

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA FARM BUREAU LEGAL
FOUNDATION, et al.

Petitioners,

v.

OKLAHOMA WATER RESOURCES BOARD,

Respondent,

v.

TISHOMINGO NATIONAL FISH HATCHERY,
et al.,

Other Parties of Record.

Case No. CV-2013-2414

District Judge Barbara Swinton

**MOTION FOR DISCOVERY AND HEARING ON PROCEDURAL
IRREGULARITIES AND FOR SCHEDULING CONFERENCE**

Petitioners Pontotoc County Farm Bureau, Oklahoma Farm Bureau Legal Foundation, Oklahoma Independent Petroleum Association, Oklahoma Aggregates Association, Environmental Federation of Oklahoma, Oklahoma Cattlemen's Association, TXI, and Arbuckle-Simpson Aquifer Protection Federation of Oklahoma, Inc. (collectively "Petitioners"), move pursuant to 75 O.S. § 321 for an order providing for discovery and an evidentiary hearing on alleged irregularities in administrative procedure before the Oklahoma Water Resources Board ("Board").

In this case, Petitioners seek judicial review of the Board's order finding that just 78,404 acre-feet of groundwater is available for use from all of the Arbuckle-Simpson Groundwater Basin (roughly 400,000 surface acres) each year. The APA confines this Court's review to the record except that additional testimony may be taken regarding alleged procedural irregularities not shown in the record. *Id.* § 321. Petitioners allege that in the course of evaluating the evidence

the Hearing Examiner received and considered *ex parte* communications to which they had no opportunity to respond. Under the Oklahoma Administrative Procedures Act (“APA”), findings of fact in an individual proceeding must be based exclusively on evidence received and matters officially noticed on the record. 75 O.S. § 309(H). Because their allegation that the Hearing Examiner received and considered material outside the administrative record necessarily cannot be evaluated solely from that record, Petitioners ask the Court for an evidentiary hearing and limited discovery pursuant to 75 O.S. § 321.

1. Board staff responded directly to Petitioners’ evidence and argument through *ex parte* communications not shown on the record.

This is an appeal from the Board’s final order in an individual proceeding to determine the amount of groundwater from of the Arbuckle-Simpson Groundwater Basin that may be used by owners of the overlying land each year (“Order”). The proceeding was initiated in March 2012 when the Board’s staff completed a statutorily required study of the basin and issued a tentative finding that 78,404 acre-feet groundwater is available annually. The Board then held an evidentiary hearing, which began with the Board’s staff’s presentation of evidence in support of their tentative finding. Petitioners participated in the hearing by cross-examining witnesses who took part in the study and by presenting independent evidence that there were errors in the groundwater modeling on which the study was centered. At the conclusion of Petitioners’ evidence, the Board’s staff attorney called rebuttal witnesses who offered additional testimony in rebuttal to Petitioners’ evidence.

In post-hearing briefing, Petitioners argued from the evidence that the staff’s study did not support or lead to the tentative finding and that adopting the tentative finding would otherwise violate both statutory and constitutional law. Though other parties filed responses to the Petitioners’ brief, the Board’s staff did not. However, the Hearing Examiner had several

communications off the record specifically to allow Board staff to respond to the Petitioners' brief.

After post-hearing briefing was complete, the Hearing Examiner asked the Board's general counsel for the staff's help in responding to the Petitioners' brief. (Meazel Aff. ¶ g. (copy attached as Exhibit 1); Walker Aff. Ex. D at 7–8 (copy attached as Exhibit 2).) The Hearing Examiner identified at least three issues for which she could not find responsive evidence in the record: (1) unexplained changes in staff's estimate of the amount of water stored in the basin, (2) errors in the groundwater modeling on which staff based their tentative finding, and (3) the staff primarily studied only one of the three regions for which they made tentative findings. (Walker Aff. Ex. D at 8.) The general counsel agreed to provide a complete response to Petitioners' brief and to have Board staff fill any gaps in the record:

“I told Emily we would take a shot at putting together a list of issues raised in the attached brief, then address those one by one with references to evidence in the record (e.g. exhibit number and page, or testimony presented at the hearing) and with staff ‘expertise’ to explain where necessary.”

(Walker Aff. Ex. D at 8 (parenthetical in original).)

Over the following month, the general counsel coordinated with the staff attorney who had presented evidence at the hearing to confer with other Board staff and witnesses who had testified at the hearing. Witnesses participated in conference calls and prepared memos and written comments intended to respond to Petitioners' brief. (See Walker Aff. Ex. D.) Included within the staff memos were new facts and arguments, which had not been presented at any point in the proceeding. The staff attorney then synthesized this information in a written response to Petitioners' brief, which was e-mailed to the Hearing Examiner on September 14, 2012. (Walker Supp. Aff ¶ 6 (copy attached as Exhibit 3); Meazell Aff. ¶ j; Walker Aff. Ex. D at 10.) Despite

Petitioners' repeated requests to the Board and the Hearing Examiner, this document has never been included in the record, and the Petitioners have never been allowed to see it or respond to it.

2. The Hearing Examiner relied on the communications with staff to evaluate the evidence and make findings of fact.

Petitioners allege that the Hearing Examiner reviewed, considered, and relied upon the written response to their brief and other off the record communications¹ with Board's staff to evaluate the evidence and make findings of fact. The September 14th e-mail transmitting the response recites that it addresses the three issues for which the Hearing Examiner had been unable to find responsive evidence. The Hearing Examiner's findings of fact on all three of these issues were uniformly contrary to the evidence cited in Petitioners' brief. (Order at Findings of Fact ¶¶ 22–23 (regarding water in storage), ¶¶ 39–54 (regarding groundwater modeling), and ¶¶ 14–18 (regarding scope of the study and the Board's findings).) Petitioners allege the Hearing Examiner relied on statements outside the record to make findings on other issues as well.

At the MAY hearing, the Protestant's presented irrefutable evidence that the standard which the Board claimed it used to make its MAY determination was *not* actually used as contended.² The Hearing Examiner's proposed order found that the Protestants proved that this

¹ Petitioners only learned of the September 14th response to their post-hearing brief by virtue of documents obtained from the Board through Open Records Act requests and from the USGS through Freedom of Information Act requests. The response itself and other communications with the Hearing Examiner were never produced. Further information may have been provided to the Hearing Examiner over the phone. The Board's general counsel and staff attorney communicated with the Hearing Examiner while they were preparing the response to Petitioners' brief, even though the staff attorney directly participated in the evidentiary hearing and presented evidence in direct opposition to Petitioners' evidence.

