osborn regarding Protestants' brief contained in the materials provided. However, I do not see any transmittal communication of same to the hearing examiner. Will you please provide same?

5. The documents provided indicate that you also solicited notes or comments to Protestants' brief from Bob Fabian, Chris Neel and possibly others to provide to the hearing

November 8, 2012

Page 2

examiner. If so, will you please provide such notes and comments and all communications to the hearing examiner regarding same.

6. From the documents provided it appears that you offered to the hearing examiner for you and Jerry Barnett to prepare the initial draft of the proposed M.A.Y. order. Was this done, if so, will you please provide copies of same and all communications with the hearing examiner regarding same?

As we continue to review the documents we may have additional questions and requests. Lastly, I note that our request was for documents *after* the last day of the M.A.Y. hearing. Much of what was provided were pre-hearing documents and exhibits admitted during the hearing. If you do charge us for copies, I trust we will not be charged for the documents that were not requested.

Sincerely,



L. Mark Walker
For the Firm

LMW/paj

cc: Mike Wofford
Scott Butcher

J. D. STRONG
EXECUTIVE DIRECTOR



MARY FALLIN
GOVERNOR

**STATE OF OKLAHOMA
WATER RESOURCES BOARD**
www.owrb.ok.gov

December 3, 2012

L. Mark Walker
Crowe & Dunlevy
20 North Broadway, Suite 1800
Oklahoma City, Oklahoma 73102-8273

Michael C. Wofford
Doerner, Saunders, Daniel & Anderson, L.L.P.
201 Robert S. Kerr Ave, Suite 700
Oklahoma City, OK 73102-4203

Re: Open Records Act Request – Arbuckle-Simpson Maximum Annual Yield Proceeding

Gentlemen:

This will reply to Mr. Walker's letter dated November 8, 2012 and subsequent emails to me regarding our response to your earlier request that the Oklahoma Water Resources Board ("OWRB") provide, under the Oklahoma Open Records Act ("ORA"), "...copies of all records relating in any way to the determination of the Maximum Annual Yield ["MAY"] for the Arbuckle-Simpson Groundwater Basin...created by, received, by, or otherwise coming into the custody, control or possession of the [OWRB], its members, or its staff on or after May 17, 2012."

The copies of records which we provided with the transmittal letter dated November 2, 2012 were and are responsive to your request. The records that are being kept confidential are protected from disclosure as allowed and authorized by 51 O.S. §§ 24A.5(1) and 24A.9. I am very surprised and disappointed that Mr. Wofford included a claim in his email to the effect that our response "is in fact a serious violation of state law." Of course, I strongly and profoundly disagree with Mr. Wofford's claim.

Your letters and emails pertaining to your ORA request appear to be based on a number of unfounded assertions ostensibly in support of your request. Some of these assertions track some of the arguments you have made in the pending proceeding on the Arbuckle-Simpson MAY, particularly your contention that the OWRB and/or its staff is a "party" in that proceeding. The ORA (nor any other law I am aware of) does not require me to respond to all of your assertions



3800 N. CLASSEN BOULEVARD • OKLAHOMA CITY, OKLAHOMA 73118
TELEPHONE (405) 530-8800 • FAX (405) 530-8900

F Ford Drummond, Chairman • Linda P Lambert, Vice Chairman • Tom Buchanan, Secretary

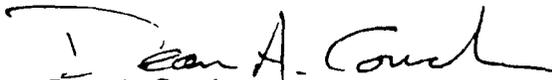


at this time and in the context of this correspondence. Nevertheless, we state the following for the record:

1. The OWRB, including its members and staff, is not a party in the pending administrative proceeding for determining the MAY of the Arbuckle-Simpson Groundwater Basin.
2. In reply to item no. 1 in your November 8 letter, neither the ORA nor the applicable and governing provisions of the Administrative Procedures Act, 75 O.S. §§ 250 through 323, require the OWRB to create a new record like a privilege log, and so we have not created and will not be providing one.
3. In reply to item no. 2 in your November 8 letter, we have no records and we are not aware of any additional modeling work or modeling results done by the U.S. Geological Survey since the MAY hearing.
4. There are no "transmittal communications to the hearing examiner" regarding notes from Derek Smithee, Noel Osborn, Bob Fabian or Chris Neel as speculated in item nos. 3, 4 and 5 in your November 8 letter. In fact, other than the September 27, 2012 Memorandum co-authored by Noel Osborn (which refers to evidence in the record), none of the notes prepared by Ms. Osborn found at pages 43 through 50 of your "Motion to Recuse/Disqualify Hearing Examiner and to Stay Proceeding and Brief in Support" filed November 8, 2012 were provided to the Hearing Examiner before your Motion to Recuse was filed.
5. In reply to item no. 6 in your November 8 letter, neither Jerry Barnett nor I have prepared a draft "Proposed Order" (i.e., as described in 75 O.S. § 311) for the Hearing Examiner.

