



**BEFORE THE OKLAHOMA WATER RESOURCES BOARD
STATE OF OKLAHOMA**

In the Matter of the Application of)	
the City of Oklahoma City for a)	Permit Application No. 2007-0017
Regular Permit to Divert Stream Water)	
In Pushmataha County, Oklahoma)	Hearing Examiner
)	Lyn Martin-Diehl
On Behalf of Kiamichi River Legacy)	
Alliance, an association of Protestants,)	
Tom Garrett, Justin Jackson, Debbie L.)	
Leo, Larinda McClellan, and Kenneth)	
Roberts, Ph.D.)	

**SUR-REPLY TO ENTRY OF APPEARANCE AND NOTICE OF INTERESTED
PARTY AND APPLICATION PROTEST, AND
MOTION FOR ORAL ARGUMENT**

COMES NOW Kiamichi River Legacy Alliance ("KRLA") to provide a sur-reply in the above-reference matter to the Response to Entry of Appearance and Notice of Interested Party and Application Protest ("Response"), by the City of Oklahoma City ("Applicant"), dated June 22, 2017. KRLA urges the Hearing Examiner to grant KRLA's motion for Entry of Appearance and Notice of Interested Party and Application Protest ("Entry") and find that KRLA is a party to this proceeding. Further, KRLA respectfully moves for oral argument to occur at the beginning of the Pre-Hearing Conference scheduled for Wednesday, June 28, 2017.

I. INTRODUCTION

KRLA is an association of Protestants and Interested Parties who filed timely protests to the application of a permit, No. 2007-0017, by the City of Oklahoma City to take water from Sardis Reservoir in the Kiamichi River Basin in southeastern Oklahoma. This association was formed after the common realization by the KRLA

members that the application of permit would have deleterious impacts upon "cultural and tribal sites and resources, threatened and endangered species, recreation, hunting and fishing, tourism, and economic development, as well as to individual water and property rights and values." Entry at 3. The Hearing Examiner, in her discretion, may allow standing and party status. OAC 785:4-5-4. Applicant acknowledges that discretion throughout its Response.

KRLA urges the Hearing Examiner, in her discretion, to grant it standing and party status for the following reasons. First, the timing of the Entry of Appearance was understandable, under the law. Second, KRLA does in fact have associational standing, if the Hearing Examiner considers the entire record thus far. Third, allowing KRLA to have associational standing would be efficient because it would combine numerous protestants into one argument, thus economizing time and resources. Finally, KRLA is a party with standing because it also meets the criteria of creating a class action suit in state court to challenge any permit granted to Oklahoma City to take water from Sardis Lake and the Kiamichi River basin.

II. LEGAL ARGUMENT

KRLA's motion for Entry of Appearance and Notice of Interested Party and Application Protest should be approved because 1) KRLA filed Notice in a reasonable and understandable time after its constituent members had filed timely protests, 2) KRLA has associational standing; 3) KRLA's presence brings efficiency; and 4) KRLA would be able to bring a class action against Applicant in state court if Applicant receives a permit or if KRLA needs other judicial relief.

1. KRLA Filed in a Reasonable Time After Its Constituent Members
Had Filed Timely Protests

KRLA was created in the aftermath of the permit protest deadline, but the procedural and legal details have taken some time. First, constituent members filed timely protests. Then, those individual protestants held meetings in southeastern Oklahoma to compare information and gauge interest. Meetings have been attended by various residents of southeastern Oklahoma with various interests, including but not limited to business owners, environmentalists, ranchers, professors, homemakers, and more. Then, KRLA had to file as an organization with the Oklahoma Secretary of State and then retain an attorney. That attorney then needed reasonable time to work through factual and legal information relating to the Application. Again, as Applicant has admitted, a Hearing Examiner has discretion about this kind of issue. KRLA, for the following reasons, argues that it would be reasonable to accept KRLA as a party.

2. KRLA Has Associational Standing.

The issue about standing actually is an issue about whether a protestor has a “specific, legally protected interest” under OWRB regulations. Applicant cites OAC 785: 4-5-4(b)(3), 20-5-4(a)(3), 20-5-5(d) on pages 6 and 8, and also includes a footnote saying it intends to moving for dismissal against numerous Protestants.¹ A quick search of these regulations in Westlaw shows no case law determining the meaning of that phrase. Nowhere does Applicant attempt to operationalize a cogent

¹ In the event that Applicant fulfills its threat to oppose certain Protestants, then KRLA plans on opposing any motion against the standing of any Protestant, including the filing for appropriate administrative and judicial relief.

definition of "specific, legally protected interest." Rather, Applicant looks to the common law of standing as applied generally to Oklahoma administrative proceedings, *quoting Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058, 1062 (Okla. 2007). The test asserted by Applicant can be summarized as where members can sue for their own interests but also can sue as a group. Or, as Applicant said, "they must have 'direct, immediate and substantial' interest in the controversy and a 'personal stake in the outcome.'" Response at 4, *quoting Okla. Educ. Assn.* at 1063. Each Protestant has standing because the Permit will hurt each.