² In the evidence presented at the MAY hearing, the Board claimed that it used reductions in *fish habitat* as its criteria or standard to determine how much groundwater could be withdrawn without unreasonably reducing the natural flow of springs and streams. The Board conducted an Instream Flow Assessment ("ISA") which measured the reduction in fish habitat resulting from corresponding reductions in "baseline low flow" (a very specific stream flow regime). The

was indeed the case, nevertheless the Hearing Examiner adopted the proposed MAY without any explanation of what standard, if any, was used in its place or why such new standard was supposedly appropriate. The information obtained by Protestants through the Open Records Act request highly suggests that the Hearing Examiner received off-the-record arguments and new evidence which responded to the arguments made in Protestants' post-hearing brief and which influenced the Hearing Examiner's deliberations and decision on this critical issue.

3. **Because whether the Hearing Examiner received or considered material outside the record necessarily cannot be shown from within the record, the Court should hold an evidentiary hearing.**

Under the Oklahoma's APA, the Board's findings of fact must be based exclusively on the evidence received and matters officially noticed on the record. 75 O.S. § 309(H). Though the Board may utilize its expertise in evaluating the evidence, the technical or scientific facts on which they rely must be formally noticed on the record and subjected to scrutiny by the parties. *Id.* § 310(4); 2013 OK 29 ¶ 8. Accordingly, the APA provides for the administrative record to include (1) the evidence received or considered at the proceeding, (2) a statement of matters officially noticed, and (3) "all other evidence or data submitted to the Hearing Examiner...in connection with their consideration of the case *provided all parties have had access to such evidence.*" *Id.* § 309(F) (emphases added).

Board decided that groundwater could be withdrawn so long as it did not reduce this "baseline low flow" by more than 25%, because the Board determined that the corresponding reductions in fish habitat were acceptable. However, the evidence presented at the MAY hearing irrefutably showed that, inexplicably, the Board's computer modeling and its MAY determination were based upon an entirely different stream flow regime, *i.e.* the 5-Year Average Flow (according to the Board), and consequently no one knew or could say what impact groundwater withdrawal at the MAY amount would have upon fish habitat, *i.e.* whether the impact would be more or less than the 25% standard selected by the Board.

Petitioners allege that the Hearing Examiner received and considered information that is not included in the record and which no party has had any opportunity to contest. In fact, it is clear (1) that the Hearing Examiner solicited from staff a Board response in opposition to Petitioners' post-hearing brief, (2) that staff prepared a response brief presenting its position as to why Petitioners' arguments were not well founded, and (3) that the Hearing Examiner received and considered such response in her deliberations. Because their allegation that the Hearing Examiner relied on material outside the administrative record cannot be evaluated solely from within that record, Petitioners ask the Court for an evidentiary hearing and limited discovery.

4. **Because uncertainty over whether and when an evidentiary hearing will be held before this Court to supplement the record has prevented the parties from agreeing to a briefing schedule, a scheduling conference is requested in coordination with the resolution of this motion.**

All the parties who have appeared to date have tried to mutually agree on a schedule for this matter, but the uncertainty as to whether or when there would be a hearing to supplement the record made it impossible to agree on specific dates. Petitioners proposed neutralizing this obstacle by moving for an evidentiary hearing and concurrently requesting a scheduling conference to be held in light of the resolution of that motion. No party objected to proceeding thusly. Therefore, Petitioners ask that a scheduling conference be set contemporaneously with the resolution of its motion for an evidentiary hearing.

Respectfully submitted,



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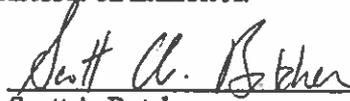


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This is to certify that a true and correct copy of the above and foregoing was mailed, postage prepaid, this 29th day of April, 2014, to the addresses on Exhibit A.



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Derek L. Collins
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Betty Sue Boyd
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Darrell Morris
586964 A North
224 Mack Alford Correctional Center
PO Box 220
Stringtown, Oklahoma 74569

TAB
|

assistance from the OWRB staff in locating evidence in the record on certain issues;

- h. Following Dean Couch's assurance that such assistance was contemplated by applicable statutes and regulations, and based on my own independent evaluation of the same, I also communicated with Jerry Barnett, then OWRB's Staff Attorney, to obtain such assistance;
- i. At no time following the hearing did I contact or request anything from the United States Geological Survey ("USGS") or its employees or representatives;
- j. I received an email from Jerry Barnett on September 14, 2012 which included information from OWRB staff referencing where evidence in the record could be found on certain issues;
- k. I received an unsolicited email from Dean Couch on September 28, 2012 that included a memorandum written to Jerry Barnett by retired USGS employee Scott Christenson and current USGS employee Noel Osborn. That email and memo are attached hereto as Exhibit 2 and speak for themselves;
- l. After certain Protestants in the A-S MAY Proceeding filed a "Motion to Recuse/Disqualify Hearing Examiner and To Stay Proceeding" on November 8, 2012, the OWRB's Dean Couch and Jerry Barnett advised me that the governing statute required the issue to be decided by the OWRB members;
- m. I postponed completing the Proposed Order until late December 2012, after the OWRB members issued their order on December 18, 2012 denying the "Motion to Recuse/Disqualify Hearing Examiner and To Stay Proceeding";
- n. On December 27, 2012, I transmitted the Proposed Findings of Fact, Conclusions of Law, and Board Order to OWRB;
- o. It is my understanding that, with transmittal of the Proposed Order, my service as Hearing Examiner in the A-S Proceeding is complete;
- p. At all times during the A-S Proceeding, I conducted myself in an impartial, unbiased manner; and
- q. The Proposed Order is based entirely and exclusively on the record in the A-S MAY Proceeding. The Proposed Order further addresses this matter and speaks for itself.

Further affiant sayeth not.



Emily Hammond Mezell

The foregoing was acknowledged before me this 8th day of February, 2013 by Emily Hammond Mezell.

Sonya Castevens Jones
Notary Public

My Commission Expires: 10-7-2015

(SEAL)

Sonya Castevens Jones
Notary Public
Perquimans County, State of North Carolina
My Comm. Exp. 10-7-2015

TAB

2

**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)

AFFIDAVIT OF L. MARK WALKER

I, L. Mark Walker, of lawful age and upon my oath and upon my personal knowledge, do state as follows:

1. At the Arbuckle-Simpson Maximum Annual Yield ("A-S M.A.Y.") hearing, appearing as counsel for the Oklahoma Water Resources Board ("OWRB"), Mr. Jerry Barnett called witnesses, rebuttal witnesses and presented evidence on behalf of the OWRB. Mr. Barnett called Ms. Julie Cunningham as the OWRB's first witness, and called Mr. Scott Christenson and Noel Osborn as OWRB rebuttal witnesses.

2. On August 30, 2012, myself and Mike Wofford submitted an Open Records Act request to the OWRB seeking all documents relating to the A-S M.A.Y. proceeding generated after May 17, 2012 (i.e. the last day of the hearing). A copy of this request is attached hereto as Exhibit A.