If you wish, the Executive Director and I are also willing to meet with you to discuss these issues.

Sincerely,


Dean A. Couch
General Counsel

L. Mark Walker
Direct Tel: (405) 235-7783
Direct Fax: (405) 272-5287

mark.walker@crowedunlevy.com

December 11, 2012

VIA EMAIL

Dean Couch
Oklahoma Water Resources Board
3800 N. Classen Boulevard
Oklahoma City, OK 73118

Re: Open Records Act Request Regarding Arbuckle-Simpson MAY Proceeding

Dear Dean:

I understand your letter of December 3, 2012, to state that none of the information which you solicited and obtained from Board staff for the express purpose of providing to the Hearing Examiner was ever sent or communicated to her. I am having difficulty reconciling this statement with the documents previously provided and with Mr. Strong's prior reports to the Board as discussed below.

In the documents previously produced in response to the Open Records Act Request, there were emails authored by you in which you told various OWRB staff that you were soliciting information from staff to help "explain the evidence to the hearing examiner", including evidence addressing "the issues raised in the Protestants' brief filed by Mark Walker of Crowe & Dunlevy (attached)." The emails disclose that this information was solicited from at least Derek Smithee, Bob Fabian and Chris Neel. The records reflect that Derek Smithee provided his memorandum in response to your request. Similarly, one of your emails to Derek Smithee states that, "Noel provided me a copy of a memo containing information to address the hearing examiner's request to address the issues pointed out in the post-hearing brief filed by Mark Walker," and a copy of Noel's six page memo was in the documents produced.

At the September 18, 2012 Board meeting, J.D. Strong told the Board:

"The Hearing Examiner has been trying to crunch through a lot of that (the hearing evidence). She actually had some very technical questions to have answered by researchers that worked on the study. I think the bulk of those at this point have been answered with the exception of USGS."

December 11, 2012

Page 2

I understood this to mean that answers to the Hearing Examiner's questions were answered by OWRB staff prior to September 18, 2012, but that the USGS had not yet provided its answers. This fits perfectly with the documents produced which show that you were requesting comments from staff around August 14, 2012, and reports were provided by OWRB staff in the late August/early September time frame. However, the USGS did not provide its memorandum until September 27, 2012.

At the October 16, 2012 Board meeting, Mr. Strong reported to the Board:

"We finally ... we can report that the USGS and other technical information that the Hearing Examiner had been working on has now been delivered finally to the Hearing Examiner. So the Hearing Examiner ought to be writing up her final proposed order...."

Based upon the foregoing, I am concerned that perhaps the documents themselves may not have been forwarded to the Hearing Examiner, but that the content or substance of such reports was provided to the Hearing Examiner, either by communications which you are withholding under claim of privilege or through oral conversations that you or staff members had with the Hearing Examiner. It's possible that this information was transmitted to the Hearing Examiner in one of the conference calls that was had with her as referenced in the produced documents, or perhaps there were meetings in person with the Hearing Examiner.

Can you please explain to us what happened? Was the information that you solicited from staff for the express purpose of providing to the Hearing Examiner to respond to Protestants' brief provided to the Hearing Examiner in any form or fashion, whether orally or in writing? I understood your earlier communications to indicate that some of the Hearing Examiner's notes were being withheld from production until such time as the Hearing Examiner issues her proposed order. Do any of these notes include information provided by staff after the hearing that relate to the evidence presented at the hearing? We may have a disagreement over whether it was proper for the Hearing Examiner to have communications with staff, but I see no reason for us to have any dispute over exactly what information was provided to the Hearing Examiner. I look forward to you clarifying the facts in this regard.

Sincerely,

Handwritten signature of L. Mark Walker, with the initials "SAB" written to the right of the signature.

L. Mark Walker
For the Firm

LMW/bd

Enclosure

cc: Mike Wofford
Scott A. Butcher