That exactly is why KRLA and each board member has standing, but for reasons that Applicant fails to grasp. The potential harm to interests is more than an alleged riparian right, but also to the environmental, economic, cultural, and social interests of all residents, businesses, and other organizations along or near the Kiamichi River basin. KRLA's operational purpose is summarized by its name – Kiamichi River Legacy Alliance – because its one and sole mission is to join together common parties to protect the integrity and benefits of the Kiamichi River to the region. The taking of water is not just about water, or the state and federal governments would not have required numerous considerations about interests other than water. Applicant's Exhibit F apparently must be litigated one Protestant at a time, given its argument about how to define a legal interest. Applicant's legal position against Protestants promotes inefficiency and deflects away from addressing squarely the defects in its Permit, which KRLA will address throughout the hearing process.

Again, KRLA has made a clear and plain statement in its Notice and in this Sur-Reply about its purpose to protect the Kiamichi River and the interests of those along it. Also, and more importantly, each and every person and entity who filed a protest has standing before the OWRB on the matter of taking water from the Kiamichi River basin generally and Sardis Lake specifically. The ripple effect of a permit will be felt by everyone in southeastern Oklahoma. KRLA has met the prongs of the test for associational standing because it represents those directly affected by the Permit application. KRLA argues for and supports standing for each Protestant.

3. KRLA Brings More Efficiency to the Process

Nothing in the law prohibits existing Protestants in a water permit case to organize in opposition against a water permit. In the present case, dozens of people and organizations filed protests. A brief perusal of long list of the Certificate of Mailing shows that someone or something needs to speak on behalf of the numerous people and institutions in southeastern Oklahoma who object to the Applicant's Permit Application. KRLA, by and through its counsel, can make consistent arguments and provide evidence that would give voice to those who have not had voice. As argued in the Entry, none of the parties to the August 2016 Settlement Agreement directly represent the wishes of southeastern Oklahoma. KRLA argues, instead, that the state of Oklahoma failed to account for the specific wants and needs of southeastern Oklahoma, the the Kiamichi River basin. So, KRLA organized after the notice provided about the numerous Protestants against the permit.

4. KRLA and Other Protestants Meet The Criteria For a Class Action Suit

Assuming *arguendo* that the Applicant fails to prove that it qualifies for a water permit but receives a permit anyway, or that the Applicant otherwise is legally deficient in the permitting process, KRLA and other Protestants may well consider a class action suit. The test under Oklahoma statute is clear:

One or more members of a class may sue or be sued as representative parties on behalf of all only if:

1. The class is so numerous that joinder of all members is impracticable;
2. There are questions of law or fact common to the class;
3. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
4. The representative parties will fairly and adequately protect the interests of the class.

12 O.S. §2023 (2014).

KRLA and its board members as Protestants and Interested Parties argue that it represents a class of all of southeastern Oklahoma and the seven counties in the Kiamichi River basin. Harm to the Kiamichi River harms all of southeastern Oklahoma economically, culturally, socially, environmentally, and more. There are common questions of law. A pertinent example is whether a “specific, legally protected interest” under OWRB regulations in a water permitting case is confined to riparian rights of adjacent landowners.

The Choctaw and Chickasaw Nations sued Applicant and other parties on behalf of its tribal members. All of southeastern Oklahoma – tribal or not – needs focused, articulable representation in water litigation involving its own water. If Applicant prevails by pressuring out Protestants as parties, then the few who remain will have few other options but to organize as a class and sue, which then would extend the process and cost the parties and taxpayers more money and headaches. It is more efficient to recognize KRLA and all Protestants in this Hearing.

III. CONCLUSION

KRLA is a direct result of duly notified Protestants who discovered common interests in associating and hiring counsel. It took some weeks to accomplish that. Because KRLA filed an Entry of Appearance and Notice of Interested Party and Application Protest within a reasonable and understandable amount of time given the circumstance, has associational standing, brings more efficiency to the process, and qualifies for a class action, its motion should be granted as per the Hearing Examiner's discretion.

WHEREFORE, Applicant respectfully requests that the Hearing Examiner grant KRLA's motion for Entry of Appearance and Notice of Interested Party and Application Protest and find that KRLA is a party to this proceeding, and also that it be granted oral argument on June 28, 2017 before the Pre-Hearing Conference begins.

Respectfully submitted this 26th day of June, 2017,

Kevin R. Kemper

Kevin R. Kemper, OBA #32968
ATTORNEY FOR KRLA

CERTIFICATE OF MAILING

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