3. On November 2, 2012, the OWRB produced certain records in response to the Open Records Act request, but withheld others on the basis of claimed privilege. The November 2, 2012 transmittal letter from Dean Couch to myself is attached hereto as Exhibit B.

4. From the documents received on November 2, 2012, it is now apparent that direct and/or indirect post-hearing *ex parte* communications have occurred between the hearing examiner and witnesses who testified at the hearing and between the hearing examiner and the OWRB's counsel regarding the evidence and the issues raised in the post-hearing brief which I

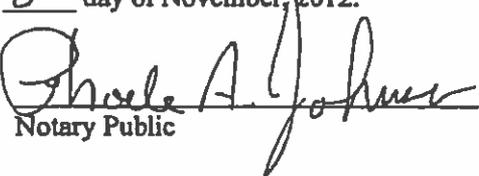
EXHIBIT 2

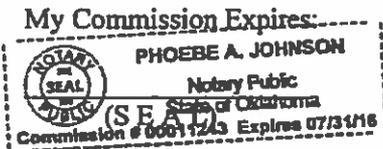
filed on behalf of various protestants on May 31, 2012. An example of such *ex parte* communications is reflected in the documents attached hereto as Exhibit C. Other documents which show or suggest additional *ex parte* communications are attached hereto as Exhibit D. The full extent of the *ex parte* communications is not currently known because the OWRB refused under claims of privilege to produce all of the documents responsive to the Open Records Act Request, and because the Open Records Act request does not encompass oral *ex parte* communications that may have occurred which were not memorialized in writing.

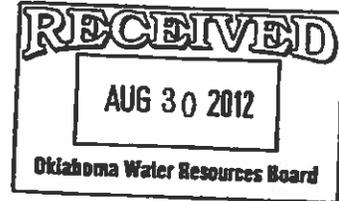
Further affiant sayeth not.


L. Mark Walker

Subscribed and sworn to before me this 8th day of November, 2012.


Notary Public





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

Exhibit A

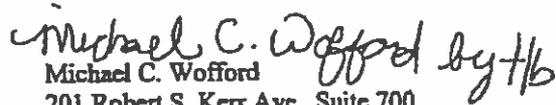
Page 2

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
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J. D. STRONG
EXECUTIVE DIRECTOR



MARY FALLIN
GOVERNOR

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

November 2, 2012

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

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

Dear Mark:

This will reply to your letters dated August 30, 2012 and October 22, 2012 in which you made a request that the Oklahoma Water Resources Board ("OWRB") provide, under the Oklahoma Open Records Act ("Act"), "...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."

Our staff has searched our agency's records and, subject to the exemptions from the Act discussed below, copied such records to CDs which are responsive to your request. We will send an invoice later for the cost of this copying.

While we have endeavored to be fully and openly responsive to your request, there are a limited number of records that will be kept confidential as allowed and authorized by the following provisions of law:

- A. 51 O.S. § 24A.5(1): "The Oklahoma Open Records Act, Sections 24A.1 through 24A.28 of [Oklahoma Statutes Title 51], does not apply to records specifically required by law to be kept confidential including:
 - a. records protected by a state evidentiary privilege such as the attorney-client privilege [and] the work product immunity from discovery..."; and
- B. 51 O.S. § 24A.9: "Prior to taking action, including making a recommendation or issuing a report, a public official may keep confidential his or her personal notes and personally created materials...."

Exhibit B



3800 N. CLASSEN BO
TELEPHONE

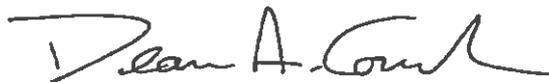
OKLAHOMA 73118
0-8900

F. Ford Drummond, Chairman • Linda P. Lambert, Vice Chairman • Tom Buchanan, Secretary
Bob Drake • Marilyn Fenner • Ed Pite • Rudy Hermanns • Jason W. Hitch • Richard C. Severnolds



Please let me know if I can be of further assistance.

Sincerely,

A handwritten signature in black ink that reads "Dean A. Couch". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

Dean A. Couch
General Counsel

Enclosures

From: Mezell, Emily
To: Couch, Dean;
Subject: Re: USGS - evidence evaluation
Date: Friday, September 28, 2012 12:47:51 PM

Thank you very much!

On Fri, Sep 28, 2012 at 1:46 PM, Couch, Dean <DACOUCH@owrb.ok.gov> wrote:

- > Emily,
- >
- > Finally, some rain here (central Oklahoma) the last couple days. I hope the
- > semester at WFU has started off OK for you and your family.
- >
- >
- >
- > Attached is a scanned copy of a memorandum provided to Jerry from Scott
- > Christenson and Noel Osborn of the USGS containing references to reports in
- > the record about five items subject of Mr. Walker's post-hearing brief.
- > Hope this helps. Jerry is out of town until October 9, but if you have
- > questions about the material he sent to you last week or so, or other
- > matters involving review of the administrative record, please let me or
- > Julie Cunningham know.
- >
- >
- >
- > Dean

—
Emily Hammond Mezell
Associate Professor
Wake Forest University School of Law
336-758-5834
meazeleh@wfu.edu
<http://ssrn.com/author=649887>

Exhibit C



United States Department of the Interior

U.S. GEOLOGICAL SURVEY

Water Resources Discipline
Oklahoma Water Science Center
202 Northwest 66th Building 7
Oklahoma City, Oklahoma 73116

September 27, 2012

Memorandum

To: Jerry Barnett, Oklahoma Water Resources Board
From: Scott Christenson, Hydrologist, Scientist Emeritus, retired and Noel Osborn,
Hydrologist, Oklahoma Water Science Center
Subject: Technical comments regarding the Arbuckle-Simpson Hydrology Study

The following comments are in response to your request regarding questions about the Arbuckle-Simpson Hydrology Study.

1. Natural flow

Natural flow for purposes of the Arbuckle-Simpson Hydrology Study was defined as follows: "The approach taken for this study was to interpret "natural flow" as observed streamflow conditions for water years 2004 through 2008" (USGS Scientific Investigations Report 2011-5029 (SIR 2011-5029) "OWRB exhibit 1", page 81).

2. Model Calibration to streamflow

The process used to calibrate the model is documented in SIR 2011-5029 pages 62-79. As described in SIR 2011-5029, the USGS Arbuckle-Simpson groundwater-flow model was calibrated to 5-year average streamflow (that is, the total amount of water in the stream) and base flow (the groundwater component of streamflow) for the streamflow gages at Blue River near Connerville and Pennington Creek near Reagan. The model was calibrated to average flows to insure that the amount of flow (both streamflow and base flow) computed by the model is equal to the actual observed flows. From SIR 2011-5029, table 22, page 83:

	Blue River		Pennington Creek	
	Observed	Modeled	Observed	Modeled
5-Year Average Streamflow	92.92	92.98	42.97	42.69
5-Year Average Base Flow	61.28	61.34	32.47	32.19

All numbers in cubic feet per second

Monthly gaged and simulated streamflows are shown on figure 36 for the Blue River streamgage and figure 37 for the Pennington Creek gage (page 72). Regarding the model calibration to streamflow, Dr. Blaine Reely stated "It's almost a perfect calibration, or match. It's an amazing calibration" (Arbuckle-Simpson Hearing CD, Part 12, 14:50).

3. Streamflow depletion

The effect of equally distributed groundwater withdrawals on streamflow was evaluated in terms of depletion of streamflow, base flow, and 75-percent exceedance (SIR 2011-5029 pages 80-89). Graphs and tables showing the depletion of streamflow, base flow, and 75-percent exceedance simulated with groundwater withdrawals distributed as an equal proportionate share were generated (SIR 2011-5029 pages 83-87). Table 22 (page 83) shows the depletion of the 5-year average streamflow and of the 5-year average base flow. The 75-percent exceedance and depletion of 75-percent exceedance of streamflow are shown on table 23 (page 87).

4. Storage coefficient

As stated in SIR 2011-5029 (page 44), "Aquifer tests provide descriptions that apply at the scale of feet to hundreds of feet, and other techniques, such as the regional methods described in this report, provide descriptions of hydraulic properties that are applicable on the scale of miles." As described on pages 46-48, multiple regional methods were used to determine a storage coefficient of 0.008 for the Arbuckle-Simpson aquifer, including the subsurface drainage basins of Blue River and Byrds Mill Spring, which encompass an area of over 130 square miles. The regional methods were considered to be more representative of the Arbuckle-Simpson aquifer than a single aquifer test.

The Arbuckle-Simpson Aquifer Hydrology Study emphasized recharge and flow in streams and springs, not storage coefficient. As stated in SIR 2011-5029 (page 81), long-term stream and springs flows are derived from recharge, not storage:

Stream and spring flows are maintained in the long term (during time periods of years) by water entering the aquifer as recharge (during short time spans, on the order of days to weeks, stream and spring flows are maintained by water from storage), and, therefore, groundwater withdrawals could not exceed recharge. In fact, for longer time scales (years to decades) withdrawals must be less than recharge because if withdrawals equal or exceed recharge then stream and spring flow eventually would be reduced to zero.

5. Data availability and review

Data and methodology used in the Arbuckle-Simpson Hydrology Study were fully documented, archived and made available for public review and scrutiny. The data used for the Arbuckle-Simpson Hydrology Study are available on the USGS and OWRB web sites: <http://ok.water.usgs.gov/> and <http://www.owrb.ok.gov/maps/index.php>.

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.

Model data sets used by the MODFLOW model are available on-line. All USGS data and groundwater model files are archived in perpetuity.

The methods used for the Arbuckle-Simpson Hydrology Study are described in many documents included as exhibits by the protestants, including (to name only a few): Christenson and others (2011; protestants' exhibit 5), Christenson and others (2009; OWRB exhibit 3), Faith and others (2010; protestants' exhibit 8), and Puckette and others (2009; protestants' exhibit 8).

References:

- Christenson, Scott, Hunt, A.G., and Parkhurst, D.L., 2009, Geochemical investigation of the Arbuckle-Simpson aquifer, south-central Oklahoma, 2004–06: U.S. Geological Survey Scientific Investigations Report 2009–5036, 51 p.
- Christenson, Scott, Osborn, N.I., Neel, C.R., Faith, J.R., Blome, C.D., Puckette, James, and Pantea, M.P., 2011, Hydrogeology and simulation of groundwater flow in the Arbuckle-Simpson aquifer, south-central Oklahoma: U.S. Geological Survey Scientific Investigations Report 2011–5029, 104 p.
- Faith, J.R., Blome, C.D., Pantea, M.P., Puckette, J.O., Halihan, Todd, Osborn, Noel, Christenson, Scott, and Pack, Skip, 2010, Three-dimensional geologic model of the Arbuckle-Simpson aquifer, south-central Oklahoma: U.S. Geological Survey Open-File Report 2010–1123, 26 p.
- Puckette, Jim, Halihan, Todd, and Faith, Jason, 2009, Characterization of the Arbuckle-Simpson aquifer—Final report submitted to the Oklahoma Water Resources Board, Stillwater, Oklahoma State University School of Geology, 53 p.

From: Meazell, Emily
To: Couch, Dean;
Subject: Re: Draft Proposed Findings, Conclusions and Final Order
Date: Wednesday, September 12, 2012 2:59:57 PM

Hi Dean,

I hope you're well! Just checking in... how are things coming along on this?

Thanks!
Best,
Emily

On Thu, Aug 16, 2012 at 10:02 AM, Couch, Dean <DACOUCH@owrb.ok.gov> wrote:

> Emily,
>
> So sorry. Hopefully, the attached will help. Staff has begun it review of
> the brief and evaluation of the evidence, but it appears that they need
> until sometime in the middle of next week to go through the record to get
> specific citations. Their initial reaction is positive that information is
> in the record to address the factual issues raised. Rowdy is scheduled to
> return today and he should be able to assist staff in the effort as well.
> Seems that extreme drought conditions keeps our folks running to address
> complaints more than usual. Thanks for your patience.
>
> Dean
>
>
>
> From: Meazell, Emily [<mailto:meazeleh@wfu.edu>]
> Sent: Thursday, August 16, 2012 8:25 AM
>
>
> To: Couch, Dean
> Subject: Re: Draft Proposed Findings, Conclusions and Final Order
>
>
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> Hi Dean,
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> Any luck coming up with a word processor version of the tentative order?

Exhibit D

>
> Thanks!
> Emily
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> Sent: Monday, August 13, 2012 7:48 PM
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> To: Couch, Dean
> Subject: Re: Draft Proposed Findings, Conclusions and Final Order
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> Sent: Friday, August 10, 2012 7:16 PM
> To: Couch, Dean
> Subject: Re: Draft Proposed Findings, Conclusions and Final Order
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> mild weather and getting rain every few days. :) Not to rub it in...
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> Have a great weekend!
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> Dean
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>
>
> --
> Emily Hammond Mezell
> Associate Professor
> Wake Forest University School of Law
> 336-758-5834
> meazeleh@wfu.edu
> <http://ssrn.com/author=649887>
>
>
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From: Couch, Dean
To: Smithee, Derek;
cc: Cunningham, Julie; Fabian, Bob;
Subject: Arbuckle-Simpson evidence review
Date: Thursday, August 16, 2012 9:44:44 AM
Attachments: Arb-SimpTOProtestantsPostHearingBrief5-31-12.pdf.html

Bo,

Attached is a pdf copy of Mark Walker's post-hearing brief. Emily Meazell asked for staff's review and evaluation of the evidence that is in the record (we can't add to the record at this point unless Emily re-opens the record and allows all parties to review and respond to anything we might add).

Fabian and Chris Neel will prepare a sort of "comment/ response" summary to address each factual issue point by point (Emily noted that she can handle policy/ legal conclusion issues). Please review and note any comments you have relating to the points raised by Mark on matters that you dealt with in the attached. Let Fabian and me know if you would like to sit down and discuss. I told Emily we would try to get something to her by mid next week if possible.

DC

From: Fabian, Bob
To: "Noel I Osborn";
cc: Couch, Dean; Cunningham, Julie; Neel, Chris; "Stanley T Paxton";
"Scott Christenson (schrisc@usqs.gov)";
Subject: FW: Emily Mezell - assistance
Date: Wednesday, August 15, 2012 2:48:00 PM
Attachments: Arb-SimpTOProtestantsPostHearingBrief5-31-12.pdf.html
ArbSimp Tentative Order, Signed 3-13-12.pdf.html

Noel,

Please see Dean's email below. We need to visit about the review of the evidence and testimony addressing any questions Ms. Mezell needs.

Bob Fabian

Robert S. Fabian
Technical Program Manager
Oklahoma Water Resources Board
3800 N. Classen Blvd.
Oklahoma City, OK
405-530-8800
rsfabian@owrb.ok.gov
www.owrb.ok.gov

Please note: Most written communications to or from state personnel regarding state business are public records available to the public and media upon request. Your email communications may be subject to public disclosure.

From: Couch, Dean
Sent: Tuesday, August 14, 2012 4:22 PM
To: Fabian, Bob; Neel, Chris
Cc: Cunningham, Julie; Barnett, Jerry; Strong, J.D.
Subject: Emily Mezell - assistance

Trebor, Chris,

I talked to Emily Mezell this morning about the draft Proposed Final Order and her plans to get it out by the end of this week. She was a little hesitant at first, but we agreed that a hearing examiner for the OWRB can utilize the assistance of agency staff in preparing a proposed final order. We also agreed that in providing that assistance to the hearing examiner, staff can review evidence submitted in the record then use staff expertise to explain the evidence to the hearing examiner, but the hearing examiner cannot rely on matters outside the record, so staff cannot rely on matters outside the record. Clear as mud?

That said, Emily indicated that she was having problems finding evidence in the record to address some of the issues raised in the Protestants' brief filed by Mark Walker of Crowe and Dunlevy (attached). Also attached FYI is a signed copy of the Tentative Order approved March 13. Two or three issues she specifically mentioned that she had not been able to clarify from the record: (1) amount of water in storage mentioned as 9 MAF in one place, but 11 MAF in another, (2) why Scott Christenson used the model he did rather than a model by Poeter (sp?), and (3) why the eastern portion was primarily studied.

I told Emily that we would take a shot at putting together a list of issues raised in the attached brief, then address those one by one with references to evidence in the record (e.g. exhibit number and page, or testimony presented at the hearing) and with staff 'expertise' to explain where necessary.

We might need to get together in the next couple days to see where we are on this. I told her we would try to get the list and responses ASAP. Let me know how I can help.

DC

From: Smithee, Derek
To: Couch, Dean;
Subject: RE: Arbuckle-Simpson hearing examiner request
Date: Friday, September 28, 2012 11:32:44 AM

So you want more than I already provided or what I already provided "reprovided"? The notes you mentioned in Mark's post hearing brief are just highlights over the text with maybe a couple words in the margin. And these were all captured in what I put together.

I'm headed out around 1:00 today and gone next Monday and Tuesday to the Lake Texoma Advisory Committee meeting. Will be in all day the 3rd, 4th and 5th. Out all week the 8th.....

Let me know what I need to do and I'll do it!

Derek

From: Couch, Dean
Sent: Friday, September 28, 2012 9:28 AM
To: Smithee, Derek
Cc: Cunningham, Julie; Barnett, Jerry
Subject: Arbuckle-Simpson hearing examiner request

Bo,

Yesterday, Noel provided me with a copy of a memo containing information to address the hearing examiner's request to point out where in the administrative record there is evidence to address the issues pointed out in the post-hearing brief filed by Mark Walker. You had provided an e-mail to me a few weeks ago to explain points about the instream flow analysis made for the Arbuckle-Simpson. However, Professor Meazell needs more specific information to show where in the record the issues raised by Mark Walker are addressed. You had mentioned that you may have jotted some notes down when you reviewed Mr. Walker's brief. Rowdy may have already hit you up about this before he left, but perhaps you could provide that info to me and I will forward it to Professor Meazell. Rowdy is not scheduled back until October 9 and I would like to get something out to her on the instream flow issues before then. Thanks.

DC

From: Barnett, Jerry
To: "meazeleh@wfu.edu";
cc: Couch, Dean;
Subject: Followup on evidentiary issues
Date: Friday, September 14, 2012 11:08:26 AM
Attachments: Evidentiary issues - Answers 9-14-2012.docx.html

Hello Professor Meazell,

I am sorry it has taken so long to get this to you. I am afraid one of the primary culprits for the delay has been my own self-inflicted down time which I suspect you have heard about from Dean. I am mending remarkably well but I don't need to be trying (again) to act like a 25-year-old any time soon. ☺

What I have compiled in the attachment (with our technical staff's assistance) focuses on answering the three questions that Dean relayed to us from his conversation with you back on August 14. I wanted to send you this first, to see if the form and content are helpful or if you would prefer something more or even something else.

I also wanted to ask, for my own benefit, if you could identify specifically the additional evidentiary issues, from Mark Walker's post-hearing brief or otherwise, for which you would like us to find answers in the record. I know that Dean volunteered that we would work on a listing of those issues and furnishing pertinent responses from the record, but in all candor I am dense and struggling with this. I have noted many issues raised in Mr. Walker's brief, but it seems to me that many of them are legally argumentative, or factual issues which are not particularly material or necessary for the Board to decide. If it is not too presumptuous of me, I thought it would save us and you time and effort if you could direct me to the issues you want us to work on, and we will get those items addressed in a second installment. Please let me know what I need to do and we will do our best to move forward. You can email me back, or call me (405-530-8803), as is most convenient for you.

I hope you are well-settled in and enjoying this new chapter in your life.

Thank you for your patience, and have a good weekend,

Rowdy

From: Smithee, Derek
To: Barnett, Jerry; Couch, Dean;
Subject: Derek Smithee Arbuckle-Simpson response to the Walker Post Hearing Brief
Date: Monday, August 20, 2012 11:06:18 AM
Attachments: Derek Smithee Arbuckle-Simpson response to the Walker Post Hearing Brief.docx.html

fyi

**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.

The attendance sheet is attached from the first meeting held at the Chickasaw National Recreation Area.

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 ad hoc 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 sensitive to 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.

OS 60:60 does not, as Mr. Walker infers, define "natural flow" as the flow necessary for human use. In fact it is silent in that regard, and rather establishes requirements for impoundments to not affect natural flows.

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 species 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. The corollary of one species benefitting from decreased flow is that another species suffered from decreased flows. 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. The studies clearly establish the relationship between fish populations and the WUA, or more commonly, habitat.

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

From: Mezell, Emily
To: Couch, Dean;
Subject: Re: Draft Proposed Findings, Conclusions and Final Order
Date: Thursday, August 16, 2012 8:25:30 AM

Hi Dean,

Any luck coming up with a word processor version of the tentative order?

Thanks!
Emily

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And yes, I write to ask about the draft proposed order for the MAY. I cannot imagine how busy and crazy it must be, with

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Dean

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TAB

3

**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)

SUPPLEMENTAL AFFIDAVIT OF L. MARK WALKER

I, L. Mark Walker, of lawful age and upon my oath and personal knowledge, do state as follows:

1. This Affidavit is supplemental to the November 8, 2012 submitted by the undersigned in connection with the Motion to Recuse/Disqualify Hearing Examiner which was filed on November 8, 2012.

2. On August 30, 2012, Mike Wofford and I submitted an Open Records Act request to the OWRB seeking all documents relating to the Arbuckle-Simpson (A-S) Maximum Annual Yield proceeding generated after May 17, 2012.

3. In response, the OWRB produced several memos, notes and documents created by OWRB staff which responded to issues raised in Protestants' Post-Hearing Brief. Although these documents indicated that they were to be provided to the Hearing Examiner, there were no letters or emails produced which showed when they were sent to the Hearing Examiner. Accordingly, on November 8, 2012, I sent to the OWRB the letter attached hereto as Attachment 1 asking for the documents which transmitted the OWRB staff memos, notes and documents to the Hearing Examiner.

4. On December 3, 2012, I received from the OWRB the response letter attached hereto as Attachment 2. In this letter I was advised that, "there are no 'transmittal communications to the hearing examiner' regarding notes from Derek Smithee, Noel Osborn, Bob Fabian or Chris Neel...".

5. On December 11, 2012, I sent to the OWRB the letter attached hereto as Attachment 3. In this letter I pointed out that, based upon the statements made by the Executive Director at the September 18, 2012, and October 16, 2012, Board meetings, it seemed apparent that the OWRB staff information had been provided to the Hearing Examiner in some form or fashion, and I asked the OWRB to disclose how such information had been communicated to the Hearing Examiner.

6. On December 14, 2012, I spoke with Dean Couch, OWRB General Counsel, and again inquired how the OWRB staff post-hearing information had been communicated to the Hearing Examiner. In this conversation Mr. Couch acknowledged that Mr. Jerry Barnett, OWRB counsel, had taken all of the information supplied by the OWRB staff members in the

various notes, memos and documents, and had "filtered and consolidated" such information and provided same to the Hearing Examiner via email. Mr. Couch indicated that he thought the OWRB would provide me a copy of this email on the following Monday, December 17, 2012. Scott Butcher of my law firm was in my office and heard this conversation via speaker phone. On December 20, 2012, I sent to Mr. Couch the email attached hereto as Attachment 4 which confirmed the substance of this conversation.

7. The email from Mr. Jerry Barnett which transmitted to the Hearing Examiner the information obtained from OWRB staff was not furnished on December 17, 2012, nor has it been produced to date. I spoke to Dean Couch again on January 7, 2013, and asked if the OWRB was going to produce the email in question. He indicated that the OWRB is not willing to produce the email at this time. Mr. Jerry Barnett was the OWRB attorney who represented the OWRB at the MAY hearing. Mr. Barnett actively participated in the MAY hearing on behalf of the OWRB, calling witnesses and presenting evidence on the OWRB's behalf. Because of this, I cannot understand how his post-hearing communications with the Hearing Examiner could possibly be privileged.

8. On October 19, 2012, Scott Butcher of my office received a phone message from Ms. Anissa Campbell at the OWRB responding to inquiries from my office as to when the documents requested by the Open Records Act request would be produced. Her message stated in pertinent part:

"I finally got an answer on the open records act 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."

A digital copy of Ms. Campbell's voice message is attached hereto as Attachment 5, and can be accessed by all parties as shown on Attachment 5.

9. As applicable here, I understand 51 O.S. § 24.9 to provide that the Hearing Examiner's personal notes and personally created materials can be kept confidential prior to the time the Hearing Examiner takes action, which I understand to mean when the Hearing Examiner submits the proposed order to the Board. I understood the above voice message to mean that the Hearing Examiner's personal notes and materials would be produced by the OWRB in response to the Open Records Act request as soon as the Hearing Examiner submitted the proposed order to the Board. These notes and materials are important because they will likely show the post-hearing *ex parte* information, from both written and oral communications, that the Hearing Examiner received from OWRB staff, the USGS, and witnesses who testified at the MAY hearing. On January 7, 2013, I spoke to Mr. Couch and inquired if the OWRB intended to produce the Hearing Examiner's notes and materials as previously indicated now that the Hearing Examiner had submitted her proposed order to the Board. Mr. Couch would not commit to provide the notes and materials.

10. Because of difficulties in obtaining records from the OWRB as above-described, on November 9, 2010, Mike Wofford and I submitted a Freedom of Information Act (FOIA) request to the USGS seeking documents relating to the MAY proceeding generated after May 17, 2012. A copy of this request is attached hereto as Attachment 6. By letter dated January 4, 2013, a copy of which is attached hereto as Attachment 7, the USGS provided certain documents in response to the request, although the letter states that certain documents are being withheld pending a "release review determination".

11. Included within the documents produced by the USGS are the emails attached hereto as Attachment 8. These emails reflect that Alan Woodcock reviewed and had input into the post-hearing USGS report that was furnished to the Hearing Examiner. Mr. Woodcock was an attorney that participated in the MAY hearing on behalf of U.S. Fish & Wildlife.

12. Included within the documents produced by the USGS is the document attached hereto as Attachment 9. Although the author of the document is not identified, it appears reasonably obvious that it was prepared by Mr. Scott Christenson, as the document asks if the author can run the Poeter model, and Mr. Christenson was the modeler for the USGS that testified at the MAY hearing. This document refers to "issues for OWRB conference call", and includes the following statements:

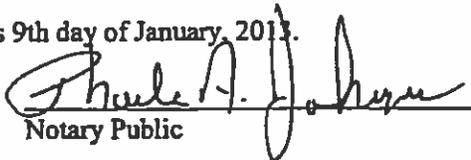
Are we planning a point-by-point rebuttal of protestants' brief?....Some of the points of protestants' brief are valid; the logic of how to proceed from SB 288 to the OWRB ability to regulate the A-S. Where did the .2 (a-f/a)/yr number come from? It did not come from the model...

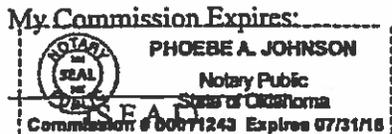
This document raises the concern that information was provided by the USGS to the OWRB in conference calls, which information may not be memorialized in the USGS's writings, and that such information was then furnished by the OWRB to the Hearing Examiner.

Further affiant sayeth not.


L. Mark Walker

Subscribed and sworn to before me this 9th day of January, 2013.


Notary Public

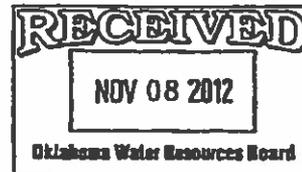




L. Mark Walker
Direct Tel: (405) 236-7783
Direct Fax: (405) 272-5287

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

OKLAHOMA CITY
20 NORTH BROADWAY, SUITE 1800
OKLAHOMA CITY, OK 73102-8273
TEL: 405.236.7700 • FAX: 405.236.8831

Attachment 1

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

A. D. STRONG
EXECUTIVE DIRECTOR



MARY FALLER
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



3308 N. CLASSEN BOULEVARD • OKLAHOMA CITY, OKLAHOMA 73118
TELEPHONE (405) 530-8200 • FAX (405) 530-9600

F. Fred 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.

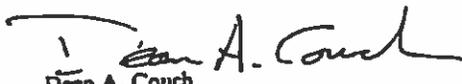
3. In reply to item no. 2 in your November 8 letter, we have no records and we are not aware of any additional modeling work or modeling results done by the U.S. Geological Survey since the MAY hearing.

4. There are no "transmittal communications to the hearing examiner" regarding notes from Derek Smithce, 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."

Attachment 3

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,



L. Mark Walker
For the Firm

LMW/bd
Enclosure

cc: Mike Wofford
Scott A. Butcher

2394316.01

Mark Walker

From: Mark Walker
Sent: Thursday, December 20, 2012 7:58 AM
To: 'Couch, Dean'
Cc: Barnett, Jerry; 'Wofford, Michael C.'; Scott Butcher
Subject: RE: Open Records request

Dean,

When we spoke last Friday, you indicated that Jerry Barnett had taken the various information supplied by staff and "filtered and consolidated" that information and then provided same to the Hearing Examiner, and that there was an email from Jerry Barnett to the Hearing Examiner conveying such consolidated information, which email you indicated you thought you would provide to us on Monday. In your email on Monday, all that was attached was Derek Smithee's memo, which was similar to one which was previously provided in response to our Open Records Act request, although the new version is slightly different than the one previously furnished. Are you going to provide us the Jerry Barnett email? Was the Derek Smithee memo which provided on Monday or information contained therein provided to the Hearing Examiner? Thanks,
Mark

L. Mark Walker Crowe & Dunlevy | 20 North Broadway, Suite 1800 | Oklahoma City, OK 73102 |
T: 405.235.7783 F: 405.272.5287 mark.walker@crowedunlevy.com

From: Couch, Dean [mailto: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

Attachment 4

1/7/2013

Attachment 5 is an audio CD containing of a voice message from Anissa Campbell to Scott A. Butcher recorded on October 29, 2012. You can download the message at <http://bit.ly/13flacp>. If you would like to have an audio CD mailed to you, then call or write to:

**Scott A. Butcher
20 N. Broadway
Suite 1800
Oklahoma City, OK 73102
(405) 235-7737
scott.butcher@crowedunlevy.com**

The following is a transcription of the full message:

Hey, Scott. It's Anissa at the Water Board. I'm sorry it's taken me a couple of days to get back in touch you. 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. And Dean and Jerry are basically citing 51 O.S. § 24A.9 to keep it confidential until the order goes to the board. And if you have any questions It's 530-8801. Thanks. Have a good weekend.

November 9, 2012

VIA EMAIL TO foia@usgs.gov

United States Geological Survey FOIA Officer
Mail Stop 807, National Center
Reston, VA 20192

Re: FREEDOM OF INFORMATION ACT REQUEST - In the Matter of Determining
the Maximum Annual Yield for the Arbuckle-Simpson Groundwater Basin

Dear Sir or Madam:

Pursuant to the Freedom of Information Act, 5 U.S.C. 552, *et. seq.*, (the "Act"), please provide copies of all records relating in any way to the determination of the Maximum Annual Yield ("M.A.Y.") for the Arbuckle-Simpson ("A-S") Groundwater Basin ("Determination") created by, received by, or otherwise coming into the custody, control or possession of the United States Geological Survey ("USGS"), 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 communications with the Oklahoma Water Resources Board or its employees or representatives, the Hearing Examiner of the Arbuckle-Simpson Maximum Annual Yield hearing, or any other legal or natural persons. This request also specifically includes records relating to internal meetings and other communications between and among the USGS members, USGS staff, and/or other USGS agents or representatives, as well as computer simulations or runs, emails, and any notes or memoranda finalized, revised, or added to any USGS file on or after May 17, 2012 regardless of the date of the initial draft relating to the A-S M.A.Y. proceeding.. This request specifically includes without limitation all files, computer simulations or runs, notes, emails and documents of Scott Christenson and Noel Osborn relating to the A-S M.A.Y. proceeding which were created on or after May 17, 2012.

With respect to this request, the term "record" is used in the broadest sense consistent with the Act.

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 it being withheld. Such descriptions should include a citation to specific legal authority for 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.

The undersigned promise to pay all reasonable copying costs for the requested documents that are chargeable under the Act upon presentation of an invoice with the records requested. Alternatively, because this request is made in part on behalf of entities which include non-profits, a waiver of all or part of the copying costs is requested. Though this request is made jointly by both of the undersigned, the requested copies and/or any index of exempt materials should be

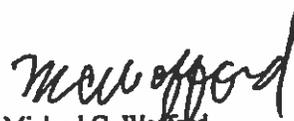
November 9, 2012
Page 2

delivered to the address provided below for L. Mark Walker. If, at any point, the copying costs are expected to exceed \$500.00, please use the email address or phone number provided below to contact L. Mark Walker immediately to discuss copying and payment arrangements. Any other questions regarding this request should be directed to the 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@dsda.com



United States Department of the Interior

U. S. GEOLOGICAL SURVEY
BOX 25046 MS 406
Denver Federal Center
Denver, Colorado 80225

January 4, 2013

L Mark Walker
Crowe & Dunlevy
20 North Broadway, Suite 1800
Oklahoma City, OK 73102

Transmitted via Fed Ex
Re: U.S. Geological Survey FOIA #USGS-2013-00023

Dear Mr. Walker:

This letter transmits responsive documents pursuant to your Freedom of Information Request (FOIA) dated November 9, 2012 and received by the USGS FOIA Officer on November 9, 2012. You requested:

".....all records pertaining to relating in any way to the determination of the maximum Annual Yield ("M.A.Y.") for the Arbuckle-Simpson ("A-S") Groundwater basin ("Determination") created by, received by, or otherwise coming into custody, control or possession of the United States Geological Survey ("USGS"), its members, or its staff on or after May 17, 2012."

Response Summary

The enclosed paper copies (135 pages) provide responsive information identified to your request.

Additional documents have been identified which are undergoing a release review determination. Pursuant to our phone conversation on January 2, 2013, I will make every effort to expedite this process. You will either be provided the documents undergoing release review determination or provided an explanation specific to each document why it was withheld.

If you consider this response to be a denial of your request under 43 CFR 2.28 (a) (2), you may file an appeal by writing to:

Freedom of Information Act Appeals Officer
U.S. Department of the Interior
Office of the Solicitor, Division of General Law
1849 C Street,
NW MS-6556
Washington, D.C. 20240

Your appeal must be received no later than 30 workdays after the date of this letter. The appeal should be marked, both on the envelope and the face of the appeal letter, with the words "FREEDOM OF INFORMATION APPEAL." Your appeal should be accompanied by a copy of your original request and this letter, along with any information you have which leads you to believe that responsive records do in fact exist, including where they might be found, if the location is known to you.

Also, as part of the 2007 OPEN Government Act FOIA amendments, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a nonexclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation.

You may contact OGIS in any of the following ways:

Office of Government Information Services (OGIS)
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, Maryland 20740-6001

Email: ogist@nara.gov
Phone: 301-837-1996
Fax: 301-837-0348
Toll-free: 1-877-684-6448

The USGS has assigned an individualized tracking number USGS-201-00023 to your request. All future correspondence to the USGS for this request should include this tracking number. If you have any questions concerning your request, please contact me either by electronic mail (kskipper@usgs.gov) or by phone (303) 236-1477.

Thank you for your interest in the U.S. Geological Survey.

Sincerely,

Kenneth J. Skipper
U.S. Geological Survey
Water Resources Mission Area, National FOIA Liaison

Enclosures: 135 paper copies

Christenson 20120828-1425

Arbuckle-Simpson Hearing Follow-Up
Stanley T Paxton
to:
Awoodcoc
08/28/2012 02:25 PM
BCC:
Scott C Christenson
Show Details

Alan Woodcock,

I am Acting Director at the USGS Oklahoma Water Science Center this week.

Kim Winton has taken a new position as director of the USGS South Central Area Climate Science Center in Norman.

Alan, I may have a written document for review from Scott Christenson and Noel Osborn. This document addresses post-hearing questions asked of Scott and Noel by the hearing officer 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.

Scott and Noel's involvement in this matter has been at the request of the Oklahoma Water Resources Board, the state of Oklahoma cooperator for whom the USGS work was completed.

Should you or someone else within USGS look at Scott's and Noel's response(s) before the document goes back to the hearing officer?

Thanks for any advice and assistance that you can provide.

Sincerely,

Stanley T. Paxton, Ph.D.
Studies Chief, USGS Oklahoma Water Science Center
U.S. Geological Survey
202 NW 66th Street, Bldg. 7
Oklahoma City, OK 73116
Phone (405) 810-4405 FAX (405) 843-7712
Mobile (405) 388-3044

Christenson 20120828-1428

FW: Out of Office: Arbuckle-Simpson Hearing Follow-Up
Stanley T Paxton
TO:
Scott C Christenson, Noel I Osborn
08/28/2012 02:28 PM
Show Details

FYI

Sincerely,

Stanley T. Paxton, Ph.D.
Studies Chief, USGS Oklahoma Water Science Center
U.S. Geological Survey
202 NW 66th Street, Bldg. 7
Oklahoma City, OK 73116
Phone (405) 810-4405 FAX (405) 843-7712
Mobile (405) 388-3044

----- Forwarded by Stanley T Paxton/WRD/USGS/DOI on 08/28/2012 03:28 PM

From: "Woodcock, Alan" <Alan.Woodcock@sol.doi.gov>
To: "Paxton, Stanley T." <spaxton@usgs.gov>
Date: 08/28/2012 03:25 PM
Subject: Out of Office: Arbuckle-Simpson Hearing Follow-Up

I will be out of the office until August 30. I will respond to your message after I return.

Christenson 20120829-1245

RE: Arbuckle-Simpson Hearing Follow-Up
Stanley T Paxton
to:
Woodcock, Alan
08/29/2012 12:45 PM
CC:
Scott C Christenson, Noel I Osborn
Show Details

Alan,

Sorry for the delay and thanks for your willingness to help us.

The authors, Christenson and Osborn, are still wrestling with the verbiage.

I will send you documents in a few days if that is okay!?

Sincerely,

Stanley T. Paxton, Ph.D.
Studies Chief, USGS Oklahoma Water Science Center
U.S. Geological Survey
202 NW 66th Street, Bldg. 7
Oklahoma City, OK 73116
Phone (405) 810-4405 FAX (405) 843-7712
Mobile (405) 388-3044

From: "Woodcock, Alan" <Alan.Woodcock@sol.doi.gov>
To: "Paxton, Stanley T." <spaxton@usgs.gov>
Date: 08/28/2012 05:03 PM
Subject: RE: Arbuckle-Simpson Hearing Follow-Up

Alright, I checked with the Regional solicitor so we should do it. Can you send me the incoming and the proposed response? I will be out tomorrow, but will try to look at it on Thursday.

Alan R. Woodcock
Office of the Solicitor
7906 East 33rd Street, Suite 100
Tulsa, OK 74145
(918) 669-7730
(918) 669-7736 (Fax)

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From: Stanley T Paxton [mailto:spaxton@usgs.gov]
Sent: Tuesday, August 28, 2012 3:26 PM
To: Woodcock, Alan



Issues for OWRB conference call

Are we planning a point-by-point rebuttal of the protestant's brief? If not, what is the plan?

Can I write part of the rebuttal? USGS policy is an issue. I may need to get my writings reviewed.

Can I run the Poeter model? I believe it will show little difference in long-term average total and base flow.

Some of the points of protestant's brief are valid; the logic of how to proceed from SB288 to the OWRB ability to regulate the A-S.

Where did the 0.2 (a-f/a)/yr number come from? It did not come from the model, at least not directly. If linked to the model, I need to know where so I can place my efforts there.

Does the NPS have a copy of the protestant's brief? Can we share? They expressed an interest in a modified version of the model, they might be willing to fund some of my time.

Who is coordinating our response and writing?

204.87.111.53

owrb_quest1

owrb_in2

